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The Eleventh Amendment and the Reading of  
Precise Constitutional Texts

by  
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# Article

## The Eleventh Amendment and the Reading of Precise Constitutional Texts

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## INTRODUCTION

In recent years, the Supreme Court has frequently observed that most statutes involve compromise.<sup>1</sup> In particular, when Congress enacts a clear and precise statutory text—one that articulates not only a set of relevant aims but also the specific means of their pursuit—the Court has assumed that the operative details of such a statute may reflect a (frequently unrecorded) compromise to go so far and no farther in pursuit of its background goals.<sup>2</sup> Accordingly, even when a precise statute seems over- or underinclusive in relation to its ultimate aims (as is often the case), the Court now hews closely to the rules embedded in the enacted text, rather than adjusting that text to make it more consistent with its apparent purposes.<sup>3</sup>

One might think that similar principles would apply with equal, if not greater, force to constitutional interpretation. The constitutional lawmaking processes prescribed by Articles V and VII reflect a conscious design to give political (or at least geographical) minorities extraordinary power to block constitutional change.<sup>4</sup> Such political minorities, therefore, also have extraordinary power to insist upon compromise as the price of assent. Although constitutional scholarship tends to emphasize those constitutional texts that are framed in open-ended terms, many of the document's clauses—including some rather important ones—articulate their policies at a level of detail that suggests compromise over the acceptable means of pursuing such clauses' apparent background aims. In this Article, I argue that, just as in the case of statutes, when the Court confronts a precise and detailed constitutional text, it should adhere closely to the prescribed solution rather than stretch or contract the text in light of the apparent *ratio legis*. Indeed, the heightened protection assigned to minority interests in the amendment process may make it especially crucial for a court to adhere to the compromises embedded in a precise constitutional text.

This premise about constitutional precision, if correct, represents an overlooked but, I believe, quite significant consideration in the ongoing controversy over the Eleventh Amendment's meaning. That Amendment of course has played a central but awkward role in the development of the

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1. See *infra* notes 185-190 and accompanying text. To say this, one need not join public choice theorists in believing that interest groups routinely purchase statutory (or constitutional) outcomes. Rather, compromise is routinely to be expected simply because legislation represents "the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds." JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999).

2. See *infra* notes 199-205 and accompanying text.

3. See, e.g., *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Brogan v. United States*, 522 U.S. 398, 403 (1998).

4. See *infra* notes 143, 206-212 and accompanying text.

federal law of state sovereign immunity. As the only constitutional provision that bears directly on the states' immunity against the assertion of federal jurisdiction, the Amendment's centrality to this body of law is unsurprising. At the same time, it is a familiar reality that almost none of the Court's important cases involving the Amendment deal with matters that fall within its terms. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Yet despite the Amendment's carefully drawn alignment of parties, the Court has extended state sovereign immunity to include federal lawsuits filed by a state's own citizens,<sup>5</sup> by federal corporations,<sup>6</sup> by tribal sovereigns,<sup>7</sup> and by foreign nations.<sup>8</sup> The resulting immunity, moreover, now reaches not only "any suit in law or equity," but also any suit in admiralty.<sup>9</sup> Finally, although the Amendment is framed as a constraint on "[t]he Judicial power of the United States," states presently enjoy constitutional immunity from actions before state courts and federal administrative tribunals as well.<sup>10</sup> In recognizing such broad classes of immunity, the Court has dealt with the Eleventh Amendment's text in two (arguably inconsistent) ways, each of which raises an important and much overlooked methodological question about the interpretation of precise constitutional texts.

First, invoking what I have elsewhere called "strong purposivism,"<sup>11</sup> the Court has relied on the Amendment's perceived background purpose to establish broad state sovereign immunity that goes well beyond its carefully drawn text. The Court's justification for this approach has rested squarely on historical premises. Specifically, in the ratification debates over the original Constitution, figures no less important than Hamilton, Madison, and Marshall offered explicit assurances that Article III's adoption would leave intact the background sovereign immunity that states, like all other

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5. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 57-73 (1996); *Hans v. Louisiana*, 134 U.S. 1, 18-19 (1890).

6. See *Smith v. Reeves*, 178 U.S. 436, 449 (1900).

7. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991).

8. See *Monaco v. Mississippi*, 292 U.S. 313, 331-32 (1934).

9. See, e.g., *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 489-93 (1987) (plurality opinion) (holding that principles of immunity reflected in the Eleventh Amendment bar admiralty suits against states, even though such actions are not technically "suit[s] in law or equity"); *Ex parte New York*, 256 U.S. 490, 497 (1921) (same).

10. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760-61 (2002) (holding that sovereign immunity applies to proceedings before federal administrative tribunals); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that sovereign immunity applies to federal causes of action brought in state courts).

11. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3, 7 (2001).

sovereigns, had traditionally enjoyed.<sup>12</sup> Soon after ratification, however, the Court in *Chisholm v. Georgia* invoked the state-citizen diversity clause of Article III—which governs controversies “between a State and Citizens of another State”<sup>13</sup>—to assert jurisdiction over a common law action by a citizen of South Carolina to recover a debt from Georgia.<sup>14</sup> Although the Eleventh Amendment quickly overturned *Chisholm* by adopting carefully worded restrictions on the exercise of federal jurisdiction in suits against states by out-of-state individuals,<sup>15</sup> the Court in *Hans v. Louisiana* held that the Amendment stands for more than it says.<sup>16</sup> In particular, the *Hans* Court’s “shock of surprise” theory maintained that the Amendment’s swift and emphatic adoption conveyed a purpose not only to deal with the precisely drawn classes of jurisdiction described by the text, but also to overturn *Chisholm* and its guiding premise that Article III made states suable in the first place.<sup>17</sup> Although the Amendment’s text could not bear that wider meaning, the Court concluded that reading it as written would produce an absurdity, given eighteenth-century American society’s obvious support for broad sovereign immunity.

Second, the Court has sometimes read the Eleventh Amendment more defensively, treating it merely as a nonimpediment to the independent derivation of a broad immunity from Article III or the constitutional structure more generally. In this line of cases, perhaps typified by *Monaco v. Mississippi*, the Court has simply held that

neither the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent.<sup>18</sup>

In other words, the Amendment’s precise specification of certain types of immunity carries no negative implication. In some tension with *Hans*, the Court in this second line of cases has typically built on the assumption that the Amendment merely sought to rectify *Chisholm*’s narrow holding, not to

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12. See *infra* note 42 and accompanying text.

13. U.S. CONST. art. III, § 2.

14. 2 U.S. (2 Dall.) 419, 419 (1793).

15. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473 (1987) (noting that the Eleventh Amendment “was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding”); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1263 (1989) (“Everyone agrees that the Eleventh Amendment was adopted to overturn the result the Supreme Court reached in *Chisholm v. Georgia* in 1793.” (footnote omitted)).

16. 134 U.S. 1 (1890).

17. *Id.* at 11.

18. *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934).

articulate a comprehensive but carefully limited policy about state sovereign immunity in general.<sup>19</sup> Under this theory, the Amendment's specific terms do not constrain the Court's ability to derive new rules of sovereign immunity from the general authority of "the judicial Power" in Article III or to infer them from the constitutional structure as a whole.

Perhaps because of the Court's openly originalist approach, an extensive body of legal scholarship has undertaken to examine the historical foundations of sovereign immunity case law. For the most part, this scholarship has proceeded from the Court's specific frame of reference, relying on eighteenth-century historical context to dispute (or, much more rarely, to buttress) the Court's reading of the intentions or background understandings of those who adopted Article III and the Eleventh Amendment.<sup>20</sup> To be sure, most such writings rely on the Amendment's text or the text and structure of the Constitution to anchor their criticism of the Court's analysis.<sup>21</sup> But with rare exceptions, work in this area gives little if any attention to the more fundamental methodological question embedded in the cases: How should a federal court interpret a precise constitutional text like the Eleventh Amendment?<sup>22</sup> In particular, no one has

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19. See *Alden v. Maine*, 527 U.S. 706, 723 (1999).

20. Scholarship in this area typically is critical of the Court's position. See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 536-46 (1978) (contending that sovereign immunity survived the adoption of Article III as a common law doctrine subject to legislative revision, and adding that this interpretation fits comfortably with the text of the Eleventh Amendment); 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, 1054-63 (1983) (arguing that the Eleventh Amendment is properly understood merely to impose a limiting construction on the heads of Article III jurisdiction that authorize suits between states and out-of-state individuals); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926-38 (1983) (arguing that the Eleventh Amendment was framed narrowly to accommodate the Federalists' diplomatic concerns about the enforceability of British claims under the Treaty of Paris); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1323-52 (1998) (arguing that the Eleventh Amendment operated as an "explanatory amendment," meant to ensure that the states were not subject to liability in federal court for debts incurred under the Articles of Confederation). Those who find state sovereign immunity consistent with either the original understanding of Article III or the Eleventh Amendment are fewer in number. In a characteristically thoughtful recent article, Caleb Nelson has suggested that state sovereign immunity in fact survived Article III because a "Case" or "Controversy" presupposed a party amenable to compulsory process and because states were traditionally not amenable to such process. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1567-608 (2002).

21. See, e.g., Amar, *supra* note 15, at 1481-83 (parsing the text of the Eleventh Amendment); Field, *supra* note 20, at 543-44 (arguing that treating state sovereign immunity as a common law construct makes sense of the Eleventh Amendment's text); Fletcher, *supra* note 20, at 1060-62 (closely reading the Amendment's text and comparing it with various unadopted drafts of the Amendment); Pfander, *supra* note 20, at 1323 (arguing that under interpretive customs of the time, the insertion of the words "be construed to" in the Eleventh Amendment suggests that it was intended as an explanatory amendment).

22. As one of the debate's leading participants has put it, "Seeking a historical understanding of the Eleventh Amendment is not a particularly theoretical enterprise. As I view it, the task is to

examined the legitimacy of using an amendment's background purpose to depart from the otherwise clear import of the adopted text.<sup>23</sup> Nor has existing scholarship, with one exception, examined how the specification of a precise constitutional policy on a given topic (state sovereign immunity against federal jurisdiction) ought to affect the Court's capacity to invoke otherwise applicable general authority ("the judicial Power") to craft additional law on the same question.<sup>24</sup>

These methodological arguments have become more salient in recent years. The Rehnquist Court has not only credited *Hans* under rules of stare decisis, but has also endorsed and utilized its strongly purposive method of constitutional reasoning to resolve open questions about the scope of sovereign immunity under the Eleventh Amendment.<sup>25</sup> Alternatively, as in the *Monaco* case of an earlier era, the Rehnquist Court has also held that the line-drawing implicit in the Eleventh Amendment carries no negative implication, thereby allowing the Court to cull new unenumerated sovereign immunities from general features of constitutional structure.<sup>26</sup>

These decisions create an apparent incongruity in the modern Court's interpretive jurisprudence. In matters of statutory interpretation, a defining trait of the Rehnquist Court has been its assiduous observance of the lines

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arrive at the best explanation of what the adopters intended, based on the known historical facts and the reasonable inferences that can be drawn from them." Fletcher, *supra* note 15, at 1263. Judge Fletcher's observation nicely captures the general tenor of the debate.

23. In an influential piece arguing for a literal interpretation of the Eleventh Amendment, Lawrence Marshall gave the methodological question its most extended consideration. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). Even Marshall, however, simply assumed the legitimacy of measuring a text's congruence with its apparent background goals. See *id.* at 1345. He noted, in particular, that "an originalist may feel compelled to abandon a determinate text when the results of following the text are so ridiculous that it is unreasonable to conclude that the drafters and supporters of the provision intended to reach the results that the common understanding of the text dictates." *Id.* Although he concluded that the Eleventh Amendment was sufficiently congruous with its underlying goals to justify its implementation as written, he never examined the more basic legitimacy of engaging in the strong constitutional purposivism that his—and ultimately the Court's—framework contemplates. For a thoughtful article that analyzes this problem by assuming (but not defending) the legitimacy of constitutional textualism, see Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

24. The exception is Nelson, *supra* note 20, at 1617-20. Professor Nelson argues that the limited scope of the Eleventh Amendment tells us, at most, that the Framers doubted their capacity to obtain the requisite supermajorities for other categories of immunity. See *id.* at 1619. Accordingly, the Amendment, properly understood, left intact whatever authority the Court previously had to derive sovereign immunity from (or read it into) Article III. See *id.* at 1618-19. As I explain below, I attach different significance to the line-drawing reflected in the Amendment's precise terms. See *infra* Section II.C.

25. See *Seminole Tribe v. Florida*, 517 U.S. 44, 64-72 (1996); see also *infra* notes 91-101 and accompanying text (discussing the current Court's strongly purposive reading of the Eleventh Amendment).

26. See *Alden v. Maine*, 527 U.S. 706, 723 (1999); see also *infra* notes 239-244 and accompanying text (describing alternative justifications for sovereign immunity rooted in "the judicial Power" of Article III and the constitutional structure as a whole).



drawn by a clear and precise statutory text, even when the outcomes seem difficult to square with the statute's apparent background purpose.<sup>27</sup> The Court has suggested that enacting a statute is always path-dependent and often predicated on unknowable compromise; hence, in a system based on legislative supremacy, respect for the legislative process requires the judge to hew closely to the enacted text when clear. This form of textualism contrasts sharply with the interpretive approach prevailing at the time of *Hans* and most of its progeny; until quite recently, the Court started from the assumption that lawmakers often express their intentions clearly but imprecisely, and that judges may show greater fidelity to the lawmaker by enforcing the spirit rather than the letter of the law.<sup>28</sup> Accordingly, while *Hans* and all but its most recent progeny fit tightly with the interpretive norms prevailing at the time of their decision, the Rehnquist Court's continued application of strong purposivism to clarify and extend state sovereign immunity creates an apparent methodological incongruity that requires explanation.

The most plausible resolution of that anomaly is this: Whereas the Rehnquist Court has tended toward textualism in statutory cases, few would contend that constitutional interpretation warrants the same strictness as statutory interpretation. Instead, the conventional wisdom, often traced (mistakenly) to *McCulloch v. Maryland*,<sup>29</sup> presupposes that judges have greater freedom to interpret the Constitution atextually to effectuate its broader purposes. Because the Constitution prescribes a charter of government for the ages and is, by design, prohibitively difficult to amend, that document quite simply compels greater flexibility from its interpreters than typically shorter-lived and more easily altered statutes.<sup>30</sup> Accordingly, even if the modern Court takes pains to read a clear and precise statute strictly according to its terms, it is nonetheless justified in treating the Eleventh Amendment as part of the living Constitution.

I argue here that the conventional wisdom is backwards—at least where the Constitution speaks in precise rule-like terms, as the Eleventh Amendment does. I start from the Court's own premise that it must enforce even the seemingly awkward lines drawn by a clear and precise *statutory* text, because such a text frequently represents an unknowable compromise and, at least in our system of government, legislative compromise merits judicial solicitude. In light of the elaborate process of constitutional lawmaking prescribed by Article V, the Rehnquist Court's interpretive assumptions about compromise apply with greater force, *ceteris paribus*, to

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27. See *infra* notes 112-117 and accompanying text.

28. See *infra* notes 78-87 and accompanying text.

29. 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget that it is a *constitution* we are expounding.”).

30. See *infra* Section II.A.

a precise constitutional text. In the typical invocation of the amendment process, any amendment must secure distinct supermajorities of two-thirds of each chamber of Congress and three-quarters of the states. 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. Accordingly, using a precisely worded constitutional amendment's apparent background purpose to circumvent the clear lines drawn by its text dilutes the constitutional protection that Article V assigns to political minorities.

For similar reasons, the Court should perhaps not be so quick to dismiss the possibility that the Eleventh Amendment carries a negative implication, precluding judicial recognition of additional categories of state sovereign immunity under the general authority of Article III or the constitutional structure. Given its emphasis in recent years on the importance of compromise, the Rehnquist Court has enthusiastically applied to statutes the ancient maxim that the specific governs the general.<sup>31</sup> The "specificity canon" holds that if one statute speaks in precise terms to a specific question, that fact may preclude judges from addressing the same question in a different way under an otherwise applicable general statute. Like its close relative *expressio unius est exclusio alterius*, the specificity canon of course applies only when a reasonable person would justifiably infer a negative implication from reading the specific text in context.<sup>32</sup> Still, it does alert the interpreter to read potentially overlapping statutes with the following concern in mind: When Congress has focused explicitly on a particular question and prescribed a precise rule to address it, the outcome may reflect the specific compromise that the relevant political forces could reach on that question. If courts or agencies are able to invoke more general authority to prescribe further law on the same question, the result might be an end run around a legislative compromise on the precise question in issue. Because of the importance of compromise reflected in the Article V process, I argue here that justification for the specificity canon has at least as much force where a precise constitutional provision is concerned.<sup>33</sup> I further contend that although the question is close, the specific text of the Eleventh Amendment, read in context, appears to convey a negative implication that should preclude the derivation of further classes of state sovereign immunity from suit in federal court.<sup>34</sup>

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31. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

32. See *infra* notes 222-231 and accompanying text.

33. See *infra* notes 282-283 and accompanying text.

34. See *infra* Section III.C.

Part I sets the stage by examining the Court's strongly purposivist approach to the precise terms of the Eleventh Amendment. It then compares that case law with the Rehnquist Court's more textualist approach to precise statutes. In Part II, I consider first whether a plausible distinction between constitutional and statutory adjudication makes strong purposivism more acceptable in the former context, even if rejected in the latter. I conclude, however, that the modern insights of statutory textualism also preclude the application of strong purposivism when interpreting a precise constitutional amendment such as the Eleventh Amendment. As compared to the legislative process prescribed by Article I, Section 7, Article V's process calls upon the judiciary to place, if anything, a greater premium on respecting the lines of compromise. More tentatively, Part III contends that the specificity canon may have a crucial role to play in applying the Eleventh Amendment. To the extent that the amendment process focused specifically on the question of state sovereign immunity in federal courts and produced a precise solution that went so far and no farther, judges should hesitate before invoking general authority such as "the judicial Power" to alter the balance struck by the Eleventh Amendment.

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Before being asked to venture forth into the complicated analysis that follows, the reader is entitled to a precise statement of why it is worth studying the methodology of a case, like *Hans*, that has been entrenched law for more than a century. Two considerations, I believe, justify the effort. First, if one believes that the present law of state sovereign immunity has practical importance,<sup>35</sup> it is relevant to consider the legitimacy of a precedent and, indeed, an interpretive method that the Court has used in recent years to consolidate and extend that law.<sup>36</sup> Second, examining the

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35. Some believe that remaining avenues of relief make the present doctrine of sovereign immunity less significant. See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 68-81 (1998) (arguing that the Eleventh Amendment and 42 U.S.C. § 1983 together establish a coherent system of constitutional remedies based on fault); Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126-32 (1996) (discussing the availability of suits for prospective relief against state officers acting in violation of federal law).

36. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-65 (2001) (using Eleventh Amendment immunity as the trigger for enforcing "congruence" and "proportionality" requirements against a statute purporting to rest on Section 5 of the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73, 78-81 (2000) (same); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634-35 (1999) (same); *Seminole Tribe v. Florida*, 517 U.S. 44, 57-73 (1996) (relying on *Hans* and strongly purposive methods to hold that Congress lacks Article I power to abrogate unenumerated Eleventh Amendment immunity); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-82 (1991) (extending Eleventh Amendment immunity to a federal question action by a tribal sovereign).

Although I start from the assumption that some meaningful form of stare decisis is appropriate to our system of government, consideration of the proper circumstances for applying

mode of interpreting the Eleventh Amendment should help to clarify the appropriate methods of interpreting precise constitutional provisions in general. In particular, it suggests that the Court should adhere to the boundaries of a precisely worded constitutional text at least as strictly as it presently observes the limits of a precisely worded statute.<sup>37</sup> In short, examining questions of interpretive method should cast light on the Eleventh Amendment debate, and examining that debate should, in turn, cast reciprocal light on questions of interpretive method.

### I. THE “SPIRIT” OF THE ELEVENTH AMENDMENT

For more than a century, the Court has acted on the premise that the Eleventh Amendment’s precise text means more than it says. In particular, beginning with *Hans v. Louisiana*,<sup>38</sup> the Court has held that the Amendment must be read in light of its animating purpose to overturn the Court’s opinion in *Chisholm v. Georgia*<sup>39</sup> and thereby to make clear that state sovereign immunity survived the establishment of federal jurisdiction in Article III. After *Chisholm* found a state suable under the state-citizen diversity clause of Article III, the Amendment followed swiftly and decisively. The Amendment’s text, of course, deals narrowly with the availability of federal jurisdiction in various suits against states by out-of-state parties. But in view of the strong reaction against *Chisholm* and eighteenth-century society’s widespread commitment to state sovereign immunity in general, the *Hans* Court found it unthinkable that the Amendment was intended merely to shield states from the narrow class of suits described by its text, rather than to establish a more comprehensive form of immunity that extended even to federal questions by in-staters.<sup>40</sup> Today, the Rehnquist Court has used the same strongly purposive reasoning to resolve (in the negative) the longstanding question whether Congress possesses Article I power to abrogate the immunity previously read into the Eleventh Amendment.

This Part sets the stage for examining the legitimacy of atextual and strongly purposive interpretation of a precise constitutional text like the Eleventh Amendment. In particular, I elaborate on both the *Hans* Court’s

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or departing from precedent lies beyond the scope of this Article. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988) (describing the virtues of stare decisis while acknowledging the many difficulties that govern its application). Accordingly, I take no position on the further question whether *Hans*, if wrongly decided, should be overruled. In any case, even if one were to assume that it is too late in the day to overturn *Hans* itself, the analysis that follows is relevant to the many open questions not fairly encompassed within the holding of *Hans* or its progeny.

37. See *infra* Section II.B.

38. 134 U.S. 1 (1890).

39. 2 U.S. (2 Dall.) 419 (1793).

40. See *Hans*, 134 U.S. at 14-15.

and the modern Court's strongly purposive interpretation of the Amendment. I then compare the Rehnquist Court's strongly purposive approach to the Amendment with its concomitant insistence upon protecting legislative compromise in statutory cases, even when the outcome seems at odds with background statutory purposes. This comparison supplies the necessary context for examining (in Part II) whether process concerns emanating from Article V suggest that interpreters should, if anything, show greater solicitude for the apparent lines of compromise drawn by a precise constitutional, as opposed to statutory, text.

A. *The Immediate Context: Chisholm v. Georgia*

Because *Hans* effectively "treat[ed] the Eleventh Amendment as if it were a precedent to the opposite of *Chisholm v. Georgia*,"<sup>41</sup> rather than a set of precise rules about the proper limits of Article III, brief consideration of both *Chisholm* and the pre-*Chisholm* context will help to frame the *Hans* Court's strongly purposive methodology. It is fair to say that *Chisholm* itself worked against the backdrop of a Constitution that had left the question of state sovereign immunity, like many other structural questions, relatively unsettled. No constitutional provision addressed the matter directly. State sovereign immunity went unmentioned in the Philadelphia Convention. 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>42</sup> In other words, the direct evidence of the original understanding of Article III was at best inconclusive on the question of the states' suability.<sup>43</sup>

Although I do not intend here to join an already extensive debate over the original meaning of Article III on the question of state suability, it is worth noting that the contextual evidence frequently invoked in the

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41. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 782 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

42. See, e.g., Field, *supra* note 20, at 527-36 (analyzing diverse views on the question in the ratifying debates); Fletcher, *supra* note 20, at 1045-54 (same). For me, in any case, scattered remarks in the ratifying debates demand a heavy discount: One cannot know how widely such remarks circulated across thirteen distinct conventions, or who may have agreed or disagreed with them, or to what extent the utterers shaped their contributions in light of strategic concerns in decidedly political ratification contests. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1340, 1348-54 (1998).

43. See *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 483-84 (1987) (plurality opinion) ("At most, . . . the historical materials show that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous.").

scholarly debate seems relatively indeterminate. For example, even if one assumes that the English judicial practice at the time still embodied meaningful limitations on suits against the sovereign,<sup>44</sup> English common law traditions do not always supply an appropriate reference point for understanding the distinctive features of our constitutional structure.<sup>45</sup> Even assuming, moreover, that a vibrant tradition of sovereign immunity characterized state judicial practice in the years leading up to the Philadelphia Convention,<sup>46</sup> that fact alone cannot resolve the question whether Article III implicitly incorporated that tradition into “the judicial Power” or, instead, repudiated it by extending an unqualified federal judicial power to heads of jurisdiction that included states as potential defendants.<sup>47</sup> If sovereign immunity ultimately derived from feudal premises about the sovereignty of the Crown, those origins might make it inapposite to a republic in which the people delegated sovereignty on limited terms to its governors.<sup>48</sup> Conversely, if suits against sovereigns were

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44. Compare, e.g., Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-18 (1963) (arguing that the practical effect of the English doctrine of sovereign immunity had diminished to insignificance in the years before the nation’s Founding), with Nelson, *supra* note 20, at 1574-79 (arguing that the sovereign was not amenable to process under English judicial practice in the years before the Founding). Examination of this question is beyond the scope of this Article. For purposes of the analysis here, I assume the Founders took a robust common law doctrine of sovereign immunity as their baseline.

45. See Manning, *supra* note 11, at 56. The practices prevailing at Westminster in 1789 may inform our understanding of aspects of the judicial power. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (defining core Article III business); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (determining justiciability in light of “the business of the Colonial courts and the courts of Westminster when the Constitution was framed”). But in many respects, such practices were simply inapposite to the very different premises about the judiciary implicit in the structure of the U.S. Constitution. For example, Blackstone stated that English judges lacked the power of judicial review. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*91. But in an American government established by “a written constitution,” the Supreme Court of course found such authority to be implicit in the judicial power “to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion) (noting that the legislative supremacy principle described by Blackstone is modified by the premise that “the power of American legislative bodies . . . is subject to the overriding dictates of the Constitution and the obligations that it authorizes”).

46. Compare, e.g., Gibbons, *supra* note 20, at 1898-99 (arguing that many early state constitutions implicitly provided for the amenability of states to suit), with Nelson, *supra* note 20, at 1574-79 (contending that the common understanding in the preconstitutional period was that the states were not amenable to judicial process without their consent).

47. In general, given the Founding generation’s widespread dissatisfaction with the way many state governments had operated in the years leading up to the Philadelphia Convention, it is not clear to what extent early state governments and practices served as affirmative, rather than negative, models for understanding the U.S. Constitution. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 549-53 (1969). On this assumption, I have previously argued that it is dangerous simply to assume that early state judicial practice supplied the baseline for understanding any particular aspect of “the judicial Power.” See John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1660-65 (2001).

48. See, e.g., Amar, *supra* note 15, at 1466, 1480-81, 1485-86 (arguing that broad sovereign immunity is antithetical to the guiding constitutional premise that a sovereign people has

unknown to the law, could one fairly assume that the states conceded their immunity to the federal sovereign without some clear statement to that effect in the constitutional plan?<sup>49</sup> How should one understand sovereign immunity in a dual republic in which the states seem to have ceded some measure of sovereignty to the federal government on matters within a limited sphere of federal power and, beyond that, seem to have agreed to certain express constitutional restrictions on their own sovereign powers?<sup>50</sup> I do not mention these questions to intimate any kind of answer, but rather to note that the survival of broad state sovereign immunity under Article III seems not to have been a foregone conclusion.

Certainly, that is the import of the seriatim opinions in *Chisholm v. Georgia*, which confronted such questions from a perspective far closer than the present. The precise factual context involved the narrow question of whether an out-of-state plaintiff seeking to recover a debt from a state could invoke Article III, Section 2's extension of federal jurisdiction to "Controversies . . . between a State and citizens of another State." Most basically, *Chisholm* held that state sovereign immunity did not survive Article III's unqualified extension of "the judicial Power" to a head of jurisdiction whose text plainly included states as potential defendants.<sup>51</sup> But the majority opinions and the dissent also addressed the problem of state sovereign immunity more generally. Ultimately, as discussed below, the breadth of the majority opinions' analysis and the dissent's refutation of that analysis laid much of the groundwork for the atextual and purposive interpretation subsequently applied to the Eleventh Amendment by *Hans v. Louisiana* and its progeny. Accordingly, it is worth outlining some of the crucial reasoning of the five *Chisholm* opinions.

First, two opinions emphasized that because sovereign immunity originated in the feudal notion that the Crown was a sovereign who was above his or her subjects,<sup>52</sup> its premises did not apply to a republican

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delegated limited authority and that the people's agents lose any veneer of sovereignty when acting *ultra vires*).

49. See Nelson, *supra* note 20, at 1598-99 (recounting certain post-ratification arguments against the suability of states in federal court).

50. See, e.g., Fletcher, *supra* note 20, at 1064-78.

51. See 2 U.S. (2 Dall.) 419, 450-51 (1793) (Blair, J.) (explaining that the judicial power is "expressly extended" to suits between a state and citizens of another state and that *Chisholm*'s action "[u]ndoubtedly" fits that description); *id.* at 466 (Wilson, J.) ("[C]ould this strict and appropriated language [of the state-citizen diversity clause], describe, with more precise accuracy, the cause now depending before the tribunal?"); *id.* at 467 (Cushing, J.) ("The case . . . seems clearly to fall within the letter of the Constitution."); *id.* at 477 (Jay, C.J.) (emphasizing that *Chisholm*'s suit "clearly falls not only within the spirit, but the very words of the Constitution").

52. Justice Wilson, for example, traced sovereign immunity to feudal notions that the Crown, as sovereign, was not subject to the jurisdiction of any superior power. *Id.* at 458 (Wilson, J.); see also *id.* at 457 (noting that "sovereignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States"); *id.* at 471 (Jay, C.J.) (observing that European sovereignties rest on "feudal principles" and that

system of government in which sovereignty resides with the people.<sup>53</sup> Second, several Justices reasoned that even if sovereign immunity survived a republican form of government, the states necessarily ceded a measure of their sovereignty to the nation when they assented to the Constitution.<sup>54</sup> Because the Constitution conferred upon Congress certain powers affecting the states and also imposed various express restrictions on state power, it followed that the judiciary should possess authority sufficient to vindicate such federal laws.<sup>55</sup> Third, certain majority opinions invoked other heads of

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such a system regards “the *Prince* as the *sovereign*” and “excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere”).

53. See *id.* at 458 (Wilson, J.) (emphasizing that laws “must be founded on the CONSENT of those, whose obedience they require,” and that sovereignty must be traced to the people); *id.* at 479 (Jay, C.J.) (arguing that the extension of federal jurisdiction to actions such as Chisholm’s “enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined”).

54. Justice Wilson offered a general statement of this premise:

[T]he citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the “People of the *United States*,” did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia* is NOT a sovereign State.

*Id.* at 457 (Wilson, J.). One opinion emphasized that by submitting themselves to the judicial power of the United States, the states had ceded whatever immunity had accrued from exclusive control over access to their own courts. Justice Blair thus argued:

When sovereigns are sued in their own Courts, such a method [the traditional petition of right] may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign’s own Courts, it follows that when 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 452 (Blair, J.).

55. Justice Cushing thus made the following argument:

Whatever power is deposited with the *Union* by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States. This is, as it were, a self-evident proposition; at least it cannot be contested. Thus the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in *Congress*; and are a most essential abridgement of State sovereignty. Again; the restrictions upon States; “No State shall enter into any *treaty*, *alliance*, or *confederation*, *coin money*, *emit bills of credit*, *make any thing but gold and silver a tender in payment of debts*, *pass any law impairing the obligation of contracts*;” these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the *Union*; and to establish some fundamental uniform principles of public justice, throughout the whole *Union*. So that, I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all offices Legislative, Executive, and Judicial, both of the States and of the *Union*, are bound by oath to support it.

*Id.* at 468 (Cushing, J.). Justice Wilson made a similar point. He started from the premise that the Constitution authorizes the legislative power to act upon the states. See *id.* at 464 (Wilson, J.) (“When certain laws of the States are declared to be ‘subject to the revision and controul of the *Congress*,’ it cannot, surely, be contended that the *Legislative* power . . . was meant to have *no* operation on the several States.” (quoting U.S. CONST. art. I, § 10 (emphasis added))). He then



Article III jurisdiction to establish the basic point that the states did not join the union with their background immunity intact. In particular, Article III created jurisdiction in controversies “between two or more States,” a meaningless provision unless a state could subject another state to suit in federal court.<sup>56</sup> And two Justices found it obvious that foreign states could sue states under the head of jurisdiction governing controversies between “a State . . . and foreign States, Citizens or Subjects.”<sup>57</sup> If a state could assert sovereign immunity against the exercise of such jurisdiction, it would defeat the constitutional purpose of denying states the ability “to embroil the whole confederacy in disputes” with foreign powers.<sup>58</sup> This conclusion, in turn, made it more difficult to find that Article III simultaneously preserved state sovereign immunity under the similarly structured and worded state-citizen diversity clause.<sup>59</sup>

Justice Iredell’s dissent displays the greatest humility about the difficult question of “first impression” before the Court.<sup>60</sup> Starting from the assumption that the Necessary and Proper Clause grants Congress power to prescribe the federal courts’ “manner of . . . proceeding,” Justice Iredell

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stressed that “[n]othing could be more natural than to *intend* that this Legislative power should be enforced by powers Executive and *Judicial*.” *Id.* at 465. Similarly, with respect to constitutional restrictions such as those contained in the Contract Clause, Justice Wilson asked: “What good purpose could this Constitutional provision *secure*, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controuling judiciary power?” *Id.*

56. *Id.* at 451 (Blair, J.) (noting that under the state-state clause, “a State must, of necessity, be a Defendant”).

57. *See id.*; *id.* at 467-68 (Cushing, J.).

58. *See id.* at 451 (Blair, J.). Along similar lines, Justice Cushing wrote:

[A]lthough the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing as far as may be, yet ingenuity may say, that the State here may sue, but cannot be sued; but that the foreign State may be sued but cannot sue. We may touch foreign sovereignties but not our own. But I conceive the reason of the thing, as well as the words of the Constitution, tend to shew that the Fæderal Judicial power extends to a suit brought by a foreign State against any one of the *United States*. ONE design of the general Government was for managing the great affairs of peace and war and the general defence; which were impossible to be conducted, with safety, by the States *separately*. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them.

*Id.* at 467-68 (Cushing, J.).

59. *See id.* at 468 (“So also, with respect to controversies between a State and citizens of another State (at home) comparing all the clauses together, the remedy is reciprocal; the claim to justice equal.”). Justice Blair relied on his conclusions about the state-foreign state diversity clause to refute the argument that controversies “between a State and citizens of another State” only envisioned states as plaintiffs, given the order of their appearance in the clause. *See id.* at 450 (Blair, J.) (noting that the state-citizen diversity clause of Article III, Section 2 “[u]ndoubtedly” reaches Chisholm’s suit, “unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State”).

60. *Id.* at 449 (Iredell, J., dissenting).

emphasized that section 14 of the Judiciary Act of 1789 authorized such courts merely to issue writs “agreeable to the principles and usages of law.”<sup>61</sup> For him, the crucial point was that Congress had instructed the federal courts (including the Supreme Court) to look to existing law in determining the availability of compulsory process against the states. In the absence of any state or federal statute specifically addressing that question, Justice Iredell reasoned that section 14 necessarily incorporated the common law of the states—a body of law that, in his view, had not materially deviated from the common law pertaining to the sovereign immunity of the English Crown.<sup>62</sup> That tradition excluded an unconsented common law action to recover a debt from a state.

Justice Iredell’s dissent emphasized, however, that the question was one of great difficulty and delicacy and, thus, should be resolved on narrow grounds. Indeed, even he acknowledged a potential distinction between common law actions like *Chisholm*’s and those involving genuine federal interests—“the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy.”<sup>63</sup> The states, he explained, “separately possess[ed], as to every thing simply relating to themselves, the fullest powers of sovereignty, and yet in some other defined particulars [were] subject to a superior power composed out of themselves for the common welfare of the whole.”<sup>64</sup> Still, deeming it crucial that a judge not “rashly commit” on “important questions” of constitutional dimension, Justice Iredell never specified his precise understanding of Congress’s constitutional power, if any, to subject states to suit.<sup>65</sup> He intimated, however, that his “present

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61. *Id.* at 434 (quoting Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (current version at 28 U.S.C. § 1651 (2000))) (emphasis omitted).

62. As Justice Iredell thus explained,

The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed “the common law,” a law which I presume is the ground-work of the laws in every State in the *Union*, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controuls it, to be in force in each State, *as it existed in England, (unaltered by any statute) at the time of the first settlement of the country.* . . . No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union* in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as completely sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but such *as the States have surrendered to them*: Of course the part not surrendered must remain as it did before.

*Id.* at 435.

63. *Id.*

64. *Id.* at 447.

65. *Id.* at 449.

opinion [was] strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money.”<sup>66</sup> Given the strong background of sovereign immunity, “nothing but express words, or an insurmountable implication . . . would authorize the deduction of so high a power.”<sup>67</sup>

Although *Chisholm* involved a fairly circumscribed set of facts (a common law action for debt grounded in diversity jurisdiction), the broad reasoning discussed above would have major interpretive consequences in later years. The four majority opinions rested the assertion of jurisdiction on a general theory of “the judicial Power” in a constitutional republic. That justification, moreover, seemed to apply a fortiori to other heads of jurisdiction. Indeed, in support of the broader conclusion that sovereign immunity did not survive the adoption of Article III, the seriatim opinions cited a number of specific categories for which such abrogation seemed obvious—such as federal question jurisdiction, suits in admiralty, suits between states, and suits against states by foreign states. This breadth of reasoning was to open the door for future generations to read the Eleventh Amendment’s subsequent repudiation of *Chisholm* not as the Amendment was written (a set of precise rules for reading the judicial power), but rather as a sweeping rejection of the broader animating principles that underlay *Chisholm*’s specific holding.

#### B. Hans and Holy Trinity

No one questions that the nation adopted the Eleventh Amendment in response to *Chisholm*. The text of the Amendment, however, addresses the problem posed by that decision through the articulation of rather precise rules limiting the proper construction of Article III power: “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.” Although this text is open to more than one plausible interpretation,<sup>68</sup> one

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66. *Id.*

67. *Id.* at 450.

68. Two leading schools of thought exist on the question of how to read the Eleventh Amendment’s text. The diversity theory maintains that when viewed alongside the text that it modifies (Article III), the Amendment simply adopts a narrowing construction of Article III, Section 2’s subclauses dealing with suits against states by out-of-state individuals. Specifically, Article III, Section 2 authorizes jurisdiction over controversies “between a State and Citizens of another State” and “between a State . . . and foreign . . . Citizens or Subjects.” U.S. CONST. art. III, § 2, cl. 1. After the Amendment, a federal court could no longer rely on those precise subclauses to sustain jurisdiction over the state as a defendant. *See, e.g., Fletcher, supra* note 20, at 1045-54, 1060-63; *Gibbons, supra* note 20, at 1894, 1936-37. On this view, the Amendment does not affect federal question actions against states even if the alignment of parties happens to correspond to one described by the Amendment. *See, e.g., Fletcher, supra* note 20, at 1063;

thing about it is quite clear: It cannot bear the meaning assigned to it by *Hans v. Louisiana*, which initiated the strongly purposive approach to the Amendment that governs its interpretation to this day. The facts of *Hans* are too familiar to require extensive recitation. *Hans* involved a suit filed by a citizen of Louisiana against the State of Louisiana. Louisiana had repudiated the interest on state bonds held by Hans. Hans sued in federal court, alleging that the state's refusal to make the required payments violated the Contract Clause of the U.S. Constitution.<sup>69</sup> On the premise that his case arose under the Constitution, Hans filed in federal circuit court under the relatively new statute providing for federal question jurisdiction.<sup>70</sup> Against this assertion of federal jurisdiction, the State interposed the bar of the Eleventh Amendment.

Unsurprisingly, the plaintiff argued that he was “not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits . . . brought by the citizens of another State, or by citizens or subjects of a foreign State.”<sup>71</sup> While acknowledging that “the amendment does so read,”<sup>72</sup> the Court interpreted it against the backdrop of the “shock of surprise” that had swept the nation after *Chisholm*:

[A]t the first meeting of Congress [after *Chisholm*], the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. . . .

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in

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Gibbons, *supra* note 20, at 1937. Literal theorists, by contrast, view the Amendment more broadly. Emphasizing that the plain meaning of the text reaches “any suit in law or equity” that has the alignment of parties described in the Amendment, such theorists argue that the Amendment precludes even a federal question action if brought against a state by a citizen of another state or a citizen or subject of a foreign state. *See, e.g.*, Marshall, *supra* note 23, at 1346-49. On the assumption that both interpretations represent a plausible reading of the Amendment's text, I do not attempt here to adjudicate the dispute between diversity and literal theories.

69. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

70. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (granting the federal circuit courts “original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States”).

71. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

72. *Id.*

accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution . . . Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.<sup>73</sup>

In other words, the Eleventh Amendment's purpose was not merely to limit the federal judicial power in cases involving the party alignments described by the Amendment's precise text, but also to repudiate *Chisholm* and all that it stood for. To the extent that *Chisholm*'s reasoning indicated that state sovereign immunity generally did not survive Article III's adoption, the Eleventh Amendment established just the opposite. In so doing, the Amendment also gave constitutional force to (a broad reading of) Justice Iredell's dissent *and* to the views of "the great defenders of the Constitution" (Hamilton, Madison, and Marshall), whose statements during the ratification debates had "expressly disclaimed, and even resented" any notion that "the judicial Power" authorized unconsented suits by individuals against the states.<sup>74</sup>

The Court's reasoning gives rise to the methodological question under consideration. While acknowledging that the letter of the Amendment did not reach Hans's lawsuit, the Court relied on its apparent background

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73. *Id.* at 11-12.

74. *Id.* at 12. Thus, whatever disagreement had marked the question of immunity when the Court had rendered its decision in *Chisholm*, "the people of the United States in their sovereign capacity subsequently decided" that the views of commentators like Hamilton and Iredell "were clearly right." *Id.* at 14. To be sure, Justice Bradley's opinion for the Court offered some independent reasons for thinking that Article III, properly understood, had preserved a broad state sovereign immunity from suit. But that reasoning did not cut deeply; it merely stressed that prior to the Founding "[t]he suability of a State without its consent was a thing unknown to the law." *Id.* at 16. The Court did frankly acknowledge that under our novel constitutional structure, "[s]ome things . . . were made justiciable which were not known as such at the common law." *Id.* at 15. But it did not pause to examine, in particular, whether novel considerations relating to the enforcement of federal law in a dual republic rendered the common law of sovereign immunity inapposite to federal question actions against states. In other words, apart from the Amendment, the Court identified no affirmative basis for extending immunity to what Justice Iredell himself had recognized as "the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting). I do not mean to suggest an answer to that difficult question. My point here is simply that the Court in *Hans* did not independently determine the meaning of Article III in relation to the overall constitutional structure, but rather relied on the Eleventh Amendment to do the work.

purpose to engage in “imaginative reconstruction” of the true intentions of those who framed and ratified the Amendment.<sup>75</sup> In view of the strong and immediate political reaction against *Chisholm* and eighteenth-century society’s apparently widespread sentiment in favor of broad state sovereign immunity, the Court simply found it unthinkable that the Eleventh Amendment’s framers and ratifiers would have left open federal question actions against the states:

The letter is appealed to now, as it was [in *Chisholm*], as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.<sup>76</sup>

In other words, the *Hans* Court relied on the political context and the temper of the times to infer a broader spirit than the Amendment’s text could bear, and then enforced that spirit over the letter of the Amendment. Accordingly, subsequent decisions have typically credited *Hans* with establishing “Eleventh Amendment immunity” against federal question actions brought against a state by its own citizens.<sup>77</sup>

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75. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.” (footnote omitted)).

76. *Hans*, 134 U.S. at 15.

77. See, e.g., *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002) (emphasizing that “[t]he Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, . . . and by its own citizens as well”); *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973) (“Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (“A state’s freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent.”); David L. Shapiro, *The Supreme Court, 1983 Term—Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*,

The *Hans* Court's approach was hardly unusual for its time. The tradition of strong purposivism was already an important cornerstone of the law of *statutory* interpretation. By the late nineteenth century, it was axiomatic that statutory interpretation entailed the accurate discernment and faithful implementation of the legislature's genuine intent.<sup>78</sup> That premise created the opening for atextual, purposive interpretation. Because legislatures inevitably work under the constraints of limited foresight and imperfect language, the expression of policy contained in an enacted text, however clear, might fail to capture the legislature's true intent as applied to some overlooked or even unforeseeable circumstance.<sup>79</sup> Among other things, if the commands embodied in a precise statute seemed dramatically over- or underinclusive in relation to the statute's apparent background purpose (viz. its general aims),<sup>80</sup> the Court took such incongruity to indicate that the statutory language had failed to capture Congress's intended meaning.<sup>81</sup> Thus, when factors such as the circumstances surrounding the statute's enactment, the dominant values of society, or the absurdity of a particular result suggested such a mismatch, the Court would not hesitate to forego the letter of a statute in favor of its spirit or purpose.<sup>82</sup>

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98 HARV. L. REV. 61, 71 (1984) (noting that the Court's reasoning in *Hans* "has been folded into the eleventh amendment itself").

78. See, e.g., *Dewey v. United States*, 178 U.S. 510, 521 (1900) ("Our duty is to give effect to the will of Congress, as thus plainly expressed."); *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."); *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 64 (1879) ("[I]n endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."); *Mo., Kan., & Tex. Ry. Co. v. Kan. Pac. Ry. Co.*, 97 U.S. 491, 497 (1878) ("It is always to be borne in mind, in construing a congressional grant, . . . that such effect must be given to it as will carry out the intent of Congress.").

79. See Manning, *supra* note 11, at 10-15 (describing the premises of strong purposivism).

80. While the terms are often used interchangeably, an analytically important distinction exists between "purpose" and "intent." If purpose refers to "the general aims" of legislation, intent can be understood, more precisely, to connote "meaning"—that is, "the specific particularized application which the statute was 'intended' to be given." Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370-71 (1947).

81. See Manning, *supra* note 11, at 6, 12-13 (examining the analytical relationship between background purpose and specific intent reflected in the Court's traditional approach).

82. See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (acknowledging that a literal application of the resolution annexing Hawaii would violate "the intention of the legislative body"); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706-07 (1899) (refusing to accept a construction that "ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress"); *Price v. Forrest*, 173 U.S. 410, 419, 423 (1899) (holding that a statute restricting "all transfers and assignments made of any claim upon the United States" did not apply to transfers made by judgment of a state court of competent jurisdiction, as such transfers failed to implicate "the object of Congress . . . to protect the Government, and not the claimant, and to prevent frauds upon the Treasury"); *Calderon v. Atlas S.S. Co.*, 170 U.S. 272, 281 (1898) (concluding that the rule that "'intention must be gathered from the words'" does not preclude avoidance of "'absurdity, which the legislature ought not to be presumed to have

By applying the same technique to a constitutional amendment, *Hans* fit nicely within the strongly purposive tradition typified by its equally famous contemporary, *Church of the Holy Trinity v. United States*<sup>83</sup>—a decision whose interpretive approach has become an important and often controversial focal point of the modern statutory interpretation debate.<sup>84</sup> To see the close (but generally overlooked) family resemblance, it is worth briefly recounting *Holy Trinity*'s reasoning. The Court held that the Church of the Holy Trinity did not violate the Alien Contract Labor Act by contracting for Reverend E. Walpole Warren to come from Britain to the United States to work as a pastor. The Act broadly forbade contracting with or assisting an alien to come to the United States “to perform labor or service of any kind.”<sup>85</sup> Although acknowledging that the church's employment contract fell squarely within the clear terms of the Act's prohibition, the Court rested on the “familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>86</sup> Just as *Hans* had reasoned that the Eleventh Amendment would have foundered if its framers and ratifiers had thought it to allow federal question suits by in-staters against states, *Holy Trinity* reasoned that the Alien Contract Labor Act would have failed to pass if legislators had understood it to preclude the engagement of foreign clerics for work in the United States. Justice Brewer thus famously wrote for the Court:

Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make similar

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intended” (quoting *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 172 (1896) (“Such an absurdity cannot be imputed to the legislature.”); *Folsom v. United States*, 160 U.S. 121, 127 (1895) (“[W]here the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention . . .”).

83. 143 U.S. 457 (1892).

84. See, e.g., 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: FEDERAL COURTS AND THE LAW* 3, 18-23 (Amy Gutmann ed., 1997) (using *Holy Trinity* to frame a criticism of intentionalism); Frederick Schauer, *Constitutional Invocations*, 65 *FORDHAM L. REV.* 1295, 1307 (1997) (“*Church of the Holy Trinity v. United States* is not only a case, but is the marker for an entire legal tradition, a tradition . . . emphasizing . . . that there is far more to law than the plain meaning of authoritative legal texts . . .” (footnote omitted)); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *STAN. L. REV.* 1833, 1835-36 (1998) (discussing the centrality of *Holy Trinity* to the contemporary debate over textualism).

85. Alien Contract Labor Act, ch. 164, § 1, 23 Stat. 332, 333 (1885) (repealed 1952), quoted in *Holy Trinity*, 143 U.S. at 458.

86. *Holy Trinity*, 143 U.S. at 459.



arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute.<sup>87</sup>

This reasoning could scarcely be more similar to that deployed two years earlier in *Hans*. In both cases, the Court concluded that the political context and the widely shared social attitudes held at the time of enactment necessarily precluded reading a precise text as written. Using the technique of imaginative reconstruction, the Court in both cases cast itself into the minds of the relevant lawmakers and concluded that neither text would have been adopted unless it had, in fact, stood for more (*Hans*) or less (*Holy Trinity*) than indicated by the clear import of the applicable text.

### C. Seminole Tribe and the New Textualism

As discussed below, the Rehnquist Court's interpretive approach to statutes has, in recent years, shifted quite noticeably away from the strong purposivism of *Holy Trinity*.<sup>88</sup> The Court has based this shift on rather explicit premises about the legitimate role of the courts in exercising the law-declaration function in our system of government. Contrary to prior conceptions, the Court's recent cases suggest that judges show greater fidelity to the carefully designed legislative process prescribed by Article I, Section 7 if they adhere to the clearly worded statutes that emerge from that process, rather than trying to conform an otherwise precise text to its perceived background purpose.<sup>89</sup> I have more to say about this proposition shortly. For now, it suffices to note that the idea, if correct, might also be thought to govern those instances, however infrequent, when the finely wrought processes for adopting or amending the Constitution themselves have produced clear and precise constitutional texts. This complicated question, which supplies the focus of Part II of this Article, is brought into high relief by one line of the Rehnquist Court's Eleventh Amendment cases.<sup>90</sup>

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87. *Id.* at 472.

88. *See infra* notes 102-117 and accompanying text.

89. *See infra* notes 112-117 and accompanying text.

90. As discussed below, certain of the Rehnquist Court's recent decisions approach the Eleventh Amendment defensively, treating it merely as a nonimpediment to the recognition of new forms of state sovereign immunity under the constitutional structure. *See infra* notes 239-245 and accompanying text. In other cases, however, the Court continues to invoke the Eleventh Amendment more directly, relying on its apparent background purposes as an affirmative source of state sovereign immunity against suits in federal court. *See infra* notes 91-101 and

In particular, the Rehnquist Court has not merely adhered to *Hans* as a matter of stare decisis, but rather has continued to rely on its strongly purposive technique as a means to resolve unsettled questions about the very reach and implications of *Hans* and its progeny. For the modern development of state sovereign immunity, the defining moment came with the Rehnquist Court's decision in *Seminole Tribe v. Florida*, which held that Congress lacks authority under Article I to abrogate the state sovereign immunity provided by the Eleventh Amendment.<sup>91</sup> Previously, that outcome had been far from obvious; indeed, the Court in *Seminole Tribe* found it necessary to overrule a recent (albeit fractured) precedent that had explicitly recognized Article I power to abrogate such immunity.<sup>92</sup> Perhaps because it was overruling its own recent precedent, perhaps because *Hans* itself did not explicitly address congressional power to abrogate state sovereign immunity,<sup>93</sup> or perhaps because Justice Souter's *Seminole Tribe*

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accompanying text. The latter cases reflect the strongly purposive, atextual technique under consideration in this Section and in Part II.

91. 517 U.S. 44 (1996).

92. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. 44. In a plurality opinion for four members of the Court in *Union Gas*, Justice Brennan concluded that Congress possessed Article I authority to abrogate state sovereign immunity. In a separate opinion concurring in the judgment, Justice White provided an opaque fifth vote for that conclusion. *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part). Several developments had paved the way for that decision. First, the Court had suggested that Congress could, under certain circumstances, use the commerce power to compel a constructive waiver of sovereign immunity by states undertaking activities in interstate commerce. *See Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964). Second, the Court had recognized congressional authority to abrogate "Eleventh Amendment immunity" pursuant to the enforcement powers prescribed by Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *see also* U.S. CONST. amend. XIV, § 5 (assigning Congress the "power to enforce, by appropriate legislation, the provisions of this article"). Third, based on the foregoing developments, the Court had at times assumed without deciding that Congress had Article I authority to abrogate state sovereign immunity, provided that the statute made an unmistakably clear statement to that effect. *See, e.g., Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (plurality opinion); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

Justice Brennan's plurality opinion in *Union Gas* built directly on the decisions holding that Congress had authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. In *Fitzpatrick v. Bitzer*, then-Justice Rehnquist's opinion for the Court had emphasized that the Civil War Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). Because the Fourteenth Amendment's substantive guarantees expressly restricted state sovereignty, "the principle of state sovereignty which [the Eleventh Amendment] embodies . . . [was] necessarily limited by [Section 5's] enforcement provisions." *Id.* at 456. Justice Brennan's (short-lived) plurality opinion in *Union Gas* reasoned that "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16 (plurality opinion). On that assumption, Justice Brennan concluded that Article I, like the Fourteenth Amendment, must also authorize Congress to abrogate sovereign immunity. *See id.* at 17-19.

93. As Justice Brennan argued in his plurality opinion in *Union Gas*, the statute pursuant to which *Hans* had filed his Contract Clause action—the federal question provision of the Judiciary Act of 1875—did not convey an intention to abrogate state sovereign immunity. *Union Gas*, 491 U.S. at 18-19 (plurality opinion).

dissent argued that the Court's opinion "immensely magnifie[d] the century-old mistake of *Hans* itself,"<sup>94</sup> the *Seminole Tribe* Court undertook an unusually explicit defense of the idea that the Eleventh Amendment embodies the broader principle "that state sovereign immunity limited the federal courts' jurisdiction under Article III."<sup>95</sup> On that understanding, the Court held that permitting Congress to abrogate such immunity under Article I would contradict the "fundamental" precept that Congress cannot "expand the jurisdiction of the federal courts beyond the bounds of Article III."<sup>96</sup>

As in *Hans*, the facts at issue in *Seminole Tribe* involved a federal question action filed by an in-stater. Although the Eleventh Amendment does not, by its precise terms, apply to such a case, the Court reiterated its earlier understanding that "blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"<sup>97</sup> To be sure, the Amendment's text was framed in precise terms, but that consideration did not preclude the Court from again reading the Amendment in light of the broader purpose that underlay its adoption. In particular, the Amendment sought to overturn not only *Chisholm's* holding, but also its mistaken understanding that state sovereign immunity did not qualify Article III's otherwise unconditional terms.<sup>98</sup> That the Amendment did not speak of the broader mischief that it purported to resolve was perfectly understandable under the circumstances:

The text [of the Eleventh Amendment] dealt in terms only with the problem presented by the decision in *Chisholm*; in 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

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94. *Seminole Tribe*, 517 U.S. at 117 (Souter, J., dissenting). Like the plurality opinion in *Union Gas*, Justice Souter's dissent in *Seminole Tribe* stressed that the *Hans* Court had not had an occasion to decide whether Congress could abrogate state sovereign immunity. In particular, because state sovereign immunity had passed into our law from the common law of England, one might read *Hans* narrowly to hold that (in the absence of express abrogation) "a non-constitutional common-law immunity" framed the meaning of federal jurisdictional grants in areas not within the Eleventh Amendment's plain text. *Id.* at 124. After extended consideration of various textual and historical arguments counseling against a constitutional form of sovereign immunity (outside the categories specified by the Eleventh Amendment), Justice Souter concluded that *Hans* should be limited to its facts. *See id.* at 130 (arguing that several considerations counsel against extending *Hans* to preclude congressional abrogation of state sovereign immunity).

95. *Id.* at 64 (majority opinion).

96. *Id.* at 65. Although *Fitzpatrick* had nonetheless recognized abrogation authority under the Section 5 power, the *Seminole Tribe* Court found it decisive that the Fourteenth Amendment came into force "well after the adoption of the Eleventh Amendment"; hence, unlike the Commerce Clause, the Fourteenth Amendment "operated to alter the pre-existing balance . . . achieved by Article III and the Eleventh Amendment." *Id.* at 65-66.

97. *Id.* at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934)).

98. *See id.* at 69-71.

1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.<sup>99</sup>

In other words, although they adopted a text to resolve the specific problem posed by *Chisholm*, the Amendment's framers acted under the impulse of a more general purpose to endorse a "background principle of state sovereign immunity."<sup>100</sup> And that general purpose extends with equal force to unforeseen circumstances (such as federal question jurisdiction) that the text simply failed to address. Accordingly, any argument predicated on the Amendment's carefully limited text was but a "straw man."<sup>101</sup>

But in contrast with the Fuller Court's consistent reliance on strong purposivism when it decided *Hans* more than a century ago, the Rehnquist Court's use of the same technique to resolve open questions about the Eleventh Amendment creates at least a prima facie incongruity in its interpretive jurisprudence. In recent years, the development of a "new textualism" has influenced the Court's statutory jurisprudence in ways that bear directly on its use of strong purposivism.<sup>102</sup> Modern textualism builds on the premise that the legislative process is too complex, opaque, and path-dependent to allow judges to identify, in any meaningful sense, an unexpressed legislative intent at odds with the meaning conveyed by a text that is clear in context.<sup>103</sup> While textualists acknowledge that legislation

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99. *Id.* at 69-70.

100. *Id.* at 72. As the Court elaborated elsewhere in its opinion:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

*Id.* at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)) (alteration in original) (citations and internal quotation marks omitted).

101. *Id.* at 69. Consistent with that view, the Rehnquist Court has repeatedly followed *Hans* in treating the Amendment's language as a broad statement of principle, rather than as a specific rule embedded in a precise text. That is to say, the Court has decided a good many "Eleventh Amendment immunity" cases that have nothing to do with the Amendment's text. *See, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) ("Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States. . . . The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) ("Although today's cases concern suits brought by citizens against their own States, this Court has 'long understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (quoting *Seminole Tribe*, 517 U.S. at 54)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634-35 (1999) (incorporating *Seminole Tribe*'s characterization of the Eleventh Amendment into its decision).

102. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

103. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2408-19 (2003) (discussing the process assumptions underlying modern textualism as practiced by the Rehnquist Court).

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>104</sup> By offering an alternative explanation for an apparent lack of means-end fit, this premise of modern textualism, if correct, tends to undercut the Court's traditional justification for departing from a clearly expressed legislative command.<sup>105</sup>

Three related premises underlie the textualist position. First, where a statute reflects bargaining among competing interest groups (as is often the case),<sup>106</sup> the compromise reflected in the enacted text may fall short of or exceed the background purpose that ultimately inspired it.<sup>107</sup> Second, building on the work of Kenneth Arrow and others,<sup>108</sup> textualists contend that a statute's content may reflect procedural factors such as the sequence of the alternatives presented (agenda manipulation) or the effect of strategic voting (including logrolling).<sup>109</sup> If true, this consideration makes it difficult, if not impossible, to know why a statute took the particular shape that it did.<sup>110</sup> Courts thus lack any meaningful capacity to "reconstruct" whether Congress would (or even could) have "corrected" a perceived mismatch between a precise statutory text and its apparent background purpose if the

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104. See *id.* at 2415-17 (discussing the impact of contemporary intent skepticism on the traditional assumptions of strong purposivism).

105. See *id.* at 2418-19.

106. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (suggesting that interest groups purchase legislation through "campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes").

107. See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984) (noting that in such instances, "[w]hat Congress wanted was the compromise, not the objectives of the contending interests"). Indeed, one would expect legislative compromise even where interest group influence is weak. See *infra* text accompanying note 189.

108. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (Yale Univ. Press 2d ed. 1963) (1951).

109. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made."); *id.* 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."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992) ("Many policies, in principle, can topple an existing status quo. That some are more likely than others to actually do so is dependent on idiosyncratic, structural, procedural, and strategic factors, which are at best tenuously related to normative principles embraced by democratic theorists and philosophers.").

110. In other words, if one accepts the premises of public choice theory, the very notion "that statutes have purposes or embody policies becomes quite problematic, since the content of the statute simply reflects the haphazard effect of strategic behavior and procedural rules." DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 41 (1991) (critically discussing the implications of Arrowian public choice theory).

issue had come to light in the legislative process. Third, to the extent that legislation does embody any discernible purpose, the statute's breadth says something important about that purpose. Because Congress legislates alternatively through open-ended standards or specific rules, shifting a statute's level of generality to conform to its background purpose dishonors an evident congressional choice to legislate in broader or narrower terms.<sup>111</sup>

Although the modern Court has not fully embraced textualism,<sup>112</sup> its implicit assimilation of many of the foregoing assumptions has led the Court to rethink the strong purposivism of cases such as *Holy Trinity* and its progeny. Almost two decades ago, the Court began to place greater emphasis on respecting legislative compromise and the need to hew closely to the precise textual outcomes of an opaque and often path-dependent legislative process. As early as 1986, the Court thus explained:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise . . . .<sup>113</sup>

More recently, the Court has stressed that its role is not to use a statute's "overarching legislative purpose" to smooth over the inevitable infelicities in a statutory text.<sup>114</sup> Rather, dissatisfaction with a statute's final contours "is often the cost of legislative compromise," and "[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the

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111. As Judge Easterbrook has explained, "Sometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994). Relying on "an imputed 'spirit' to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law." *Id.*

112. See Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 6 (1998) (describing the Court's eclectic approach to statutory interpretation). On rare occasion, the modern Court still engages in strongly purposive interpretation. See *Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998) (broadening an expedited review provision because the literal meaning undermined the statutory purpose to provide "a prompt and authoritative judicial determination of the constitutionality of the Act"); *Lewis v. United States*, 523 U.S. 155, 160 (1998) (refusing to enforce a statute's conventional meaning when "a literal reading of the words . . . would dramatically separate the statute from its intended purpose").

113. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

114. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (Thomas, J.).

President . . . are not for [the courts] to judge or second-guess.”<sup>115</sup> Hence, judges “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”<sup>116</sup> As such themes have become more common in the Court’s decisions,<sup>117</sup> the Court’s reliance on strong purposivism has lessened significantly. At a minimum, therefore, the Rehnquist Court’s continued deployment of a purposivist technique to interpret the Eleventh Amendment requires further examination.

## II. ARTICLE V AND CONSTITUTIONAL PRECISION

Even if the Rehnquist Court’s new realism about the legislative process has led it to abandon strongly purposivist interpretation in *statutory* cases, one must ask if perhaps the Court can legitimately apply that technique to *constitutional* texts like the Eleventh Amendment. Although historical scholarship suggests that many in the Founding generation regarded

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115. *Id.*; see also *id.* (“[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . [A] change in any individual provision could have unraveled the whole.”).

116. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (Scalia, J.).

117. See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002) (Kennedy, J.) (“Like any key term in an important piece of legislation, the [relevant] figure was the result of compromise between groups with marked but divergent interests in the contested provision. . . . Courts and agencies must respect and give effect to these sorts of compromises.”); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (Scalia, J.) (“[A]ssuming . . . that Congress did not envisio[n] that the [Americans with Disabilities Act] would be applied to state prisoners, in the context of an unambiguous statutory text that is irrelevant.” (second alteration in original) (citation and internal quotation marks omitted)); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *Brogan v. United States*, 522 U.S. 398, 403 (1998) (Scalia, J.) (observing “the reality that the reach of a statute often exceeds the precise evil to be eliminated” and explaining that “it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself”); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (Scalia, J.) (noting that “the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone,” and that “[t]he best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President” (citation omitted)). Nontextualist Justices have articulated similar premises. See, e.g., *Bates v. United States*, 522 U.S. 23, 29 (1997) (Ginsburg, J.) (“The text of § 1097(a) does not include an ‘intent to defraud’ state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face.”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1993) (Stevens, J.) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (Blackmun, J.) (“[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987))).

constitutional and statutory interpretation as analogous,<sup>118</sup> an important intellectual tradition suggests that the Court should approach constitutional provisions with greater flexibility than it does with statutes.<sup>119</sup> The supporting arguments are familiar. Because it frames a system of government for a large nation, the Constitution is an especially complex document. Because that document is intended “for the ages,” problems of foresight and translation are intensified with the inevitability of changed circumstances. The well-known difficulty of amending the Constitution, moreover, makes the necessity of judicial flexibility more pressing. These considerations, of course, underpin one important version of the “living Constitution” tradition, which marks off constitutional adjudication from more conventional textual exegesis. On that account, even if one believes that statutory interpretation calls for strict observance of the semantic boundaries of the enacted text, one might still subscribe to a more flexible theory of constitutional interpretation—one that permits greater reliance on the document’s background purpose to smooth out the rough edges of the text and to adapt it to unforeseen circumstances over time.

Ultimately, however, I argue that inferences from the lawmaking structure implicit in Article V cut in decidedly the other direction. Before elaborating on that conclusion, it is necessary to say a word about why I find Article V important, if not decisive, in determining the proper method of constitutional adjudication. As I have emphasized in previous work, I start from the assumption that rules of interpretation necessarily reflect broader questions about constitutional structure.<sup>120</sup> The Constitution does not generally prescribe explicit rules of construction to guide the task of constitutional adjudication.<sup>121</sup> In the absence of any express direction, courts must craft rules of interpretation for themselves. Because these rules necessarily define the relationship between the lawmaker and adjudicator, their design should try to make sense rather than nonsense of the

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118. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 915-16, 936, 943-44 (1985).

119. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 282 (1982) (observing “that virtually everyone who writes on the question thinks that constitutional provisions should not be construed as strictly as statutory provisions”).

120. See Manning, *supra* note 103, at 2432-33; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 636-37 (1996); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 690-92 (1999).

121. The Ninth and arguably the Tenth Amendments supply specialized rules of construction. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The Eleventh Amendment, of course, is also framed as a rule for interpreting the judicial power prescribed by Article III. None of these amendments, however, prescribes a basic method of deciphering the meaning of the text.



institutional roles and responsibilities prescribed for such actors in the surrounding constitutional structure.<sup>122</sup> At least in the absence of any textual specification of the content of the judicial power “to say what the law is,”<sup>123</sup> one should perhaps 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>124</sup> This frame of analysis reflects the widely accepted idea that in construing open-ended grants of constitutional power, it is appropriate and, indeed, desirable to read a discrete (but indeterminate) textual provision to make sense in light of the overall constitutional structure.<sup>125</sup>

The Court’s new textualism rests on the idea that most statutes reflect compromise. As I have argued elsewhere, the Court’s decision to protect the lines of a precise statutory compromise finds justification in the goals of bicameralism and presentment.<sup>126</sup> Because that elaborately designed process assigns political minorities the right to insist upon compromise as the price of assent to legislation, disturbing the lines of compromise embedded in a final text threatens that important constitutional safeguard. With the constitutional amendment process, the multiple supermajority requirements give political minorities more explicit and more pronounced rights to veto or constrain constitutional amendments. Hence, disturbing the lines of a precise constitutional compromise raises even greater concerns.

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122. Cf. Jerry L. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995) (“To carry out its [interpretive] task, the court must adopt—at least implicitly—a theory about its own role in defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature.”).

123. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

124. Full examination of the original understanding of the judicial power to interpret the Constitution is beyond the scope of this Article. Such an inquiry, of course, would entail a significant examination of the history and practice of judicial review both before and after the adoption of the Constitution. See, e.g., CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 63-64 (1996) (discussing early practice); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 121-25 (1990) (same); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1157-76 (1987) (same). Because the Rehnquist Court’s strictness in statutory cases rests ultimately on conclusions about the legislative process, I focus—for purposes of comparison—on the interpretive implications of the Article V and VII processes for adopting constitutional texts.

125. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 8-23 (1969) (examining the use of structural inference in constitutional adjudication). As discussed below, such a method of interpretation thus does not implicate the process concerns underlying modern textualism. See *infra* note 160.

126. See, e.g., Manning, *supra* note 103, at 2437-40; Manning *supra* note 11, at 70-78.

This Part first examines the traditional conception that interpreters should have more flexibility when reading constitutional, as opposed to statutory, texts. It then considers the relative process concerns associated with disturbing constitutional versus statutory compromise. Finally, it examines the Eleventh Amendment in light of the process concerns emanating from Article V.

#### A. *Constitution Versus Statutes*

Although the current Rehnquist Court majority would doubtless resist such a characterization, perhaps the most plausible defense of the Court's current approach to the Eleventh Amendment falls within the rubric of the "living Constitution." Before elaborating on that proposition, some preliminary observations are necessary to avoid confusion. Vague as it is, the "living Constitution" metaphor describes a range of constitutional theories,<sup>127</sup> including the rather profound claim that constitutional adjudication does not require interpretive fidelity to the historical understanding or intended meaning of the language adopted by the Constitution's framers and ratifiers.<sup>128</sup> Reserving that question of first principle for another day,<sup>129</sup> my focus here is on a milder connotation associated with the same metaphor—namely, that American judges are faithful agents of lawmakers, but that true fidelity to the Constitution and its Founders involves implementing the document's broader purposes, not

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127. See, e.g., Arthur Selwyn Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881, 884 (1963) ("The concept of the 'living Constitution' has never been explained in detail so as to indicate how far it goes and what it means."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (noting the ambiguity in the concept of a "living Constitution"). For an illuminating discussion of the history of the "living Constitution" metaphor and its permutations, see G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 872-99 (1997).

128. This strain of thought presupposes that judges in a Lockean democracy should not ascribe binding authority to an old and hard-to-amend document because our present society "did not adopt the Constitution, and those who did are dead and gone." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996) ("Following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours."). Frequently, this claim is referred to as the "dead hand" argument. See, e.g., Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

129. A number of scholars have elaborately defended the proposition that the constitutional text has binding authority despite its age. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-9 (1980); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 363 (1992); Easterbrook, *supra* note 128, at 1119-21; Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1129-31 (1998); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383-87 (1981). For an interesting and thoughtful effort to embrace the "dead hand" problem while also defending the authority of commitments made in the constitutional text, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

reading the text as a series of rule-bound clauses.<sup>130</sup> So understood, this version of the “living Constitution” metaphor merely represents a strongly purposive method of originalism—an effort to be *more* faithful to the Founders by emphasizing their apparent goals and values rather than the particular rules they devised to implement them.

I focus on the narrower conception of the “living Constitution” for several reasons. First, the question of immediate interest is the legitimacy of the Court’s reasoning in cases such as *Hans v. Louisiana* and *Seminole Tribe v. Florida*, decisions that quite clearly invoke strongly purposive originalism. Second, and more generally, the Court’s articulated frame of reference, at least for matters of first impression, virtually always builds upon some notion of fidelity to historical or original understanding of the adopted text.<sup>131</sup> If for no other reason, this fact makes it relevant to examine

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130. See *infra* notes 136-142 and accompanying text.

131. See, e.g., *Utah v. Evans*, 536 U.S. 452, 474 (2002) (relying on the “text” of the Census Clause and the “history of the constitutional phrase” “actual Enumeration” to determine the validity of current Census Bureau practices); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) (“[T]he available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court . . . reveal the Framers’ intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.”); *Nixon v. United States*, 506 U.S. 224, 233 (1993) (“The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language.”); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275-76 (1989) (“We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The Court’s interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.”); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (construing Article I, Section 7’s bicameralism and presentment requirement in light of “the records of the [Philadelphia] Convention, contemporaneous writings and debates”); *Ingraham v. Wright*, 430 U.S. 651, 670 n.39 (1977) (“The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation.”); *United States v. Classic*, 313 U.S. 299, 317-18 (1941) (“To decide [the question at hand] we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes.”); *South Carolina v. United States*, 199 U.S. 437, 450 (1905) (“To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.”), *overruled on other grounds by New York v. United States*, 326 U.S. 572 (1946); *Missouri v. Illinois*, 180 U.S. 208, 219 (1901) (“[W]hen called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.”); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (concluding that the meaning of the Constitution “must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states”).

As many commentators have noted, even when the Court is deviating from any plausible reading of the original meaning of the document, it nonetheless typically tries to fit its reasoning into the rubric of original meaning. See, e.g., John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 401 (1978) (“Interpretivism is no mere passing fad . . . in fact the Court has always, where plausible, tended to talk an interpretivist line.”); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975)

competing conceptions of fidelity to the document's original understanding. Third, focusing on a strongly purposivist version of the metaphor provides the most apt basis for comparison to the methods of statutory construction that frame the analysis here. Cases like *Holy Trinity* built on the idea that judges were more faithful agents if they followed a statute's apparent purpose rather than its text in cases where the two conflicted. Even though that idea has now become less fashionable in the statutory arena, the question posed by the Rehnquist Court's Eleventh Amendment case law is whether the distinctive considerations involved in constitutional exegesis permit a faithful agent to engage in strongly purposive and atextual readings of even the most precise constitutional texts.

Recall the grounds for strong purposivism in statutory interpretation. In a system predicated on legislative supremacy, the central task of interpretation is to ascertain the intended meaning of the enacted text.<sup>132</sup> On the assumption that human beings (even legislators) can and do choose their words to express their intentions, a statute whose text is clear in context is taken as *prima facie* evidence of such meaning.<sup>133</sup> Yet words are imprecise, legislators have imperfect insight, and each increment of statutory precision makes legislative bargaining more protracted and costly.<sup>134</sup> Because rules

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("[I]f judges resort to bad interpretation in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decisionmaking to be of suspect legitimacy."); Monaghan, *supra* note 129, at 383 ("In virtually every instance, the court has made an effort—often strained, to be sure—to find an acceptable textual home for its results . . .").

132. Even if modern textualists are correct in concluding that one cannot reconstruct a multimember body's actual intent, Joseph Raz has insightfully noted that "it makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make." Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996). As he explains:

[T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation. But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions of the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.

*Id.* at 258-59. Professor Raz explains that one can have meaningful legislative supremacy if legislators intend to enact a law that will be decoded according to prevailing interpretive conventions. *Id.* at 268 (noting that one can charge legislators with the intention "to say what one would ordinarily be understood as saying, given the circumstances in which one said it").

133. See Manning, *supra* note 103, at 2395-98 (explaining the "plain meaning presumption" in statutory interpretation).

134. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 303 (1988) (Brennan, J., concurring in part and dissenting in part) (arguing that a statute's "specific wording . . . was by no means carefully considered, which provides all the more reason to avoid a hypertechnical interpretation"); *United States v. Locke*, 471 U.S. 84, 118-19 (1985) (Stevens, J., dissenting) (arguing that a clear text may be "the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should."); (quoting *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting)); *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.)

embedded in statutes are thus typically over- or underinclusive in relation to their background purposes, the language of a statute sometimes fails to capture the legislature's true intentions, particularly when that statute has been sitting on the books for a long time. So when a rule embedded in a statute deviates sharply from its apparent background purpose, courts have sometimes assumed that Congress has expressed its intentions clearly but imprecisely, and those courts have felt free to adjust their interpretations of the statutory text accordingly.

As discussed above, a defining feature of the Rehnquist Court's approach to statutes is its general rejection of such purposivism. Despite the inevitable problem of incomplete fit between ends and means that marks any written law, the Court has typically chosen to emphasize the possibility that precise but seemingly awkward legislation may reflect the fruits of compromise rather than simply poor drafting. For the Court, responsibility for the correction of apparent over- or underinclusiveness lies, if anywhere, with Congress.<sup>135</sup>

With constitutional texts, however, the underlying concerns that inspire strong purposivism are often thought to have greater—and perhaps unavoidable—force. The Constitution undertakes the large and complicated task of prescribing governmental architecture for a great nation, and of doing so in a manner intended to endure for the ages.<sup>136</sup> Hence, the problems of foresight and expression perhaps differ in kind from those of a typical statute. In the context of statutes, moreover, Congress has at least a realistic capacity to amend the law when the rules embedded in an enacted

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("[Judges] know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings.").

135. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) ("To supply omissions [from a statute] transcends the judicial function." (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926))); *Reves v. Ernst & Young*, 494 U.S. 56, 63 n.2 (1990) ("If Congress erred, however, it is for that body, and not this Court, to correct its mistake."); *cf. Neal v. United States*, 516 U.S. 284, 296 (1996) ("Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.").

136. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."); *Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."); *The Legal Tender Case*, 110 U.S. 421, 439 (1884) ("A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract.").

text deviate from their apparent background purpose.<sup>137</sup> Constitutional provisions, in contrast, are notoriously difficult to amend when problems of fit come to light.<sup>138</sup> Accordingly, fidelity to the purposes underlying constitutional text may involve the need to adjust its precise text more significantly to unforeseen problems.

The pith of this conception is typically expressed by invoking Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*: "[W]e must never forget that it is a *constitution* we are expounding."<sup>139</sup> Of course, in context (sustaining congressional legislation incorporating the Second Bank of the United States), Marshall's statement merely addressed the virtue of

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137. To be sure, congressional overrides of statutory decisions are relatively infrequent. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335 (1991). But the frequency of their occurrence differs in order of magnitude from the frequency of constitutional amendments. In contrast with the voluminous legislation passed during each Congress, our nation has adopted only twenty-seven (de jure) constitutional amendments, eleven of which came in the first decade of the Constitution's existence. By some estimates, moreover, only six to nine of those amendments sought to override the Supreme Court's constitutional rulings. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 365-66 (7th ed. 1998); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493, 493 (1989). In contrast, one recent empirical study suggests that at least in the modern era, each Congress typically overrides several of the Supreme Court's statutory decisions. See Eskridge, *supra*, at 337 (reporting that 124 of the Supreme Court's statutory decisions were overridden during the twelve Congresses assembled between 1967 and 1990); see also *id.* (estimating that the same Congresses overrode or modified 220 statutory decisions by lower courts).

138. See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981) ("Reference to the 'important objects' of the framers rather than their specific intentions is, no doubt, a necessity if the evolving needs of the nation are to be served. The amendment process established by article V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government."). For a particularly clear expression of this idea, see *Oliver v. United States*, 466 U.S. 170, 186-87 (1984) (Marshall, J., dissenting). As Justice Marshall thus wrote:

We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.

*Id.* (footnote omitted). A similar set of considerations underlies the Court's traditional application of a stronger form of stare decisis to statutory rather than constitutional precedents. See, e.g., William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-37 (1949).

139. 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.). Marshall elaborated:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.

*Id.*

recognizing adequate *congressional* authority to address unforeseen circumstances under the Necessary and Proper Clause.<sup>140</sup> The aphorism thus did not originate in the service of supporting strongly purposive *judicial* interpretation of the document. Still, many have extracted from Marshall's statement the broader conclusion that because the Constitution could not be drafted with "the prolixity of a legal code," it should not be interpreted as if it had been.<sup>141</sup> As then-Justice Stone once put it:

"[W]e must never forget, that it is a constitution we are expounding." Its provisions are not to be interpreted like those of a municipal code or of a penal statute, though even the latter is to be read so as not to defeat its obvious purpose, or lead to absurd consequences. In defining their scope something more is involved than consultation of the dictionary and the rules of English grammar. They are to be read as a vital part of an organic whole so that the high purpose which illumines every sentence and phrase of the instrument may be given effect in a consistent and harmonious framework of government.

The Court has hitherto consistently held that a literal reading of a provision of the Constitution which defeats a purpose evident when the instrument is read as a whole, is not to be favored.<sup>142</sup>

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140. See Easterbrook, *supra* note 128, at 1124 ("There is that famous phrase: 'we must never forget, that it is a *constitution* we are expounding.' But now you see its context: not to assert that law is mush, but to say that the Constitution allows the living legislature to govern.").

141. *McCulloch*, 17 U.S. (4 Wheat.) at 407. The first modern generalization of Marshall's dictum came in Justice Brandeis's dissent in *Olmstead v. United States*:

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.

277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407; and *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)) (citations omitted), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Since then, Marshall's statement has become closely associated with the idea of purposive and dynamic constitutional interpretation. See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11 n.25 (1998) ("Marshall, of course, was speaking not of all constitutional interpretation, but of the expansive interpretation of Congress's enumerated power. . . . Nonetheless, these words from *McCulloch* gave living constitutionalism its mantra.").

142. *Wright v. United States*, 302 U.S. 583, 606-07 (1938) (Stone, J., dissenting in part) (citations omitted). Justice Stone recited the following examples of the Court's purposivism:

In other words, whatever the proper approach to statutes, judges must not read the specifics of the Constitution in a rule-bound way. Rather, judges can and should read the document holistically, with an eye toward effectuating the general purposes behind specifically worded clauses and adapting those clauses to circumstances that were not foreseen or provided for. On that account, one can at least plausibly justify the coexistence of the Rehnquist Court's strict approach to precise statutes with its openly atextual and purposive approach to the Eleventh Amendment's precise text.

### B. *Article V and Constitutional Compromise*

My central claim here takes issue with the foregoing premises about constitutional versus statutory adjudication. In particular, I contend that for reasons tracing to the lawmaking processes prescribed by Article V, the Court has, if anything, a more obvious duty to respect the boundaries set by a constitutional rather than statutory text—at least when the text is clear and precise in context. The argument is complex, so I will begin by sketching my conclusion: I believe that a stricter approach to precise constitutional texts rests on the relative importance of limitations on the lawmaking structure prescribed by Article V. In the context of statutes, Article I, Section 7's requirements of bicameralism and presentment give salience to legislative compromise by establishing an effective supermajority requirement for legislation. Because under this framework a political minority can often block legislation, such a minority can also insist upon compromise as the price of its assent. Article V deals with constitutional amendments, not legislation. Its structure is designed to restrict change in a manner far more stringent than Article I, Section 7. Interests represented by one-third of the members of either house or one-quarter of the states can block constitutional change. With constitutional amendments, the right of political minorities to insist upon compromise as the price of assent is both more explicit and more pronounced. (For completeness, I note that similar

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The phrase "due process" in the Fifth and Fourteenth Amendments has long since been expanded beyond its literal meaning of due procedure. See *Davidson v. New Orleans*, 96 U.S. 97; cf. Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 373. The term "contract" in the contract clause is not confined literally to the contracts of the law dictionary. *Dartmouth College v. Woodward*, 4 Wheat. 518. The prohibition against their impairment has never been taken to be inexorable. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, and cases cited at 430 *et seq.* The injunction that no person "shall be compelled in any Criminal Case to be a witness against himself" is not literally applied. *Brown v. Walker*, 161 U.S. 591, 595. "From whatever source derived," as it is written in the Sixteenth Amendment, does not mean from whatever source derived. *Evans v. Gore*, 253 U.S. 245. See, also, *Robertson v. Baldwin*, 165 U.S. 275, 281, 282; *Gompers v. United States*, 233 U.S. 604, 610; *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501; *United States v. Lefkowitz*, 285 U.S. 452, 467.

*Id.* at 607.



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>143</sup> 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.)

Precisely because political minorities do have an extraordinary right to insist upon compromise in the framing of constitutional texts, it is especially important to pay attention to the level of generality of the relevant text—that is, the type of compromise reached. Sometimes the text can be read to articulate policy judgments at a high level of generality, using seemingly vague and open-ended language that conveys little about how to resolve questions at the level of application. Except where necessary for comparison, I reserve questions about the construction of such clauses for another day. Of more obvious relevance to the Eleventh Amendment, some clauses are relatively rule-like, expressing fairly precise judgments about both the relevant ends and the acceptable means of their accomplishment. With respect to the more rule-like clauses (or, indeed, the rule-like aspects of broadly worded clauses), I contend that textual precision should be understood to reflect the adopters' willingness or ability to go so far and no farther in pursuit of the desired constitutional objective.

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143. Under the rules of the Philadelphia Convention, each state had an equal vote, and its delegates voted as a unit. *See* MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 57 (1913). This arrangement 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. *See, e.g., id.* at 91-112 (discussing the "Great Compromise" giving states equal representation in the Senate). Moreover, bargaining over the document's contents (or at least much of the bargaining) occurred in the shadow of a ratification process still to be determined—one that ultimately called for a supermajority of three-quarters of the states. *See* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 91, 102-08 (1996) (discussing the evolution of various competing proposals for ratification); *see also* U.S. CONST. art. VII. Thus, one 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. Beyond this consideration, Akhil Amar suggests the two-tiered nature of both the Article V and Article VII processes has given the Constitution's drafters an incentive to deliberate and express themselves with care:

More generally, democratic proponents of a given constitutional provision are obliged to give their ideas a crisp textual formulation and submit that text to a separate group of democratic ratifiers. At the Founding, the Philadelphia Convention carefully crafted a text ultimately approved by independently elected ratifying conventions. Thereafter, congressional supermajorities carefully crafted amendments that required ratification by a broad array of independently elected democratic bodies. This two-step procedure promotes good deliberation. Proposers can never be assured of ratification and thus face strong incentives to draft well so as to maximize their prospects. The gap between proposers and ratifiers creates a healthy uncertainty, a kind of veil of ignorance.

Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 39 (2000).

If so, then invoking a clause's background purpose to convert a precise rule into a broad, open-ended standard threatens to disturb the lines of compromise that political minorities had the right to exact under Article V. After brief elaboration of these points, I explain (in Section II.C) how the foregoing principles apply to the Eleventh Amendment.

### 1. *Background Consideration*

My starting premise here is that lawmakers are able to communicate meaningful directions to interpreters through the adoption of legal texts, understood in context. I have elsewhere offered a detailed defense of that premise.<sup>144</sup> In brief, as Wittgenstein demonstrated, communication is intelligible only by virtue of a community's shared conventions for understanding words in context.<sup>145</sup> Language may lack "intrinsic" meaning; nonetheless, someone conversant with the relevant linguistic community's practices can assess an interpretation's correctness or incorrectness *as measured against those practices*.<sup>146</sup> This possibility, in turn, explains how lawmakers can convey instructions to official interpreters and the public by encoding words and phrases in enacted texts. As Jeremy Waldron has put it:

A legislator who votes for (or against) a provision like "No vehicle shall be permitted to enter any state or municipal park" does so on the assumption that—to put it crudely—what the words mean to

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144. This discussion builds on Manning, *supra* note 103, at 2396-98.

145. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134-142 (G.E.M. Anscombe trans., 2d ed. 1958) (1945) (emphasizing the significance of the way words are used in linguistic interactions within a relevant community). Although more widely shared, this premise is a cornerstone of modern textualism. *See, e.g.*, *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.").

146. *See, e.g.*, Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, in *LAW AND INTERPRETATION* 203, 222 (Andrei Marmor ed., 1995) ("Meaning is not radically indeterminate; instead, meaning is public—fixed by public behaviour, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meaning of terms determinately."); Brian Langille, *Revolution Without Foundation: The Grammar of Skepticism and the Law*, 33 *MCGILL L.J.* 451, 493 (1988) (noting that a linguistic community's "agreement in judgments is a necessary precondition of language, the background 'given' which makes language possible").

I note that a significant strand of critical legal scholarship contends that a baseline linguistic indeterminacy makes rule following impossible. *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 19, 21 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781, 822-23 (1983). Consideration of this broader question is beyond this Article's scope. By starting from the premise that texts are sometimes determinate in context, I hold constant a basic analytical assumption that the Court has brought to the cases under consideration here. Such a starting premise, moreover, has at least a plausible basis in practice. *See, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 64-68 (1991) (arguing that rules may convey linguistic determinacy in the context of an established language).

him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed) . . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.<sup>147</sup>

Accordingly, even if one can say nothing meaningful about the actual intentions or expectations of the numerous participants in the legislative process or, indeed, the infinitely wider and more scattered collection of constitutional ratifiers, one can properly attribute to legislators the reasonable minimum intention “to say what one would ordinarily be understood as saying, given the circumstances in which it is said.”<sup>148</sup> This principle, it should be noted, does not direct interpreters to follow the literal or dictionary meaning of a word or phrase. To the contrary, it demands careful attention to the nuances and specialized connotations that speakers of the relevant language attach to particular words and phrases in the context in which they are being used.<sup>149</sup> And because of the often technical character of constitutional language, its interpreters must pay particular attention to the linguistic practices of the legal community, which through experience has fashioned many of its own terms of art and off-the-rack interpretive conventions that (some believe) facilitate communication of the law’s often technical nuances.<sup>150</sup>

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147. Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION, *supra* note 146, at 329, 339.

148. Raz, *supra* note 132, at 268.

149. See, e.g., *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting) (arguing that “the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny”); *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting) (narrowing the broad meaning of the term “use” in a criminal statute in light of common-sense, contextual understanding of the term).

150. See Manning, *supra* note 103, at 2456-76; Manning, *supra* note 11, at 108-15. As is true of chemistry or the construction trades or any other specialized field, the law also comprises a specialized linguistic subcommunity with established practices and conventions peculiar to it. See *Morissette v. United States*, 342 U.S. 246, 263 (1952) (noting that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“Words of art bring their art with them. . . . [I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”). Determining the public meaning of a legal text therefore compels attention to the technical nuances of terms of art. By the same token, determining the public meaning of a legal text may entail the application of specialized rules of construction that, by settled practice, inform the meaning of such texts. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-41 (1992) (examining various linguistic and syntactic canons of construction, as well as settled rules of construction, such as the rule of lenity, that serve more substantive aims). Karl Llewellyn, of course, famously questioned the predictability and utility of lawyers’ canons. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How*

For understandable reasons, one does not often associate this essentially semantic framework with the task of constitutional adjudication. Although constitutional texts of course fall along a continuum reflecting many shades of precision,<sup>151</sup> much scholarship views many (quite important) provisions as vague or open-ended<sup>152</sup>—more in the nature of standards than rules.<sup>153</sup> Although such clauses are not my focus here, it is worth noting that conventional textual meaning *alone* may not take textualists very far in applying phrases like “unreasonable searches and seizures,” “cruel and unusual punishments,” “equal protection of the laws,” or similar clauses.<sup>154</sup>

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*Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (arguing that the canons of construction, including the linguistic canons, are ultimately indeterminate because there are “two opposing canons on almost every point”). While a full discussion of the canons is a matter for another day, it is worth noting that influential recent scholarship has suggested that courts have the capacity to make sense of such canons in context or to develop practices that will move in that direction. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 650-51 (1992).

151. See ELY, *supra* note 129, at 13 (“Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured.”).

152. See, e.g., *id.* at 14, 16-17 (noting that various clauses of the Constitution are “open-ended” or “open-textured”); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 48, 72, 77 (1991) (emphasizing that the constitutional text is open-ended); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 63 (1997) (noting that a number of “constitutional norms may be too vague to serve directly as effective rules of law”).

153. Isaac Ehrlich and Richard Posner describe a “standard” as “a general criterion of social choice,” such as efficiency or reasonableness. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974). A “rule,” in contrast, “withdraws from the decision maker’s consideration one or more of the circumstances that would be relevant to decision.” *Id.* A statute imposing liability for “negligence” is more standard-like. *Id.* One specifying that a driver is liable for any collision while “driving within 100 feet of the preceding car” is more rule-like. *Id.*; see also, e.g., Louis Kaplow, *Rules and Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992) (“[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. . . . A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.”); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“A legal directive is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimiting triggering facts. . . . A legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”).

154. See, e.g., ELY, *supra* note 129, at 13 (“Still other provisions, such as the Eighth Amendment’s prohibition of ‘cruel and unusual punishments,’ seem even more insistently to call for a reference to sources beyond the document itself and a ‘framers’ dictionary.”); Easterbrook, *supra* note 129, at 360 (noting that the Fourth Amendment’s “mention of reasonableness” calls for “more abstraction” in its application); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 675 (1991) (“Many of the most important constitutional provisions . . . are like the equal protection clause: there is not only no widely shared understanding of the provisions; there are competing understandings, both intratemporally and intertemporally.”).

Of course, even the most open-ended clauses have some structure and boundaries. See ELY, *supra* note 129, at 14. For example, the indeterminacy of the Eighth Amendment’s prohibition against “excessive fines” may vest interpreters with wide discretion, but the text ultimately requires something that plausibly can be called a “fine,” as that term was historically understood.

Certainly, in matters of statutory interpretation—the basis for comparison here—modern textualists recognize the limits of what judges can glean from a vague or ambiguous text.<sup>155</sup> Accordingly, they would not hesitate to resolve any textual indefiniteness, inter alia, by consulting a statute’s apparent background purpose (as derived from sources other than the legislative history)<sup>156</sup> or by making sense of a discrete clause in relation to

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*See* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (“We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments.”); *cf.* *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (holding that “punishment” for Eighth Amendment purposes refers to measures inflicted “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions” and that the Due Process Clause addresses the imposition of other forms of sanctions). Similarly, to invoke the Fourth Amendment’s broadly worded guarantee against “unreasonable searches and seizures,” there must be some act that one could plausibly call a “search” or “seizure.” For example, the Court has divided over the question whether an off-premises wiretap plausibly constitutes a “search” within the Amendment’s meaning. *Compare* *Katz v. United States*, 389 U.S. 347, 352-54 (1967) (holding that a wiretap constitutes a “search” despite the absence of physical intrusion), *with id.* at 365 (Black, J., dissenting) (“A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized.”). More recently, the Court has repeatedly confronted the question whether hot pursuit constitutes a “seizure” for Fourth Amendment purposes. *See, e.g.,* *California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991) (relying on “the common law” to determine the meaning of “seizure” within the Fourth Amendment and concluding that some touching is necessary to constitute a “seizure”); *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (holding that the term “seizure” cannot apply to an “unknowing act” that happens to stop a fleeing felon). Whatever the correct disposition of such cases (a matter beyond this Article’s scope), they serve to illustrate that some degree of textual constraint exists even in the more standard-like clauses.

155. In particular, when the statutory text is indefinite, textualists believe that the statute necessarily vests the interpreter with a range of discretion. *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasizing that “no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it”); Easterbrook, *supra* note 107, at 16 (“[C]ourts implementing general statutes (such as the antitrust laws) become the decisionmakers.”).

156. *See, e.g.,* *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (Scalia, J.) (“[T]he title of a statute . . . [is] of use only when [it] shed[s] light on some ambiguous word or phrase.”) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947)) (first, third, and fourth alterations in original)); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 192 (1995) (Scalia, J.) (“While the meaning of the text is by no means clear, this is in our view the only reading that comports with the statutory purpose . . . .”); *Nat’l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (“Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity.” (citations omitted)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (noting that the traditional judicial method of resolving ambiguity “unquestionably involves judicial consideration and evaluation of competing policies . . . to determine which one will best effectuate the statutory purpose”). Modern textualists, of course, will not treat legislative history as probative evidence of such purpose. *See, e.g.,* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-89 (1997) (describing the modern textualist critique of legislative history). But there are many other sources of determining a statute’s background aims—including the overall tenor of the statute, its relationship to other statutes, the temper of the time of enactment, and the public events that inspired the legislation in the first place.

the statute as a whole (or, indeed, to other parts of the U.S. Code).<sup>157</sup> They would also emphasize that judges may properly apply a broadly worded statute to circumstances that its drafters might not have foreseen or even approved of.<sup>158</sup> While the evidence suggests that the leading judicial textualists also apply at least some of these premises to broadly worded constitutional texts,<sup>159</sup> the question of how fully these methods translate to constitutional interpretation must (with one exception) await another day.<sup>160</sup>

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157. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (contending that “[e]vidence of pre-emptive purpose [may be] sought in the text and structure of the statute at issue” (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (first alteration in original)) (emphasis omitted)); *United States v. Fausto*, 484 U.S. 439, 449 (1988) (Scalia, J.) (holding that the nonreviewability of adverse personnel actions under the Civil Service Reform Act derives “not only from the statutory language, but also from . . . the structure of the statutory scheme”).

158. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 79 (1998) (Scalia, J.) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); Easterbrook, *supra* note 109, at 546 (arguing that when the statute merely identifies “the goal” to be achieved by the interpreter, “the subsequent selection of rules [by the interpreter] implements the actual legislative decision, even if the rules are not what the legislature would have selected itself”).

159. The leading judicial textualist, Justice Scalia, has suggested something along these lines, at least in his academic writings. In particular, he has contended that the task of constitutional adjudication merely involves application “of the usual principles” of construction “to an unusual text.” Scalia, *supra* note 84, at 37. Invoking *McCulloch v. Maryland*, he has explained that “[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.” Scalia, *supra* note 84, at 37. In other words, the Constitution uses so many broadly worded concepts for a reason, and judges should pay careful attention to that textual cue. Along similar lines, as in the case of statutory interpretation, Justice Scalia “rejects the drafter’s intent as the criterion for interpretation of the Constitution.” *Id.* at 38. Although he does not elaborate on that position, the process justifications for rejecting specific intent in the statutory context arguably apply with at least equal force to constitutional texts. The process for adopting a constitutional provision requires agreement on language that can attract a vastly wider level of support—two-thirds of each house and three-fourths of the states. Relying on textual generalities (and thus papering over disputes about specifics) may be necessary more often to secure that extraordinary degree of consensus.

160. I take the position here that textualists properly rely on structural arguments in ascertaining the content of otherwise open-ended constitutional provisions. In particular, I rely on structural inferences from Article I, Section 7 and Articles V and VII to determine the appropriate content of “the judicial Power” to declare the law applicable to a case or controversy. See *supra* notes 120-125 and accompanying text. Further, I suggest more generally that structural inference reflects an appropriate method of “liquidating” (clarifying) the meaning of open-ended constitutional texts. See *infra* Section III.B.

Because the use of structural inference ultimately involves deriving background purpose from the text of the statute as a whole, one might ask whether that technique is consistent with textualist skepticism about the recoverability and relevance of legislative intent or purpose. As I have argued in previous writing, however, textualists do not deny that a text, read in context, can convey purpose; rather, they are skeptical of the use of background intent or purpose to contradict the clear import of an otherwise precise statutory text. See Manning, *supra* note 103, at 2434 n.179. When textualists do not feel the pinch of a precise text, they think it appropriate for judges to try to make related texts coherent with one another. Accordingly, textualist judges resolve ambiguity in light of broader structural inferences “not because that precise accommodative meaning is what the lawmakers must have had in mind . . . , but because it is [the judiciary’s] role to make sense rather than nonsense of the corpus juris.” *W. Va. Univ. Hosps., Inc. v. Casey*,

For purposes of the Eleventh Amendment and its like, the more salient questions involve constitutional texts that speak with both clarity and rule-like precision.

Although less extensively discussed in the constitutional literature, relatively clear and precise texts—many of them quite important—exist in some abundance in the Constitution. To avoid potential confusion about this claim,<sup>161</sup> let me be clear at the outset about its scope and limits: All constitutional provisions will be indefinite in certain respects; all certainly require interpretation. But the conventional meaning of many provisions of the constitutional text will sometimes convey some messages quite clearly. Equally important for purposes of the analysis here, many such provisions are rule-like (or have rule-like aspects) in the sense that they convey more definite and hard-edged policy judgments. That is, almost any reader familiar with the linguistic and cultural conventions of the society that adopted the text would recognize the precise judgment in question after reading the text in context. I do not attempt to inventory the examples here. But it is possible to make some preliminary observations about where one might expect to find clearly delineated policy expressed in the document's conventional meaning.

First, the everyday meaning of some clauses will simply be clear and precise in context. Unsurprisingly, the bellwether example here involves the Constitution's age requirements for various federal officeholders.<sup>162</sup> The

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499 U.S. 83, 100-01 (1991); *see also, e.g., id.* at 100 (“Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”); *Fausto*, 484 U.S. at 453 (describing the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination”).

This technique has obvious relevance to the appropriate construction of the often indefinite terms that define our frame of government. Many aspects of the constitutional structure are opened, and the document consciously defines the branches' respective powers in relation to one another. Accordingly, interpretation of the vague terms of Vesting Clauses lends itself to analysis based on structure and relationship. *See, e.g., Loving v. United States*, 517 U.S. 748, 757-58 (1996) (ascribing the nondelegation doctrine to the process of bicameralism and presentment); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-24 (1995) (relying on the strict separation of legislative and judicial powers to infer the inviolable finality of court judgments as an attribute of “the judicial Power”). When used properly, such analysis does not depend on background purpose to contradict a precise text, but rather reads an ambiguous provision in light of other parts of the same text. *See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975) (“[T]he traditional method of ‘interpreting’ textual provisions is hardly inconsistent with taking into account structural considerations. The former are often simply the textual embodiment of the latter.”).

161. Because of the deep influence of the old “plain meaning” school, the contention that texts can convey clear meaning is sometimes equated with the now-discredited position that statutes, when clear, simply do not require interpretation. *See, e.g., United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868) (“If the language be clear it is conclusive. There can be no construction where there is nothing to construe.”).

162. *See, e.g., ELY, supra* note 129, at 13 (“At one extreme—for example the requirement that the President ‘have attained to the Age of thirty five years’—the language is so clear that a conscious reference to purpose seems unnecessary.”); Richard H. Fallon, Jr., *A Constructivist*

evident aim of such provisions is to ensure the requisite maturity in presidents, senators, and representatives. The relevant constitutional provisions seek to achieve this broader purpose by drawing precise and ultimately arbitrary lines setting specific ages for particular offices.<sup>163</sup> As Judge Posner notes, it surely requires linguistic and cultural competence to understand what English speakers in this country mean, for example, by requiring that any president “have attained to the Age of thirty five Years.”<sup>164</sup> Yet those with that requisite competence would widely understand not only the semantic import of that phrase, but also the cultural practice of using essentially arbitrary eligibility cutoffs to ensure predictability and ease of application.<sup>165</sup> However our society’s conception of the requisite maturity might change, the Constitution’s age requirements express a clear and specific policy judgment about eligibility for various federal offices.

Second, although terms of art may, at times, import a framework of common law reasoning, those technical terms may also convey some determinate and limiting connotations that would have been transparent to anyone familiar with the (legal) community’s linguistic practices.<sup>166</sup> For example, application of the Ex Post Facto Clause will often entail fine-grained common law reasoning about the kinds of legal innovations that

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*Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) (“Where the text speaks clearly and unambiguously—for example, when it says that the President must be at least thirty-five years old—its plain meaning is dispositive.”); Monaghan, *supra* note 129, at 363 (“Limitation of the presidency to persons of age thirty-five or more is an easy illustration of a particularized provision.”).

163. See U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . .”); *id.* § 3, cl. 3 (“No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . .”); *id.* art. II, § 1, cl. 4 (“[N]either shall any Person be eligible to th[e] Office [of the President] who shall not have attained to the Age of thirty five Years . . . .”).

164. *Id.* art II, § 1, cl. 4. Judge Posner has argued:

The provision is profoundly unclear to a person who does not know English; and if it is still in force in a thousand years, it may be as unclear as Anglo-Saxon or Old English is to us. In India, where the official language is English but age is measured from conception rather than birth, [the clause] would mean something different from what it means to us. It would mean something different in a society that did not record the date of birth. A text is only clear by virtue of linguistic and cultural competence.

Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190-91 (1986).

165. See Posner, *supra* note 164, at 191 (arguing that the “age thirty-five provision” is clear, in part, because “American lawyers recognize it as part of a family of rules that establish arbitrary eligibility dates in preference to making eligibility turn on uncertain qualitative judgments”).

166. Here, I am not talking about large generic concepts such as “the executive Power” or “the judicial Power,” for example. Although such concepts have common law antecedents, the U.S. Constitution departs in important respects from the English constitutional structure. Accordingly, while the common law understanding of those concepts supplies an important starting point for analysis, it is unsafe to assume that the broad descriptions of governmental power refer to all the details of the mother country’s practice. See Manning, *supra* note 11, at 56.



count as impermissible retroactivity.<sup>167</sup> Yet (at least if Blackstone is to be believed), a reasonable person conversant with the relevant linguistic and cultural conventions would surely have understood its technical meaning to exclude retroactive civil statutes.<sup>168</sup> Similar principles apply to a common law term like “Pardons.”<sup>169</sup> Certainly, a reasonable person would have read that presidential grant against the settled background of the common law tradition.<sup>170</sup> For instance, given the settled common law practice, the President’s pardon power extends to contempt orders designed to punish violations against the dignity of the court, but not those meant to remedy noncompliance with a court order.<sup>171</sup>

Of course, in arguments that hinge upon borrowing the technical meaning of a term from English common law tradition, one must always ask whether American practice somehow rejected or altered that tradition prior to the Constitution’s adoption, or whether the practice is contradicted by other clear elements of the constitutional structure.<sup>172</sup> Still, the need for

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167. Justice Chase’s influential opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.), purported to distill from the common law a series of factors that help ascertain whether something constitutes an ex post facto law. There remains, however, considerable room for judgment about the precise application of those common law criteria. For example, the Court recently divided sharply over the question whether altering a criminal statute of limitations to the detriment of the defendant constituted a forbidden ex post facto law. *See Stogner v. California*, 123 S. Ct. 2446 (2003).

168. *See Calder*, 3 U.S. (3 Dall.) at 396 (Paterson, J.) (relying on Blackstone to conclude that “[t]he words, *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties”); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (noting that “*ex post facto* law” was “a term of art with an established meaning at the time of the framing of the Constitution”). Many have questioned the historical accuracy of limiting the “ex post facto” prohibition to criminal laws. *See, e.g., Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 n.a & app. at 681-87 (1829) (Johnson, J.); 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 324-51 (1953).

169. *See U.S. CONST.* art. II, § 2, cl. 1 (“[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

170. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (“As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.”).

171. *See Ex parte Grossman*, 267 U.S. 87, 111 (1925). Similarly, the Court has found that the President’s pardon power includes the traditional common law power to commute capital sentences to life imprisonment. *See Ex parte Wells*, 59 U.S. (18 How.) 307, 310-11 (1856).

172. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 248-49 (1936) (“[T]he range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. . . . [But] the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions.”); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856) (defining due process in light of the “settled usages and modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country”). In addition, as Richard Fallon has noted, “the possibility that a constitutional term might be either a term of art or an instance of more ordinary usage sometimes will undermine the claim to . . . authority of arguments from text.” Fallon, *supra* note 162, at 1253. Like any textual

such a preliminary inquiry does not foreclose the possibility of identifying common law terms whose salient features did remain fixed and intact (or ascertainable as altered) when they were incorporated into the document. Accordingly, because the Constitution (particularly the portion adopted in the eighteenth century) contains so much “legalese,”<sup>173</sup> one might expect to find some elements of determinacy in the technical connotations of its many terms of art.<sup>174</sup>

A third set of provisions conveys crispness and detail through the elaborate prescription of procedural requirements for the exercise of granted powers. For reasons discussed below, the specificity of articulation of many such procedures may convey a negative implication, denying Congress power to provide for the exercise of the same powers through different means.<sup>175</sup> For example, Article I, Section 7 carefully spells out the procedures of bicameralism and presentment for the enactment of legislation;<sup>176</sup> hence, permitting Congress to adopt legislation through other

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conclusion, however, identifying a term as one of ordinary or technical meaning may become clear from context.

173. See, e.g., *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980) (“The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind.”); *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 461-62 (1978) (suggesting that “the Framers used the words ‘treaty,’ ‘compact,’ and ‘agreement’ as terms of art, for which no explanation was required”); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury thus preserved is the right which existed under the English common law when the [Seventh] Amendment was adopted.”); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”); *Ex parte Wilson*, 114 U.S. 417, 422 (1885) (“The scope and effect of [the Grand Jury Clause], as of many other provisions of the Constitution, are best ascertained by bearing in mind what the law was before.”); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 718 (1999) (noting that “like treason and bribery, high crimes and misdemeanors” are “terms of art” for purposes of the Impeachments Clause).

174. I recognize, of course, that as a descriptive matter the Court has frequently departed from the common law understanding of technical legal terms. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (deviating from the common law understanding of property).

175. See *infra* notes 286-292 and accompanying text.

176. Article I, Section 7 prescribes elaborate criteria for passing a bill. For example, Article I, Section 7, Clause 2 provides that a bill that has passed both Houses must “be presented to the President” for signature or veto, that he or she must return a vetoed bill “with his [or her] Objections to that House in which it shall have originated,” and that a veto may be overridden only by a “two thirds” vote of each house. In the event of an attempted override, moreover, “the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.” Clause 2 also specifies how many days the President has to consider a bill (“ten Days (Sundays excepted)”), the effect of his or her not signing or returning it within the specified time (“the Same shall be a Law”), and the consequences that follow if a legislative adjournment prevents the President from returning a vetoed bill to Congress during the ten-day period allocated for his or her consideration (“it shall not be a Law”). In an apparent attempt to prevent evasion of bicameralism and presentment, Clause 3 then provides that the procedures for enacting a bill apply with equal force to “[e]very Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment).”

means might constitute an impermissible end run around that process.<sup>177</sup> Although considerable academic disagreement now attends the question, the Court has at times suggested a similar view of the Article V process for amending the Constitution.<sup>178</sup> Certainly, the Court has found exclusivity in the Constitution's carefully drawn appointments process.<sup>179</sup> And at least as an original matter, the advice and consent requirements of the Treaty Clause might have warranted similar treatment.<sup>180</sup> Indeed, one can point to quite a number of carefully framed procedural provisions specifying the manner in which the federal branches must exercise their assigned powers,<sup>181</sup> not to mention those allocating authority between the federal and

177. See *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto).

178. See, e.g., *Ullman v. United States*, 350 U.S. 422, 428 (1956) ("Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1856) (noting that the Constitution "is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them"). For discussion of the academic debate, see *infra* note 207.

179. The Appointments Clause thus provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2; see *Buckley v. Valeo*, 424 U.S. 1, 132-34 (1976) (per curiam) (holding that Congress lacks the authority to prescribe a method of appointing "Officers of the United States" that does not comply with the specific strictures of the Appointments Clause).

180. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have [the] Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."). In this arena, the force of precedent cuts in decidedly the other direction. Several Supreme Court decisions have approved the validity of certain (binding) executive agreements and protocols, even though they had not been submitted to the Senate for ratification. See, e.g., *United States v. Pink*, 315 U.S. 203, 223 (1942) (recognizing the binding effect of an international compact); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) ("[A]n international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations."). In addition, a substantial scholarly debate has grown up around the legitimacy of so-called "congressional-executive agreements"—international accords negotiated by the President and approved by simple legislation rather than by the advice and consent of two-thirds of the Senate. Compare, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (defending the practice), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1272-75 (1995) (arguing that such a practice contradicts the text and structure of the Treaty Clause).

181. See, e.g., U.S. CONST. art. I, § 3, cls. 6-7 (Impeachment Clauses); *id.* § 4, cl. 1 (granting authority to prescribe the "Times, Places, and Manner" of holding elections); *id.* § 5, cl. 1 (defining the authority of each house to judge elections and setting forth rules for "a Quorum to do Business"); *id.* cl. 2 (authorizing each house to prescribe "Rules of its Proceedings" and to punish or expel members); *id.* art. II, § 1, cl. 6 (specifying the manner of succession to the presidency and authorizing Congress to "provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President"), amended by U.S. CONST. amend. XXV; *id.* § 2, cl. 3 (providing for recess appointments); *id.* art. III, § 2, cl. 1 (prescribing the heads of jurisdiction for federal courts); *id.* cl. 2 (defining and allocating the Supreme Court's original and appellate

state governments.<sup>182</sup> None of this is to suggest that the procedures in question are pellucid; doubtless each leaves open difficult questions of interpretation in some, perhaps important, respects.<sup>183</sup> Rather, my point is simply that, by virtue of their precision, many of the processes contemplated by the Constitution do take on the essential quality of rules.

## 2. *Reading Precise Constitutional Texts*

The premises of statutory textualism now embraced by the Rehnquist Court suggest that contrary to its Eleventh Amendment case law, the Court should, if anything, give stricter adherence to the clear lines drawn by precise constitutional texts. I have previously argued that, properly understood, modern textualism builds on the related premises (1) that the lines drawn by clear and precise texts frequently reflect (unknowable) legislative compromise, and (2) that the carefully drawn lawmaking process prescribed by the Constitution makes it imperative for judges to respect such compromise.<sup>184</sup> Because both aspects of modern statutory textualism bear crucially on the proper method of reading precise constitutional texts, each point merits brief elaboration.

The first premise—that legislative compromise plays a crucial but often undetectable role in the framing of statutes—has been an important foundation of the Court’s recent shift toward statutory textualism.<sup>185</sup> Indeed,

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jurisdiction); *id.* cl. 3 (providing for jury trials and prescribing venue for “[t]he Trial of all Crimes, except in Cases of Impeachment”).

182. *See, e.g., id.* art. I, § 8, cl. 16 (defining the relative authority of Congress and the States with regard to militias); *id.* art. II, § 1, cl. 2 (providing for each state’s appointment of presidential electors “in such Manner as the Legislature thereof may direct”); *id.* art. IV, § 2, cl. 2 (defining states’ obligations concerning extradition).

183. For example, a difficult threshold question under Article I, Section 7 is whether certain types of action qualify as exercises of legislative power subject to the requirements of bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 952-55 (1983) (concluding that a one-house veto of administrative action is legislation). Similarly, before applying the Appointments Clause, it is necessary to determine whether a federal official is an “Officer of the United States” (within the meaning of the Clause) or a mere employee. *See Buckley*, 424 U.S. at 126 n.162 (per curiam) (“Employees are lesser functionaries subordinate to officers of the United States, whereas the [Federal Election] Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.” (citations omitted)).

184. *See, e.g., Manning, supra* note 103, at 2408-19, 2437-38; Manning, *supra* note 11, at 70-78.

185. *See, e.g., Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002) (suggesting that “any key term in an important piece of legislation” will be “the result of compromise”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (describing the enactment of pension reform legislation for coal miners as “a typical story of legislative battle among interest groups, Congress, and the President”); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (refusing to consider various “policy arguments” while embracing what the Court viewed as “the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (noting that “compromises

modern textualists insist that compromise is a pervasive fact of any lawmaking process.<sup>186</sup> To be sure, this textualist starting point is a generalization, not an incontrovertible empirical fact.<sup>187</sup> But it is, I believe, a highly plausible premise, and one grounded in experience. Given the influence of public choice scholarship, it is common enough to think of “compromise” pejoratively as “unprincipled compromise”—that is, as a set of deals struck by economically self-interested interest groups.<sup>188</sup> While such conditions may describe some legislation (and, indeed, some constitutional texts), a more general (and less cynical) understanding of compromise has greater relevance here. In particular, the leading philosophical textualist, Jeremy Waldron, has argued—correctly, I believe—that compromise is routinely to be expected whenever enacted texts reflect “the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and

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necessary to [statutes’] enactment may require adopting means other than those that would most effectively pursue the main goal”); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (emphasizing that because legislators may differ about “the means” of effectuating a vague but widely shared goal, “the final language of the legislation may reflect hard-fought compromises”). The Court recently made the same general point about state laws. *See Fitzgerald v. Racing Ass’n of Cent. Iowa*, 123 S. Ct. 2156, 2159 (2003) (noting that the state law under review, “like most laws, might predominately serve one general objective . . . while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole”).

186. Judge Easterbrook is perhaps the leading proponent of this view. *See, e.g.*, Easterbrook, *supra* note 36, at 429 (arguing that “legislation is *compromise*—that laws are not enacted section by section, but as a package”); Easterbrook, *supra* note 109, at 540 (“Almost all statutes are compromises . . .”); Easterbrook, *supra* note 111, at 68 (“Legislation is compromise. Compromises have no spirit; they just are. . . . If [the outcome] is unprincipled, it is the way of compromise. Law is a vector rather than an arrow.”).

187. Of course, some rather concrete evidence supports the general notion that the Constitution involved compromise. In particular, the deliberations of the Philadelphia Convention reveal a series of important compromises that seemed to permit agreement on a final document. *See FARRAND, supra* note 143, at 201 (describing the original Constitution as a “bundle of compromises”); *see also Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (referring to “the great debates and compromises that produced the Constitution”). As Farrand thus explained:

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 could be logical or even consistent.

FARRAND, *supra* note 143, at 200-01. I note this fact not to suggest that the interpreters should use the Convention’s deliberations as an authoritative source for identifying the scope of specific “compromises,” but rather to support the general point that compromise played a role in the document’s adoption. However rich the records of the Convention may be, textualists believe that the final text, when clear, represents the only reliable indicator of the compromise actually adopted.

188. For an excellent discussion of interest group theory and its limitations, see, for example, FARBER & FRICKEY, *supra* note 110, at 12-37.

backgrounds.”<sup>189</sup> Certainly, if one accepts Professor Waldron’s account as an accurate depiction of the workings of Congress, it should apply a fortiori to the constitutional amendment process, in which drafters must try to anticipate and accommodate the concerns of a supermajority of legislators in each house *and* the ratifiers in an even larger supermajority of the fifty states. For that reason, it 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.<sup>190</sup>

Equally important, the Court’s new textualism presupposes that the adopted text represents the most, if not the only, reliable indicator of the resulting compromise. In previous writing, I have considered this position and its limitations in great detail.<sup>191</sup> For now, it suffices to note that because the legislative process is complex, path-dependent, and often opaque, textualists believe that it is difficult if not impossible for judges to go behind a statute to determine why the final text took the form that it did.<sup>192</sup> Legislation must pass through many diverse, and frequently nontransparent, veto gates; its sponsors must fight for time on the floor; and its final shape will depend, often unknowably, on the sequence of alternatives presented and the effective exercise of strategic voting.<sup>193</sup> No matter how extensive the legislative record may be, interpreters cannot know whether and to what extent crucial decisions about the bill’s scope or contours took place behind the scenes.<sup>194</sup> Accordingly, textualists believe that the safest course, at least

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189. WALDRON, *supra* note 1, at 125. Accordingly, one might expect any statute’s “specific provisions” to be “the result of compromise and line-item voting.” *Id.*

190. *See, e.g.*, Easterbrook, *supra* note 129, at 366 (“The Constitution is a series of compromises . . . Prudence rather than unifying principle shaped the initial document and all of its amendments.”); Easterbrook, *supra* note 128, at 1125 (arguing that “the 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”). This conception of compromise is shared by some nontextualists. *See, e.g.*, Monaghan, *supra* note 129, at 392 (“Like important statutes, the constitution emerged as a result of compromises struck after hard bargaining.”).

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. Even when it comes to widely shared principles like equal treatment or scruples against cruel punishment, participants in the lawmaking process will inevitably differ with respect to the structure and boundaries of the principle being adopted and, perhaps most important, with respect to the way that principle should apply to concrete cases.

191. *See* Manning, *supra* note 103, at 2408-19. The discussion that follows builds upon my earlier analysis.

192. *See supra* notes 108-111 and accompanying text.

193. *See* Manning, *supra* note 103, at 2414-17.

194. *See id.* at 2411 (“Some compromises . . . are the product of ‘back-room deals,’ which are difficult if not impossible to detect from the public record.”).

when a statute is clear, is to take Congress at its word—a premise, as noted, that is increasingly reflected in the Court’s decisions.<sup>195</sup>

Although the process of adopting a constitutional amendment is less onerous in one respect (joint resolutions proposing such an amendment are not subject to presidential veto),<sup>196</sup> there is little reason to believe that the shape of such amendments depends any less on the complexities of the legislative process. Joint resolutions proposing constitutional amendments, much like ordinary legislation, must clear committee, face amendment, fight for floor time, and the like.<sup>197</sup> If anything, the bargaining that goes into framing a viable constitutional amendment is complicated by the need to secure extraordinary levels of consent that statutes do not require. In reading an amendment, one cannot ignore the possibility that its language was crafted as it was—however broadly or narrowly—because someone or some set of people made the calculation, perhaps not on the public record, that the particular formulation would most likely ensure the requisite supermajorities in Congress and the larger supermajority of ratifying states. Article V, in other words, sets up a carefully designed and elaborate process for filtering constitutional impulses into constitutional law, and the text is the one and only thing that has come through that process. Although not a textualist himself, John Ely captured the point well when he observed that the very point of having a final “vote on an authoritative text is to generate a record of just what there was sufficient agreement on to gain [the requisite] consent.”<sup>198</sup>

A second, and more normative, element of the Court’s recent statutory jurisprudence relies on the foregoing premises about compromise to insist upon strict enforcement of a precise statute, even when the conventional meaning of the text, as applied, seems over- or underinclusive in relation to the law’s background purposes. However awkward the results might appear, “[t]he deals brokered” in the legislative process are not for courts “to judge or second-guess.”<sup>199</sup> To see why the same premise applies a fortiori to precise constitutional texts, it is necessary to say a few words

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195. See *supra* notes 113-117 and accompanying text.

196. This practice was entrenched by the Court’s summary disposition in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), which applied the Eleventh Amendment despite the Attorney General’s contention that it was invalid because not presented to the President. See *Consumer Energy Council v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 460 (D.C. Cir. 1982) (discussing *Hollingsworth* and its implications), *aff’d sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

197. See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 110, 131, 201-02, 234, 237 (4th ed. 1996) (collecting examples of procedural maneuvers that affected the course of deliberations on constitutional amendments). For example, to prevent opponents from offering controversial floor amendments, Speaker Tip O’Neill brought the proposed Equal Rights Amendment to the House floor in 1983 under suspension of the House Rules, a procedure that “limited debate and prevented amendments.” See *id.* at 131.

198. ELY, *supra* note 129, at 17.

199. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

about what I regard as the most persuasive justification for respecting statutory compromise. The Court's recent decisions seem to assume that respect for compromise straightforwardly implements the idea of legislative supremacy. Its opinions, however, never explain why courts, as faithful agents of the legislature, should pay attention to the details of a specific compromise rather than the broad policy contours underlying it.<sup>200</sup> In previous writing, I have offered a normative justification for respecting the details of a legislative compromise—a justification ultimately rooted in the constitutional aims of bicameralism and presentment.<sup>201</sup> By dividing legislative power among three institutions answering to differently composed constituencies, the very design of bicameralism and presentment evinces an objective to check the influence of factions.<sup>202</sup> Political science has now clarified one way in which bicameralism and presentment achieve that aim: The division of legislative power among three bodies answering to different constituencies effectively installs a supermajority requirement for enacting statutes.<sup>203</sup>

On that account, any faction will find it more difficult to capture the legislative machinery because political minorities have extraordinary power to block legislation or, more important for present purposes, to insist upon compromise as the price of assent.<sup>204</sup> Given the central role that compromise thus plays in the design of the legislative process, judges should eschew rules of interpretation that shift the level of generality conveyed by the text, lest they disturb a (perhaps unrecorded) compromise that may have been essential to the legislation's enactment.<sup>205</sup>

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200. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322-30 (1989) (presenting an alternative conception of "legislative supremacy" that focuses not on statutory detail but rather on judicial authority to adapt a statute's background goals to new circumstances over time).

201. See Manning, *supra* note 103, at 2437-40; Manning, *supra* note 11, at 72-78.

202. See, e.g., Manning, *supra* note 11, at 72-73. I use "faction" here in the sense in which Madison used that term. See THE FEDERALIST NO. 10, at 778 (James Madison) (Clinton Rossiter ed., 1961) (defining a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"). The restraining influence of bicameralism and presentment upon the power of factions did not go unnoticed during the Founding. See WOOD, *supra* note 47, at 559-61.

203. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-48 (1962). By dividing decisionmaking authority, bicameralism and presentment may also help counteract the tendency of group deliberation to result in polarization in the directions of the more extreme points in the group's predeliberation views. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 110-11 (2000).

204. See Manning, *supra* note 11, at 74-78. In particular, the distinctly American version of bicameralism and presentment gives specific protection to the minority consisting of small state residents by providing their states with equal representation in the Senate. See U.S. CONST. art. I, § 2. For a discussion of this feature's implications for lawmaking, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1391-93 (2001).

205. See Manning, *supra* note 11, at 77-78.



If one accepts that premise, then the need to respect unrecorded compromises reflected in constitutional text applies, if anything, with even greater force. Consider the process of constitutional amendment prescribed by Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

The deliberately cumbersome amendment process, with its steep and multitiered supermajority requirements, quite clearly establishes a set of safeguards for political minorities much stronger than the legislative process created by Article I, Section 7. I do not base this claim on anything in the rather thin historical record surrounding Article V's adoption. Rather, I rest entirely on the structural import of the Article, which in this respect could hardly be more explicit.<sup>206</sup> To establish a new constitutional power or recognize a new right or immunity through the amendment process, one must typically secure the assent of two-thirds of each house of Congress and three-fourths of the states.<sup>207</sup> (That is, at least, the only Article V process thus far employed.) One could view these high hurdles as a means to safeguard hard-fought constitutional arrangements against the influence of momentary passion—in Madison's words, to "guard[] . . . against that extreme facility, which would render the Constitution too mutable."<sup>208</sup> In

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206. For further discussion of structural inferences from the constitutional text, see *supra* notes 125, 160 and accompanying text.

207. U.S. CONST. art. V. Scholars disagree about the exclusivity of Article V as a method of amending or otherwise changing the Constitution. Compare Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (arguing that a simple majority of the national polity has the power to amend the Constitution outside the confines of Article V), and 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (approvingly elaborating historical examples of American constitutional amendment outside the confines prescribed by the Constitution), with Clark, *supra* note 204, at 1332-34 (arguing that the constitutional structure suggests that putative constitutional amendments can be considered "the supreme Law of the Land" under the Supremacy Clause only if adopted pursuant to Article V), and Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (contending that the nonexclusive theories of amendment slight the protections that Article V affords to the states). The intriguing question of Article V exclusivity is beyond the scope of this Article. The present analysis focuses instead on the interpretive consequences that arise when American society explicitly invokes the processes of Article V to create a canonical and precise constitutional text.

208. THE FEDERALIST NO. 43, *supra* note 202, at 278 (James Madison).

particular, by requiring the assent of three-fourths of the states, Article V obviously affords the states—particularly the smaller ones—protection against easy alterations in the terms of the union.<sup>209</sup> But it is an often overlooked reality that Article V does more than reinforce political inertia or protect states. In addition to its state-centered supermajority requirements (which protect political minorities in their own way),<sup>210</sup> Article V also explicitly grants a small minority of national political society—those represented by only one-third of the House of Representatives or of the Senate—the right to block constitutional change.<sup>211</sup> By giving several sets of (partially overlapping) political minorities the power to block constitutional change, Article V of course also confers upon them extraordinary power to insist upon compromise as the price of assent.<sup>212</sup>

If protecting the rights of political minorities to exact a compromise is so central to Article V's design, how does that affect the norms of interpretation? Inferences from the Article V amendment process suggest that judges should adhere strictly to clear and rule-like constitutional texts. If the conventional meaning of a constitutional provision, in context, unmistakably conveys a sharp-edged policy judgment to a reasonable person conversant with the community's practices, it is of doubtful legitimacy to adjust that clear meaning in order to make the text more congruent with its apparent purposes. The careful lines drawn by a precise

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209. See Monaghan, *supra* note 207, at 129-30.

210. See *id.* at 156 (recounting Founding-era observations that Article V would give one-quarter of the states authority to block constitutional change without regard to their population and would thus permit small states to band together to prevent amendments).

211. Indeed, a prominent strain of political theory has criticized the amendment process precisely because it gives political minorities such extraordinary blocking power—contrary, it is said, to the premises of majority rule. See *id.* at 171-73 (collecting and discussing sources); see also, e.g., J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* 46 (1907) (arguing that the amendment process contradicts “the general belief that in this country the majority rules” and noting that, as of 1900, “one forty-fourth of the population distributed so as to constitute a majority in the twelve smallest states could defeat any proposed amendment”).

212. See Monaghan, *supra* note 207, at 125-26. In particular, a supermajority requirement should shift the leverage point away from the median voter and toward the minority position. Consider the following description of the difference in strategic bargaining in a supermajority setting:

Where supermajorities are required . . . , the bill before Congress may need to be amended away from the median in order to gain the required supermajority. Such a situation gives rise to sophisticated voting on two fronts. First, the majority for change (including the median member) must occasionally vote against its immediate interests by “weakening” a bill. This will provide an outcome that is preferred to the status quo and can gain the support of a supermajority, but which is less preferred than the median outcome would have been. . . . Second, as a bargaining tool, members of the minority who are pivotal to forming a supermajority may vote sophisticatedly. This minority group could vote in favor of the status quo over a compromise position proposed by the majority in order to secure an even better deal for themselves. When they prefer the original compromise position to the status quo, such a vote for the status quo is a sophisticated vote.

Craig Volden, *Sophisticated Voting in Supermajoritarian Settings*, 60 J. POL. 149, 151 (1998).

constitutional provision seemingly reflect a particular type of compromise—an expressed willingness to go so far and no farther in pursuit of a goal. Altering those lines to pursue the goal more effectively threatens to disturb the compromise and dilute the important and explicit protection that Article V's multitiered supermajority requirements confer upon political minorities. To sharpen and elaborate on this point, I return now to the Eleventh Amendment.

### C. *Article V and the Eleventh Amendment*

The previously discussed structural premises call into question the Court's present approach to the Eleventh Amendment. The central theme of *Hans* and *Seminole Tribe* is this: Given the strong and immediate reaction against *Chisholm* and the widespread subscription of eighteenth-century Americans to state sovereign immunity, it is unthinkable that the Amendment's framers or ratifiers would have intended it to be applied as written. Had they imagined that its purpose did not include the elimination of suits arising under federal law, the Amendment would not have been adopted.

For present purposes, I assume that the Court in *Hans* and *Seminole Tribe* accurately discerned the eighteenth-century social consensus in favor of rather comprehensive state sovereign immunity. Even if one accepts in theory the plausibility of identifying a lawmaker's intention at odds with a provision's conventional meaning, the mere existence of a social or political consensus contrary to the text cannot carry the heavy burden required to justify deviating from such a text, especially in constitutional law. Perhaps a majority, even a vast majority, of eighteenth-century Americans, if asked, would have strongly favored state sovereign immunity from federal judicial process in federal question actions, suits in admiralty, suits by foreign states, and so forth. Yet by unmistakable design, the Article V process does not seamlessly translate social sentiment, even widespread social sentiment, into constitutional law. 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.<sup>213</sup>

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213. Along these lines, the Court recently observed that "[t]he events leading to the adoption of the Eleventh Amendment . . . make clear that the individuals who believed the Constitution stripped the States of their immunity from suit were at most a small minority." *Alden v. Maine*, 527 U.S. 706, 726 (1999). The crucial point here is that the amendment process prescribed by Article V makes it possible for even a "small minority" to block or qualify proposals to amend the Constitution in ways not to their liking. The Court has not purported to claim that those who

The more basic question, however, 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. Or perhaps they feared that if the proposed amendment were broadened much beyond the mischief that instigated the process (suits against states by out-of-staters), the process would have bogged down in costly bargaining about just how far such extensions should go. It is also possible that the Congress that proposed the Amendment was more nationalist than society at large and that those who controlled the agenda quietly put forward the least radical amendment they felt they could get away with.<sup>214</sup> Especially given the sparse record accompanying the Amendment's proposal or adoption, it is hard to rule out the possibility that the Amendment's precise limitations reflect a byproduct of the Article V process rather than inadvertently narrow drafting or imperfect foresight.

Indeed, given the Article V interest in protecting the fruits of a (potentially unrecorded) compromise, those who would deviate from the clear text of an amendment should at least carry the burden of negating any plausible grounds for its having been worded as written. At a minimum, therefore, the Court should enforce an amendment as written if one could imagine rational reasons, pragmatic or political, for a precisely drawn text like the Eleventh Amendment to have taken the shape that it did.

While I do not delve here into the rich debate about the original meaning of the Eleventh Amendment, I note that others have identified circumstances that, if accurate, supply plausible grounds for imagining that the Amendment's text took the shape it did for reasons other than poor drafting or imperfect foresight. Perhaps, as Judge Gibbons has argued, some Federalists felt concerned that the elimination of federal question jurisdiction against the states would have adverse diplomatic repercussions, given Great Britain's apparent dissatisfaction over states' noncompliance with the Treaty of Paris.<sup>215</sup> Or given the widespread discontentment over the fact that many state legislatures had in recent years suspended debt

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avored a narrower immunity were a sufficiently small minority to be irrelevant to the adoption of the Eleventh Amendment. Nor does it seem as if the Court could plausibly reach such a conclusion, given the paucity of the records surrounding the Amendment's adoption.

214. At least some recent historical scholarship suggests that the early Congresses had a disproportionately nationalist tilt. See THORNTON ANDERSON, *CREATING THE CONSTITUTION* 174-83 (1993). Perhaps the narrow framing of the Amendment accounts for the broad support it received in Congress. See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 71 (1972) ("The roster of those favoring the Amendment includes the names of ardent nationalists, as well as states' rights men.").

215. See Gibbons, *supra* note 20, at 1939-41.

collections, passed ex post facto laws, printed paper money, and the like,<sup>216</sup> perhaps some thought it wiser not to foreclose precipitously any future possibility of invoking federal jurisdiction to enforce Article I, Section 10's explicit prohibitions against such abuses.<sup>217</sup> Or perhaps some of the Amendment's drafters merely feared that these or other concerns might surface if the Amendment were too broadly worded. I offer no opinion about these or the many other historical accounts of the Amendment's narrow drafting. Nor do I think it possible ever to know the true reason, if one exists, for the final shape of the Amendment's text. Rather, I mention the foregoing possibilities merely to suggest that the *Hans* and the *Seminole Tribe* Courts simply overlooked the possibility that a political minority sufficient to shape the Amendment may have preferred the Eleventh Amendment as written or, at least, that the Amendment's drafters may plausibly have thought as much. Absent evidence negating any conceivable basis for such a conclusion, the Court in both cases should have enforced the Eleventh Amendment as written.

### III. THE ELEVENTH AMENDMENT AS A LIMIT ON STATE SOVEREIGN IMMUNITY

A distinct feature of the Eleventh Amendment debate calls attention to another important but frequently overlooked interpretive question involving constitutional precision: When does one appropriately read a negative implication into the Constitution's detailed specification of a newly granted power or its careful delineation of exceptions to such a grant? In particular, a second line of the Court's case law asks not whether the Eleventh Amendment establishes state sovereign immunity, but rather whether it stands as an affirmative impediment to the derivation of such immunity from other constitutional sources. These decisions hold that despite the Amendment's particularity, its adoption does not preclude deriving additional categories of state sovereign immunity from "the judicial Power"

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216. See, e.g., WOOD, *supra* note 47, at 404; William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 33-34 (1928); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 519 (1925).

217. I refer here to the Legal Tender Clause, the Ex Post Facto Clause, and the Contract Clause, all of which apply in terms against the states. U.S. CONST. art. I, § 10, cl. 1. It is worth noting that in his argument in *Chisholm v. Georgia*, Attorney General Randolph cited this concern as one of the central reasons for not reading state sovereign immunity into Article III:

What is to be done, if in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State? What, if a State should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts?

What if a State should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State.

2 U.S. (2 Dall.) 419, 422 (1793).

or the constitutional structure as a whole.<sup>218</sup> By offering a subtler and more plausible analysis of the Amendment's role in state sovereign immunity law, these cases present a more difficult interpretive question. Accordingly, my claims here are more tentative. I suggest that in the Amendment's absence, 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>219</sup> Under well-known (but sometimes controversial) principles of negative implication, however, the Amendment's adoption may have exhaustively specified the available classes of state sovereign immunity in federal court and thereby displaced any residual authority to develop further sovereign immunity principles.<sup>220</sup>

More specifically, because Article III did not speak explicitly to the question of sovereign immunity, I expect that, in the Amendment's absence, questions about state sovereign immunity would have been resolved in the same way that this nation settled other open questions about constitutional structure. By practice, the branches charged with implementing "the judicial Power" would have settled its meaning in common law fashion, perhaps consulting traditional practices associated with that concept and inferences available from the overall constitutional structure. Through that process, our constitutional tradition would have come to rest around whichever practices and decisions about state sovereign immunity withstood the test of time. If *Chisholm* was mistaken, there was certainly time to reexamine its premises, just as early Americans ultimately did with many of their other first impressions of "the judicial Power."<sup>221</sup>

By adopting the Eleventh Amendment in response to *Chisholm*, however, eighteenth-century Americans explicitly confronted the question that Article III had left in the shadows. By limiting the available jurisdiction of the federal courts, the Eleventh Amendment seems to have supplied a specific solution to the problem of state sovereign immunity from federal judicial action. A venerable maxim of construction holds that when a specific and a general provision address the same subject, the specific governs the general.<sup>222</sup> This "specificity canon" seeks to ensure that when the legislature has focused specifically on a matter and struck a precise policy balance, the resulting balance is not disturbed by an agency's or

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218. See *infra* Section III.A (discussing cases).

219. See *infra* Section III.B (describing the tradition of practical interpretation of vague constitutional clauses).

220. See *infra* Section III.C (elaborating on principles of negative implication and applying them to the Eleventh Amendment).

221. See *infra* text accompanying notes 252-254; see also *infra* notes 257-260 (giving concrete examples of this phenomenon).

222. See *infra* notes 270-282 and accompanying text (discussing the specificity canon and its justification).

court's exercise of more general authority to reach the same subject. This tradition points to the following conclusion: If the Amendment's carefully drawn text reflects an implicit judgment that the contemplated limits on state amenability to suit should go so far and no farther, then the balance struck by the Amendment might properly displace whatever general authority the Court had possessed to develop a jurisprudence of state sovereign immunity against federal jurisdiction under "the judicial Power" of Article III.

Certainly, invoking the specificity canon to resolve this textual question raises its own set of questions. All canons of course are controversial. As a specialized version of the negative implication canon (*expressio unius est exclusio alterius*), the specificity canon is perhaps especially so.<sup>223</sup> The canon rests on the familiar idea that the enumeration of specific matters in a statute logically implies the exclusion of others.<sup>224</sup> Traditionally, the Court treated the canon as a means to identify specific legislative intent.<sup>225</sup> But it is equally comprehensible in textualist terms; a negative implication may represent "the most natural reading" of a circumscribed statutory text.<sup>226</sup> Under either conception, the *expressio unius* principle has the same justification and poses the same difficulty: Like all linguistic canons, this one is what Holmes once called an "axiom of experience"<sup>227</sup>—a shorthand way of describing tendencies in the use of a language. For that reason, its application is far from automatic. When people specify a list of items or a particular method of doing something, the specification sometimes suggests exclusivity, but not always. For example, in certain circumstances, a textual specification of certain items may connote only that the lawmaker has chosen to take one step at a time and has yet to address the omitted matters one way or the other.<sup>228</sup>

This fact, however, does not drain the *expressio unius* canon of all resolving significance. Like any other textual cue, the canon draws meaning

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223. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1250 (2001) ("Law professors consider [the *expressio unius*] canon unreliable or even bogus."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455 (1989) (describing the *expressio unius* canon as "controversial").

224. See *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned.").

225. See, e.g., *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (describing the *expressio unius* principle as one of the maxims used "to aid in deciphering legislative intent"); *United States v. Barnes*, 222 U.S. 513, 519 (1912) ("The maxim . . . expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest.").

226. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

227. *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

228. See *In re Am. Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1988) (Easterbrook, J.) ("The legislature does not tie up every knot in every statutory subsection. A list of four ways may imply only that Congress has yet to consider whether there should be others.").

from context. In textualist terms, when a statutory or constitutional text enumerates a list or prescribes a particular way of doing something, the *expressio unius* canon directs interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive.<sup>229</sup> I have more to say about the particulars of such an inquiry below.<sup>230</sup> For now, it suffices to emphasize that the *expressio unius* canon, properly applied, is not advanced as a mechanical or acontextual solution to any interpretive problem.<sup>231</sup> Rather, consistent with the previously identified goals of Article V, the canon alerts interpreters to consider whether a carefully drawn text is indicative of a compromise that went so far and no farther. Whether the Eleventh Amendment, in particular, warrants such a reading is the question to which this Article now turns.

#### A. *The Eleventh Amendment as Irrelevant*

At times, the Court has invoked the Eleventh Amendment solely to make clear that the Amendment's carefully drawn limitations on federal jurisdiction did not, by negative implication, preclude the Court's recognition of more extensive state sovereign immunity under other sources of constitutional authority. Perhaps the leading case of this type is *Monaco v. Mississippi*,<sup>232</sup> which held that despite the Amendment's limited terms, states enjoyed sovereign immunity from suits authorized by Article III's grant of jurisdiction over controversies "between a State . . . and foreign States." A private party had given Monaco some bonds issued and then repudiated by Mississippi, and Monaco brought a common law action to recover on those bonds. What makes this case particularly interesting is that the full text of the relevant portion of Article III, Section 2, Clause 1—the ninth (and last) head of jurisdiction articulated in that Clause—authorizes federal jurisdiction over controversies "between a State . . . and foreign States, Citizens or Subjects." The Eleventh Amendment, in relevant part, withdraws federal jurisdiction from suits against a state "by Citizens or Subjects of any Foreign State." Accordingly, with surgical precision, the Amendment deals with the ninth head of jurisdiction by restricting suits

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229. As one commentator has put it, 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." EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 337 (1940) (quoting *State ex rel. Curtis v. De Corps*, 16 N.E.2d 459, 462 (Ohio 1938)); see also *infra* note 285 and accompanying text.

230. See *infra* Section III.C.

231. See HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* § 72, at 219 (2d ed. 1911) ("[Negative implication] is based upon the rules of logic and the natural workings of the human mind. But it is not to be taken as establishing a Procrustean standard to which all statutory language must be made to conform.")

232. 292 U.S. 313 (1934).



against a state by foreign citizens or subjects while leaving untouched suits between a state and foreign states.

Unsurprisingly, the Principality of Monaco emphasized this very fact.<sup>233</sup> Despite the apparent negative implication, the Court held that

neither the literal sweep of the words of Clause One of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described by Clause One, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent.<sup>234</sup>

Rather, the Court would not “assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States.”<sup>235</sup> Against this backdrop, the Court analogized Mississippi’s assertion of sovereign immunity to other unenumerated postulates that conditioned “the judicial Power”:

There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been “a surrender of this immunity in the plan of the convention.”<sup>236</sup>

With that observation, the Court gently shifted the question of state sovereign immunity from the Eleventh Amendment to a more plausible home in Article III. Accordingly, the Court was then to examine each head of jurisdiction in Article III, Section 2, Clause 1 to determine “its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme.”<sup>237</sup> Under this conception, by superseding *Chisholm v. Georgia*, the Eleventh Amendment simply gave the Court a fresh start in deriving the appropriate postulates of immunity in common law fashion from the original plan of the Convention.<sup>238</sup>

Recently, the Court elaborated upon and refined *Monaco*’s defensive interpretation of the Eleventh Amendment. In *Alden v. Maine*, the Court

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233. *Id.* at 320-21 (discussing the plaintiff’s contention that the Amendment expressly restricts the exercise of federal jurisdiction under Article III, Section 2, Clause 1, but “contains no reference to a suit brought by a foreign State”).

234. *Id.* at 321.

235. *Id.* at 322.

236. *Id.* at 322-23 (quoting THE FEDERALIST NO. 81, *supra* note 202, at 487 (Alexander Hamilton)) (footnote omitted).

237. *Id.* at 328.

238. *Id.*

held that states enjoy immunity from suit in their own courts and that Congress lacks Article I authority to abrogate such immunity.<sup>239</sup> Acknowledging the “truism” that the Eleventh Amendment is “inapplicable in state courts,”<sup>240</sup> the Court emphasized that the Amendment, properly understood, did not establish *the* constitutional doctrine of state sovereign immunity. Instead, it was merely a narrow response to the specific problem of immunity that *Chisholm* had made salient at the time:

The text reflects the historical context and the congressional objective in endorsing the Amendment for ratification. Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision. Given the outraged reaction to *Chisholm*, as well as Congress’ repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment . . . .<sup>241</sup>

The Amendment, moreover, presented no occasion to address state sovereign immunity in *state* courts because “nothing in *Chisholm* . . . suggested that States were not immune from suits in their own courts.”<sup>242</sup> Thus, while conceding that it sometimes referred to state sovereign immunity as “Eleventh Amendment immunity,” the Court made clear that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”<sup>243</sup> State sovereign immunity instead represents a general attribute of “the structure of the original Constitution itself.”<sup>244</sup> While the precise question of state sovereign immunity in state courts is beyond the scope of this Article, both *Alden* and *Monaco*, I believe, too readily found that the Eleventh Amendment’s

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239. 527 U.S. 706 (1999).

240. *Id.* at 735-36.

241. *Id.* at 723 (citation omitted).

242. *Id.* at 742.

243. *Id.* at 713.

244. *Id.* at 728. In particular, the Court claimed, the states retained critical attributes of sovereignty when they assented to the Constitution. *See id.* at 713-15. Thus, the Court explained that “[v]arious textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance.” *Id.* at 713. Moreover, the Tenth Amendment removed “[a]ny doubt regarding the constitutional role of the States as sovereign entities.” *Id.* According to the Court, the states would not have adopted the document at all “if it had been understood to strip the States of immunity from suit in their own courts.” *Id.* at 743. Building on *Alden*’s reasoning, the Court recently extended the principle of state sovereign immunity to proceedings against states brought before federal administrative agencies, which perform adjudicative functions but do not exercise “the judicial Power” in an Article III sense. *See Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002).

carefully worded restrictions on federal jurisdiction left the Court free to develop further immunities under the general authority of “the judicial Power” or the constitutional structure as a whole. I consider this point in greater detail below.<sup>245</sup>

### B. *Liquidating Article III*

To evaluate the question whether the Eleventh Amendment precludes the Court’s recognition of further state immunities from federal jurisdiction, it is helpful to consider what authority the Court might have enjoyed in the Eleventh Amendment’s absence. I start from the assumption that Article III did not definitively resolve questions about state sovereign immunity.<sup>246</sup> The Constitution left many such questions for future resolution.<sup>247</sup> With open-ended concepts such as “the judicial Power,” much remained subject to reasonable debate. While the most obvious model for understanding the idea of judicial power assuredly came from English tradition, our Constitution sometimes departed in important respects from the common law model.<sup>248</sup> Nor did experience with state governments prior to the Philadelphia Convention necessarily provide definitive guidance, for much of the constitutional design reflected a growing sense of dissatisfaction with the composition and corresponding behavior of early state governments, including their judiciaries.<sup>249</sup>

Accordingly, while the Constitution was far from radically indeterminate in all respects, Madison was surely correct when he observed:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient clarity, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the

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245. See *infra* Section III.C.

246. See *supra* notes 42-50 and accompanying text (suggesting grounds for uncertainty about whether sovereign immunity survived the adoption of Article III). Based on the swift and decisive adoption of the Eleventh Amendment, the Court has recently suggested that the Founding generation did not find the question of state sovereign immunity particularly debatable. See *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) (noting that any suggestion that “*Chisholm* was ‘reasonable,’ certainly would have struck the Framers of the Eleventh Amendment as quite odd” (citation omitted)). While the opinions in *Chisholm* may have badly misread the country’s mood, it does not follow that they badly misread the conventional legal materials that went into their judgment about open-ended terms like “the judicial Power.” Indeed, assuming *arguendo* that the four Justices in the majority were in some meaningful sense “wrong” about the best reading of Article III, even Justice Iredell’s influential dissent acknowledged both the difficulty and novelty of questions concerning the application of sovereign immunity to our new system of government. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449-50 (1793) (Iredell, J., dissenting).

247. Much of the discussion that follows is based on Manning, *supra* note 47, at 1672-80.

248. See *supra* notes 44-45 and accompanying text.

249. See *supra* note 47.

different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.<sup>250</sup>

The necessary clarifications would come only with the passage of time and accretion of experience. In that vein, referring in part to the very problem of “delineating the several objects and limits of . . . different tribunals of justice,” Madison added: “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.”<sup>251</sup>

Madison’s remarks nicely anticipated the method by which many aspects of “the judicial Power” ultimately became settled.<sup>252</sup> Indeed, the practical liquidation of meaning had particular force in determining how and to what extent English judicial traditions survived the premises of our distinctive constitutional structure.<sup>253</sup> The process often involved twists and turns in practice that did not come immediately to rest.<sup>254</sup> But the end result was that open questions about “the judicial Power” came to be settled by practical exposition of the proper role of the courts in our constitutional system.

Although typically defended in other terms, it is worth noting that at least on preliminary analysis, this practice is consistent with the premises of constitutional textualism described above. Invoking Madison’s technique of practical liquidation depends on an antecedent finding of textual indeterminacy; it does not purport to substitute institutional practice for a clear textual command.<sup>255</sup> The process of liquidating meaning, moreover, frequently represents an effort to make sense of indefinite or obscure provisions in light of the constitutional structure as a whole—a technique to which textualists subscribe without hesitation in cases of indeterminacy.<sup>256</sup> Finally, building upon early practical interpretations of the document may, in fact, enhance the accuracy of later textual readings by capturing

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250. THE FEDERALIST NO. 37, *supra* note 202, at 228 (James Madison).

251. *Id.* at 229.

252. *See, e.g.,* *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (“[I]t is sufficient to observe, that practice and acquiescence under [the custom of Justices riding circuit] for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”).

253. *See* Manning, *supra* note 47, at 1673.

254. *See id.* at 1673-80 (discussing examples).

255. *See* *Fairbank v. United States*, 181 U.S. 283, 311 (1901) (emphasizing “that practical construction is relied upon only in cases of doubt”).

256. *See supra* note 160.

linguistic and cultural nuances that might otherwise have been lost to future readers.<sup>257</sup>

The Madisonian approach to liquidating meaning nicely captures the way Article III disputes came to rest in areas as disparate as federal common law crimes,<sup>258</sup> the permissibility of advisory opinions,<sup>259</sup> and (as I

257. See *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring) (“Alterations in the legal and cultural landscape may make the [original] meaning hard to recover.”). Along these lines, the Court frequently gives weight to early legislative constructions of the Constitution precisely because early legislators “must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.” *Knowlton v. Moore*, 178 U.S. 41, 56 (1900); see also, e.g., *Myers v. United States*, 272 U.S. 52, 174-76 (1926) (relying on early practical construction of the Constitution); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (same), *overruled in part by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *The Laura*, 114 U.S. 411, 416 (1885) (same); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (same); *Laird*, 5 U.S. (1 Cranch) at 309 (same).

258. In the 1790s, many circuit courts simply assumed that they had inherited common law powers to fill the void left by a sparse federal criminal code. See, e.g., *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (punishing expatriate hostilities against the United States); *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (punishing a violation of U.S. neutrality); *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323) (punishing the counterfeiting of U.S. bank notes). *But see* *United States v. Worrall*, 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766) (Chase, Circuit Justice) (rejecting federal common law crimes as inappropriate to our system of government). The question, however, did not quickly come to rest. When the Federalist Congress passed the Sedition Act in 1798, Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801), its supporters defended the bill against Jeffersonian opponents by arguing that seditious libel was already a federal common law crime. See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1075-83 (1985); Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 936-39 (1992).

In the protracted debate that followed the Act’s passage, the Jeffersonians repeatedly contended that judicial power to recognize federal common law crimes undermined important premises of the broader constitutional structure. See Jay, *supra*, at 1090-91; see also Madison’s Report on the Virginia Resolutions (1799-1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 565-66 (photo. reprint 1987) (Jonathan Elliot ed., New York, Burt Franklin 1888) (arguing that federal common law crimes violate crucial premises of the separation of powers and federalism). After the Jeffersonians swept to office in 1800, their position gained ascendancy through various legislative and executive actions, including Jefferson’s decision to halt the prosecution of common law crimes. See, e.g., Jay, *supra*, at 1083-111; Rowe, *supra*, at 939-41; see also Kathryn Preyer, *Jurisdiction To Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 237-38 (1986). In *United States v. Hudson & Goodwin*, the Court rejected a federal common law of crimes, reasoning in part that “the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.” 11 U.S. (7 Cranch) 32, 32 (1812).

259. Early federal judges frequently issued advisory opinions. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 178-79* (1995). In 1793, however, the Justices of the Supreme Court relied on the separation of powers in declining to give advice requested by Secretary of State Jefferson on a number of legal questions concerning the hostilities between England and France. See Letter from the Justices to George Washington (Aug. 8, 1793), in RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 93 (4th ed. 1996). Although the question did not come to rest immediately, it later became settled that advisory opinions did not fall within federal judges’ limited Article III authority to decide “cases” or “controversies.” See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS*,

have argued in previous work) the proper conception of the federal judiciary's law-declaration power in matters of statutory interpretation.<sup>260</sup> The Court's state sovereign immunity case law fits a similar pattern. Despite the Eleventh Amendment's adoption, the Court has rarely behaved as if the question of immunity turns upon the meaning of a canonical text. Instead, it has engaged in a gradual common law elaboration of the ways in which state sovereign immunity fits or does not fit, in different contexts, with our structure of government. Starting from the premise that state sovereign immunity presumptively survived Article III's adoption, the Court has asked whether there is some reason to believe that a particular form of that immunity was surrendered "in the plan of the convention."<sup>261</sup>

In the Court's view, "the plan of the convention" allowed two types of domestic sovereigns—a sister state or the United States itself—to sue a state in federal court. The basis for suits by sister states is straightforward: Because a tribunal for resolving disputes between states was thought "essential to the peace of the Union," federal jurisdiction over the states as defendants "was . . . established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union."<sup>262</sup> Jurisdiction over suits by the United States, in turn, reflects the idea that the federal government was "established for the common and equal benefit of the people of all the States."<sup>263</sup> Because each government (federal and state) is "'sovereign, with respect to the objects committed to

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1789-1888, at 12-13 (1985). Because English judges had themselves issued advisory opinions, the ultimate rejection of advisory opinions apparently rested on the policies implicit in Article III, not on historical pedigree. See *Flast v. Cohen*, 392 U.S. 83, 96 (1968); Felix Frankfurter, *Advisory Opinions*, in 1 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 475, 476 (Edwin R.A. Seligman ed., 1930).

260. I have argued that, in matters of statutory interpretation, early federal courts sometimes invoked the English judicial practice of equitable interpretation—a practice giving judges broad authority to extend statutes according to their *ratio legis* and to recognize exceptions for harsh results that did not serve the statutory purpose. See Manning, *supra* note 11, at 86-89. Starting from premises about the proper understanding of the judicial power in our system of separated powers, the Marshall Court subsequently settled instead around what we would now call the "faithful agent" theory of statutory interpretation. See Manning, *supra* note 47, at 1677-80; Manning, *supra* note 11, at 89-102. Under that conception, the federal judge's duty is to discern and enforce as accurately as possible the precise instructions issued by the legislature. For a different reading of the early history of the federal judiciary's law-declaration power, see William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 *COLUM. L. REV.* 990, 1058-87 (2001) (arguing that the Court's early approaches to statutory interpretation were more consistent with the equitable traditions of their English and state antecedents).

261. *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (internal quotation marks omitted).

262. *Id.* at 328-29 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)). Of course, the textual basis for such jurisdiction is quite compelling. Article III extends the judicial power to suits "between two or more States." U.S. CONST. art. III, § 2, cl. 1. Nonetheless, in the aftermath of *Hans*, the Court only narrowly rejected the contention that federal jurisdiction over suits between two states was subject to an implied exception for claims of money damages. See *South Dakota v. North Carolina*, 192 U.S. 286, 318-22 (1904).

263. *United States v. Texas*, 143 U.S. 621, 646 (1892).

it, and neither [is] sovereign with respect to the objects committed to the other,” allowing the federal government to sue a state in federal court “does no violence to the inherent nature of sovereignty.”<sup>264</sup> And “consent [to such litigation] was given by [each state] when admitted into the Union upon an equal footing in all respects with the other States.”<sup>265</sup>

Conversely, the plan of the Convention left state immunity intact with respect to suits by foreign nations and tribal sovereigns. With respect to foreign nations, the *Monaco* Court thus explained:

The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State.<sup>266</sup>

Similarly, the Court has discerned “no compelling evidence” that “the States waived their immunity against Indian tribes when they adopted the Constitution.”<sup>267</sup> Whereas states implicitly waived immunity against sister states by “mutuality of . . . concession” in the Constitutional Convention, no such mutuality was possible between states and tribes because the tribes “were not even parties” to the Convention.<sup>268</sup> Accordingly, just as the tribes enjoy immunity against suits by states, so too do the states enjoy immunity against suits by tribal sovereigns.

I am not concerned here with the correctness of any particular determination in this line of cases. My point here is that the method employed by the Court would have represented a plausible way of “liquidating” the meaning of “the judicial Power” of Article III had *Chisholm* and the Eleventh Amendment not intervened. Whether or not the structural inferences in particular cases were justifiable, one can hardly object to the general approach of reading an open-textured provision like “the judicial Power” in light of the broader premises of the constitutional structure. *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

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264. *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)).

265. *Id.*

266. *Monaco*, 292 U.S. at 330.

267. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991).

268. *Id.* at 782.

general authority the Court previously may have had to address the same question in common law fashion.

### C. *The Specific and the General*

One might surely view the Eleventh Amendment's adoption as leaving untouched whatever power the Court originally possessed to determine open questions of sovereign immunity against federal jurisdiction under Article III. On that view, the Amendment's specification of particular jurisdictional limitations merely sought to ensure a minimally acceptable degree of state sovereign immunity in federal court. In areas covered by the new restrictions, the Court could no longer construe "the judicial Power" to provide *less* immunity than the Amendment prescribes; at the same time, nothing in the Amendment explicitly displaces the Court's residual authority to read into "the judicial Power" an immunity wider than the Amendment itself prescribes. This premise offers the most persuasive justification for *Hans* and its progeny.<sup>269</sup>

Nonetheless, it is also possible to understand the relationship between the Eleventh Amendment and "the judicial Power" differently. Specifically, one might examine that relationship in light of the considerations underlying the venerable maxim of statutory construction "that the specific governs the general."<sup>270</sup> The idea is easily stated: "However inclusive may be the general language of a statute, . . . [s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling."<sup>271</sup> For example, the federal government's ability to enforce a tax lien rests exclusively on the specific provisions of the Federal Tax Lien

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269. Indeed, on this account, one might even conclude that the pro-immunity policy embodied in the Eleventh Amendment properly informed the subsequent common law decisionmaking undertaken pursuant to the Court's general authority to elaborate "the judicial Power." Cf. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (arguing that courts should use statutory policies as a source of reasoning in common law decisionmaking); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429 (same).

270. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); see also, e.g., *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls one of more general application."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974))).

271. *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). The canon is also accurately described as follows: "[T]he general and specific in legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general; so that general and specific provisions in the laws, both written and unwritten, may stand together, the latter qualifying and limiting the former." JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 112A, at 106-07 (Boston, Little, Brown & Co. 1882).



Act of 1966, rather than the otherwise applicable provisions of a distinct statute more generally prescribing the government's debt collection priority.<sup>272</sup> In contrast with the related doctrine of implied repeals, which provides that a later statute impliedly repeals an earlier one only to the extent of any irreconcilable conflict,<sup>273</sup> the specificity canon governs regardless of the order in which Congress enacted the specific and general statutes.<sup>274</sup>

The specificity canon is part of the larger family of interpretive rules that seek to promote coherent readings of related statutory provisions.<sup>275</sup> In particular, it represents a version of the canon *expressio unius est exclusio alterius*<sup>276</sup>—and a rather strong version at that. As relevant here, it presupposes that when a statute prescribes either a carefully drawn method of exercising a given power or a well-delineated set of restrictions on such power, an interpreter may read that specification to displace more general sources of potential authority to prescribe different methods or restrictions upon the same subject. So understood, the canon may reach not only an exercise of general authority that directly contradicts a specific statute, but also one that alters the apparent balance struck by the more specific enactment.<sup>277</sup>

Although rarely explained, the specificity canon seeks to prevent a “narrow, precise, and specific” statute from being “submerged” by judicial or agency elaboration of a distinct statute covering “a more generalized

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272. See *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998). Similarly, although federal employees had long enjoyed a cause of action for adverse personnel decisions under the general authority of the Back Pay Act, the Court found this authority to have been superseded by the specific remedial scheme that the Civil Service Reform Act of 1978 prescribed for such actions. See *United States v. Fausto*, 484 U.S. 439, 453 (1988).

273. See, e.g., *Mancari*, 417 U.S. at 550 (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 457 (1945) (“Only a clear repugnancy between the old law and the new results in the former giving way . . .”).

274. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (“[I]t is familiar law that a specific statute controls over a general one ‘without regard to priority of enactment.’” (quoting *Townshend v. Little*, 109 U.S. 504, 512 (1883))).

275. For example, the specificity canon is closely related to the maxim *ejusdem generis*, which provides that “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.” *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991); see also, e.g., *Cleveland v. United States*, 329 U.S. 14, 18 (1946) (“Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it.”); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that the canon of *ejusdem generis* ordinarily “limits general terms which follow specific ones to matters similar to those specified”).

276. See *supra* notes 223-229 and accompanying text.

277. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (“[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (noting that when a statute “speak[s] directly to a question” of maritime law, the Court cannot use its authority under the admiralty jurisdiction to “‘supplement’ Congress’ answer so thoroughly that the [statute] becomes meaningless”).

spectrum.”<sup>278</sup> The reasons behind it seem ultimately related to preserving the safeguards built into the legislative process. In contrast with a general statute, a specific statute may reflect Congress’s “detailed judgment” about the proper means to “accommodate” competing policy concerns on a particular subject.<sup>279</sup> When the legislature enacts a statute dealing with a discrete problem, the bargaining among relevant interest groups focuses on the contours of that problem.<sup>280</sup> The lines drawn by the resulting statute may embody whatever specific balance the arrayed political forces could strike, acting within the constraints of bicameralism and presentment.<sup>281</sup> If a court or an agency were to invoke more generalized statutory authority to displace the resulting balance, it would eviscerate the protections prescribed by a carefully designed lawmaking process.<sup>282</sup>

Again, the process concerns associated with the specificity canon seem to apply with greater force when it comes to constitutional, as opposed to statutory, texts. Given the heightened consensus requirements imposed by Article V, when an amendment speaks with exceptional specificity, interpreters must be sensitive to the possibility that the drafters were willing to go or realistically could go only so far and no farther with their policy. When such compromise is evident, respect for the minority veto indicates that those implementing the amendment should hew closely to the lines

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278. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

279. *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998); *see also* Easterbrook, *supra* note 109, at 547 (“A legislature that tries to approach the line where costs begin to exceed benefits is bound to leave a trail of detailed provisions, which . . . would preclude judges from attempting to fill gaps.”).

280. *See* THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 98 (New York, Baker, Voorhis & Co. 2d ed. 1874) (noting that the specificity canon seeks to preserve the fruits of a process in which “the mind of the legislator has been turned to the details of a subject, and he has acted upon it”).

281. For example, the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(b), 84 Stat. 1590, 1593-96 (codified as amended at 29 U.S.C. § 655(b) (2000)), grants the Secretary of Labor general authority to prescribe regulations setting maximum allowable levels of toxic substances in the workplace. If Congress were also to adopt a more specific statute setting the maximum level for a particular toxin such as benzene, that specific statute might displace whatever general authority the agency would otherwise have had over that substance. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 272. Accordingly, if the hypothetical benzene statute set allowable levels at “no more than 10 parts per million,” the agency arguably could not invoke the more general statute to adopt a regulation allowing “no more than 5 parts per million.” “Although such a regulation might be viewed as supplementing, rather than contradicting, the specific statutory requirements, it might also be seen as unsettling the precise balance struck in a legislative process that presumably involved bargaining between labor and manufacturing interests.” *Id.*

282. *See, e.g., Gomez v. United States*, 490 U.S. 858, 872 (1989) (noting that while the Federal Magistrates Act grants district courts broad authority “to assign to magistrates unspecified ‘additional duties,’” the statute’s “carefully designed grant of authority to conduct trials of civil matters and minor criminal cases should be construed as an implicit withholding of authority to preside at a felony trial”); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (“[W]e do not believe that Congress intended to undermine this carefully drawn statute through a general saving clause . . .”).

actually drawn, lest they disturb some unrecorded concession insisted upon by the minority or offered preemptively by the majority as part of the price of assent. In short, when the amendment process addresses a specific question and resolves it in a precise way, greater cause exists for interpreters to worry about invoking general sources of constitutional authority to submerge the carefully drawn lines of a more specific compromise.

As a threshold matter, of course, one must be able to identify when a specific text is properly read as a compromise to go so far and no farther, and this determination will not always be straightforward. Lawmakers engage in specification for many reasons; it does not always connote an implied exclusion of omitted cases.<sup>283</sup> Reading a negative implication even from a carefully specified text is, as Hamilton recognized, a matter of “common sense.”<sup>284</sup> As with any form of textual interpretation, the inquiry is inevitably contextual. As the Court has suggested, resolution of such inquiries turns on whether a reasonable person would have had cause to read the specification of one thing as exclusive of any others in the circumstances in which the statement was uttered.<sup>285</sup>

Certainly, shared experience over time helps to identify recurring situations in which a member of the linguistic community would presumptively read certain forms of specification as exclusive. For

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283. See Sunstein, *supra* note 223, at 455 (“The failure to refer explicitly to the [item] in question may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts, rather than an implicit negative legislative decision on the subject.”). For example, a statutory specification might seek to clarify a matter in genuine doubt or address an immediate problem, leaving the unspecified matters for future resolution. Thus, two substantive provisions of the Civil Rights Act of 1991 contain explicit clauses providing for prospective application. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 258-59, 261 (1994). Although the Act’s many other provisions lack similar clauses, the Court refused to find a negative implication in the disparate inclusion and omission. Noting that its own decisions had been somewhat ambiguous about the background rules of statutory retroactivity, the specification of prospectivity in two provisions might have meant only that Congress desired certainty in the areas covered by those provisions. See *id.* at 261. The omission of similar clauses in other provisions did not necessarily mean that Congress preferred retroactive application, but rather might have suggested that Congress was content to take its chances with the Court’s uncertain framework in those contexts. See *id.*

284. THE FEDERALIST NO. 83, *supra* note 202, at 496 (Alexander Hamilton) (emphasis omitted).

285. Although not expressed in quite these terms, the substance of the Court’s recent guidance suggests that the inquiry turns on whether a reasonable person would have been justified in inferring exclusivity from reading the text in context. See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (“As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002))); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (“The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”).

example, when an adopted text establishes a new power and takes care to specify the mode of its exercise, our tradition is to treat such a specification as presumptively exclusive.<sup>286</sup> Otherwise, why would a lawmaking body take the trouble to spell out often elaborate procedures for exercising a grant of power if alternative procedures would do just as well?<sup>287</sup> Unsurprisingly, this general convention has deep roots in our constitutional tradition<sup>288</sup>—a consideration that itself lends weight to the convention’s legitimacy.<sup>289</sup> Accordingly, although Congress has broad and general authority to compose the institutions of government pursuant to the Necessary and Proper Clause,<sup>290</sup> it cannot give itself authority to pass laws in a manner that deviates from Article I, Section 7’s specific requirements of bicameralism and presentment.<sup>291</sup> Again, despite its general powers under the Necessary and Proper Clause, Congress also cannot prescribe a method of appointing “Officers of the United States” different from the

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286. See, e.g., *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (“Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized.”); *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.”); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.”). As Henry Campbell Black thus wrote:

Particularly when a statute gives a new right or a new power, and provides a specific, full, and adequate mode of executing that power or enforcing the right given, the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort to any other mode of executing the power or of enforcing the right.

BLACK, *supra* note 231, § 72, at 221.

287. For a particularly cogent explanation of this idea, see Tribe, *supra* note 180, at 1241-43.

288. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.”); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 448, at 434 (Boston, Hilliard, Gray & Co. 1833) (“There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others.”).

289. See Eskridge & Frickey, *supra* note 150, at 67 (“[T]he canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it. This point is most applicable to the canons relating to grammar, word choice, and inference from different syntactical configurations.”).

290. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

291. U.S. CONST. art. I, § 7, cls. 2-3; see also *supra* notes 176-177 and accompanying text.

specific methods laid out in the carefully drawn terms of the Appointments Clause.<sup>292</sup>

Another traditional application of the *expressio unius* canon directly implicates the Eleventh Amendment. Typically, when a legal instrument enumerates a list of exceptions to a power or prohibition found in the same instrument, the convention is to treat the list as presumptively exclusive.<sup>293</sup> This convention reflects the same intuition that underlies the ancient aphorism that “the exception proves the rule.”<sup>294</sup> The Eleventh Amendment illustrates both the relevance and the limitations of that presumption (and, by extension, of the *expressio unius* canon more generally). Because the Amendment explicitly qualifies the availability of federal jurisdiction under Article III, Section 2, Clause 1,<sup>295</sup> one might, as an initial matter, draw a negative implication from the Amendment’s obvious selectivity about what it modified and what it left untouched.<sup>296</sup> Three of the heads of jurisdiction

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292. U.S. CONST. art. II, § 2, cl. 2; see also *supra* note 179 and accompanying text. Along similar lines, the enumeration of qualifications may convey exclusivity. Apparently, established convention holds that the enumeration of particular qualifications for holding office impliedly precludes the addition of others. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (discussing the background convention and its pedigree). For example, the Constitution enumerates a list of qualifications for service as a U.S. Representative. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”). Based on the specificity canon, the Court has held that Congress cannot add to those qualifications pursuant to its general authority to “be the Judge of the Elections, Returns and Qualifications of its own Members.” *Id.* § 5, cl. 1; *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (holding that the qualifications prescribed by the Qualifications Clause are exclusive).

293. See, e.g., *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (“[The statute’s] detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute [of limitations].”); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (“[The Endangered Species Act] creates a number of limited ‘hardship exemptions,’ none of which would even remotely apply to the Tellico Project. . . . [U]nder the maxim *expressio unius est exclusio alterius*, we must presume that these were the only ‘hardship cases’ Congress intended to exempt.”). As Sutherland has observed:

An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumeration weakens it as to things not expressed.

2 J.G. SUTHERLAND, *STATUTORY INTERPRETATION* § 494, at 923 (John Lewis ed., 2d ed. 1904) (footnotes omitted).

294. *Sturges v. Collector*, 79 U.S. (12 Wall.) 19, 28 (1871).

295. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (“There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected.”).

296. Cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (noting that “the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone”).

in Clause 1 turn on a state's presence as a party:<sup>297</sup> "Controversies between two or more States;—between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects." These categories, in turn, include three subcategories of jurisdiction that depend on the presence of a state *and* an out-of-state individual—citizens of another state or citizens or subjects of a foreign state. The Eleventh Amendment is phrased quite precisely to address *only* those three subcategories. Indeed, so discriminating is the text that it parses a subcategory from amidst the final head of jurisdiction ("Controversies . . . between a State . . . and foreign States, Citizens or Subjects"), leaving untouched suits between a state and "foreign States" while restricting suits against states by "foreign . . . Citizens or Subjects." As a first cut, this fact suggests at least that the Amendment's framers carefully picked and chose among Article III, Section 2, Clause 1's categories in determining what jurisdictional immunity to prescribe.

The Eleventh Amendment's careful inclusion and omission of particular heads of Article III jurisdiction creates at least a *prima facie* case that the amendment process entailed judgments about the precise contexts in which it was desirable (or perhaps politically feasible) to provide for state sovereign immunity.<sup>298</sup> *Monaco v. Mississippi* itself provides the clearest demonstration of this point. As discussed previously, the Court there held that sovereign immunity shields states from diversity suits by foreign states. I assume *arguendo* that in the Eleventh Amendment's absence, the Court could legitimately have reached that conclusion in liquidating the meaning of "the judicial Power" in light of the overall constitutional structure. But given the way the Amendment parses the language of Article III, Section 2, Clause 1, it becomes quite difficult to sustain the Court's residual authority to recognize such immunity. As discussed, the last jurisdictional head in Clause 1 extends the judicial power to "Controversies . . . between a State . . . and foreign States, Citizens or Subjects"; the Amendment, in relevant part, restricts suits against states "by Citizens or Subjects of any Foreign State." Given this obvious selectivity, it is hard to avoid the conclusion that the Amendment reflects a considered judgment to place suits by foreign states on one side of the line rather than the other.

The Eleventh Amendment, however, also clearly illustrates why canons of negative implication cannot be mechanically applied, but rather make sense only when considered in context. Even if the Amendment's textual

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297. See Marshall, *supra* note 23, at 1346-47.

298. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

selectivity creates a prima facie case of negative implication, one must ask whether its enumeration might be explained in terms other than the disparate inclusion and exclusion of jurisdictional categories in a carefully drawn codification of state sovereign immunity law. Here, there is a highly plausible alternative explanation for the Amendment's narrow framing. If (as *Alden v. Maine* suggests<sup>299</sup>) the Amendment provided a specific answer to the narrower question of "how to deal with *Chisholm*," then it would be harder to find that the Amendment's precisely drawn contours reflect a decision to go so far and no farther in establishing a sovereign immunity exception to Article III. On that reading, the Amendment's enumeration dealt with the problem at hand and made no implicit judgment about any wrinkles on sovereign immunity that might later arise.

Although the question is not free of doubt, the contextual clues, I believe, ultimately confirm the negative implication suggested by the text. Initially, one might note that the Amendment, in fact, goes beyond *Chisholm*'s holding. *Chisholm* arose under the clause of Article III extending the judicial power to controversies between "a State and Citizens of another State." The Amendment establishes that the judicial power does not extend to suits against states "by Citizens of another State" or "by Citizens or Subjects of any Foreign State." At the least, such an extension entailed making the judgment that diversity jurisdiction involving foreign individuals warranted like treatment, even though its curtailment might present distinctive risks of an international dimension. Still, the added categories have a tight conceptual fit with the type of case at issue in *Chisholm*. Certainly, they involved a similar threat of individuals using diversity jurisdiction to collect common law debts from states. So while the Amendment's text is overinclusive relative to the specific problem posed by *Chisholm*, it is perhaps only mildly so. Hence, it may not be safe to rely on that overinclusiveness alone to establish that the Amendment focused on and provided a carefully tailored solution to the question of state sovereign immunity in general.

But ultimately, consideration of the immediate context against which the Amendment was adopted also suggests that the amendment process, properly understood, involved the considered inclusion and, more important, exclusion of categories of state sovereign immunity. Because some might conceive of the analysis that follows as relying on decidedly extratextual considerations, it is helpful to start with a few words about how the analysis fits, if it does, with the premises of constitutional textualism. The process of negative implication is a permissible textualist tool of construction because it entails a judgment about the way a reasonable

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299. 527 U.S. 706, 723 (1999).

person would read certain textual cues in context.<sup>300</sup> At the same time, although a negative implication involves reading textual cues, the existence or scope of a negative implication, as discussed, will sometimes be ambiguous. For example, Article I and Article II specify impeachment as a method of removing, *inter alia*, executive officers.<sup>301</sup> Even if one infers a negative implication from that textual specification, does the text prescribe the exclusive means for *Congress* to remove such an officer or for *any constitutional actor* (including the President) to do so?<sup>302</sup> Does Article I, Section 7's elaborate prescription of bicameralism and presentment just preclude Congress from granting interstitial lawmaking power to its own components (*viz.* a single house or a committee), or does it also forbid the delegation of such authority to agencies or courts in conjunction with their respective powers of law execution and adjudication? Resolving questions regarding the existence or scope of a negative implication, like any other form of textual exegesis, entails reading the operative text(s) in context.

Sometimes, of course, a specific text will itself provide a fairly strong indication of the terrain that it occupies, and thus of the existence and scope of any negative implication. Imagine, for example, that instead of referring only to certain categories of diversity actions between states and individuals, the Eleventh Amendment had provided:

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 in cases arising under this Constitution, in cases of admiralty and maritime Jurisdiction, or in controversies brought by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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300. David Shapiro offers some excellent illustrations of this point. *See* Shapiro, *supra* note 150, at 928 (“[A] statute requiring that any cat born on or after a certain date must be vaccinated can fairly be taken to exclude any requirement of vaccination of cats born before that date. And a statute imposing an implied warranty on transfers for consideration can fairly be taken not to impose such a warranty on gratuitous transfers.” (footnotes omitted)).

301. *See* U.S. CONST. art. I, § 3, cls. 6-7 (prescribing in detail the procedures for impeachment); *id.* art. II, § 4 (providing that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

302. The First Congress's practical construction of the Constitution casts some light on this question. In the course of the so-called “Decision of 1789,” which established the Department of Foreign Affairs, Congress adopted legislation unmistakably at odds with the premise that impeachment supplied the exclusive means of removing executive officers. *See* Myers v. United States, 272 U.S. 52, 111-15 (1926) (discussing the legislative deliberations involved in the Decision of 1789). Although not essential to the foregoing conclusion, it is worth noting that two or three participants in the House debate had suggested that impeachment provided the exclusive method of removal. *See* John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1315 (1999) (describing arguments about impeachment from the House debate).



Had the Amendment in that way more extensively picked and chosen among the nine heads of jurisdiction set forth in Article III, Section 2, a reasonable person could surely have read it as reflecting a comprehensive judgment about the forms of immunity states should or should not enjoy in our system of government. Similarly, if the exceptions enumerated in the Amendment had been adopted with and as part of Article III (or perhaps even if the Amendment's language had been interlineated with Article III),<sup>303</sup> the relevant text(s) might have read as a more obviously integrated enumeration of jurisdictional grants and limited exceptions to those grants.<sup>304</sup>

The Eleventh Amendment's actual text speaks less decisively, of course. It is not as comprehensive as the hypothetical amendment. Nor is it formally interlineated with Article III (though its relationship to the prior text could hardly be more direct).<sup>305</sup> And because the Amendment deals with a fairly coherent subset of Article III's jurisdictional grants (suits brought against states by out-of-state individuals), it is possible to read it as dealing with a discrete subset of jurisdictional concerns rather than the

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303. For an interesting discussion of early deliberations over the question whether to interlineate constitutional amendments with the original document, see Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 252-64 (1997). Some have suggested that the Amendment's interlineations into Article III might have produced distinct interpretive consequences, though not the precise consequences I identify here. See *id.* at 264-67 (suggesting that interlineations might have made the diversity theory of the Amendment more obvious); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 22 (same).

304. Such a text might have looked as follows:

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 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; *provided that*, 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.

Professor Edward Hartnett has suggested a different way of interlineating the Amendment with Article III, one that perhaps carries less obvious negative implications. See Hartnett, *supra* note 303, at 264-67.

305. The Amendment is, after all, framed as a rule of construction directing that "the Judicial power shall not be construed to extend" to various classes of suits against states, all of which involve jurisdictional heads prescribed by Article III. Accordingly, although physically separate from Article III, the Amendment has meaning only as a qualifier to that Article. While the Amendment's drafting does not shed conclusive light on why it was framed as a rule of construction, recent scholarship has suggested that it was framed in that way in order to trigger an interpretive convention that would assure the Amendment's retroactive application to pending cases. See Nelson, *supra* note 20, at 1604 n.222; Pfander, *supra* note 20, at 1364.

broader question of how much sovereign immunity to confer.<sup>306</sup> In short, based 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.

Accordingly, to resolve the resulting textual ambiguity, any textualist would need to know more about the Amendment's context. As discussed, finding a negative implication depends on the determination that a reasonable person would ordinarily associate a given set of items as a group, so that their disparate inclusion and omission implies careful line-drawing.<sup>307</sup> Two related considerations suggest that a reasonable person contemplating the Amendment's text would have viewed it as a carefully circumscribed answer to the more general question of how much immunity to give states against the assertion of Article III jurisdiction as a whole.

First, to evaluate the Amendment's limited enumeration of exceptions, it is helpful to know the legal baseline against which the adopters acted.<sup>308</sup> As discussed, no one doubts (or could doubt) that *Chisholm* directly provoked the Amendment's adoption. It therefore supplies the most immediate context for reading the Amendment's text. Even if *Chisholm* was (in some meaningful sense) wrongly decided or at least widely perceived as such, the broad reasoning of all four majority opinions certainly provided good reason to think that the question addressed by the Amendment involved the desired scope of state immunity to Article III jurisdiction as a whole. 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. All four opinions emphasized that Article III's unqualified language supplied a

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306. Along these lines, if one were to subscribe to the "literal theory" of the Amendment's text, it would strengthen the inference of comprehensiveness. Under that theory, which is generally viewed as a less plausible reading of the text in context than the diversity theory, the Amendment precludes the exercise of federal jurisdiction in *any* suit—federal question actions, suits in admiralty, cases involving ambassadors, and so forth—in which the party alignment matches that of the Eleventh Amendment. See *supra* note 68. So understood, the Amendment precludes federal jurisdiction over an array of litigation considerably broader than the precise class of cases involved in *Chisholm*. As such, one would have an easier time reading the Amendment as a comprehensive judgment about the appropriate scope of state sovereign immunity, rather than a mere effort to deal with the particular problem of diversity actions posed by *Chisholm*.

307. See *supra* notes 229, 285 and accompanying text.

308. Cf. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (noting that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone").

sufficient basis for asserting jurisdiction against unconsenting states.<sup>309</sup> Two of those opinions asserted that state sovereign immunity was flatly incompatible with the premises of our republican form of government.<sup>310</sup>

In addition, several opinions specifically invoked other jurisdictional heads to substantiate their reasoning that state sovereign immunity did not qualify Article III. In particular, two of the Justices reasoned that Article III could not have left such immunity intact because federal jurisdiction so obviously extended against the states in certain federal question cases—a context in which the states had conceded a measure of their sovereignty to the federal government.<sup>311</sup> Similarly, two opinions concluded that state sovereign immunity could not have survived Article III's adoption because of the jurisdictional head authorizing suits between “a State . . . and . . . foreign States,” which surely contemplated a federal forum for foreign states to pursue their grievances against individual states of the Union.<sup>312</sup> Importantly, the Justices invoked these examples on the ground that they represented even plainer cases for state suability than the case before the Court. 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. If so, the Eleventh Amendment might well have been perceived as a carefully circumscribed answer to that broader question.<sup>313</sup> Accordingly, contrary to the conventional wisdom, reading the

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309. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450-51 (1793) (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 466-67 (Cushing, J.); *id.* at 477 (Jay, C.J.); see also *supra* note 51 and accompanying text.

310. See *Chisholm*, 2 U.S. (2 Dall.) at 457-58 (Wilson, J.); *id.* at 471 (Jay, C.J.); see also *supra* notes 52-53 and accompanying text.

311. See *Chisholm*, 2 U.S. (2 Dall.) at 464-65 (Wilson, J.); *id.* at 468 (Cushing, J.); see also *supra* note 55 and accompanying text.

312. See *Chisholm*, 2 U.S. (2 Dall.) at 451 (Blair, J.); *id.* at 467-68 (Cushing, J.); see also *supra* notes 57-59 and accompanying text.

313. This mode of analysis is distinguishable from the ratification doctrine, which statutory textualists typically reject. The ratification doctrine assumes that if Congress extensively amends a statute without disturbing a well-known interpretation, its action gives rise to an inference of approval. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983) (inferring ratification of interpretations of section 10(b) of the Securities Exchange Act of 1934 because Congress extensively amended the securities laws without touching section 10(b)); *Lykes v. United States*, 343 U.S. 118, 127 (1952) (giving a Treasury Regulation substantial weight because “Congress has made many amendments to the Internal Revenue Code without revising [that] administrative interpretation”). As a general proposition, such an inference is dangerous because Congress may have many reasons for not amending a provision, other than its approval of the way that provision has been construed. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 184, 185-87 (1994) (criticizing the ratification doctrine).

The ratification doctrine, however, bears only a remote relationship to the principles of negative implication discussed here. Certainly, if Congress amends statutory provisions other than the previously construed provision, there is no reason to assume that its failure to amend that one provision carries any significance at all. (For example, if instead of the Eleventh Amendment, eighteenth-century Americans had amended Article III to eliminate circuit riding by the Justices, the failure to mention *Chisholm* would have had no import.) At the same time, however, if a court

Amendment against the contextual baseline of *Chisholm*, if anything, tends to confirm an initial negative implication emanating from the text's disparate inclusion and exclusion of categorical exceptions to potential Article III jurisdiction against the states.<sup>314</sup>

has decisively interpreted a particular statutory provision, and then Congress amends that very provision to repudiate the interpretation in part, the resulting negative implication reflects a tighter and more direct inference. Consider the following example: As of 1991, 42 U.S.C. § 1988 authorized a prevailing party to recover a "reasonable attorney's fee" in actions "to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . . , or title VI of the Civil Rights Act of 1964." That year, in *West Virginia University Hospitals, Inc. v. Casey*, the Court held that the authorization to shift an "attorney's fee" did not permit judges to shift "expert fees," which prior congressional usage had identified as a separate item. 499 U.S. 83, 88-102 (1991). The same year, Congress overturned the result in *Casey*, but in a highly tailored fashion. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 103, 113(a), 105 Stat. 1071, 1074, 1079 (codified as amended at 42 U.S.C. §§ 1981a, 1988 (2000)). In particular, the amended version of § 1988 adopted a new proviso stating that in an action "to enforce a provision of section 1981 or section 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c). Against the baseline of the Court's prior interpretation of the phrase "attorney's fee," this highly targeted reference to two statutes surely implies a lack of authority to award expert fees in cases arising under the many other statutes named in § 1988's general authorization of fees. See *Jenkins ex rel. Jenkins v. Missouri*, 158 F.3d 980, 983 (8th Cir. 1998) (noting that the 1991 legislation's limited amendment of § 1988 left *Casey*'s restrictive holding intact with respect to actions brought under 42 U.S.C. § 1983).

314. Caleb Nelson contends that "[a] constitutional amendment that fails to override some applications of a Supreme Court decision is not the same as a constitutional amendment that codifies those applications." Nelson, *supra* note 20, at 1618. While characteristically powerful, Professor Nelson's contention ultimately proves too much. The Eleventh Amendment adopts a carefully delineated set of exceptions to the nine heads of jurisdiction prescribed by Article III, Section 2. As discussed, this circumstance ordinarily gives rise to a negative implication concerning any unspecified exceptions. One can rebut that implication by showing that a reasonable person would not necessarily have expected drafters to associate the included and omitted categories in the first place. In the Eleventh Amendment context, *Chisholm* cuts against such a conclusion. 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. Accordingly, I do not suggest here that the Eleventh Amendment codified *Chisholm*, but rather that *Chisholm* supplies the critically relevant context for resolving ambiguity about whether to credit or discredit an apparent negative implication otherwise arising from the text.

Professor Nelson also suggests that negative implication arguments are simply inappropriate in this circumstance, because the Eleventh Amendment adopted a form of immunity different from the traditional form. See *id.* at 1619 n.268. In that vein, he has marshaled impressive evidence suggesting that the principle of sovereign immunity traditionally operated as a limitation on the courts' authority to subject sovereigns to compulsory process. See *id.* at 1568-69 (describing the preconstitutional tradition). In contrast, the Eleventh Amendment—much like *Chisholm* itself—dealt with the question in terms of subject matter jurisdiction. See *id.* at 1566. For Professor Nelson, the Amendment's explicit focus on subject matter jurisdiction thus precludes reading it to displace the distinct (and more traditional) category of immunity from personal jurisdiction. See *id.* at 1619 n.268.

That apparent categorical distinction, I believe, cannot bear the weight assigned it. Professor Nelson notes that the available historical records do not reveal why the Amendment's drafters chose to frame the text as a limit on subject matter jurisdiction. See *id.* at 1603. As he acknowledges, however, the drafters perhaps took their lead from *Chisholm*'s majority opinions, which had quite clearly treated Article III's grant of subject matter jurisdiction as the source of federal judicial power "to expose unconsenting states to suit by individuals." *Id.* If that explanation is correct, then the Amendment's limitation on subject matter jurisdiction simply dealt with the problem of sovereign immunity by eliminating (in carefully delineated classes of cases) the identified basis for its abrogation. The resulting focus on subject matter jurisdiction, then, does

Second, this inference finds collateral support in (what little is known about) the Amendment's actual adoption. As others have shown, much 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.<sup>315</sup> James Pfander, for example, has demonstrated that when faced with potentially burdensome litigation of its own, the Massachusetts legislature influentially called for an amendment to establish proper limits on Article III.<sup>316</sup> Specifically, Governor John Hancock secured from the state legislature a final report broadly calling for an amendment to "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>317</sup> The completed resolution was circulated to other governors.<sup>318</sup> Six additional state legislatures quickly followed suit, adopting broadly worded resolutions patterned after that of Massachusetts.<sup>319</sup> "This outpouring of state resolutions," Professor Pfander

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not mean that the Amendment was unconcerned with traditional sovereign immunity as such. Nor does that focus eliminate the possibility that the Amendment's careful enumeration of exceptions to Article III carried a negative implication with respect to the jurisdictional heads outside its scope.

315. See Pfander, *supra* note 20, at 1333-39.

316. *Id.* at 1336.

317. Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: SUITS AGAINST STATES, at 440, 440 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC].

318. See Pfander, *supra* note 20, at 1337.

319. See *id.* at 1337-38; see also, e.g., Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), in 5 DHSC, *supra* note 317, at 618, 618 (instructing the state's senators, and requesting the state's 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"); Proceedings of the Maryland House of Delegates (Dec. 27, 1793), in 5 DHSC, *supra* note 317, at 611, 611 (directing the state's senators, and asking the state's 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), in 5 DHSC, *supra* note 317, at 338, 338-39 (passing a resolution 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"); *id.* at 339 nn.2-3 (noting the Virginia State Senate's passage of the Amendment and its transmittal to the state's congressional delegation); Resolution of North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, *supra* note 317, at 615, 615 (instructing the state's senators, and urging the state's 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"); Resolution of the Connecticut General Assembly (Oct. 29, 1793), in 5 DHSC, *supra* note 317, 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").

notes, “provide[d] the background against which Congress acted in adopting the Eleventh Amendment in 1794.”<sup>320</sup> 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>321</sup>

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In addition, the South Carolina State Senate passed a similar resolution, though the assembly never acted on it. See Proceedings of the South Carolina Senate (Dec. 17, 1793), in 5 DHSC, *supra* note 317, at 610, 611 & n.3 (directing the state’s senators, and requesting the state’s representatives, to secure an amendment to “remove any clause or Article of the said Constitution, which can be construed to imply, or justify a decision that a State is compell[[]]able to answer in any suit, by an individual, or individuals in any Court of the United States”).

320. Pfander, *supra* note 20, at 1339.

321. Although textualists do not credit legislative history, someone who subscribed to the strong purposivism underlying *Hans* and *Seminole Tribe* might find the Amendment’s actual drafting history relevant. If that sparse history tells us anything, it tends to mildly confirm that the Amendment reflected a compromise to go so far and no farther. The day after the decision in *Chisholm*, Representative Theodore Sedgwick, a Federalist from Massachusetts, proposed an amendment in the House that would have broadly provided:

[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

*Proceedings of the United States House of Representatives (Feb. 19, 1793)*, GAZETTE U.S., Feb. 20, 1793, *reprinted in* 5 DHSC, *supra* note 317, at 605, 605-06. The next day, Senator Caleb Strong introduced a narrower amendment in the Senate, one far closer to the ultimate wording of the Eleventh Amendment: “The Judicial power of the United States shall not extend to any suits in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any foreign State.” 3 ANNALS OF CONG. 651-52 (1794). For whatever reason, the Second Congress ended without acting on either proposal. In the Third Congress, Senator Strong introduced a modified version of his earlier proposal, one that substituted the words “shall not be construed to extend” in place of “shall not extend.” 4 ANNALS OF CONG. 25 (1794). After two motions to narrow the amendment were defeated, *see id.* at 30, the Senate passed Senator Strong’s version overwhelmingly, *see id.* at 30-31 (tallying a final vote of 23 to 2). After a narrowing motion of its own was defeated, *see id.* at 476, the House lopsidedly voted to accept the Senate’s version and thus to send the proposed amendment to the states, *see id.* at 477-78 (tallying a final vote of 81 to 9).

Because Congress adopted a proposal far narrower than Representative Sedgwick’s quite comprehensive initial draft, an intentionalist or strong purposivist might infer that the Amendment’s adopters intended go so far and no farther in defining the Amendment’s coverage. See *Seminole Tribe v. Florida*, 517 U.S. 44, 111-12 (1996) (Souter, J., dissenting) (suggesting that if the Amendment’s framers had wished to cover federal question jurisdiction, they would have adopted Representative Sedgwick’s proposal). But it would be quite difficult, even for a nontextualist, to draw too firm a conclusion from the Sedgwick proposal’s fate. So far as the record reveals anything, it appears that the House simply never acted on the Sedgwick proposal. Nothing in the sparse existing record indicates how widely that draft was publicized or discussed. Nor does it suggest why the Sedgwick proposal ultimately did not supply the basis for the proposed Amendment. At most, this drafting history suggests that some of the Amendment’s framers knew or should have known how to draft a broader proposal—a fact that is perhaps evident without invoking Representative Sedgwick’s unadopted text.

Although the evidence does not all point in one direction, the Eleventh Amendment appears to have offered a carefully circumscribed answer to the larger question of how much sovereign immunity states should possess against the exercise of Article III jurisdiction.<sup>322</sup> Because the Amendment reflected such an obvious negative reaction to *Chisholm*'s refusal to recognize state sovereign immunity, one might perceive "considerable irony" in the notion that the Amendment creates a negative implication precluding unspecified forms of such immunity.<sup>323</sup> But such irony abates when one recalls that *Chisholm* triggered a constitutional lawmaking process that is consciously designed to compel majorities—even broad majorities—to compromise and accept less than a full loaf. Neither Article III nor any other provision of the original Constitution dealt directly with the problem of sovereign immunity, and American society had had no previous occasion to confront the question squarely, one way or the other.

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322. A similar question arguably arises in the context of the Sixteenth Amendment, which repudiated a controversial Supreme Court precedent construing Article I, Section 9's limitation on "direct" taxes. Compare, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 39-51 (1999) (arguing that the Sixteenth Amendment should have been understood as a broadly transformative constitutional event that reshaped basic principles of federal taxation), with Eric M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2342-44 (1997) (emphasizing that the Sixteenth Amendment only partially repudiated existing case law on the apportionment of "direct" taxes). As this Article has shown, evaluating the negative implication of a constitutional amendment, like any other textual exegesis, ultimately depends on context. The complex question of how to read the Sixteenth Amendment in context lies beyond the scope of this Article.

323. Nelson, *supra* note 20, at 1618. Of course, the Founding generation was acutely aware of the possibility of negative implications from constitutional amendments. Only a few years prior to the Eleventh Amendment's adoption, an important part of the extensive debate over the Bill of Rights turned on the concern that enumerating specific rights would impliedly negate others. See, e.g., Bradford R. Clark, *Unitary Judiciary Review*, 72 GEO. WASH. L. REV. 319, 341-42 (2003) (discussing the negative implication concerns raised during the debate over the Bill of Rights); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 5-6 (1994) (same). For example, in introducing the relevant amendments in Congress, Madison acknowledged that "one of the most plausible arguments I ever heard" against the Bill of Rights was "that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration." 1 ANNALS OF CONG. 456 (1789) (statement of Rep. Madison). It is widely believed of course that the Ninth and Tenth Amendments were adopted in response to this concern. See Clark, *supra*, at 342-47. Having so recently gone through the process of considering and guarding against the possibility of negative implications from constitutional amendments, those who adopted the Eleventh Amendment were perhaps keenly aware that its enumeration of limits on Article III power would potentially carry a negative implication. Of course, one might argue that restricting state sovereign immunity by negative implication is in tension with the preexisting rule of construction prescribed by the Tenth Amendment. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). By its terms, however, that Amendment simply does not preclude the derivation of federal authority through a properly drawn textual implication. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799-800 (1999); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasizing that the Tenth Amendment does not limit the exercise of federal authority to powers "expressly" delegated to the United States). Thus, to the extent that "the judicial Power of the United States" otherwise permits federal courts to adjudicate cases or controversies against the states, the Tenth Amendment does not preclude the exercise of such authority.

When dissatisfaction with *Chisholm* brought the Article V process to bear on that previously unanswered question, the text that emerged quite clearly went so far and no farther in embracing state sovereign immunity. Perhaps the resultant line-drawing merely reflected an inability to secure the requisite supermajorities for a broader Amendment. But if so, that would be fully consistent with the expected play of Article V. Especially in the context of an amendment process designed to protect political minorities, one cannot disregard the selective inclusion and exclusion implicit in such careful specification. If American society for the first time was explicitly confronting the appropriate limitations on potential Article III jurisdiction over suits against states, one should perhaps attach significance not only to what the drafters placed in the Amendment, but also to what they deemed necessary or even prudent to exclude.<sup>324</sup> To do otherwise would risk upsetting whatever precise compromise may have emerged from the carefully drawn lawmaking process prescribed by Article V.

#### CONCLUSION

For more than a century, the Court has invoked the tenets of strong purposivism to hold that the Eleventh Amendment means far more than it says. Given the Amendment's perceived purpose to repudiate all aspects of *Chisholm v. Georgia*, the Court read the Amendment as adopting rather comprehensive state sovereign immunity, despite its more limited text. When *Hans v. Louisiana* announced that conclusion in 1890, its method of reasoning fit comfortably with the prevailing interpretive norms of the day. Lawmaking bodies have imperfect foresight, and they inevitably must write laws in inherently imprecise human language. When the text of an enacted

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324. Caleb Nelson questions whether one should attach any weight to the failure to attract the requisite supermajorities for a broader version of state sovereign immunity. See Nelson, *supra* note 20, at 1618-19. Even if the Amendment's narrow delineation reflected an inability to secure the supermajorities needed to adopt broader protections, Professor Nelson finds it implausible to believe "that the necessary supermajorities would have approved an amendment explicitly exposing states to such suits, or that such an amendment would then have been ratified by three-fourths of the states." *Id.* at 1619. Framing the question in that way, I believe, inappropriately shifts the burden of inertia. If one is justified in drawing a negative implication from the complementary texts of Article III and the Eleventh Amendment, then the adoption of those texts confers the necessary legitimacy on whatever textual implication one might properly draw from them. If one also had to verify that a particular implication could survive the Amendment process as a freestanding proposition, all negative implication would cease. For example, it is certainly fair to infer that the carefully specified process of bicameralism and presentment impliedly negates congressional lawmaking through other means. See *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto as a violation of Article I, Section 7's bicameralism and presentment requirements). If correct, however, that conclusion need not be confirmed by the further determination that the Founders could have passed a freestanding amendment affirmatively prohibiting the legislative veto or any similar informal legislative lawmaking devices. The same conclusion applies with respect to whatever negative implication one might justifiably draw from the relationship between Article III and the Eleventh Amendment.



law deviated too much from its apparent purpose, the Court thought it proper to smooth the rough edges of statutes that perhaps represented clear but imprecise expressions of intent. The Court's approach to the Eleventh Amendment was of a piece with that philosophy.

Modern methodological premises are different. The Rehnquist Court has made clear that the details of precise *statutory* texts typically represent the fruits of a legislative compromise—a decision to go only so far in pursuit of a goal or to pursue a mix of goals that are not always consistent. The Court has also emphasized that judges in our system of government have a duty to respect such compromises. Although the results may sometimes seem awkward, that is the nature of compromise. Accordingly, even when a precise statute seems over- or underinclusive in relation to its background purpose, the Court will adhere closely to the statute's clearly expressed terms, lest it upset one of the (frequently unrecorded) bargains essential to its passage.

These premises apply with even greater force to constitutional adjudication. Although modern constitutional scholarship emphasizes the document's relatively open-ended clauses, the Constitution also includes many important provisions that embody clear and precise policy judgments. When that is the case, the judicial duty to respect the terms of a precise compromise is, if anything, even more pronounced. By specifying not only the ends but also the particular means of their pursuit, a detailed and precise constitutional text, like its statutory analogue, may reflect an expressed willingness to go so far and no farther in pursuit of the law's ultimate purposes. Because of its multitiered supermajority requirements, the Article V process for amending the Constitution gives small minorities of our political society extraordinary power to veto constitutional change or to insist upon compromise as the price of assent.

Accordingly, when interpreting a precisely worded constitutional provision like the Eleventh Amendment, the Court must adhere to the compromise embedded in the text. It must not readjust the Amendment's precise terms to capture their apparent background purpose. And it must be sensitive to the possibility that the Amendment's precise enumeration of exceptions to the grant of Article III power carries a negative implication, the product of an apparent decision to go so far and no farther in defining the desired exceptions to federal jurisdiction. These analytical premises—both of which are missing from the Court's Eleventh Amendment jurisprudence—reflect the reality that the Constitution is the product of a process that, by conscious design, places extraordinary weight on the right to insist upon compromise.