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# The People or the State?: Chisholm v. Georgia and Popular Sovereignty

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## ESSAYS

### THE PEOPLE OR THE STATE?: *CHISHOLM V. GEORGIA* AND POPULAR SOVEREIGNTY

*Randy E. Barnett\**

**C**HISHOLM v. Georgia was the first great constitutional case decided by the Supreme Court. In *Chisholm*, the Court addressed a fundamental question: Who is sovereign? The people or the state? It adopted an individual concept of popular sovereignty rather than the modern view that limits popular sovereignty to collective or democratic self-government. It denied that the State of Georgia was a sovereign entitled, like the King of England, to assert immunity from a lawsuit brought by a private citizen. Despite all this, *Chisholm* is not among the canon of cases that all law students are taught. Why not? In this Essay, I offer several reasons: constitutional law is taught by doctrine rather than chronologically; law professors have reason to privilege the Marshall Court; and the Court's individualist view of popular sovereignty is thought to have been repudiated by the adoption of the Eleventh Amendment. I explain why the Eleventh Amendment did not repudiate the view of sovereignty expressed in *Chisholm* by comparing the wording of the Eleventh with that of the Ninth Amendment. I conclude by suggesting another reason why *Chisholm* is not in the canon: law professors follow the lead of the Supreme Court, and, like the Ninth Amendment, the Supreme Court has deemed its first great decision too radical in its implications.

#### INTRODUCTION

Constitutional law professors know two things that their students often do not: John Marshall was not the first Chief Justice of the

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United States, and *Marbury v. Madison*<sup>1</sup> was not the first great constitutional case decided by the Supreme Court. That honor goes to *Chisholm v. Georgia*,<sup>2</sup> decided some ten years earlier when John Jay was Chief Justice. Students may be unaware of these facts because most basic courses in constitutional law begin with *Marbury*, which, along with Chief Justice Marshall's opinions in *McCulloch v. Maryland*<sup>3</sup> and *Gibbons v. Ogden*,<sup>4</sup> are the earliest cases that are emphasized. The opinions in *Chisholm* are never read; at most, the case is mentioned in passing to explain the origin of the Eleventh Amendment, which reversed its holding.

In *Chisholm*, the Supreme Court, by a vote of four to one, rejected Georgia's assertion of sovereign immunity as a defense against a suit in federal court for breach of contract brought against it by a citizen of another state. The fundamental nature of the issue presented by the case was aptly characterized by Justice Wilson:

This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this—"do the people of the United States form a Nation?"<sup>5</sup>

In *Chisholm*, the Justices of the Supreme Court rejected Georgia's claim to be sovereign. They concluded instead that, to the extent the term "sovereignty" is even appropriately applied to the newly adopted Constitution, sovereignty rests with the people, rather than with state governments. Their decision is inconsistent with both the modern concept of popular sovereignty that views democratically elected legislatures as exercising the sovereign will of the people and the modern claim that states are entitled to the same immunity as was enjoyed by the King of England. The Justices in *Chisholm* affirmed that, in America, the states are not

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

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

<sup>3</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>4</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>5</sup> *Chisholm*, 2 U.S. (2 Dall.) at 453 (Wilson, J.) (emphasis omitted).

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kings, and their legislatures are not the supreme successors to the Crown.

### I. WHY WE SHOULD TEACH *CHISHOLM*

The judicial opinions in *Chisholm* are interesting for several reasons. First, the opinions exemplify the early reliance by the courts primarily on first principles, or what Justice Wilson referred to as “general principles of right,”<sup>6</sup> and only secondarily on the text of the Constitution. *Chisholm* is typical in this regard. This is not to claim that courts ever countenanced using first principles to ignore or contradict a pertinent text. Rather, *Chisholm* well illustrates how first principles were used to interpret the meaning of the text, such as Article III, Section 2, which specifies that “[t]he judicial power of the United States shall extend to . . . controversies, between a state and citizens of another State.”<sup>7</sup>

In *Chisholm*, Georgia contended that this text needed to be qualified by the extratextual doctrine of sovereign immunity. The Court did not reject Georgia’s claim due to its reliance on first principles. Instead, it rejected the first principles Georgia asserted in favor of others. Justice Wilson began his analysis of Georgia’s claim of sovereign immunity by contesting the appropriateness of the very term “sovereignty” with regard to the new Constitution:

To the Constitution of the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves “Sovereign” people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.<sup>8</sup>

Wilson then identified possible alternative meanings of the term “sovereign.” First, “the term sovereign has for its correlative, subject[.] In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Con-

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<sup>6</sup> Id. at 456.

<sup>7</sup> U.S. Const. art. III, § 2.

<sup>8</sup> *Chisholm*, 2 U.S. (2 Dall.) at 454 (emphasis omitted).

stitution there are citizens, but no subjects.”<sup>9</sup> Indeed, Wilson noted that the “term, subject, occurs . . . once in the instrument; but to mark the contrast strongly, the epithet ‘foreign’ is prefixed.”<sup>10</sup> Wilson rejected the concept of “subject” as inapplicable to states because he knew “the Government of that State to be republican; and my short definition of such a Government is,—one constructed on this principle, that the Supreme Power resides in the body of the people.”<sup>11</sup> Furthermore, Wilson argued that

the 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.<sup>12</sup>

In other words, according to Justice Wilson, to the extent one wishes to use the word “sovereignty” at all, sovereignty lies in the people themselves, not in any government formed by the people.

Wilson then considered another sense of sovereignty that relates it to the feudal power of English kings. “Into England this system was introduced by the conqueror: and to this æra we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. . . . With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.”<sup>13</sup> Wilson characterized this as “only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care.”<sup>14</sup>

Wilson rejected this feudal notion of sovereignty as inconsistent with “another principle, very different in its nature and operations [that] forms . . . the basis of sound and genuine jurisprudence.”<sup>15</sup> This is the principle that “laws derived from the pure source of

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<sup>9</sup> Id. at 456 (emphasis omitted).

<sup>10</sup> Id. (citing U.S. Const. art. III, § 3) (emphasis omitted).

<sup>11</sup> Id. at 457.

<sup>12</sup> Id. (emphasis omitted).

<sup>13</sup> Id. at 458 (emphasis omitted).

<sup>14</sup> Id. (emphasis omitted).

<sup>15</sup> Id.

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equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.”<sup>16</sup> In other words, obedience must rest on the consent of the only “sovereign” from which justice and equality rest: the individual person who is asked to obey the law. Wilson believed that the only reason “a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws.”<sup>17</sup>

State governments are simply the product of these very same people, themselves bound by laws, who have banded together to form a government. As such, states are as bound by the law as are the ultimate sovereign individuals that establish them. “If *one free man*, an *original sovereign*, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired.”<sup>18</sup>

From this analysis Wilson reached the following conclusion about Georgia’s claim of sovereign immunity against a suit for breach of contract:

A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.<sup>19</sup>

That Justice Wilson was the author of this opinion is significant. James Wilson was as crucial a member of the Constitutional Convention as any other, including James Madison. His defense of the Constitution in the Pennsylvania ratification convention was

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<sup>16</sup> Id. (emphasis omitted).

<sup>17</sup> Id. at 456 (emphasis omitted).

<sup>18</sup> Id. (emphasis added and omitted).

<sup>19</sup> Id. (emphasis omitted).

lengthy and influential,<sup>20</sup> and that state's early ratification set the stage for the Constitution's eventual adoption in other key states.<sup>21</sup> Wilson was also among the most theoretically sophisticated of the Founders, as his lectures on law given as a professor from 1790 to 1792 at the College of Pennsylvania demonstrate.<sup>22</sup> Indeed, one reason why his opinion in *Chisholm* may be overlooked is that it may seem too long and theoretical to be a good *judicial* opinion.

Justice Wilson was not alone in locating sovereignty in the individual person. Chief Justice Jay, in his opinion, referred tellingly to "the joint and equal sovereigns of this country."<sup>23</sup> Jay affirmed the "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."<sup>24</sup> Denying individuals a right to sue a state, while allowing them to sue municipalities, "would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that *popular sovereignty* in which every citizen partakes."<sup>25</sup> Neither Wilson nor Jay's individualist view of sovereignty fits comfortably into the notion of popular sovereignty as a purely "collective" concept.<sup>26</sup>

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<sup>20</sup> Given that Wilson's lengthy speeches were virtually the only ones reported in Elliott's debates for the Pennsylvania ratification convention, it would seem that he was thought to have been a crucial member of that convention. See 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 415–542 (photo. reprint 1974) (Jonathan Elliott ed., 2d ed. n.d.) (records of Pennsylvania debates).

<sup>21</sup> Ratifying a week after Delaware, Pennsylvania was just the second state—and the first large one—to ratify the Constitution. 2 *The Documentary History of the Constitution of the United States of America* 27 (photo. reprint 1965) (Washington, U.S. Dep't of State 1894).

<sup>22</sup> See Mark David Hall, *The Political and Legal Philosophy of James Wilson 1742–1798*, at 27–29 (1997) (describing the importance of Wilson's lectures on law).

<sup>23</sup> *Chisholm*, 2 U.S. (2 Dall.) at 477 (Jay, C.J.).

<sup>24</sup> *Id.* at 479 (emphasis added).

<sup>25</sup> *Id.* at 473 (emphasis added).

<sup>26</sup> Professor Elizabeth Price Foley captures the individualist concept of popular sovereignty by calling it "residual individual sovereignty." See Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* 42 (2006) ("[O]ne of the foundational principles of American law—at both the state and federal level—is residual individual sovereignty."). Professor William Casto has coined the phrase "the people's sovereignty" to convey this idea. See William R. Casto, James Iredell and the American Origins of Judicial Review, 27 *Conn. L. Rev.* 329, 330 (1995) ("[T]he idea of the people's sovereignty should not be confused with



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Even Justice Iredell, the sole dissenter in *Chisholm*, did not rest his dissent on a rejection of the joint and individual sovereignty of the people. Instead, he devoted the bulk of his opinion to the question of whether the Supreme Court has jurisdiction to hear a breach of contract case in the absence of express authorization either by the Constitution itself or by Congress. Because he concluded that such authorization was both required and lacking, Iredell contended that the suit should have been dismissed. Had this reasoning prevailed, there would have been no need to reach the issue of sovereignty, which Justice Iredell addresses only in passing.<sup>27</sup>

Justice Wilson and Chief Justice Jay's individualist concept of sovereignty was later passionately expanded upon by John Taylor in response to the Supreme Court's opinion in *McCulloch*:

I do not know how it has happened, that this word has crept into our political dialect, unless it be that mankind prefer mystery to knowledge; and that governments love obscurity better than specification. The unknown powers of sovereignty and supremacy may be relished, because they tickle the mind with hopes and fears; just as we indulge the taste with Cayenne pepper, though it disorders the health, and finally destroys the body. Governments delight in a power to administer the palatable drugs of exclusive privileges and pecuniary gifts; and selfishness is willing enough to receive them; and this mutual pleasure may possibly have sug-

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popular sovereignty, which carries connotations of democracy and universal suffrage.”). But it may well be anachronistic to concede the term “popular sovereignty” actually used by Chief Justice Jay to the modern collective reading.

<sup>27</sup> On the nature of sovereignty, Justice Iredell says,

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.

*Chisholm*, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting) (emphasis omitted).

gested the ingenious stratagem, for neutralizing constitutional restrictions by a single word . . . .<sup>28</sup>

In his lengthy treatment of the subject Taylor notes,

Sovereignty implies superiority and subordination. It was therefore inapplicable to a case of equality, and more so to the subordinate power in reference to its creator. The word being rejected by our constitutions, cannot be correctly adopted for their construction . . . . It would produce several very obvious contradictions in our political principles. It would transfer sovereignty from the people, (*confining it to mean the right of self-government only,*) to their own servants. It would invest governments and departments, invested with limited powers only, with unspecified powers. It would create many sovereignties, each having a right to determine the extent of its sovereignty by its own will. . . . Our constitutions, therefore, wisely rejected this indefinite word as a traitor of civil rights, and endeavored to kill it dead by specifications and restrictions of power, that it might never again be used in political disquisitions.<sup>29</sup>

While Justice Iredell would have afforded to states the sovereignty of kings, Taylor identifies whence kings appropriated the term. He observed that “the term ‘sovereignty,’ was sacrilegiously stolen from the attributes of God, and impiously assumed by kings.”<sup>30</sup> He then condemned the importation of the concept into a republican system. “Though [kings] committed the theft, aristocracies and republics have claimed the spoil.”<sup>31</sup> Taylor denied that the U.S. Constitution included the concept:

By our constitutions, we rejected the errors upon which our forefathers had been wrecked, and withheld from our governments the keys of temporal and eternal rights, by usurping which, their patriots had been converted into tyrants; and invested them only with powers to restrain internal wrongs, and to resist foreign hos-

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<sup>28</sup> John Taylor, *Construction Construed, and Constitutions Vindicated* 25 (The Lawbook Exchange, Ltd. 1998) (1820).

<sup>29</sup> *Id.* at 26 (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

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tility; without designing to establish a sovereign power of robbing one citizen to enrich another.<sup>32</sup>

By omitting *Chisholm* from the canon, students learn none of this. They are left unexposed to the radical yet fundamental idea that if anyone is sovereign, it is “We the People” as individuals, in contrast with the modern view that locates popular sovereignty in Congress or state legislatures, which supposedly represent the will of the people.

Another reason for teaching *Chisholm* is that it represents the “road not taken” with respect to constitutional amendments. Congress and the states chose to follow the advice of Justice Blair. “If the Constitution is found inconvenient in practice in this or any other particular,” he wrote in his opinion, “it is well that a regular mode is pointed out for amendment.”<sup>33</sup> Precisely because its holding was reversed two years later by the ratification of the Eleventh Amendment, *Chisholm* represents an opportunity to consider how the practice of constitutional interpretation by courts might have been different if the tradition of correcting Supreme Court decisions by express amendment had taken hold.

The Eleventh Amendment reads as follows: “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.”<sup>34</sup> As I discuss below, there are two distinctly different ways by which this language “reversed” the Court’s decision in *Chisholm*. The first is the assumption of modern so-called Eleventh Amendment cases: the enactment of the Eleventh Amendment could imply that the Supreme Court had incorrectly interpreted the Constitution, and the Amendment therefore restores its original meaning. But, second, the enactment of the Eleventh Amendment could imply instead that the Court was correct in its interpretation of Article III, but the states were so unhappy with this implication of the original meaning of the Constitution that they sought successfully to change the original meaning by using Article V. Somewhere in between these two implications lies the

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<sup>32</sup> Id. at 26–27.

<sup>33</sup> *Chisholm*, 2 U.S. (2 Dall.) at 468 (Blair, J.).

<sup>34</sup> U.S. Const. amend. XI.

possibility that the Court's decision was within the range of permissible interpretations of the original text, as was the Eleventh Amendment, in which case, once again, the Court was not mistaken about the original meaning of the Constitution.

In any case, if written amendments were socially accepted as a more normal reaction to an objectionable Supreme Court decision, the need perceived by some for the Supreme Court to engage in creative "interpretation" might be obviated. The rapid adoption of the Eleventh Amendment suggests that Article V constitutional amendments can be practical, provided the legal and political culture views amendments as a natural response *either* to a Supreme Court misinterpretation of the Constitution or to a correct interpretation of our imperfect Constitution with which there is widespread dissatisfaction. Today, lacking a culture of written amendment, correct but objectionable interpretations of the Constitution have to be treated as misinterpretations to justify judicial intervention.

## II. WHY WE NEGLECT *CHISHOLM*

Before addressing what the Eleventh Amendment should be understood to imply about the correctness of the decision in *Chisholm*, it is worth pausing for a moment to ask why *Chisholm* and the adoption of the Eleventh Amendment are usually omitted from the canon—the set of cases almost always covered in the basic course on constitutional law. There are at least three plausible reasons. First, constitutional law is ordinarily taught doctrine by doctrine, rather than chronologically. If one organizes the course by modern doctrines, there is no obvious or natural place in which to include *Chisholm* because the nature of "sovereignty" is not among the doctrines normally taught in either the structures or the rights portions of constitutional law.

True, *Chisholm* and the Eleventh Amendment *could* be taught in a traditional "structures" course, and some professors surely do. Because, however, professors do not traditionally cover the concept of "sovereignty" in constitutional law and consider the doctrine of sovereign immunity an additional doctrinal topic—and a complex one at that—*Chisholm* itself is typically omitted. By the same token, when teaching constitutional law doctrine by doctrine, there is no natural place in which to cover the case of *Prigg v.*

*Pennsylvania*,<sup>35</sup> which concerns the meaning of the Fugitive Slave Clause. Even the pivotal case of *Dred Scott v. Sanford*<sup>36</sup> does not fit neatly into introductory courses devoted mainly to structural issues.

Were constitutional law taught chronologically rather than doctrine by doctrine, it would be an open invitation to begin the course by studying the first great constitutional controversy—the debate in Congress and within the Washington administration over the first Bank of the United States—and follow that with the question that occupied the Supreme Court in *Chisholm*, its first major decision: the nature of sovereignty in the United States. And it would be equally natural to move from there to coverage of the Marshall Court’s famous decisions—*Marbury v. Madison*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*—followed by the infamous slavery decisions of the Taney Court.

An opening sequence such as this would convey to students an entirely different impression of the subject of constitutional law than does the more typical approach that is organized by doctrine and often begins with *Marbury*. It would also make far more meaningful to students both Chief Justice Marshall’s views on the nature of sovereignty that he articulates in *McCulloch*,<sup>37</sup> which otherwise seem superfluous, and Chief Justice Taney’s views of sovereignty expressed in *Dred Scott*.<sup>38</sup> In other words, *Chisholm* is just the first of several landmark Supreme Court treatments of the nature of sovereignty, but dropping it from the canon distorts the teaching of this subject, as the Marshall Court opinions are studied out of context.<sup>39</sup>

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<sup>35</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>36</sup> 60 U.S. (19 How.) 393 (1856).

<sup>37</sup> See 17 U.S. at 404–05 (“The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).

<sup>38</sup> See 60 U.S. at 404 (“The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty.”).

<sup>39</sup> To this sequence I also add the discussion of sovereignty articulated in James Madison’s *Report to the Virginia House of Delegates*. See James Madison, Report on

The second reason we lead with *Marbury* rather than with *Chisholm* is that, until relatively recently, constitutional law professors in the post-Warren Court era viewed judicial review as an engine of social justice. Although enthusiasm for judicial review has waned in recent years—as witnessed by the recent interest in “judicial minimalism,”<sup>40</sup> “taking the Constitution away from the courts,”<sup>41</sup> and “popular constitutionalism”<sup>42</sup>—this current intellectual trend has yet to affect the organization of the basic courses in constitutional law. So judicial review still kicks off most casebooks that were devised years before interest developed in “the constitution outside the courts.”<sup>43</sup>

A third reason for omitting *Chisholm* is that, according to “modern” Supreme Court decisions dating back to the 1890 case of *Hans v. Louisiana*,<sup>44</sup> the Eleventh Amendment repudiated *Chisholm*’s view of sovereignty, and, therefore, the decision itself is a dead letter. Even when professors include the Eleventh Amendment in the basic constitutional law course, they cover it well after *Marbury* and usually relegate *Chisholm* to a passing footnote in the coverage of the modern Eleventh Amendment cases.

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the Alien and Sedition Acts, *reprinted in* Writings 608, 611 (Jack N. Rakove ed., 1999) (“The constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. . . . The states then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated . . .”).

<sup>40</sup> See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

<sup>41</sup> See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>42</sup> See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

<sup>43</sup> See Mark Tushnet, *Constitutional Interpretation Outside the Courts*, 37 *J. Interdisc. Hist.* 415, 415 (2007) (“By the late twentieth century, the Constitution had become the property of lawyers and, especially, judges. When the public paid attention to constitutional issues, it focused on the Supreme Court. In the 1990s, however, several scholars in law and political science turned their attention to ‘the Constitution outside the courts.’ Much of their concern was normative. The hopes that they may have had for a liberal, reformist Supreme Court on the model of Chief Justice Earl Warren’s had been decisively dashed. But they could draw support for their claim that legislatures had an important role in constitutional interpretation by gesturing toward the past, citing prominent examples of congressional and executive constitutional interpretation.”).

<sup>44</sup> 134 U.S. 1 (1890).

This last reason for ignoring *Chisholm*—that the adoption of the Eleventh Amendment repudiated it—is the subject of the balance of this Essay. I contest the modern Court’s claim that the Eleventh Amendment repudiated the view of sovereignty the Court had previously adopted in *Chisholm*. Although I am hardly the first person to question this claim,<sup>45</sup> I hope to add to the current discussion by offering a comparison of the wording of the Ninth and Eleventh Amendments that undercuts the claim that the Eleventh Amendment repudiated the individualist concept of sovereignty the Court relied upon in *Chisholm*. Consequently, I join a diverse group of other scholars who have concluded that the modern Supreme Court’s so-called Eleventh Amendment line of cases is based on a faulty reading of the Eleventh Amendment dating back to *Hans* and is fundamentally misconceived.

### III. WHY THE ELEVENTH AMENDMENT DID NOT REPUDIATE *CHISHOLM*’S APPROACH TO POPULAR SOVEREIGNTY

To assess the relationship between the Eleventh Amendment and *Chisholm*, it is useful to identify clearly the two alternative readings of the Amendment. First, the Amendment could be read narrowly as simply reversing the holding of *Chisholm* that states may be sued by citizens of other states in federal court. Of course, by also immunizing states from suits by subjects of foreign nations, the Amendment does more than this, which may be significant, as we shall see. According to this interpretation, the Eleventh

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<sup>45</sup> See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1978) (arguing that sovereign immunity is a common law doctrine and not constitutionally compelled); 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 (1983) (arguing that the Amendment does not cover federal question or admiralty jurisdiction); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983) (arguing from a historical standpoint that the Amendment’s passage was primarily secured as part of a bargain to enforce the peace treaty); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L. Rev. 953, 1010 (2000) (arguing that “sovereign immunity is in some respects unjust” and “the Eleventh Amendment need not be understood to have endorsed that injustice as a general proposition”); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269 (1998) (arguing that the Amendment represented a compromise on fiscal policy between the states and the federal government).

Amendment leaves entirely intact the underlying individualist concept of popular sovereignty upon which the Court rested its holding. The Amendment merely negates one constitutional implication of this more general concept of popular sovereignty.

A second reading of the Amendment is the one adopted by the Supreme Court in *Hans v. Louisiana* that continues to be accepted by the Court today. In *Seminole Tribe of Florida v. Florida*, Chief Justice Rehnquist provided a concise summary of this position:

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.”<sup>46</sup>

Chief Justice Rehnquist excoriates the dissent for “relying upon the now-discredited decision in *Chisholm v. Georgia*.”<sup>47</sup> And he affirms the Court’s conclusion in *Hans* that the views of state sovereignty articulated by Justice Iredell in his dissent “were clearly right,—as the people of the United States in their sovereign capacity subsequently decided” when it enacted the Eleventh Amendment.<sup>48</sup>

The modern Eleventh Amendment doctrine, therefore, rests not on the literal text of the Amendment, but rather on what the Court claims to be its underlying principle—what Chief Justice Rehnquist referred to as the Amendment’s “presupposition,”<sup>49</sup> and what Justice Kennedy referred to in *Alden v. Maine* as “fundamental postulates implicit in the constitutional design.”<sup>50</sup> Chief Justice Rehnquist is quite forthright about his departure from the text in favor of a more reasonable construction:

The dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recog-

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<sup>46</sup> 517 U.S. 44, 54 (1996) (citations omitted).

<sup>47</sup> *Id.* at 68.

<sup>48</sup> *Hans*, 134 U.S. at 14.

<sup>49</sup> *Seminole Tribe*, 517 U.S. at 54.

<sup>50</sup> 527 U.S. 706, 729 (1999).



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nized 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.” The text dealt in terms only with the problem presented by the decision in *Chisholm* . . . .<sup>51</sup>

As I have already noted, however, this last sentence is not quite true. The text of the Eleventh Amendment goes beyond the narrow problem of a state being sued by a citizen of another state in federal court and extends to suits by “citizens or subjects of any foreign state.” Professor John Manning finds this to be significant:

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.<sup>52</sup>

From this, Manning concludes that “[t]he 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>53</sup>

It is striking that the Court, beginning with *Hans* and continuing through today, has employed a version of originalism that, in recent years, has been repudiated by most originalists. This version is based on the original intentions of either the framers or ratifiers, rather than upon the original public meaning of the text they

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<sup>51</sup> *Seminole Tribe*, 517 U.S. at 69 (quoting *Hans*, 134 U.S. at 15) (citation omitted); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (“Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.”).

<sup>52</sup> John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1739 (2004).

<sup>53</sup> *Id.*; see also Jackson, *supra* note 45, at 1000 (“The precision and specificity of its language lend themselves to (though they do not compel) a narrow reading.”).

adopted. By using the principles, “presuppositions,” or “postulates” allegedly held by the drafters to override the public meaning of the text itself, the Court in *Hans* employed the same version of original intent originalism that Chief Justice Taney used in *Dred Scott* when interpreting the meaning of “the People” in the Preamble and in the Declaration of Independence.<sup>54</sup>

Justice Bradley’s opinion in *Hans* exemplifies a typical feature of original intent originalism: its reliance on the counterfactual hypothetical intentions of the framers.

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>55</sup>

How similar this sounds to Chief Justice Taney’s method in *Dred Scott*.<sup>56</sup>

Given the certitude with which a majority of Justices now believe that the Court’s interpretation of the text in *Chisholm* was erroneous and that the Eleventh Amendment merely reestablished

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<sup>54</sup> The use of original intent to narrow the meaning of the text of the Reconstruction Amendments was a favorite technique of the Reconstruction Court, beginning as early as the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Although decided after Reconstruction ended, *Hans* exemplifies this interpretive practice. On the other hand, it could be argued that these background presuppositions and postulates informed the public meaning of Article III that four of five members of the Supreme Court in *Chisholm*, including so principal a framer as James Wilson, then proceeded to ignore.

<sup>55</sup> *Hans*, 134 U.S. at 15.

<sup>56</sup> See 60 U.S. at 416 (“It cannot be supposed that [the State sovereignties] intended to secure to [free blacks] rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State.”).

the status quo ante, it is useful to remember that Chief Justice John Marshall apparently did not agree. In *Fletcher v. Peck*, he continued to affirm that the Court's reading of the Constitution in *Chisholm* was correct until the text was altered by the Eleventh Amendment.<sup>57</sup> In a much-neglected passage, he described the principle that states were amenable to suit in federal court as

*originally ingrafted in that instrument*, though no longer a part of it. The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual States. A state, then, which violated its own contract was suable in the courts of the United States for that violation. . . . This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.<sup>58</sup>

In other words, in *Fletcher*, Marshall explicitly rejected the proposition that *Chisholm* was incorrectly decided—the proposition first asserted in *Hans* some one hundred years after the adoption of the Eleventh Amendment. And, like the Court in *Chisholm*, Marshall rejected an argument “in favour of presuming an intention to except a case, not excepted by the words of the constitution.”<sup>59</sup>

In his article, Manning defends the narrow interpretation of the Eleventh Amendment by making an important methodological claim about originalist textualism: specific constitutional text should be interpreted specifically according to its terms and not expanded, contracted, or contradicted by the purposes, original intentions, or underlying principles for which the text was adopted. “Given the heightened consensus requirements imposed by Article V,” he writes,

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 actually drawn, lest they disturb some unrecorded concession insisted upon by the mi-

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<sup>57</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>58</sup> *Id.* at 139 (emphasis added).

<sup>59</sup> *Id.* (interpreting the Contracts Clause).

nority or offered preemptively by the majority as part of the price of assent.<sup>60</sup>

“In short,” Manning continues, “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.”<sup>61</sup>

Manning suggests that one justification for the conclusion that the original public meaning of the Eleventh Amendment was limited to its precise terms is based on the legal background against which the Amendment was adopted.<sup>62</sup> The most salient background assumption for the Eleventh Amendment was the Court’s decision in *Chisholm* in which four of five Justices denied the existence, as a general matter, of state sovereign immunity, with Justices Wilson and Jay specifically “assert[ing] that state sovereign immunity was flatly incompatible with the premises of our republican form of government.”<sup>63</sup>

According to the *Chisholm* Court, states may be sued by individuals in federal court to enforce their private contractual rights; and the states’ assertion that the text of Article III should be qualified by an unenumerated immunity from suit based on their sovereignty is inconsistent with the fundamental principles of republicanism on which the Constitution rests. The Court’s decision in *Chisholm*, therefore, put before Congress, the states, and the people of the nation a proposition concerning the nature of sovereignty that, while it may have been implicit in the text of Article III, might not have been widely apparent. With this issue now unequivocally presented by the decision in *Chisholm*, did Congress respond with an amendment squarely rejecting the Court’s view of popular sovereignty as resting in the People as individuals rather than in the states? It did not. Instead, it responded with a very narrow, precisely worded withdrawal of judicial power—subject-matter jurisdiction—in two specific circumstances.

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<sup>60</sup> Manning, *supra* note 52, at 1735–36.

<sup>61</sup> *Id.* at 1736.

<sup>62</sup> See *id.* at 1743 (“[T]o evaluate the Amendment’s limited enumeration of exceptions, it is helpful to know the legal baseline against which the adopters acted.”).

<sup>63</sup> *Id.* at 1743–44.

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Would the Eleventh Amendment have been ratified so swiftly, or at all, if it had been more broadly worded? Manning contends that we can never know the answer to this question. The wording of the Amendment could well have been a product of compromise within the drafting process or have been drafted in anticipation of potential, but not yet realized, opposition to a broader claim of state sovereignty. To interpret the Amendment more broadly than the language that was actually proposed and ratified is to run a serious risk of overriding the desires of either a majority or a *potential ratification-blocking minority* who would never have consented to a broader claim of state power. Furthermore, it may well have been the case that nationalist Federalists in Congress gave the states the bare minimum needed to mollify them. Again, because it is impossible to know for certain, the Court should adhere to the public meaning of the text actually adopted, rather than overriding specific text by appealing to an allegedly broad underlying purpose or principle.

Manning's summary of his argument here is worth quoting at length:

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. 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. To do otherwise would risk upsetting

whatever precise compromise may have emerged from the carefully drawn lawmaking process prescribed by Article V.<sup>64</sup>

Although I find persuasive Manning's argument against using underlying purposes to expand the specific wording of the Eleventh Amendment, he fails to consider another possible defense of the Court's so-called Eleventh Amendment jurisprudence. Constitutional texts not only have a literal grammatical meaning in themselves; they also have what Professor Lawrence Solum has called "constitutional implicature."<sup>65</sup> These implications can be express references in the text to concepts or can be implied affirmances of underlying assumptions that went unmentioned in the text. Shifting the assumptions underlying the text would distort, rather than faithfully adhere to, the public meaning of the text.

An implication of the text is not the same as its purpose. A piece of text can have many purposes, and these purposes are largely extratextual. A particular provision of a text is very likely to be either under- or overinclusive of its underlying purposes, or both. Moreover, while there was a demonstrable consensus concerning the adoption of a particular wording of a text, there may have been no comparable consensus about underlying purposes. In contrast, an implication of the text is a product of its *meaning*, though it may not be expressed in so many words. While saying one thing, it may imply something compatible with, though beyond, what it says. And the original public meaning of the Constitution might be distorted if this implication is later denied or reversed, while the specific expressed meaning of the text is preserved.

A good example of constitutional implicature can be found in the Ninth Amendment, the only other provision of the Constitution explicitly to provide a rule for how the Constitution "shall not be construed." The Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>66</sup> Read literally, the Ninth Amendment rejects just one construction of the text: a construc-

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<sup>64</sup> Id. at 1748–49.

<sup>65</sup> See Posting of Lawrence Solum to Legal Theory Blog, Sentence Meaning and Clause Meaning, [http://lsolum.typepad.com/legaltheory/2006/12/over\\_at\\_books\\_d.html](http://lsolum.typepad.com/legaltheory/2006/12/over_at_books_d.html) (Dec. 12, 2006, 6:25 a.m.). See generally Paul Grice, *Studies in the Way of Words* 23–57 (1991) (discussing "conversational implicature").

<sup>66</sup> U.S. Const. amend. IX.

tion that is based on “the enumeration in the Constitution, of certain rights.” Its injunction applies only when the enumeration of certain rights in the Constitution is offered as a reason for denying others retained by the people. According to this reading, the Ninth Amendment would have no application whatsoever outside the assertion of this specific misconstruction based on the enumeration of rights.

Before questioning this claim, it is important to stress that even this limited reading of the Ninth Amendment as solely a “rule of construction” in this one circumstance would render it extremely important. Such a reading would specifically negate a key claim of the most important footnote in Supreme Court history that says, in relevant part: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be *within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”<sup>67</sup> Footnote Four of *United States v. Carolene Products* is directly asserting that the enumeration in the Constitution of certain “express prohibitions” is reason “to deny or disparage” any constitutional claims based on “other rights retained by the people.” Even were the presumption of constitutionality affirmed in *Carolene Products* simply a burden-shifting presumption, it would *disparage* the other rights retained by the people, though perhaps not deny them altogether. But later, in cases such as *Williamson v. Lee Optical*,<sup>68</sup> the “presumption” was rendered effectively irrebuttable, resulting in the effective *denial* of unenumerated rights until *Griswold v. Connecticut*.<sup>69</sup>

Today’s judicial conservatives urge a return, not to the original meaning of the Ninth Amendment—even narrowly construed as above—but to the New Deal Court’s philosophy of Footnote Four when they disparage the protection by the courts of any unenumerated rights. For example, Justice Scalia, in his dissent in *Troxel v. Granville*, wrote that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them,

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<sup>67</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added).

<sup>68</sup> 348 U.S. 483 (1955).

<sup>69</sup> 381 U.S. 479 (1965).

and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."<sup>70</sup> Notice Justice Scalia's rather blithe identification of the legislature with the people themselves, an equation that was widely rejected at the founding and expressly denied by the Supreme Court in *Chisholm*.

I want to claim, however, that the text of the Ninth Amendment does more than expressly reject the construction of the Constitution provided by Footnote Four; it also implies the *existence* of other rights retained by the people. Why? For one thing, it refers explicitly to these "other[]"<sup>71</sup> rights. While it does not expressly call for the affirmative protection of these rights, the rule of construction it proposes would make absolutely no sense if there were no such other rights. Why else would an entire amendment have been added to the Constitution barring a construction of enumerated rights that would deny or disparage these other rights? Of course, we have overwhelming historical evidence, independent of the text, that the Founders believed that the people possessed individual natural rights. But the Ninth Amendment adds a textual affirmation of this underlying assumption of the text that could otherwise be denied. Therefore, notwithstanding the limits of its express injunction, the existence of the Ninth Amendment's reference to other rights retained by the people provides important textual support for the following conclusion: *any* construction of the Constitution that results in the denial of these rights would violate the Constitution's original public meaning, not merely a construction based on the enumeration of certain rights.

Does my claim that the rule of construction provided by the Ninth Amendment has important implications for the protection of other rights that are not to be denied shed any light on the meaning of the Eleventh Amendment? Could the Supreme Court's invocation of the "presupposition" of state sovereignty likewise be justified as an *implication* of its specific text rather than as a reflection of the underlying *purpose* of the Eleventh Amendment as characterized by John Manning? Just as the Ninth Amendment presupposes and textually affirms the existence of unenumerated rights,

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<sup>70</sup> 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

<sup>71</sup> See U.S. Const. amend. IX.



might the Eleventh Amendment not presuppose and textually affirm the existence of state sovereignty? This seems to be what Chief Justice Rehnquist was suggesting when he dismissed a “blind reliance” on the text of the Amendment in *Seminole Tribe*.<sup>72</sup> A “blind reliance” would be limiting the text to its terms while denying what it implies, whether a blind reliance on the text of the Ninth Amendment that limits it solely to a narrow rule of construction or a blind reliance on the text of the Eleventh Amendment that limits it solely to barring two specific types of plaintiffs suing state governments in federal court.

A careful comparison of the Ninth and Eleventh Amendments, however, undermines, rather than supports, a claim that the text of the Eleventh Amendment implies the rejection of the broad reasoning of *Chisholm*. First, and most obviously, unlike the Ninth Amendment’s explicit reference to “others retained by the people,” the Eleventh Amendment contains no explicit reference either to a principle of state sovereignty or to a doctrine of state sovereign immunity. The Ninth Amendment’s injunction against drawing a particular conclusion from “the enumeration in the constitution of certain rights” contains within it an express reference to—and therefore an implied affirmation of—the “other” rights “retained by the people,” coupled with the additional implication that these rights not be “denied or disparaged.”

To reach a contrary conclusion about the Ninth Amendment would require acceptance of the proposition that there are no other rights retained by the people or that those rights that do exist may be denied or disparaged at the will of the legislature, provided *only* that such a denial is not justified on the ground that some rights were enumerated. But why foreclose this, *and only this*, justification of denying unenumerated rights by means of a constitutional amendment? Clearly, the denial of unenumerated rights was the general evil to be avoided, and the Amendment was included to guard against a particular source of this evil that was aggravated by the addition of “the enumeration in the Constitution of certain rights.” And the source of this evil is the foreseeable assertion of the doctrine of *expressio unius*: to express or include one thing implies the exclusion of the other.

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<sup>72</sup> See *supra* text accompanying notes 46–51.

Although the text of the Eleventh Amendment lacks any comparable textual reference to state sovereignty or state sovereign immunity, would it nevertheless be fair to infer these concepts from what the text does affirm? I think not. To see why, let us imagine a hypothetical amendment dealing with unenumerated rights whose origin would parallel that of the Eleventh. Recall that for two years after the ratification of the Constitution, there was no Bill of Rights, so there was no express prohibition on takings of private property for public use. Suppose that during this period, the federal government took land for the public use of building a post office without making just compensation to the property owner. When the owner brings suit for compensation, the government denies the existence of any such right to compensation.

Now suppose further that, notwithstanding the absence of an express Takings Clause, the Supreme Court holds that the property owner is nevertheless entitled to just compensation. The opinions of the Justices are clearly based, first and foremost, on an extensive analysis of the preexistent natural rights retained by the people that no republican government can properly deny or disparage, including the rights to life, liberty, property, and the pursuit of happiness. One Justice in the majority—call him “Justice Chase”—contends that

[t]here are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.<sup>73</sup>

Textually, the Court grounds its holding in the Necessary and Proper Clause, reasoning that a law authorizing a taking of private property for public use without just compensation is not a “proper” law. A lone dissenter—call him “Justice Iredell”—protests this reliance on unenumerated rights. In his words, “[i]t is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a

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<sup>73</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (emphasis omitted).

government, any Court of Justice would possess a power to declare it so.”<sup>74</sup>

Far from being entirely hypothetical, the Court eventually used just this type of reasoning when it first required states to make just compensation for their takings under the Due Process Clause of the Fourteenth Amendment. In *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, it interpreted the Fourteenth Amendment as barring states from taking property for public use without just compensation, not by “incorporating” or even invoking the expressed Takings Clause of the Fifth Amendment, but because the “[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions.”<sup>75</sup> Consequently,

if . . . a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.<sup>76</sup>

Now imagine that Congress, in direct response to this hypothetical “takings” decision of the Court, seeks to “overrule” it by enacting a constitutional amendment. Two versions are proposed. The first reads, “The judicial power of the United States shall not be construed to encompass the power to grant just compensation as a remedy for takings of private property for public use.” The second reads, “This Constitution shall not be construed to encompass a judicial power to enforce any right not expressly enumerated herein.” Congress then chooses to propose, and the states to ratify, the first rather than the second of these amendments.

A century later it is argued that the enacted text presupposes that no unenumerated rights are ever to be judicially protected. Given this sequence of events, would this be a permissible con-

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<sup>74</sup> Id. at 398 (Iredell, J.).

<sup>75</sup> 166 U.S. 226, 235–36 (1897).

<sup>76</sup> Id. at 236.

struction of the amendment actually ratified? Would it be reasonable to claim that the substance of the second proposed version was implied by adopting the text of the first? Or would it instead be more reasonable to conclude, first, that the scope of the amendment actually adopted was limited solely to takings; and, second, that by adopting the first version rather than the second, Congress declined to reverse the broader reasoning of the Court that put the issue of the right to compensation before the Congress? In other words, unlike the broader version, the narrowly worded amendment left the broad reasoning of the Court intact.

Why Congress might have chosen the narrower amendment may be unknowable. Perhaps it accepted the Court's general reasoning about unenumerated constitutional rights but rejected its implication for the particular right to compensation for public takings. Perhaps it disliked the Court's general reasoning but was fearful that the more general amendment would get hung up in the ratification process, and it took what it felt confident it could get. Manning's point is that we cannot know for sure everything that might have led Congress to choose the narrow formulation.

Would it change the analysis if only the narrow version of the amendment had been proposed, so that the broader wording was not directly rejected in favor of the narrower reading? While perhaps reducing our certainty a tiny bit, I think such a change in the hypothetical does not affect the ultimate conclusion. For in the hypothetical story that produced the amendment, it was the notorious assertion by the Court of a general judicial power to protect unenumerated rights that engendered the controversy. Knowing this, Congress nevertheless addressed just one application of this more general power. The conclusion remains that Congress left this judicially claimed power intact. This is not to claim that the original judicial opinion was necessarily a correct interpretation of the Constitution but only that the subsequent hypothetical amendment narrowly reversing its holding did not challenge its interpretive correctness.

The narrowly drafted words of the Eleventh Amendment were adopted by Congress in the face of the Court's open denial of state sovereignty, especially in the opinions of Justice Wilson and Chief Justice Jay. In so doing, Congress turned away from more broadly

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worded amendments. For example, Massachusetts Congressman Theodore Sedgwick initially proposed the following amendment:

That no 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 . . . .<sup>77</sup>

But even this more sweeping grant of immunity speaks in the jurisdictional terms of Article III and concerns the scope of the judicial power, rather than confronting directly the Supreme Court's denial of the concept of state sovereignty itself. The terms of the public debate over *Chisholm* focused primarily on the "suability" of states, not on their "sovereignty."<sup>78</sup> It is not clear whether Chief Justice Rehnquist believed that the Eleventh Amendment should be viewed as a repudiation of the principle that the people and not the states are sovereign. It is, however, certain that he adduced no evidence that those who proposed and ratified the Eleventh Amendment did so in order to establish that the prerogatives of state government equaled those of the English King.

#### CONCLUSION: THE DANGEROUSNESS OF *CHISHOLM*

Let me conclude by emphasizing what I am *not* claiming in this Essay. Despite the time I have spent discussing the Eleventh Amendment, this is not an essay about its original meaning. A rich

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<sup>77</sup> 5 The Documentary History of the Supreme Court 605–06 (Maeva Marcus ed., 1994); see id. at 597 ("The motion was tabled and apparently never taken up again.").

<sup>78</sup> See Pfander, *supra* note 45, at 1279–80 ("By treating the problem as one of state suability, I have consciously chosen to adopt the usage of the generation that framed and ratified the Eleventh Amendment, and to abandon the language of state sovereign immunity that modern courts and commentators frequently use to characterize the Eleventh Amendment. . . . This modern talk of sovereign immunity suggests that the Eleventh Amendment marked a complete Anti-Federalist victory in the battle over state suability; in truth, the two parties appear to have reached a compromise. In any event, once the Court begins to conceptualize the problem of state suability in terms of a free-standing principle of "sovereign immunity," rather than as a technical problem in the parsing of the language of judicial power, it unleashes a dangerous and unwieldy restriction on the federal courts' power to enforce federal-law restrictions against the states. By returning to the language of state suability, I hope to cabin the influence of this spurious principle of sovereign immunity." (footnotes omitted)).

and challenging literature examining this issue already exists. Nor am I proposing that we start our teaching of constitutional law by examining the scope and meaning of the Eleventh Amendment. That may well be too complex for students just beginning their study of the Constitution to comprehend.

Rather, my only claim about the Eleventh Amendment is to identify a single meaning it did *not* have. Contrary to what the Supreme Court now maintains, the Eleventh Amendment was not a repudiation of the individualist conception of popular sovereignty articulated by Justice Wilson and Chief Justice Jay. The narrow and technical language of the Eleventh Amendment could not reasonably have been understood either as a repudiation of the grand and magisterial idea that “We the People” are sovereign or as establishing the power of the English monarchy as the model of state government authority. Given all this, I submit that beginning the study of constitutional law with the deep issues in *Chisholm*, as well as with the importance of constitutional amendments, is preferable to beginning with Chief Justice Marshall’s defense of judicial review in *Marbury* as has become the custom.

Second, I am not claiming that Congress was affirming the broader reasoning of the case when it reversed only the narrow holding of *Chisholm*. John Manning seems to suggest otherwise,<sup>79</sup> and he may well be right. But, for the present, I am merely denying that the broader principle of state sovereignty to which Chief Justice Rehnquist referred was a “presupposition” of the text of the Eleventh Amendment. So far as constitutional implicature is concerned, the Eleventh Amendment leaves the reasoning of *Chisholm* as it was. As such, it must be judged on its merits. If it was wrongly decided, the Eleventh Amendment adds little, if any, support for that conclusion.

Nor am I claiming in this Essay that the Court in *Chisholm* was correct in its conception of popular sovereignty as belonging to the people as individuals and not to the state or state governments, either as a matter of constitutional theory or of history. Of course, my sympathies on this subject should be obvious. That *Chisholm*

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<sup>79</sup> See Manning, *supra* note 52, at 1749 (“[O]ne cannot disregard the selective inclusion and exclusion implicit in such careful specification . . . [and] 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.”).

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1757

was decided so close to the enactment of the Constitution—in sharp contrast to the Court’s decision in *Hans* one hundred years later—and that the individualist concept of popular sovereignty was affirmed by the eminences of James Wilson and John Jay is powerful evidence that “the People” to which the Constitution refers was indeed an individualist concept. At a minimum, it is plainly not anachronistic to attribute so individualist a sense of sovereignty to the era.

The proposition that “joint sovereignty” resides in the individuals who comprise the people is also textually supported by the wording of the Tenth Amendment, which confirms that all powers not delegated to the general government by the Constitution are reserved to the states respectively, *or to the people*. If at least some of the “other” rights retained by the people to which the Ninth Amendment refers belong to individuals, as I believe the evidence shows,<sup>80</sup> it would be exceedingly odd if “the People” to which the Tenth Amendment refers are not also individuals. And “the People” is explicitly distinguished from “the states.” I confess that I am beginning to suspect that the purely collective reading of “the People” by Professor Akhil Amar and others may well be anachronistic, but to establish this proposition would require more investigation into the historical sources than I have yet to attempt.

My only claim with respect to the Eleventh Amendment is that it did not displace the individualist concept of the people affirmed by the Court, whether rightly or wrongly, in *Chisholm*. And, unlike the Ninth Amendment, which makes no sense whatsoever without presupposing the existence of the very unenumerated rights to which it refers, the Eleventh Amendment makes perfect sense whether or not you assume the existence of state sovereignty. It can fairly be read as carving out of federal jurisdiction suits brought by two types of parties, an alteration in the jurisdiction afforded by Article III that required a *change* in the original Constitution to accomplish. At a minimum, the conclusion that *Chisholm*’s individualist concept of sovereignty was not repudiated by the Eleventh Amendment justifies including this concept among

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<sup>80</sup> See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1 (2006).

the contenders for how popular sovereignty was conceived at the time of the founding.

But putting aside the Eleventh Amendment, the really interesting challenge posed by *Chisholm* is its individualist theory of popular sovereignty: what *does* it mean to say that the people are “joint sovereigns”? This brings me to a final reason why *Chisholm* is not among the canon of constitutional law cases of which all learned lawyers must be aware. *Chisholm* may be ignored for the very same reason that the Ninth Amendment is ignored: it is simply too radical. Indeed, the individualist popular sovereignty affirmed in *Chisholm* is the opposite side of the very same coin as the “other” individual rights retained by the people, as affirmed by the Ninth Amendment.<sup>81</sup> It may well be that the concept of sovereignty affirmed in *Chisholm*, the original meaning of the Ninth Amendment, and the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment are all ignored by the Court because the implications of taking them seriously are so momentous. And law professors tend to internalize the Supreme Court’s boundaries on respectable legal argument (and vice versa).

If nothing else, *Chisholm* teaches that the concept of sovereignty as residing in the body of the people, as individuals, was alive at the time of the founding and well enough to be adopted by two Justices of the Supreme Court, who were also influential Founders. Likewise, *Chisholm* shows that the bold assertion that states inherited the power of kings (subject only to express constitutional constraints) was rejected by four of five Justices when the issue first arose. By omitting *Chisholm v. Georgia*, the first great constitutional case, from the canon of constitutional law, we have turned our gaze away from perhaps the most fundamental question of constitutional theory and the radical way it was once answered by the Supreme Court. We law professors have hidden all this from our students; and by hiding it from our students, we have hidden it from ourselves.

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<sup>81</sup> See *id.* (affirming the individual natural rights model of the Ninth Amendment).