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Resorting to External Norms and Principles in Constitutional Decision-Making

BY ALVIN L. GOLDMAN*

INTRODUCTION

Given the very significant role of constitutional law in the American political system and the fact that Supreme Court Justices are appointed through a political process, it is understandable that the appropriate judicial approach to resolving constitutional issues often is the subject of political commentary. Unfortunately, discourse by politicians concerning this issue seldom rises to the deserved level of wisdom. One of President George W. Bush's public mantras is illustrative of political commentary respecting federal judicial appointments: "I'm going to put strict constructionists on the bench."1 On its face, and as understood by politically naive audiences, the statement appears to mean that the appointed Supreme Court Justice will interpret the Constitution so as to enforce what is stated in the charter's text; that is, the Justice will resolve all constitutional issues by applying a "plain meaning" rule. This doubtless sounds reasonable to those who are unfamiliar with constitutional decision-making. Any serious student of that process should recognize, however, that this is a ludicrous promise.2

*William T. Lafferty Professor of Law, University of Kentucky. The substance of much of this article was prepared as the U.S. national report for a session of the World Congress of the International Association of Constitutional Law, Santiago, Chile, January 15, 2004, which examined the use of "unwritten norms and principles" in constitutional decision-making. The author appreciates corrections made to this article by the student editors and acknowledges an important correction called to his attention by Professor Stephen Vasek.


2 For politically sophisticated audiences, the statement carries a less literal meaning. The more accurate understanding of it takes account of political norms and principles. Audiences who understand the applicable political nuance realize
I. ELUSIVENESS OF THE CONSTITUTION'S "PLAIN MEANING"

Careful reading of the text of the U.S. Constitution quickly reveals that much of it lacks clear meaning. Although the text is the essential starting point, divining the Constitution's meaning requires much more than a dictionary of American vocabulary and a treatise on American grammar and usage; sound interpretation frequently necessitates finding guidance from other sources.

In order to appreciate why the written text is but the starting point in understanding the Constitution, it helps to keep in mind some basic characteristics of the charter, as well as the manner and context in which it was adopted. First, the original Constitution was written in 1787, and a majority of the amendments were adopted in the succeeding one hundred years. The vocabulary of the English language is neither fixed nor rigidly regulated. Words and phrases can have multiple meanings, and these can change with time. In addition, general linguistic usage in the United States was not clearly established in the late eighteenth century, when the original Constitution was adopted, and American etymology was not well-tracked during the period when most of the constitutional text was prepared.

The phrase "strict constructionist" is a code declaring that the jurist will favor the judicial agenda of the President's conservative supporters by limiting the protections afforded persons investigated for or accused of crimes, rejecting the constitutionality of affirmative action remedies in civil rights cases, upholding laws that prohibit abortions, and lowering the barriers to government assistance to and participation in mainstream religious institutions and practices.

As early as 1780, John Adams, later the nation's second President, and others unsuccessfully urged Congress to establish an institute for "refining, correcting, improving and ascertaining the English language." JONATHON GREEN, CHASING THE SUN: DICTIONARY MAKERS AND THE DICTIONARIES THEY MADE 305 (1996).

The first English language dictionaries were tools for English-Latin and English-French translation and had only brief definitions. The earliest dictionaries devoted solely to the English language were published primarily as guides to spelling and pronunciation, not meaning, and covered only a small portion of the English vocabulary. Samuel Johnson's Dictionary, published in 1755, set out to establish fixed meanings for listed words, a task he later acknowledged was futile. SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 50 (1984). His dictionary was not imported into the United States until 1818, but some private American libraries no doubt had copies purchased in England. GREEN, supra note 3, at 285. Noah Webster's American Dictionary of the English Language, first published in 1828, included multiple meanings. LANDAU, supra, at 60. These often, however, reflected Webster's personal religious, social, and political prejudices. Id.; GREEN, supra note 3, at 318, 324-25.
A. Historical Evolution of Meanings

The meaning attached to words, and to legal terms, can change with the context in which they are used. For example, the Constitution provides for the impeachment of civil officers for “Treason, Bribery, or other high Crimes and Misdemeanors.” In his dictionary of 1755, Samuel Johnson defined “misdemeanor” as “Offence; ill behaviour; something less than an atrocious crime.” Noah Webster’s dictionary of 1828 provides this definition: “Ill behaviour; evil conduct; fault; mismanagement: In law, an offense of a less atrocious nature than a crime.” A modern dictionary, on the other hand, reports that the archaic meaning was merely “misdeed,” but that the contemporary meaning of misdemeanor is “a crime less serious than a felony.” Nevertheless, when the word “misdemeanor” is added into the phrase used in the Constitution, its meaning takes on different shading based on the history of seventeenth- and eighteenth-century impeachment trials in the British Parliament, where impeachment was thought to be justified only by a serious abuse of a public trust.

Even if judges had not construed “misdemeanor” as having separate meanings in common usage and when used to describe offenses warranting impeachment, each definition of the word ascribed by early dictionary writers nonetheless suffers from vagueness. Unsurprisingly, therefore, scholars disagree regarding the proper application of the phrase to particular events.

B. The Absence of Unitary Intent

Another reason the text of the Constitution is not self-explanatory is that the promulgators reached many compromises in choosing the docu-

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8 WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 541 (1971).
9 See THE FEDERALIST No. 65 (Alexander Hamilton); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 268–70 (1833).
10 See supra notes 6–7.
11 For a history of impeachments for “high Crimes and Misdemeanors,” as well as a survey of interpretations of the phrase, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 169–202 (3d ed. 2000).
Partly for that reason, they often were content with broad statements rather than detailed provisions. They realized that the more the document said, the more difficulties would be encountered in winning popular support for its ratification by a geographically, religiously, politically, economically, and culturally diverse populace. Therefore, in order to reduce the prospect of offending those whose support was needed, the drafters often selected general, vague terms and used language sparingly. As one observer explains: “Precise and vague at one and the same time, the words of the Constitution were . . . the visible signs of a painful process of bargaining among proud, committed, and yet not unbending men.”

The drafters’ cautious effort to avoid saying too much is evident in the very conciseness of the document. Excluding provisions superseded by amendments, the entire Constitution, including amendments and headings, has only 6800 words. Nevertheless, with such little verbiage, the Constitution defines the legislative, executive and judicial branches of the federal government, describing their powers and the limitations thereof. The Constitution also sets forth the manner in which governing officials are selected or elected; the fundamental procedures by which the branches are to conduct their business; the branches’ interrelationships and interactions with the constituent states; the manner in which officials can be removed from office; limitations on the authority of state officials; and various fundamental rights and liberties of individuals residing in, and entities conducting business in, the United States. Perhaps the brevity of the Constitution can be better appreciated by comparing it with a not overly detailed federal law, the Administrative Procedures Act, which uses more than twice as many words to regulate the right of persons to access information held by federal agencies and to attend meetings where agencies and their staffs decide official business.

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13 WARREN, supra note 12, at 701–02, 737.
15 This word count includes the twenty-six words of the Twenty-seventh Amendment, whose status as a proper part of the Constitution may be in doubt because its ratification spanned a period of over two hundred years. See generally Richard B. Bernstein, The Sleeper Awakes: The History and Legacy of the Twenty-Seventh Amendment, 61 FORDHAM L. REV. 497 (1992) (describing controversies surrounding the amendment’s validity). The amendments, moreover, are typically more verbose than the provisions they replaced.
It can be argued that, since the Constitution is a compact, provisions that are vague or unclear should be interpreted to carry out the intentions of those who devised and adopted it. Accordingly, courts should give weight to only those external sources that clearly reveal the original intent. For many important provisions of the Constitution, however, there is little concrete evidence respecting those intentions. A few participants kept notes purporting to report what was said in debates at the Constitutional Convention of 1787, but these notes were incomplete, were not always in agreement, and were not officially approved by the Constitutional Convention. Also, even though much of the wording of the final draft, prepared by a small committee, differed significantly from the resolutions adopted by the full Convention after several months of debate and votes, the nuances of those differences were not fully discussed in the days prior to adoption.

In addition, the understandings of the drafters were only the first step in reaching agreement to reconstitute the system of government for the United States of America. The new charter had to be approved in separate ratification conventions held in each state. Over the course of many months, objections to numerous provisions of the proposed Constitution were publicly discussed and variously interpreted by debaters in the states. There is some documentation regarding those debates, but this record, too, is far from complete. (The same was true of key amendments to the Constitution, especially the earliest ones.) Further, although some state conventions recorded their reservations regarding particular provisions and the absence of others, those reservations were not incorporated into the Constitution. This may have been because the structure of the ratification procedure “forced an ‘all-or-nothing’ vote on the proposed Constitution, and ‘nothing’ risked dissolution of the Union (as the states might have proved unwilling to continue living under the Articles of Confederation

17 The earliest publication of such notes was in 1819. The most comprehensive, those of James Madison, were not published until 1840. WARREN, supra note 12, at 127.
18 WILLIAM P. MURPHY, THE TRIUMPH OF NATIONALISM 148–49 (1967). Compare the resolutions adopted by the Convention between June 20 and July 26, 1787, with the August 6 draft of the Plan by the Committee of Detail and the Committee of Style and Revision’s final draft of September 12. See WARREN, supra note 12, at 686.
19 MURPHY, supra note 18, at 422.
20 For a discussion of these reservations and of the amendments states proposed in their ratification conventions, see id. at 309–99.
while the proposed Constitution was being rewritten). As a result, it is doubtful "that constitutional interpreters can ever divine the Ratifiers' intended meaning, as they never had a chance to express their specific intent." Justice Jackson once aptly summarized the problem:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.

C. Debates Surrounding the Second Amendment

The difficulties of relying solely on either the words or historical evidence to discover the "true" meaning of the Constitution can be illustrated by current debates respecting the Second Amendment, which states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The very use of the word "arms" in this amendment demonstrates the potential difficulties in construing the English language since the word's most common meaning describes the upper limbs of the human body. In this context, however, those who adopted the amendment unquestionably understood it to refer to weapons or, more specifically, weapons of the sort wielded by a single individual in the late eighteenth century.

Some commentators, emphasizing the reference to "the people" in second part of the sentence that constitutes the Second Amendment, argue that this language prohibits the federal government from imposing any restraints or regulations on private ownership or on the use of deadly

22 Id.
24 The amendment formed part of the Bill of Rights, which was generally understood to address the relationship of the federal government to the people. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 368 (6th ed. 2000).
weapons of any sort. The advocates of this approach assert that the term “the people” in the second clause of the sentence identifies an individual right distinguishable from the state’s collective interest in its militia, described in the first clause. A variation of this “individual right” interpretation argues that, considering both the attention to the security of one’s home reflected in the Third and Fourth Amendments, and the reported British tradition of treating possession of arms as a symbol of individual freedom, textual and historical evidence supports an intention to bar the federal government from depriving people of the right to own weapons of the sort commonly used to defend oneself or one’s household or local community.

Others point out that the phrase “the people” does not have a single, consistent, narrow meaning in the Constitution or its amendments. This is apparent in the Preamble, where the phrase “the people” is used not with reference to individual action, but instead in the composite sense of a communal action of entering into a social compact—a meaning more appropriate to the context of the Second Amendment’s adoption. Thus, it

25 See Randy E. Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?, 83 TEXAS L. REV. (forthcoming 2005) (manuscript at 8–16, http://ssm.com/abstract=420981) (arguing that contemporaneous state constitutions providing an individual right to bear arms suggest that ratifying states understood the Second Amendment to extend this right).

26 See id. (manuscript at 12–13).

27 Don B. Kates, Jr., The Second Amendment and the Ideology of Self-Protection, in THE GREAT AMERICAN GUN DEBATE 271, 288 (Don B. Kates, Jr. & Gary Kleck eds., 1997) [hereinafter Kates, Self-Protection]: “In the absence of a police, the American legal tradition was for responsible, law-abiding citizens to be armed and see to their own defense and for most military age males to chase down criminals in response to the hue and cry and to perform the more formal police duties associated with their membership in the posse comitatus and the militia.” See generally id. at 278–79. See also Don B. Kates, Jr., Handgun Protection and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 259 (1983) [hereinafter Kates, Original Meaning]. If, as Kates argues, the qualification “responsible, law-abiding citizens” was understood to be incorporated into the meaning of the term “the right to keep and bear arms,” then the government had inherent power to prohibit arms possession by non-citizens, or by irresponsible or non-law-abiding citizens.

28 See, e.g., Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1163 (1991) (noting that, while many scholars consider allusions to “the people” in the Bill of Rights to confer individual rights, the term also “conjure[s] up the Constitution’s bedrock principle of popular sovereignty”).

29 Id.
is argued, when the Second Amendment is read as a whole, and in light of ratification debates reflecting concerns that Congress' constitutional authority to organize and discipline the militia\(^3\) could permit it to eliminate or minimize state militias, the second part of the sentence provides the means for carrying out the purpose stated in the first part.\(^3\) From this perspective, the Second Amendment merely guarantees a state's authority to establish and maintain local defensive units (the militia) by assuring that federal law will not disarm militia members.\(^2\) According to this interpretation, the amendment grants the right to each state, not to individual citizens. A variation of this interpretive approach contends that the amendment merely prohibits the federal government from barring individuals eligible for militia service from owning and possessing weapons they will need should they be called to service.\(^3\) Still another reading is that even if the

\(^{30}\) See U.S. CONST. art. I, § 8, cl. 16.

\(^{31}\) Amar, supra note 28, at 1165. Others argue that the word “people” in the Second Amendment is used to designate a person's individual right in the same manner as when the term “people” is used in the First, Fourth, and Ninth Amendments. Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. REV. 793, 810 (1998). However, this characterization of those other provisions is not self-evident. Although “people” is used in the First Amendment in referring to the right to assemble, assembly requires more than a single person and therefore is a collective, not an individual, right. See Amar, supra note 28, at 1152–53. The Fourth Amendment refers to the right of the “people” to be secure in their homes, thus protecting both the individual and the collective household. Id. at 1175–77 (noting, however, that the collective reading of “people” in this amendment may be strained). The Ninth Amendment states that the “people” retain rights that the Constitution does not expressly grant the government. That ambiguous provision can be construed to encompass communal rights, such as freedom of association or the principle of majority rule in voting or in decisions by multi-member governing institutions. Id. at 1200. It can also refer to individual rights, such as personal autonomy. See infra note 146.


\(^{33}\) See Robert Weisberg, Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime, 39 HOUS. L. REV. 1, 2 & n.3 (2002) (citing United States v. Emerson, 270 F.3d 203, 221–27 (5th Cir. 2001)); 1 TRIBE, supra note 11, at 899 (noting that many conclude the Second Amendment does not protect hunting and self-defense). The argument is also made that if a state does not have a militia, the Second Amendment is of no effect and today, in fact, the militias no longer exist. H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS 228 (2002); David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 615 (1991). Congress enticed the states to eliminate their militias by providing substantial financial assistance for the establishment of a state National Guard.
language prohibits federal regulation of individual ownership and possession of "arms," the protection is limited to weapons equivalent to the personal armaments used by militias in 1791 when the amendment was adopted. The weaponry of the day, of course, included swords, daggers, pikes, hatchets, and single-shot pistols, rifles, and what today would be shotguns. In United States v. Miller, the Court held that a sawed-off shotgun, a weapon not used for hunting, was not protected by the Second Amendment. 34

Since there is no compelling logic that clearly merits selecting any one of the above interpretations, 3 5 some advocates of these various approaches have attempted to bolster their positions by turning to historical evidence. These scholars have cited accounts concerning the degree to which militias in fact were organized at the time of the Second Amendment's adoption, the militias' actual dependence upon members' providing their own weapons, the extent to which people owned various types of weapons at that time, the use of privately owned weapons in committing crimes, and contemporaneous public attitudes toward firearm ownership. 36 It is inevitable that such research into ancient facts will confront an array of difficulties. 37 Therefore, it is no surprise that there is a lack of consensus

Uviller & Merkel, supra, at 134. Each state thereafter created its state National Guard and in so doing agreed to abide by federal regulations and oversight in the Guard’s organizational structure, recruitment policies, pay schedules, disciplinary regulations, training programs, and the like. Id. at 228. On the other hand, Professor Barnett argues that a federal law, 10 U.S.C. § 311, continues to recognize the existence of the militia. Barnett, supra note 25 (manuscript at 37–38). Barnett, however, incorrectly discounts the fact that the cited statute created a federal militia; it did not continue state militias. See id. at 38. Since the “militia” referred to in the Second Amendment undoubtedly is the state militia, the cited federal statute has no affect on whatever right is or is not preserved by the amendment. Thus, if Second Amendment rights are dependent on the existence of a state militia, currently those constitutional rights are in a state of suspension.


35 One author observed that from 1970 to 1989, scholarly articles on the subject were almost evenly divided between those that supported and those that rejected the individual right interpretation. Carl T. Bogus, The History and Politics of Second Amendment Scholarship: A Primer, 76 Chi.-Kent. L. Rev. 3, 8–g (2000).

36 See, e.g., Kates, Self-Protection, supra note 27, at 276 (arguing that in the colonial era, those who used personal weapons to thwart crime were viewed as virtuous citizens).

37 For example, inconsistent data have been presented by scholars who examined probate documents of the time in an effort to identify the portion of the population that actually owned guns. For a variety of reasons, however, those data
regarding the relevant demographics and practices when the Second Amendment was adopted.\textsuperscript{38}

More importantly, determination of the precise factual setting in which a constitutional provision was drafted does not necessarily provide reliable guidance respecting the norm or principle intended to be conveyed by the wording of that provision. The goal of a constitutional provision, whether in the original or amended text, can be either to preserve a valued rule or arrangement or to modify an existing rule or arrangement. The Constitution and its Bill of Rights undoubtedly were intended to do some of both. Thus, ascertaining the principles or practices that existed at the time of the adoption of the Constitution or the Second Amendment does not reveal whether the goal was preservation or change.

The foregoing demonstrates that some provisions of the Constitution lack a clear meaning because many of the words and phrases did not have fixed, universal definitions when written. In addition, some terms in the Constitution were terms of art intended to carry a special meaning. Here again, though, there was not universal agreement regarding such special definitions. Finally, little reliable evidence exists concerning the extent to which those who drafted the document had a common understanding of the purposes of particular provisions, and even less evidence is available to clarify the understanding of these provisions among the diverse, dispersed population that participated in the adoption and ratification of the Constitution.\textsuperscript{39}

may either overstate or understate such ownership. To illustrate, estates of persons too poor to own guns were less likely to be probated since it was less likely there was any property to be transferred. On the other hand, persons living in wilderness areas were more likely than others to be armed, but it was less likely that their heirs would have gone to distant courts to resolve or record inheritances. \textit{See generally} James Lindgren & Justin L. Heather, \textit{Counting Guns in Early America}, 43 WM. & MARY L. REV. 1777 (2002).

\textsuperscript{38} 1 TRIBE, \textit{supra} note 11, at 901 n.221.

\textsuperscript{39} In a related context, Professor Adrian Vermeule offers a number of reasons why judges often are not competent to accurately discern legislative intent from the history of a statute. He argues that the risks of error caused by judicial misperceptions of legislative history justify excluding this source from the process of statutory interpretation. \textit{See} Adrian Vermeule, \textit{Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church}, 50 STAN. L. REV. 1833 (1998). Professor Vermeule’s arguments are equally applicable to controversies surrounding the intent of participants in the Constitutional Convention and state ratification conventions. Although the arguments are persuasive respecting the need for judicial caution in giving weight to legislative history, for the reasons discussed in the conclusion of this article, I do not think they justify
II. INTERPRETIVE GUIDELINES DRAWN FROM NON-TEXTUAL SOURCES

Given the difficulty of ascertaining the "plain meaning" of the Constitution, it is not surprising that from the earliest time, U.S. Supreme Court Justices have looked to a broad range of external sources both to discover and to confirm the norms and principles imposed by the Constitution. For example, in what probably was the single most important decision in the development of American constitutional jurisprudence, Marbury v. Madison, Chief Justice John Marshall applied a variety of textual analysis techniques to support the Court's conclusion that the Constitution gives the judiciary the power to vacate unconstitutional statutes. In addition, and of special significance to the concern of this article, Chief Justice Marshall's opinion for the Court placed particular emphasis on principles drawn from the following sources: (1) the historical development of the American constitutional system; (2) political and legal theories respecting the nature of a written constitution; and (3) the role of the judiciary in maintaining the rule of law.

Even if the Justices attempted to take a literalist, "clear meaning" approach to construing the Constitution, many of its provisions would leave them with no choice but to consult other sources in order to discern the principles enshrined in the text. The provision for removal from civil office on grounds of "Treason, Bribery, or other high Crimes and Misdemeanors" demonstrates the need to consult external sources to construe ambiguous provisions: scholars and courts have parsed history to determine what conduct constitutes a serious abuse of public trust warranting impeachment.

A. Non-Textual Authority and the Appointments Clause

The constitutional language governing the authority to appoint government officers presents a similar problem. The Constitution provides

ignoring this source of possible guidance either when the legal text lacks clear meaning on its face or when history demonstrates that a meaning that seems apparent under modern linguistic usage does not reflect how the words were used or intended when the document was adopted.

40 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
41 Id. at 178-80.
42 Id. at 176-78.
44 It is unsettled, of course, whether the Senate, as the tribunal that hears impeachment cases, has the sole authority to interpret this part of the Constitution. Nixon v. United States, 506 U.S. 224, 231 (1993).
that the President, with the advice and consent of the Senate, shall appoint people to several specified categories of offices, and that this procedure will also be used for appointment of other “Officers of the United States.” The text, however, contains no direct language identifying those other offices. On the other hand, the Appointments Clause provides that Congress may place the authority to appoint “inferior Officers” either in the President alone or elsewhere. Nowhere, however, does the Constitution define what makes an officer “inferior” for this purpose, nor does it define “superior” or “principal” officers, whose appointment can be made only by the President with the advice and consent of a Senate majority. Rather, the text has left it to the Court to discover the meaning of this incomplete, imprecise provision.

The U.S. Supreme Court was faced with this issue in a case that challenged the constitutionality of a statute that called for judicial selection of an independent counsel to investigate and, if necessary, prosecute certain high-ranking government officials for alleged violations of federal criminal laws. The challengers asserted that because the authority to enforce federal law is a presidential responsibility, the Constitution does not permit the appointment to be made in a manner that separates the appointee from the President’s ultimate control.

The Supreme Court, in upholding the statutory method of judicial appointment of an independent counsel, explained: “We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the ‘inferior officer’ side of that line.” Without specifying all the elements of the definition of “inferior officer,” the Court justified its conclusion by noting that the independent counsel lacked various important attributes of high-ranking government positions, such as broad discretion to formulate policy and a

45 U.S. CONST. art. II, § 2, cl. 2:
[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.

46 Id.

47 Generally, “principal officer” denotes officers of sufficiently high rank or degree of responsibility to require appointment by the President with the Senate’s advice and consent. See Morrison v. Olson, 487 U.S. 654, 670 (1987).

48 Id. at 673.

49 Id. at 671.
broad range of responsibilities. To illustrate, it made observations respecting both the characteristics of officers constitutionally required to be appointed by the President with Senate approval, and those of officers who have always been appointed through that process even though the Constitution does not expressly require it. The Court did not identify a textual source designating the attributes of a principal officer. Rather, its decision drew upon what are common characteristics of those offices generally accepted as being of high rank, even though not specifically designated in the text of the Constitution as requiring presidential appointment with Senate approval. Thus, although in part the Court drew upon the text of the Constitution to discover the characteristics of principal officers, it also drew upon historically accepted applications of Congress' power, an extra-textual norm, as a basis for deciding that the challenged delegation of appointment authority was constitutionally permissible.

The Constitution's delegation of authority to the federal judiciary to decide cases of admiralty and maritime jurisdiction forms another example of text requiring resort to external sources. The Supreme Court has explained that the scope of that jurisdiction is defined by tradition, not by any explicit constitutional language. On that basis, the Court held that admiralty law governed a suit to recover monetary relief when a pile driver aboard a barge on the Chicago River damaged a tunnel running under the river and caused flooding of basements in downtown Chicago.

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50 *Id.* (noting that the independent counsel is removable by Executive Branch officials, possesses limited powers, and is confined by limited jurisdiction).

51 *Id.* at 671-76. The sole dissenter, Justice Scalia, contended that because Article III of the Constitution uses the word “inferior” in describing the lesser federal courts, subordination is a necessary attribute of an “inferior officer.” *Id.* at 719-23 (Scalia, J., dissenting). He explained that an independent counsel appointed to investigate charges of misconduct by high-ranking executive officers does not have this attribute, because no other officer can direct the independent counsel’s exercise of discretion. *Id.* at 722-23. Therefore, he concluded, the independent counsel is not an “inferior officer.” In attempting to bolster his dissent, Justice Scalia quoted from the definition of “inferiour” in Samuel Johnson’s dictionary, which offered two meanings. *Id.* at 719. Although Johnson’s second meaning is “subordinate,” the first meaning given by Johnson is “lower in place, ... station,” *id.*, and would appear to support the majority’s conclusion.

52 Such officers would include the Attorney General, Secretary of State, and Secretary of the Treasury.

53 U.S. CONST. art. III, § 2, para. 1.


55 *Id.* at 529, 547.
B. Non-Textual Authority and the Law of Nations

Several provisions of Article I vest Congress with power to adopt or modify the rules for engaging in foreign relations or foreign commerce.\textsuperscript{56} One of these is the delegation of power to Congress to "define and punish \ldots Offenses against the Law of Nations."\textsuperscript{57} When deciding cases involving foreign sovereigns or citizens, the Court has examined the law of nations both to ascertain the scope of Congress’ constitutional powers in this area, and to decide what rules the federal bench should apply if Congress has not spoken with precision.

For example, an early case raised the question of whether, during the War of Independence, Virginia had the authority to adopt a law pronouncing debts owed to British subjects fully satisfied by payment to the state of the amount owed.\textsuperscript{58} Based on the treaty of peace with Britain, the U.S. Supreme Court ultimately ruled that the debts were not relieved.\textsuperscript{59} In the course of the opinion, however, Justice Chase also cited international law treatises to support the contention that at the time the payments were due, Virginia had a right under the law of nations to confiscate the property of British subjects.\textsuperscript{60} Because the Constitution had not been adopted when Virginia enacted the law at issue, the Court was not constitutionally required to rely on the law of nations in ascertaining the legitimacy of the confiscation. Nevertheless, the matter-of-fact manner in which Justice Chase and other Justices sought guidance from the law of nations reflected the Court’s high level of respect for principles derived from that source and also indicated that the Justices considered the Court bound by those rules in the absence of contrary treaties or legislative dictates.

\begin{footnotes}
56 See, e.g., U.S. Const. art. I, § 8, cl. 1 (the power to raise duties, imposts, and excises); id. art. I, § 8, cl. 4 (the power to establish uniform rules of naturalization); id. art. I, § 8, cl. 10 (the power to punish piracies and felonies in the high seas and offenses against the law of nations); id. art. I, § 8, cl. 11 (the power to declare war, grant letters of Marque and Reprisal, and make rules of capture on land and water); id. art. I, § 8, cl. 15 (the power to repel invasions). In addition, under Article II, Section 2, Clause 2, the Senate must approve treaties. Also, as a result of the derivative power the Necessary and Proper Clause of Article I, Section 8, gives to Congress, it may find additional power to regulate in the sphere of international law.
57 Id. art. I, § 8, cl. 10.
58 Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
59 Id. at 285.
60 Id. at 230–31.
\end{footnotes}
A few years later, the Court addressed a confiscation case arising under the Constitution, *Murray v. Schooner Charming Betsy.* That dispute resulted from actions taken in response to tensions between the United States and France originating in the late 1790s, when French war ships were seizing American merchant vessels presumed by the French to be violating France's embargo on shipping to Britain. The United States eventually retaliated by passing a law authorizing American privateers to retake captured American vessels that were in the hands of the French.

The owner of a retaken schooner, the Charming Betsy, sought restitution and damages on the ground that the law allowing such conduct did not authorize the confiscation of his vessel or cargo. Explaining the Court's approach to the task of interpreting the law relied on by the privateer, Chief Justice Marshall stated:

> [A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

This statement implied that the Constitution requires that rights recognized by the law of nations be given full respect by the courts. The Supreme Court made this proposition explicit a few years later when it announced that in suits involving claims to cargoes seized as prizes of war, the Court is "bound by the law of nations which is a part of the law of the land" unless the federal legislature adopts a rule of law that differs from the international standard. The Court has continued to follow this principle.

In *Charming Betsy*, Chief Justice Marshall spoke of the law of nations "as understood in this country." Nonetheless, when resolving questions of the law of nations, the Supreme Court examines a variety of sources that are external not only to the Constitution but also to American jurispru-
In this respect, an instructive illustration of the Court’s reliance on extra-constitutional sources is provided by the evolution of the “act of state” doctrine in American law, which “began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries.”

In an early statement of the act of state concept, the Supreme Court explained:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In more recent years the principle has been clarified as follows:

> The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The act of state doctrine has been described by the Court as an exercise of judicial discretion “compelled by neither international law nor the Constitution,” but instead as a policy adopted to minimize judicial interference with diplomatic activities (including secret negotiations), to foster stability in international transactions, and to promote “progress toward the goal of establishing the rule of law among nations . . .”

Nevertheless, a more recent judicial discussion of the doctrine uses an analytic approach suggesting that, at least in some aspects, it is a principle
with constitutional status. In the mid-1970s, four members of the Supreme Court contended that if a foreign government engages in purely commercial activities, the act of state doctrine should not immunize it from answering in a U.S. court based on the normal rules of international commercial transactions. Justice White’s explanation for this modification, or clarification, of the act of state doctrine relied in part on the decisions of other nations’ courts and on international law treatises and commentaries. These materials showed that a growing number of nations accept the normative proposition that governments engaged in purely commercial activities should be treated in the same manner as other commercial entities. Because that conclusion was based on interpretation of the law of nations, implicitly it is presented as a matter of constitutional law.

C. Non-Textual Authority and the Fourteenth Amendment’s Due Process Clause

Especially significant in the development of American constitutional law is the Supreme Court’s use of extra-textual sources to interpret the Due Process Clause of the Fourteenth Amendment, which declares that the states shall not deprive any person of “life, liberty or property, without due process of law . . . .” The Fifth Amendment, which limits the power of the federal government, includes the same due process language. The Bill of Rights prohibits the federal government from encroaching upon the freedoms of speech, religion, and assembly; the right to not be exposed to an unreasonable search; and the right to a lawyer and a jury trial in criminal cases. The Fourteenth Amendment, on the other hand, was adopted separately and does not contain a similar list of specific rights. Nevertheless, it was adopted as a corrective measure to ensure that state and local governments not exercise their power oppressively. The constitutional text is therefore unclear as to whether the Due Process

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75 Id. at 701–05.
76 U.S. CONST. amend. I.
77 Id. amend. IV.
78 Id. amend. VI, VII.
Clause of the Fourteenth Amendment incorporates the Bill of Rights' freedoms.

Perhaps the most interesting judicial debate respecting the proper interpretation of the Fourteenth Amendment's Due Process Clause was an exchange in Adamson v. California, a case in which a 5–4 majority ruled that the protection against compulsory self-incrimination is not violated when a state law allows a prosecutor to comment to the jury about the defendant's failure to testify. Such prosecutorial commentary had been found to violate the defendant's privilege against self-incrimination under the Fifth Amendment.

In a concurring opinion in Adamson, explaining why he agreed with the majority's decision not to extend the federal rule to state trials, Justice Frankfurter asserted that the Due Process Clause of the Fourteenth Amendment has a meaning separate from the provisions of the Bill of Rights. He contended:

Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.

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81 Id. at 50.
82 Id. at 67–68 (Frankfurter, J., concurring). Justice Frankfurter offered no explanation for confining the reference sources to notions of justice of English-speaking people. One can only assume that this was intended to reflect the British common law background of most American jurisdictions. A number of states, including California, the state in which Adamson was tried, as well as Louisiana, Arkansas, and Texas, derived much of their early doctrinal principles and procedural structures from civil law. See M.H. Hoeflich, Translation and the Reception of Foreign Law in the Antebellum United States, 50 Am. J. Comp. L. 753, 755 (2002). Those influences continue to shape aspects of their local legal systems.
In sharp contrast with that position was a dissenting opinion prepared by Justice Black and joined by Justice Douglas. Black took an originalist approach, arguing that the history of the Fourteenth Amendment demonstrates that it was intended to require the states to adhere to all the Bill of Rights provisions. In support of that contention, he appended a summary of what he considered relevant events and comments relating to the adoption of the amendment. He additionally urged that the protections afforded by the Bill of Rights are salutary because they reflect historical experiences in combating governmental oppression:

In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights.  

Justice Murphy wrote a separate dissent in Adamson, joined by Justice Rutledge. He argued that the Due Process Clause not only incorporates all of the textual guarantees of the Bill of Rights, as asserted by Black, but also requires adherence to fundamental standards of procedure even if there is no violation of a specific provision in the Bill of Rights.

Less than two decades later, by a vote of 5-4, the Supreme Court reversed the specific holding in Adamson, finding that the Due Process Clause of the Fourteenth Amendment requires the states to provide defendants with the same protection against compulsory self-incrimination as the federal government affords under the Fifth Amendment. Quoting with approval from an early decision, the Court explained:

[A]ny compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. It is

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83 Adamson, 332 U.S. at 71–72 and app. at 92–123 (Black, J., dissenting).
84 Id. at 89.
85 Id. at 124 (Murphy, J., dissenting).
86 Malloy v. Hogan, 378 U.S. 1, 8 (1964); see also Carter v. Kentucky, 450 U.S. 288, 305 (1981) (holding that the Fourteenth Amendment, like the Fifth, requires that upon the defendant's request, the trial court instruct the jury that no negative inferences are to be drawn from the defendant's failure to testify).
abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.87

The debate among the Justices in Adamson, and the eventual shift in approach, were repeated with respect to other Bill of Rights provisions. For example, Palko v. Connecticut,88 a decision relied on by the majority of the Court in Adamson, involved a defendant who in his first trial had been convicted of murder in the second degree, a crime not subject to the death penalty. The state prosecutor appealed to the state’s high court and obtained a retrial of the original first-degree murder charge, which could result in the death penalty.89 On retrial, the defendant was convicted of first-degree murder and was sentenced to death.90 The Supreme Court heard the case to consider whether the Due Process Clause of the Fourteenth Amendment prohibited the retrial on the ground that it constituted double jeopardy. Because the Fifth Amendment expressly prohibits a person “to be twice put in jeopardy of life or limb” for the same offense, the defendant argued that subjecting him to the second trial violated the Fourteenth Amendment prohibition against taking life or liberty without due process of law.91 Under prior decisions, the double jeopardy prohibition of the Fifth Amendment would have barred retrial in a federal prosecution despite the prosecutor’s showing of trial errors.92 Nevertheless, the Supreme Court, with just a single dissenting vote, ruled that this protection is not available to a state court defendant under the Fourteenth Amendment’s Due Process Clause. Justice Cardozo, writing for the Court, explained that although some specific liberties listed in the Bill of Rights, such as the freedom of expression, religion and assembly, and the right to counsel in a criminal case, are implicit in the Fourteenth Amendment Due Process Clause’s protection of ordered liberty, not all constitutional restrictions on the

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87 Malloy, 378 U.S. at 9 n.7 (quoting Boyd v. United States, 116 U.S. 616, 631–36 (1886) (omissions in original)).
89 Id. at 321. On appeal, the prosecution contended that the trial court had erroneously excluded testimony concerning the defendant’s confession, excluded certain prosecution cross-examination, and given incorrect instructions to the jury.
90 Id. at 321–22.
91 Id. at 322.
92 See id. at 322–23 (citing Kepner v. United States, 195 U.S. 100 (1904) and Trono v. United States, 199 U.S. 521 (1905)).
federal government specified in the Bill of Rights are absorbed into the Fourteenth Amendment. Rather, the Court explained that the Fourteenth Amendment's Due Process Clause protects only those rights that are essential to the preservation of ordered liberty—those whose denial would sacrifice the existence of liberty or justice. In explaining why the double jeopardy protection is not such an essential protection, Cardozo cited scholarly works reporting that double jeopardy is not forbidden in other legal systems.

In Betts v. Brady, a 6-3 majority of the Court concluded that a state did not have a constitutional obligation under the Fourteenth Amendment's Due Process Clause to provide legal counsel to an indigent criminal defendant in a non-death penalty case. In reaching that result, the Court examined the past and current practices of state courts and legislatures concerning the provision of counsel for indigent defendants and concluded that under the circumstances of the case, the failure to provide the defendant with counsel was not "offensive to the common and fundamental ideas of fairness." In contrast, Justice Black, dissenting, cited pronouncements in earlier case decisions, as well as some states' statutory requirements of counsel, to argue that denial of appointed counsel to impoverished defendants charged with serious crimes "has long been regarded as shocking to the 'universal sense of justice' throughout this country."

Eventually, the Supreme Court overruled both Palko and Betts. By a 7-2 margin in Benton v. Maryland, the Court condemned the Palko approach as a watered-down standard of the American scheme of justice, announcing that the guarantee against double jeopardy is of a fundamental nature. The Court explained that this right's origins can be traced to ancient Greece and Rome, and that the right was established in England long before the founding of the United States. Of particular interest to this discussion, Justice Harlan's concurrence, joined by Justice Stewart, emphasized that Harlan did not read the Court's opinion as accepting the

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93 Id. at 323–28.
94 Id. at 325–26 n.3.
96 Id. at 473.
97 Id. at 476–77 (Black, J., dissenting); see also id. app. 477–80 (listing state statutes requiring counsel for indigent defendants in non-capital cases).
99 Benton, 395 U.S. at 795.
notion that all protections of the Bill of Rights automatically restrict state power under the Fourteenth Amendment’s Due Process Clause.  

Similarly, the Court’s decision in *Gideon v. Wainwright* unanimously overruled *Betts*. The Court’s opinion explained that the earlier decision had deviated from the American tradition concerning the importance of the right to counsel in obtaining a fair trial. Writing for the Court, Justice Black also stated:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.

When we review these examples of the evolution of the Court’s interpretation of the Fourteenth Amendment’s Due Process Clause, we can see that, because of the vagueness of that provision, in each decision the Justices looked beyond the constitutional text to find guiding principles. And in each, they found that guidance in their perceptions of prior and contemporary practices, in their impressions of “widespread belief” (as Justice Black characterized it in *Gideon*), and in their deductive analysis of the principle of procedural fairness.

### D. Non-Textual Authority and the Eighth Amendment

Still another situation in which the Constitution’s text invites reliance upon external sources is the Eighth Amendment’s prohibition against the infliction of “cruel and unusual punishments,” a phrase that inherently

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100 *Id.* at 801.  
101 *Gideon*, 372 U.S. at 343–45.  
102 *Id.* at 344.  
103 *Id.*.  
104 U.S. CONST. amend. VIII: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
necessitates exploring contemporary or historic norms and principles. In recent decades, the U.S. Supreme Court has been closely divided regarding the proper interpretation of this language. This tension was illustrated in the Court’s recent decision in *Atkins v. Virginia.*

That case involved the appeal of Daryl Atkins, who, together with William Jones, robbed a victim at gunpoint, then drove him to an automatic teller machine and forced him to withdraw more money. The defendants then drove the victim to an isolated location where either Atkins or Jones shot the victim eight times. Each claimed the other committed the murder, and at trial Jones testified against Atkins. Atkins had sixteen prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming, and the record indicated that he gave unpersuasive, inconsistent testimony. However, based on a review of Atkins’ school and court records, Atkins’ score of fifty-nine on a standard intelligence test, and interviews with Atkins and others familiar with him, a psychologist testified that he was “mildly mentally retarded.” Based on similar interviews and a review of records, but not on an intelligence test, a psychologist testifying for the prosecution concluded that Atkins was not mentally retarded, but instead had average intelligence and an antisocial personality. The prosecution’s psychologist testified that Atkins did poorly on assigned tasks “because he did not want to do what he was required to do.” Under state law, a jury sentenced Atkins to be executed. The Virginia Supreme Court upheld the sentence and rejected the argument that a mentally retarded defendant cannot be sentenced to death.

By a 6–3 vote, the U.S. Supreme Court reversed the death sentence and remanded the case to the state court for reconsideration. The majority opinion stated the Eighth Amendment draws “its meaning from the evolving standards of decency that mark the progress of a maturing society.” The majority then explained that when legislative acts reveal a

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106 *Id.* at 307.
107 *Id.* at 339 (Scalia, J., dissenting).
108 *Id.* at 308–09. The score range for the intelligence test is 45–155, with 100 being the mean. Only one to three percent of the population scores lower than 70–75. A score below 70 is generally regarded as mental retardation. *Id.* at 309 n.5.
109 *Id.* at 309.
110 *Id.* at 309 n.6.
111 *Id.* at 309–10.
112 *Id.* at 321.
113 *Id.* at 311–12 (quoting with approval *Trop v. Dulles,* 356 U.S. 86, 100–01 (1958)).
consensus regarding the citizenry's opinion of suitable criminal punish-
ments, the Court will accept this judgment unless it finds reason to disagree
with it. The Court observed that in addition to the fourteen states that did
not allow the death penalty, the federal legislature and eighteen states had
barred its use on the mentally retarded, and similar legislation was pending
in some other states. It also reported that executions of mentally retarded
defendants rarely occur even in those states that permit them, and that the
pattern of change has been consistently in the direction of eliminating the
death penalty as a punishment for the mentally retarded.\footnote{4} From this, the
Court majority concluded: "[T]oday our society views mentally retarded
offenders as categorically less culpable than the average criminal. The
evidence carries even greater force when it is noted that the legislatures that
have addressed the issue have voted overwhelmingly in favor of the
prohibition."\footnote{5} In a footnote, the majority opinion deemed the consensus
against such executions evident from the positions of relevant professional
associations and leadership of diverse religious communities, from public
opinion polls, and from penal standards adopted in many foreign nations.\footnote{6}

In order to decide whether there was reason to disagree with this social
consensus, the opinion then examined the factual and analytical grounds for
concluding that mentally retarded individuals should be treated as less
culpable than others and less capable than others of defending themselves
against false or misleading accusations. It considered those findings sound
and, therefore, held that the Eighth Amendment prohibits imposing the
death penalty on mentally retarded defendants.\footnote{7}

Chief Justice Rehnquist and Justices Scalia and Thomas joined in two
dissenting opinions. Although the dissenters accepted the majority’s
characterization, following \textit{Trop v. Dulles}, of the Eight Amendment as
embracing an evolving standard of decency, Chief Justice Rehnquist
condemned the weight the majority placed “on foreign laws, the views of
professional and religious organizations, and opinion polls in reaching its
conclusion.”\footnote{8} Instead, he argued that, in a democratic society, contempo-
rary moral assessment of the propriety of a punishment is the proper
domain of the state legislature and the trial jury, not the federal courts. The

\begin{footnotes}
\footnotetext[14]{Id. at 313–16.}
\footnotetext[15]{Id.}
\footnotetext[16]{Id. at 316 n.21.}
\footnotetext[17]{Id. at 318–21.}
\footnotetext[18]{Id. at 322 (Rehnquist, C.J., dissenting). Justice Scalia’s dissent was even
more emphatic in condemning the majority’s references to practices in other
nations. \textit{Id.} at 347–48 (Scalia, J., dissenting).}
\end{footnotes}
Chief Justice also questioned the reliability of public opinion data cited by the majority.\textsuperscript{119} A dissenting opinion by Justice Scalia additionally asserted that the majority position misrepresented the consensus respecting exemption of mentally retarded persons from the death penalty. He complained that the eighteen legislatures that had passed such legislation represented but a minority of those states in which the death penalty is permitted. He also noted that a majority had adopted the legislative change prospectively with the result that some mentally retarded defendants could still be executed after the change had been adopted. He commented: "That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches."\textsuperscript{120}

Justice Scalia further argued that the majority's reliance on external sources purporting to reflect public disapproval of capital punishment for mentally retarded persons in fact served as a mere subterfuge for imparting the Justices' own notions of fairness into the Constitution. With characteristic lack of self-restraint, he asserted:

\begin{quote}
The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. "In the end," it is the feelings and intuition of a majority of the Justices that count—"the perceptions of decency, or of penology, or of mercy, entertained... by a majority of the small and unrepresentative segment of our society that sits on this Court."\textsuperscript{121}
\end{quote}

Justice Scalia also challenged the logic of the Court's underlying rationale for exempting mentally retarded persons from a punishment that can be administered to others. He pointed out that because the majority accepted the contention that a mentally retarded offender can know the difference between right and wrong, the proper test would be to permit the sentencer to assess "whether [the defendant's] retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question."\textsuperscript{122}

Finally, in response to the majority's explanation that mentally retarded defendants have special difficulties in assisting their counsel and offering persuasive testimony, Justice Scalia stated:

\begin{itemize}
\item \textsuperscript{119} Id. at 325–27 (Rehnquist, C.J., dissenting).
\item \textsuperscript{120} Id. at 342 (Scalia, J., dissenting).
\item \textsuperscript{121} Id. at 348–49 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)) (internal citations omitted).
\item \textsuperscript{122} Id. at 351 (Scalia, J., dissenting).
\end{itemize}
I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt), it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an Eighth Amendment claim that execution of the mentally retarded is cruel and unusual.\textsuperscript{123}

Only Justice Scalia and those who joined this opinion can say whether this statement was intended to be a serious assertion or was merely hyperbole resulting from excessively emotional rhetoric. Clearly, the quoted contention ignores the fact that the death penalty, unlike long prison terms, is irreversible if error is later discovered. It is because of this special characteristic of punishment by execution that the majority was prompted to take extraordinary precautions in limiting its availability.

For purposes of this examination of constitutional decision-making in the United States, several insights emerge from the Supreme Court's contentious analysis of the constitutional prohibition against cruel and unusual punishment. First, in deciding the \textit{Atkins} case, all of the Justices joined in opinions that accepted the proposition that discovering the correct meaning of this provision necessitates going beyond the text and finding guidance from other sources. Thus, the decision demonstrates that, at least in some instances, resort to external sources of guidance is a universal characteristic of the analytical approach of U.S. Supreme Court Justices. The Justices do, however, differ in the frequency with which they cite to such sources.\textsuperscript{124}

Secondly, the Justices do not agree on the degree of weight to be accorded to particular factual assertions of social scientists and other non-legislative or non-judicial observers of American norms and principles. Although, in \textit{Atkins}, the majority of the Justices gave some weight to social science findings, the dissenters asserted that such findings should be disregarded due to imperfections in methods of empirical research and analysis. This argument, however, begs the following question: Even if scientific deficiencies exist in some social science studies, are these inaccuracies likely to be greater than those resulting from the judiciary's

\textsuperscript{123} \textit{Id.} at 352 (Scalia, J., dissenting).

\textsuperscript{124} An empirical study of 1996 Supreme Court decisions documents the Court's frequent resort to external sources in cases involving statutory construction. \textit{See} Jane S. Schacter, \textit{The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond}, 51 \textit{STAN. L. REV.} 1, (1998).
reliance on its own, no doubt often inaccurate, perceptions of human behavior or social consensus? The judiciary’s deficiencies in assessing individual behavior and the mechanics of social structure are well illustrated by the fact that for centuries common law jurisdictions treated women, especially married women, as less than legally competent with respect to many types of activities. The justification included the judiciary’s perceptions (misperceptions) respecting the mental stability and capacities of women and the assumed need for and inevitability of a wife’s subservience in order to maintain household tranquility.  

Finally, even though the Court majority in *Atkins* accepted the proposition that analysis of the Constitution can be improved by consulting the jurisprudence of other legal systems, the three dissenters vigorously insisted that only American sources can legitimately guide the Court’s determination of whether a punishment offends the Eighth Amendment.  

In relation to this last point, it is interesting to observe that in the delibera-

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125 For example, in *Towers v. Hagner*, 3 Whart. 48 (Pa. 1838), the Pennsylvania Supreme Court, in explaining why a wife was not permitted to bring a suit without joining her husband, stated:

In contemplation of law, the wife is scarcely considered to have a separate existence: she and her husband constitute but one person, and all the rights and duties which are hers at the period of the marriage, become his, during the continuance of that union. This unity of the persons of the husband and wife, is the source from which her disability to maintain suit is derived. *Id.* at 60.

For similar sentiments in a case in which a court refused to enforce a wife’s support claims based on a separation agreement, see *Simpson v. Simpson*, 34 Ky. (4 Dana) 140 (1836).

See, too, the concurring opinion in *Bradwell v. Illinois*, 83 U.S. 130, 140–42 (1872), where Justice Bradley, joined by Justices Swayne and Field, rejected the assertion that women have a right to seek a license to practice law:

It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex. *Id.* at 142.

126 *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting); *id.* at 347–48 (Scalia, J., dissenting).
tions of the Constitutional Convention and the debates respecting the proposed ratification of the Constitution, frequent references were made to the rules of other legal systems, to wisdom gained from historical experiences of other nations, and to what in modern terminology would be characterized as political, social, and economic theory posited by world-renowned scholars.\textsuperscript{127} Moreover, the very phrase "cruel and unusual punishment" traces its origins to a 1689 English case in which the House of Lords decided that a fine imposed on Lord Devonshire for assault and battery "was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land."\textsuperscript{128} How unseemly can it be to seek guidance from standards and practices of other societies when applying a legal concept that was itself adopted from another nation's jurisprudence?\textsuperscript{129}

E. Non-Textual Authority and Substantive Due Process

Probably the most controversial modern example of the U.S. Supreme Court's resort to extra-textual sources was its decision in \textit{Roe v. Wade}, the case in which a 7–2 majority decided that a state can neither prohibit a woman from obtaining a medical abortion during the first trimester of pregnancy nor impose excessive restrictions on such procedures during the second trimester.\textsuperscript{130} The \textit{Roe} plaintiffs challenged a state statute that made it a crime to procure or perform an abortion unless it was "with medical advice for the purpose of saving the life of the mother."\textsuperscript{131} At the time, a majority of states had similar laws.\textsuperscript{132}

Before addressing the issue of whether a woman has a constitutional right to terminate her pregnancy, Justice Blackmun, writing for the Court, drew upon scholarly accounts to examine the ancient and more recent


\textsuperscript{128} Weems v. United States, 217 U.S. 349, 376 (1910) (citing State v. Driver, 78 N.C. 423 (N.C. 1878)).

\textsuperscript{129} For an extended analysis of this point, see Harold Hongju Koh, \textit{Paying "Decent Respect" to World Opinion on the Death Penalty}, 35 U.C. Davis L. Rev. 1085 (2002).

\textsuperscript{130} \textit{Roe v. Wade}, 410 U.S. 113, 164 (1973) (holding that, during the second trimester, the state may regulate abortion only to the extent necessary to protect maternal health).

\textsuperscript{131} \textit{Id.} at 117–18.

\textsuperscript{132} \textit{Id.} at 118.
history of social and religious attitudes and reactions to abortion. He found persuasive one theorist's proposition that societies' acceptance or rejection of abortion was determined in large part by their philosophic or religious perceptions of when human life begins.\footnote{Id. at 130–32.}

Justice Blackmun's opinion, based on ancient and modern treatises, also observed that early British common law decisions did not criminalize abortion performed prior to the fetus's becoming "animated" or "quickened" around the sixteenth to eighteenth week of pregnancy.\footnote{Id. at 132–33.} Blackmun linked the establishment of this line of demarcation to a "confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."\footnote{Id. at 133.} Additionally, he noted disagreement as to whether at common law the abortion of a quickened fetus was a felony, a lesser crime, or no crime at all, and that common-law attitudes on this subject changed over the centuries. Around the time of the founding of the U.S. constitutional system, the prevalent common-law view seemed to be that abortion after quickening was not a felony.\footnote{Id. at 134–35 (noting that courts relied on Coke's statement that post-quickening abortion was "a great misprision, and no murder" (quoting SIR EDWARD COKE, INSTITUTES III * 50)).} Blackmun also cited a modern scholar who argued that post-quickening abortion was at no point a common-law crime.\footnote{Id. at 135 (citing Cyril C. Means, Jr., The Phoenix of Abortional Freedom, 17 N.Y.L. F. 335 (1971)).} The common-law view held sway in the U.S. until after the Civil War, when several states adopted legislation prohibiting abortion both before and after quickening. Generally, these statutes treated pre-quickening abortions as a lesser offense. The statutory prohibitions and penalties grew harsher, however, and by the mid-twentieth century most states had made all abortions a serious crime unless necessary to save the mother's life. Nonetheless, a few jurisdictions adopted a broader exception for abortions necessary to preserve the mother's health.\footnote{Id. at 138–39.}

On the other hand, Justice Blackmun reported that in the approximately ten years preceding \textit{Roe}, the trend had reversed in some states: about a third of the state legislatures had relaxed abortion restrictions.\footnote{Id. at 140.} A few had decriminalized abortions; others had adopted lesser penalties for abortions performed early in pregnancy and expanded the situations in which...
Abortions were allowed. These exceptions included rape, pregnancy due to illicit intercourse with a girl under age sixteen, incest, the potential birth of a child with a grave mental or physical defect, or serious endangerment of the mother's health. These provisions reflected a recent change in the position of the nation's largest physician group, the American Medical Association, which had moved from total opposition to abortion, to endorsing a statement accepting its legitimacy under the above special circumstances. Eventually, the organization adopted a statement indicating that it no longer opposed abortions performed by licensed medical personnel after the mother's consultation with a physician. Justice Blackmun also cited recent positions by other professional groups that supported less severe restrictions on abortions.

The Court's opinion then turned to the possible justifications for restrictions on abortion procedures. Relying on published medical reports, the Court rejected the contention that criminalizing the procedure was a justified safeguard of the woman's health. Justice Blackmun explained that the mortality risks of early abortions are lower than the risks of carrying a pregnancy to full term.

This brought the Court to the core of the constitutional issue, the assertion that anti-abortion laws are justified by the government's interest in protecting unborn human life. The thesis of this argument is that the state legislature has a duty to treat all human life equally, to place the protection of a human life above competing personal interests of others, and to decide when life begins. Blackmun noted that courts sustaining state anti-abortion laws had held them to be a legitimate exercise of legislative responsibility to prevent the taking of a person's life without due process of law. The courts had held that this due process concern extends, as well, to protecting potential human life. Justice Blackmun's analysis of this issue began by reviewing various contexts in which the Court had found that the right of personal privacy is implicit in the protections of the first nine amend

140 Id. at 140 & n.37.
141 Id. at 147 n.40.
142 Id. at 140–47.
143 Id. at 149–50.
144 Id. at 149.
145 Id. at 156.
146 See id. at 153–56. In a concurring opinion, Justice Stewart characterized the liberty at stake as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . . ." Id. at 169 (quoting Eisenstadt v. Baird, 405 U.S. 438 (1972)).
ments as incorporated into the Fourteenth Amendment, and that a woman's right to terminate her pregnancy, though not absolute, is within the scope of the right to personal privacy.\footnote{Id. at 152–56.} Because the right to privacy is not absolute, it must give way if the government has a compelling purpose for interfering with it and has selected the least restrictive means of accomplishing that purpose.

In order to assess whether abortion prohibitions are supported by a compelling interest, the Court next examined the question of whether a fetus is a "person" within the meaning of the Due Process Clause. In dicta, the Court noted a logical inconsistency between the justification that anti-abortion laws protect the life of a person, and exceptions in the Texas statute and other anti-abortion laws, which permit abortions under some circumstances and impose a lesser penalty than that imposed for taking the life of a person by other means.\footnote{Id. at 157 n.54.} Nevertheless, the Court did not rest its decision on such inconsistencies. Justice Blackmun surveyed an array of religious, philosophical, medical and biological writings evidencing a wide divergence of opinion respecting when human life begins. He also examined how courts treat the status of a fetus in other contexts and concluded "the unborn have never been recognized in the law as persons with all the rights of persons." Autonomy" is probably the more succinct term to use and is more accurate than "personal privacy." Cf. Planned Parenthood v. Casey, 505 U.S. 833, 851–52 (1992) (describing the right as encompassing "choices central to personal dignity and autonomy").

\footnote{Id. at 152–56.} Courts had located this privacy interest variously in the First Amendment, the Fourth and Fifth Amendments, the Ninth Amendment, and the liberty guarantee of the Fourteenth Amendment. \footnote{Id. at 152–53.} Courts had also traced the privacy right more broadly to the "penumbras of the Bill of Rights." \footnote{Id.} The Roe majority preferred the view locating the right in the Fourteenth Amendment's liberty guarantee. \footnote{Id.} Traditionally, the first eight amendments have been referred to as the Bill of Rights. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It has been read variously as a canon of interpretation requiring the Court to read expansively the Constitution's explicit list of protected liberties, and as an incorporation into the Constitution of all those liberties that are the natural rights of a free people who have surrendered to the government only that part of their natural rights necessary to establish a system of ordered liberty. Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring). The latter proposition is supported, as well, by the Preamble of the Constitution, which lists among its purposes securing "the blessings of liberty."
Therefore, he explained, the government cannot override a woman’s right to terminate her pregnancy by merely adopting a highly debatable definition of when life begins. The Court went on, however, to note that the government’s interest in a woman’s health and in the potential birth of a child increases as fetal development progresses, justifying progressively more intrusive restrictions at the more advanced stages of pregnancy.\textsuperscript{150}

In his dissent, Justice Rehnquist observed that when the Fourteenth Amendment’s Due Process Clause was adopted, most states had laws limiting the right to engage in abortion and suggested, therefore, that the states could not have contemplated a right to terminate a pregnancy as falling within the amendment’s protections.\textsuperscript{151} This argument, of course, assumed without discussion the erroneous premise that the Constitution is amended solely to preserve the status quo. Rehnquist also argued: “The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”\textsuperscript{152}

Dissenting in \textit{Roe’s} companion case, \textit{Doe v. Bolton}, Justice White condemned the Court for requiring the state to demonstrate that it had a compelling governmental purpose to justify the burden its law placed on a woman seeking an abortion.\textsuperscript{153} He argued that it was sufficient for there to be a legitimate governmental purpose, and that the state legislature should be permitted to strike a reasonable balance between the competing communal and individual interests. Justice White concluded: “As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.”\textsuperscript{154}

Justice White’s willingness to rely on the legislative will to balance competing personal and communal interests disregards the fact that in large

\textsuperscript{149} \textit{Id.} at 162.

\textsuperscript{150} \textit{Id.} at 163–65.

\textsuperscript{151} \textit{Id.} at 174–75 (Rehnquist, J., dissenting).

\textsuperscript{152} \textit{Id.} at 174 (Rehnquist, J., dissenting) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).


\textsuperscript{154} \textit{Id.} at 222.
measure, the concept of constitutional protection of individual liberty is a check on democratic prerogatives. In a system of representative government, despite problems of political corruption or apathy, eventually interests having popular support can be expected to prevail. Although constitutional protections are needed to preserve the structures for registering the popular will, if those representative structures are in place, seldom must constitutional protections be invoked to ensure adoption of the populace’s prevailing policy desires. In contrast, when persons, conduct, or expression are disfavored by the majority, repression is likely to prevail absent constitutional protection. For this reason there is wisdom in the principle applied in Roe of requiring the government to demonstrate a compelling public need before restricting the exercise of a fundamental individual right.\(^{155}\)

III. THE STATE SOVEREIGNTY MYTH

In the previous illustrations of Supreme Court debates regarding the respective roles of constitutional text and external sources in reaching constitutional decisions, the more conservative members of the Court chided their brethren, accusing them of going beyond the text’s apparent or historical meaning. But as we already have seen, the Court’s conservatives do not always resist, and sometimes are compelled to seek, guidance beyond the text.\(^{156}\) The most striking example of this is these Justices’ reliance in recent years on concepts of federalism and sovereign immunity, phrases not found in the Constitution, to support the proposition that federal power cannot provide individual redress against state conduct unless Congress acts under the authority of powers expressly granted by the Fourteenth Amendment.

A. State Autonomy Concerns Among the Framers

During both the Constitutional Convention in Philadelphia and the ratification process, unquestionably a core issue was the extent to which federal power would be able to supersede the authority of the states.\(^{157}\) The Anti-Federalists, who included Samuel Adams and Patrick Henry, feared that a central government would become a source of uncontrollable


\(^{156}\) See, e.g., supra notes 118–123 and accompanying text.

\(^{157}\) See KELLY ET AL., supra note 12, at 90–96.
oppression and that interests of less populated regions would be ignored by the national government. Those fears in part were placated by establishing an upper legislative chamber in which each state had the same number of representatives, and by giving the federal government only enumerated powers. Additionally, a few specific limitations were imposed on federal power. These included not allowing Congress to prohibit the slave trade until 1808 and placing a cap on the tax that Congress could impose on the importation of people; requiring uniformity in any federal duties, imposts or excises; forbidding the levy of federal taxes on goods exported from a state; and requiring that regulation of ports be equal.

On balance, however, the Constitution substantially shifted to the central government the ultimate power to protect, promote, regulate, and represent the interests of the people of the United States. And, although considerable discussion in the Constitutional Convention addressed concerns regarding the effects a more powerful central government would have on the citizens and the states, no mention was made of the doctrine of sovereign immunity.

Moreover, the original Constitution clearly made the states subservient to federal authority. Thus, Article VI explicitly states that the Constitution and federal laws and treaties are supreme and binding on state as well as federal courts. In addition, in defining the power of the federal courts,

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159 See Murphy, supra note 18, at 74–75. For example, Paterson, see supra note 158, left the Convention after the House-Senate compromise was reached but eventually returned to sign the Constitution. Id. at 74. He later was a U.S. Senator from New Jersey, where he served on the Judiciary Committee. Id. at 75. He left the Senate to be Governor of New Jersey from 1790 to 1795, when he resigned to accept an appointment to the U.S. Supreme Court. He served on the Court until his death in 1806. Id.

160 U.S. Const. art. I, § 9, cl. 1.

161 Id. art. I, § 8, cl. 1; id. art. I, § 9, cl. 4.

162 Id. art. I, § 9, cl. 5.

163 Id.

164 See 4 The Records of the Federal Convention, supra note 127, at 216 (word and general index of the Convention debates, in which "sovereign immunity" does not appear as a term).

165 U.S. Const. art. VI, para. 2.
Article III extends jurisdiction not only based on the Constitution, laws, and treaties of the United States, but also based on categories of parties, such as "Controversies . . . between a State and Citizens of another State."\textsuperscript{166} This parties-based grant of jurisdiction could potentially prevent a state court from enforcing the state's own criminal laws, tax laws, and government contracts if a non-citizen of the state was a party to the action. Furthermore, the state-citizen diversity provision implies that the common law notion of sovereign immunity does not apply to the states when sued in federal court. This may have appeared to the framers to be a necessary feature of federal judicial authority inasmuch as Article I, Section 10 of the Constitution places a variety of specific restraints on state power in dealing with individuals.\textsuperscript{167} The vindication of those protections obviously necessitates allowing an individual to sue an offending state sovereign.

The need to enshrine in the Constitution national sovereignty, not state sovereignty, was evident even to such leaders of the Constitutional Convention as George Mason of Virginia, an outspoken proponent of states' rights. In a memorandum written during the Convention, he observed that the states, which as colonies were under the Crown and thereafter were within the Confederation, had never operated as distinct and independent nations.\textsuperscript{168} Mason refused to sign the Constitution because it did not contain a Bill of Rights, and, in his opinion, gave so much power to the federal legislative and judicial branches that their state counterparts could ultimately be without meaningful power.\textsuperscript{169} That view, though perhaps an exaggerated reading of the document, revealed that Mason, for one, did not perceive the Constitution as providing a fortress to preserve sovereign prerogatives of the states.

James Madison, who signed the Constitution and championed its ratification, similarly recognized that the new charter was a major encroachment on state authority. He posted a copy of the Constitution to his friend and mentor Thomas Jefferson, who was abroad, together with a description of some of the more highly debated issues and the reasons for his satisfaction with the more important compromises.\textsuperscript{170} He explained that

\textsuperscript{166} Id. art. III, § 2, para. 1.

\textsuperscript{167} Id. art. I, § 10, cl. 2. These restraints included limitations on a state's levy of imposts or duties, and prohibitions against state-issued bills of attainder, ex post facto laws, laws impairing the obligation of contracts, or laws adopting a requirement that payment be accepted in other than silver or gold. \textit{Id.}

\textsuperscript{168} \textsc{4 The Records of the Federal Convention}, \textit{supra} note 127, at 75–76.

\textsuperscript{169} \textsc{Murphy}, \textit{supra} note 18, at 69–70.

\textsuperscript{170} \textsc{3 The Records of the Federal Convention}, \textit{supra} note 127, at 20, 34–35, 131–36.
of the different government structures discussed, the Convention "embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them . . . ."\textsuperscript{171} He also expressed fear that states might resist judicial protection of individuals but offered the opinion that the authority of the federal judiciary allowed it to keep the states within their proper limits.\textsuperscript{172}

On the other hand, during the ratification debates some participants in favor of ratification sought to assure skeptics that Article III did not unduly encroach on state sovereignty. In the New York ratification debates, an Anti-Federalist pamphlet had claimed that the Article III state-citizen diversity provision would "'humble' the states by subjecting undesirable liability."\textsuperscript{173} Hamilton prepared \textit{The Federalist No. 81} to rebut this claim. In ambiguous language which was inconsistent with the apparent meaning of the constitutional text, he stated:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . [A]nd the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?\textsuperscript{174}

Hamilton's statement can be understood not as reading out of Article III the language giving the federal courts jurisdiction in "Controversies . . . between a State and Citizens of another State," but rather as a suggestion that Congress, in regulating federal court jurisdiction, would never authorize such a claim for relief. Such an understanding of Hamilton's argument would explain the otherwise cryptic assertion that "the danger intimated must be merely ideal."\textsuperscript{175}

In \textit{The Federalist Nos. 45 and 46}, Madison attempted to quiet concerns about federal encroachment on state authority. He did so largely by

\textsuperscript{171} \textit{Id.} at 132.

\textsuperscript{172} \textit{Id.} at 132, 134.


\textsuperscript{174} \textit{The Federalist No. 81}, at 248 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

\textsuperscript{175} \textit{Id.}
demonstrating that under the new plan of government, the people of the states retained more than ample political and even military power to thwart abuses by the federal government. In his introduction of the topic in The Federalist No. 45, however, he made it clear that while one might speak of federal or state sovereignty, the ultimate sovereign authority resides in the people: "[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, ... let the former be sacrificed to the latter."76

Others in the ratifying conventions also tried to quiet fears respecting the scope of federal authority by reassuring constituents that the provision for state-citizen suits in federal court applied only when the state was plaintiff. But that strained reading of the wording did not sit well with other supporters of the Constitution, such as Edmund Randolph, a member of the Convention's Committee of Detail, who declared that not only could a state be held accountable to individuals in federal court but also that the state should have such accountability.77

Several state ratifying conventions considered proposals to amend the Constitution by modifying the scope of federal court authority to hear suits against states,78 and a few adopted such proposals.79 Some of these proposals would have preserved, in words or substance, the proposition that a state enjoys sovereign immunity from suit. A South Carolinian proposed an amendment to the Bill of Rights that would remove state-citizen diversity jurisdiction from Article III, but the proposal was not considered by the full House of Representatives.80

B. States' Sovereign Immunity: Chisholm v. Georgia and the Eleventh Amendment

Not too many years after the Constitution's ratification, the Supreme Court was presented with a case in which the plaintiff looked to a federal court to vindicate a claim against a state. Chisholm v. Georgia81 was filed by Alexander Chisholm, the executor of the estate of a Captain Farquhar,

177 Fletcher, supra note 173, at 1049–50.
178 New York, for example, entertained but rejected a proposal that would have deprived the federal courts of jurisdiction over suits against states. Id. at 1052.
179 Id. at 1051–52. Virginia, North Carolina, Rhode Island, Massachusetts, and New Hampshire all proposed such an amendment.
180 Id. at 1052–53.
181 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amendment as stated in Hans v. Louisiana, 134 U.S. 1 (1890).
a South Carolina resident who had allegedly sold goods to the state of Georgia for $169,613.33. Because Farquhar was a British loyalist, Georgia refused to honor the debt on the ground that it had been extinguished by a statute adopted after the debt had been incurred. Because a state was a party, the executor of Farquhar’s estate invoked the U.S. Supreme Court’s original jurisdiction and brought his action in assumpsit directly to the Court. Although it made a special appearance through counsel to announce that it denied that the Court had jurisdiction, the state of Georgia declined to respond to the claim because it regarded itself as immune from suit by a citizen of another state.

The Supreme Court, with each Justice writing a separate opinion, held that Article III indeed subjected the state to suit for payment of its debts to a resident of another state. All agreed except Justice Iredell. Since no argument had been presented by the state of Georgia, the opinions of the other Justices largely responded to Iredell’s reasoning.

Justice James Iredell, who had attended the North Carolina ratification convention as a supporter of the proposed Constitution, began his opinion with an interesting aside. He argued that criminal actions are beyond the scope of federal jurisdiction granted by Article III since they are not considered “controversies,” the term used respecting actions between a state and a citizen of another state. Iredell’s interpretation of the constitutional text placed special significance on the sequence of the nouns in Article III’s grant of state-citizen diversity jurisdiction. According to his interpretation, Article III permits a state to sue a non-citizen in federal court, but Iredell concluded that this jurisdiction extends only to “controversies,” or civil cases. Because the most common suit by a state against a non-citizen would be a criminal proceeding, but for Iredell’s interpretation of “controversies,” the door would be left open for Congress to allow such

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183 *Id.*
184 *Chisholm*, 2 U.S. (2 Dall.) at 430–31 (Iredell, J., dissenting). For constitutional jurisdiction, the plaintiff invoked Article III, § 2, para. 2 of the Constitution (state-citizen diversity). *Id.*
185 Swindler, *supra* note 182.
186 *Chisholm*, 2 U.S. (2 Dall.) at 469 (Jay, C.J.).
187 *Id.* at 479 (Jay, C.J.).
188 *Id.* at 449 (Iredell, J., dissenting).
189 *Id.* at 431–32 (citing U.S. CONST. art. III, § 2, para. 2).
190 *Id.*
actions to be removed from state to federal court, a result that would be a
far greater affront to state authority than the assumpsit action at issue.
Although they had much to say in refutation of Iredell’s basic thesis, none
of his brethren took issue with his remarks concerning state criminal
actions.\(^9\)

Second, Iredell concluded that while a state may pursue a civil action
against a diverse citizen in federal court, the inverse does not hold.
Consistent with the previously suggested reading of Hamilton’s *The
Federalist No. 81*, Iredell concluded that there can be no suit in a federal
court unless authorized by Congress, and that Congress had not adopted a
law allowing a citizen to bring an assumpsit action against a state.\(^9\) He
went further, however, and rejected the contention that Congress could
authorize such a right of action, explaining:

> Every State in the Union in every instance where its sovereignty has not
been delegated to the United States, I consider to be as compleatly
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.\(^9\)

Finally, Justice Iredell, in a long discourse guided by English treatises and
decisions, explained that in most instances courts do not entertain suits to
recover money owed by the Crown.\(^9\)

Justice John Blair, who had been a Virginia delegate at the Constitu-
tional Convention, dismissed the assertion that a state could have sovereign
immunity from suit. Rather, he reasoned that 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.”\(^9\)

Justice James Wilson, one of the most active participants in the debates
at the Constitutional Convention, and a member of the Committee of Detail

\(^9\) See *id.* at 450–53 (Blair, J.); *id.* at 453–55 (Wilson, J.); *id.* at 465–69
(Cushing, J.); *id.* at 469–79 (Jay, C.J.).
\(^9\) *Id.* at 432 (Iredell, J., dissenting) (arguing that federal jurisdiction is “one of
those cases . . . in which an article of the Constitution cannot be effectuated without
the intervention of legislative authority”).
\(^9\) *Id.*
\(^9\) *Id.* at 445 (Iredell, J., dissenting).
\(^9\) *Id.* at 452 (Blair, J.).
that had played a major role in drafting the Constitution, politely and indirectly chided his close friend, Justice Iredell, by recounting philosophical critiques of those who are so wedded to traditional notions that their minds are too inflexible to recognize and accept superior concepts that have superseded those rules. Wilson rejected the claim that a state can immunize itself from suit by surrounding itself in a cloak of sovereignty. In language that rang with the indignation of a signer of the Declaration of Independence, he asserted:

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.

Justice Wilson declared that Georgia was not a "sovereign" because it is the people of Georgia who are sovereign: "[A]nother principle . . . forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of 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." Justice Wilson then defended the merits of his conclusion by surveying the history of the concept of sovereignty, the political and legal principles underlying the adoption of the Constitution, the text, and the process of ratification.

Justice William Cushing, who had been vice chair of the Massachusetts convention that ratified the Constitution, offered a more concise and less developed opinion, which largely parsed the constitutional text. He, too, concluded that the suit filed in the Supreme Court against Georgia was proper under the Constitution.

Chief Justice John Jay's opinion was the last in the sequence. Jay was the author of five of The Federalist Papers, which played an important role in persuading New York voters to support ratification. Jay used the same fundamental premise as Wilson in voting to allow the action against Georgia. Describing the legal effect of the revolution, he stated:

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196 See id. at 454 (Wilson, J.).
197 Id. (Wilson, J.).
198 Id. at 458 (Wilson, J.).
199 See id. at 458–66 (Wilson, J.).
200 Id. at 466–69 (Cushing, J.).
From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; ... the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly.  

Jay next observed that European and British notions of sovereignty were based on a feudal society in which the prince is sovereign and the people are subjects of that central authority. He declared, however, that "no such ideas obtain here." The Chief Justice then asked whether "suability is compatible with State sovereignty." In answer to that question he observed that since a citizen obviously can sue another citizen or a group of citizens or a corporation formed by citizens, and since all the citizens of one state sue all of another when one state sues another state, and since a state can sue an individual citizen, there is no good reason that a citizen should not be able to sue the entire citizenry of a state in that community's collective capacity. Jay argued that this view reflected the plain meaning of Article III, Section 2, as well as promoting the Preamble's promise of establishing justice. He argued that the Preamble's goals include providing justice for the few against the many as well as the many against the few.

Jay reserved the question of whether the Constitution's rejection of sovereign immunity applied to debts incurred prior to the adoption of the Constitution.

Returning to the main thesis, we find that, although in a variety of ways all of the Justices had participated in the promulgation or adoption of the Constitution, most of the opinions went beyond that text to discern its

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201 Id. at 470 (Jay, C.J.).
202 Id. at 471 (Jay, C.J.).
203 Id. at 472 (Jay, C.J.).
204 Id. at 472–79 (Jay, C.J.). The Chief Justice also briefly considered whether the federal government is immune from suit. Observing that the question was not before the Court, he noted a possible reason to distinguish the necessity of granting federal immunity from suit. Although the federal Executive can execute judgments against a defendant state, there is no power the Court can call upon to enforce a judgment against the United States. Id. at 478. Hence, Jay indicated it might be appropriate for the Court, perhaps as a matter of judicial discretion in controlling its docket, to treat the federal government as immune from suit in order to avoid rendering unenforceable judgments. Id.
205 Id. at 479 (Jay, C.J.).
meaning under the circumstances of the case. In assessing the value of
guidelines for interpreting the text, one should remember that The
Federalist Papers may not always provide relevant evidence of the
framers’ and ratifiers’ intent, since five of the states ratified the Constitution before the Papers were published. Similarly, to the extent they are available, the statements at the ratifying conventions were not published until decades later. Nonetheless, the more probing judicial opinions examined and assessed the appropriateness or inappropriateness of the competing contentions by weighing particular doctrines of common law and political theory, the lessons of history, and the jurists’ own perceptions of the effect their decision would have in carrying out the Constitution’s stated purposes.

The Chisholm decision provoked considerable political consternation. Some expressed indignation that those who supported the British could now collect their debts from the taxes paid by those who fought the Revolution—a view that overlooked the Chief Justice’s final observation respecting the possible justification for allowing immunity from suits on debts that preceded adoption of the Constitution. Others may have been offended by the image of federal judges, including Supreme Court Justices, who were not residents of the state, interpreting instruments involving state government undertakings and deciding questions of state substantive law, or even trying the facts, in disputes concerning seemingly local affairs. Still another likely concern was that, at least with respect to non-citizens, a state might no longer be able to create a cause of action under which it could not itself be liable.


207 See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 13 & n.75 (1986) (noting that all information about the ratifying conventions comes from Jonathan Elliot’s The Debates in the Several State Conventions, first published in four volumes between 1827 and 1830).

208 See Fletcher, supra note 173, at 1058.

209 See Chisholm, 2 U.S. (2 Dall.) at 479 (Jay, C.J.).

210 Starting in 1789 and throughout the period in question, the Circuit Courts, which held two annual sessions in each district, were trial courts that consisted of two Supreme Court Justices and a district court judge. Robert A. Carp & Ronald Stidham, The Federal Courts 15 (2d ed. 1991).

At one extreme, in response to Chisholm the Georgia House adopted a bill condemning to hanging anyone in that state who might attempt to levy a judgment against the state.\textsuperscript{212} Massachusetts took a less extreme position by adopting a resolution calling for an amendment to "remove any Clause or Article . . . which can be construed to imply or justify a decision that a State is compelled to answer in any suit by an individual or individuals in any Court of the United States."\textsuperscript{213} It is not clear whether this "any Court" reference was intended to include state courts. What is clear, though, is that the Massachusetts call did not explicitly reject the Supreme Court's pronouncement that a state does not have sovereign immunity against being sued.

The political climate in which this reaction took place was complicated by continuing tensions between the United States and Britain over their mutual accusations of non-compliance with the Jay Treaty.\textsuperscript{214} British troops remained in the Northwest Territory and justified their continued presence by arguing that, in violation of the peace treaty, American states as well as individuals were not paying debts owed British subjects.\textsuperscript{215} At the same time, hostilities grew between France and Britain, and each sought support from the United States. President Washington was determined to maintain neutrality but feared that Britain would not respect American neutrality so long as America was not adhering to its treaty obligation to enforce claims owed British subjects.\textsuperscript{216} Anti-Federalists, on the other hand, generally were sympathetic to France, with the result that states and localities resisted paying debts owed the British for reasons of both ideology and financial stress. In order to strengthen their ability to resist such claims, some in the Anti-Federalist camp were calling for a new convention to amend the Constitution.\textsuperscript{217}

A proposal to overrule Chisholm by constitutional amendment came shortly after it was decided. The initial proposed wording is reported to have provided that no state could be liable in a suit by any person in "judicial courts, established, or which shall be established under the authority of the United States."\textsuperscript{218} Congress recessed; when it resumed in

\textsuperscript{212} Fletcher, supra note 173, at 1058.
\textsuperscript{213} Id.
\textsuperscript{215} See id. at 1914.
\textsuperscript{216} See id. at 1928–29 (describing Washington's decision to take a neutral stand for fear that war with the British would erupt).
\textsuperscript{217} Id. at 1931–32.
\textsuperscript{218} Fletcher, supra note 173, at 1058–59. The next day, a second proposed amendment was submitted to the House. Id.
January of 1794, the present wording was introduced for what became the Eleventh Amendment. There is little known documentation showing what the drafters discussed or intended. What is clear is that the Federalists, who still controlled Congress, wanted to quiet the political tension being generated over *Chisholm* by passing an amendment that narrowly overruled the case. At the same time, the Federalists wanted to retain the power to placate the British, and thus persuade them to leave the territories, through assurances that courts would enforce the Jay Treaty. Whatever was on the minds of those who drafted and adopted the resulting constitutional change, a year after *Chisholm* was decided, Congress passed the Eleventh Amendment, which received the necessary state ratification in just over one year.

Although in *Chisholm* the Court had denied that a state had immunity from suit, the Eleventh Amendment said nothing about sovereign immunity. Rather, it addressed only the narrow diversity jurisdictional question decided in *Chisholm* by specifying who can sue in federal court. The text of the Eleventh Amendment offers two possible readings respecting its effect on the jurisdiction of federal courts. The more literal reading removes from federal courts all authority to entertain a suit of any sort brought against a state by a citizen of another state or a citizen of another nation. This more literal reading, however, does not bar a person in that category from suing a state in its own court based on a federal right, such as the constitutional prohibition against the impairment of contracts, or a right, privilege or responsibility enacted by Congress. In such a suit, the state court is bound, under the Supremacy Clause, to enforce that federal right as the supreme law of the land, and any assertion of state immunity should yield to the superior federal right. *Chisholm* explained with clarity and extensive justification why a state court must enforce federal law in a suit by a person against the state; that duty is not contradicted by anything in the text of the Eleventh Amendment. On its face, therefore, the Eleventh Amendment does nothing more than require non-citizens to go to the state court.

219 *Gibbons*, *supra* note 214, at 1932.
220 *Id.* at 1934.
221 *Id.* at 1935.
222 *See id.* at 1934–35; Fletcher, *supra* note 173, at 1059.
223 U.S. CONST. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
224 *Gibbons*, *supra* note 214, at 1928.
225 *See id.* at 1935.
court to obtain a judgment for debts owed by the state. Commentators have noted that this interpretation is consistent with carrying out the political objectives of the Federalists who controlled Congress when the amendment was adopted.\textsuperscript{226} As so construed, the amendment quieted state indignation over the implicit affront of not trusting such suits to the states' courts, while at the same time enabling the Secretary of State to give the British assurances that treaty obligations continued to be enforceable.

In order to understand the alternative reading of the Eleventh Amendment's text, it is helpful first to review the structure and language of the jurisdictional provisions of Article III and the effect \textit{Chisholm} had on the interpretation of those provisions. Article III creates two types of federal court jurisdiction: a) jurisdiction based on the identity of one or both parties to a dispute; and b) jurisdiction based on the subject matter of a suit involving a federal substantive claim. Although Chisholm's suit involved a federal substantive claim—a potential violation of the Contracts Clause of Article I, Section 10\textsuperscript{227}—the Court did not discuss that potential basis for jurisdiction.

Moreover, this subject matter alone would not have qualified the action to be tried under the Supreme Court's original jurisdiction. Rather, the decision allowed the suit to be initiated in the U.S. Supreme Court for two reasons. First, the identity of the parties—a state and a citizen of another state—complied with one of the parties-based categories of jurisdiction in Article III, Section 2, Paragraph 1. Second, the fact that a state was a party further qualified the suit to be initiated as an original matter in the Supreme Court under Article III, Section 2, Paragraph 2.\textsuperscript{228} Inasmuch as the Eleventh Amendment was intended to reverse \textit{Chisholm}, and inasmuch as it is silent respecting \textit{Chisholm}'s explicit holding that sovereign immunity did not bar the federal court from exercising jurisdiction, a reasonable reading of the amendment is that its only purpose was to delete from Article III, Section 2, Paragraph 1 the language giving federal courts jurisdiction based on state-citizen diversity.\textsuperscript{229} Under this alternative reading, however, Chisholm

\textsuperscript{226} See generally id. at 1931–39.

\textsuperscript{227} "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{228} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431 (1793).

could still have sued in the Supreme Court based on the constitutional claim as a separate basis for jurisdiction.

This alternative interpretation of the Eleventh Amendment draws support not only from the history of its purpose, but also from the wording of the amendment and Article III. The federal judiciary is granted three forms of subject-matter jurisdiction under Article III: cases in law and equity; cases arising under the Constitution, laws, and treaties of the United States; and cases in admiralty and maritime jurisdiction. If the phrase "suit in law or equity" used in the Eleventh Amendment is given its traditional meaning, it encompasses only judicially promulgated rules of law and equity. Thus, under this reading, the Eleventh Amendment is inapplicable to cases involving constitutional, federal statutory, treaty, admiralty, or maritime claims, and federal courts retain jurisdiction over diversity suits against states in these subject-matter categories. Moreover, because the amendment provides that the "Judicial power... shall not be construed to extend" to suits brought by a non-citizen against a state, the text can be interpreted as permitting the federal legislature to provide for suits based on federal subject matter jurisdiction relating to constitutional, federal statutory, treaty, admiralty, or maritime claims.

Soon after the adoption of the Eleventh Amendment, the Attorney General of the United States petitioned the Supreme Court, in Hollingsworth v. Virginia, to decide whether the Eleventh Amendment did or did not "supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state." The status of the petition is perplexing, since Virginia had not

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230 The suit, alternatively, could have been brought in the federal circuit court. See supra note 210.
231 U.S. CONST. art. III, § 2, para. 1.
232 The Court eventually ruled that the federal judiciary lacks authority to create or enforce general common-law rules except when acting under such specific delegations of authority as is the case respecting its admiralty and maritime jurisdiction. However, this principle had not been announced at the time the Eleventh Amendment was adopted. See generally United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that the federal courts do not have jurisdiction to enforce criminal common law); Erie R.R. Co. v. Tompkins 64 (1938) (holding that there is no general federal common law). From 1809 to 1921 the Supreme Court declined to include admiralty claims within the scope of the Eleventh Amendment's jurisdictional ban. See Fletcher, supra note 173, at 1078–83.
made an appearance in the suit. Therefore, at most, the Attorney General participated in an *amicus curiae* capacity. If the Attorney General was not a party, he should have lacked standing to raise any question respecting the status of this suit. Moreover, the question he raised extended to other pending actions, which likely included some in which he had not yet made an appearance in any capacity. More importantly, it was not clear whether the petition was addressing only suits claiming federal jurisdiction based on the identity of the parties, or whether it was also addressing those based on subject-matter jurisdiction. The case report’s summary of the arguments does not clarify this.

The claimant in *Hollingsworth* relied on two grounds to assert that the Eleventh Amendment could not possibly stand in the way of his suit. First, he contended that because the constitutional amendment had not been presented to the President for his signature, the procedure of its adoption was deficient and, thus, the amendment was a nullity. Additionally, he maintained that since his case had been filed before the amendment’s adoption, it could not ex post facto eliminate the Court’s jurisdiction. The day after arguments were made, the Court, without explanation, announced that “the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.” The Court’s very pronouncement was in the form of an advisory opinion, and Chief Justice John Jay, who had since left the Court, had held such pronouncements to be beyond the Court’s authority. Later decisions confirmed advisory opinions to be outside the Court’s powers. More importantly, the holding lacked any supporting explanation of its scope of reasoning.

About a quarter-century later, the Court considered a case in which a Virginia court convicted two non-Virginian defendants of violating state law by selling in Virginia a lottery ticket issued by the City of Washington, which was within the federal enclave of the District of Columbia. The

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234 Id. at 380.
235 Id. at 379.
236 Id. This claim relied on Article I, § 10, cl. 1 of the Constitution, which prohibits the state from making ex post facto laws.
237 Id. at 382.
defendants appealed to the Supreme Court on the premise that their conduct
was authorized by a federal law.\textsuperscript{241} The state resisted Supreme Court review
on the ground that the Eleventh Amendment removed from the Supreme
Court jurisdiction to review the case, since the controversy was between a
state and a non-citizen of that state.\textsuperscript{242} Chief Justice Marshall, speaking for
the Court, asserted that the Eleventh Amendment had been adopted solely
to quiet apprehension that debts owed by the states might be enforced in the
federal courts.\textsuperscript{243} Marshall did not, however, offer any documentary support
for this conclusion or discuss what other concerns had been expressed by
those who drafted, adopted, and ratified the amendment. He did, though,
delineate the difference between the federal judiciary's subject-matter
jurisdiction and its jurisdiction based on the character of the parties, and
emphasized that subject-matter jurisdiction applies without exception to all
such cases including those in which a state is a party. The Chief Justice's
discourse avoided explicitly examining the Eleventh Amendment's effect
on \textit{Chisholm's} rejection of the sovereign immunity principle. It was
unnecessary for him to explore that question, however, because the
attributed purpose of safeguarding state treasuries justified the Court's
conclusion that only cases in which the state is a defendant (here the state
was the plaintiff) are covered by the amendment.\textsuperscript{244} Moreover, appellate
review by means of a writ of error, the basis on which the case was in a
federal court, was found not to be a suit against a state.\textsuperscript{245}

Marshall's discussion in a later case, \textit{Sundry African Slaves v. Madrazo}, suggests that he may have been prepared to exclude from the
Eleventh Amendment's preclusion of federal jurisdiction those cases
against a state that raise a federal substantive claim for relief or a claim
brought in admiralty.\textsuperscript{246} In \textit{Sundry African Slaves}, a Spanish slave trading
ship's cargo was seized pursuant to an 1807 federal law expropriating slave
cargoes, and custody of the slaves was transferred to the state of Georgia,
where the seizure occurred. In accordance with the 1807 federal statute,
Georgia sold most of the slaves, kept the proceeds, and retained custody of
the remaining slaves. The slave trader brought an admiralty action against
the Governor of Georgia, seeking restitution of slaves taken from his ship
and the payment to him of the proceeds from the state's sale of other slaves

\textsuperscript{241} Id. at 269.
\textsuperscript{242} Id. at 315.
\textsuperscript{243} Id. at 406–07.
\textsuperscript{244} See id. at 405–12.
\textsuperscript{245} Id. at 412.
who had been removed from the vessel.\textsuperscript{247} Writing for the Court, Justice Marshall first determined that the suit was based on actions of the Governor that conformed with state law.\textsuperscript{248} Next, Marshall observed that the Governor had done nothing in violation of federal law. Although Marshall did not spell out the significance of that fact, his observation raised the implication that the possibility of federal subject-matter jurisdiction was not present.\textsuperscript{249} That implication takes on new significance when one considers that the Court must have weighed the federal issue—whether the taking conformed with federal law—in order to conclude that the Governor had not violated that statute. That is, the Court must have exercised jurisdiction over the claim against the state in order to make this finding. The Chief Justice next observed: “The decree cannot be sustained as against the state, because, if the 11th amendment to the Constitution, does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court.”\textsuperscript{250} That is, there was a procedural defect in bringing the federal admiralty claim. The Court, therefore, explicitly did not reach the issue of whether federal subject-matter jurisdiction based on admiralty was beyond the jurisdictional barrier created by the Eleventh Amendment. Nevertheless, as observed above, the Court implicitly had exercised its subject-matter jurisdiction with respect to the question of whether the federal statute had been violated.

In the meantime, in another case, the Court had narrowed the Eleventh Amendment’s grant of state immunity when it held that a state’s merely having an interest in the outcome of an action does not bring the case within the Eleventh Amendment.\textsuperscript{251} Thus, a non-citizen could bring a suit in federal court against a bank chartered by a state even though the state was part owner of the bank.\textsuperscript{252}

\textbf{C. Post-Civil War Understandings of the Eleventh Amendment}

The text of the Eleventh Amendment left more questions unanswered than answered. The Justices who lived through the process of the amend-
ment's adoption never, in their opinions concerning Eleventh Amendment questions, resolved the ultimate question of what changes the amendment was intended to effect. Clearly, the amendment represented an adjustment of the balance between federal and state authority. A little over six decades later, however, whatever adjustment the amendment had achieved was overshadowed by the outcome of the Civil War and the resulting constitutional amendments, particularly the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment.253 In the aftermath of a war fought over claims of state sovereignty, those Clauses provided new bases for Congress to allow states to be sued.

The Supreme Court has never questioned that the Civil War Amendments modified the Eleventh Amendment, because they were adopted more recently. Nor has the Court questioned that federal laws adopted pursuant to those amendments can provide enforceable individual claims for relief against a state.254 Accordingly, it has been persuasively argued that the Fourteenth Amendment’s protection from state interference with federally granted privileges and immunities should ensure that states not interfere with remedies granted by constitutionally valid federal laws, whether these laws are enforced in state or in federal courts.255

Nevertheless, the Court's decisions in the latter part of the nineteenth century extended rather than reduced the Eleventh Amendment’s restrictions on suits against states. In Louisiana v. Jumel, over the dissents of Justices Field and Harlan, the Court dismissed a suit in equity brought by claimants of unidentified citizenship, who had asked the Court to require state officers to enforce the state’s obligation to pay state bondholders the

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253 U.S. Const. amend. XIV, § 1: “All persons born or naturalized in the United States, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”


interest due on state bonds. Without examining the text of the Eleventh Amendment or the impact of the Supremacy Clause or the Fourteenth Amendment upon the federal court's subject-matter jurisdiction, and without reference to any source of constitutional guidance, the Court, citing a decision of the Louisiana Supreme Court, held for the state: "[T]here is no way in which the state, in its capacity as an organized political community, can be brought before any court of the State, or of the United States, to answer a suit in the name of these holders to obtain such a judgment."

The Louisiana decision cited by the majority in Jumel addressed only the issue of whether under Louisiana law a court of that state could entertain a suit that in essence was against the state. The Supreme Court offered neither analysis respecting the soundness of that decision, nor any explanation of the decision's relevance to the Eleventh Amendment issue. Instead, the bulk of the Court's opinion addressed the question of whether this suit was against individual state officers to prevent their commission of unconstitutional conduct, which arguably would have been a means of avoiding the claimed Eleventh Amendment defense, or in reality was an effort to require the state itself to pay the money owed. Comparing various British and American suits involving the enforcement of bonds, the Court concluded that in fact this action was of the latter type.

In contrast, Justice Field, dissenting, analyzed the subject-matter jurisdiction issue based on the constitutional text and prior applications of the supremacy doctrine. Field explained that whenever a state legislature impairs the performance of its contractual obligations, its conduct is a nullity because the federal Constitution is supreme. Justice Harlan, also dissenting, asserted that British decisions respecting whether sovereign immunity can bar a court from requiring a government to pay its debts did

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257 Id. at 720 (citing State ex rel. Hart v. Burke, 33 La. Ann. 498 (1881)).
258 Jumel, 107 U.S. at 720–21. The proposition had the support of the Court’s decision in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 868 (1824). In Ex parte Young, 209 U.S. 123 (1908), the Court accepted this method of evading the Eleventh Amendment immunity claim. In Edelman v. Jordan, 415 U.S. 651, 665 (1974), however, the majority held that an Ex parte Young action cannot be used to obtain a retroactive monetary remedy from a state. In Idaho v. Coeur d’Alene Tribe, 521 U.S. 261 (1997), the majority indicated that such an action cannot be brought by individuals to obtain any form of relief if it is the state’s own legislative policies that are challenged by the suit. Id. at 269.
259 Jumel, 107 U.S. at 728.
260 Id. at 733 (Field, J., dissenting).
not support the majority’s conclusion. More importantly, Harlan observed that the claim of state sovereign immunity is inconsistent with the American constitutional structure, in which the only supreme power is the law. Quoting from an earlier decision of the Court, he stated: “All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.” According to Harlan, the Supremacy Clause is not modified by the Eleventh Amendment; the Clause dictates that the constitutional duty not to impair contractual obligations prevails over any sovereign immunity claim by a state.

A few years later, in *Hagood v. Southern*, the Court ruled that *Jumel* barred a suit in federal court to enforce payment on a scrip the state had issued as a guarantor of the payment of a failed railroad’s bond. Once again, however, the Court offered no explanation for the conclusion it had reached in *Jumel*. The Court’s failure in *Jumel* to provide any meaningful supporting analysis, whether based on text, history, or other sources, was certainly consistent with its generally cursory, callous, and inaccurate treatment of the Fourteenth Amendment during the last three decades of the nineteenth century. It made some effort at meaningful legal analysis and exposition in 1890, however, when it decided *Hans v. Louisiana*. *Hans*, a citizen of Louisiana, alleged that in violation of Article I, Section 10 of the U.S. Constitution, Louisiana had failed to pay interest due on the state-issued bonds Hans held. The federal trial court had dismissed Hans’ suit based on the state’s assertion of sovereign immunity. That decision was affirmed by the U.S. Supreme Court, which invoked *Jumel* and two subsequent similar decisions to conclude that the Eleventh Amendment did not permit federal courts to take subject-matter jurisdiction over an individual’s suit against a state.

Although the Court used *Hans* as an opportunity to provide the missing analysis to support its *Jumel* ruling, its rationale in *Hans* primarily explained why, when the Eleventh Amendment’s text speaks only about suits brought against a state by non-citizens, an action could not be

\[\text{261 Id. at 755–56 (Harlan, J., dissenting).}\]
\[\text{262 Id. at 756 (Harlan, J., dissenting) (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).}\]
\[\text{263 Hagood v. Southern, 117 U.S. 52, 67, 70 (1886).}\]
\[\text{264 See, for example, its disposition of the Fourteenth Amendment arguments in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) and *The Civil Rights Cases*, 109 U.S. 3 (1883).}\]
\[\text{265 Hans v. Louisiana, 134 U.S. 1 (1890).}\]
\[\text{266 Id. at 3.}\]
\[\text{267 Id. at 10.}\]
entertained by a federal court even though the plaintiff was a citizen of the same state. The Court reasoned that it would be unseemly to bar a non-citizen from using federal subject-matter jurisdiction to sue a state in federal court, but to allow such a suit to a citizen of that state.\(^{268}\) Of course, the relevance of this proposition was dependent on the soundness of the still-unanalyzed pronouncement of the Louisiana court, which had been accepted by the Supreme Court without discussion in \textit{Jumel}.

After pronouncing this potential “anomalous result,”\(^{269}\) the Court turned to its examination of the meaning of the Eleventh Amendment by observing that it was adopted as a result of the “shock” created by the \textit{Chisholm} decision.\(^{270}\) The Court, however, offered no documentation or details respecting the degree or direction of that “shock.”\(^{271}\) Instead, it simply recounted the pronouncement in the \textit{Hollingsworth} case and, without any examination of the possible alternatives in evaluating the significance of that decision, asserted that this showed that “the highest authority of this country was in accord” with the minority in \textit{Chisholm}.\(^{272}\) (Presumably the “highest authority” reference was to “the people,” but possibly it was to the Court.) The Court then reviewed the historic evidence supporting Justice Iredell’s dissent in \textit{Chisholm}, including statements by James Madison and John Marshall at the Virginia ratification convention when they were attempting to quell the objections of George Mason and Patrick Henry. Those statements suggested that federal courts would hear a case initiated by citizens against a state only if the state gave its consent.\(^{273}\)

The Court continued its analysis in \textit{Hans} without concern for the ambiguities of the ratification debates, the incompleteness of the quotes ascribed to Madison and Marshall, the later statements of both men, the difficulty of matching the debate rhetoric with the actual constitutional text, the effect of the unmodified Supremacy Clause, or—most significantly—the dubious relevance of those statements concerning the original Constitution when the case involved construing the Eleventh Amendment. Rather, the Court’s opinion simply declared, “[T]hese views of those great

\(^{268}\) Id. at 14–15.
\(^{269}\) Id. at 10.
\(^{270}\) Id. at 11.
\(^{271}\) This unexamined characterization of \textit{Chisholm}’s impact was repeated by Chief Justice Hughes in \textit{Monaco v. Mississippi}, 292 U.S. 313, 325 (1934) (holding that sovereign immunity bars another nation from suing a state in the U.S. Supreme Court) and by Justice Powell in \textit{Pennhurst State Sch. & Hosp. v. Halderman}, 465 U.S. 89, 97 (1984).
\(^{272}\) \textit{Hans}, 134 U.S. at 12.
\(^{273}\) Id. at 14.
advocates and defenders of the constitution were most sensible and just, and apply equally to the present case as to that then under discussion." Interestingly, after giving such great deference to what in the ratification debates it found to be Marshall's support for the proposition that a state is immune from suit by an individual, toward the end of its decision the Court disregarded as mere dicta Marshall's assertion in *Cohens v. Virginia* that the federal judiciary has subject-matter jurisdiction if a suit against a state is based on the laws or Constitution of the United States.

Instead of proceeding from first principles manifested in the text of the Constitution, such as the sovereignty of the people and the goals of establishing justice and preserving the blessings of liberty, the *Hans* opinion pronounced principles drawn from the Court's own prejudices. For example, it announced "The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States." The opinion also declared, "The suability of a state, without its consent, was a thing unknown to the law." These declarations disregarded the content of Article III, the deliberations at the Constitutional Convention, an accurate summary of the legal history, and the contrary reasoning offered in *Chisholm* by jurists who had participated in drafting that Article. Moreover, they disregarded the rule of law established by *Chisholm*, which was only partially modified by an amendment that speaks exclusively to the identity of the litigants as the basis for federal court jurisdiction, and says nothing about state immunity from suit.

Despite the Court's acceptance of the proposition that the Eleventh Amendment barred federal courts from hearing an individual's federal claim against a state, it avoided treating that immunity as unassailable. The Court's opinion in *Hans* instead suggested that in some instances it may be possible to avoid the effects of sovereign immunity by seeking to have the state's actions treated as a nullity because the state acted in violation of federal law.

**D. Modern Understandings of the Eleventh Amendment**

For over eight decades, the authority of *Hans* as binding precedent went largely unquestioned. In *Employees of the Department of Public
Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, however, Justice Brennan's dissent examined in detail the evolution of the Eleventh Amendment and the relevant case decisions, and concluded that the framers of the amendment did not intend it to "ensconce the doctrine of sovereign immunity." In the case, state employees sued for overtime pay owed under the Federal Labor Standards Act. Brennan argued that sovereign immunity is anathema to the doctrinal premise underlying the Constitution and that, at the very least, the amendment does not insulate a state from being sued by its own citizens to enforce a right granted by Congress. That dissent launched a recent, more penetrating scholarly and judicial examination of the amendment's text and the principles, sources and analysis that best reveal its meaning.

Justice Brennan again confronted the issue, this time in even greater depth and breadth, when he dissented, joined by Justices Marshall, Blackmun, and Stevens, in Atascadero State Hospital v. Scanlon. He declared:

[T]he Court's Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation.

Justice Brennan then reviewed the Article III ratification debates, including statements in the news media of the day, as well as in the archived convention journals; the soundness of the majority opinions in Chisholm; the drafting, adoption and text of the Eleventh Amendment; and the inept analysis presented in the Hans decision. He concluded from his extensive examination that the amendment did nothing more than provide that "henceforth, a State could not be sued in federal court where the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien."

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280 Id. at 309.
281 Id. at 314.
282 Id.
283 Id. at 247 (Brennan, J., dissenting).
284 Id. at 247–48.
285 Id. at 287.
Although there has been some change in its personnel, the Court continues to be split five to four on the question of state sovereign immunity. For a while, when the issue was raised, the majority was content to justify its decisions simply by citing the rule in *Hans* and made no effort to defend the rationale of that holding. More recently, however, faced with the dissenters' probing analysis, the majority has turned to sources external to the text in an effort to justify the proposition that the Constitution immunizes states from all suits by individuals.

Several decisions involving somewhat different questions signaled the latest phase of the debate respecting a state's immunity from suit by an individual. In one, *Gregory v. Ashcroft*, the Court, in order to avoid a constitutional question, construed the Age Discrimination in Employment Act of 1967 as not being intended to affect a state constitution's mandatory retirement age for state judges. Referencing the Tenth Amendment, citing the Article IV, Section 4 guaranty to the states of a republican form of government, and quoting earlier decisions, *The Federalist Papers*, journal articles, and historical accounts of the framing of the Constitution, Justice O'Connor's opinion for the Court spoke of the Constitution's establishment of "dual sovereignty between the States and the Federal Government." However, her opinion also observed:

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. . . . This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

In another decision, *Printz v. United States*, the Court went a step further, holding that Congress lacks power to require states to carry out administrative tasks designed to facilitate enforcement of federal gun control laws. Justice Scalia, writing for a majority of five Justices, spoke not only of a system of dual sovereignty, but also, quoting from *The Federalist No. 39*, of the states' "residuary and inviolable sovereignty." In support of this characterization, Justice Scalia cited the Constitution's prohibition against involuntarily reducing or combining a state's

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287 Id. at 467.
288 Id. at 457.
289 Id. at 460 (citations omitted).
291 Id. at 919.
its recognition of state citizenship, the requirement of state approval of constitutional amendments by a super-majority, the Guarantee Clause, and the limitation of federal authority to powers delegated by the Constitution. Relying especially on statements in The Federalist Papers, Justice Scalia concluded that the Constitution does not authorize Congress to impose affirmative duties on state administrative personnel.

Three Justices joined Justice Stevens' dissenting opinion in Printz, in which he argued that law enforcement practices at the time the Constitution was adopted, as well as observations made during the ratification debates, demonstrate that the framers and ratifiers construed the Supremacy Clause to mean that "[f]ederal law establishes policy for the States just as firmly as laws enacted by state legislatures . . . ." In a separate dissent, Justice Souter took issue with the majority's reading of particular Federalist Papers respecting the role of the states in enforcing federal law. It is noteworthy that Justice Souter was one of the five members who had joined the opinion of the Court in Gregory v. Ashcroft, the prime prior opinion relied on by Justice Scalia, and later by Justice Kennedy in Alden, in support of the "dual sovereignty" thesis. In Gregory, however, the discussion was dicta, and the potential constitutional issue concerned the state's ability to regulate who may hold judicial office.

The debate respecting state immunity from individual suits was resumed in earnest in Alden v. Maine, a case in which Justice Kennedy attempted to defend the soundness of the Hans decision. In Alden, state probation officers sought overtime pay under the Fair Labor Standards Act. The Court held, five to four, that because the state had not consented to be sued, sovereign immunity prohibited the claimants from recovering against the state. With implicit recognition of the obvious inconsistency

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292 Id. (citing U.S. CONST. art. IV, § 3).
293 Id. (citing U.S. CONST. art. IV, § 2). Scalia neglected to note that the Fourteenth Amendment can remove a state's ability to control who can hold that status. See U.S. CONST. amend. XIV, § 1.
294 Printz, 521 U.S. at 919 (citing U.S. CONST. amend. V).
295 Id. (citing U.S. CONST. art. IV, § 4).
296 Id. at 935.
297 Id. at 948.
298 Id. at 971–76.
299 See infra notes 300–322 and accompanying text.
301 Id. at 711–12.
302 Id. at 759–60.
between the text of the Eleventh Amendment and some of the Court's previous decisions, Justice Kennedy stated: "[S]overeign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Instead, he asserted, it is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." This conclusory statement, of course, fails to address the reasoning of Chisholm that state immunity from individual suit is inconsistent with a Constitution promulgated by the authority of a sovereign people who have declared the primacy of federal law. Justice Kennedy circuitously countered the argument that sovereign immunity did not survive the Supremacy Clause, saying: "When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." This contention falls, of course, if such sovereignty is not inherent in the nature of a state of the United States. Moreover, it is a matter of "implementation," to use Kennedy's words, for a state's status to dictate where it can be sued, but it is a matter of "primacy" if the state's status allows it to dictate whether it can be held accountable for a claim bestowed by the federal governmental authority.

With respect to the first consideration, whether states are sovereign powers, Justice Kennedy cites earlier opinions to bolster his view that the Constitution "specifically recognizes the States as sovereign entities." One would expect such a statement to be supported by textual references to the Constitution; Justice Kennedy offers none because there are none to be offered. The closest he comes is to cite the Tenth Amendment as preserving state sovereignty. Although the term sovereignty was widely used at the time of the Constitution's framing, the Tenth Amendment says nothing about that status. The power to legislate over such matters as regulating commerce is delegated to Congress, and the Constitution makes its laws supreme. Moreover, the Tenth Amendment reaffirms the ultimate

303 Id. at 713.
304 Id.
305 Id. at 732.
306 Id. (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996)).
307 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."
308 Id. art. I, § 8; id. art. VI, § 2.
sovereignty of the people and Article I, Section 8 gives Congress the authority to represent the will of the people in matters such as regulating commerce. Hence, the text of that amendment provides no support for Justice Kennedy’s declaration.

The majority opinion in *Alden* additionally covers the same ground relied on by Justice Iredell’s dissent in *Chisholm*, in effect proclaiming the sanctity of state sovereign immunity. But that doctrine, at least as applied to suits in the federal courts, was rejected by the *Chisholm* decision, and (by Kennedy’s own admission) the face of the amendment adopted in response to *Chisholm* does not undo the constitutional responsibility of all courts to enforce federal law throughout the land.309

In an effort to explain why the Eleventh Amendment does not explicitly preserve state sovereign immunity, Justice Kennedy argued that Congress decided to “restore the original constitutional design” by addressing “the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.”310 The *Chisholm* decision’s rejection of sovereign immunity, however, did not turn on the jurisdictional language of Article III allowing a non-citizen to sue a state in federal court. Instead, the Court invoked the nature of a state as a subsidiary unit in a system in which government is beholden to a free, sovereign people, in which the purpose of uniting the states in a federal structure includes establishing justice, and in which the people’s expression of law in the federal Constitution is declared supreme.311 Moreover, the Eleventh Amendment’s text removes neither Article III’s language establishing federal subject-matter jurisdiction nor the Supremacy Clause, both of which are among the specific provisions that, in Justice Kennedy’s words, “formed the basis of the *Chisholm* decision.”312

Justice Kennedy also reiterated the previously recounted protests against *Chisholm*.”313 His account, however, does not take into consideration the range of concerns voiced in such protests, the continued support from other quarters calling for protection of the right to redress from the states, or the national government’s pressing need to quiet British challenges regarding the new nation’s ability or willingness to comply with its

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309 *Alden*, 527 U.S. at 722–23 (citing U.S. CONST. amend. XI) (noting that the “shall not be construed” language suggests the amendment was intended to overrule *Chisholm*, rather than to create new limits on the courts’ Article III powers).

310 *Id.*

311 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470–71 (1793) (Jay, C.J.).

312 *Alden*, 527 U.S. at 723.

313 *Id.* at 723–24.
commitments. Accordingly, his depiction of the setting in which the amendment was adopted fails to appreciate that the amendment was crafted by a Federalist-dominated Congress, not to provide a victory for the most extreme Anti-Federalist protesters, but rather to remove the immediate source of political difficulties while preserving the ability to assure foreign governments and foreign investors that all debts remained enforceable in the United States.\textsuperscript{314}

The \textit{Alden} majority also sought support in what it refers to as "the essential principles of federalism and . . . the special role of the state courts in the constitutional design."\textsuperscript{315} (There is irony in the Court's use of the term "federalism" to justify heightened state authority inasmuch as, at the time of the founding, the champions of states' rights were Anti-Federalists.) The Court supports this part of its thesis by referring not to any part of the Constitution revealing the "principles of federalism" or the "special role of the state courts," but instead to quotes drawn from earlier opinions, almost all of which were penned by the Justices voting in the \textit{Alden} majority. In contrast, if one looks to the text as a starting point, what we find is that, beginning with the Civil War Amendments, there has been a steady reduction of the autonomy of the states, a reduction that reflects lessons of political experience demonstrating that the states, like the federal government, pose dangers to liberty and impair coordinated actions needed both to combat economic market abuses and to facilitate efforts to secure the nation from external threats. Thus, in addition to the Civil War Amendments' restrictions on state power, the Sixteenth Amendment allows Congress to levy income taxes without apportionment among the states, the Seventeenth Amendment provides for popular election of Senators rather than appointment by the state legislatures, the Nineteenth Amendment removes state power to limit the right to vote based on sex, the Twenty-fourth Amendment removes the power of states to limit voting to taxpayers, and the Twenty-sixth Amendment removes the power of states to limit voting based on age above eighteen.

Justice Souter's dissenting opinion in \textit{Alden} cited colonial charters, case law, and treatises to demonstrate that when the Constitution was adopted and in the succeeding decades, sovereign immunity was understood to be exclusively a Crown privilege. He further explained that while the doctrine of sovereign immunity limited the types of suits available against the Crown, it did not totally remove them.\textsuperscript{316} In addition, Justice Souter reviewed conflicting positions taken by statesmen, state charters,

\textsuperscript{314} See supra notes 221–22 and accompanying text.
\textsuperscript{315} \textit{Alden}, 527 U.S. at 748.
\textsuperscript{316} \textit{Id.} at 765–66.
and state laws on the question of whether the liberated states could assert sovereign immunity and whether it could be legislatively abrogated.\(^{317}\) He concluded: "This dearth of support makes it very implausible for today's Court to argue that a substantial (let alone a dominant) body of thought at the time of the framing understood sovereign immunity to be an inherent right of statehood, adopted or confirmed by the Tenth Amendment."\(^{318}\)

Justice Souter also examined the philosophic construct of natural law that has supported the notion of sovereign immunity as a fundamental characteristic of lawmaking power,\(^{319}\) and explained: "[I]f the sovereign is not the source of the law to be applied, sovereign immunity has no applicability."\(^{320}\) Alternatively, he suggested that if the source of the doctrine is not natural law, it must be common law and, if so, such rules can be changed by Congress acting under its legislative authority.\(^{321}\)

Once again, in *Alden* we witness the full Court resorting to extra-textual sources to vindicate their conclusions respecting constitutional standards. Although the weightiness and persuasiveness of the competing efforts may differ, it should be clear that assessing the merits of the decisions should go beyond weighing the competing sources. The sources themselves are too fragile to dictate the final resolution. Hence, the less the resulting doctrinal pronouncements are anchored in the constitutional text, the more apparent it is that Justices are reshaping the Constitution to reflect their personal political and moral philosophies. It is submitted, in this respect, that the majority decision in *Alden*, which was joined by self-anointed originalists or textualists,\(^{322}\) is at least as tarnished by such excess as any of the other decisions examined in this article.

**CONCLUSION**

Whenever the Supreme Court pronounces as constitutional doctrine a rule that draws upon principles and norms found outside the text, there is danger that the judiciary is usurping its responsibility to interpret and apply

\(^{317}\) *Id.* at 769–70.

\(^{318}\) *Id.* at 789.

\(^{319}\) Justice Kennedy denied placing any reliance on natural law, insisting that his position was based on the understanding of the framers. *Id.* at 734.

\(^{320}\) *Id.* at 797.

\(^{321}\) *Id.* at 798.

the law and, instead, is acting as "a bevy of Platonic Guardians";\(^3\) that in such instances the people's charter has been displaced by dictates from a judicial oligarchy. Such an abuse of power occurred in the United States in the first third of the twentieth century, when the Supreme Court struck down a series of state and federal statutes designed to provide economic and social justice for impoverished workers and owners of small farms and businesses.\(^3\) Ultimately, the Court adopted an approach of giving great deference to legislative authority to balance competing economic and social interests; as a result, the Court upheld the constitutionality of later social legislation.\(^3\) On the other hand, as is illustrated in some of the previously discussed cases, recently the Court majority has become more accommodating to legislation that restricts the exercise of individual rights and liberty and more aggressive in curbing Congress' efforts to require states, as well as persons, to comply with congressionally determined standards of fairness.\(^3\)

In the spirit of those who proclaim that they are preventing the judiciary from usurping the Constitution, the Rehnquist dissent in *Roe*, as well as the positions the Chief Justice and Justices Scalia and Thomas took in *Atkins*, present a challenging proposition. Although Chief Justice Rehnquist accepts the notion that the Constitution protects fundamental rights, his constitutional interpretation, in those cases at least, looks to popularly accepted norms and principles (in a sense, to the common law) reflected in state legislation, as the source for discovering the identity of those constitutional rights.

If the dominant history of a society reveals a deep-rooted, consistent, widely-held respect for individual liberty, perhaps it would be sufficient to look solely to that society's own legislative actions in defining fundamental rights. But what society can boast such a track record? The Declaration of Independence declared the inherent right to liberty and equality, but the principal author, Thomas Jefferson, was and remained a slave holder and the Constitution, founded on that Declaration, preserved the institution of slavery.

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\(^3\) In his dissent in *Griswold v. Connecticut*, 381 U.S. 479, 526–27 (1965), Justice Black borrowed this phrase from Judge Learned Hand.

\(^3\) *Lochner v. New York*, 198 U.S. 45 (1905) and *Adair v. United States*, 208 U.S. 161 (1908) are the paradigm cases of this era. In the first, the Court held unconstitutional a state law that established a maximum number of work hours for bakery workers; in the second, it held unconstitutional a federal law that protected the right of railroad workers to form labor organizations.

\(^3\) See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

\(^3\) See *supra* Part III.D.
slavery for close to another century. The Fourteenth Amendment's Due Process Clause, itself a response to widespread societal repression and government restriction of basic freedoms, including slavery and indentured servitude, failed for over another century to end apartheid, unequal legal and social treatment on the basis of ancestry and religion, deprivation of political rights of women, and much more.\textsuperscript{327} Clearly, the principles encompassed in the amendment reflected ideals to strive for, not a norm that had been achieved. Too often state legislation merely demonstrates the unwillingness of the populace to protect fundamental rights of the dispossessed, minorities, cultural subgroups, or those supporting unpopular ideas. Often, too, in reality legislation results not from the will of the majority, but from the passion of a single-minded minority dedicated to a particular cause. Such groups can wield disproportionate influence on political decisions because their potential financial assistance often is vital to a successful election campaign, or because their ability to marshal enough ballot support can provide the margin of electoral victory. Accordingly, a pattern of statutory rejection of a claimed right is a weak guidepost for ascertaining whether the claim involves a liberty that society regards as, or the Constitution protects as, fundamental.

How, then, can a court search for the constitutional principles subsumed within such grand phrases as “due process of law,” “freedom of speech,” and “equal protection,” without merely becoming a “bevy of Platonic Guardians,” reflecting the Justices' own prejudices and notions of propriety? As we can see from \textit{Alden} and similar decisions, consulting the historic and philosophical underpinnings of the Constitution's text and a broad range of norms and principles from extra-textual sources does not insulate a court from error if it is determined to transform the institution of the American government to fit its own preferences. On the other hand, Chief Justice Jay and Justices Wilson and Blair, all active participants in the deliberations that produced the Constitution, showed the path to a more disciplined approach in their \textit{Chisholm} opinions.\textsuperscript{328} Sources external to the text provide a backdrop allowing jurists to explore and weigh the soundness of alternative interpretations. The conclusions that flow from such an open-

\textsuperscript{327} 1 \textsc{Harry J. Carman et al.}, \textsc{A History of the American People} 222–24, 363–65, 509–14 (3d ed. 1967); \textsc{Howard Jay Graham}, \textsc{Everyman's Constitution} 14–15, 54 n.73, 162, 169–70, 171 n.56, 181–85, 225–38 (1968); \textsc{William Miller}, \textsc{A New History of the United States} 109, 190–95, 224 (1958); \textsc{Arthur Meier Schlesinger}, \textsc{Political and Social History of the United States: 1829–1925}, 134, 265–73 (1929).

\textsuperscript{328} See supra notes 195–205 and accompanying text.
ended approach need not be a product of whim or prejudice, but rather can reflect the wisdom of disciplined reason drawn from diverse experiences. To this end, the Justices must test the choices against their duty to fulfill the goals set forth at the very beginning of the Constitution. American constitutional decision-making at its best should be a search for meaning that fosters a system of ordered liberty, justice, and the promotion of the general welfare—a search for rules that best fulfill the promises of the Constitution’s Preamble.

To illustrate, in the situation posed by Alden, the majority’s rule meant that prison guards employed by the state were not entitled to sue to collect overtime pay—even though they could collect if the Department of Labor decided to use its limited resources to bring a suit on their behalf. Yet, county prison guards and guards employed at prisons operated by private contractors can sue to collect for overtime. Because it is an instrumentality of the people’s collective authority, a state government should be required to be more protective, not less protective, of its employees’ interests than is a private employer. Yet, based on its slender case for protecting state sovereign immunity as a symbol of the survival of “federalism,” the Court majority reached the opposite result. Neither the Eleventh Amendment’s text or history, nor the Constitution’s goals of establishing justice and promoting the general welfare, are served by that result. Rather, the only apparent interest served by the majority’s interpretation is the Justices’ personal philosophical commitment to curbing Congress’ full exercise of its power to regulate activities affecting interstate commerce.