

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

Randy E. Barnett*

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

Constitutional law professors know two things that their students often do not: John Marshall was not the first Chief Justice of the United States, and *Marbury v. Madison*¹ was not the first great constitutional case decided by the Supreme Court. That honor goes to *Chisholm v. Georgia*,² decided some ten years earlier when John Jay was Chief Justice. Students may be unaware of these facts because most basic courses in constitutional law begin with *Marbury*, which, along with Marshall's opinions in *McCulloch v. Maryland*,³ and *Gibbons v.*

*Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. This paper was prepared to be delivered as the inaugural lecture of the Carmack Waterhouse Professorship in Legal Theory at Georgetown University Law Center and the John E. Sullivan Lecture at Capital Law School in Columbus, Ohio.

¹5 U.S. (Cranch) 137 (1803).

²2 U.S. (Dall.) 419 (1793).

³17 U.S. (Wheat) 316 (1819).

Ogden,⁴ are the earliest cases that are emphasized. The opinions in *Chisholm* are never read; at most, the case is mentioned in passing to explain the origin of the Eleventh Amendment that reversed its holding.

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

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

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

I. WHY WE SHOULD TEACH *CHISHOLM*

The judicial opinions in *Chisholm* are interesting for several reasons. To begin with, the opinions exemplify the early reliance by the courts on first principles, or what Wilson referred to as “general principles of right”⁶ and only secondarily on text. *Chisholm* is typical in this regard. This is not to claim that courts ever countenanced using first principles to ignore or contradict a pertinent text. Rather, *Chisholm* well illustrates how first principles were used to interpret

⁴22 U.S. (Wheat.) 1 (1824).

⁵*Chisholm*, 2 U.S., at 453.

⁶*Id.* at 456.

the meaning of the text in Article III, section 2 that reads: “The judicial power of the United States shall extend to . . . controversies, between a state and citizens of another State,” against the assertion that this text must be qualified by an extra-textual unwritten “first principle” known as sovereign immunity. Georgia’s extra-textual claim of sovereign immunity placed the issue squarely before the Court.

Justice Wilson began his analysis of this claim by contesting the appropriateness of the very term “sovereignty” with regard to the new Constitution:

To the Constitution of the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves “Sovereign” people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.⁷

Wilson then identified possible alternative meanings of the term “sovereign.” First, “the term sovereign has for its correlative, subject[.] In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects.”⁸ Indeed, Wilson noted that the “term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet “foreign” is prefixed.”⁹ Wilson rejected this concept as inapplicable to states because he knew “the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people.”¹⁰ Furthermore,

the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the “People of the United States,” did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.¹¹

⁷*Id.* at 454.

⁸*Id.* at 456.

⁹*Id.* at 456-57 (citing Art. III. § 3).

¹⁰*Id.* at 457.

¹¹*Id.*

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

Wilson then considered another sense of sovereignty that relates it to the feudal power of English kings. “Into England this system was introduced by the conqueror: and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. . . . With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.”¹² Wilson characterized this as “only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care.”¹³ And he expressly condemned William Blackstone for advancing and defending this despotic system.

Wilson rejected this feudal notion of sovereignty on the ground “that another principle, very different in its nature and operations, forms,” in his 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.”¹⁴ In other words, obedience must rest on the consent of the only “sovereign” from which justice and equality rest: the individual person who is asked to obey the law. “The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws.”¹⁵

State governments are simply the product of these very same people, themselves bound by laws, who have banded together to form a government. As such, states are as bound by the law as are the ultimate sovereign individuals that establish them. “If *one free man*, an *original sovereign*, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired.”¹⁶

From this Wilson reached the following conclusion about the state of

¹²*Id.* at 458.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 456.

¹⁶*Id.* (emphasis added).

Georgia's claim of sovereign immunity against a suit for breach of contract:

A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.¹⁷

That this opinion was authored by Justice Wilson is significant. James Wilson was as crucial a member of the Constitutional Convention as any other, including James Madison. His defense of the Constitution in the Pennsylvania ratification convention was lengthy and instrumental, and that state's ratification set the stage for the Constitution's eventual adoption in other key states. Wilson was also among the most theoretically sophisticated of the founders, as evidenced by his lectures on law given as a professor from 1790 to 1792 at the College of Pennsylvania.¹⁸ Indeed, one reason why his opinion in *Chisholm* may be overlooked is that it may seem just too long and theoretical to be a good *judicial* opinion.

Wilson was not alone in locating sovereignty in the individual person. Chief Justice Jay, in his opinion, referred tellingly to "the joint and equal sovereigns of this country."¹⁹ Jay affirmed the "great and glorious principle, that the people are the sovereign of this country, and consequently that *fellow citizens and joint sovereigns* cannot be degraded by appearing with each other in their own Courts to have their controversies determined."²⁰ Denying individuals a right to sue a state, while allowing them to sue municipalities, "would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that *popular sovereignty* in which every citizen partakes."²¹ Neither Wilson nor Jay's individualistic view of sovereignty fits comfortably into the notion of popular sovereignty as a "collective" concept.²²

¹⁷*Id.*

¹⁸See MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742-1798 27-29 (1997) (describing importance of Wilson's lectures on law).

¹⁹*Id.* at 477.

²⁰*Id.* at 479 (emphasis added).

²¹*Id.* at 473 (emphasis added).

²²Elizabeth Price Foley captures this concept by calling it "residual individual sovereignty." See ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN THE NEW ERA

Even Justice Iredell, the sole dissenter in *Chisholm*, did not rest his dissent on a rejection of the joint and individual sovereignty of the people. Instead, he devoted the bulk of his opinion to whether the Supreme Court has jurisdiction to hear a breach of contract case in the absence of expressed authorization either by the Constitution itself or by Congress. Finding neither, he would have dismissed the suit. The thrust of Iredell's opinion, therefore, attempts to avoid reaching the issue of sovereignty, which he addresses only in passing in what would have been obiter dictum had his reasoning prevailed.²³

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

I do not know how it has happened, that this word has crept into our political dialect, unless it be that mankind prefer mystery to knowledge; and that governments love obscurity better than specification. The unknown powers of sovereignty and supremacy may be relished, because they tickle the mind with hopes and fears; just as we indulge the taste with Cayenne pepper, though it disorders the health, and finally destroys the body. Governments delight in a power to administer the palatable drugs of exclusive privileges and pecuniary gifts; and selfishness is willing enough to receive them; and this mutual pleasure may possibly have suggested the ingenious stratagem, for neutralizing constitutional restrictions by a single word. . . .²⁴

OF PUBLIC MORALITY 42 (2006) ("one of the foundational principles of American law — at both the state and federal level — is residual individual sovereignty"). William Castro has coined the phrase "the people's sovereignty" to capture this idea. See William R. Castro, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 330 (1995) ("the idea of the people's sovereignty should not be confused with popular sovereignty, which carries connotations of democracy and universal suffrage."). But it may well be anachronistic to concede the term "popular sovereignty" actually used by Justice Jay to the modern collective reading.

²³Here is what he says on the nature of sovereignty:

Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before. . . .

2 U.S. at 435.

²⁴JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 25 (The Lawbook Exchange, Ltd. 1998) (1820).

In his lengthy treatment of the subject Taylor notes,

Sovereignty implies superiority and subordination. It was therefore inapplicable to a case of equality, and more so to the subordinate-power in reference to its creator. The word being rejected by our constitutions, cannot be correctly adopted for their construction. . . . It would produce several very obvious contradictions in our political principles. It would transfer sovereignty from the people, (*confining it to mean the right of self-government only,*) to their own servants. It would invest governments and departments, invested with limited powers only, with unspecified powers. It would create many sovereignties, each having a right to determine the extent of its sovereignty by its own will. . . . Our constitutions, therefore, wisely rejected this indefinite word as a traitor of civil rights, and endeavored to kill it dead by specifications and restrictions of power, that it might never again be used in political disquisitions.²⁵

While Iredell would have afforded to states the sovereignty of kings, Taylor identifies from where kings appropriated the term. “In fact,” he observed,

the term “sovereignty,” was sacrilegiously stolen from the attributes of God, and impiously assumed by kings. Though they committed the theft, aristocracies and republics have claimed the spoil. . . . By our constitutions, we rejected the errors upon which our forefathers had been wrecked, and withheld from our governments the keys of temporal and eternal rights, by usurping which, their patriots had been converted into tyrants; and invested them only with powers to restrain internal wrongs, and to resist foreign hostility; without designing to establish a sovereign power of robbing one citizen to enrich another.²⁶

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

Another reason for teaching *Chisholm* is that it represents the “road not taken” with respect to constitutional amendments. The states and Congress chose to follow the advice of Justice Blair. “If the Constitution is found inconvenient in practice in this or any other particular,” he wrote in his opinion, “it is well that a

²⁵*Id.* at 26 (emphasis added).

²⁶*Id.* at 26-27.

regular mode is pointed out for amendment.”²⁷ Precisely because its holding was reversed two years later by the ratification of the Eleventh Amendment, *Chisholm* represents an opportunity to consider how the practice of constitutional interpretation by courts might have been different if the tradition of correcting Supreme Court decisions by express amendment had taken hold.

As I shall discuss below, there are two possible implications of *Chisholm*’s effective “reversal” by the Eleventh Amendment, which reads: “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.”²⁸ The enactment of the Eleventh Amendment could mean that the Court had incorrectly interpreted the Constitution, and the Amendment restores its original meaning. This is the assumption of modern so-called Eleventh Amendment cases. But the enactment of the Eleventh Amendment could mean instead that the Supreme Court was correct in its interpretation of Article III, but the states were unhappy enough with this implication of the original meaning of the Constitution to successfully have it amended through the political process.

In either case, if written amendments were seen as a more normal reaction to a Supreme Court decision, the perceived need for creative “interpretation” by the Supreme Court itself may have been obviated. The rapid adoption of the Eleventh Amendment suggests that Article V constitutional amendment can be practical, provided the legal and political culture views amendments as a natural response either to a Supreme Court misinterpretation of the Constitution or to a correct interpretation of our imperfect Constitution with which there is widespread dissatisfaction.

II. WHY WE NEGLECT *CHISHOLM*

Before addressing which view of the Eleventh Amendment’s relation to *Chisholm* is correct, it is worth pausing for a moment to ask why *Chisholm* and the adoption of the Eleventh Amendment is usually omitted from the canon—the set of cases that are almost always covered in the basic course on constitutional law. I can think of at least three reasons. First, constitutional law is ordinarily taught doctrine-by-doctrine, rather than chronologically. If one organizes the

²⁷*Id.* at 468.

²⁸U.S. CONST., Amend. XI.

course by modern doctrines, there is no obvious or natural place in which to include *Chisholm* because “sovereignty” is not among the doctrines normally taught in either the structures or the rights portions of constitutional law.

By the same token, when teaching modern doctrines, there is no natural place in which to cover the case of *Prigg v. Pennsylvania*,²⁹ which concerns the meaning of the Fugitive Slave Clause. Even the pivotal case of *Dred Scott v. Sanford*,³⁰ does not fit neatly into introductory courses devoted mainly to structural issues. Were constitutional law taught chronologically, it would be an open invitation to take up the question that occupied the Supreme Court in its first major decision: the nature of sovereignty in the United States. And it would be equally natural to follow the coverage of the Marshall Court’s famous decisions with the infamous slavery decisions of the Taney Court.

Such an opening sequence conveys to students an entirely different impression of the subject of constitutional law than does our current organization that revolves around modern doctrine and typically begins with *Marbury*. And it would also make far more meaningful to students both Chief Justice Marshall’s views on the nature of sovereignty in *McCulloch*³¹ and Chief Justice Taney’s views of sovereignty expressed in *Dred Scott*.³² In other words, *Chisholm* is just the first of several landmark Supreme Court treatments of the nature of sovereignty, but dropping it from the canon distorts the teaching of this subject by reading the Marshall Court opinions out of context.³³

²⁹41 U.S. (Pet.) 539 (1842).

³⁰60 U.S. (19 How.) 393 (1857).

³¹See *McCulloch*, 17 U.S., at 404-05 (“The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).

³²See *Dred Scott*, 60 U.S., at 404 (“The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty.”)

³³To this sequence I also add the discussion of sovereignty articulated in James Madison’s Report to the Virginia House of Delegates. See James Madison, *Report on the Alien*, in WRITINGS 608, ____ (Jack N. Rakove ed., 1999):

The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. . . . The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last

The second reason we lead with *Marbury* rather than with *Chisholm* is that, until relatively recently, constitutional law professors in the post-Warren Court era viewed judicial review as an engine of social justice. Although enthusiasm for judicial review has waned in recent years — as witnessed by the recent interest in “judicial minimalism,”³⁴ “taking the constitution away from the courts,”³⁵ and “popular constitutionalism”³⁶ — this recent intellectual trend has yet to affect the organization of the basic courses in constitutional law. So judicial review still kicks off most casebooks that were devised years before interest developed in “the constitution outside the courts.”³⁷

A third reason for omitting *Chisholm* is that, according to “modern” Supreme Court decisions dating back to the 1880 case of *Hans v. Louisiana*,³⁸ *Chisholm*’s view of sovereignty was repudiated by the Eleventh Amendment and, therefore, the decision itself is a dead letter. Even when the Eleventh Amendment is included in the basic constitutional law course, it is covered well after *Marbury* and *Chisholm* is usually relegated to a passing footnote in the coverage of the modern so-called “Eleventh Amendment” cases.

This last reason for ignoring *Chisholm* will be the subject of the balance of my remarks. I will contest the modern Court’s claim that the view of sovereignty it adopted in *Chisholm* was repudiated by the Eleventh Amendment. Although I am hardly the first person to question this claim,³⁹ I will explain why a comparison of the wording of the Ninth and Eleventh Amendments undercuts the Supreme Court’s view that the individualist concept of sovereignty that the Court in *Chisholm* relied upon to reach its result was repudiated by the Eleventh Amendment. Consequently, I join other scholars who have concluded that the

resort, whether the compact made by them be violated. . . .

³⁴See CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

³⁵See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

³⁶See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

³⁷See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

³⁸*Hans v. Louisiana*, 134 U.S. 1 (1890).

³⁹See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

modern Supreme Court’s so-called “Eleventh Amendment” line of cases is based on a faulty reading of the Eleventh Amendment dating back to *Hans* and is fundamentally misconceived.

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

To assess the relationship between the Eleventh Amendment and *Chisholm*, it is useful to identify clearly the two alternative readings of the Amendment. First, the Amendment could be read narrowly as simply reversing the holding of *Chisholm* that states may be sued by citizens of other states in federal court. Of course, the Amendment does more than this by also immunizing states from suits by subjects of foreign nations. That it did so may be significant, as we shall see. According to this reading, the Eleventh Amendment leaves entirely intact the underlying individualist concept of popular sovereignty upon which the Court rested its holding.

The second reading of the Amendment was the one adopted by the Reconstruction Court in *Hans* and continues to be accepted by the Court. In *Seminole Tribe of Florida v. Florida*,⁴⁰ Chief Justice Rehnquist provided a concise summary of this position:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.” That presupposition, first observed over a century ago in *Hans v. Louisiana* (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”⁴¹

Chief Justice Rehnquist excoriates the dissent for “relying upon the now-discredited decision in *Chisholm v. Georgia*.”⁴² Rehnquist affirms the Court’s conclusion in *Hans* that the views of state sovereignty articulated by Justice Iredell in his dissent “were clearly right – as the people of the United States in

⁴⁰517 U.S. 44 (1996).

⁴¹*Id.* at 54.

⁴²*Id.* at 68.

their sovereign capacity subsequently decided”⁴³ when it enacted the Eleventh Amendment

The modern Eleventh Amendment doctrine, therefore, rests not on the literal text of the Amendment, but rather on what the Court claims to be its underlying principle, or what Chief Justice Rehnquist referred to as its “presupposition.” Chief Justice Rehnquist is quite forthright about this:

The dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man — we long have recognized that blind reliance upon the text of the Eleventh Amendment is [quoting *Hans*] “to strain the Constitution and the law to a construction never imagined or dreamed of.” The text dealt in terms only with the problem presented by the decision in *Chisholm*. . . .⁴⁴

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

Indeed, so discriminating is the text that it parses a subcategory from amidst the final head of jurisdiction (“Controversies . . . between a State . . . and foreign States, Citizens or Subjects”), leaving untouched suits between a state and “foreign States” while restricting suits against states by “foreign . . . Citizens or Subjects.” As a first cut, this fact suggests at least that the Amendment’s framers carefully picked and chose among Article III, Section 2, Clause 1’s categories to determining what jurisdictional immunity to prescribe.⁴⁵

From this Manning concludes: “The Eleventh Amendment’s careful inclusion and omission of particular heads of Article III jurisdiction creates at least a prima facie case that the amendment process entailed judgments about the precise contexts in which it was desirable (or perhaps politically feasible) to provide for state sovereign immunity.”⁴⁶

It is striking that the Court in *Hans*, and up through today, employed a version of originalism that has, in recent years, been repudiated by most

⁴³*Hans*, 134 U.S. at 14.

⁴⁴*Seminole Tribe*, 517 U.S. at 69.

⁴⁵John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1739 (2004).

⁴⁶*Id.*

originalists: that based on the original intentions of either the framers or ratifiers, rather than upon the original public meaning of the text they adopted. By appealing to the principles or “presuppositions” allegedly held by the drafters of the text in question to override the public meaning of the text itself, the Reconstruction Court in *Hans*, perhaps not entirely coincidentally,⁴⁷ employed the same version of original intent originalism used by Justice Taney in *Dred Scott*, when interpreting the meaning of “the People” in the Preamble as well as the meaning of the Declaration of Independence.

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

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, while the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.⁴⁸

How similar this sounds to Justice Taney in *Dred Scott*.⁴⁹

In his article, Manning defends the narrow interpretation of the Eleventh Amendment by making an important methodological claim about originalist-textualism: Specific constitutional text should be interpreted specifically according to its terms, and not expanded, contracted, or contradicted by the purposes (or original intention) for which the text was adopted, or by its

⁴⁷The use of original intent to narrow the meaning of the text of the Reconstruction Amendments was a favorite technique of the Reconstruction Court, beginning as early as *The Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873).

⁴⁸*Hans*, 134 U.S. at 15.

⁴⁹See *Dred Scott*, 60 U.S. at ___:

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

underlying principles. “Given the heightened consensus requirements imposed by Article V,” he writes,

when an amendment speaks with exceptional specificity, interpreters must be sensitive to the possibility that the drafters were willing to go or realistically could go only so far and no farther with their policy. When such compromise is evident, respect for the minority veto indicates that those implementing the amendment should hew closely to the lines actually drawn, lest they disturb some unrecorded concession insisted upon by the minority or offered preemptively by the majority as part of the price of assent.⁵⁰

In short, “when the amendment process addresses a specific question and resolves it in a precise way, greater cause exists for interpreters to worry about invoking general sources of constitutional authority to submerge the carefully drawn lines of a more specific compromise.”⁵¹

Manning offers three reasons to conclude that the original public meaning of the Eleventh Amendment was limited to its precise terms. First, “to evaluate the Amendment’s limited enumeration of exceptions, it is helpful to know the legal baseline against which the adopters acted.”⁵² And the most salient background assumption was the Court’s decision in *Chisholm* in which four of five Justices denied the existence, as a general matter, of state sovereign immunity, and Justices Wilson and Jay specifically “asserted that state sovereign immunity was flatly incompatible with the premises of our republican form of government.”⁵³

The Court’s decision in *Chisholm*, therefore, put before Congress, the states, and the people of the nation as a whole, a proposition concerning the nature of sovereignty that, while it may have been implicit in the text of Article III, might not have been widely apparent. According to the Court, states may be sued by individuals in federal court to enforce their private contractual rights; their assertion of immunity from suit based on their sovereignty is inconsistent with the fundamental principles of Republicanism on which the Constitution rests.

With this issue now unequivocally presented by the decision in *Chisholm*, where it had not been before, did Congress respond with an amendment squarely rejecting the Court’s view of popular sovereignty as resting in the People as

⁵⁰Manning, *supra* note 45, at 1735-36.

⁵¹*Id.* at 1736.

⁵²*Id.* at 1743.

⁵³*Id.* at 1744.

individuals rather than in the states? It did not. Instead, it responded with a very narrow, precisely worded, withdrawal of judicial power (or subject matter jurisdiction) in two specific circumstances.

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

Manning's conclusion here is worth quoting at length:

Neither Article III nor any other provision of the original Constitution dealt directly with the problem of sovereign immunity, and American society had no previous occasion to confront the question squarely, one way or the other. When dissatisfaction with *Chisholm* brought the Article V process to bear on that previously unanswered question, the text that emerged quite clearly went so far and no farther in embracing state sovereign immunity. Perhaps the resultant line-drawing merely reflected an inability to secure the requisite supermajorities for a broader Amendment. But if so, that would be fully consistent with the play of Article V. Especially in the context of an amendment process designed to protect political minorities, one cannot disregard the selective inclusion and exclusion implicit in such careful specification. If American society for the first time was explicitly confronting the appropriate limitations on potential Article III jurisdiction over suits against states, one should perhaps attach significance not only to what the drafters placed in the Amendment, but also to what they deemed necessary or even prudent to exclude. To do otherwise would risk upsetting whatever precise compromise may have emerged from the carefully drawn lawmaking process prescribed by Article V.⁵⁴

I find Manning's argument against appealing to underlying purposes to

⁵⁴*Id.* at 1748-49.

expand the specific wording of the Eleventh Amendment to be entirely convincing. But he fails to consider another possible defense of the Court's so-called Eleventh Amendment jurisprudence. Constitutional texts not only have a literal grammatical meaning in themselves; they also have what Larry Solum has called "constitutional implicature."⁵⁵ These implications can be express references in the text to concepts, or can be implied affirmances of underlying assumptions that went unmentioned in the text. Shifting the assumptions underlying the text as written would be to distort, rather than faithfully adhere to, the public meaning of the text.

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

A good example of constitutional implicature can be found in the Ninth Amendment, which is also the only other provision of the Constitution to explicitly provide a rule for how the constitution "shall not be construed." 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."⁵⁶ Read literally, the Ninth Amendment solely denies a single construction of the text: a construction that is based on "the enumeration in the constitution of certain rights." It's injunction applies only when the enumeration of certain rights in the Constitution is offered as a reason for denying others retained by the people. According to this reading, the Ninth Amendment would have no implication whatsoever outside the assertion of this specific misconception based on the enumeration of rights.

⁵⁵See Lawrence Solum, *Sentence Meaning and Clause Meaning*, LEGAL THEORY BLOG, http://lsolum.typepad.com/legaltheory/2006/12/over_at_books_d.html (December 12, 2006); see generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 23-57 (1989) (discussing "conversational implicature").

⁵⁶U.S. CONST. Amend. IX.

Before questioning this claim, it is important to stress that even this limited reading of the Ninth Amendment as solely a “rule of construction” would render it extremely important. For it would specifically negate a key claim of the most important footnote in Supreme Court history that begins: “There may be narrower scope for operation of the presumption of constitutionality *when legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”⁵⁷ Footnote Four of *Carolene Products* is directly asserting that enumeration in the Constitution of certain “express prohibitions” is reason “to deny or disparage” any constitutional claims based on “other rights retained by the people.” Even were the presumption of constitutionality affirmed in *Carolene Products* simply a burden shifting presumption, it would *disparage* the other rights retained by the people, while not perhaps denying them altogether. But later, in cases such as *Williamson v. Lee Optical*,⁵⁸ the “presumption” was rendered effectively irrebuttable, resulting in the effective *denial* of unenumerated rights, until *Griswold v. Connecticut*⁵⁹ came along.

Ironically, it is the New Deal Court’s philosophy of Footnote Four to which today’s judicial conservative want to return when they disparage the protection by the courts of any unenumerated rights, as for example did Justice Scalia in his dissent in *Troxel v. Granville*.⁶⁰ “The Constitution’s refusal to ‘deny or disparage’ other rights,” he wrote, “is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”⁶¹ Notice Justice Scalia’s rather blithe identification of the legislature with the people themselves, an equation that was widely rejected at the Founding, and expressly denied by the Supreme Court in *Chisholm*.

I want to claim, however, that the Ninth Amendment does more than expressly reject the construction of the Constitution provided by Footnote Four. The text of the Ninth implies the *existence* of other rights retained by the people. Why? For one thing, it refers explicitly to these “other[.]”⁶² rights. While it does

⁵⁷U.S. v. *Carolene Products*, 304 U.S.144, 152, n. 4 (1938).

⁵⁸*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

⁵⁹*Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶⁰*Troxel v. Granville*, 530 U.S. 57 (2000).

⁶¹*Id.* at 91.

⁶²*See* U.S. CONST. AMEND. IX.

not expressly call for the affirmative protection of these rights, the rule of construction it proposes would make absolutely no sense if there were no such other rights. Why else would there be an entire amendment added to the Constitution barring a construction of enumerated rights that would deny or disparage these other rights? Of course, we have overwhelming historical evidence independent of the text, that the founders believed that the people possessed individual natural rights. But the Ninth Amendment adds a textual affirmation of this underlying assumption of the text that could otherwise be denied. And the existence of the Ninth Amendment's reference to other rights retained by the people is important support for a conclusion that any construction of the Constitution that results in the denial of these rights would violate the Constitution's original public meaning.

Assuming I am right to claim that the rule of construction provided by the Ninth Amendment implies the protection of other rights that are not to be denied, what does this tell us about the Eleventh Amendment? One way to reconstruct sympathetically the Supreme Court's affirmation of the "presupposition" of state sovereignty is to claim that it is not relying on the underlying purpose of the Eleventh Amendment, as characterized by John Manning, but instead on an implication of its specific text. Just as the Ninth Amendment presupposes the existence of unenumerated rights, the Eleventh Amendment presupposes the existence of state sovereignty. This seems to be what the Justice Rehnquist was getting at when he dismissed a "blind reliance" on the text of the Amendment. A "blind reliance" would be to limit the text to its terms while denying what it implies, whether a blind reliance on the text of the Ninth Amendment that limits it solely to a rule of construction or, with the Eleventh Amendment, to limit it solely to barring two types of plaintiffs from suing state governments in federal court.

However, a careful comparison of the Ninth and Eleventh Amendments undermines rather than supports Rehnquist's claim that the text of the Eleventh implies the rejection of the broad reasoning (as opposed to the narrow holding) of *Chisholm v. Georgia*. To begin with, and most obviously, unlike the Ninth Amendment's explicit reference to "others retained by the people," the Eleventh Amendment contains no explicit reference either to a principle of state sovereignty or to a doctrine of state sovereign immunity. With the Ninth Amendment, its injunction against drawing a particular conclusion from "the enumeration in the constitution of certain rights," contains within it an expressed reference to — and therefore an implied affirmation of — the "other" rights "retained by the people," coupled with the additional implication that these rights

not be “denied or disparaged.”

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

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

Now suppose further that, notwithstanding the absence of an express Takings Clause, the Supreme Court holds that the property owner is nevertheless entitled to just compensation. The opinions of the Justices are clearly based, first and foremost, on an extensive analysis of the pre-existent natural rights retained by the people that no republican government can properly deny or disparage, including the rights to life, liberty, property, as well as a right to the pursuit of happiness. One Justice in the majority — call him “Justice Chase” — contends that “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.”⁶³ Textually, the Court grounds its holding on the Necessary and

⁶³Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Justice Chase).

Proper Clause, reasoning that a law authorizing a taking of private property for public use without just compensation was not a “proper” law. A lone dissenter — call him “Justice Iredell” — protests this reliance on unenumerated rights. In his words: “It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so.”⁶⁴

This is not entirely hypothetical. It is what the Court eventually did when it first applied the requirement of just compensation for governmental takings under the Due Process Clause of the Fourteenth Amendment.

[A] statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence, — an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. . . . But if . . . a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.⁶⁵

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

⁶⁴*Id.* at 398 (opinion of Justice Iredell).

⁶⁵See *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, ___ (1897)(J. Harlan).

the states to ratify, the first rather than the second of these amendments.

One hundred years later it is argued that the version actually adopted presupposes the general proposition that unenumerated rights are not judicially protected. Given this sequence of events, would this be a permissible construction of the amendment actually ratified? Would it be reasonable to claim that the substance of the second proposed version was implied by adopting the text of the first? Or would it instead be more reasonable to conclude, first, that the scope of the amendment actually adopted was limited solely to takings; and second, that, by adopting the first version rather than the second, Congress impliedly refused to reverse the broader reasoning of the Court that put the issue of the right to compensation before the Congress? In other words, unlike the broader version, the narrowly worded amendment left the broad reasoning of the Court intact.

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

Would it change the analysis if only the narrow version of the Amendment had been proposed, so that the broader wording was not directly rejected in favor of the narrower reading? While perhaps reducing our certainty a tiny bit, I think such a change in the hypothetical does not affect the ultimate conclusion. For in the hypothetical story that produced the amendment, it was the notorious assertion by the Court of a general judicial power to protect unenumerated rights that engendered the controversy. Knowing this, Congress nevertheless addressed just one application of this more general power. The conclusion remains that Congress left this judicially-claimed power intact.

The narrowly-drafted words of the Eleventh Amendment were adopted by Congress in the face of the open denial of state sovereignty affirmed by the Court, and especially by the opinions of Wilson and Jay. In so doing, Congress turned away from more broadly-worded amendments. For example, Massachusetts congressman Theodore Sedgewick initially proposed an amendment reading:

That no state shall be liable to be made a party defendant, in any of the judicial

courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.⁶⁶

But even this sweeping grant of immunity speaks in the jurisdictional terms of Article III, and concerns the scope of the judicial power, rather than confronting directly the Supreme Court's denial of the concept of state sovereignty itself. The terms of the public debate over *Chisholm* focused primarily on the "suability" of states, not on their "sovereignty."⁶⁷ It is not clear whether Chief Justice Rehnquist believed that the Eleventh Amendment should be viewed as a repudication of the principle that the people and not the states are sovereign; it is, however, certain that he adduced no evidence that those who proposed and ratified the Eleventh Amendment did so in order to establish that the prerogatives of state government equaled those of the English King.

CONCLUSION: THE DANGEROUSNESS OF *CHISHOLM*

Let me conclude by emphasizing what I am *not* claiming in this essay. Despite the time I have spent discussing the Eleventh Amendment, this is not a lecture about its original meaning. A rich and challenging literature exists examining this issue. Nor am I proposing that we start our teaching of constitutional law by examining the scope and meaning of the Eleventh

⁶⁶5 DOCUMENTARY HISTORY OF THE SUPREME COURT (Meeva Marcus, ed), 1994, at p. 605. See *id.* at 597 ("The motion was tabled and apparently never taken up again.").

⁶⁷See Pfander, *supra* note 39:

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

Amendment. That would be far too complex for students just beginning their study of the Constitution to comprehend.

Rather, my only claim about the Eleventh Amendment is to identify a single meaning it did not have. Contrary to what the Supreme Court now maintains, the Eleventh Amendment was not a repudiation of the individualist conception of popular sovereignty articulated by Wilson and Jay. Indeed, I would submit that the narrow and technical language of the Eleventh Amendment could not have been understood either as a repudiation of the grand and magisterial idea that “We the People” are sovereign or as establishing the power of the English Monarchy as the model of state government authority .

Given all this, I am proposing that it would be far better to begin the study of constitutional law with the deep issues in *Chisholm*, as well as with the importance of constitutional amendments, than to begin our classes with Marshall’s defense of judicial review in *Marbury* as has become the custom.

Second, I am not claiming that Congress was affirming the broader reasoning of the case when it reversed only the narrow holding of *Chisholm*. John Manning seems to suggest otherwise,⁶⁸ and he may well be right. But, for the present, I am claiming only that the broader principle of state sovereignty to which Chief Justice Rehnquist referred was not a “presupposition” of the text of the Eleventh Amendment. So far as constitutional implicature is concerned, the Eleventh Amendment leaves the reasoning of *Chisholm* as it was. As such it must be judged on its merits.

Nor am I claiming in this lecture that the Court in *Chisholm* was correct in its conception of popular sovereignty as belonging to the people as individuals and not to the state or state governments, either as a matter of constitutional theory or of history. Of course, my sympathies on this subject should be obvious. That *Chisholm* was decided so close to the enactment of the Constitution — in contrast with John Marshall’s opinions or the Court’s decision in *Hans* — and that the individualist concept of popular sovereignty was affirmed by the eminences of James Wilson and John Jay is powerful evidence that “the People” to which the Constitution refers was indeed an individualistic concept. At minimum, it cannot be considered anachronistic to attribute so individualist a sense of sovereignty to the era.

⁶⁸See Manning, *supra* note 45, at 1749 (“one cannot disregard the selective inclusion and exclusion implicit in such careful specification . . . [and] should perhaps attach significance not only to what the drafters placed in the Amendment, but also what they deemed necessary and prudent to exclude.”).

That “joint-sovereignty” resides in the individuals who comprise the people is also textually supported by the wording of the Tenth Amendment, which confirms that all powers not delegated to the general government by the Constitution are reserved to the states respectively, or to the people. If at least some of the “other” rights retained by the people to which the Ninth Amendment refers belong to individuals, as I believe the evidence shows to be the case,⁶⁹ it would be exceedingly odd if “the People” to which the Tenth Amendment refers are not also individuals. And “the People” is explicitly distinguished from “the states.” I confess that I am beginning to suspect that the purely collective reading of “the People” by Akhil Amar and others may well be anachronistic, but to establish this proposition would require more investigation into the historical sources than I have yet to attempt.

My only claim with respect to the Eleventh Amendment is that it did not displace this individualistic concept of the people affirmed by the Court, whether rightly or wrongly, in *Chisholm*. Unlike the Ninth Amendment, which makes no sense whatsoever without presupposing the existence of the very unenumerated rights to which it refers, the Eleventh Amendment makes perfect sense whether or not you assume the existence of state sovereignty. It can fairly be read as carving out of federal jurisdiction suits brought by two types of parties, an alteration in the jurisdiction afforded by Article III that required a change in the Constitution to accomplish. At a minimum, the existence of *Chisholm* and the fact that its individualist concept of sovereignty were not repudiated by the Eleventh Amendment elevates this concept to among the contenders for how popular sovereignty was conceived at the time of the founding.

But putting aside the Eleventh Amendment, the really interesting challenge posed by *Chisholm v. Georgia* is its individualist theory of popular sovereignty. What *does* it mean to say that the people are “joint-sovereigns”? This brings me to a final reason why *Chisholm* is not among the canon of constitutional law cases of which all learned lawyers must be aware. *Chisholm* is ignored for the very same reason that the Ninth Amendment is ignored: it is simply too radical. Indeed, the individualist popular sovereignty affirmed in *Chisholm* is the opposite side of the very same coin as the “other” individual rights retained by the people affirmed by the Ninth Amendment.⁷⁰ The fact that *Chisholm* was gutted by the very same Reconstruction Court that gutted the

⁶⁹See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

⁷⁰See *id.* (affirming the individual natural rights model of the Ninth Amendment).

Thirteenth and Fourteenth Amendments because they too were too radical lends further support to the idea that the concept of sovereignty affirmed in *Chisholm* and the original meaning of the Ninth Amendment, along with the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, are ignored by the Court because the implications of taking them seriously are so momentous. And law professors tend to internalize the Supreme Court's boundaries on respectable legal argument.

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