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THE ROLE OF HISTORY IN CONSTITUTIONAL INTERPRETATION: A CASE STUDY†

Gary J. Simson‡

On various occasions, the Supreme Court has expressed its commitment to a method of constitutional interpretation that sees as its ultimate goal the implementation of the intent of the framers.¹ In *The Sovereign Prerogative*, Professor Eugene Rostow succinctly explained the nature of this search for original intent. His explanation indicates both the broad view of intent that sound constitutional interpretation necessarily requires and the importance of history to understanding this intent:

In deciding a constitutional case, the Court must deal with the policy of a constitutional provision. It must decide whether the act of the legislature or of the executive called into question before it is authorized by the Constitution, which has higher authority as an act of the people. The political content of the judge's work is therefore to interpret and enforce the broad intention of the Constitution. That task is rarely easy, since few provisions of the Constitution are beyond ambiguity. And it often has a political character. Judges and others have held differing views as to the purpose of particular articles of the Constitution. As Chief Justice Hughes once said, there is no reason to expect more unanimity on difficult problems of law than in the higher reaches of physics, philosophy, or theology. For our purposes, however, the point is clear: there is a political element in constitutional interpretation, requiring a judge to be thoroughly steeped in the history and public life of the country. This is the reason why so many of our finest Justices, like Marshall, Taney, and Hughes, came to the Court from active political life. But this political element in constitutional interpretation does not turn, and certainly should not turn, merely on personal or partisan or idiosyncratic views of politics, but on the differences serious men might well have in seeking to understand and apply the spirit and language of a Constitution intended to last for centuries.²

† This article is a slightly revised version of a paper that appeared under the same title in *Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1984) (M. McDougal & W. Reisman eds.).

‡ Professor of Law, Cornell Law School. B.A. 1971, J.D. 1974, Yale University. I thank Kevin Clermont and Rosalind Simson for various helpful comments.

¹ See, e.g., *Williams v. Florida*, 399 U.S. 78, 98-100 (1970); *South Carolina v. United States*, 199 U.S. 437, 448-50 (1905); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187-89 (1824).

² E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 93-94 (1962).

This article examines *Nevada v. Hall*,³ a Supreme Court decision of recent years that I believe illustrates particularly well the need for close analysis of history under an approach to constitutional interpretation based on original intent.⁴

I

On May 13, 1968, two California residents, Patricia Hall and her son John, were seriously injured when their car collided on a California highway with one driven by a University of Nevada employee engaged at the time in official business. The employee was killed in the collision. Invoking California's nonresident motorist long-arm jurisdiction statute, the Halls brought a negligence action in a California state court against the employee's estate, the University of Nevada, and the State of Nevada. By statute, Nevada had waived its and its agencies' sovereign immunity in tort cases only insofar as allowing Nevada courts to find it liable for a maximum of \$25,000 per claimant. In accordance with this statutory policy, the state and the university moved for the California court to dismiss on grounds of sovereign immunity. The trial court granted the motion, an intermediate appellate court affirmed, but the California Supreme Court reversed. In its opinion, the California high court maintained that California was not obliged to recognize another state's sovereign immunity when, as in the instant case, the other state acted outside its territorial boundaries. California law made the state of California liable without limitation in suits of this kind, and the court concluded that, under the circumstances, Nevada should enjoy no greater immunity from suit than California would enjoy. The state and the university unsuccessfully petitioned the United States Supreme Court for certiorari. After the trial court on remand rejected a motion by the state to apply the recovery ceiling in the Nevada statute, the case went to trial. The jury found negligence and awarded the Halls \$1,150,000 in damages. The trial court entered judgment on the verdict, an intermediate appellate court affirmed, the California Supreme Court declined to review the case, and the United States Supreme Court granted certiorari and affirmed.⁵

³ 440 U.S. 410 (1979).

⁴ Some commentators have questioned the validity of an original-intent approach even if it takes the fairly expansive view of original intent described above. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Munzer & Nichol, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977). It is beyond the scope of this article to attempt to respond to their various criticisms. For broad support for the type of nonrestrictive original-intent approach pursued in this article, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

⁵ *Nevada v. Hall*, 440 U.S. 410 (1979). The above description of the case is based on the Court's opinion in *Hall* and on *Hall v. University of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972).

The Court, with Justice Stevens writing for a six to three majority, held that nothing express or implicit in the Constitution required California to dismiss the suit against Nevada or to respect Nevada's \$25,000 ceiling on recoveries against the state. After noting that the Court had never ruled on the constitutional basis, if any, for states' immunity from suit in other states' courts,⁶ the majority opinion began its analysis by distinguishing between two issues: a sovereign's immunity from suit in its own courts, and the obligation of the courts of one sovereign to recognize another sovereign's claim of immunity. According to the majority, a sovereign's absolute right to insist on immunity in its own courts has been acknowledged since feudal times, but the immunity of one sovereign in another sovereign's courts traditionally has depended on the existence of some agreement between the two sovereigns or on a voluntary decision by one sovereign to defer out of comity to the other sovereign's claim of immunity.⁷ In the instant case, the Court reasoned, California obviously had indicated its unwillingness to respect voluntarily Nevada's claim of immunity. There remained, however, the possibility urged by Nevada that, in ratifying the Constitution, California had in effect already reached agreement with Nevada and every other state in the union to respect claims of this sort.

Turning to this possibility, the Court first disclaimed the relevance of the eleventh amendment, which in full provides:

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.⁸

The majority briefly related the origins of the amendment. According to this account,⁹ at the time of the framing of the Constitution, sovereign immunity was an important issue because many states had accumulated large Revolutionary War debts; during the ratification debates, article III was said by some to subject a state against its will to federal court suits by persons residing outside the state, but others denied that the article was intended to have any such effect;¹⁰ and shortly after the

⁶ 440 U.S. at 414. The Court also noted Nevada's claim that prior Court opinions "reflected" the view that "no sovereign is amenable to suit without its consent." *Id.* The Court made no attempt anywhere in its opinion to refute the claim. Justice Rehnquist's review in his dissent of opinions manifesting this view leaves little doubt that, regardless of whether or not the Court should have been significantly influenced by the validity of this claim, the claim in fact was well-founded. *Id.* at 437-38 (Rehnquist, J., dissenting).

⁷ *Id.* at 414-16.

⁸ U.S. CONST. amend. XI.

⁹ 440 U.S. at 418-20.

¹⁰ See U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Court in 1793 in *Chisholm v. Georgia*¹¹ interpreted article III in accordance with the former of these two views, the eleventh amendment was adopted in response. In the *Hall* Court's view, this history of an amendment aimed expressly at the federal courts had no bearing on the issue at hand. Very simply, the topic under discussion in the late eighteenth century was "federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts."¹² The majority opinion acknowledged that the framers "presumably" anticipated that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another."¹³ It maintained, however, that this expectation was irrelevant to the proper resolution of the issue in *Hall*. The critical point, according to the Court, was that "the need for constitutional protection against that contingency [of a state's being sued in other states' courts against its will] was not discussed."¹⁴ There was nothing, said the Court in summation, explicit or implicit in the eleventh amendment to support Nevada's claim for immunity.¹⁵

Next, the Court denied that the requirement in article IV that "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State"¹⁶ in any way obligated California to apply Nevada's sovereign immunity statute. California need not, the Court held, dismiss the suit out of deference to the statute's limitation of any waiver of immunity to Nevada courts, nor need it observe the statute's \$25,000 limitation on recoveries. The majority conceded that "in certain limited situations, the courts of one State must apply the statutory law of another State."¹⁷ Emphasizing, however, that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy,"¹⁸ the majority found that the case under review did not present such a situation. With regard to persons injured on California roads, California had, the Court maintained, a substantial "interest" in applying the policy, expressed in its laws, of full recovery for victims of others' negligence; and to require California to sacrifice this interest in any way would be "obnoxious" to California public policy.¹⁹

Lastly, the majority opinion rejected Nevada's contention that, in

¹¹ 2 U.S. (2 Dall.) 419 (1793).

¹² 440 U.S. at 420-21.

¹³ *Id.* at 419.

¹⁴ *Id.*

¹⁵ *Id.* at 421.

¹⁶ U.S. CONST. art. IV, § 1.

¹⁷ 440 U.S. at 421.

¹⁸ *Id.* at 422.

¹⁹ *Id.* at 424.

providing for a union of various states, the Constitution implicitly requires each state to respect the others' sovereignty. The Court acknowledged that a number of provisions in the Constitution oblige states to act with greater deference to one another than sovereign nations necessarily display in their interactions. The Court denied, however, that these expressed limitations on one state's freedom to treat another state as it wishes imply the existence of the particular unexpressed limitation alleged to exist by Nevada. According to the majority, "if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States" ²⁰

Chief Justice Burger and Justices Blackmun and Rehnquist dissented. In an opinion joined by the other two dissenters, Justice Blackmun conceded that no specific constitutional provision establishes one state's immunity from suit in another state's courts. He argued, however, that this immunity should be found to have "implicit constitutional dimension" because it was widely assumed at the time of the framing that a state would not be forced to defend suits in other states' courts.²¹ "The only reason why this immunity did not receive specific mention," asserted Justice Blackmun, "is that it was too obvious to deserve mention."²²

Writing for himself and the Chief Justice, Justice Rehnquist maintained that the position on sovereign immunity taken in the majority opinion was inconsistent with the "constitutional plan"—i.e., with the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers."²³ To support this conclusion, Justice Rehnquist essentially argued along the following lines:²⁴ a prominent ingredient of the constitutional plan is the availability of federal courts to decide suits that state courts are apt to decide in a provincial way; suits by individuals against unconsenting states are suits that state courts are apt to decide in a provincial way; if state courts are free to entertain such suits, the constitutional plan requires that federal courts be available to hear them as well; the eleventh amendment, however, bars these suits from federal court; it is therefore inconsistent with the constitutional plan for state courts to be free to hear them.²⁵

²⁰ *Id.* at 426-27.

²¹ *Id.* at 431 (Blackmun, J., dissenting).

²² *Id.*

²³ *Id.* at 433 (Rehnquist, J., dissenting).

²⁴ *Id.* at 434-37.

²⁵ Like Justice Blackmun, Justice Rehnquist attached significance in his opinion to the framers' apparent assumption that a state would not be sued in other states' courts without its

II

If state court suits by individuals against unconsenting states are constitutionally permissible, the Court in *Hall* failed to offer a persuasive explanation why. More specifically, the Court did not adequately explain why the eleventh amendment should not be construed to establish implicitly a prohibition on such suits.²⁶ First of all, the Court exaggerated the extent to which the recorded debate of the late eighteenth century about suits against states and the language of the eleventh amendment militate against interpreting the amendment to cover state courts. The Court tacitly assumed that the discussion of federal courts and inattention to state courts in the recorded debate, and the mention of federal courts and silence as to state courts in the amendment, imply that the amendment was predicated on an understanding that state courts would be free to entertain the suits that federal courts were expressly prohibited by the amendment from hearing. It is at least as plausible, however, that the recorded debate and the words of the amendment instead evidence an understanding of a very different sort: that an express constitutional prohibition would not be needed to prevent state courts from hearing suits by individuals against unconsenting states. As the Court acknowledged but summarily dismissed as irrelevant,²⁷ in the years preceding adoption of the amendment, federal courts were the only courts entertaining, or threatening in the foreseeable future to entertain, suits by individuals against unconsenting states. Thus, the Court's literalism in *Hall* notwithstanding, the focus exclusively on federal courts in the recorded debate and in the words of the amendment hardly forecloses the possibility that the eleventh amend-

consent, *id.* at 435-36 (Rehnquist, J., dissenting); and like Justice Rehnquist, Justice Blackmun attached significance in his opinion to the seeming incongruity of the result in *Hall* in light of the eleventh amendment and the role of federal courts, *id.* at 431 (Blackmun, J., dissenting). Each of the two Justices, however, plainly placed primary reliance on the argument associated with him in the text above. Furthermore, in addition to making the arguments summarized in the text as to the constitutional source of the immunity claimed by Nevada, Justices Blackmun and Rehnquist attacked perceived ambiguities in the Court's opinion, questioned the decision's consistency with precedent, and predicted adverse effects from the decision on interstate relations.

²⁶ The eleventh amendment does not expressly prohibit federal court suits against an unconsenting state by all "individuals," but only ones by nonresidents of the state. It seems appropriate, however, to discuss the amendment as a bar on suits by "individuals" and to understand its possible implications for state court suits in those terms. Basically, the amendment's failure to mention residents alongside nonresidents is hardly indicative of an intent to distinguish between residents and nonresidents with regard to their rights under the Constitution to sue an unconsenting state. Instead, in all probability, it simply reflects the fact that residence within the state that one wishes to sue, unlike residence outside the defendant state, is not arguably a basis for federal jurisdiction under article III. See U.S. CONST. art. III, § 2, cl. 1. Cf. *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the eleventh amendment bars federal question suits in federal court against an unconsenting state by residents and nonresidents alike).

²⁷ See 440 U.S. at 419; *supra* text accompanying notes 13-14.

ment was intended to prevent state courts from hearing suits against unconsenting states if and when state courts should threaten to do so—"intended" being understood broadly to include not only what the framers of the amendment actually intended with regard to matters within their contemplation, but also what they probably would have intended with regard to matters outside their contemplation.²⁸

Second, the Court did not indicate why, if the framers of the amendment recognized (or would have recognized) that an express constitutional prohibition might be needed to keep state courts from hearing suits against unconsenting states, they rationally might have decided to bar only federal courts from hearing these suits. Yet, if no rational basis can be suggested for drawing this distinction between state and federal courts, it must be assumed that the framers did not "intend" to draw it.²⁹

The majority was not alone in failing to argue convincingly for the constitutional ruling that it deemed correct. Justice Blackmun's theory in support of the disputed state court immunity is flawed because it overestimates the significance of any consensus that may have existed at the time of the framing with regard to state court suits against unconsenting states. A general expectation that a state would not be forced to defend itself in other states' courts need not have been predicated on the view that a state had any constitutional right to resist such a suit. Instead, such an expectation easily may have reflected only a recognition that the states in particular and friendly sovereigns in general traditionally respected one another's claims of immunity. In and of itself, the fact that the framers may have anticipated that a state would not be an unwilling defendant in another state's courts hardly implies that they intended to ensure that this event never come about.

Although Justice Rehnquist's appeal to the "constitutional plan" highlights a factor—the protection against parochialism afforded by federal courts—important to the proper resolution of the constitutional

²⁸ In this regard, it is instructive to compare the Court's approach in *Hall* with its willingness on several occasions to find that the eleventh amendment prohibits a class of federal court suits against an unconsenting state not expressly barred by the amendment. See *Monaco v. Mississippi*, 292 U.S. 313 (1934) (suits by foreign nations); *Ex parte New York*, 256 U.S. 490 (1921) (admiralty suits); *Hans v. Louisiana*, 134 U.S. 1 (1890) (suits by citizens of the defendant state).

²⁹ The Court's full-faith-and-credit analysis in *Hall*, which basically conforms to the Court's full-faith-and-credit approach of recent years, is hardly noncontroversial. It invites the various criticisms that have been directed at the Court's modern approach. See, e.g., Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981). I doubt, however, that under any of the alternatives proposed to the Court's approach, a court violates full faith and credit by refusing, as the California courts ultimately did in *Hall*, to dismiss a suit brought by a forum resident to recover damages for injuries received in the forum state and compensable under forum law.

question in *Hall*,³⁰ it does not provide a firm foundation for Nevada's claim of immunity. If the framers of the Constitution were absolutely committed to having federal courts available to hear cases that state courts would be apt to decide in a provincial way, then Justice Rehnquist's claim that the eleventh amendment's prohibition on federal courts must imply the existence of a similar prohibition on state courts would be difficult to dispute. By all indications, however, this commitment fell materially short of absolute. Perhaps most obviously, a conception of this commitment on the part of the framers as never yielding to other values is belied by the original division of authority between state and federal courts with regard to suits between citizens of different states. Article III allows for the possibility that, despite the obvious invitation to parochial decisionmaking presented by these "diversity suits," such suits might only be tried in state courts: the Supreme Court would lack original jurisdiction over these suits; inferior federal courts would not exist unless Congress chose to create them; and even if Congress chose to create such courts, it would not have to vest them with jurisdiction over diversity cases.³¹ The fact that the first Congress exercised its prerogatives to create lower federal courts and to vest them with diversity jurisdiction³² is beside the point. For even if the framers anticipated that Congress would act in this way, their decision not to mandate the existence of lower federal courts with diversity jurisdiction evidences a less than absolute commitment to having federal courts available for cases that invite parochial decisionmaking.

III

The immediate purpose of the eleventh amendment was to eliminate federal-state friction stemming from federal courts' requiring states to defend suits by individuals. In this section, I suggest that the purpose of the eleventh amendment is most reasonably construed to include the

³⁰ See *infra* text following notes 35 & 53.

³¹ See U.S. CONST. art. III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish

Section 2. The judicial Power shall extend . . . to Controversies . . . between Citizens of different States

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

(On Congress's inability to expand the Supreme Court's original jurisdiction beyond the several types of cases named as falling within it, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).)

³² See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (current version at 28 U.S.C. § 1332(a) (1982)).

elimination of another form of friction inimical to the smooth and efficient operation of the federal system: the interstate friction stemming from state courts' entertaining this type of suit. To underline the importance to my thesis of close examination of the history of the eleventh amendment, I first analyze the possible relevance of the eleventh amendment to the issue in *Hall* without reference to the history of the amendment. Then, after detailing various aspects of this history, I supplement my earlier analysis of the issue with inferences drawn from the available historical data. At the outset, I emphasize that the analysis in this section is tailored to the type of suit against a state under review in *Hall*: a state court suit against an unconsenting state by an individual to vindicate a state law claim. The immunity problems presented by other types of suits against states—for example, ones brought by another state or by a foreign nation, or ones by individuals based on federal law claims—raise different sets of considerations and require resolution sensitive to the particular considerations at hand.³³

A

Federal court suits by individuals against unconsenting states and state court suits of this kind are similar insofar as they both threaten to cause undesirable friction within the federal system—federal-state friction in the federal court setting and interstate friction in the state court setting. For the federal venture to succeed, the central government and the various states must work together harmoniously—in a spirit of cooperation and common endeavor. And for them to work together harmoniously, it is important that federal-state and interstate friction be kept to a minimum.

Based only on this similarity between federal court and state court

³³ The Supreme Court has found that suits against unconsenting states by other states are within the scope of the federal judicial power. *See* *New Jersey v. New York*, 30 U.S. (5 Pet.) 284 (1831). In *Monaco v. Mississippi*, 292 U.S. 313 (1934), the Court concluded that the eleventh amendment implicitly prohibits a federal court from entertaining a suit by a foreign nation against a state unless the state consents to suit. For a sense of the various distinctions drawn by the Court as to eleventh amendment limitations on suits by individuals against states to vindicate federal law claims (including suits with state officers as the nominal defendants), compare *Ex parte Young*, 209 U.S. 123 (1908), with *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (federal jurisdiction exists over suits of this sort for prospective relief but not—except where Congress is competent to provide otherwise and does—over such suits for retroactive relief). The view that the eleventh amendment should be found not to bar any claim against a state arising under federal law is argued in Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 337-47 (1980). For the view that a distinction should be drawn in this regard between federal causes of action specifically authorized by Congress to be brought against states and federal causes of action lacking such specific authorization, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-37 (1978); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

suits by individuals against unconsenting states, it is unclear whether or not the eleventh amendment's prohibition should be interpreted to extend to state courts. In light of then-existing and anticipated state court practices, it is dubious that the framers of the eleventh amendment thought carefully about states' immunity from suit in other states' courts. If one hypothesizes, however, that they had done so, the above similarity does not establish whether or not the framers would have intended that states enjoy in state court the constitutional immunity from suit by individuals that the framers expressly guaranteed to states in federal court. On the one hand, for either or both of two reasons, the framers might have found that, although in the federal court context the interest in avoiding friction within the federal system outweighs the competing interest in ensuring that individuals with meritorious claims against states are compensated for their losses, the relevant balance of interests should come out against immunity in the state court context. First, the framers at least arguably might have concluded that state court suits by individuals against unconsenting states would generate less serious friction than federal court suits of this sort. They rationally might have based this conclusion on an assumption that states would take particular umbrage at being stripped of their immunity by courts of a sovereign that, shielded by federal supremacy, need not fear a response in kind.³⁴ Alternatively, they rationally might have based this conclusion on an assumption that, fearful in general of federal usurpation of authority traditionally exercised by the states, states would be especially agitated by federal courts' making them defend suits against their will. Second, the framers at least arguably might have found that a factor without obvious counterpart in the federal court balance significantly militates against constitutionalizing immunity in the state court context. More specifically, proceeding on the theory that states would resent a federal rule that deprived them of a freedom—that of deciding whether or not to hear suits against other sovereigns—that sovereigns traditionally enjoy, the framers rationally might have found that a constitutional prohibition on state court suits by individuals against unconsenting states would generate substantial federal-state friction.³⁵

On the other hand, these reasons for striking the balance against immunity in the state court context are not so persuasive that the framers sensibly might not have discounted them and found that, as in the federal court context, the balance should be struck in favor of immunity. Not only might the framers reasonably have concluded that state court suits by individuals against unconsenting states would not create less

³⁴ On the United States's implicit constitutional immunity from suit without its consent, see *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1869).

³⁵ Recall the Court's response to Nevada's claim of implicit constitutional protection. See *supra* text accompanying note 20.

serious friction than federal court suits of this sort; in light of the less neutral nature of state tribunals, the framers quite sensibly might have concluded that the state court suits would create more. Furthermore, it is quite conceivable that the framers would have deemed inconsequential any federal-state friction apt to result from requiring states to defer to one another's claims of immunity. Based on the fact that the states already had agreed in many ways to treat one another as friendly sovereigns,³⁶ the framers reasonably might have decided that states would not materially resent a federal rule that would prevent them from acting toward one another in a manner that sovereign nations traditionally have regarded as hostile.

B

To determine whether or not the eleventh amendment should be construed as a prohibition on state court suits by individuals against unconsenting states, it is necessary to turn to the history of the adoption of the eleventh amendment. This history to which the opinions in *Hall* devoted little attention begins with the Supreme Court's decision in 1793 in *Chisholm v. Georgia*.³⁷ In *Chisholm*, Alexander Chisholm, executor of the estate of a South Carolina merchant, sued Georgia in the Supreme Court on behalf of the deceased merchant's estate. He sought payment for war supplies that the merchant had delivered under contract to the state. Georgia refused to appear to defend the suit, and the Court, after hearing argument by counsel for the plaintiff, granted by a four to one margin the plaintiff's motion for a default judgment. In individual opinions—the customary procedure for rendering decisions at the time—the four Justices in the majority agreed that the Court enjoyed original jurisdiction over the suit by virtue of the clauses in article III extending the federal judicial power to "Controversies . . . between a State and Citizens of another State"³⁸ and granting the Supreme Court original jurisdiction over "Cases . . . in which a State shall be Party."³⁹ The dissenting Justice maintained that the Court clearly lacked jurisdiction in the instant case because Congress had never authorized it to hear suits of this sort. He then voiced his doubts that, under a fair reading of the Constitution, a state could ever be required to defend a suit by an individual for the recovery of money.⁴⁰

Chisholm was met almost immediately with great hostility on the part of Congress and the state governments. Within two days of the

³⁶ See, e.g., U.S. CONST. art. IV, § 1 (full faith and credit clause); art. IV, § 2, cl. 1 (privileges and immunities clause).

³⁷ 2 U.S. (2 Dall.) 419 (1793).

³⁸ U.S. CONST. art. III, § 2, cl. 1.

³⁹ U.S. CONST. art. III, § 2, cl. 2.

⁴⁰ 2 U.S. (2 Dall.) at 449-50 (Iredell, J., dissenting).

time that the decision was handed down, two resolutions had been introduced in Congress proposing a constitutional amendment that would bar suits by individuals against unconsenting states in federal court.⁴¹ Although Congress did not act on either resolution before adjourning the next month, it overwhelmingly approved in early 1794 with no reported debate a subsequent resolution based almost verbatim on one of these two.⁴² By this time, prompted not simply by the possibility of more suits like *Chisholm's* interfering with state finances⁴³ but also by the actual existence on the Court's docket of other suits by individuals against states,⁴⁴ almost every state governor had denounced *Chisholm* in a message to his state's legislature, and various state legislatures had passed resolutions and other measures indicating their displeasure with the decision.⁴⁵ Particularly striking in this regard was the passage by a sizable majority of the Georgia house of representatives of a bill prescribing "death, without the benefit of the clergy, by being hanged" for a federal marshal or anyone else who attempted to levy on the state's treasury or other state property to satisfy a claim against the state held by Alexander Chisholm or any other person.⁴⁶ The amendment's history effectively came to a close within a year of the time that Congress had acted. The legislatures of twelve of the existing fifteen states had approved by then the proposed amendment,⁴⁷ thus satisfying the three-fourths vote requirement set forth in article V for amending the Constitution.⁴⁸ Only the formalities of certification remained.⁴⁹

In 1890, the Supreme Court in *Hans v. Louisiana* took the position that the eleventh amendment simply vindicated an understanding widely shared by the framers of article III.⁵⁰ According to the Court in *Hans*, the *Chisholm* Court erred in reading article III to authorize federal jurisdiction over suits against an unconsenting state by a person residing outside the state. Under this view, the language in the article arguably placing such suits within the federal judicial power was intended to au-

⁴¹ See 3 ANNALS OF CONG. 651-52 (1793); Pennsylvania Journal, Feb. 20, 1793.

⁴² See 4 ANNALS OF CONG. 30, 476-78 (1794).

⁴³ See generally Nowak, *supra* note 33, at 1433-41.

⁴⁴ For the details of these cases, see C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 57-64 (1972). In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court held that the eleventh amendment required the dismissal of any pending suits instituted by individuals against unconsenting states prior to the adoption of the amendment.

⁴⁵ See C. JACOBS, *supra* note 44, at 65-66.

⁴⁶ Augusta Chronicle, Nov. 23, 1793. The Georgia senate did not go along, but perhaps only because it believed that the less drastic means of a constitutional amendment would soon be available to accomplish the same end. See C. JACOBS, *supra* note 44, at 57.

⁴⁷ See C. JACOBS, *supra* note 44, at 67, 180 n.96.

⁴⁸ U.S. CONST. art V.

⁴⁹ Certification proved "extremely erratic," and the President did not notify Congress until 1798 that the requisite number of states had ratified. C. JACOBS, *supra* note 44, at 67.

⁵⁰ 134 U.S. 1, 12-15 (1890). To similar effect, see *Edelman v. Jordan*, 415 U.S. 651, 660-62 & n.9 (1974); *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

thorize federal jurisdiction only over suits by states against out-of-staters and over suits by out-of-staters against consenting states. In recent years, some commentators have questioned the existence among the framers of article III of broad agreement that the article did not subject unconsenting states to suits by individuals.⁵¹ They suggest that *Chisholm* was not the clear violation of original intent that the Court in *Hans* supposed. For present purposes, I emphasize that, whether or not the framers of article III generally were agreed that article III did not extend federal jurisdiction to suits by individuals against unconsenting states, the fact remains that adamant and widespread support for protecting states from such suits emerged unmistakably in the 1790s and soon culminated in the adoption of the eleventh amendment.

C

The history presented above clarifies in two ways the relationship between the balance actually struck by the framers of the eleventh amendment for the federal court context and the balance that the framers of the amendment probably would have struck for the state court context. In so doing, it indicates that the eleventh amendment should be interpreted as barring suits by individuals against unconsenting states in state and federal court alike.⁵²

One way in which the history of the eleventh amendment provides this clarification is that it suggests that if the framers of the amendment had thought carefully about states' immunity from suit in state court, they probably would have concluded that state court suits by individuals against unconsenting states would create friction approximately as serious as the friction created by federal court suits of this sort. This proposition follows from two others. First, if the framers of the amendment had thought carefully about the source of the intense emotions to

⁵¹ See, e.g., C. JACOBS, *supra* note 44, at 3-51; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527-36 (1978). The Court in *Hall* cited Professor Jacobs on this point with apparent approval. See 440 U.S. at 419 & n.17.

⁵² Whether or not the balance struck by the framers of the eleventh amendment is one that today would receive the approval of Congress and three-fourths of the states is open to debate. On the one hand, states typically have repudiated at least in part their traditional immunity from suit, see K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 25.00 to 25.00-2 (Supps. 1976 & 1980), and sovereign immunity has long been strongly and widely criticized, see, e.g., Borchard, *Governmental Responsibility in Tort* (pts. 1-6), 34 YALE L.J. 1, 129, 229 (1924), 36 YALE L.J. 1, 757, 1039 (1926); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1977). On the other hand, some states limit waivers of immunity to the friendly confines of the state's own courts, see, e.g., NEV. REV. STAT. § 41.031 (1977), and the state defendant in *Hall* is hardly the only state to find disagreeable the prospect of states' having to defend suits that they have not consented to defend, see, e.g., Brief of 41 States for Petition for Reharing as Amici Curiae, *Nevada v. Hall*, 440 U.S. 410 (1979). Whether or not the Court believes that this balance struck in the late eighteenth century currently would win approval, however, the Court lacks authority under an interpretive model based on original intent to revise it.

which *Chisholm* gave rise, they most reasonably would have concluded that the friction caused by federal courts' hearing suits like the one in *Chisholm* was based in whole or in large part on the threat of interference with state finances posed by such suits, rather than on the federal nature of the forum. For reasons mentioned earlier,⁵³ it is conceivable that some part of the antipathy to *Chisholm* might have derived from the fact that the court in which Georgia was required to defend itself was a federal court: The states might have especially objected to federal courts' stripping them of their immunity because federal courts could do so without fear of retaliation against the federal sovereign and/or because the states were anxious to prevent any further inroads into state autonomy by the new central government. It is highly dubious, however, that these rather abstract and theoretical grounds for objection to *Chisholm* fueled more than a small part of the outrage that followed in *Chisholm's* wake. It is far more likely that strong emotions of this kind were directed entirely or largely at the very tangible threat to state finances presented by existing and potential suits like the one in *Chisholm*. Second, if the framers indeed had concluded that the friction caused by federal courts' hearing suits like the one in *Chisholm* was entirely or largely unrelated to the federal nature of the forum, then they most reasonably would have proceeded to equate the friction stemming from state court and federal court suits by individuals against unconsenting states. At least arguably, the framers reasonably might have found that the federal nature of the forum in federal court suits against states would excite some small measure of special antipathy. It is doubtful, however, that they reasonably might have assigned this finding any significance in comparing state court and federal court suits against states, because they almost certainly would have had to find that state court suits against states excite by their appearance of partiality a measure of special antipathy no less substantial than the amount attributable in federal court suits to the federal nature of the forum.

The second way in which the history of the eleventh amendment sheds light on the issue in *Hall* is that it indicates that if the framers of the amendment had thought carefully about states' immunity from suit in state court, they probably would have concluded that the possible federal-state friction caused by constitutionalizing states' immunity in state courts would be insignificant. In view of the outrage with which states reacted to *Chisholm*, the framers most reasonably would have assumed that the states would not be materially offended by a federal rule that denied them the option to hear suits like the one in *Chisholm* and offered them in return protection from such suits.⁵⁴

⁵³ See *supra* text accompanying notes 34 & 35.

⁵⁴ The thirteenth, fourteenth, and fifteenth amendments and federal civil rights legislation of the same era provide a possible basis for defending the result in *Hall* even if the

D

In criticizing earlier in this article the Court's eleventh amendment analysis, I argued that the absence of any mention of state courts in the eleventh amendment does not strongly imply an intent to exclude state courts from the amendment's coverage.⁵⁵ I based my argument on the fact that at the time of the amendment federal courts were the only tribunals either hearing suits against unconsenting states or apparently likely to hear such suits. The history presented in this section lends further support to the view that the words of the eleventh amendment are not a substantial impediment to interpreting the amendment to apply to state and federal courts alike. It does so by revealing an amendment process remarkably swift in all of its phases. Drafted essentially in two days, proposed in short order by Congress, and ratified promptly by the states, the eleventh amendment virtually begs for a mode of interpretation that studiously avoids undue attention to its precise words.

IV

Several years ago, Professor Martha Field set forth a novel theory of the eleventh amendment that, if valid, would undermine entirely my approach to the immunity issue in *Hall*.⁵⁶ According to Professor Field, the eleventh amendment was intended to repudiate *Chisholm* in a much narrower way than the Court and commentators generally have supposed. She agrees that the amendment overturned the holding in *Chisholm* that the Constitution gives federal courts jurisdiction over suits by individuals against unconsenting states. She rejects, however, the received wisdom that in accomplishing this reversal of *Chisholm*, the

preceding eleventh amendment analysis is sound. These post-Civil War developments at least arguably changed the nature of the federal system in a way that effected a tacit repeal of the eleventh amendment in whole or in large part. Cf. Thornton, *supra* note 33, at 334-47 (maintaining that the eleventh amendment "seems inconsistent" with the policies underlying the post-Civil War amendments and the 1871 act, from which 42 U.S.C. § 1983 (1982) is derived, and suggesting two respects in which the Court, in recognition of this inconsistency, should narrow its current definition of the range of federal litigation barred by the eleventh amendment). If the eleventh amendment indeed has been significantly or fully repealed by these developments, its implications for the issue in *Hall* are entitled to little, if any, respect.

An inquiry into the possible validity of a defense of *Hall* along these lines is beyond the scope of this article. Extensive discussion of the post-Civil War amendments and legislation almost certainly would be involved. In keeping with this article's emphasis on history, however, it may be appropriate to mention some historical evidence that cautions against easy acceptance of such a defense. Prior to 1860, various states had enacted laws waiving immunity from suit in their own courts. Having accumulated sizable debts during the Civil War, many of these states sought to protect their economic interests by repealing these consents to suit at the end of the war. See Engdahl, *supra* note 52, at 13, 21.

⁵⁵ See *supra* text accompanying notes 26-28.

⁵⁶ The basic theory is set forth in Field, *supra* note 51. In summarizing the theory in this section, I rely occasionally for clarification on Professor Field's subsequent article, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978).

amendment constitutionalized states' immunity from suit by individuals in federal court. In her view, the amendment simply established that this immunity is a nonconstitutional issue—an issue for the federal courts to decide as a matter of common law unless and until Congress in the exercise of its rulemaking powers over the federal courts chooses to decide it. Because recognition of sovereign immunity was the prevailing common law doctrine at the time of the amendment, the immediate effect of the amendment was, according to Professor Field, to give states common law protection from suits by individuals in federal court.⁵⁷

If, as Professor Field maintains, the eleventh amendment was intended only to place on a nonconstitutional footing states' immunity from suit by individuals in federal court, it is not even arguable that the amendment constitutionalizes this immunity in state court,⁵⁸ and the Court in *Hall* did well to pay the eleventh amendment so little heed. It is dubious, however, that Professor Field's theory of the amendment is sound. First, even if liberally construed, the words of the amendment militate strongly against the theory. The amendment provides that the federal judicial power "shall not be construed to extend to" specific types of cases. According to Professor Field, "to extend to" should be interpreted to mean "affirmatively to allow."⁵⁹ If "to extend to" is so understood, the amendment says only that the federal judicial power does not *necessarily* encompass the types of cases named. It leaves open the possibility that the federal judicial power may encompass such suits. This interpretation of "to extend to," however, may well be more than the words can bear. Absent evidence to the contrary, it seems appropriate to assume that the framers of the amendment used "to extend to" in its ordinary sense; and the ordinary meaning of "to extend to" is not "affirmatively to allow," but instead "to reach"—a meaning incompatible with Professor Field's theory of the amendment. Furthermore, the available evidence appears only to confirm that the framers of the amendment used "to extend to" in its ordinary sense: in denoting the types of cases included within the federal judicial power, the framers of article III used "extend to" to mean "reach";⁶⁰ and the framers of the eleventh amendment plainly used as their point of departure in drafting the amendment the language of article III.⁶¹ Rather than assume, as Professor Field does, that the framers of the eleventh amendment in-

⁵⁷ See Field, *supra* note 51, at 538-46; Field, *supra* note 56, at 1261-62.

⁵⁸ Professor Field makes clear this implication of her theory in Field, *supra* note 51, at 546-49 & n.103.

⁵⁹ See *id.* at 543.

⁶⁰ See generally C. WRIGHT, THE LAW OF FEDERAL COURTS §§ 7, 8, 10 (4th ed. 1983).

⁶¹ For confirmation of the framers' reference to article III, compare the wording of the eleventh amendment with that of the relevant portion of article III (reproduced *supra* at text accompanying note 8 and in note 10, respectively). Also, recall that *Chisholm* was based on an interpretation of article III and that the eleventh amendment was a direct response to *Chisholm*.

tended to use "extend to" differently from the way in which it had been used in article III, it is far more reasonable to suppose that they borrowed these and other words from article III with the expectation and desire that the words be interpreted to mean the same thing in both contexts.

Second, Professor Field's theory of the eleventh amendment is unpersuasive because it clashes with the history of the amendment. If sovereign immunity enjoyed no more than common law status in federal courts after the adoption of the eleventh amendment, the federal courts or Congress at a very early date could have reinstated the *Chisholm* Court's view of federal jurisdiction simply by declaring as a matter of sound policy for the federal courts that suits like *Chisholm*'s henceforth would be heard. Yet, in view of the vehement negative reaction to *Chisholm* that led rapidly to the adoption of the eleventh amendment, it is virtually inconceivable that the amendment was intended to achieve a reversal of *Chisholm* so readily undone. Professor Field acknowledges that, under her interpretation of the amendment, early modification of the restored immunity would have been theoretically possible.⁶² She denies, however, that the existence of this possibility indicates that the amendment probably was intended to give sovereign immunity constitutional status. In this regard, she asserts that the Congress that proposed the amendment was "not of a mind" to modify states' immunity in federal court;⁶³ and she suggests that this Congress probably would have considered substantial early judicial modification of this immunity highly unlikely.⁶⁴ Even assuming, though, that these observations about the proposing Congress are sound, it still must be seriously doubted that the eleventh amendment theory urged by Professor Field can coexist with the amendment's history. By all indications, the Congress that proposed the amendment and the states that ratified it felt so strongly about protecting states from having to defend suits like the one in *Chisholm* that they would not have been willing to take even the slightest risk that in the foreseeable future a later Congress or the federal courts would require states to defend such suits. Given their powerful sentiments on the matter, the most reasonable inference is that in adopting the eleventh amendment, Congress and the states wished to ensure that suits like the one in *Chisholm* would be barred from the federal courts in perpetuity—that is, barred from the federal courts as a matter of constitutional, rather than common, law.⁶⁵

⁶² See Field, *supra* note 51, at 545 n.98.

⁶³ See *id.*

⁶⁴ See *id.*; Field, *supra* note 56, at 1263.

⁶⁵ The suit in *Chisholm*, like the one in *Hall*, was a suit to vindicate a state law claim. The criticism in the above text of Professor Field's theory does not deny that the eleventh amendment sensibly may be interpreted to allow for some or all suits by individuals to vindicate federal law claims against states. See *supra* note 33.

V

In this article I have tried to demonstrate that the Court in *Hall* gave history far less than its due. In doing so, my purpose has not been to suggest that, in reaching its decisions, the Court generally should rely on history to a greater extent than it does. Perhaps it should, but history often may prove much less useful in resolving a constitutional issue than it appears to prove with regard to the issue in *Hall*. My basic point is that the Court cannot hope to decide correctly the significance, if any, of history to the issue before it without studying the matter with considerable care. Overemphasis of history is no greater virtue than underemphasis. From a broad perspective, *Hall* should serve as a warning against both.