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ESSAY

LAWMAKING IN THE LEGITIMACY GAP: A SHORT HISTORY OF THE SUPREME COURT'S INTERPRETIVE FINALITY

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Despite bestowing an epic name upon the nation's highest tribunal, the Constitution says precious little about the weight that we must accord to its constitutional decisions. That silence has spawned serious division among jurists and scholars. Some argue that the Supreme Court may conclusively determine only the rights of the parties before it. Yet others contend that its interpretations, like the Constitution itself, are "the supreme Law of the Land." Whichever view is correct is today a high-stakes question, given that the Court, practically speaking, enjoys interpretive finality. But its privileged position has a questionable historical pedigree. Far from the Court serving as the ultimate expositor of constitutional meaning, constitutional interpretation was originally seen as a dialogue between the Court and the People. The Court, no doubt, could construe the Constitution to settle individual controversies. But when it erred, the People could swiftly correct it by amending the Constitution. A forgotten but important example of that model, this Essay contends, was the People's reversal of Chisholm v. Georgia *through the Eleventh Amendment. Yet the "*Chisholm *model" was not to last, and the amendment process is*

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nearly defunct. Why? One reason, this Essay suggests, is that the Court would later begin to render decisions within "legitimacy gaps"—where its constitutional interpretations were demonstrably erroneous but also insufficiently unpopular to reverse. Such legitimacy gaps corrode the design of Article V and facilitate the judicial arrogation of power. But they also have a straightforward remedy: judicial adherence to the Constitution's original meaning.

INTRODUCTION

Even before its formal creation, the federal judiciary spawned sharp debate about its proper role in a system of separated powers. Writing as "Publius" in defense of the proposed Constitution, Alexander Hamilton famously remarked that, among the three "departments," the judiciary would be the "least dangerous."[1] Having "neither FORCE nor WILL," it could merely render judgments in individual cases and controversies.[2] And it still would "depend upon the aid of the executive arm" for those judgments to carry real-world significance.[3] But even at the Framing, Hamilton hardly could have boasted that his depiction of the judicial power enjoyed universal acclaim. Less famous, but no less important, was the attack on Article III that "Brutus" had mounted in the *Anti-Federalist*.[4] Rejecting claims of a timid judiciary, Brutus instead forecasted that it would acquire inordinate strength.[5] It alone had "the power, in the last resort, to determine . . . the meaning and construction of the constitution."[6] Courts could thus control the legislature in a way that the legislature could not control the courts: since "the constitution is the highest or supreme law," Brutus said, courts would enjoy the prerogative to reject "a law, which, in their judgment, opposes the constitution."[7] And without a practical mechanism confining courts to the Constitution's "letter," their constructions would become "very liberal" and their powers "supreme and uncontrollable."[8]

[1] The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[2] Id.
[3] Id.
[4] See Essays of Brutus No. XII, N.Y.J., Feb. 7, 1788, *reprinted in* The Anti-Federalist Papers *and* the Constitutional Convention Debates 298 (Ralph Ketcham ed., 1986).
[5] Id. at 298–99.
[6] Id. at 299.
[7] Id.
[8] Id. at 299–300.

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This back-and-forth, it turns out, presaged central debates about the nature of judicial power that persisted long after the Framing. Consider, for instance, the following question: Who is the legitimate interpreter of the federal Constitution? One view suggests that there is no single answer. Rather, everybody with a stake in constitutional meaning—the executive, legislature, judges, and People—may claim an interpretive role.[9] But another answer is that the Supreme Court really is supreme and that its constitutional interpretations are final.[10] On that view, the Court's opinions (and the "constitutional law" they generate) become part of the Constitution itself.[11] Through the Supremacy Clause, then, they constitute "the supreme Law of the Land."[12]

Whichever view is correct has obvious and profound consequences for American democracy. But belying that issue's central importance is the Constitution's laconic treatment of it. We learn from Article III that federal courts will exercise something called the "judicial Power."[13] We also learn that there will (indeed, must) be "one supreme Court" and that Congress may (but need not) create various "inferior Courts."[14] And, Article III tells us, these courts' subject-matter jurisdiction extends only to certain "cases or controversies."[15] That is about it. We do not learn which aspects of the Supreme Court's work product (whether opinions or mere judgments) are binding, whether either may bind non-parties, or, at least directly, whether even the lower courts must follow Supreme Court precedent.[16] The Supremacy Clause is not of much help either. Though labeling "supreme" the "Constitution" and "Laws of the United States,"

[9] See Edward A. Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 N.Y.U. L. Rev. 123, 159 (1999); see also Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 221 (1994) (arguing that authority to interpret the law is a shared power among the three branches).

[10] Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land").

[11] Id.

[12] Id.; see also U.S. Const. art. VI, cl. 2 (stating the same).

[13] U.S. Const. art. III, § 1.

[14] Id.

[15] Id. art. III, § 2.

[16] See, e.g., Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 834–38 (1994).

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the clause never equates judicial opinions with the "Constitution" or "Laws."[17] Indeed, it omits mention of opinions altogether.[18]

Given that lacuna, some defenders of "judicial supremacy" (that is, of judges' interpretive finality) have conceded that it cannot be justified by the text alone.[19] Professors Larry Alexander and Frederick Schauer, for instance, contend that because "a central moral function of law is to settle what ought to be done," treating judicial opinions as functionally supreme can have important practical benefits.[20] Still, Alexander and Schauer acknowledge that their thesis has encountered "thoughtful and troubling" criticisms about the ahistorical nature of judicial supremacy.[21] Professor Edward Hartnett, for example, has persuasively argued that history refutes "opinion supremacy."[22] Instead, it confirms that constitutional interpretation should be a "conversation" between courts and others "legitimately interested in the meaning of the Constitution," like the political branches.[23] Judicial attempts to arrogate the sole power of final interpretation—as the Supreme Court claimed to do most famously in *Cooper v. Aaron*[24]—are thus misguided.[25]

Like Professor Hartnett and others, this Essay contends that judicial supremacy is less a textual command than an unwritten and historically contingent norm. But this Essay makes that point by examining a deeply underappreciated constitutional moment in American history: the Supreme Court's 1793 decision in *Chisholm v. Georgia*[26] and its swift demise through the People's ratification of the Eleventh Amendment.[27] *Chisholm* nominally concerned whether Article III's grant of diversity jurisdiction abrogated states' immunity from suit by private individuals in federal court.[28] Yet as Part I details, the *Chisholm* decision—the

[17] U.S. Const. art. VI, cl. 2.

[18] Id.

[19] See, e.g., Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 459–60 (2000).

[20] Id. at 457.

[21] Id. at 458.

[22] Hartnett, supra note 9, at 126–36. I take the phrase "opinion supremacy" from William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1845 (2008).

[23] Hartnett, supra note 9, at 159.

[24] See supra note 10.

[25] Hartnett, supra note 9, at 126.

[26] 2 U.S. (2 Dall.) 419 (1793).

[27] See U.S. Const. amend. XI.

[28] *Chisholm*, 2 U.S. (2 Dall.) at 430–31.

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Court's first construing the Constitution[29] and the first to be reversed by an amendment[30]—has a hidden significance. It provides an early and provocative example of how constitutional interpretation was viewed as a dialogue between the Court and the People. The Court, to be sure, was entitled to construe the constitutional text. But when it erred, the People could swiftly correct it with a more sublime exposition. The *Chisholm* incident thus contains valuable clues about how the People believed they would maintain interpretive supremacy through Article V.

As Part II discusses, however, the People's check on the judiciary was not to last. Like Brutus predicted,[31] judicial review would come to operate within the context of what I term "legitimacy gaps"—where constitutional decisions, though demonstrably inconsistent with the Constitution itself, are also tough to reverse.[32] Sometimes, for example, a dubious right gained popular backing that was at once appreciable but also insufficient to produce a constitutional amendment. Yet the Court

[29] 5 The Documentary History of the Supreme Court of the United States, 1789–1800, at 127 (Maeva Marcus et al. eds., 1994) [hereinafter DHSC].

[30] Id.

[31] See Essays of Brutus No. XII, supra note 4, at 300 (predicting that courts would subordinate the Constitution's text to its "spirit and reason" to reach policy-oriented outcomes).

[32] I will take a moment here to describe how I use the term "legitimacy" throughout—a usage informed by Professor Richard Fallon's recent work on the topic. We can think of "legitimacy" in three different respects: legal, moral, and sociological. See Richard H. Fallon, Law and Legitimacy in the Supreme Court 21 (2018). Put simply, a decision is morally legitimate when it represents what *ought* to be done, while it is sociologically legitimate when it enjoys wide popular support. Id. The question of legal legitimacy is more complex, and I define it differently than does Professor Fallon. See id. at 49–51. In my view, legitimacy unfolds on a spectrum, and a constitutional decision is *most* legally legitimate when it both stems from originalist decision procedures and is substantively correct as an original matter. Ideally, of course, a decision would embody all three types of legitimacy—legal, moral, and sociological. But in practice, the three planes can diverge. A decision may be legally illegitimate and yet enjoy sociological legitimacy given its wide popular support. Indeed, that is how I conceptualize the "legitimacy gap"—when a decision is arguably or even clearly legally illegitimate and yet enjoys sufficient sociological legitimacy to prevent its repudiation. Additionally, I should clarify that legitimacy in my view differs from *authority*. There may be situations in which a rule of decision is legally illegitimate under the criteria I set out above and yet possibly we should still accept it as binding authority; the doctrine of *stare decisis*, for instance, seeks to explain when we should do so in the context of overruling precedent. See, e.g., Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) ("[*S*]*tare decisis* has consequence only to the extent it sustains incorrect decisions . . . ."). Or, to give another example, a lower-court judge remains bound to apply indistinguishable Supreme Court precedent even when such precedent is indefensible as an original matter.

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still codified the right into "constitutional law."[33] While it thus could not have achieved constitutional status through Article V on its own merits, the right was insufficiently *un*popular to *abrogate* by an amendment. Or, perhaps worse, the People could affirmatively *recognize* new rights with a constitutional amendment, but the Court could then undermine those guarantees with an erroneous construction that was insufficiently unpopular to dislodge. The Court's construction was thus illegitimate, but not *so* illegitimate that it spurred prompt reversal. The rise of the Court's interpretive finality, in other words, hinged on the existence of background levels of polarization sufficient to insulate controversial decisions from correction by the People.

But the rabid polarization that has stymied popular checks on the judiciary should not be seen, in turn, as a license for the judiciary to freely operate within those legitimacy gaps. Amendments' rarity should instead cause judges to be even more circumspect in their constitutional constructions. To that end, this Essay suggests that courts can mitigate the lack of a popular-constitutional check by declining to make new decisions—and hesitating to extend old ones—that are dubious as an original matter. By seeking fidelity to original meaning, judges can defuse the "judicial tyranny" that legitimacy gaps may otherwise create.[34]

I. *CHISHOLM* AND THE LOST CONVERSATION BETWEEN THE COURT AND THE PEOPLE

By its terms, Article III of the Constitution provides that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State."[35] But does that grant of jurisdiction mean that private plaintiffs may hale even *un*consenting states into a federal tribunal? That was the question the Supreme Court considered in *Chisholm v. Georgia*.[36] During the Revolutionary War, Georgia had contracted with South Carolina merchant Robert Farquhar for the purchase of goods worth about

[33] Even ardent judicial supremacists acknowledge that judge-made "constitutional law" is distinct from the Constitution itself. See, e.g., Eric J. Segall, The Constitution Means What the Supreme Court Says It Means, 129 Harv. L. Rev. F. 176, 178 (2016).

[34] Robert Bork, The Tempting of America: The Political Seduction of the Law 140 (1990); see also Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17, 22 (1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

[35] U.S. Const. art. III, § 2, cl. 1.

[36] 2 U.S. (2 Dall.) 419, 430 (1793) (opinion of Iredell, J.); see also id. at 452 (opinion of Blair, J.).

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£9,000 sterling.[37] Farquhar delivered the goods but, despite his "many demands," Georgia never paid.[38] Farquhar "spent the remainder of his life trying to recover the debt."[39] Yet he died in 1784, still uncompensated.[40] In response, Farquhar's executor, Alexander Chisholm, sued Georgia in the United States Circuit Court for the District of Georgia.[41] The novel claim put Georgia's government "at a loss to know how to proceed."[42] It eventually filed a plea to the jurisdiction, asserting that it could not "be drawn or compelled" into court without its consent.[43]

District Judge Nathaniel Pendleton, sitting alongside circuit Justice James Iredell, agreed.[44] Though Pendleton's opinion is lost to history, Iredell's survived.[45] He began by noting the practical oddities of subjecting a state to judicial process. It seemed that Georgia's governor, Edward Telfair, would be the relevant natural person to appear on Georgia's behalf.[46] But if *many* plaintiffs sued Georgia, Telfair could not possibly defend all the suits at once. So, Iredell reasoned, it was proper that subordinate counsel should appear on Georgia's behalf and defend the action.[47] Satisfied that Georgia's plea to the jurisdiction was procedurally valid, Iredell turned to jurisdiction itself. He noted first that even if Article III permitted state suability in theory, Congress had not explicitly created such jurisdiction by statute.[48] In any event, he said, only the Supreme Court could even exercise such jurisdiction.[49] Article III specifies that the Court "shall have original Jurisdiction" in cases "in which a State shall be Party,"[50] and given the importance of state suability,

[37] 5 DHSC, supra note 29, at 127.
[38] Id.
[39] Id.
[40] Id.
[41] Id. at 127–28.
[42] Id. at 128.
[43] Plea to the Jurisdiction, Chisholm ex rel. Farquhar v. Georgia, (C.C.D. Ga. Oct. 21, 1791), *in* 5 DHSC, supra note 29, at 143, 143.
[44] See 5 DHSC, supra note 29, at 130.
[45] Id. at 130 n.25.
[46] See Chisholm ex rel. Farquhar v. Georgia (C.C.D. Ga. Oct. 21, 1791) (opinion of Iredell, J.), *in* 5 DHSC, supra note 29, at 148, 152.
[47] Id.
[48] Id. at 154.
[49] Id. at 153.
[50] U.S. Const. art. III, § 2, cl. 2.

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he reasoned, the Court's jurisdiction must not only be original, but also exclusive.[51] He and Pendleton thus dismissed the suit.[52]

Undeterred, Chisholm filed an original action against Georgia in the Supreme Court itself.[53] Georgia refused to appear, so the Court heard argument only from counsel for Chisholm, Edmund Randolph.[54] Both Randolph and the five Justices who heard the case understood that its central issue—state suability—was paramount.[55] The states had accumulated massive debts to private creditors during the Revolutionary War.[56] They had also expropriated many Loyalists' property.[57] If creditors or Loyalists could use the federal courts to vindicate those claims—states' objections notwithstanding—states could face the prospect of bankruptcy. Unsurprisingly, the *Chisholm* litigation attracted intense public scrutiny.[58]

For the "numerous and respectable audience" that had gathered in Philadelphia to hear the Court's decision in February 1793, the states initially might have appeared secure.[59] Justice Iredell, back from the circuit assignment, delivered his opinion first.[60] He again rejected the claim that states could be sued in federal court, echoing his statutory arguments from the circuit.[61] But as his colleagues (Justices Blair, Wilson, Cushing, and Chief Justice Jay) delivered their own opinions *seriatim*, it became clear that Iredell would not prevail. Rather—relying on everything from the Constitution's supposedly plain text[62] to sundry European philosophers[63]—the four contended that, indeed, Article III had abrogated states' immunity from suit.

[51] Chisolm ex rel. Farquhar v. Georgia (C.C.D. Ga. Oct. 21, 1791) (opinion of Iredell, J.), *in* 5 DHSC, supra note 29, at 148, 153.

[52] 5 DHSC, supra note 29, at 130–31.

[53] Id. at 131.

[54] Id. at 134.

[55] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 419 (1793); see also id. at 432 (opinion of Iredell, J.); id. at 450 (opinion of Blair, J.); id. at 453 (opinion of Wilson, J.); id. at 467–68 (opinion of Cushing, J.); id. at 479 (opinion of Jay, C.J.).

[56] 5 DHSC, supra note 29, at 2.

[57] Id.

[58] Id. at 134.

[59] Id.

[60] *Chisholm*, 2 U.S. (2 Dall.) at 429.

[61] Id. at 430, 432 (opinion of Iredell, J.).

[62] Id. at 467 (opinion of Cushing, J.); id. at 476–77 (opinion of Jay, C.J.).

[63] Id. at 457–63 (opinion of Wilson, J.).

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The decision "fell upon the country with a profound shock"[64]—and for good reason. George Mason and Patrick Henry had criticized the proposed Constitution for its apparent codification of state suability.[65] But "during the ratification debates . . . both James Madison and John Marshall [had] explicitly asserted that Article III would *not* expose unconsenting states to suit by individuals."[66] Likewise, Alexander Hamilton had written in *Federalist* No. 81 that it was "inherent in the nature of sovereignty" for a state "not to be amenable to the suit of an individual without its consent."[67] So for Anti-Federalists who had relented when given those guarantees, *Chisholm* was no doubt a stinging decision.

And their anger was justified. *Chisholm*'s interpretation of Article III was both inconsistent with the ratification debates and simply wrong: Unconsenting states' immunity from process *was* a personal-jurisdictional backdrop that Article III was not supposed to abolish.[68] More important for our purposes, though, was the ensuing reaction. Observers almost immediately began to contest the deference due the Supreme Court's pronouncement. True, the Court found defenders in various quarters. Noah Webster's paper, the *American Minerva*, ran an editorial strongly defending judicial supremacy.[69] The Supreme Court had "deliberately decided [that Article III] extends to enable a person to sue a State," it said.[70] "This decision is then a law of the United States, or rather *a part of the constitution*," and thus "binding on every citizen."[71] Edmund Pendleton likewise wrote to his nephew Nathaniel that though *Chisholm*

[64] 5 DHSC, supra note 29, at 4; accord James E. Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 Cornell L. Rev. 1269, 1278 (1998).

[65] Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1592–93 (2002).

[66] Id. at 1564.

[67] The Federalist No. 81, supra note 1, at 486 (Alexander Hamilton) (emphasis omitted).

[68] Nelson, supra note 65, at 1565–66. This is not to say that, inversely, states thus enjoyed constitutional immunity from *all* process in the federal courts. However repugnant suits against states by individuals might have been, subjecting states to process in other types of suits—such as those between states or between a state and the United States, at least so long as Congress established the requisite statutory jurisdiction over such disputes—seems to accord with the original design of Article III. See id. at 1631–32.

[69] See An Intemperate Resolution of Georgia, Am. Minerva, Jan. 15, 1794, *reprinted in* 5 DHSC, supra note 29, at 237, 238.

[70] See id.

[71] Id. (emphasis added).

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seemed wrongly decided, he supposed that it "must be taken for law."[72] A similar and "striking . . . defense of the federal judiciary" arose from the Virginia Senate.[73] When the House of Delegates excoriated "the decision of the Supreme Fœderal Court," several state senators lodged protest.[74] The Constitution was "at least ambiguous" on state suability, in their view, so the Court did not deserve the lower house's "censure."[75]

Among the broader populace, however, the Justices' opinions were then considered neither infallible nor, as a practical matter, final. The "swift and widespread" perception was instead that *Chisholm* would soon be reversed through Article V.[76] Vice-President John Adams predicted as much in a letter to his son in March 1793, even before copies of the *Chisholm* opinions were widely available.[77] "The Report of the late Case in the Supream national Court will soon be made public and the Arguments of the Judges weighed," he said.[78] "If it Should be necessary for Congress to interfere by Submitting that part of the Constitution to the Revision of the State Legislatures, they have Authority to do it."[79] His assessment was not only correct but even somewhat belated. For on the *same day* of *Chisholm*'s decision, the House of Representatives had already begun to contemplate an amendment barring state suability.[80]

Resistance likewise gained momentum in the state legislatures. Georgia soon demanded "an explanatory amendment to the Constitution" reversing *Chisholm*.[81] And it urged federal "Senators and Representatives to use every means in their power to obtain a speedy ratification."[82] Virginia and Connecticut likewise instructed their congressional

[72] Letter from Edmund Pendelton to Nathaniel Pendleton (Aug. 10, 1793), *reprinted in* 5 DHSC, supra note 29, at 232, 232.

[73] Id. at 285–86.

[74] See Proceedings of the Virginia House of Delegates (Nov. 28, 1793), *reprinted in* 5 DHSC, supra note 29, at 338, 338; Proceedings of the Virginia Senate (Dec. 4, 1973), *reprinted in* 5 DHSC, supra note 29, at 339, 339. This Essay preserves historical sources' original spelling.

[75] Id. at 339.

[76] 2 DHSC, supra note 29, at 338.

[77] Letter from John Adams to Charles Adams (Mar. 18, 1793), *in* The Adams Papers Digital Collection (Sara Martin ed., 2022), https://rotunda.upress.virginia.edu/founders/ADMS-04-09-02-0241 [https://perma.cc/39ST-E8KP].

[78] Id.

[79] Id.

[80] 2 DHSC, supra note 29.

[81] Proceedings of the Georgia House of Representatives, Augusta Chron., Nov. 9, 1793, *reprinted in* 5 DHSC, supra note 29, at 235, 235.

[82] Id.

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delegates to secure an amendment "to remove or explain any clause" suggesting "that a state is compellable to answer in any suit."[83] At Governor John Hancock's direction, Massachusetts made a similar push.[84] Its General Court recommended that any text in Article III supporting state suability be "wholly expunged from the Constitution."[85] For "the Supreme Judicial Court of the United States," it said, "hath given a construction to [it] very different from the ideas which the Citizens of this Commonwealth entertained . . . at the time it was adopted."[86]

By March 1794 (soon after *Chisholm*'s first anniversary), the House and Senate had approved the text of the requested explanatory amendment.[87] In its now-famous language, it declared that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[88] With lawyerly precision, then, it dispelled the jurisdiction the *Chisholm* majority had grafted onto Article III.

Ratification came soon after, first in New York and last in North Carolina in February 1795.[89] As the twelfth in a Union of then fifteen to ratify, North Carolina converted the proposal into the Eleventh Amendment.[90] The Court's "first great constitutional case"[91] thus became its first great constitutional defeat: *Chisholm*'s reign was extinguished in only its second year.

For the People, however, it was the first great interpretive victory. After the Justices had offered their own construction of Article III, the People disagreed, and so they reversed it with a superior exposition through Article V. In this respect, the "explanatory" language of the Eleventh Amendment is revealing.[92] It treated *Chisholm* not as having unveiled

[83] Proceedings of the Virginia House of Delegates (Nov. 28, 1793), *reprinted in* 5 DHSC, supra note 29, at 338, 338–39; Resolution of the Connecticut General Assembly (Oct. 29, 1793), *reprinted in* 5 DHSC, supra note 29, at 609, 609.

[84] See Report of a Joint Committee of the Massachusetts General Court, Indep. Chron., June 20, 1793, *reprinted in* 5 DHSC, supra note 29, at 230, 230.

[85] Id.

[86] Id. at 231.

[87] 4 Annals of Cong. 477 (1795).

[88] Id.; see also U.S. Const. amend. XI (stating the same).

[89] See Pfander, supra note 64, at 1271 n.5.

[90] Id.

[91] Randy E. Barnett, The People or the State?: *Chisholm v. Georgia* and Popular Sovereignty, 93 Va. L. Rev. 1729, 1729 (2007).

[92] Pfander, supra note 64, at 1335–43.

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some truth about the Constitution that required a change. Rather, by informing the judiciary how Article III "shall not be construed," the amendment framed *Chisholm* as wrong the day it was decided.[93] Indeed, the original Constitution had not meant to abolish the states' existing immunity. But it took the People's exposition to rescue that original meaning from the Court's erroneous construction.

Uninformed observers might assume that this exchange sparked a longer tradition of vigorous popular checks on the judiciary, with the People sitting as an "Article V court" to continuously revise judicial interpretations. However, Part II suggests why that future never materialized.

II. LEGITIMACY GAPS AND THE EXPANSION OF JUDICIAL POWER

Many reasons account for why the Court's later decisions were (and still are) almost never overruled by amendment. Much of the Court's docket, to be sure, involves "lawyer's law"—low-salience disputes incapable of generating broad public interest. But the Court has also waded into some of the most fraught public debates imaginable—from abortion and affirmative action to school prayer and same-sex marriage. Even still, only perhaps five of its decisions in the last two-hundred years have met direct reversal through Article V.[94] Why? It seems incredible to believe that the Court always gets it right; the Court *itself* sometimes disavows important portions of its own jurisprudence. Rather, *Chisholm* again bears important lessons. Article V worked in that case, it turns out, because state suability was both economically important *and* not particularly controversial. A wide consensus existed that the Court's decision was erroneous. And the People were collectively mad enough to do something about it.

But imagine instead that Federalist support for the decision had been more widespread. Indeed, imagine that Federalists and Anti-Federalists had fractured evenly into their respective camps, so that state suability enjoyed public approval and disapproval in about equal measure. In that case, Article III's actual meaning would not have been particularly

[93] Id.

[94] See U.S. Const. amend. XIV (overruling Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); U.S. Const. amend. XVI (overruling Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895)); U.S. Const. amend. XIX (overruling Minor v. Happersett, 88 U.S. 162 (1875)); U.S. Const. amend. XXIV (overruling Breedlove v. Suttles, 302 U.S. 277 (1937)); U.S. Const. amend. XXVI (overruling Oregon v. Mitchell, 400 U.S. 112 (1970)).

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important. The Court could have decided *Chisholm* either way—for *or* against state suability—and its decision would have been immune from Article V review. If the public had been more polarized on the immunity issue, in other words, *Chisholm* would have survived as an important precedent in "constitutional law." And it would have done so even despite its status as a demonstrably erroneous misreading of the original Constitution.

That probably sounds like a bad outcome. The People would have achieved seeming consensus during ratification, only to be duped by misguided *seriatim* opinions and subsequent polarization. But for many later decisions, that counterfactual is a reality—it's what really explains why the Court became near-impervious to amendments. So long as its decisions are insufficiently *un*popular to reverse, the Court can safely abandon the Constitution's actual meaning. A couple of brief examples will illustrate such legitimacy gaps in action.

A. Inventing Dubious Rights: New York Times Co. v. Sullivan *(1964)*[95]

As originally understood, the First Amendment had "nothing to do" with regulating libel suits.[96] To the contrary, libel was a crime and a tort at the Framing and well into the twentieth century.[97] As late as 1952, the Supreme Court upheld a libel conviction, given that "libelous utterances" were outside "the area of constitutionally protected speech."[98] Twelve years later, however, the Court upended almost two centuries of jurisprudence and inaugurated "a seemingly irreversible process of constitutionalizing the entire law of libel[.]"[99] First, in *New York Times Co. v. Sullivan*, the Court held that public officials who sued for libel had to prove that defendants acted with "actual malice"—either while knowing their statements were false or with reckless disregard for their falsity.[100] Then, "[t]he Court promptly expanded" that rule[101] to include "public figures"—private citizens otherwise engaged in public

[95] 376 U.S. 254 (1964).

[96] Dexter v. Spear, 7 F. Cas. 624, 624 (Story, Circuit Justice, C.C.R.I. 1825) (No. 3,867).

[97] Ronald A. Cass, Weighing Constitutional Anchors: *New York Times Co. v. Sullivan* and the Misdirection of First Amendment Doctrine, 12 First Amend. L. Rev. 399, 404–06 (2014).

[98] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[99] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985) (White, J., concurring in the judgment).

[100] *Sullivan*, 376 U.S. at 279–80.

[101] McKee v. Cosby, 139 S. Ct. 675, 677 (2019) (Thomas, J., concurring in denial of certiorari).

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discourse[102]—and later even to certain private figures criticized on matters of "public concern."[103]

As a result, libel actions have become "almost impossible" to win, even when defendants' accusations are egregious and demonstrably false.[104] Unsurprisingly, the actual malice standard has generated intense controversy. Justices Gorsuch and Thomas, for instance, have criticized the decision for its raw policymaking and lack of any plausible connection to original meaning.[105] Progressives, too, have called for *Sullivan*'s revision, since it ended up immunizing outright "lies" rather than "vigorous public exchange."[106] Yet the decision retains a fair degree of support and is firmly entrenched in our First Amendment mythology.[107] (And, naturally, the last attempt to reverse it through a constitutional amendment failed.)[108] So, while *Sullivan* bears questionable relation to the Constitution itself, it survives in a legitimacy gap as a leading principle of constitutional law.[109]

[102] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion).

[103] *Dun & Bradstreet, Inc.,* 472 U.S. at 751.

[104] Id. at 771 (White, J., concurring in the judgment); see also Justin W. Aimonetti & M. Christian Talley, How Two Rights Made a Wrong: *Sullivan*, Anti-SLAPP, and the Underenforcement of Public-Figure Defamation Torts, 130 Yale L.J. Forum 708, 708 (2021). (noting "the *Sullivan* standard is almost impossible to satisfy").

[105] Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2019) (Thomas, J., dissenting from denial of certiorari); id. at 2426 (Gorsuch, J., dissenting from denial of certiorari).

[106] Jeremy Lewin, The Progressive Case for Libel Reform, Wall St. J. (Apr. 5, 2021), LUP5https://www.wsj.com/articles/the-progressive-case-for-libel-reform-11617638828?mod=article_inline [https://perma.cc/RPB9-LUP5]

[107] See, e.g., The Uninhibited Press, 50 Years Later, N.Y. Times (Mar. 8, 2014), https://www.nytimes.com/2014/03/09/opinion/sunday/the-uninhibited-press-50-years-later.html [https://perma.cc/7XW7-2GMU].

[108] H.R.J. Res. 1285, 92nd Cong., 118 Cong. Rec. 27714 (1972).

[109] It is thus an example of the useful distinction Professor Stephen E. Sachs has drawn between "actual law" and "actual practice." See Stephen E. Sachs, Law Within Limits: Judge Williams and the Constitution 3–9 (Geo. Mason Univ. Ctr. for Study Admin. State, Working Paper No. 21-36, 2021), https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/09/Sachs-Law-Within-Limits.pdf [https://perma.cc/G8EB-7RV9]. We can think of "actual law," on the one hand, as the Constitution *itself* and its original meaning as fixed at the time of its ratification, while we can think of "actual practice," on the other, as the precedents of "constitutional law" that lawyers actually apply to litigate concrete cases. See id. These precedents are not the Constitution itself (and for that matter sometimes may be an egregious misinterpretation of it), but they nonetheless supply binding rules of decision that lower courts must apply in the actual practice of constitutional adjudication. See also William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. Univ. L. Rev. 1455, 1472 (2019) ("Under our system's rules of precedent, legal actors are sometimes commanded to follow a Supreme Court decision 'as if' it were the law—even as the underlying legal materials, which

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B. Cabining Rights Guaranteed: United States v. Cruikshank *(1876)*[110]

After the Union's victory in the Civil War—and the several hundred thousand Union deaths required to achieve it—the nation ratified the "Reconstruction Amendments" in an attempt to unravel Southern white supremacy. The Thirteenth abolished slavery,[111] while the Fifteenth prohibited denial of the right to vote on account of race.[112] And the Fourteenth, by its terms, featured three central guarantees: due process, equal protection, and that no state should "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[113] For reasons that will soon become apparent, the last guarantee has fallen into practical desuetude. But that development was itself bizarre. "At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights'"—precisely the sort of rights considered "fundamental" and "inalienable" and that had been "codifi[ed] in the Constitution's text" via the Bill of Rights.[114]

It was quite reasonable, then, for federal prosecutors in 1873 to have indicted several white-supremacist Democrats and Klansmen for deprivation of constitutional rights after they had murdered scores of Black militiamen outside a Louisiana courthouse.[115] The conspiracy and ensuing massacre had undeniably deprived the freedmen of their rights to assemble and bear arms. But in a stunning decision in March 1876, the Court reversed the Klansmen's convictions.[116] Building on its earlier

command ultimate authority, prescribe a different result. . . . This 'as if' law can be binding on particular actors without thereby *becoming* the law. . . .").

[110] 92 U.S. 542 (1875).

[111] See U.S. Const. amend. XIII.

[112] See U.S. Const. amend. XV.

[113] U.S. Const. amend. XIV.

[114] McDonald v. Chicago, 561 U.S. 742, 813, 818 (2010) (Thomas, J., concurring in the judgment). For a recent exploration of this topic, see Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 176–78 (2021). Barnett and Bernick persuasively criticize the *Slaughter-House* Court's "extremely narrow" and "bizarre" reading of the Privileges or Immunities Clause to cover only supposed rights of national citizenship rather than fundamental rights—such as those embodied in the Bill of Rights—more broadly. See id. at 174–78; see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 117–19 (1873) (asserting "privileges and immunities" can be found "in the original Constitution" and its "early amendments").

[115] James Gray Pope, Snubbed Landmark: Why *United States v. Cruikshank* (1876) Belongs at the Heart of the American Constitutional Canon, 49 Harv. Civ. Rts.-Civ. Liberties. L. Rev. 385, 387 (2014).

[116] United States v. Cruikshank, 92 U.S. 542, 556–57 (1875).

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Slaughter-House decision, the Court reasoned that assembly and carriage of arms could not be privileges or immunities stemming from *United States* citizenship, since those rights had preexisted the United States' creation.[117] Thus, their fundamental nature "was the very reason citizens could not enforce [them] against [the] States."[118] That conclusion likewise meant that *none* of the Bill of Rights was enforceable against the South, since *all* the rights guaranteed in the first nine amendments flowed from principles earlier than nationhood.[119] So despite the Fourteenth Amendment's plain and "established" terminology,[120] the Court applied a construction that reduced its protections to a sliver. Amendment attempts in the 1880s to expand and restore civil rights failed,[121] since much of the nation was no doubt pleased by the Court's narrowing construction. (Indeed, white race-terrorists in the South celebrated the *Cruikshank* ruling by murdering several Black citizens and Republican officials.)[122] Later litigants would thus be forced to seek "selective incorporation" through the vehicle of "substantive" due process.[123] The practical result is that even one-hundred-fifty years later, the Bill of Rights still does not fully apply to the states.[124]

CONCLUSION

It is interesting to imagine how constitutional doctrine might have developed differently had the *Chisholm* model survived and the "People's Court" of Article V sat in continuous judgment of Article III. For instance, as is sometimes said with regard to statutes,[125] we might believe that the

[117] Id. at 544, 551; see also Barnett & Bernick, supra note 114, at 181–84.

[118] *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in the judgment).

[119] *Cruikshank*, 92 U.S. at 551–52. I thus include the Ninth Amendment, though whichever rights it protects (and whether they are judicially enforceable) is the subject of longstanding debate. See, e.g., Troxel v. Granville, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting).

[120] *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in the judgment).

[121] See, e.g., H.R.J. Res. 92, 48th Cong., 15 Cong. Rec. 282 (1884).

[122] Pope, supra note 115, at 412–13.

[123] See, e.g., Jerold H. Israel, Selective Incorporation: Revisited, 71 Geo. L.J. 253, 253, 274 (1982).

[124] The Third Amendment, the Fifth Amendment's grand-jury requirement, and the Seventh Amendment's right to civil jury trials remain unincorporated. *McDonald*, 561 U.S. at 765 n.13.

[125] See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989). Whether a differential stare decisis regime for statutory precedents makes sense, I would note, is subject to dispute. See Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

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People's failure to overrule an innovative constitutional construction thus ratified it as a definitive gloss. As it turns out, however, modern realities could hardly sustain such a presumption. The amendment process is ossified, and given the realities of political polarization, judges enjoy functional finality in exposing constitutional meaning—even when their constructions are demonstrably erroneous.

The lack of a popular-constitutional check does not mean the situation is hopeless, of course. It just means that, in that check's absence, restraint must come from the judiciary itself. Courts should endeavor to apply the Constitution's original meaning—that to which the People agreed—rather than "extorting from precedents something" the Constitution "does not contain."[126] And they "should tread carefully before extending [those] precedents" that are dubious as an original matter.[127] Only then are we bound by "the intention of the people," rather than by the mere "intention of their agents."[128]

[126] Robert Rantoul, Oration at Scituate (July 4, 1836), *in* Kermit L. Hall, William M. Wiecek & Paul Finkelman, American Legal History 317, 318 (1991).

[127] Garza v. Idaho, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting).

[128] The Federalist No. 78, supra note 1, at 467 (Alexander Hamilton). I confess that in the context of this short essay, I cannot provide a comprehensive account of why originalism is the best interpretive system to achieve legal legitimacy. So, a couple of brief points will have to suffice instead. First, originalism treats as law the historical meaning of the Constitution—a factual and thus falsifiable claim—rather than the unfalsifiable intuitions of individual jurists. See Baude & Sachs, supra note 109, at 1458; see also William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2363, 2398–99 (2015) (declaring originalism to be "meaningfully distinct" because it has "one methodology" and can be subject to "historical falsification."). In this way, it of all systems most plausibly constrains constitutional interpretation. And second, the meaning to which such interpretation is bound is original *public* meaning—that to which the People as sovereign originally assented. See Obergefell v. Hodges, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) ("The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments."). Originalism thus not only constrains (or, of competing systems, most plausibly constrains), but it constrains to that source of meaning with the most plausible claim to representing truly legitimate authority. See U.S. Const. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . ."); see also J. Joel Alicea, The Moral Authority of Original Meaning, 98 Notre Dame L. Rev. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049069 [https://perma.cc/4782-UZWL] (recognizing "original meaning…is necessary to preserve the legitimate authority of the people….").