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Interstate Immunity and the Uncompleted Constitution

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In a recent decision, the Supreme Court held that "the founding generation took as a given" that states would be constitutionally immune to suit in the courts of sister states, overruling an earlier ruling that interstate immunity is governed by state law. This Article rejects both approaches, showing that interstate immunity was unaddressed by the original Constitution and the Eleventh Amendment. But though interstate immunity is what this Article calls a "constitutional omission," what ultimately fills it must be federal law.

Filling in a constitutional omission necessarily requires a choice among options—what philosophers call an exercise of agency. But the inevitability of agency is not a license for judicial lawmaking because the Constitution allows for "shared agency" by many institutions to jointly work out whether states have interstate immunity. Shared agency's constitutive norms constrain the agency of all those institutions, creating favorable conditions for making constitution-worthy fill-ins for constitutional omissions.

This Article's framework of an uncompleted constitution made more complete through shared agency is an alternative to originalism and living constitutionalism that has relevance far beyond interstate immunity. Shared agency is a widespread human practice that allows intergenerational projects to be worked on by large numbers of people. This Article explains why the Framers bequeathed us an uncompleted constitution, and demonstrates shared agency's epistemic, functional, and foundational democratic benefits for making it more complete.

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INTRODUCTION

This Article introduces a novel alternative to originalism and living constitutionalism and applies it to the question of whether an unconsenting state can be sued in a sister state's court—an issue of "interstate immunity" about which the Constitution is silent.

No constitutional text addresses the interstate immunity question of a state's suability in a sister state's court. Stepping into the textual void, Justices and scholars have offered a dizzying array of answers. Relying on the absence of constitutional text regarding interstate immunity, *Nevada v. Hall*[1] held in 1979 that interstate immunity was a matter of state law.[2] *Hall* provoked substantial criticism. Some scholars argued that interstate immunity was derived from the constitutional text ("States"[3] or "Cases or Controversies"[4]), while others grounded interstate immunity's constitutional status in structure and history.[5] The recent 5–4 case of *Franchise Tax Board v. Hyatt* ("*FTB*") overturned *Hall*.[6] Justice Thomas's majority opinion reads as if history resolved the question. Quoting Alexander Hamilton, James Madison, and John Marshall, *FTB* unqualifiedly concluded that "[t]he leading advocates of the Constitution . . . took as [a] given that States could not be haled involuntarily before each other's courts."[7] Justice Breyer's dissent in *FTB* would have upheld *Hall* on grounds of stare decisis.[8]

This Article takes a different approach. Against *FTB* and the aforementioned scholars, it contends that interstate immunity was unaddressed and unanswered by the original Constitution and the Eleventh Amendment because it was either overlooked, unresolved, or sidestepped to facilitate consensus. Even if Hamilton, Madison, and Marshall thought unconsenting states couldn't be sued, other "leading advocates of the Constitution"[9] thought otherwise—including John Jay, James Wilson, and Edmund Randolph.[10] Regardless of what these prominent early Americans thought—or perhaps *because* of their divergent views—the Constitution didn't address interstate

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1. 440 U.S. 410 (1979).

2. *Id.* at 425, 427.

3. U.S. CONST. art. III, § 2, cl. 1; *see* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821, 870 (1999) (arguing that interstate immunity was a "traditional attribute[]" of "States").

4. U.S. CONST. art. III, § 2, cl. 1; *see* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1566, 1576–77 (2002) (arguing there would be no "case" or "controversy" against unconsenting states on account of eighteenth-century general law).

5. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249, 251 ("*Hall* . . . w[as] incorrectly decided, as a matter of the constitutional framers' intent, structure, and text, as well as historical practice, and practical results.").

6. 139 S. Ct. 1485, 1499 (2019).

7. *Id.* at 1494–95 (quoting Alden v. Maine, 527 U.S. 706, 716 (1999)).

8. *Id.* at 1500 (Breyer, J., dissenting).

9. *Id.* at 1495 (majority opinion) (internal quotation marks omitted) (referring to Hamilton, Madison, and Marshall).

10. *See infra* Part I.

immunity, making it what this Article calls a *constitutional omission*. But contrary to *Hall*, this Article argues that what ultimately fills that omission must be federal law.

Insofar as constitutional omissions exist because they reflect issues that were either overlooked, unresolved, or sidestepped, filling them in necessarily requires exercises of agency—not agency in the doctrinal sense of agents and principals, but in the philosophical sense of making choices.[11] In a constitutional democracy, exercises of agency entail the decisionmaker taking responsibility for her choices, as opposed to describing herself as a mere conduit of others' decisions. Denying agency when agency is being exercised, like *FTB*'s unpersuasive claim that history establishes that states have interstate immunity, is a problem for many reasons: it is a power grab, is objectionable on foundational democratic grounds, and is not conducive to making qualitatively good constitutional decisions.

It might be objected that acknowledging the need for agency would license judges to legislate from the bench. But it does not, because there is a happy medium between the problematic extremes of agency-denial on the one hand, and unconstrained judicial lawmaking on the other: the *shared agency* exercised by multiple institutions, which as this Article explains amounts to a substantially constrained agency on account of shared agency's constitutive norms.[12] Those norms channel all participants' agency in their shared project, creating favorable conditions for making constitution-worthy fill-ins for a constitutional omission.[13]

Shared agency is a widespread human practice that permits projects to be worked on by large numbers of people over long periods of time.[14] Science and

11. Agency also presupposes the possibility of acting on those choices in circumstances where they can make an anticipatable difference in the world. *See generally* CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 84–89 (1st ed. 2009).

12. *See* Mark D. Rosen, *History: Limit or License in Constitutional Adjudication?*, *in* COMPARATIVE CONSTITUTIONAL HISTORY: VOLUME II: USES OF HISTORY IN CONSTITUTIONAL ADJUDICATION 33 (Francesco Biagi et al. eds., 2022) (explaining the benefits of understanding the practice of constitutionalism as a form of shared agency). *See generally* MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER (1st ed. 2014).

13. *See* Rosen, *supra* note 12, at 32 (explaining why the agency exercised in a shared-agency project is constrained, and elaborating what this means for constitutionalism).

14. *Id.* at 23; *see* BRATMAN, *supra* note 12, at 19. Bratman developed his theory of shared agency in relation to "small, adult groups," and in subsequent writings introduced the term "institutional agency" to capture the agency that is sharedly exercised by larger groups. *See* MICHAEL E. BRATMAN, SHARED AND INSTITUTIONAL AGENCY: TOWARD A PLANNING THEORY OF HUMAN PRACTICAL ORGANIZATION (2022*).* For expositional reasons, I have elected to retain Bratman's original terminology of shared agency to refer to a political community's practice of democratic constitutionalism. My account of shared agency, which predated Bratman's most recent writings, suitably modifies Bratman's original account so that it accommodates exercises of shared agency by large groups of people over time. *See* Rosen, *supra* note 12, at 38–40. A book in progress of mine draws on important insights from Bratman's more recent work to more fully refine my shared-agency account of democratic constitutionalism. *See* Mark D. Rosen, Shared Agency and the Uncompleted Constitution (Aug. 7, 2023) (unpublished manuscript) (on file with *Hastings Law Journal*).

art are prominent examples.[15] Shared agency is especially useful when a project's originators cannot complete what they have begun, which is typically due to limits on what the originators could have known (that is, epistemic limits), time constraints, and the nature of the project. Shared agency permits uncompleted projects to be made more complete by the joint efforts of many people across time and space. And as it supports incremental progress, shared agency also permits a division of labor among participants who have variegated capacities, skills, and perspectives.

Part I argues that democratic constitutionalism is well suited to shared agency. Philadelphia's conventioneers bequeathed the American political community an *uncompleted constitution*—the Constitution omitted some issues (*omissions*) and incompletely specified the novel institutions and rights it did address (leaving those matters *unfinished*). The omissions and unfinished specifications that account for the Constitution's incompleteness are consequences of the drafters' epistemic limitations, time constraints, and the need to reach consensus. Shared agency has critical advantages over originalism, which agency-denies as it over-relies on originators who could not have completed the project they only began. Shared agency also has important advantages to living constitutionalism, which among other things overlooks the disciplining norms that should constrain all the institutions that work together to make the political community's uncompleted constitution more complete. Shared agency's norms provide favorable conditions for making constitution-worthy completions for an uncompleted constitution.

The rest of this Article establishes that interstate immunity is a constitutional omission, and then identifies the shared agency our constitutional system allows for filling it.

Part II critiques the Court's recent decision in *FTB* by uncovering the hidden agency behind its holding. It then explains why the historical evidence does not disturb the conclusion that interstate immunity was among the Constitution's omissions and argues that democratic constitutionalism calls for agency-acknowledgment rather than agency-denial by those who make an uncompleted constitution more complete.

Part III explains why interstate immunity remains a constitutional omission even after the Eleventh Amendment. It revisits *Chisholm v. Georgia*,[16] which *FTB* characterizes as the "blunder" that prompted the Eleventh Amendment.[17] Part III rehabilitates *Chisholm*'s much maligned majority opinions. In doing so, it sidesteps the current received wisdom's surprising implication that the

15. Rosen, *supra* note 12, at 23; *see* MICHAEL STREVENS, THE KNOWLEDGE MACHINE: HOW IRRATIONALITY CREATED MODERN SCIENCE 3 (2020) (explaining the rise of modern science in terms consistent with shared agency); JED PERL, AUTHORITY AND FREEDOM: A DEFENSE OF THE ARTS 15–16, 76–77 (2022) (arguing that art advances through artists' "understand[ing]" and "acknowledge[ment]" of, though not necessarily submission to, "the ancient tradition" that produces a "hierarchy of values").

16. 2 U.S. (2 Dall.) 419 (1793).

17. Franchise Tax Bd. v. Hyatt (*FTB*), 139 S. Ct. 1485, 1496 (2019).

Supreme Court that included *Federalist Papers* contributor John Jay, as well as conventioneer and Committee of Detail member James Wilson, somehow overlooked one of We the People's deep commitments in its very first express constitutional holding. Drawing on modern historical scholarship, Part III also argues that the Eleventh Amendment was driven more by pragmatic considerations than by a consensus that unconsenting states could not be sued. For all these reasons, the Eleventh Amendment neither answered whether, nor presupposed that, states enjoyed interstate immunity.

Part IV critiques *Hall*'s conclusion that interstate immunity is a matter of state law, arguing that interstate immunity has the status of federal constitutional law. After all, interstate immunity is enmeshed with extraterritoriality, helps determine the type of horizontal federal system we have, helps construct the nature of state and national citizenship, and is intimately connected to the health of the interstate system.

Having established that interstate immunity remains a constitutional omission, Part V shows the multiple opportunities for shared agency that the Constitution allows for filling it. Congress can enact a statute. States can create an interstate agreement with Congress's approval under the Compact Clause. And absent statute or interstate agreement, courts must provide answers on a case-by-case basis if an unconsenting state offers the defense that it cannot be sued in a sister state's court. But Part V argues that such rulings should be treated as constitutional default rules that, like dormant Commerce Clause doctrine, may be modified by federal statute or interstate agreement. On this understanding, *FTB*'s holding can be modified by Congress alone, or by the states in tandem with Congress.

As Part V explains, these three pathways allow the constitutional incompletion of interstate immunity to be filled through the shared agency of multiple institutions. Part V then shows shared agency's epistemic, functional, and democratic benefits for making our uncompleted Constitution more complete. And as a short conclusion explains, shared agency has relevance for far more than just interstate immunity.

I. SHARED AGENCY AND THE UNCOMPLETED CONSTITUTION

A. SHARED AGENCY

More so than any other animal, human beings engage in ongoing projects that involve large numbers of individuals over extended periods of time. This is especially important for projects not susceptible to being completed by their originators, which typically owes to some combination of epistemic limits on what the originators knew, time constraints, and the nature of the project.[18]

18. *See* BRATMAN, *supra* note 12, at 19.

Massive collaborations in such intertemporal projects can accomplish what an individual, or even a large contemporaneous group, could not.

Consider music and science. As brilliant as Beethoven and Einstein were, they could not have produced what they did if they had been born 3,500 years earlier. Beethoven could not have created his compositions without the tradition he simultaneously inherited and reworked. Einstein's general relativity could not have emerged without the understanding of astronomy, physics, and mathematics generated by Galileo, Newton, and countless others. Humanity has Einstein's and Beethoven's contributions only because each was a participant in an ongoing multigenerational project.

What philosopher Michael Bratman labels *shared agency* is among the most important methods that humans have developed for coordinating people as they navigate uncompleted projects.[19] If projects unamenable to being completed by their originators are not to remain perennially uncompleted, they "must be filled in as time goes by."[20] Those who fill them in must exercise judgment and make choices when doing so—they exercise *agency*. *Shared* agency—agency that is exercised by multiple people in furtherance of a shared project—is constituted by a set of norms that discipline participants' reasoning, bargaining, and other activities in connection with their shared project.[21] For example, scientific advancement through shared agency would not have been possible had the scientific community not developed a "shared rule of engagement" that gave "all scientists the same advice as to what counts as a relevant experiment or observation, regardless of their intellectual predilections, cultural biases, or narrow ambitions."[22] This Article will progressively elaborate shared agency's norms for constitutionalism—the norms that facilitate the ongoing completion of the shared-agency project of democratic constitutionalism.[23]

B. THE UNCOMPLETED CONSTITUTION

Akin to humanity's earliest composers and scientists, Philadelphia's conventioneers did not bequeath their political community a completed constitution. The Constitution's uncompletedness owed in large measure to epistemic limits and time constraints. The conventioneers created numerous novel institutions[24] and institutional arrangements[25] in a remarkably short period

19. *See id.* at 15, 19.

20. *Id.* at 19.

21. *See id.* at 27.

22. STREVENS, *supra* note 15, at 97–98.

23. *See infra* text accompanying notes 38–50, 321–32.

24. For example, the President was a wholly new institution of executive governance, courts in England had been part of the executive branch, and never before had there been an electoral college. *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE CONSTITUTION (Rich Leffler & John Kaminski eds., 2016); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) (noting that the Constitution was "breathtakingly novel").

25. Such as federalism. *See infra* text accompanying note 126.

of time—about the length of a single academic semester.[26] There was virtually no advance planning, since all but four conventioneers had come to amend the Articles of Confederation, not to create a (new) constitution.[27] And they did so without relying on models from other countries because there basically weren't any.[28]

The Constitution's uncompletedness also owed to the nature of constitution writing. The drive for consensus led the conventioneers to select open-ended language that papered over differences, and to sidestep some matters altogether.[29] The Constitution also embodied unresolved tensions, if not outright contradictions—some that reflected compromises thought necessary to achieve a consensus that could launch the national political community,[30] and others that were a byproduct of the conventioneers not having been prophets.[31]

Despite these challenges, the Constitution's drafters completely settled many crucial questions. There are two houses of Congress. Article II is headed by a single person (not several), who serves for a fixed term (not life, as several delegates would have preferred[32]). But the Constitution as a whole was *uncompleted*, primarily due to two phenomena. First, there were *omissions*: the Constitution neglected to address some issues that a suitably functional constitution should have. For example, the Constitution indicates how executive officers are appointed, but not removed; how statutes are enacted, but not repealed; and how treaties are made, but not abrogated.[33] This Article argues that interstate immunity is yet another constitutional omission. Second, even as to the institutions and rights the Constitution *did* create, the Constitution was *unfinished*; it did not fully specify how each of its newly created institutions and rights operated on their own, much less how they were to interact with one another.[34] In short, *omissions* and *unfinishednesses* are two types of *incompletions* that account for the 1789 Constitution's *uncompletedness*.

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26. Rosen, *supra* note 12, at 16.

27. *Id.*

28. *See* ROBERT DAHL, HOW DEMOCRATIC IS THE CONSTITUTION? 8–9 (Ali Peterson ed., 2d ed. 2003) ("The knowledge of the Framers – some of them, certainly – may well have been the best available in 1787. But reliable knowledge about constitutions appropriate to a large representative republic was, at best, meager. History had produced no truly relevant models of representative government on the scale the United States had already attained, not to mention the scale it would reach in the years to come.").

29. *See, e.g.*, KLARMAN, *supra* note 24, at 610–11 & n.9 (discussing the Constitutional Convention's decision to not address whether Congress would have the power to incorporate a bank).

30. This is especially true regarding slavery but extends to many other matters. *See* 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 305–06 (Merrill Jensen et al. eds., 1st ed. 1976) ("[P]eople differed[,] but to reach consensus, people had been 'less rigid on points of inferior magnitude' and had adopted an approach of "mutual deference and concession.").

31. *See* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?* McCutcheon, *Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1564 (2015) (arguing that a constitution's commitment to multiple foundational values cannot include a comprehensive enumeration of normatively attractive resolutions to the conflicts that might arise among them).

32. *See* KLARMAN, *supra* note 24, at 245 n.399.

33. *See* Rosen, *supra* note 12, at 16 n.13.

34. *See id.* at n.14.

When faced with its uncompleted Constitution, the American political community regularly acts as *completers* that make the Constitution *more complete*. Most of the time, this has not involved formal amendment through Article V. For example, when the First Congress considered how executive officers were to be removed, they rejected the suggestion made by a handful of representatives that the answer had to await a constitutional amendment and instead proceeded to answer the question themselves.[35] But as their extensive debates demonstrated, there were several plausible options.[36] So, when the First Congress made the Constitution more complete with respect to removing executive officers,[37] they necessarily made judgments as they chose among the plausible options. In so doing, they exercised agency.

C. DEMOCRATIC CONSTITUTIONALISM

There are three reasons why shared agency is particularly well suited to making an uncompleted democratic constitution more complete. First, the participation of multiple institutions and constituencies increases those completions' democratic pedigree relative to completions that are generated by fewer participants.

Second, shared agency conduces to substantively superior decisionmaking than decisionmaking by a single institution does. Shared agency permits massive feats of collaboration over space and time that can accomplish what an individual, or even a contemporaneous group, could not, on account of people's epistemic limits. Shared agency also permits a division of labor that promises epistemic and other functional benefits because each institutional participant has distinctive competencies, vantage points, and powers.

Third, shared agency's constitutive norms provide resources to address the understandable concern that the idea of an uncompleted constitution licenses judges to legislate from the bench. It does not, because many actors serve as completers, not only judges. Each actor has a unique role, and, under shared agency, all are subject to the norms constitutive of shared agency that constrain the agency they exercise. Shared agency's norms govern participants' reasoning and actions in relation to their project, helping them to coordinate, organize, guide, and settle matters that bear on their shared project.[38] For a political community that makes its uncompleted constitution more complete over time, shared agency provides a happy middle ground between the fiction of agency-

35. *See* GIENAPP, *supra* note 24, at 137–38.

36. For example, does removal, like appointment, require senatorial participation? Or can the President unilaterally remove officers? *See* Myers v. United States, 272 U.S. 52, 284–85 & nn.72–75 (1926) (Brandeis, J., dissenting) (detailing representatives' divergent positions). *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

37. This is not to suggest that they generated a single clear answer. *Compare* Prakash, *supra* note 36, *with* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 774–840 (2023).

38. *See* BRATMAN, *supra* note 12, at 19.

denial on the one hand, and the problem of judges legislating from the bench, on the other.

Shared agency's norms set shared agency apart from merely collective activity, such as simple multi-institutionalism. Shared agency's norms transform merely collective activity into a *shared* activity. To better understand the difference between (merely) collective activity and shared activity, consider two examples. In the first, you and I decide to take a trip to New York City in which we each take a turn driving the car. In the second, I kidnap you, forcing you by gunpoint to drive halfway to New York City. Though both are instances of collective activity, only the first is a shared activity. Sharedness depends upon intentions, and kidnapping is not a shared activity because the kidnapper is unconcerned with the victim's intentions.[39] Shared agency requires that each agent intend to accomplish a shared project "in part by way of the intention of the other."[40] Each must "treat the other as an intentional co-participant."[41]

What shared agency's norms concretely require varies from project to project; composers face different constraints than scientists. To cash out the shared-agency norms for the project of democratic constitutionalism, we must start by recognizing the three main ways a democratic political community can select the rules that govern its political relations: *brute force* of the majority imposing its preference, one group *persuading* the other, and *compromise* among groups.[42] Persuasion and compromise seek consensus, unlike the brute force of pure majoritarianism.[43] Shared agency's norms require that the completers who work to make their uncompleted constitution more complete seek consensus where possible.[44] And where contemporaneous consensus is not possible, completers can only adopt completions that the losing side plausibly might come to endorse.[45]

Making an uncompleted democratic constitution more complete entails a search for consensus (either present consensus or future-oriented plausible endorseability) because the losers in brute force majoritarianism have participated in a collective activity, but not the shared activity that democratic constitutionalism calls for. The need for shared and not merely collective activity when answering constitutional questions (both when creating constitutional text and when making an uncompleted constitution more complete) derives from constitutional democracy's foundational commitment to equal citizenship.[46] Equal citizenship entails an ethic of mutual respect and reciprocity among a

39. *See id.* at 6, 49.

40. *Id.* at 53.

41. *Id.* at 48–49.

42. Mark D. Rosen, *The Special Norms Thesis: Why Congress's Constitutional Decision-Making Should Be Disciplined by More Than the Usual Norms of Politics*, 40 CARDOZO L. REV. 2769, 2820–21 (2019).

43. *Id.*

44. *See id.* at 2771–2812, 2835–59.

45. As those other agents are, not as the completers who have sufficient numbers to get their way wish they were. *See id.* at 2821–24.

46. *See infra* note 83.

political community's fellow members when settling on the constitutional framework that will determine their going-forward relations in the domain of ordinary politics. When acting *within* that framework in pursuit of ordinary politics, people may pursue a purely self-oriented hardball politics.[47] But when a political community decides questions belonging to the constitutional domain, shared agency calls for reasoning, bargaining, and action that is guided by something more than hardball politics. Instead of hardball politics, shared agency requires that completers engage in what might be called a *tempered politics* that aims for consensus, and that settles for plausible future endorseability when contemporary consensus is unattainable.[48] As Part V explains more fully, tempered politics is operationalized by two sets of shared-agency norms.[49]

In short, *democratic* constitutionalism's commitment to *self*-government by politically equal citizens entails that an uncompleted constitution should be made more complete by a *shared* activity—not the merely kidnapper-like collective activity of a numerical majority's unilateral dictate. Democratic constitutionalism cannot accomplish its foundational goals—legitimating governmental authority, constituting a suitable political fraternity, and democratically constructing its polity's core identity—if participants treat constitutionalism as ordinary politics.[50]

D. ORIGINALISM, LIVING CONSTITUTIONALISM, AND SHARED AGENCY

Like originalism, a shared-agency approach to constitutionalism understands that participants' agency is especially constrained in relation to a constitution's complete settlements.[51] From a shared-agency perspective, a democratic constitution lays down the settlements and commitments that establish the ongoing social practices through which a political community will continue to work out its political relations over time. Insofar as complete settlements can launch and thereafter sustain a political community only if such settlements are henceforth treated as firmly and finally settled, the shared-agency project of democratic constitutionalism demands that a constitution's complete settlements be treated as definitive resolutions.

But while originalism's historical focus is fitting for complete settlements, it is inapposite to the Constitution's incompletions. Where the Constitution leaves a constitutional question unanswered—whether because the issue was incapable of being answered, it was overlooked, or it was deliberately left ambiguous or sidestepped to facilitate consensus—agency necessarily must be

47. Equal citizenship's ethics of mutual respect and reciprocity does not constrain nonconstitutional lawmaking as they limit constitutional decisionmaking. *See* Rosen, *supra* note 42, at 2800–10.

48. *See id.* at 2820–35.

49. *See infra* text accompanying notes 321–32.

50. *See* Rosen, *supra* note 42, at 2786–2859.

51. *See supra* text accompanying note 27.

exercised when our political community answers it and in so doing makes the Constitution more complete. Looking to history for an original understanding that authoritatively fills an incompletion solely by virtue of the fact that it was an original understanding is a category mistake—it's a misplaced reliance on originators who could not, and did not, complete the project they only began. A court's claim to have identified an authoritative original understanding of an incompletion is in effect, even if not in intent, an agency-denying power grab that forfeits shared agency's epistemic and democracy-enhancing benefits.[52]

As to shared agency's relationship to living constitutionalism, shared agency provides a superior way of conceptualizing the practice of constitutionalism. In place of the difficult metaphor of a living constitution, which might appear to be only a jerry-rigged, post-hoc justification for modern constitutional doctrine, this Article's approach assimilates constitutionalism into a wide-ranging human practice for coordinating large numbers of people on intertemporal projects—that of shared agency. And while all sophisticated accounts of living originalism are sensitive to the concern that judges not impose their personal values, none has shared agency's resources for identifying the disciplining norms that should constrain judges' agency.[53] And no account of living constitutionalism considers that those disciplining norms also should apply to the Constitution's other completers.[54]

II. INTERSTATE IMMUNITY AND THE 1789 CONSTITUTION

A. *FTB*'S AGENCY-DENYING USE OF HISTORY

This Part will show that the recently decided case of *FTB*[55] relied on an agency-denying invocation of history when generating an answer to a constitutional omission. At issue was whether an individual can sue an unconsenting state for damages in a sister state's court. In answering no, Justice Thomas's majority opinion overruled the forty-year-old precedent of *Nevada v. Hall*,[56] which had permitted a Californian to sue the State of Nevada for damages in a California state court.[57]

FTB's majority opinion reads as if history answered the interstate immunity question before it. FTB insisted that stare decisis could not save *Hall* because it was an "erroneous precedent" that was "contrary to our constitutional design and

52. This is not to suggest that original understandings play no role in a shared-agency account of democratic constitutionalism. A book in progress fully explains the roles of original understandings from the perspective of a shared-agency account of democratic constitutionalism. *See* Rosen, *supra* note 14.

53. *See* Rosen, *supra* note 12, at 12–22.

54. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (Geoffrey R. Stone ed., 2010). The Author's book in progress fully explains the relationship between living constitutionalism and a shared-agency account of democratic constitutionalism. *See* Rosen, *supra* note 14.

55. 139 S. Ct. 1485 (2019).

56. 440 U.S. 410 (1979).

57. *Id.* at 424–26.

the understanding of sovereign immunity shared by the States that ratified the Constitution."[58] "The founding generation took as a given that States could not be haled involuntarily before each other's courts,"[59] the majority opinion declared, because immunity from private suits was a "fundamental aspect" of a country's "inviolable sovereignty" that was "well established and widely accepted at the founding" under international law.[60] Collecting quotations from Alexander Hamilton, James Madison, and John Marshall, *FTB*'s majority averred that "[t]he leading advocates of the Constitution" assumed unconsenting states would not be suable in federal courts.[61] According to the majority, *Hall* simply "misread[ ] the historical record."[62]

But the historical record confounds Justice Thomas's analysis. *FTB*'s majority and dissenting opinions correctly observed that the states considered themselves fully sovereign nations after independence from Britain.[63] Under the customary international law then in place, country *A* was exempt from suit in country *B*'s courts only if country *B* consented to extending immunity to country *A*. Country *B* could withdraw that consent at any time, thereby subjecting country *A* to suit in its courts.[64] This means *Hall*'s rule was not inconsistent with the customary international rule after all. The California court had simply declined to extend sovereign immunity to Nevada.

Was the historical record sufficiently murky that *FTB*'s majority and dissenting opinions understood it differently? No. Justice Thomas quoted an 1822 Justice Story opinion that "the host nation's consent to provide immunity may be withdrawn upon notice at any time, without just offence,"[65] and an opinion from Chief Justice Marshall to the same effect.[66] This is why Justice Breyer's terminology—that during the Framing era sovereign countries had "permissive" rather than absolute immunity from suit in other countries[67]—was apt.

The historical record confounds the *FTB* majority's analysis in a second respect. While Hamilton, Madison, and Marshall thought unconsenting states generally could not be sued in federal court, other "leading advocates of the Constitution"[68] thought otherwise, including *Federalist Papers* contributing

58. *FTB*, 139 S. Ct. at 1492.

59. *Id.* at 1494.

60. *Id.* at 1493.

61. *Id.* at 1495 (quoting Alden v. Maine, 527 U.S. 706, 716 (1999)).

62. *Id.* at 1492.

63. *Id.* at 1493; *id.* at 1500–01 (Breyer, J., dissenting); *see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 584 (1994) ("During the period that preceded the framing, the states regarded themselves and one another as sovereign states within the meaning of the law of nations . . . .").

64. *See supra* text accompanying note 59.

65. *FTB*, 139 S. Ct. at 1497 (quoting The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822)).

66. *Id.* (citing The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)).

67. *Id.* at 1504 (Breyer, J., dissenting).

68. *Id.* at 1495 (majority opinion) (internal quotation marks omitted) (using this phrase, but referring to Hamilton, Madison, and Marshall).

author and future Chief Justice of the Supreme Court John Jay.[69] Another member of this group was the future Supreme Court Justice James Wilson—a conventioneer and member of the Committee of Detail who is thought to have been the single person most responsible for drafting Article III.[70]

B. *FTB*'S HIDDEN AGENCY

So if each state had the status of an independent sovereign nation before the Constitution, and if customary international law *allowed* one country to be sued in another country's courts, how could the *FTB* majority rely on history for its conclusion that states are absolutely immune from suit in the courts of sister states? A careful read of *FTB* reveals that the majority's conclusion relied on a *dissimilarity* between states and full-fledged nations: "[T]he Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns."[71]

That sentence is unquestionably correct. The post-Constitution states were not permitted to wage war against one another or to lay imposts or duties. And some disputes that the pre-Constitution states could have resolved through "pure political power," such as disagreements concerning borders and water rights, were resolved by federal rules of decision after the Constitution's adoption.[72] After explaining the differences between the states and full-fledged sovereigns, the *FTB* majority then turned to an analogy to support its ultimate conclusion. A "State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns" akin to border disputes.[73] Sovereign immunity is "*similarly integral* to the structure of the Constitution," so it must be "implied as an essential component of federalism."[74]

Thus, the historical record does not on its own provide the reason for *FTB*'s holding. The real work is the majority's determination of what counts as disanalogous (full-fledged sovereigns and the post-ratification states) and analogous (border disputes and an unconsenting state's being forced to litigate in a sister state's courts). The fact that those historical facts did not on their own dictate the majority's conclusion is confirmed by Justice Breyer's dissent. After all, Justice Breyer did not dispute any of the historical predicates on which the majority relied. He simply thought they provided "no strong reason for treating States differently than foreign nations in this context."[75]

FTB's ultimate holding depended on an additional exercise of agency: its disregard of stare decisis in overruling *Nevada v. Hall*.[76] As measured by the

69. *See infra* text accompanying notes 88–96.
70. *See infra* text accompanying notes 88–96.
71. *FTB*, 139 S. Ct. at 1497.
72. *See id.* at 1497–98.
73. *Id.* at 1498.
74. *Id.* (emphasis added) (quoting Nevada v. Hall, 440 U.S. 410, 430–31 (1979)).
75. *Id.* at 1504 (Breyer, J., dissenting).
76. *See id.* at 1499 (majority opinion).

majority's methodological commitment to history, the magnitude of its agency in overruling *Hall* was directly proportionate to *Hall*'s consistency with the historical practice. *Hall*'s high substantive consistency with that practice correlates to a high measure of agency when *FTB* overruled it.

In short, Justice Thomas's agency-denying invocation of history to answer *FTB* is unpersuasive because *FTB*'s holding depended on multiple choices concerning what counted as analogous and disanalogous, and the additional decision to overrule precedent.

C. WHY INTERSTATE IMMUNITY IS A CONSTITUTIONAL OMISSION

Justice Breyer's dissent in *FTB* identified a deep irony in the majority's agency-denying claim that historical facts directed its conclusion. Why, asked Breyer, "would the Framers, silently and without evident reason, have transformed sovereign immunity from a permissive immunity predicated on comity and consent into an absolute immunity that States must accord one another?"[77] The irony is this: the historical record not only undermines the *FTB* majority's substantive holding, but also might be said to affirmatively support *Hall*'s.

But *should* the historical record be used to help answer interstate immunity? No, because as this Subpart shows, the historical record does not indicate that the drafters or ratifiers answered it. Since interstate immunity is a constitutional omission, filling it in requires post-ratification agency. Overplaying Breyer's question (as an argument that the historical record establishes that states had only permissive immunity) would hide the agency necessarily involved in answering the question, replicating the majority's methodological error.

1. The Historical Evidence

Hall's majority opinion stated that the Framers' discussions of state suability occurred only in relation to "*federal-court* jurisdiction." While the Framers considered the "extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves *in those courts*," the Framers had passed over the interstate immunity question of state suability in sister state courts.[78] Professor Ann Woolhandler has made the most sustained attack on *Hall*, arguing that "state immunity in the courts of other states was foundational to all sides of the debate on whether Article III effected a waiver of state immunity."[79] But while her evidence shows that a handful of Framers gave consideration to interstate immunity, this Subpart shows that *Hall*'s central claim remains intact.

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77. *Id.* at 1504 (Breyer, J., dissenting).

78. Nevada v. Hall, 440 U.S. 410, 420–21 (1979) (emphasis added); *see id.* at 418–19.

79. Woolhandler, *supra* note 5, at 251. Woolhandler provides two other arguments to support her conclusion that *Hall* was wrong. *See id.* at 251–52.

Woolhandler argues that "*all sides* of the framing era debate . . . built their argument[s]" concerning the Constitution's State-Citizen Diversity and Original Jurisdiction Clauses on the "the impossibility of unconsented *in personam* suits against states in the courts of other states."[80] Woolhandler propounds a very strong claim: that there effectively was a Founding-era consensus that unconsenting states could not be sued in sister states' courts. But what is the affirmative evidence in support of it?

Let us proceed one constitutional clause at a time. The State-Citizen Diversity Clause creates federal court jurisdiction over controversies "between a State and Citizens of another State."[81] Insofar as it *creates* federal jurisdiction, it is not a promising candidate for demonstrating a consensus that unconsenting states could *not* be sued. Recognizing this, Woolhandler leans heavily on an article by her colleague Caleb Nelson that, in Woolhandler's words, "illuminated *how it was possible* to read Article III as preserving state immunity, *despite*" the State-Citizen Diversity Clause.[82] Nelson's article argued there could be no Article III "case" or "controversy" against an unconsenting state because eighteenth-century general law did not permit courts to issue compulsory process against a state at the behest of an individual.[83] Below, I offer several criticisms of Nelson's argument.[84] But even setting those criticisms aside, showing how the Diversity Clause can "possibly" be interpreted as preserving state immunity falls far short of Woolhandler's proposition that there was a Framing-era consensus concerning the "impossibility" of state suability.

To be sure, Woolhandler's Diversity Clause argument relies on more than just Professor Nelson's general law–based argument. Woolhandler reproduces well-known quotations from a triumvirate of founders (John Marshall, James Madison, and Alexander Hamilton), all of which are fairly read as generally endorsing sovereign immunity.[85] Though none of their statements explicitly addressed *interstate* immunity, and despite the fact that both Madison and Hamilton contemporaneously acknowledged that unconsenting states could be sued in some circumstances,[86] Woolhandler argues "[i]t seems reasonable" to conclude that their endorsements extended to interstate immunity.[87] Given the fact that Madison and Hamilton did not treat sovereign immunity as an absolute, Woolhandler's conclusion is far from axiomatic.

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80. *Id.* at 253 (emphasis added). While the quotation from Woolhandler was directed to the Diversity Clause, it paraphrases Edmund Pendleton's remarks concerning the Original Jurisdiction Clause ("OJC") before the Virginia Convention. *See id.* at 258 (citing Pfander, *supra* note 63, at 634–35) (discussing Pendleton's discussion of the OJC).

81. U.S. CONST. art. III, § 2, cl. 1.

82. Woolhandler, *supra* note 5, at 255 (emphasis added).

83. *See* Nelson, *supra* note 4, at 1577.

84. *See infra* note 158.

85. *See* Woolhandler, *supra* note 5, at 256.

86. *See* Pfander, *supra* note 63, at 629–34.

87. Woolhandler, *supra* note 5, at 256–57.

Moreover, several other Framers thought otherwise—fatally undermining the notion of a Framing-era consensus concerning interstate immunity. More specifically, at least two prominent participants in the Constitution's drafting and ratification—James Wilson and John Jay—thought the post-Constitution states were not entitled to immunity. As Supreme Court Justices, both argued in their opinions in *Chisolm v. Georgia* that sovereign immunity was a monarchical artifact inapplicable to the republican governments in the United States.[88] Justice Wilson, who is thought to have been Article III's primary drafter as one of the five members of the Committee of Detail, observed that the Constitution neither contains the words "sovereign" nor "sovereignty," nor sovereignty's correlative term "subject."[89] This was no oversight, Wilson insisted, but reflected that "sovereignty is derived from a feudal source" and has no application in a republican form of government where "the Supreme Power resides in the body of the people."[90] Chief Justice Jay's opinion likewise associated sovereign immunity with political systems in which rulers occupied a position above and beyond their subjects.[91] Jay wrote that "[f]rom the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ."[92] Because sovereignty in England and Europe "[wa]s generally ascribed to the Prince,"[93] those countries' sovereign immunity doctrines were inapposite to the United States' republican form of government.[94] Both Justices went on to hold in *Chisholm* that the unconsenting State of Georgia was subject to suit in federal court.[95] While these opinions were penned in 1793, after the Constitution was drafted and ratified, there is no evidence to suggest that their views were newly adopted, and there are strong indicators that their views were longstanding.[96]

88. *See* 2 U.S. (2 Dall.) 419 (1793). These parts of Jay's and Wilson's opinions are counterevidence to the claim advanced by some scholars that that a general law of personal jurisdiction–like immunity continued in effect after ratification. *See, e.g.*, Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1872 (2012); Nelson, *supra* note 4, at 1587.

89. *Chisholm*, 2 U.S. (2 Dall.) at 454–55 (opinion of Wilson, J.). The Constitution speaks of "citizens" of the states and the United States, and only speaks of "foreign subjects" in relation to other countries. *See id.* at 456; *see also id.* at 472 (opinion of Jay, C.J.) (noting that in the United States there are no "subject[s]" who are "inferior" to others, but that "all the citizens being as to civil rights perfectly equal there is not, in that respect, one citizen inferior to another").

90. *Id.* at 457 (opinion of Wilson, J.); *see id.* at 471–72 (opinion of Jay, C.J.).

91. *Id.* at 471 ("[F]eudal ideas . . . exclud[ing] the idea of [the monarch] being on an equal footing with a subject . . . [undergirded the rule that] such a sovereign could not be amenable to a Court of Justice.").

92. *Id.* at 472.

93. *Id.*

94. *See id.* at 471 (critiquing those who rely on foreign practices for being "inattent[ive] to differences which subsist between" Europe's feudal-based states and the United States).

95. *See id.* at 466 (opinion of Wilson, J.); *id.* at 476 (opinion of Jay, C.J.).

96. Representing the plaintiff, Wilson brought suit against the State of Virginia in the 1784 case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1784). After the State of Pennsylvania dismissed the lawsuit for violating the law of nations, Wilson labored to secure a constitutional provision in Pennsylvania authorizing suits against the state. *See* Pfander, *supra* note 63, at 585–86. As a member of the Committee on Detail, Wilson is thought to have penned the Constitution's opening words "We the People," an ode to the republicanism that in turn grounded his opposition to sovereign immunity.

Although less well known than the Diversity Clause, the Constitution's Original Jurisdiction Clause ("OJC") is the more promising locus for unearthing Founding-era views concerning interstate immunity. That clause vests the Supreme Court with original jurisdiction in "[i]n all Cases . . . in which a State shall be a Party."[97] In a path-breaking article on which Woolhandler heavily relies, Professor James Pfander ties the OJC to a "perceived inadequacy of the state courts" to enforce states' compliance with federal (especially constitutional) obligations and the Framers' decision to create only a single federal court (the Supreme Court) under the Madisonian compromise.[98] Pfander argues that insofar as state courts were deemed inadequate and there were no established inferior federal courts, vesting the Supreme Court with original jurisdiction was the only sensible option.[99]

Following Pfander, Woolhandler argues that state courts were deemed inadequate because state defendants could have invoked sovereign immunity in both their own courts and the courts of sister states.[100] Pfander provides incontrovertible evidence that during the times of the Articles of Confederation, "the states regarded themselves and one another as sovereign states within the meaning of the law of nations."[101] Pfander also argues that the law of nations provided countries immunity from suit in the courts of other nations,[102] and collects substantial evidence tending to show that the pre-Constitution states viewed themselves as enjoying law-of-nations immunity on account of their status as sovereign states.[103]

But Pfander overstates in arguing that the OJC's "grant was *necessary* to overcome the states' law-of-nations immunity from suit in state and federal court."[104] It does not necessarily follow that an immunity whose source was the law of nations would have carried over to the post-Constitution states, which no longer had the status of independent sovereigns.[105] The Constitution withdrew from the states the "traditional diplomatic and military tools that foreign sovereigns possess," imposed "duties on the States not required by international law," and "reflect[ed] implicit alterations to the States' relationship with each

97. U.S. CONST. art. III, § 2, cl. 2.

98. Pfander, *supra* note 63, at 635.

99. *See id.* at 592–97.

100. *See id.* at 636; Woolhandler, *supra* note 5, at 258. Professor Pfander's article did not meaningfully engage with *Hall*, focusing instead on federal court jurisdiction. Professor Woolhandler explained the implications of Pfander's article for interstate immunity. *See* Woodhandler, *supra* note 5.

101. *See* Pfander, *supra* note 63, at 584 nn.108–09.

102. Here, Pfander missteps insofar as the forum had the power to waive its consent, thereby subjecting the foreign country to suit in its courts. *See supra* text accompanying notes 65–67.

103. *See* Pfander, *supra* note 63, at 560, 577–88.

104. *Id.* at 636 (emphasis added).

105. Justice Iredell made a similar point in his *Chisholm* dissent. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 449 (1793) (opinion of Iredell, J.) ("No part of the Law of Nations can apply to this case, as I apprehend, but that part which is termed 'The Conventional Law of Nations;' *nor can this any otherwise apply than as furnishing rules of interpretation, since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples*." (emphasis added)).

other, confirming that they [were] no longer fully independent nations."[106] Critically, neither Pfander nor Woolhandler addresses whether the law of nations would have applied to polities with the peculiar status and properties of the post-Constitution states.[107]

To be sure, it would not have been possible to definitively answer that question because of the federal system's utter novelty. Although the world had known confederations, Madison noted at the Virginia Convention that the Constitution's "mixed nature" of government, comprising a national government and subnational states, "is in a manner unprecedented: We cannot find one express example in the experience of the world."[108] This strongly suggests that in place of Pfander's and Woolhandler's assumption that the OJC reflected the Framers' assumption that the law of nations undoubtedly would have continued to apply to the states, the OJC may just have foreclosed uncertainty as to whether it did. This may be the best way of construing Edmund Randolph's discussion of the OJC at the Virginia Convention: "I think, *whatever the law of nations may say*, that any doubt respecting the construction that a state may be plaintiff, and not defendant [on account of sovereign immunity], is taken away by the [OJC's] words 'where a state shall be a party.'"[109]

There are other reasons why the OJC's inclusion does not establish that the Framers presupposed that the post-Constitution states would be immune from suit in state courts. Concerns apart from sovereign immunity may have led to the OJC, such as "distrust of state courts"[110] to enforce federal obligations against states in cases they heard.[111] And the OJC may have been adopted for reasons having nothing at all to do with state courts. The OJC helped specify the properties of the novel federal system that the Constitution created, making the states suable in federal court to enforce federal obligations.[112] Federal court

106. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1497 (2019).

107. This is why Professor Rappaport's claim that the Constitution's use of the term "States" is the source of interstate immunity is another instance of agency-denial. *See* Rappaport, *supra* note 3, at 821, 870; *see also FTB*, 139 S. Ct. at 1494 (noting that "[t]he Constitution's use of the term 'States' reflects" international-law immunity).

108. James Madison, *Debates of the Virginia Convention (June 6, 1788)*, *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 970, 995 (John P. Laminski & Gaspare J. Saladino eds., 1990).

109. *Id.* (emphasis added) (paraphrasing the OJC). In other words, the italicized language may reflect Randolph's uncertainty as to whether the law of nations would apply to the post-Constitution states. Likewise, Randolph's comments concerning state suability in his 1790 report to Congress did not rest on the law of nations, but on an interpretation of the OJC. *See* Pfander, *supra* note 63, at 637 ("[A]s far as a particular state can be a party defendant, a sister state cannot be her judge. Were the states of America unconfederated, they would be as free from mutual control as other disjoined nations. Nor does the federal compact narrow this exemption; but confirms it, by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress.").

110. Pfander, *supra* note 63, at 620 (ascribing this to the Committee of Detail).

111. While this concern could have been alleviated by federal appellate review, vesting a federal court with original jurisdiction may have been seen as a more direct remedy.

112. The description above reflects Pfander's theory, which diverges from longstanding precedent that incorporates a diversity requirement into the OJC. *See id.* at 572–77 (persuasively criticizing the diversity requirement that the Court has read into the OJC).

jurisdiction over such matters is significant irrespective of state courts' capacities.

But there is a more fundamental reason for not construing the OJC's drafting and ratifying history as evidence of a Framing-era consensus that the post-Constitution states had interstate immunity. The OJC was first introduced relatively late in the drafting process by the Committee of Detail,[113] meaning that no more than five conventioneers thought to include it. Only eight conventioneers thereafter voted on the draft of Article III that was reported out of the Committee, and none of those votes concerned or even implicated interstate immunity.[114] Furthermore, "the ratification debates rarely mention[ed]" the OJC.[115] In Virginia "no one aside from [Edmund] Pendleton, [Patrick] Henry, and [Edmund] Randolph mentioned the clause at all."[116] And in New York, the only other convention in which the OJC was mentioned, Professor Pfander's analysis consists almost exclusively of a close read of Hamilton's *The Federalist Nos. 80* and *81*, neither of which directly engaged with law-of-nations immunity or interstate immunity.[117]

At the end of the day, of the handful of individuals who discussed the OJC during the ratification debates, only Edmund Pendleton and Edmund Randolph explicitly connected it to the states' immunity.[118] While Pfander thinks both their remarks "indicated that the [OJC] sought to overcome barriers to state suability posed by state immunity under the law of nations,"[119] only Pendleton's clearly do;[120] Randolph's comment is equivocal for the reason explained above.[121] But even if Pfander's characterization of Randolph's words are credited, we are left with a sum total of two debaters' brief comments at one state convention—against which we have the views of Wilson and Jay, both of whom thought that sovereign immunity had no application to the post-ratification states.

On this thin record, any talk of a Framing-era understanding regarding interstate immunity in the post-Constitution states, much less a Framing-era

113. *See id.* at 620.

114. *See id.* at 622–27.

115. *Id.* at 628.

116. *Id.* at 636.

117. After carefully parsing the notoriously convoluted arguments in *The Federalist Nos. 80* and *81*, Pfander concludes that "Hamilton's remarks *suggest a distinction, much like that proposed in this Article* between the states' law-of-nations immunity . . . and their common law immunity." *Id.* at 632 (emphasis added). But Hamilton's subtle formulations, which Pfander plausibly suggests were intended "to downplay the true effect on state sovereignty of the [OJC]'s state-party provision," undermine the *Federalist Papers*' evidentiary value in establishing a Framing-era consensus concerning interstate immunity. *Id*. Apart from the *Federalist Papers*, the New York Convention's proposed amendment barring federal courts from exercising jurisdiction against a state "in any manner whatever," which Pfander also discusses, had no obvious or logically necessary connection to interstate immunity. *See id.* at 632–33.

118. Patrick Henry's fleeting comments did not. *See id.* at 635 n.331.

119. *Id.* at 635–36.

120. Pendleton unqualifiedly stated that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state[] shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." *Id.* at 635.

121. *See supra* text accompanying note 109.

consensus, is inapt. With no constitutional text mentioning interstate immunity to serve as a focal point for widespread consideration, discussion, and debate, the evidence shows only that a handful of participants gave thought to the connection between the OJC and interstate immunity. Whether widely held assumptions that underwrite but do not appear in constitutional text can ever be constitutionally binding by virtue of their supporting role in the text's genesis is an interesting and hard question. But even if they can, Professor Woolhandler's record falls short of documenting a Framing-era consensus that the post-Constitution states had interstate immunity.

2. The Inaptness of History Alone

Two additional considerations fortify the case against importing Framing-era understandings of interstate immunity simply because they were the Framers' views. First, the law-of-nations immunity rule sprang from a conception of sovereignty that has since been rejected. Courts and scholars during the Framing era thought "[t]he jurisdiction of [a] nation within its own territory [was] necessarily exclusive and absolute."[122] Because the jurisdiction of a country's courts was "susceptible of no limitation not imposed by" the country itself,[123] country *A* could not have a right of immunity from suit in country *B*'s courts, for such a restriction of country's *B*'s adjudicatory jurisdiction would have violated the then-prevailing exclusivist understanding of sovereignty. But twentieth-century jurisprudence rejects the proposition that countries have exclusive power within their borders and accordingly may act however they wish. This is most readily shown by the emergence of modern human rights law, which refuses to grant modern-day Nazis such a prerogative. And customary international law imposes many other restrictions beyond a genocide ban.[124] Insofar as exclusivism's rejection is to be applauded, importing the immunity rule it spawned only because it was the Framers' understanding does not conduce to quality decisionmaking.

Part I's discussion of the Constitution's uncompletedness gives rise to a second family of reasons why the Framers' extratextual understandings of interstate immunity should not be dispositive. Conventioneers confronted an enormous number of basic design decisions during the relatively short time they gathered: Should there be many Presidents or just one?[125] How should the President be selected?[126] For how long should the President serve? Among the possibilities under consideration were tenure during good behavior, twenty years, twelve years, and (of course) four years.[127] Should legislation require the

122. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).
123. *Id.*
124. *See generally* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (1st ed. 2015).
125. *See* KLARMAN, *supra* note 24, at 215–16.
126. *See id.* at 599, 602.
127. *See id.* at 229.

support of simple majorities or supermajorities?[128] Should there be a federal veto power over state law?[129] Should there be federal trial courts?[130]

Given all that was on their plates, it is unsurprising that the constitutional text on which they settled did not fully specify all the details of the novel federal system they created.[131] Unspecified details may have been overlooked, unresolved, or sidestepped to facilitate consensus. The same factors that account for the Constitution's uncompletedness are reasons for not according dispositive force to Framing-era understandings that were not widely considered, settled, or ultimately codified in the Constitution's text. The Framers could not have foreseen the multitude of issues that would arise as the novel federal system was put into effect and as that system interacted with the Constitution's other institutions.

The Constitution's incomplete specification of the federalist system is due not just to epistemic limitations, but also to the nature of constitution writing. By and large, the Constitution memorialized the most that a fledgling political community composed of mutually suspicious subgroups with divergent interests and aspirations could agree upon.[132] At that time, and continuing until about 1850, political identities were linked more to state than to country; the "United" in United States operated as a true adjective that reflected the centrality of state identity.[133] Today's New Yorkers and Virginians share a deeper political affiliation than did their nineteenth-century counterparts, owing to the profound national political identity they now share.

From a shared-agency perspective, the deeper political affiliations that have been fostered by the political community's having governed itself under the Constitution over time are the appropriate inputs for making its uncompleted Constitution more complete. This is especially true for constitutional questions that could not have been fully resolved, or addressed at all, at the polity's infancy.[134] Shared agency responds to a plan's incompleteness, allowing partial plans to be "filled in as time goes by."[135] Aiming to fill in a partial plan by reference to the understandings that prevailed when the plan was begun—precisely when it was *unamenable* to being specified—is 180 degrees backward, and undermines one of shared agency's greatest benefits. To the extent that sensibilities concerning national and state identity are relevant to interstate

128. *See id.* at 152.

129. *See id.* at 155–58.

130. *Id.* at 165–69.

131. *See supra* text accompanying notes 24–31.

132. This fairly characterizes Klarman's magisterial account of the Constitution's drafting and ratification history. *See* KLARMAN, *supra* note 24, at 126–304.

133. *See* Sean Wilentz, *The Paradox of the American Revolution*, N.Y. REV. OF BOOKS 26, 28 (Jan. 13, 2022) (noting that until 1850 "Americans remained firmly, even passionately tied to their state and local allegiances" such that "the United States was less a nation and more like a league of autonomous states").

134. *See* Rosen, *supra* note 12, at 14–15 & nn.9–11, 18 nn.22–23.

135. BRATMAN, *supra* note 12, at 19.

immunity, it is contemporary sensibilities that should be drawn upon when completers make the Constitution more complete, not Framing-era sensibilities.

D. AGAINST AGENCY-DENIAL

If a constitutional question has been unanswered, then agency almost always will have to be exercised when the question *is* resolved. Agency will be unnecessary only if one answer is possible due to other features of the constitutional system that were settled and specified. But the set of such structurally determined answers is likely small, and may be null, because it almost always is the case that there are multiple plausible ways a political community might govern itself. Accordingly, what the Constitution settled and specified almost never will point to a unique solution to the questions it did not address. Answering an underdetermined, unanswered constitutional question requires that a choice be made from among the set of plausible candidates. Choices of this sort necessarily involve agency.

The naked fact that answering unanswered constitutional questions requires agency does not on its own establish the desirability of acknowledging that agency must be exercised. This is because agency-denial might be a useful fiction. Thus, it is necessary to consider whether fictive agency-denial might ever be justifiable in the practice of democratic constitutionalism. This Subpart critically examines three possible justifications for fictive agency-denial, ultimately concluding that none is adequate in today's United States.

First, agency-denial might carry benefits. For example, insofar as one of a constitution's purposes is to settle controversial questions so a political community can establish itself and move forward with its communal life,[136] it might be useful for a question to be treated as having been settled even if it has not. This might be so where decisionmakers sincerely (but mistakenly) deny that they are exercising agency.[137] It also conceivably might be true in the circumstance where a decisionmaker is privately cognizant of her agency but publicly denies that she must exercise agency. For example, perhaps judges use the rhetoric of agency-denial to enhance rule-of-law values.

Second, if the choice is between fictively treating a question as having been settled, on the one hand, and destabilizing a polity by proclaiming that agency must now be exercised to answer a constitutional question, on the other, the values of peace and stability might weigh in favor of a fictive settlement's agency-denial.[138]

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136. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (emphasizing the Constitution's settlement and coordination functions).

137. The third possible justification for fictive agency-denial elaborates this.

138. *Cf.* AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISE 9 (2010) (discussing the view of certain political philosophers that it is preferable "to worry about the stability of peace than to worry about whether or not it is just").

Third, agency-denial might be justifiable if it conduces to substantively superior decisionmaking. For example, perhaps constitutional decisionmakers will come to better outcomes if they labor under a false consciousness, not understanding that they must exercise agency and make choices.

The first possibility, agency denial to augment settlements, is unacceptably broad. As a matter of process, fictive settlements contradict a constitutional democracy's foundational commitment to self-government. Citizens' willingness to unquestioningly accept an arrangement only because they think it was a considered settlement amounts to illusory self-government if the matter was in fact never settled. And illusoriness approaches deception when the institution that in actuality exercises contemporary agency publicly denies that agency by invoking the fictive settlement—as may be said to describe the majority in *FTB*. After all, every fictive settlement relies on *hidden agency*, for those who transform a fictive settlement into a binding decision necessarily exercise agency in doing so. Indeed, answering a constitutional question by invoking a fictive settlement actually blesses a double falsity: that a decision about the matter was rendered in the past, and that no agency is being exercised by those who actually *are* answering the question today. The usefulness of a question's being settled is not sufficiently weighty to overcome these foundational objections to fictive settlements as a general matter.

The second possibility, agency-denial to preserve the peace, is a far narrower version of the first insofar as it designates only a limited set of exceedingly important considerations that justify fictive settlements. Empirically, the second possibility's predicates surely might exist in some polities in relation to some constitutional questions. And as a normative matter, a strong case can be made that the values of peace and stability outweigh the costs of fictive settlements identified in the previous paragraph.[139] But the risk of destabilization does not have force in relation to all, most, or perhaps any unanswered constitutional questions that arise today in the United States. More to the point, although interstate immunity is genuinely important, it seems unlikely that the process of forthrightly answering it carries a serious risk of literally unwinding our Union such that it would be better for our political community to be ruled by a fictive settlement.[140]

The third possibility, that a decisionmaker's false consciousness that she need not exercise agency will result in superior decisionmaking, puts light on an important topic that has received little explicit scholarly attention: the epistemic question of what factors conduce to quality constitutional decisionmaking. While comprehensively answering that question lies beyond this Article's scope, there are powerful reasons to think that self-awareness beats false consciousness in constitutional decisionmaking. Treating an issue as having been settled in the

139. *See id.* (making such an argument).

140. This is true notwithstanding the arguments propounded *infra* Part IV as to why interstate immunity is governed exclusively by federal law.

past when it has not risks fixing an answer without careful thought ever having been given to it. The false consciousness that one is merely carrying over a prior settlement, where such a settlement did not in fact occur, opens the door to uninformed, and essentially random, decisionmaking.

But might there be an optimistic alternative to random selection? It might be posited that a false consciousness that keeps decisionmakers from recognizing their agency will lead to intuition-based decisionmaking that is superior to the public airing and critical consideration of competing considerations that accompanies self-aware exercises of agency to answer constitutional questions.

But is intuitive decisionmaking likely to be superior in the constitutional arena? While no scholar has yet tried to make the case for the superiority of false consciousness–generated intuitionalism in constitutional decisionmaking, the position's vindication seems unlikely. Constitutionalism is the process for choosing the mechanisms for allocating the benefits and costs of social living, and for determining the foundational values and commitments that are to constitute a stable and enduring political community. Precisely because these decisions have substantial distributive and identity-determining consequences, false consciousness–induced intuitionism does not seem promising. In contrast, the broad public engagement and critical discussion made possible by self-aware exercises of agency hold out greater promise for realizing the foundational purposes of a constitution described immediately above. And this is especially so if democratic constitutionalism is treated as an ongoing shared-agency project whose many participants are subject to shared agency's constitutive norms.[141]

So, although the agency-denial of fictive settlements conceivably might be justifiable in relation to some constitutional questions in some polities at some times, fictive agency-denial likely has no place at all in today's United States, and certainly has no application to interstate immunity. Democratic constitutionalism's foundational commitment to self-government, coupled with twenty-first-century America's relative social and political stability, together call for agency-acknowledgment, not agency-denial, when our political community makes its uncompleted Constitution more complete by answering unanswered constitutional questions.

III. INTERSTATE IMMUNITY AND THE ELEVENTH AMENDMENT

Part II only considered the original Constitution. This Part asks if the Eleventh Amendment undermines Part II's conclusion that the historical record licenses contemporary agency to answer *FTB*'s question concerning interstate immunity. The reasoning found in a long line of Supreme Court cases suggests that the Eleventh Amendment provides or reflects an answer regarding interstate

141. *See* Rosen, *supra* note 42, at 2833–34.

immunity, and *FTB*'s majority opinion explicitly says so. These cases rely on a "Three-Step Argument" that is detailed below in Subpart A. Subpart B critiques the Three-Step Argument, vindicating Part II's conclusion that determining whether states have interstate immunity requires an exercise of contemporary agency. Subpart B's analysis has critical implications for how both the Eleventh Amendment and the well-known case of *Chisholm v. Georgia*[142] should be understood.

A. THE THREE-STEP ARGUMENT

The first step of the Three-Step Argument is that the Supreme Court's decision in *Chisholm v. Georgia*[143] was a monumental "blunder" that realized Antifederalists' fears as it contradicted Federalists' representations that the states would be immune to suit in federal courts.[144] The second step is that *Chisholm*'s betrayal of state sovereign immunity resulted in "an immediate 'furor' and 'uproar' across the country" that quickly led to the drafting and adoption of the Eleventh Amendment.[145] The third and final step is that although the Eleventh Amendment's language addressed only *Chisholm*'s discrete circumstance of diversity suits against states for damages in federal court,[146] the "natural inference" from the Eleventh Amendment's "speedy adoption is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits."[147] As such, the "sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[148]

The Three-Step Argument captures the Court's reasoning in *Alden v. Maine*, the case that extended state sovereign immunity to federal claims in state court despite the Eleventh Amendment's silence regarding state courts.[149] *FTB* likewise relied on the Three-Step Argument to justify its conclusion that states are constitutionally immune from state law claims in the courts of sister states.[150] But as will now be explained, each of the Three-Step Argument's steps has substantial flaws that, taken together, fatally undermine its claim that the

142. 2 U.S. (2 Dall.) 419 (1793).

143. *Id.*

144. Franchise Tax Bd. v. Hyatt (*FTB*), 139 S. Ct. 1485, 1496 (2019).

145. *Id.* at 1495–96 (quoting 1 J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 734, 737 (1971)).

146. *See* U.S. CONST. amend. XI ("The Judicial power *of the United States* shall not be construed to extend . . . ." (emphasis added)).

147. *FTB*, 139 S. Ct. at 1496 (internal quotation marks omitted).

148. Alden v. Maine, 527 U.S. 706, 713 (1999).

149. *See id.* at 712–13 (holding that Congress lacked power to authorize lawsuits pressing federal claims against nonconsenting states in state courts).

150. *FTB* was not a redux of *Alden*. *FTB* involved a state law claim; *Alden* a federal law claim. *See id.* at 711–12. And only *FTB* presented a question of *interstate* immunity because in *Alden* the defendant, the State of Maine, had been sued in a Maine state court. *See id.*

Eleventh Amendment either presupposes or provides an answer to interstate immunity.

B. PROBLEMS WITH THE FIRST STEP

1. A Startling Insult

The Three-Step Argument's first step treats *Chisholm* as an inexplicable gaffe.[151] Such dismissiveness of *Chisholm* is unfounded. To begin, the notion that *Chisholm* was such an obviously flawed, wrongheaded decision is prima facie puzzling. *Chisholm* was the very first Supreme Court decision that explicitly decided a constitutional question.[152] The constitutional question did not somehow fly under the radar, as everyone involved realized its resolution would have substantial repercussions. The constitutional question was fully briefed and argued by Attorney General Edmund Randolph, a delegate at the Philadelphia Convention and member of the five-member Committee of Detail that drafted Article III.[153] Four of the five Justices who issued opinions in the case concluded that federal courts had jurisdiction against nonconsenting states, and each of their seriatim opinions contained substantial constitutional analysis.[154] Among the Justices finding federal court jurisdiction was James Wilson, who, like Randolph, served on the Committee of Detail and who also, as mentioned earlier, is thought to have been Article III's primary draftsman. Another was Chief Justice John Jay, who had been one of the three authors of the *Federalist Papers*. While these considerations do not ensure the correctness of *Chisholm*'s holding, they should remind us of the extraordinariness of the claim that *Chisholm* was a monumental blunder.

2. Chisholm*'s Four-Justice Majority*

The case against *Chisholm*-dismissiveness strengthens upon carefully reviewing the four Justices' reasoning. Under ordinary conventions of constitutional argumentation, their reasoning is strong.[155] The question in *Chisholm* was whether the Supreme Court had jurisdiction to hear an individual's claim sounding in state law for damages against an unconsenting state.[156] The Constitution provides that the "judicial Power [of the United States] . . . extend[s] to . . . Controversies between . . . a State and Citizens of

151. *See, e.g.*, *FTB*, 139 S. Ct. at 1496 (referring to *Chisholm* as a "blunder").

152. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 6–14 (1985).

153. *See* Nelson, *supra* note 4, at 1562 & n.6. The State of Georgia did not appear in the proceedings and did not submit briefs. *See id.* at 1598.

154. As explained below, Justice Iredell's dissent contained virtually no constitutional analysis. *See infra* text accompanying notes 171–82.

155. *Cf.* CURRIE, *supra* note 152, at 20 (concluding that "*Chisholm* may have been right after all").

156. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793) (opinion of Cushing, J.).

another State."[157] All four Justices concluded that there was federal court jurisdiction because a citizen of South Carolina had sued the State of Georgia (satisfying the diversity requirement of a suit between "a State and Citizens of another State") for money owed (constituting a "Controvers[y]"[158]).

All four Justices rejected the argument that because the State-Foreign Citizen Diversity Clause first mentions "State," it created federal court jurisdiction only where a state was the plaintiff. Justice Blair suggested states were first recited as a matter of respect.[159] All four Justices found the clause to be "free from ambiguity, and without room" for an "implied" exclusion of citizen-plaintiffs.[160] Each rejected the proposition that the states' dignity precluded their being sued in federal court because other constitutional provisions "most certainly contemplate[] . . . maintaining a jurisdiction against a State, as Defendant."[161] For example, the Constitution extends federal jurisdiction to "Controversies between two or more States."[162]

Having shown that states were not categorically unamenable to suit in federal court, each Justice provided affirmative reasons why the State-Foreign Citizen Diversity Clause extended federal court jurisdiction to citizen *A*'s suit against state *B*. Several argued it would make no sense to suggest that "controversies" existed only where a state was plaintiff; if party *A*'s claim against party *B* constitutes a controversy, then *B*'s claim against *A* likewise must be a controversy.[163] Several Justices invoked considerations of reciprocity and

157. U.S. CONST. art. III, § 2, cl. 1; *Chisholm*, 2 U.S. (2 Dall.) at 450–51 (opinion of Blair, J.); *id.* at 466–67 (opinion of Cushing, J.).

158. *See* CURRIE, *supra* note 152, at 16.

159. Justice Blair suggested that "probably the State was first named in respect to the dignity of a State." *Chisholm*, 2 U.S. (2 Dall.) at 450–51 (opinion of Blair, J.).

160. *Id.* at 476 (opinion of Jay, C.J.); *see id.* at 477 (arguing that the State-Foreign Citizen Clause should have read "party-Plaintiff" if Georgia were correct); *see also id.* at 450–51 (opinion of Blair, J.) ("[That the State-Citizenship Diversity Clause first mentions states] is . . . [not] alone a sufficient ground from which to conclude[] that the jurisdiction of this Court reaches the case[s] where a State is Plaintiff, but not where it is Defendant[.]").

161. *Id.* at 451; *see id.* at 467 (opinion of Cushing, J.) ("[I]t could not be intended to subject a State to be a Defendant, because it would affect the sovereignty of States. If that be the case what shall we do with the immediate proceeding clause; 'controversies between two or more States,' where a State must of necessity be [a] Defendant?").

162. U.S. CONST. art. III, § 2, cl. 1; *see Chisholm*, 2 U.S. (2 Dall.) at 451 (opinion of Blair, J.) (rejecting the argument that the State-Foreign State Clause should be construed as extending federal court jurisdiction "where a State is Plaintiff, and some foreign State a Defendant, but not where a foreign State brings a suit against a State").

163. Professor Nelson has argued that under the general law operative during the Framing era, an individual's lawsuit against an unconsenting state would not have qualified as a judicial case or controversy because compulsory process could not have been issued against states. *See* Nelson, *supra* note 4, at 1587 ("Unless a defendant voluntarily appeared[,] . . . a justiciable 'Case' or 'Controversy' would exist only if the defendant could legitimately be *commanded* to appear. But the Constitution did not seem to address (let alone change) the preexisting rule that states could not be haled into court at the behest of an individual."). But the *Chisholm* opinions are powerful counterevidence. If it were so widely understood that in personam suits against unconsenting states could not be cases or controversies, one would have expected Justice Iredell to have so argued in his dissent. Yet he did not. *See infra* Part III.B.3. And if Professor Nelson were correct, the four Justices who found jurisdiction could be sharply criticized for having failed to mention, let alone answer, such an obvious

equality as additional support.[164] Chief Justice Jay wrote: "That rule is said to be a bad one, which does not work both ways."[165] A one-way jurisdictional ratchet would "deviate from the plain path of equality and impartiality."[166] Justices Jay and Cushing added that federal tribunals were neutral forums to resolve interstate disputes and that withholding jurisdiction from foreign citizen plaintiffs might result in interstate "animosities" that might lead to "hostilities."[167]

All four Justices also considered whether citizen lawsuits against unconsenting states in federal court were incompatible with state sovereignty. All observed that the Constitution withdrew powers from the states that they previously had possessed (such as declaring war and making peace), and reasoned that ratification constituted their consent to the Constitution's limitations.[168] Because the Constitution extended federal jurisdiction to foreign citizens' suits against states, ratification negated any sovereignty-based objection to state suability.[169] And as explained earlier, Justices Jay and Wilson went further, arguing that sovereign immunity was a monarchical artifact that

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and powerful retort to their arguments. *See Chisholm*, 2 U.S. (2 Dall.) at 477 (opinion of Jay, C.J.) ("It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no *controversy* between them. . . . What is it to the cause of justice, and how can it effect the definition of the word *controversy*, whether the demands which cause the dispute, are made by a State against citizens of another State, or by the latter against the former?"); *id.* at 450 (opinion of Blair, J.) (similar); *id.* at 467 (opinion of Cushing, J.) (similar); *id.* at 466 (opinion of Wilson, J.) (similar). Perhaps anticipating this line of objection, Nelson says that *Chisholm*'s majority "show[s] at least that the logic behind Georgia's position was not universally known and accepted." Nelson, *supra* note 4, at 1608. But this concession does not adequately contend with all the *Chisholm* Justices' failure to make any mention of a proposition supposedly so foundational and broadly accepted.

164. *See Chisholm*, 2 U.S. (2 Dall.) at 468 (opinion of Cushing, J.) ("[T]he remedy [of access to federal court] is reciprocal; the claim to justice equal."); CURRIE, *supra* note 152, at 16 (quoting Chief Justice Jay's argument on this point).

165. *Chisholm*, 2 U.S. (2 Dall.) at 473 (opinion of Jay, C.J.). The day after the Court heard *Chisholm*, Georgia argued that the Supreme Court had jurisdiction over a lawsuit in the nature of an interpleader in which Georgia sought to join. *See* Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. SUP. CT. HIST. 73, 80–81.

166. *Chisholm*, 2 U.S. (2 Dall.) at 477.

167. *Id.* at 474; *see id.* at 468 (opinion of Cushing, J.) (arguing that the reason for having federal courts was to provide "a disinterested civil tribunal . . . to decide [] controversies, and preserve peace and friendship," and that denying citizens of another state the ability to sue sister states in federal court "might tend gradually to involve States in war and bloodshed").

168. *See id.* at 468 (identifying the Constitution's many "restrictions upon States" as being "a most essential abridgment of State Sovereignty," and concluding that "no argument of force can be taken from the sovereignty of states[;] [w]here it has been abridged, it was thought necessary for the greater indispensable good of the whole"); *id.* at 471 (opinion of Jay, C.J.) (advancing a similar argument, though less explicitly).

169. *See id.* at 452 (opinion of Blair, J.) ("[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."); *id.* at 468 (opinion of Cushing, J.) (similar); *id.* at 470–73 (opinion of Jay, C.J.) (concluding that state suability is compatible with state sovereignty if a state "by being a party to the national compact, consented to be suable by individual citizens of another State"). Justice Wilson addressed the objection that suability was incompatible with state sovereignty by reconfiguring sovereignty to make it compatible with republicanism. *See id.* at 454–56 (opinion of Wilson, J.). Wilson acknowledged that his reconfiguration bore little resemblance to the traditional understanding of sovereignty. *See id.*

was flatly incompatible with the republican forms of government that the Constitution created and guaranteed.[170]

3. Justice Iredell's Dissent

So much for the *Chisholm* majority's constitutional analysis. What about Justice Iredell's much celebrated dissent?

Almost all of Justice Iredell's dissenting opinion was not directed to the constitutional question of whether the Supreme Court had jurisdiction to hear the case, but to whether the Court had *statutory* authority to issue a writ directing Georgia to appear before it. Iredell's view was that independent of the Supreme Court's constitutionally granted jurisdiction, Congress had to enact legislation prescribing "the methods of their proceeding,"[171] including the writs the Court could issue.[172] In his view, Congress alone had the power to "direct[] the methods of [courts'] proceeding[s]."[173] And if Congress did not act, "[t]here is no part of the Constitution that I know of, that authorizes this Court to take up any business where they left it, and, in order that the powers given in the Constitution may be in full activity, supply their omission."[174]

In reasoning that Congress alone had the power to prescribe the Court's methods of proceedings, Iredell staked out a position at odds with the modern understanding that federal courts have federal common law authority to determine their procedural rules.[175] But Justice Iredell's rejection of what today is called federal common law was dictum because he thought Congress *had* specified the manner of proceeding in section 14 of the 1789 Judiciary Act.[176] Virtually all of Justice Iredell's opinion consists of statutory interpretation of that section, and his conclusion rested exclusively on his reading of "the act of Congress, which I consider is on this occasion the limit of our authority[,] . . . whatever opinion may be entertained[,] upon the construction of the Constitution, as to the power of Congress to authorize such a one."[177]

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170. *See supra* text accompanying notes 88–96.

171. *Chisholm*, 2 U.S. (2 Dall.) at 433 (opinion of Iredell, J.).

172. In his argument before the Court in *Chisholm*, Attorney General Randolph addressed the "master-objection . . . that the law has prescribed no execution against a State" because "no express execution is given by the judicial act or the process act." *Id.* at 426. Thus, David Currie's criticisms of Justice Iredell are inapt insofar as Iredell did not argue that legislation was necessary to establish the Supreme Court's original jurisdiction. *See* CURRIE, *supra* note 152, at 17 (criticizing Iredell on the ground that "legislation confirming the constitutional provision seems unnecessary" because Article III was not "silent . . . as to the scope of [the Supreme Court's] original jurisdiction").

173. *Chisholm*, 2 U.S. (2 Dall.) at 433 (opinion of Iredell, J.).

174. *Id.*

175. *See generally* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814–15, 846–79 (2008) (identifying and providing a justification for the widespread practice of federal courts generating "procedural common law").

176. *See Chisholm*, 2 U.S. (2 Dall.) at 433–34 (opinion of Iredell, J.).

177. *Id.* at 436–37. It might be thought that Iredell's conclusion that a writ compelling state appearance was not authorized by section 14 means that his rejection of federal common law was not mere dictum. But while federal common law typically might fill a statutory gap, Iredell's interpretation of section 14 wouldn't leave room for such filler because section 14 authorized all writs necessary for courts' exercise of their jurisdiction

Section 14 of the Judiciary Act provided that the Supreme Court "shall have power to issue writs . . . which may be necessary for the exercise of their respective jurisdictions, *and agreeable to the principles and usages of law*."[178] Justice Iredell thought the italicized language referred to the "[p]rinciples of law common to all the States"[179] "as it existed in England, . . . at the time of the first settlement of the [United States],"[180] and that "[n]o other part of the common law of England . . . c[ould] have any reference to this subject, but that part of it which prescribe[d] remedies against the crown."[181] For this reason, Justice Iredell's opinion consists almost entirely of a review of the English law concerning the King's suability.[182] Justice Iredell thought the "[p]etition of right" was the sole remedy for maintaining a suit for money against the Crown[183] and, following Blackstone, that the writ was "a matter of [the King's] grace, and not . . . compulsion."[184]

Because Justice Iredell thought *Chisholm*'s question was answerable by statutory interpretation alone, he thought it "unnecessary" to decide the constitutional question the other Justices' opinions had addressed.[185] But since "[s]o much . . . has been said on the Constitution," Justice Iredell wrote it "may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."[186] Justice Iredell provided precisely a single sentence to justify this constitutional conclusion: "I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider can be found in this case) would authorize the deduction of so high a power."[187]

In light of the high esteem afforded to Justice Iredell's dissent today, it is fair to interrogate the solidity of its reasoning. To begin, his constitutional analysis is bare. Apart from its overview of English law, which in any event was deployed for purposes of statutory interpretation, Justice Iredell provides no justification for his proposition that only "express words, or an insurmountable implication" can establish state suability. He responds not at all to Justices Wilson's and Jay's arguments that English monarchical practice was inapposite

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subject to a limitation that Iredell concluded had been triggered. On account of section 14's coverage and caveat, there was no gap to be filled by federal common law.

178. *Id.* at 433–34 (quoting Judiciary Act of 1789, § 14, 1 Stat. 73, 81–82).

179. *Id.* at 434.

180. *Id.* at 435.

181. *Id.*

182. *See id.* at 437–49.

183. *Id.* at 437.

184. *Id.* at 444.

185. *Id.* at 434–35 (demonstrating an early form of the canon of constitutional avoidance).

186. *Id.* at 449.

187. *Id.* 449–50. It seems hard to credit Stephen Sachs's suggestion that Iredell's sentence-length constitutional argumentation should be unpacked to mean that the states' general law immunity "had not been displaced, and so continued in force." Sachs, *supra* note 88, at 1871.

to republican government.[188] Perhaps even more surprisingly, Justice Iredell does not explain why Article III's extension of federal court jurisdiction to "Controversies between . . . a State and Citizens of another State" was not sufficiently "express" to overcome the defeasible presumption he averred was applicable.[189]

Justice Iredell's statutory interpretation is more fulsome. Its examination of English practice is expansive and learned, but that history's legal relevance to the question at hand is more assumed than explained. Section 14 authorized only those writs that were "*agreeable to the principles and usages of law*."[190] It certainly does not ineluctably follow that a monarchy's approach to sovereign immunity is relevant for construing the statute that established a republic's judiciary. Justices Jay and Wilson provided arguments to this effect, as to which Justice Iredell offered no response.[191] And Justice Blair thought section 14 and Article III *in pari materia* constituted adequate authorization for the Supreme Court to have proceeded.[192]

Furthermore, before Chisholm brought his suit to the Supreme Court, the State of Georgia had enacted a law that allowed it to be sued.[193] Was this statute relevant to interpreting section 14's language of "agreeable to the principles and usages of law"? Iredell insisted that Georgia's statute "surely could have no influence in the construction of an act of the Legislature of the United States passed before."[194] But why not? The Georgia statute might have reflected longstanding understandings that in turn may have been relevant to construing section 14's open-ended language. And while Justice Iredell reflexively rejected the possibility that "an action would lie in the Supreme Court against some States, whose laws admitted of a compulsory remedy against their own Governments, but not against others, wherein no such remedy was admitted,"[195] modern doctrine allows this very possibility. For example, federal common law sometimes incorporates state law, with the result that the substantive federal rule as to whether a lawsuit can go forward can vary across the states.[196]

188. *See Chisholm*, 2 U.S. (2 Dall.) at 429–50 (opinion of Iredell, J.).

189. *Id.* at 449–50; *see* John V. Orth, *Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255, 262–63 (1994) (noting the brevity of Justice Iredell's constitutional analysis).

190. *Chisholm*, 2 U.S. (2 Dall.) at 434 (quoting and analyzing this statutory language).

191. *See id.* at 429–50.

192. *See id.* at 451 (opinion of Blair, J.) ("Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that *Congress* has not provided any form of execution . . . ; the argument . . . can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution.").

193. *See id.* at 434–35 (opinion of Iredell, J.); Marcus & Wexler, *supra* note 165, at 78 (noting the Governor of Georgia's early position that "Chisholm had neglected to follow the procedure spelled out in Georgia's judiciary act for a plaintiff against the state").

194. *Chisholm*, 2 U.S. (2 Dall.) at 435 (opinion of Iredell, J.).

195. *Id.* at 434.

196. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (holding that while federal common law determines whether a state trial court's dismissal on statute of limitations grounds precludes

Finally, even if the English common law were the appropriate material to consult to construe section 14's "principles and usages of law," there is genuine doubt as to whether Justice Iredell got the English tradition right. Justice Wilson observed that "[u]ntil the time of Edward I, the King might have been sued as a common person" in which the "form of the process was even imperative." He also quoted the leading thirteenth-century scholar Bracton, who wrote that "in receiving justice, [the King] should be placed on a level with the meanest person in the Kingdom." Not only that, Justice Wilson claimed that though "now in *England* the *King* must be sued in his Courts by *Petition*, but even now, the difference is only in the *form*, not in the *thing*. The judgments or decrees of those Courts will substantially be the same upon a *precatory* [nonbinding] as upon a *mandatory* process."[197] Professor David Currie notes that "Professor Louis Jaffe, writing much later, agreed with Wilson," concluding that royal "consent apparently was given as of course."[198] As Currie observes, "[i]f Wilson and Jaffe were right, there was no meaningful tradition of sovereign immunity" in England after all.[199]

4. Three Takeaways from Revisiting Chisholm

Revisiting *Chisholm* yields three important takeaways. First, the majority Justices' seriatim opinions provide comprehensive, thoughtful constitutional arguments and conclusions.[200] At the very least—and quite contrary to the contemporary consensus—*Chisholm*'s majority opinions and holdings are not readily characterized as unfathomable blunders. So *Chisholm*'s first puzzle—how four Justices addressing the Court's very first, fully briefed, and important constitutional question could have gotten things so wrong—turns out to not be a puzzle after all. Second, in the other direction, the praise Justice Iredell's dissent garners today is not commensurate with the quality of its legal analysis, particularly its constitutional analysis. Third, in light of the relative strength of the majority's and dissent's analyses, it is the Eleventh Amendment that presents a puzzle: why was there so quick and powerful a consensus that *Chisholm* had to be undone when there were so many strong arguments on its behalf?

C. PROBLEMS WITH THE SECOND STEP

This brings us to the second step of the Three-Step Argument, that *Chisholm*'s rejection of state sovereign immunity resulted in "an immediate

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a subsequent lawsuit in federal court, the substantive content of the federal preclusionary rule matches the state preclusionary rule of the state that dismissed the lawsuit).

197. *Chisholm*, 2 U.S. (2 Dall.) at 460 (opinion of Wilson, J.).

198. CURRIE, *supra* note 152, at 19–20 (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197 (1965)).

199. *Id.* at 20.

200. Their arguments persuade me, as they have persuaded others. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) ("I am of opinion that the decision in [*Chisholm*] was based upon a sound interpretation of the Constitution as that instrument then was.").

'furor' and 'uproar' across the country" that quickly led to the drafting and adoption of the Eleventh Amendment.[201] This has been dubbed the "profound shock" school of the Eleventh Amendment, which has been attributed to the renowned legal historian Charles Warren.[202] The third takeaway from our revisiting of *Chisholm* presents a profound challenge to the profound shock school.

A careful look at Warren's position is revealing. Summarizing his findings, Warren stated as follows:

> [Although] opposition to the Court's decision was to some extent based on divergencies of political theories as to state sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the "numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion."[203]

In other words, Warren actually attributed the Eleventh Amendment not so much to a repudiation of *Chisholm*'s rejection of state sovereign immunity as a matter of principle as to prosaic concerns that *Chisholm* threatened to drain states' treasuries.[204] Thus, in tying the Eleventh Amendment to the principle of sovereign immunity, the profound shock school distorts the views of the scholar on whom they heavily rely.[205]

Warren's influential work was published in the early 1920s. Since then, there has been much additional study of the history behind the Eleventh Amendment's drafting and adoption. And while that record has given rise to divergent conclusions as to how the Eleventh Amendment should be interpreted, there is a substantial consensus concerning the historical record that is consistent with Warren's stated conclusion.

For example, Professor William Marshall concluded that "the primary concern that motivated the [F]ramers of the [E]leventh [A]mendment [was] . . . to protect state treasuries from federal judicial invasion."[206] Likewise, Professor Lawrence Marshall concluded that "land disputes and foreign debts were the crux of the states' concern" in adopting the Eleventh Amendment.[207] An "immense amount of money and property [was] at stake." States had

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201. *See supra* text accompanying note 140.

202. *See* Woolhandler, *supra* note 5, at 254 n.22; Pfander, *supra* note 63, at 578 n.85; *see also Hans*, 134 U.S. at 11 (describing *Chisholm* as having generated a "shock of surprise").

203. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922) (emphasis added).

204. *See, e.g.*, Sachs, *supra* note 88, at 1873 ("[The Eleventh Amendment] served only to confirm that *Chisholm*'s reasoning was wrong, thereby reestablishing the proper relationship between Article III and other rules about personal jurisdiction or capacity for suit.").

205. To be fair, the pages preceding the quotation reproduced above discuss contemporary criticisms of *Chisholm* in newspapers that invoked sovereign immunity. *See* WARREN, *supra* note 203, at 91–93, 96–98.

206. William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1395 (1989).

207. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1364 n.99 (1989).

confiscated more than $20 million in property through bills of attainder, which constituted "close to a tenth of the value of all improved real estate in the country." States also had taken more than $8 million in additional property through divestment acts.[208] Additionally, substantial amounts of state debt that had been issued to finance the Revolutionary War was in the hands of out-of-state speculators.[209] *Chisholm*'s ruling allowed states to be sued in federal court to recover damages in all these cases. The Eleventh Amendment protected state coffers by barring such lawsuits in federal court.

Both Professors William Marshall and Lawrence Marshall are critics of the diversity theory of the Eleventh Amendment.[210] But even the diversity theorist William Fletcher agrees that the historical record discloses that "[t]he adopters of the amendment were concerned with the possibility of monetary judgments against the States."[211] Judge John J. Gibbons, another diversity theorist, likewise rejects the position that the Eleventh Amendment reflected a "broad desire to constitutionalize a doctrine of State sovereign immunity," and instead concludes that the amendment sprung from "the desire of the Federalists to assuage the Republican clamor over the Supreme Court's decision in *Chisholm v. Georgia* while guaranteeing the enforceability against the States of the controversial peace treaty with Great Britain."[212] Because the Eleventh Amendment still permitted unconsenting states to be sued in federal court, Gibbons argued that its adoption cannot be interpreted as an endorsement of a general principle of state sovereign immunity.[213]

There is much circumstantial evidence that supports these scholars' conclusions. The very first proposal to overturn *Chisholm*, introduced by Representative Theodore Sedgwick the day after *Chisholm* was decided, is plausibly described as reflecting a state sovereign immunity principle because it would have categorically prohibited states from being sued by private individuals in federal courts.[214] But Sedgwick's proposal went nowhere.[215] Each of the three subsequent post-*Chisholm* proposed amendments, including the

208. *Id.* at 1356 n.55.

209. *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1271 (1989).

210. Lawrence Marshall believes the Eleventh Amendment bars all suits by out-of-staters against a state. *See* Marshall, *supra* note 207, at 1346. By contrast, diversity theorists think the Eleventh Amendment "required that the state-citizen diversity clause be construed to authorize jurisdiction only when the state was a plaintiff," with the result that the Eleventh Amendment did not eliminate federal courts' jurisdiction on federal claims against unconsenting states. *See, e.g.*, Fletcher, *supra* note 209, at 1264.

211. Fletcher, *supra* note 209, at 1271.

212. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894 (1983).

213. *Id.*

214. Sedgwick's proposal provided that "no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreign or foreigners, of any body politic or corporate, whether within or without the United States." Fletcher, *supra* note 209, at 1269 n.45.

215. *See id.* at 1270; Marshall, *supra* note 207, at 1366.

proposal that Congress ultimately sent to the states for ratification, eliminated jurisdiction over suits against states in only two specified circumstances (suits against states brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State").[216] But these were not the only sources of federal court jurisdiction over state defendants; none of the post-Sedgwick proposals eliminated jurisdiction in cases brought by foreign states or in-state citizens.[217] Especially because lawsuits against states by foreign states and in-staters were on Americans' minds when the Eleventh Amendment was drafted and ratified,[218] the case for extending the amendment's immunity only to the jurisdictional grounds that it specifies seems to be particularly strong.

Although there are no records of the congressional or ratification debates concerning the Eleventh Amendment,[219] it is not hard to understand why drafters might have left foreign-state and in-state citizen suits untouched by the Eleventh Amendment. As to the former, there was "fear of a foreign government becoming embroiled in a controversy with a state which, in the absence of a federal forum for adjudication of the dispute, might involve the entire nation in dispute or war."[220] And as to the latter, the Constitution imposed an array of restrictions on states, and "the vast majority of state violations affecting individuals involve[d] in-state citizens" in the "relatively immobile nature of society in the 1790s."[221] The Eleventh Amendment's drafters "certainly wanted to create an amendment that would be ratified by the states," and "[f]or the typical voter, the amendment as drafted was a relatively costless provision; it did not affect his right to invoke federal jurisdiction in suits against his own state, but spared his state from being subject to federal jurisdiction in suits by outsiders."[222] Eliminating federal court jurisdiction for in-state citizens "might have triggered opposition."[223]

The first Supreme Court decision extensively analyzing the Eleventh Amendment[224] is consistent with these historical considerations. Chief Justice

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216. U.S. CONST. amend. XI; *see* Fletcher, *supra* note 209, at 1270–71.

217. Regarding federal court jurisdiction over suits brought by foreign countries, see U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all . . . Controversies between . . . a State . . . and foreign States . . . ."). Federal court jurisdiction over a citizen's suit against her own state was available for suits "arising under the Constitution." *Id.*

218. *See* Marshall, *supra* note 207, at 1360–67.

219. *Id.* at 1350 ("Congressional debates on the Eleventh Amendment were not recorded nor were those in the state legislatures, so only a bare outline of the proceedings is available. Moreover, there are few references to the amendment in the correspondence and other writings of those who took part in the deliberations.").

220. *Id.* at 1361; *see* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821) (noting that federal jurisdiction for foreign-country lawsuits against states "might be essential to the preservation of peace").

221. Marshall, *supra* note 207, at 1368. Marshall discusses why this consideration is not inconsistent with there not having been a federal question jurisdiction statute until 1875. *Id.* at 1368–69.

222. *Id.* at 1370.

223. *Id.*

224. Before *Cohens*, the Court had made only glancing references to the Eleventh Amendment. *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 20 (1820); United States v. Judge Peters, 9 U.S. (5 Cranch) 115, 131 (1809); Fowler v. Lindsey, 3 U.S. (3 Dall.) 411, 411 (1799). None are relevant to the issues at hand.

Marshall's opinion for the Court in *Cohens v. Virginia*[225] rejected the theory that the Eleventh Amendment was intended to "maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation"[226] because states still could be sued in "controversies between two or more States, or between a State and a foreign State."[227] The Chief Justice went on to say that "[w]e must ascribe the amendment, then, to some other cause than the dignity of a State."[228] And that cause was protecting state treasuries:

> It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court [in *Chisholm v. Georgia*] maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures.[229]

In short, the historical record suggests the Eleventh Amendment was driven more by pragmatic financial concerns than by a widely shared (much less a universally embraced) principle that states had enjoyed sovereign immunity.

D. PROBLEMS WITH THE THIRD STEP

The third step of the Three-Step Argument is that the "natural inference" from the Eleventh Amendment's "speedy adoption is that 'the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits.'"[230] Therefore, the "sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[231]

But the previous Subpart's analysis undermines the last of the Three-Step Argument's steps. The historical record supports two possible conclusions concerning state sovereign immunity. First, that the Eleventh Amendment left federal jurisdiction intact for lawsuits it did not address. On this approach, the constitutional question of state suability for such suits has been answered—but in the *affirmative*, contrary to the third step's conclusion. The second possibility is that apart from the specific instances the Eleventh Amendment addresses, the Amendment's drafters and ratifiers left the constitutional question of state

225. 19 U.S. (6 Wheat.) 264 (1821).

226. *Id.* at 406.

227. *Id.*; *see id.* at 380 (rejecting the argument that "a sovereign independent State is not suable, except by its own consent").

228. *Id.* at 406.

229. *Id.*

230. Franchise Tax Bd. v. Hyatt (*FTB*), 139 S. Ct. 1485, 1496 (2019) (quoting Alden v. Maine, 527 U.S. 706, 723–24 (1999)).

231. Alden v. Maine, 527 U.S. 706, 713 (1999).

suability unresolved, perhaps to sidestep controversy and facilitate the Amendment's adoption.

While the historical record does not decide between these two possibilities, it forecloses the conclusion that the Eleventh Amendment's adoption reflected a consensus that the states enjoyed broad pre-*Chisholm* immunity from suit that extended beyond the Eleventh Amendment's specific terms. Thus, the Eleventh Amendment's adoption does not disturb Part II's conclusion that the constitutional text does not answer the question of interstate immunity.

IV. INTERSTATE IMMUNITY AS FEDERAL CONSTITUTIONAL LAW

Parts II and III established that interstate immunity is a constitutional omission. What fills it? *Nevada v. Hall*, which *FTB*'s four dissenters would have upheld, thought the answer was state law.[232] This Part explains why interstate law must be federal law. And as is true of many other constitutional omissions, including the removal of executive officers and the abrogation of treaties, the answers to interstate immunity upon which our political community ultimately settles properly belong to the domain of constitutional law. This Part argues that *Hall*'s badly mistaken constitutional conclusions are not entitled to stare decisis, with the result that answering the interstate immunity question that *FTB* addressed demanded an exercise of contemporary agency.

A. THREE HYPOTHETICALS

To appreciate why interstate immunity must be a matter of federal law, and indeed belongs to the constitutional domain, it will prove useful to consider three hypotheticals. In the wake of the demise of *Roe v. Wade*,[233] many residents of states with restrictive abortion laws are seeking abortions where it is accessible.[234] A state that banned abortions within its borders (say Texas) might require out-of-state abortion facilities to disclose names of Texan patients to Texas Family Services, and grant biological fathers access to that information.[235] A strongly pro-choice state (say New Mexico) might create a private cause of action against interference with a New Mexico provider's ability to serve as a pro-choice sanctuary.

232. *See* Nevada v. Hall, 440 U.S. 410, 425 (1979); *FTB*, 139 S. Ct. at 1500 (Breyer, J., dissenting).

233. 410 U.S. 113 (1973).

234. *Cf.* Sean Murphy, *Texas Women Drive Hours for Abortions After New Law*, ASSOCIATED PRESS (Oct. 14, 2021), https://apnews.com/article/abortion-texas-louisiana-0cc666fde471f0fe2ce8a5f28977ad28#:~:text=SHREVEPORT%2C%20La.,helped%20arrange%20a%20hotel%20room.

235. Texas's law would also have to require that its citizens waive their disclosure rights. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 877–91 (2002) (explaining scope of states' powers to extraterritorially regulate their residents and nonresidents); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093–95 (2018) (allowing states to impose, collect, and remit duties on companies not having a physical presence in the state).

Now consider three hypotheticals:

(1) Many Texan women travel to Community Health, a state medical facility in New Mexico that nationally advertises as an abortion sanctuary. Community Health does not comply with Texas's requirements. Can the biological Texan father of the fetus of a Texan woman, who learns from sources apart from Community Health that his former partner received an abortion at Community Health, sue Community Health in a Texas state court seeking monetary damages for having failed to inform him of the abortion?

(2) Investigators from Texas Family Services, a part of that state's executive branch, travel to Community Health to determine if Texans are getting abortions there. Driving recklessly on the return trip, they sideswipe a car while they are still in New Mexico. Can the injured New Mexican assert a tort claim against Texas Family Services in a New Mexico court?

(3) A private hospital in New Mexico stops performing abortions on Texan women due to Texas's requirements. Can the hospital sue Texas in a New Mexico state court for interfering with its capacity to serve as a pro-choice sanctuary?

The answers to all three questions turn on the rules governing interstate immunity. As explained below, each hypothetical substantially implicates different federalism concerns. For that reason, the answers naturally belong to the domain of federal law, not state law.

B. HORIZONTAL FEDERALISM, AND THE MEANING OF STATE AND NATIONAL CITIZENSHIP

Interstate immunity must be governed exclusively by federal law, and indeed is of constitutional stature, for three reasons. First, interstate immunity is deeply and inextricably enmeshed with extraterritoriality. Most obviously, interstate immunity determines whether state *A* can compel state *B* to litigate in state *A*'s courts. As illustrated by the second hypothetical concerning the reckless Texan drivers,[236] interstate immunity questions frequently arise after state *B*'s employees have undertaken some act in state *A*. Thus, interstate immunity in effect determines whether and to what extent state *B* can act in state *A* without being required to answer for any alleged misdeeds—in effect whether state *B* can act with impunity in state *A*. Now ask yourself: is the answer to these questions sensibly provided by *state* law? The answer, I suggest, is no: because the answers to these extraterritoriality questions help determine the nature of our federal Union, they are appropriately determined exclusively by federal law.

236. *See supra* Part IV.A.

Second, interstate immunity is intimately connected to the health of the interstate system. If interstate immunity rules have the status of state law, then one state is susceptible to being subjected to another state's contrary immunity choices. A state that decided to have immunity might be forced to defend a lawsuit in another state. And a state that waived its immunity might be left without recourse when a sister state that has not waived immunity refuses to allow itself to be answerable for its extraterritorial misdeeds. Both these possibilities hold out particularly disruptive risks because states are apt to feel strongly both about which of these choices they have made and what they've rejected. Only a uniform set of immunity rules that is applicable to all states, and that all states can participate in shaping,[237] can avoid these harms to the interstate system that treating interstate immunity as a matter of state law risks inflicting. Only federal law invites such participation and holds out the promise of a uniform nationwide result.

Third, interstate immunity is an identity-defining component of several critical substructures of our federal system. Whether an unconsenting state is suable helps determine the very nature of the states' powers and immunities. Additionally, whether an unconsenting state can be sued in a sister state's court is a determinant of the kind of relationship the states have with one another. And whether an individual can sue a state that interferes with rights she has under her home state's laws (as in all the three hypotheticals) helps determine the very nature of both state and federal citizenship. As illustrated by the first hypothetical, is state citizenship sufficiently robust that a home state can apply its paternalistic or third-party protecting laws to conduct that occurs outside its borders in a state that does not have similar laws, if the home state's not applying its laws would risk undermining its law and its citizens' rights under it? Or, in the other direction (and illustrated by the third hypothetical), does national citizenship entitle a traveling citizen of state *A* to the same opportunities while she is in state *B* that state *B*'s own citizens have?[238]

As I've explained at length elsewhere, the answers to these questions help determine whether we have a "soft" or "hard" pluralism system of horizontal federalism, or (to put it a bit differently) the very nature of state and national citizenship.[239] A hard pluralist system would allow states to efficaciously regulate across the entire range of matters as to which federal law does not demand nationwide uniformity by allowing states to ensure that their citizens cannot circumvent the paternalistic law of their home state by the simple expedient of crossing a border. Under a hard pluralist system, state citizenship would be deeply consequential. Under a soft pluralist system, by contrast, national citizenship would entail that residents of one state could avail

237. As they can, pursuant to the Compact Clause. *See infra* Part V.B.

238. *See* Mark D. Rosen, "*Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 741 (2007).

239. *Id.*

themselves of the more relaxed laws of another state by simply traveling there. To illustrate the difference with an example outside of abortion, consider the following question: Could a state with restrictive gambling laws that do not enforce certain gambling debts so as to paternalistically protect the gambler from herself as well as third-party interests (such as her family's assets) apply its laws to gambling debts that its citizens incur in another state? Interstate immunity is one of several doctrines that collectively determine where on the spectrum of soft to hard pluralist our federalist system is.[240] This helps determine what kind of federal Union we have, and correspondingly what the entailments of state and federal citizenship are.

In short, interstate immunity is intimately enmeshed with federalism in multiple ways. It is a determinant of the types of polities that states are, states' relationship to one another, and the health of the interstate system. And in helping determine whether our system of horizontal federalism allows for hard or only soft pluralism, interstate immunity is an important determinant of what state citizenship and national citizenship mean. Interstate immunity's multiple implications for federalism mean not only that interstate immunity must be federal law, but that it is of constitutional stature.[241]

Hall nonetheless concluded that "if a federal court were to hold, by inference from the structure of our Constitution and nothing else" that interstate immunity was constitutionally required, "that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union."[242] Shared agency spotlights the error in this Tenth Amendment argument. As will be explained in Part V, the conclusion that whether states have interstate immunity is a question of constitutional status does not mean that federal courts alone are responsible for answering the immunity question. Because state institutions have several soon-to-be identified pathways for participating in determining interstate immunity's metes and bounds,[243] the conclusion that interstate immunity is of constitutional status does not disrespect states in violation of the Tenth Amendment, *pace Hall*.

We are now in a position to understand the several reasons why *Hall*'s ruling that interstate immunity is state law was not appropriately safeguarded by stare decisis.[244] First, for the reasons discussed in this Subpart, *Hall*'s reasoning was particularly poor.[245] Second, *Hall* cannot be saved because stare decisis is "at its weakest" in respect of constitutional errors, such as that case's erroneous conclusion that interstate immunity is governed by state rather than

240. For a discussion of other doctrinal determinants, see *id.* at 732–40.

241. *Cf.* Printz v. United States, 521 U.S. 898, 905 (1997) (relying on structural inference to justify the anticommandeering principle in the absence of constitutional text).

242. Nevada v. Hall, 440 U.S. 410, 426–27 (1979).

243. *See infra* Part V.B–.C (discussing interstate compacts and state courts' creation of default constitutional rules).

244. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018) (providing these criteria for stare decisis).

245. *See id.*

constitutional law.[246] Third and finally, the commitment to stare decisis cannot save *Hall* on account of that decision's risks for disrupting interstate harmony.[247]

C. CONSTITUTIONAL FILL-INS

It might be thought that fill-ins for a constitutional omission cannot have constitutional stature unless they appear in a formal amendment under Article V. But that does not accurately describe our political community's longstanding practices. There has never been an amendment to fill in the constitutional omission regarding the removability of executive officers, yet the answers that have been generated through congressional action and judicial decision are uniformly understood as having the status of constitutional law.[248] The same is true for the mechanisms for abrogating treaties and repealing statutes, two other constitutional omissions.[249]

Completions that do not appear in the constitutional text (what might be called "non-amendatory completions") can have constitutional status because the constitutional domain is not coterminous with constitutional text, but rather exceeds it. To put it a bit differently, the Supreme Court's methodology for determining what has constitutional stature—what might be called its rule of constitutional recognition[250]—does not accord constitutional status only to constitutional text. For example, principles and practices that cannot be tied to constitutional text (such as structural inferences and historical gloss) can have constitutional status.[251]

More generally, the actions and omissions of nonjudicial institutions frequently reflect their judgments as to what the Constitution requires, allows, or prohibits. Much of the time, those judgements constitute completions to omissions and unfinishednesses. For example, determining whether Congress had power to incorporate a bank involved finishing an unfinishedness—determining whether the Sweeping Clause's language of "necessary" authorized "convenient" or only "indispensable" legislation.[252] The legislation incorporating a bank reflected Congress's judgment that it had power to do so, and Congress's constitutional judgment inhered in its act of legislating, not in

246. *Id.*

247. *See id.*

248. *See* Myers v. United States, 272 U.S. 52, 163–64 (1926).

249. *See* Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring).

250. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 450 (2007) (deploying this term).

251. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (relying on executive practice not objected to by Congress as grounds for holding that an executive practice was not unconstitutional); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); Printz v. United States, 521 U.S. 898, 905 (1997) (consulting historical understanding, past decisions, and structural considerations when deciding that anticommandeering is a constitutional principle despite the absence of constitutional text). *See generally* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020).

252. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–15.

constitutional text that had been adopted pursuant to Article V.[253] The logic behind the proposition that constitutional judgments can inhere in nonjudicial institutions' actions is confirmed by the many Supreme Court decisions that give deference to nonjudicial institutions' actions when they are subject to constitutional challenge. In *McCulloch v. Maryland*, for example, the Court famously explained that "[a]n exposition of the constitution, deliberately *established by legislative acts* . . . ought to receive a considerable impression [and] ought not to be lightly disregarded."[254] Such congressional constitutional judgments are not limited to statute-making, but inhere in myriad nonlegislative acts and omissions (such as deciding whether to impeach, or whether to issue a subpoena to the President). Congress's constitutional judgments are not limited to the threshold question of whether it has power to do something but might be reflected in the substantive rules it enacts (for instance, as to whether states have sovereign immunity) or the other nonlegislative acts it undertakes. Such substantive judgments also can belong to the constitutional domain even though they are not embedded in text enacted pursuant to Article V.[255]

Likewise, the Supreme Court makes non-amendatory completions all the time. The text the Court generates when it finishes an unfinishedness or fills in an omission is not enacted pursuant to Article V but is published today in the *U.S. Reports*. *McCulloch*'s completion to the unfinishedness of the constitutional language of "necessary and proper" gave weight to Congress's constitutional judgment (that appeared in a statute) and itself appeared in the Wheaton volume (and ultimately the *U.S. Reports*).

The understanding that constitutional resolutions can be found in more than just constitutional text is particularly important from the perspective of shared agency. From a shared-agency perspective, institutions that make the uncompleted Constitution more complete must comply with shared agency's constitutive norms, even when their labors produce something other than new constitutional text.[256] The uncompleted Constitution can be made more complete by Article V's amendments, but not *only* by amendments. Shared agency's norms properly apply across all the ways that completers make the uncompleted Constitution more complete.

V. INTERSTATE IMMUNITY AND SHARED AGENCY

In the wake of *FTB*, the most natural way of describing the present situation is that the Supreme Court has authoritatively decided that the Constitution provides states with interstate immunity. But this Article in essence provides an

253. *See* Rosen, *supra* note 42, at 2777–86.

254. 17 U.S. (4 Wheat.) at 401 (emphasis added).

255. *See* Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081–85 (2013) (distinguishing between the "big-C" and "small-c" constitution).

256. *See* text accompanying notes 35–45, 306–18 (detailing shared agency's norms).

alternative way of conceptualizing the status quo, and an explanation of the several institutions that could have played a role—and that still might play a role—in determining the rules of interstate immunity. More specifically, having undermined *FTB*'s agency-denying claim that interstate immunity had already been decided by some combination of constitutional text and history (Parts II and III), and having explained why interstate immunity necessarily has the status of federal constitutional law (Part IV), this Part now identifies the possibilities for shared agency for filling the omission of interstate immunity that not only are built into our constitutional system, but also are still available even after *FTB*.

Subpart A identifies Congress's authority to enact an interstate immunity statute. Subpart B explains the states' and Congress's powers to create an interstate agreement that sets the rules of interstate immunity. Subpart C explains courts' roles in generating interstate immunity rules, and argues that judicial decisions concerning interstate immunity—including *FTB*—are best understood as default constitutional rules, akin to dormant Commerce Clause doctrine, that may be modified by the political branches through the mechanisms identified in Subparts A and B. Subpart D shows why the three pathways identified in the three prior Subparts together create an attractive system of shared agency for devising the rules of interstate immunity.

A. FEDERAL STATUTE

The firmest textual source of congressional authority for an interstate immunity statute is the Sweeping Clause. But its authorization to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by the Constitution in the Government of the United States"[257] seems directed to national institutions, not to horizontal federalism. On account of this, some prominent scholars have concluded that Congress is without power to enact an interstate immunity statute.[258]

But the case for congressional power to enact an interstate immunity statute is strong. First, the Court has long countenanced expansive interpretations of constitutional language in service of finding federal power to resolve interstate disputes that are threatening to horizontal federalism. For example, the Constitution's grant of original jurisdiction to federal courts over interstate disputes has long been relied on as the source of judicial power to create substantive federal common law rules to resolve such disputes (for example, border disputes and apportioning interstate streams).[259] Likewise, there is a

257. U.S. CONST. art. I, § 8, cl. 18.

258. *See* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 621–22 (2021). Further undermining Baude and Sachs's conclusion that the rules of interstate immunity can only be modified by state law is that interstate immunity could be addressed by a congressionally approved interstate agreement, which also would have the status of federal law. *See infra* Part V.B.

259. *See* Texas v. New Jersey, 379 U.S. 674, 677 (1965) ("Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal

strong argument that there is Sweeping Clause authority because an interstate immunity statute would be useful for securing both the states' stability, which the Constitution presupposes and the federal government depends upon,[260] and the states' harmonious relations, which the federal government is constitutionally tasked with supporting.[261] And insofar as the federal government's operations themselves depend upon states (for example in running federal elections), Congress's Sweeping Clause authority to enact an interstate immunity statute that would help preserve the states might even be said to textually emanate from the clause's grant to "execute the powers of the Government."[262]

Second, Congress may be impliedly authorized to statutorily implement interstate immunity solely on account of interstate immunity's constitutional stature. The First Congress enacted a statute that prescribed the language of the oath to uphold the Constitution that state officers must take, even though no language in the Constitution authorizes Congress to enact such a statute, on the theory that Article VI's Oath or Affirmation Clause "implicitly authorized Congress to implement its provisions."[263] (Some members of Congress relied on the Sweeping Clause.[264]) Congress likewise relied on a theory of implied constitutional authorization when it enacted statutes implementing the Extradition Clause and the now-repealed Fugitive Slave Clause.[265] As one case explained, the "duty . . . was manifestly devolved upon Congress" to enact legislation because the Extradition Clause's obligations might not be fulfilled if Congress just "left [it] to the States."[266] What "manifestly devolved" an implementation power on Congress was not constitutional text, but the Court's

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statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.").

260. The federal government relies on the states for administering congressional and presidential elections, and Congress's members are drawn from states. *See* U.S. CONST. art. I, § 2, cl. 1, § 3, cl. 1, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

261. Akin to longstanding jurisprudence that extends the First Amendment's Free Speech Clause to writings, the proposition above in text understands the federal government's constitutional duty to protect states against invasion as a synecdoche that extends to securing harmonious interstate relations. *See id.* art. IV, § 4.

262. Missouri v. Holland, 252 U.S. 416, 432 (1920) (upholding congressional power under the Sweeping Clause to enact a statute executing a valid treaty, where the statute limited state authority and no other constitutional provision authorized the statute). The argument above in text answers Professors Baude and Sachs's objection that "a congressional power to force states into court may have been a 'great substantive and independent' power of the sort that would have been explicitly mentioned in the Constitution, not one left out as 'incidental to those powers . . . expressly given.'" *See* Baude & Sachs, *supra* note 258, at 621–22.

263. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 14 (1997).

264. *See* CURRIE, *supra* note 152, at 14. Currie thinks the Sweeping Clause argument "mistaken," but ensuring that state officials take oaths to uphold the Constitution plausibly falls within Congress's power to secure those officials' commitment to perform the many duties imposed on them under federal law that help carry the federal government's powers into execution, such as their many responsibilities in connection with federal elections.

265. *Id.*; Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1489 (2007).

266. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861).

judgement that states might not comply with their constitutional duties without such legislation.[267] This suggests that if interstate immunity has constitutional stature, then concerns that interstate immunity would not be properly operationalized without Congress's involvement might be the predicate for congressional authority to enact operationalizing legislation that does so.

An obvious difference between extradition and interstate immunity is that only the former is addressed by constitutional text. But this should not matter for present purposes. If our country's rule of constitutional recognition determines that interstate immunity is of constitutional stature, there is no good reason why implied congressional authority to operationalize it should be less available just because constitutional text is not its source. Our constitutional jurisprudence does not know of two classes of constitutional principles, depending on whether a principle can be tied to constitutional text. Indeed, constitutional principles not tied to constitutional text can be more robust—in the sense of being less susceptible to being overridden by competing considerations—than are principles that are grounded in constitutional text.[268]

Nor should such congressional authority depend in principle on a court's first having made a constitutional determination concerning what interstate immunity entails. After all, nonjudicial institutions can be the source of implied constitutional powers and limits. For example, the Supreme Court's "historical gloss" jurisprudence reflects the understanding that Congress and Presidents together can augment presidential powers beyond Article II's specifications.[269] Powerful epistemic and functional reasons support historical gloss.[270] Presidents are well situated to discern necessary powers that the uncompleted Constitution did not specifically grant them as they are faced with the real-world task of functioning as effective Presidents, while concerns of presidential self-aggrandizement are checked by historical gloss's requirement of congressional acquiescence.[271]

The lesson from historical gloss (that nonjudicial institutions might serve as the first movers to make the Constitution more complete in respect of presidential powers) carries over to interstate immunity. Insofar as nonjudicial

267. *Id.* at 105 (explaining why federal legislation was necessary to ensure "official communications between States, and the authentication of official documents").

268. For example, while the atextual anticommandeering principle is categorical, states may substantially impair contracts if there is a "significant and legitimate public purpose behind the regulation" despite the fact that constitutional text provides that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts." *See* U.S. CONST. art I, § 10. *Compare* Printz v. United States, 521 U.S. 898, 905 (1997) (acknowledging that "there is no constitutional text speaking to th[e] precise question" of whether the federal government can commandeer state executive officials," yet "categorically" concluding that "no comparative assessment of the various interests can overcome th[e] fundamental defect" of a federal law that "direct[s] the functioning of the state executive"), *with* Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) ("If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . .").

269. *See supra* text accompanying note 229.

270. *See* Bradley & Siegel, *supra* note 251, at 23–31.

271. *Id.*

federal institutions have epistemic and functional advantages vis-à-vis courts in the domain of horizontal federalism, such nonjudicial institutions likewise might serve as the first movers in formulating completions for undecided horizontal-federalism questions. An interstate immunity statute would require joint action by Congress and the President, two federal institutions that are attuned to nationwide concerns like horizontal federalism. Because Congress is composed of representatives from all the states, Congress also can be expected to take account of the states' interests as well as federal interests.[272] And because federal legislation requires the involvement and support of so many federal officials, constitutional omissions filled by legislation have substantial democratic pedigree.[273] For these reasons, the federal political branches conceivably might be well suited to enacting a statute that determines and operationalizes the rules of interstate immunity.

At the end of the day, whether nonjudicial institutions have epistemic and functional advantages over courts in respect of interstate immunity that would justify their serving as the first movers is an empirical question. The analysis below in Subpart C identifies reasons to think otherwise: that courts may be the superior first movers when it comes to interstate immunity. Even so, as the Article explains, Congress would have authority on the grounds identified in this Subpart to revise any judicially created provisional solutions.[274] Even if nonjudicial institutions are not suitable first movers, Subpart C explains why courts should not be the *only* (i.e., the first-*and-final*) movers.

B. INTERSTATE AGREEMENT

Our constitutional system allows the states to address common problems together and to resolve interstate disputes through negotiation and agreement.[275] Even where the federal government unquestionably has authority to resolve such matters, the Court long has expressed a "preference that states settle their controversies by mutual accommodation and agreement" through interstate agreements and compacts.[276] So it does not follow from the previous Subpart's analysis (in support of the conclusion that Congress has authority to enact an interstate immunity statute) that states would be without power to participate in determining the rules of interstate immunity.

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272. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985).

273. Furthermore, the dangers of institutional self-aggrandizement present in Justice Frankfurter's allowance of extensions of presidential power are absent in respect of a federal interstate immunity statute.

274. *See infra* Part V.C.

275. *See*, *e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 454 (1978) (upholding agreement entered into by twenty-one states on ground that it fell outside the scope of the Compact Clause).

276. Florida v. Georgia, 138 S. Ct. 2502, 2509 (2018) (internal quotations omitted). Likewise, although the Court has jurisdiction to resolve interstate border disputes, it long has expressed its preference for "arrangement and settlement between the States themselves, with the consent of Congress." New Jersey v. New York, 523 U.S. 767, 811–12 (1998) (internal quotation marks and citation omitted).

The proposition that an interstate agreement or compact might address interstate immunity is not inconsistent with the argument made in Part IV.B that interstate immunity is inherently and exclusively federal law. The Constitution's Compact Clause provides that "[n]o State shall, *without the Consent of Congress* . . . enter into any Agreement or Compact with another State."[277] Congressional approval transforms an interstate agreement into federal law.[278] Thus, akin to Article V's mechanism for amendment, the Compact Clause gives the states a direct role in creating a specific kind of federal law.

The Compact Clause has long been interpreted as not applying to all interstate agreements, and as not prohibiting agreements outside its purview.[279] Accordingly, interstate agreements not coming within the Compact Clause do not require congressional approval and have the status of state law.[280] Hence, the question for present purposes is whether interstate immunity falls within the Compact Clause. Although the Supreme Court has not yet directly confronted the question, four Justices in *FTB* seemed to think it would.[281]

I agree with those four Justices, though the conclusion is not completely free from doubt on account of the Court's unsettled Compact Clause jurisprudence, which contains three distinct tests for determining what agreements require congressional approval. The first, descending from Justice Field's nineteenth-century formulation, is that "[t]he application of the Compact Clause is *limited to* agreements that are 'directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.'"[282] Because this suggests the clause is exclusively concerned with vertical federalism, an interstate agreement concerning interstate immunity would not seem to require congressional approval.

But Justice Field's formulation is unduly restrictive insofar as it would not include interstate agreements that impact relations among the states. An 1855 decision by the Court gestured in the direction of a broader approach by including the suggestion that the Compact Clause's purview includes agreements that affect horizontal federalism. That decision explained that the Compact Clause's requirement of congressional approval "prevent[s] any compact or agreement between any two States, *which might affect injuriously the interests of the others*."[283] The Supreme Court approvingly quoted this

277. U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

278. Cuyler v. Adams, 449 U.S. 433, 440 (1981).

279. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503, 517–18 (1893); New York v. O'Neill, 359 U.S. 1, 11 (1959).

280. *See O'Neill*, 359 U.S. at 6.

281. *See* Franchise Tax Bd. v. Hyatt (*FTB*), 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

282. New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (emphasis added) (quoting *Virginia*, 148 U.S. at 519); *see* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 175–76 (1985) (discussing when the Compact Clause should be applied).

283. Florida v. Georgia, 58 U.S. 478, 494 (1855) (emphasis added).

language in a 2018 decision.[284] An agreement concerning interstate immunity would readily satisfy this standard because of the many ways (fully explained in Part IV.B) that interstate immunity implicates horizontal federalism.

Without purporting to alter its prior holdings, the 1981 case of *Cuyler v. Adams* provided yet another test for determining what interstate agreements require congressional approval under the Compact Clause.[285] *Cuyler* held that interstate agreements fall under the Compact Clause if "the subject matter of that agreement is an appropriate subject for congressional legislation."[286] By its terms, this formulation is not restricted to agreements that threaten vertical federalism by usurping federal power (i.e., Justice Field's approach). And indeed, there was no suggestion in *Cuyler* that the agreement that was at issue in the case, which concerned criminal law matters within the scope of state law, risked encroaching on the federal government's powers (as Justice Field's formulation required). *Cuyler* concluded that the agreement before it came within the Compact Clause only because there was "[c]ongressional power to legislate in th[e] area."[287] The three *dissenters* channeled Justice Field, arguing that the agreement lay outside the Compact Clause because it did not "threaten[] the just supremacy of the United States or enhance[] State power to the detriment of federal sovereignty."[288]

While there are strong arguments that an interstate immunity compact would satisfy *Cuyler* on account of the reasons provided in the previous Subpart,[289] there are reasons to be skeptical of *Cuyler*'s test. Critical analysis discloses serious deficiencies, and points to a superior set of criteria for identifying the interstate agreements that require congressional approval. The reformulation advocated here would remove any remaining doubts as to whether an interstate immunity agreement would require approval.

Cuyler's test is simultaneously overly broad and too narrow, suggesting a fundamental conceptual mistake. As to overbreadth, it demands congressional approval for too many interstate agreements on account of the regulatory overlap between the federal government and the states. Jurisdictional redundancy is a common feature of our constitutional system due to its many potential benefits.[290] *Cuyler*'s approach threatens at least one of these. Jurisdictional redundancies can serve as a failsafe in the event that one of the empowered

284. Texas v. New Mexico, 138 S. Ct. 954, 958 (2018); *see* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 ("The relevant inquiry must be one of impact on our federal structure."); *cf. U.S. Steel Corp.*, 434 U.S. at 485 (White, J., dissenting) (suggesting Congress's consent might take account of whether an agreement is "likely to disadvantage other states to an important extent").

285. 449 U.S. 433, 440 (1981).

286. *Id.* (emphasis added). Before reciting its new formulation, *Cuyler* approvingly quoted Justice Field's approach. *See id.* at 438.

287. *Id.* at 442 n.10.

288. *Id.* at 451 (Rehnquist, J., dissenting).

289. *See supra* Part V.A (discussing the Sweeping Clause and implied authorization to implement the Constitution).

290. *See* Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1121–34 (2010).

institutions does not act.[291] A requirement that both institutions act, as *Cuyler*'s test does, literally destroys a jurisdictional redundancy's failsafe benefit. For this reason, federal regulatory power in a particular domain should not on its own trigger a requirement of congressional approval of state agreements that touch on that domain.

Cuyler's formulation is also unduly narrow insofar as it might exclude some deserving interstate agreements from congressional approval. For example, for the scholars who argue that Congress is without power to enact an interstate immunity statute,[292] *Cuyler* would mean that an interstate compact concerning interstate immunity would not require Congress's consent. But on account of the many respects in which interstate immunity affects and indeed helps construct our system of horizontal federalism,[293] the notion that federal institutions have no role to play in setting the rules of interstate immunity must be wrong.

Cuyler's underbreadth is attributable to its linkage of agreements that require congressional consent to Congress's enumerated legislative powers. This is neither the only nor most obvious interpretation of the Compact Clause. Because the Compact Clause is its own constitutional provision, what qualifies as an "Agreement or Compact" requiring congressional approval need not depend upon Congress's power under other constitutional provisions, but can stand on its own. Treating the Compact Clause in this fashion would make it akin to the treaty power, which long has been understood as authorizing treaties for subject matters beyond Congress's enumerated legislative powers.[294] And there are other examples where the Constitution empowers Congress to partner with other institutions to jointly create federal law that Congress could not have enacted on its own. For example, only a special partnership of Congress and the states can amend the Constitution[295] or redraw a state's borders.[296]

In short, *Cuyler*'s fundamental conceptual mistake is its assimilation of congressionally approved compacts into the category of legislation. Approved compacts are better conceptualized as their own distinct category of federal law. As such, Congress might lack constitutional power to directly regulate matter *x* by enacting a statute, yet have supervisory approval authority to give (or withhold) its consent over an interstate agreement concerning that precise matter *x*. Approved compacts are federal law that are created by a unique federal-state partnership. On this understanding, matters outside of Congress's

291. *See id.* at 1132–34.

292. *See supra* note 258 (describing the position advocated by Professors Baude and Sachs).

293. *See supra* Part IV.B.

294. *See* Missouri v. Holland, 252 U.S. 416, 433–34 (1920). Likewise, the "general Welfare" that Congress can pursue under its Spending Clause powers is not restricted to its other enumerated legislative powers. *See* United States v. Butler, 297 U.S. 1, 66 (1936).

295. *See* U.S. CONST. art. V.

296. *See id.* art. IV, § 3, cl. 1; Green v. Biddle, 21 U.S. (8 Wheat.) 1, 87 (1823) ("[A]lthough Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia . . . .").

enumerated legislative powers still might require congressional approval under the Compact Clause if those matters become the subject of an interstate agreement.

On the approach advocated here, interstate agreements that risk either interfering with the federal government's supremacy or substantially affecting the states' relationships with one another require congressional approval,[297] regardless of whether Congress has power to directly regulate the compact's subject matter on its own through legislation. On such an understanding, an interstate agreement concerning interstate immunity unquestionably would require congressional approval on account of interstate immunity's multiple intimate connections to horizontal federalism.[298]

C. COURT-GENERATED DEFAULT RULES

In the aftermath of *FTB*, there is a judicial rule concerning interstate immunity that is binding on all courts, federal and state. But because one of this Article's objectives is to showcase the potential for shared agency that is built into our constitutional system, this Subpart shows the sources of federal and state court authority to have declared the rules concerning interstate immunity before the Court decided *FTB*. This Subpart then explains why *FTB*'s rule is best understood as a default constitutional rule that can be modified by either of the nonjudicial mechanisms identified in Subpart A (federal statute) and Subpart B (interstate compact).

For so long as interstate immunity remained unaddressed by either statute or interstate agreement, and before the Supreme Court decided *FTB*, courts had the power to provide answers when they confronted an unconsenting state's defense that it was immune from suit. Because interstate immunity concerns one state's suability in a sister state's court, such claims were most frequently presented in state courts. But interstate immunity questions also could have arisen in federal courts. For example, a federal district court confronted with a defense of issue or claim preclusion might have had to consider whether the state court that issued the potentially preclusive judgment had subject matter jurisdiction on account of interstate immunity.[299] Whether provided by state or federal courts, those courts' interstate immunity rulings would have had the status of federal law just because, as explained earlier, interstate immunity is

297. *See supra* note 274. Interstate compacts that require congressional authorization, but have not received such approval, have no legal effect, as they are neither federal nor state law. As regards federal law, unapproved compacts are analogous to bills. With regard to state law, states are without authority to create state law for agreements that fall under the Compact Clause on account of constitutional preemption. *See* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1028 (1967).

298. *See supra* Part IV.B.

299. *Cf.* Durfee v. Duke, 375 U.S. 106, 116 (1963) (holding that the federal court in Missouri had the duty to inquire whether the Nebraska courts had jurisdiction and was correct in subsequently ruling that the claim was precluded).

exclusively federal law.[300] And the Supreme Court had jurisdiction to review all courts' interstate immunity rulings.[301]

What was the source of the state and inferior federal courts' authority to create interstate immunity rules on a case-by-case basis in the absence of positive federal law? For federal courts, deciding if an unconsenting state was immune from suit would have been part of the federal judicial power under Article III of the Constitution to decide cases or controversies in which a state is the defendant.[302] For state courts, deciding if an unconsenting state was entitled to immunity would have been part of its adjudicatory powers under the organic state law that established it. Such state court power might seem surprising at first, in light of this Article's argument that interstate immunity is federal constitutional law. But it should not be: it is widely accepted that when state courts hear cases in which federal law arises, they can interpret federal statutes, create federal common law, and even propound answers to unanswered federal constitutional questions.[303]

The interstate immunity rules created by state and federal courts might be described as either federal common law or as constitutional default rules. Federal common law would be the most natural designation, were interstate immunity nonconstitutional federal law. In that circumstance, courts' case-by-case adjudications in a domain Congress can but has not regulated would generate common law rules that Congress at some later point could either codify or revise. But if interstate immunity belongs to the constitutional domain, as this Article has argued,[304] it would be more natural to describe judicial decisions concerning interstate immunity as constitutional rulings.

The political branches would still have a role in answering interstate immunity so long as judicial constitutional rulings were treated as constitutional default rules akin to dormant Commerce Clause doctrine. Because federal statutes may permit actions that have been declared unconstitutional under the dormant Commerce Clause,[305] courts' dormant Commerce Clause rulings can be accurately described as default rules that may be modified by Congress.[306] The Court's full faith and credit jurisprudence likewise is subject to

300. *See supra* Part IV.B.

301. 28 U.S.C. § 1257(a) (granting the Supreme Court power to review decisions by state courts "where any . . . immunity is specially set up or claimed under the Constitution").

302. *Cf.* Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 441 (1958) ("[U]nder Article III the Supreme Court is given power to decide controversies between states, but the Constitution does not state the rules by which such controversies are to be decided.").

303. *See generally* Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005) (discussing the making of federal common law by state courts).

304. *See supra* Part IV.B.

305. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 424–25 (1946).

306. *See* Metzger, *supra* note 265, at 1475; John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 838–53 (2006).

congressional revision,[307] and Professor Gillian Metzger has persuasively argued that Congress's "primary control over interstate relations" means that Congress can modify judicial horizontal federalism rulings in other domains as well.[308] All of this suggests that because of interstate immunity's intimate connections with horizontal federalism, courts' interstate immunity rulings should be statutorily modifiable. (The next Subpart provides additional reasons why judicial interstate immunity doctrines should be understood as constitutional default rules that can be codified or modified by federal statutes or congressionally approved interstate agreements.[309])

The understanding that all courts, state and federal, would have been generating a single body of federal law should have impacted how they went about determining their answers to interstate immunity.[310] When creating state law, state courts are free to pursue only their own state's parochial interests.[311] But when state courts create federal law, they must seek to advance federal interests. This Article earlier explained how interstate immunity implicates the nature of our federal Union, the meaning of state and national citizenship, and the health of the interstate system. Courts formulating interstate immunity rules should have considered how the rules they contemplated endorsing would have affected all these federal interests.

Moreover, when state courts generate state common law, they need not take account of the decisions of other states' courts because they are creating the law of only their state.[312] Not so when state courts decide questions of federal law.[313] Akin to federal district courts' relations to one another when interpreting federal statutes, state courts developing rules of interstate immunity would have to accord persuasive force to the decisions of other courts. The emergence of a sufficiently uniform rule across a sufficiently large number of other courts would count as a reason, perhaps even a decisive one, for a late-moving state court to join the approach that a majority of jurisdictions have taken.

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307. *See* Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional:* Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 944–61 (2006).

308. *See* Metzger, *supra* note 265, at 1475–76 (concluding that "when wielding this interstate authority Congress is not limited by judicial interpretations of Article IV").

309. *See infra* Part V.D.

310. This is yet another ground for rejecting Baude and Sachs's conclusion that *Hall* should not be disturbed. *See* Baude & Sachs, *supra* note 258, at 621–22. A defining characteristic of general law was doctrinal uniformity across jurisdictions, and this is lost if interstate immunity is state law. *See* Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1021 (2015).

311. Subject only to the relatively modest restrictions from the dormant Commerce Clause and Article IV's Privileges and Immunities Clause.

312. This is true post-*Erie*, at least. In the pre-*Erie* era of general law, what today is called common law was understood differently. *See* Rosen, *supra* note 310, at 1026–28; Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 923 (2013).

313. Although federal law occasionally has varying application across the country, interstate immunity rules are not suitable candidates. *See generally* Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999) (discussing geographical constitutional nonuniformity).

D. SHARED AGENCY

Subparts A though C identified the many institutions with roles to play in answering the constitutional omission of interstate immunity: all branches of both the state and federal governments. This next Subpart begins by identifying shared agency's institutional synergies, and then explains how shared agency's norms should discipline all institutions' decisionmaking when they work to formulate the rules of interstate immunity.

1. Institutional Synergies

There are several pathways for state institutions to help fill in the constitutional omission of interstate immunity. As a preliminary matter, although Congress theoretically could displace state participation by preemptively enacting a federal statute, this seems unlikely. It is doubtful that Congress would be so motivated or would know what interstate immunity rules to codify. A constitutional architecture that allows the states to be the first movers in generating federal law is functionally sound for issues like interstate immunity that more directly affect states, and as to which states can be expected to have more familiarity (at least initially).

But because of the many ways that interstate immunity impacts federal interests, states should not have the final word. The potential for shared agency that is built into our constitutional system operationalizes this imperative: the Supreme Court has appellate authority to review courts' interstate immunity rules; the federal political branches have power to statutorily revise courts' interstate immunity doctrines; and Congress has supervisory authority to approve interstate agreements that codify or modify judicial interstate immunity doctrines. Federal institutions are better situated than the states to take account of how the interstate effects of state-generated interstate immunity rules impact horizontal federalism. Yet Congress is unlikely to ignore interstate immunity's importance to the states since its members are elected at the state level.[314] For these reasons, subjecting the state institutions' first-mover resolutions to federal endorsement or modification is functionally sound.

Shared agency also allows a division of labor that promises epistemic benefits. Courts may be best suited to take the first cut at generating interstate immunity answers since they are frontline responders to the myriad questions concerning interstate immunity that legislators would be hard-pressed to anticipate, much less answer. An additional advantage is that the judiciary can draw on the perspective of the executive branch officials who write briefs addressing interstate immunity questions. Further, addressing interstate immunity questions as they arise in actual disputes may be epistemically beneficial insofar as interstate immunity, as is true of nearly all legal principles,

314. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985) (discussing how congressional members are elected on a state level).

likely would be defeasible.[315] On many accounts, armchair theorizing is a poor perch for determining when one commitment (such as a state's immunity from suit) should be set aside in favor of countervailing commitments (such as ensuring that state *A* behaves responsibly when it acts in state *B*, and allowing citizens from state *A* who are harmed by state *B* to recover if state *A*'s law aims to disincentivize and compensate in such circumstances). Defeasibility judgments may best be formulated in real time when a commitment concretely confronts countervailing commitments and considerations.[316]

There also is an important functional advantage to having courts serve as the first movers in answering interstate immunity. Exclusive reliance on the political branches might undersupply the optimal quantity of rulemaking because both interstate agreements and legislation require majorities or supermajorities of a sizable number of decisionmakers. But unless a judge somehow can dodge a defendant state's interstate immunity defense, that single judge must answer it. And even if the question goes up on appeal, the number of decisionmakers involved will be far smaller than what is required for generating legislation or an interstate agreement.

Any inertia keeping the political branches from taking the lead may be more readily overcome after courts have generated interstate immunity rules, particularly if the political branches disagree with what the courts have decided. And the political branches will be in a superior epistemic position than before the courts had acted to appreciate interstate immunity's benefits and costs. With these enhanced understandings in hand, members of the political branch may be better situated to negotiate either a statute or interstate agreement than before courts had been involved.

Furthermore, shared agency is the most democratic process for answering constitutional omissions. Courts' many epistemic advantages vis-à-vis legislatures does not mean that judges' answers will be the result of cold logic. While concrete controversies in courts can clarify the tradeoffs that must be made among competing commitments,[317] judges necessarily will have to exercise agency in choosing which commitment should prevail in the case before them. And as interstate immunity illustrates, those decisions might be substantially constitutive of the demos' political identity; for instance, they might help determine the nature of state and national citizenship.[318] Under foundational democratic grounds, the subjective judgments that inhere in such exercises of agency should not be made only by judges, but should come from a

315. *See* Sachs, *supra* note 88, at 1838–48 (discussing defeasibility in law); Rosen, *supra* note 31, at 1596–1603.

316. *See generally* WILLIAM DAVID ROSS, FOUNDATIONS OF ETHICS – THE GIFFORD LECTURES: OVER 100 YEARS OF LECTURES ON NATURAL THEOLOGY (1939) (discussing the concept of prima facie obligations); JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004) (discussing moral particularism).

317. Both what those competing considerations might be, and each consideration's normative significance, which typically depends on factual particulars. *See* Rosen, *supra* note 31, at 1600–03.

318. *See supra* Part IV.B.

wider and more democratically representative set of decisionmakers. Shared agency's multi-institution decisionmaking, which for interstate immunity includes the states as well as all branches of the federal government, broadens the set of participants that have roles to play in setting interstate immunity rules. Shared agency bests agency-denial that *sub rosa* vests decisionmaking exclusively in courts—as fairly describes *FTB*.[319] Under shared agency, political institutions can endorse or revise courts' provisional resolutions.

Shared agency's superior democratic pedigree not only has process advantages, but also promises to generate substantively superior outcomes than does judicial unilateralism. Political institutions have far more control over their agendas than do courts, which can issue binding holdings only in the case that happens to be before them. Political institutions have almost infinite control over their agendas; they can decide for themselves what set of issues should be addressed in a single piece of legislation or interstate agreement. And they can then negotiate, bargain, and trade off among any of those issues as they seek consensus.[320] Because of consensus's peculiar importance to constitutional decisions,[321] the political branches' superior institutional capacities for agenda-setting and trading off to reach a consensus (in the form of either a federal statute or a congressionally approved interstate agreement) is a critical functional advantage that shared agency has relative to agency-denial that effectively vests decisionmaking only in courts (as in *FTB*).

Shared agency's many advantages for completing our uncompleted Constitution gives rise to another reason why judicial interstate immunity rulings should be constitutional default rules.[322] As previously explained, there are powerful epistemic and functional reasons for courts to be the first institutions to fill in the constitutional omission of interstate immunity. But unless their resolutions are treated as constitutional default rules, our country's practice of strong judicial review means that courts will also be the *last* institutions to weigh in.[323] They should not be. For the foundational democratic and practical reasons discussed above, courts should not be the only institutions that fill constitutional omissions. If the political institutions are also to participate so that an omission can be filled through shared agency, courts' initial resolutions must have the status of either constitutional default rules or federal common law.[324] Because interstate immunity is best understood as belonging to

319. *See supra* text accompanying notes 49–69.

320. *See* Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L.J. 7, 21–25 (2010).

321. *See* Rosen, *supra* note 42, at 2805–11, 2831–35.

322. *See* Metzger, *supra* note 265, at 1469, 1475.

323. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (criticizing judicial review).

324. For additional reasons that are tied specifically to horizontal federalism, see *supra* text accompanying notes 281–85.

the constitutional domain, courts' initial rulings concerning interstate immunity should be treated as constitutional default rules.

Additional support for the proposition that courts' interstate immunity rulings are constitutional default rules comes from the fact that constitutional text itself provides many default rules.[325] For example, the Constitution provides that state legislatures are to prescribe the times, places, and manner of holding federal elections (unless a federal statute otherwise provides).[326] It vests appellate jurisdiction in the Supreme Court (but allows Congress to make exceptions),[327] bars federal officeholders from accepting presents or emoluments (unless Congress consents),[328] and sets the time and date of Congress's assembly (unless Congress "appoint[s] a different day").[329] The existence of constitutional text allowing Congress to modify constitutional requirements fortifies the proposition that judicial fill-ins for an omission might be modified by the political branches. After all, if requirements in constitutional text can be default rules, it would seem to follow a fortiori that requirements announced in judicial opinions also might be.[330]

For these reasons, *FTB*'s interstate immunity holding is best understood as a default rule that might be modified by either a federal statute or a congressionally approved interstate agreement. Under a shared-agency approach, the degree of deference that is properly given to judicial default rules turns substantially on an assessment of whether the judicial solution reflects courts' comparative epistemic and functional advantages relative to an incompletion's other potential completers. Insofar as *FTB*'s answer to interstate immunity relied on an unpersuasive agency-denying invocation of history,[331] *FTB*'s default rule does not merit special respect or deference from the political branches.

2. Shared Agency's Norms (Take Two)

Part I argued that an uncompleted democratic constitution should be made more complete by a "tempered" politics that seeks consensus solutions through persuasion and compromise, or resolutions that the losing side plausibly might endorse when consensus is not possible.[332] As I have explained elsewhere, tempered politics is operationalized by two families of shared-agency norms:

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325. Professor Metzger's illuminating article focused only on constitutional default rules in horizontal federalism. *See* Metzger, *supra* note 265, at 1475–77.

326. U.S. CONST. art. I, § 4, cl. 1.

327. *Id.* art. III, § 2, cl. 2.

328. *Id.* art. I, § 9, cl. 8.

329. *Id.* amend. XX, § 2.

330. And yet additional support comes from *FTB* itself, for the linchpin of its analysis was the analogy it drew between interstate immunity and state border disputes. *See supra* Part II.B. After all, federal courts generate federal common law to resolve state border disputes, which can then be revised by Congress. *See, e.g.*, New Jersey v. New York, 523 U.S. 767, 811 (1998).

331. *See supra* Part II.

332. *See supra* text accompanying notes 39–46.

norms that call for *consistency* and *shared deliberation*.[333] If the constitutional omission of interstate immunity is to be filled not just by multi-institutionalism simpliciter but also shared agency, then all participating actors—both the state and federal institutions—must engage in a tempered politics by respecting the norms of consistency and shared deliberation.

Consistency comprises three norms that restrict the range of options that qualify as candidate completions. A *reciprocity* norm limits candidate completions to resolutions as to which it would "at least [be] reasonable for others to accept . . . as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[334] Complementing reciprocity's requirement that participants take account of others' perspectives, the *compatibility* norm imposes an internal consistency requirement: each participant's candidate completions across the project must be logically capable of being pursued all together.[335] In addition to screening out candidate completions, the compatibility norm's insistence that participants consider how candidate completions fit with other parts of the constitutional project guides the selection of the completion among candidate completions. Finally, because plans must remain relatively stable over time for shared agency to be effectively exercised, shared agency includes a *temporal* consistency norm.[336]

The consistency norms are necessary but not sufficient to achieve tempered politics. This is because even if a numeral majority's completion satisfied the consistency norms, the majority's unilateral adoption of it would be an instance of brute political force. The second family of norms requires a *shared deliberation* among participants when filling in the plan's details, with the end of achieving contemporary consensus or potential future agreement (via endorseability).[337] Shared deliberation requires communication in which participants both aim to influence others and are open to being influenced.[338] Genuine engagement with the opposition, rather than ignoring or preemptively dismissing them, reflects the fraternal political relations among citizens that a stable constitutional democracy both fosters and requires.[339] The shared-deliberation norms try to bring about a communicative exchange in which all participants can "reason together in a way that involves a common ground of shared commitments to treating certain considerations as mattering in [their] shared deliberation."[340] The norms of shared deliberation create favorable

333. *See* Rosen, *supra* note 12; Rosen, *supra* note 42, at 2820–35.

334. Rosen, *supra* note 42, at 2821–22 (quoting JOHN RAWLS, THE LAW OF PEOPLES 136–37 (1999)). For an elaboration of what reciprocity entails, see *id.* at 2820–26.

335. *See* BRATMAN, *supra* note 12, at 15–16, 22–23; Rosen, *supra* note 42, at 2824–26.

336. *See* BRATMAN, *supra* note 12, at 15, 21–22.

337. *See* Rosen, *supra* note 42, at 2826–30 (fleshing out the requirements of "communicative exchange"); BRATMAN, *supra* note 12, at 132–34.

338. *See* Rosen, *supra* note 42, at 2826–30.

339. *See id.* at 2829.

340. BRATMAN, *supra* note 12, at 132.

conditions for reaching consensual resolutions through some mix of persuasion and compromise.[341]

Finally, each agent is constrained by her role in the project. In democratic constitutionalism, that role is largely determined by the institution to which the agent belongs.[342] Courts, legislatures, executives, and the states are distinct institutions with distinctive roles.[343] Distinctive roles are an artifact of shared agency's division of labor among agents. Division of labor is among the features that make shared agency so excellent a process for making uncompleted projects more complete.

3. Application

The consistency norms narrow the range of candidate resolutions for a constitutional omission. For example, reciprocity disqualifies a rule that would immunize the forum state from suit in sister states but allow suits against sister states in its own courts; it simply would not be reasonable to expect that other states would accept that pair of rules. Returning to the hypotheticals propounded in Part IV.A,[344] if a decisionmaker thinks Community Health can be sued in Texas in the first hypothetical, reciprocity would preclude her from claiming immunity in hypothetical two's tort suit in New Mexico, unless there were reciprocity-compliant reasons that could justify it. While shared agency's temporal consistency norm does not prevent good-faith changes in view over time, it precludes unprincipled, self-serving ones.

The compatibility norm requires internal consistency among a participant's candidate rules for interstate immunity, her positions on related issues, and the constitutional system's settled features. For instance, a decisionmaker's positions on the adjudicatory jurisdiction question of interstate immunity and the legislative jurisdiction question of states' extraterritorial regulatory authority must be capable of logically coexisting. The compatibility norm would disallow a participant in the shared-agency project of constitutionalism from both embracing a categorical rule of interstate immunity and some expansive understandings of extraterritorial regulatory authority. Likewise, compatibility disqualifies the claim that a categorical rule of interstate immunity is the only qualifying candidate completion. After all, the 1789 Constitution allowed unconsenting states to be sued in federal court under certain circumstances,[345] and Congress can abrogate state sovereign immunity pursuant to its Section 5 powers in the Fourteenth Amendment.[346]

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341. *See* Rosen, *supra* note 42, at 2826–31.

342. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

343. Citizens, nongovernmental organizations, corporations, and noncorporate entities also may have distinctive roles to play.

344. *See supra* text accompanying notes 234–36.

345. *See supra* text accompanying notes 209–11.

346. Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996).

While the consistency norms narrow the range of plausible candidate interstate immunity rules, they do not point to a unique solution. Instead, the shared deliberation norms encourage all participants to reason together from their common ground of constitutional commitments to reach consensus completions if possible, and to identify plausibly endorsable solutions if not.

As regards interstate immunity, there are, roughly speaking, three candidate completions. First, while compatibility forecloses any claim that the states' inherent dignity categorically precludes them from being sued without their consent,[347] it might plausibly be claimed that a categorical rule of interstate immunity best operationalizes the relations that should pertain among the states as a matter of horizontal federalism. A second, completely opposite possibility is that immunity is in deep tension with republican government (much as Justices James Wilson and John Jay both argued[348]), so much so that any remaining omissions regarding immunity (like interstate immunity) should be filled by a no-immunity rule. The third is that horizontal federalism is best realized by a presumptive but defeasible rule of interstate immunity that takes account of the real-world effects that one state can have in another.

Because the third possibility is more complex than the first two, it is worth exploring in greater detail. Defeasibility is commonplace in law, including constitutional law. For example, every constitutional right that triggers strict scrutiny is defeasible insofar as the right can be regulated in pursuit of a compelling government interest. More generally, defeasibility reflects the conclusion that a presumption may be overridden by sufficiently important countervailing considerations.[349]

The three hypotheticals in Part IV.A illustrate several meaningfully different kinds of effects one state can have in another state.[350] The tortfeasing Texan officials in hypothetical two cause harms in New Mexico that Texas likewise recognizes as harms; Texas tort law, after all, also compensates and deters. If both New Mexico and Texas have waived immunity in their own courts for such suits, then there is an exceedingly strong case for defeasibility as regards interstate immunity so that the harmed New Mexican could sue Texas in a New Mexican court. But if New Mexico has not waived its own immunity for tort suits in its own courts, the case for allowing a New Mexico court to force Texas to participate as a defendant is substantially weakened. New Mexico's unwillingness to compensate and deter in parallel circumstance reduces the measure of the countervailing compensation and deterrence interests, and the horizontal federal interest of interstate harmony counts against allowing New Mexico to self-interestedly treat Texas differently than itself. A harder case is presented if Texas caps its own liability at a lower amount than New Mexico

347. *See supra* text accompanying notes 209–11.
348. *See supra* text accompanying notes 82–88.
349. *See* Rosen, *supra* note 31, at 1555–87.
350. *See supra* text accompanying notes 234–36.

law does. The shared deliberation norms establish favorable conditions for conducting a discussion that hopefully can lead to constitution-worthy answers to the many constitutional omissions that hypothetical two helps identify.

Hypotheticals one and three illustrate different types of interstate effects. New Mexico law is in tension with (if not undermines) Texas's goal of restricting abortions, and Texas's law is in tension with (if not undermines) New Mexico's goal of serving as an abortion sanctuary. In short, the effects that each state has in the other under hypotheticals one and three arise from each state's having made radically different public policy choices. As explained earlier, the answers to hypotheticals one and three will help determine where our federal system falls on the continuum of soft and hard pluralism.[351] The shared deliberation norms establish conditions favorable to our political community generating constitution-worthy answers to the question of whether our large, heterogeneous republic is better served by a horizontal federalist system that permits hard pluralism, or only soft pluralism.

CONCLUSION

This Article's deep dive into interstate immunity is but the first installment of a larger project that elucidates shared agency's application to our still-uncompleted Constitution. Though shared agency's operational details vary depending on the particular incompletion (for example, omissions concerning separation of powers cannot be filled by interstate agreements, whereas the omission concerning interstate immunity can be), the framework's central insight is unwavering: making an uncompleted constitution more complete necessarily requires agency, and shared agency by multiple institutions surpasses both agency-denial and judges legislating from the bench for epistemic, functional, and foundational democratic reasons.

351. *See* Rosen, *supra* note 238, at 731–40.

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