



# Shedding New Light on Old Problems

SINCE JOINING THE VIRGINIA FACULTY FROM PRIVATE practice in 1998, Caleb Nelson has established himself as one of the country's leading young scholars of the issues of statutory interpretation and constitutional law now taught under the rubric of "Federal Courts." Much of his work uses history to analyze contemporary judicial doctrines related to federalism or the separation of powers. Nelson has also written important articles about both interpretive theory and *stare decisis*.

Nelson did not set out to be an academic. While he was still in law school, the *American Journal of Legal History* did publish a paper that he wrote as a

first-year student about the rise of judicial elections. But Nelson expected to spend his career in private practice. After clerking for Judge Stephen F. Williams on the United States Court of Appeals for the D.C. Circuit and Justice Clarence Thomas on the United States Supreme Court, Nelson

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headed back to his home state of Ohio, where he joined the firm of Taft, Stettinius & Hollister as an associate in the litigation department. Nelson has fond memories of his time there: “The firm gave me great work to do and great lawyers to learn from.” But he began to want to write and think about issues of his own choosing, and to analyze them without regard to their potential impact on a particular case. “I decided to enter the teaching market,” he says, “and Virginia took a chance on me—for which I’ll always be grateful.”

Nelson made a splash with the very first article that he wrote after entering the academy. As a law clerk, Nelson had thought that existing doctrine did not give courts an adequate conceptual apparatus to approach questions about federal preemption of state law. Despite the importance of these questions, they had attracted relatively little systematic attention from scholars; most existing articles simply focused on the preemptive effects of one particular federal statute or another. Nelson thought that historical research into the meaning of the federal Constitution’s Supremacy Clause might permit him to say something more general. Drawing upon long-overlooked session laws and early discussions of preemption, Nelson made two discoveries. First, early Americans discussed the constitutional priority of federal law over state law in the same terms that they used to discuss whether one statute repealed another. Second, the Supremacy Clause’s final phrase (“any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”) was an example of what eighteenth-century lawyers called a “*non obstante*” provision, which served a very particular function within the jurisprudence of repeals. For legal draftsmen of the founding era, such provisions instructed interpreters not to construe one law narrowly simply in order to avoid conflicts with another law.

In “Preemption,” 86 *Va. L. Rev.* 225 (2000), Nelson reported these discoveries and the inferences that he drew from them. In keeping with the traditional framework for repeals, Nelson argued that the Supremacy Clause does not itself displace all state laws whose enforcement might have the practical effect of hindering the policies behind a federal statute;

while particular federal statutes may well be read to accomplish this sort of “obstacle preemption,” any such inference is properly seen as a matter of statutory interpretation rather than as an inevitable consequence of the Supremacy Clause. In this respect, Nelson’s analysis cut against the expansive understanding of preemption that the Supreme Court had derived from the Constitution in *Perez v. Campbell* (1971). But Nelson also argued that the *non obstante* provision in the Supremacy Clause undermined the artificial presumption against preemption advocated by some other modern courts and commentators. Nelson’s subtle and balanced analysis drew immediate attention, winning the Scholarly Papers Competition that the Association of American Law Schools sponsors for professors who have been teaching law for fewer than eight years.

Nelson revisited issues of federalism in “Sovereign Immunity as a Doctrine of Personal Jurisdiction,” 115 *Harv. L. Rev.* 1559 (2002). Modern debates about the constitutional status of state sovereign immunity have tended to feature two contrary mantras: one side emphasizes the text of Article III (which explicitly extends the federal government’s judicial power to various categories of “Cases” and “Controversies” between individuals and states), while the other side emphasizes statements made during the ratification debates by the likes of James Madison and John Marshall (who assured their colleagues that the Constitution would not expose unconsenting states to suit at the behest of individuals). Ever since *Hans v. Louisiana* (1890), the Supreme Court has accepted the views of Madison and Marshall. But it has not attempted to understand the legal basis of those views: given the language of Article III, how could Madison and Marshall possibly have taken the position that they did? To shed light on this puzzle, Nelson reexamined early discussions of sovereign immunity and discovered that they were cast in terms of the judiciary’s power over the “person” of a state. Using that discovery, Nelson sought to reconstruct the logic behind Madison and Marshall’s position.

Nelson’s research led him to conclude that their argument proceeded in two steps. As a matter of general law, many members of the founding generation believed that states were not subject to compulsory process, at

least at the behest of an individual. As a matter of constitutional interpretation, moreover, many members of the founding generation believed that the existence of a “Case” or “Controversy” within the meaning of Article III depended upon the actual or constructive presence of two adverse parties who are both subject to the court’s power. Putting these two propositions together produces the position that Madison and Marshall articulated. More generally, Nelson found substantial historical evidence that members of the founding generation who believed in sovereign immunity expected it to operate through the mechanisms of personal jurisdiction. As he noted, this analysis clears up an enduring mystery: “it explains the sense in which sovereign immunity was considered ‘jurisdictional’ and yet could be waived by the state.” But as Nelson also noted, the first step in Madison and Marshall’s logic relied upon the states’ exemption from compulsory process under the general law, and that exemption was not necessarily hard-wired into the Constitution. Nelson explored the consequences of this fact for various modern disputes about state sovereign immunity, including questions about whether the Constitution empowers Congress to abrogate the protections that Madison and Marshall had in mind.

Nelson’s analyses of both preemption and sovereign immunity took an originalist approach to constitutional interpretation, and Nelson followed them up with a more sustained exploration of some of the theoretical issues raised by this approach (“Originalism and Interpretive Conventions,” 70 *U. Chi. L. Rev.* 519 (2003)). Originalism often is associated with the use of eighteenth-century dictionaries and similar evidence about how members of the founding generation tended to use individual words that appear in the Constitution. As Nelson noted, however, the meaning of any legal provision depends not only on the conventional usages of individual words but also on a variety of broader linguistic conventions—some common to the English language in general, others specific to the drafting and interpretation of particular kinds of legal documents. Even though these conventions may well be prone to quicker change than the conventional usage of individual words, originalists have not thought

systematically about the kinds of linguistic conventions that bear on the “original meaning” they seek, nor have originalists systematically investigated the content of those conventions at the time of the founding. Nelson’s article marked a first step in that direction. He concluded, among other things, that the relevance of interpretive conventions builds an extra source of legal indeterminacy into the Constitution; founding-era lawyers used somewhat different canons of construction for different kinds of legal documents, and it was not entirely clear which sets of canons the Constitution would trigger. Nelson also investigated the extent to which members of the founding generation expected the precedents that they and their successors established to “fix” the meaning of the Constitution for future generations. Although Nelson acknowledged that much more work remains to be done on the topic of founding-era interpretive conventions, his article has already been described as a “classic study” of the subject.

Some of Nelson’s more recent articles have returned to retail-level constitutional analysis, this time of the separation of powers. In “Does History Defeat Standing Doctrine?,” 102 *Mich. L. Rev.* 689 (2004), Nelson and his colleague Ann Woolhandler used nineteenth-century understandings of the difference between “public rights” and “private rights” to shed light on doctrines about standing to sue. Responding to academic criticism of the modern Supreme Court’s view that the Constitution restricts Congress’s ability to confer standing on private litigants, the article showed that the ideas behind this view have long historical roots. From the early Republic on, American jurisprudence tended to put the political branches of government in charge of seeking redress for invasions of rights held by the public as a whole. According to Woolhandler and Nelson, moreover, modern courts can properly recognize at least some limitations on Congress’s ability to transform public rights into individual interests of the sort that will support private litigation. In “Adjudication in the Political Branches,” 107 *Colum. L. Rev.* 559 (2007), Nelson went on to explore the same framework’s relevance to issues that scholars typically discuss under the rubric of “non-Article III courts.” Both the public/private distinction

and the right/privilege distinction, he argued, are deeply ingrained in the very structure of our government, to such an extent that American-style separation of powers cannot really avoid them. Not only as a matter of history but even as a matter of current doctrine, Nelson described how these distinctions help to separate the types of legal interests that Congress can authorize administrative agencies to adjudicate in a binding way from the types of legal interests whose authoritative adjudication instead requires “judicial” power.

Much of Nelson’s work uses historically grounded ideas to reveal hidden structure in current judicial practice. His recent article “The Persistence of General Law,” 106 *Colum. L. Rev.* 503 (2006), is an arresting illustration of this trait. Many modern lawyers assume that the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* (1938) eliminated any meaningful role for the concept of “general” law in the United States. But Nelson persuasively argued that state and federal courts alike still look to general jurisprudence (defined as “rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions”) for the content of many of the rules of decision that they apply. To be sure, *Erie* changed the relationship between state and federal courts; in Nelson’s words, “[w]hen a state’s highest court uses principles of general jurisprudence to resolve issues that lie within the state’s legislative competence, federal judges now accept its resolution even if they would have taken a different view of the general law,” and “[t]he converse is true when the Supreme Court of the United States draws upon general jurisprudence to resolve issues that lie within the exclusive legislative competence of the federal government.” According to Nelson, however, *Erie* “did not radically transform the source or substance of the underlying rules of decision.” Nor could it have: in Nelson’s view, the structure of our federal system effectively compels courts to continue drawing certain rules of decision from general American jurisprudence rather than from the local law of any individual state. Nelson illustrated this point with a plethora of examples from areas in which courts have understood the federal Constitution or a federal statute to displace the

lawmaking authority of individual states, but in which written federal law does not itself suggest the content of the rules of decision that the courts are supposed to apply instead.

This analysis returned Nelson to the topic of preemption, and it gave him an opportunity to make progress on one of the questions that his first article had bracketed. In discussing the extent to which federal statutes should be understood to displace state laws whose practical effects might hinder some of Congress's policy goals, Nelson's earlier article had contented itself with two relatively modest points: (1) as a matter of constitutional interpretation, the Supremacy Clause did not itself generate this sort of "obstacle preemption" automatically, and (2) as a matter of statutory interpretation, it is not true that *all* federal statutes should be read as implicitly forbidding states to enact or enforce *any* law that might get in the way of accomplishing one or more of Congress's underlying purposes. Equipped with insights from general jurisprudence, Nelson was now able to say something more concrete about the second point. In particular, Nelson argued that general American choice-of-law jurisprudence permits courts to identify what other scholars have called "policy bundles"—clusters of issues that American policymakers are presumed to treat as a package. Those policy bundles, in turn, can help courts identify some outer limits on the plausibility of inferences of obstacle preemption. "When considering matters within the same policy bundle that a federal statute addresses," Nelson explained, "courts often can plausibly impute to Congress an intention to displace certain state laws whose practical effects would hinder Congress's policies. But this intention should not lightly be presumed to reach matters outside the policy bundle[s] that the federal statute addresses...."

Overall, Nelson's scholarship reflects his desire to understand how various moving parts in American law fit together. He is intrigued by the intricate interplay of different forms of law—the relationships between state law and federal law, between doctrines of general law and written statutes or constitutions, and between judicial precedents and the sources of law that they purport to apply. He is also intrigued by the complicated



institutional structure of American government, and the overlapping allocations of responsibility among different branches and different sovereigns. Both in his research and in the classroom (where his courses in Civil Procedure and Federal Courts are renowned for both their rigor and their popularity), he seeks to organize complexity without losing its nuances. He brings to both tasks an unparalleled work ethic, a mind both disciplined and creative, and a genuine desire to follow the evidence wherever it leads. So far, it has led Nelson to make a number of important and fresh contributions to long-standing debates and has made him, at a relatively early stage in his career, one of the most important and respected federal courts scholars in the country. ❄

## EXCERPTS

## The Persistence of General Law

106 *Colum. L. Rev.* 503 (2006)

STUDIES OF AMERICAN FEDERALISM HAVE ELEGANTLY CATALOGUED the ways in which federal law can interact with the local law of individual states. Many federal rules of decision address only a few discrete questions, leaving each state free to regulate related matters as it sees fit. Other federal rules themselves incorporate local law in certain respects, so that their substance differs in different states.

Modern scholars, however, have been slower to acknowledge a different way in which federal law can piggyback on state law. Within the interstices of written federal law, courts often articulate federal rules of decision that again draw their substance from state law. Rather than tracking the local law of any single state, though, these federal rules reflect state law in general; what matters is how most states do things, not whatever the policymakers in one particular state have said.

To take just one example, consider the legal rules that determine the federal government's rights and obligations under contracts to which it is a party. Under current doctrine, no individual state is in charge of those rules; in the absence of relevant federal legislation, the governing rules are instead a matter of "federal common law." But the substance of those rules nonetheless reflects a multijurisdictional form of general American jurisprudence. As Judge Posner puts it, courts derive the legal rules applicable to government contracts from "the core principles of the common law of contract that are in force in most states" (tweaked where necessary to reflect "special characteristics of the federal government as a contracting partner").

The Supreme Court has taken much the same approach to a variety

of federal statutes that implicate background concepts of agency law, tort law, contract law, or the like. When the Bankruptcy Code refers to “fraud,” for instance, the Court has understood it to be incorporating “the general common law of torts, the dominant consensus of common-law jurisdictions.” Likewise, the Court has assumed that various modern federal statutes implicitly draw their rules of vicarious liability from “the general common law of agency, rather than ... the law of any particular State.”

For scholars who assume that the Court’s landmark decision in *Erie Railroad Co. v. Tompkins* marked the end of the very concept of “general” law, this theme in modern jurisprudence is hard to fathom—which may be why it has largely escaped comment. Properly understood, however, *Erie* does not deny the ability of lawyers and judges, drawing upon precedents and practices followed in diverse jurisdictions, to distill rules that are available for legal recognition and that are sufficiently determinate to be “law-like.” *Erie* simply altered prior views of the relationship between state and federal courts that engage in this process.

Indeed, our federal system all but requires continuing recourse to rules of general law. There are many situations in which courts and Congress alike will want to refer to some sort of national law on topics that typically are handled at the state level. Although the law of each state addresses these topics, one can certainly imagine questions as to which no individual state’s law deserves controlling weight, and on which it seems more sensible to refer to a species of general law.

Part I of this Article canvasses a variety of legal areas in which modern courts do just that. As we shall see, the governing rules of decision in these areas are not entirely under the control of any federal decisionmaker, nor are they dictated by the policymakers of any single state. Instead, the substance of these rules emerges from patterns followed across a multitude of jurisdictions; the decisions of each state’s courts and legislature help to determine their content, but the rules are best understood as a distillation of general American jurisprudence.

Unfortunately, modern courts lack a framework for thinking about such rules. As Part II notes, the result has been confusion and uncertainty; on

many matters of great practical importance, different judges have reached sharply different conclusions about the relationship between federal law and general jurisprudence. Yet just as recognition of the persistence of general law helps us identify common themes in these disagreements, so too it suggests some ways of analyzing them. Part III explains how one particular branch of general jurisprudence can account for the patterns observed in Part I and can help resolve many of the controversies identified in Part II. ❧

## Sovereign Immunity as a Doctrine of Personal Jurisdiction

115 *Harv. L. Rev.* 1559 (2002)

IN 1777, WHEN A SOUTH CAROLINIAN NAMED ROBERT FARQUHAR contracted to supply goods to the State of Georgia, he could not have known that he was laying the groundwork for one of the most enduring debates in American constitutional law. Farquhar delivered the merchandise, and Georgia apparently gave its agents money to pay him. But the state's agents never passed the money along to Farquhar. After Farquhar died, his executor—another South Carolinian named Alexander Chisholm—became responsible for collecting the debt. Taking advantage of the intervening ratification of the federal Constitution, Chisholm eventually sued Georgia in the original jurisdiction of the newly established United States Supreme Court. In its first major decision, the Court concluded that it could entertain Chisholm's suit whether or not Georgia consented. If Georgia would not appear to defend itself, the Court threatened to enter a default judgment against the state.

At first glance, this aspect of the Court's decision in *Chisholm v. Georgia* seems plainly correct. Article III of the Constitution explicitly said that the federal government's judicial power "shall extend ... to Controversies ... between a State and Citizens of another State," and it added that "the supreme Court shall have original Jurisdiction" over all such controversies. Justice James Wilson—who, as a delegate to the Philadelphia Convention, had been on the five-member committee that introduced this language into the Constitution—thought it difficult to imagine words that would "describe, with more precise accuracy, the cause now depending before the tribunal," and three of the other four Justices agreed that Article III permitted Chisholm's suit to proceed. Most modern scholars share this view: while they acknowledge that Georgia may have had some defenses on the merits of Chisholm's claims, they see nothing wrong with

the Court's decision to entertain *Chisholm's* lawsuit in the first place and to order Georgia to respond. According to the conventional academic wisdom, "the plain meaning of the language used [in Article III]" supported the Court's decision on this point.

The Supreme Court itself, however, no longer follows *Chisholm*. Part of the change can be attributed to the Eleventh Amendment, which overruled *Chisholm's* specific holding. But the Amendment is quite limited, and it does not address all of the provisions in Article III to which *Chisholm's* logic can be extended. For more than a century, the Court nonetheless has been holding that federal courts cannot entertain suits against states in a variety of contexts that apparently *are* covered by Article III's grants of subject matter jurisdiction and are *not* covered by any plausible reading of the Eleventh Amendment. As the Court has recently acknowledged, these decisions have little to do with the Eleventh Amendment; they rest instead on the premise that *Chisholm* was wrong. According to the Court's current view, the original Constitution did not subject unconsenting states to suits by individuals (or, indeed, by anyone other than the federal government or another state).

The Court has recently gone a step further. In addition to concluding that the original Constitution did not itself abrogate the states' immunity from being sued by individuals, the Court has held that the original Constitution did not empower Congress to abrogate that immunity either. The upshot is that Congress cannot use its Article I powers to let individuals sue unconsenting states, whether in state or federal court.

These decisions have generated an outcry in the academy, and impassioned dissents have echoed the conventional academic wisdom. In response to all such criticism, the Court has invoked what it calls the "original understanding" of the Constitution. The Court never tires of reminding its critics that during the ratification debates, prominent supporters of the proposed Constitution—including both James Madison and John Marshall—explicitly asserted that Article III would not expose unconsenting states to suit by individuals. When *Chisholm v. Georgia* took the contrary view, moreover, many contemporary observers lambasted the decision as illogical and unlawful.

Yet despite trumpeting this evidence, the modern Court has made little effort to connect the early criticisms of *Chisholm* to the text of the Constitution, or to understand how anyone could have interpreted Article III as Madison and Marshall apparently did. As a result, even while the Court purports to embrace the conclusions of Madison and Marshall, it has overlooked potential limitations on those conclusions. Some of the Court's critics, for their part, have been too quick to suggest that Madison and Marshall had no textual basis at all for their conclusions and were simply trying to deceive people about the Constitution's likely effects.

Part I of this Article steps back from the current debate and tries to explain the logic behind Madison and Marshall's position. Although Article III of the Constitution extends the federal government's judicial power to various "Cases" and "Controversies," many members of the Founding generation thought that a "Case" or "Controversy" did not exist unless both sides either voluntarily appeared or could be haled before the court. Traditionally, courts could not command unconsenting states to appear at the behest of an individual. For many members of the Founding generation, Article III did nothing to change this system: if a state did not consent to suit, there would be no "Case" or "Controversy" over which the federal government could exercise judicial power.... ❧

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