

# ESSAY

## A TWENTIETH AMENDMENT PARABLE

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### INTRODUCTION

Once upon a time, there was a constitutional amendment that had avoided all of the disputes characteristic of constitutional law. The Supreme Court had never even mentioned it. Only four district court decisions had in any sense turned on the Amendment's meaning.<sup>1</sup> Law schools did not hold symposia exploring the subtleties of the Amendment. The definitive law review article on the Amendment had yet to be written.<sup>2</sup> The most attention the Amendment received was as an example of a constitutional provision so straightforward that it generated few of the interpretive controversies that lurked elsewhere in the Constitution.<sup>3</sup>

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<sup>1</sup> See *Humphrey v. Baker*, 665 F. Supp. 23, 30 (D.D.C. 1987) (determining that Twentieth Amendment allows Congress to receive messages from President even when it is not in session), *aff'd*, 848 F.2d 211 (D.C. Cir. 1988); *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350, 1359 (N.D. Tex. 1981) (finding it likely that executive order concerning frozen Iranian assets had not been promulgated before President Carter's term of office expired under Twentieth Amendment); *Socialist Workers Party v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (holding Twentieth Amendment does not bar a state from excluding presidential candidate who does not satisfy Article II eligibility requirements from general election ballot); *Ashley v. Keith Oil Corp.*, 7 F.R.D. 589, 590-91 (D. Mass. 1947) (concluding that new Federal Rules of Civil Procedure had not become effective because Eightieth Congress had not adjourned within meaning of Twentieth Amendment); see also *Barnes v. Kline*, 759 F.2d 21, 37 n.29 (D.C. Cir. 1985) (discussing effect of Twentieth Amendment on congressional adjournment practices in suit contesting alleged pocket veto), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430, 441 (D.C. Cir. 1974) (same).

<sup>2</sup> This isn't it.

<sup>3</sup> See, e.g., G. Sidney Buchanan, *A Very Rational Court*, 30 *Hous. L. Rev.* 1509, 1583 n.449 (1993) (citing Twentieth Amendment as example of mechanical constitutional right); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 *Iowa L. Rev.* 1, 2 n.8 (1990) (citing Professor Levinson's example of Twentieth Amend-

The text of that Amendment—the Twentieth Amendment—offers little indication of its potential sweep. The first two sections are particularly unspectacular. They provide:

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.<sup>4</sup>

The dates in section 1 replaced the March 4 inauguration date followed by long-standing practice and implicitly adopted by the Twelfth Amendment.<sup>5</sup> Section 2 replaced Article I, section 4, clause 2, which had provided that Congress must begin its term on the first Monday in December.<sup>6</sup> Together, sections 1 and 2 seem limited—important only to members of Congress and their aides who must arrive in (or leave) Washington two months earlier than the framers had originally specified. One would never suspect that the drafters of the Twentieth Amendment considered section 1 the crux of the Amendment, or that the reason they did so has any enduring interest for constitutional law today.

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ment as rather straightforward provision); Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 382 n.33 (1982) (citing Twentieth Amendment to demonstrate that “the Constitution is not entirely incomprehensible”); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *Yale L.J.* 677, 694 n.54 (1993) (using Twentieth Amendment as example of precise constitutional provision).

<sup>4</sup> U.S. Const. amend. XX, §§ 1-2. The other sections of the Twentieth Amendment are similarly direct. Sections 3 and 4 govern various presidential succession questions; section 5 gives the effective date for sections 1 and 2. See U.S. Const. amend. XX, §§ 3-5. See generally Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 *Ark. L. Rev.* 215, 216-21 (1995) (discussing ambiguities in sections 3 and 4). Section 5 set the effective date as March 15 after ratification, and section 6 gave the states seven years to ratify the Twentieth Amendment once Congress approved it in 1932. See U.S. Const. amend. XX, §§ 5-6.

<sup>5</sup> See U.S. Const. amend. XII (providing that “if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President”); see also *infra* text accompanying notes 61-64 (discussing historical practice of setting presidential and congressional inauguration dates).

<sup>6</sup> U.S. Const. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.”). Both Section 2 of the Twentieth Amendment and the original provision of Article I allowed Congress to set a different date to begin its session.

Then one day the Supreme Court decided a case called *Seminole Tribe v. Florida*.<sup>7</sup> *Seminole Tribe* was an Eleventh Amendment case: it invalidated a federal law requiring states to negotiate with Indian tribes regarding gambling operations.<sup>8</sup> Three Justices wrote a combined sixty-seven pages and referred to twelve different constitutional provisions,<sup>9</sup> but not the Twentieth Amendment. Yet *Seminole Tribe*, by reaffirming a history of countertextual constitutional interpretations, could breathe life into the Twentieth Amendment. For if one approaches the Twentieth Amendment as the Supreme Court approached the Eleventh Amendment in *Seminole Tribe*, then GATT, CERCLA, and Stephen Breyer become unconstitutional.

# I

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>10</sup> The text suggests several results concerning who may bring suit, what suits are covered, the jurisdiction of the federal courts, and the immunity of state governments. *Seminole Tribe*, like other decisions before it, rejected them all.

The Eleventh Amendment's text bars only specific types of claims. The language deprives federal courts of diversity jurisdiction over certain suits against states but leaves the federal question jurisdiction of federal courts unaffected. Article III, which provides the context for the Eleventh Amendment, extends the federal judicial power to "Controversies . . . between a State and Citizens of another

<sup>7</sup> 116 S. Ct. 1114 (1996).

<sup>8</sup> See *id.* at 1119 (holding that Indian Commerce Clause did not grant Congress power to abrogate state sovereign immunity and that doctrine of *Ex parte Young*, 209 U.S. 123 (1908), could not be used to enforce Indian Gaming Regulatory Act against state official).

<sup>9</sup> That is sixty-seven pages in the Supreme Court Reporter; the case will occupy far more space in the official U.S. Reports. The opinions referred to the Indian Commerce Clause, see *id.* at 1119, 1121-22, 1125-27; the Interstate Commerce Clause, see *id.* at 1125-28, 1142; the Contract Clause, see *id.* at 1137, 1140, 1153, 1156, 1167; the Uniform Bankruptcy Clause, see *id.* at 1142; the Copyright Clause, see *id.* at 1142; several provisions of Article III, see *id.* *passim*; the Supremacy Clause, see *id.* at 1171, 1178, 1182, 1184; the Seventh Amendment, see *id.* at 1176; the Tenth Amendment, see *id.* at 1126 n.10, 1139, 1158 n.23, 1185 & n.65; the Eleventh Amendment, see *id.* *passim*; the Fourteenth Amendment, see *id.* at 1125, 1128, 1131 n.15, 1134, 1142, 1159, 1173, 1185; and the Twenty-Sixth Amendment, see *id.* at 1149 n.7. Justice Souter's dissent contains another interesting citation, see *Seminole Tribe*, 116 S. Ct. at 1169 n.43 ("Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott v. Sandford*, [60 U.S. (19 How.) 393 (1857)] . . ."), thus making Justice Souter the first Justice to turn to that opinion for authority in 89 years. See *Kansas v. Colorado*, 206 U.S. 46, 81 (1907).

<sup>10</sup> U.S. Const. amend. XI.

State” (one aspect of diversity jurisdiction) and to “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” (federal question jurisdiction).<sup>11</sup> A comparison of that language with the language of the Eleventh Amendment caused Chief Justice Rehnquist to concede in *Seminole Tribe* that “the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts.”<sup>12</sup> Nonetheless, the Court reasserted that the Eleventh Amendment applies to federal question jurisdiction as well as to diversity jurisdiction.<sup>13</sup> As Chief Justice Rehnquist explained it, “[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”<sup>14</sup> That presupposition maintained that states possess the traditional immunity of a sovereign absent their consent to suit.<sup>15</sup> The Eleventh Amendment nowhere refers to sovereign immunity—it speaks only of federal court jurisdiction—but the Court did not feel constrained by this wording. The Court identified the general purpose of the Amendment as confirming state sovereign immunity, and it used that purpose to fashion the interpretive rule applied to the case before it.

Likewise, the Amendment’s specification of “any suit in law or equity” would seem to leave admiralty suits untouched. Article III distinguishes between “Cases . . . in Law and Equity” and “Cases of admiralty and maritime Jurisdiction;”<sup>16</sup> the Eleventh Amendment re-

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<sup>11</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>12</sup> *Seminole Tribe*, 116 S. Ct. at 1122; see also *id.* at 1150 (Souter, J., dissenting) (observing that “the text of the Amendment does, after all, suggest to common sense that only the Diversity Clauses are being addressed”); accord *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24 (1989) (Stevens, J., concurring) (arguing that Eleventh Amendment only reaches diversity jurisdiction and noting works of “numerous scholars” that refute interpretation of Eleventh Amendment as coextensive with sovereign immunity); *id.* at 31 (Scalia, J., dissenting) (summarizing argument, which he later rejects, that text merely creates exception to diversity jurisdiction); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286-89, 299 (1985) (Brennan, J., dissenting) (arguing that plain language of Eleventh Amendment reaches only diversity jurisdiction and plain language interpretation avoids “extravagant assumptions about the unexpressed intent of Congress and the state legislatures”).

<sup>13</sup> See *Seminole Tribe*, 116 S. Ct. at 1122.

<sup>14</sup> *Id.* (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)); see also *id.* at 1127 (noting that it has been “well established . . . that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III”); *id.* at 1127-28 (stating that “the Eleventh Amendment reflects ‘the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984))); *id.* at 1131 (reconfirming “the background principle of state sovereign immunity embodied in the Eleventh Amendment”).

<sup>15</sup> See *id.* at 1122.

<sup>16</sup> U.S. Const. art. III, § 2, cl. 1.

fers only to the former. The Court, however, has long held that the Eleventh Amendment immunizes states from admiralty suits in federal courts.<sup>17</sup> Again, the Court has relied on the Eleventh Amendment's implicit adoption of existing state sovereign immunity, which applies to admiralty cases as much as it does to other kinds of cases.

The departure from the text's explicit scope cuts both ways. Federal courts may entertain suits against state officials in their official capacities for injunctive and prospective relief, but not for damages.<sup>18</sup> Here, too, the Court has interpreted the Eleventh Amendment pursuant to its purposes instead of its words. The Amendment was designed to protect a state's finances,<sup>19</sup> a concern most implicated by damage awards enforceable against the state treasury, and one outweighed by the Supremacy Clause interest in empowering federal courts to enjoin ongoing violations of federal law.<sup>20</sup> But such a prospective/retroactive distinction is not even suggested by the Eleventh Amendment's words.

The Amendment's description of the affected plaintiffs has met a similarly countertextual fate. "Citizens of *another* State" and "Citizens or Subjects of any *Foreign* State" cannot bring certain suits against a state in federal court.<sup>21</sup> The text says nothing about the ability of a state's own citizens to sue their state in federal court.<sup>22</sup> Yet the

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<sup>17</sup> See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472-73 (1987) (plurality opinion) (acknowledging that admiralty suits are not suits in equity or law, but reaffirming that admiralty suits are barred by principle if not language of Eleventh Amendment); *Ex parte New York*, No. 1, 256 U.S. 490, 497-500 (1921) (justifying broad interpretation of plain text by calling "any suit in law or equity" an example of general Eleventh Amendment state immunity which bars admiralty and maritime cases as well). But see *Welch*, 483 U.S. at 497-504, 509-10 (Brennan, J., dissenting) (arguing that Court should honor exclusion of admiralty jurisdiction from Eleventh Amendment's protections).

<sup>18</sup> See *Halderman*, 465 U.S. at 102-03 (interpreting Eleventh Amendment as permitting suits against state officials but barring damage claims); *Edelman v. Jordan*, 415 U.S. 651, 662-71 (1974) (barring action where judgment would necessarily be paid from state treasury).

<sup>19</sup> See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (holding that Eleventh Amendment did not immunize interstate railroad created by New York and New Jersey pursuant to Interstate Compact Clause because judgments against railroad would not be paid from state treasury).

<sup>20</sup> See *Green v. Mansour*, 474 U.S. 64, 68 (1985) (holding that Eleventh Amendment bars claims for declaratory and "notice relief" against state for past violations of federal law); *Halderman*, 465 U.S. at 104-06 (finding that Eleventh Amendment bars federal court from ordering state officials to act in accordance with state law).

<sup>21</sup> U.S. Const. amend. XI (emphasis added).

<sup>22</sup> See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1134 (1996) (Stevens, J., dissenting) (insisting that "[t]here can be no serious debate . . . over whether Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued"); *id.* at 1152 (Souter, J., dissenting) (noting that there is no textual basis for reading Eleventh Amendment to deprive federal courts of jurisdiction over all cases brought by state's own citizens); see also Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 424 (1985) (using

distinction between citizens of a state and citizens of another state has long since been jettisoned by the Court.<sup>23</sup> Nor does the Eleventh Amendment appear to restrict federal jurisdiction over suits brought against a state by a foreign *government*, yet the Court has extended the Amendment to cover those cases as well.<sup>24</sup> The broad general purpose of the Amendment as confirming state sovereign immunity, relied upon by the Court in *Seminole Tribe*, provides the foundation for those extensions of the Eleventh Amendment as well.

Whatever the scope of the Amendment, its language does not contain any exceptions. The Eleventh Amendment withdraws federal jurisdiction over “any suit” that it covers.<sup>25</sup> The Amendment thus appears to deprive federal courts of jurisdiction to entertain certain suits against a state regardless of what that state or Congress says. But the Court allows a state to consent to suit in federal court,<sup>26</sup> and it allows Congress to abrogate a state’s immunity from suit in federal court provided that Congress clearly indicates its intention to do so.<sup>27</sup> The congressional abrogation power arises from “the important role played by the Eleventh Amendment *and the broader principles it reflects*,”<sup>28</sup> including the balance between state and federal power inherent in the federalist system established by the Constitution.<sup>29</sup> The principle of federal power is limited itself; thus, the Court’s actual holding in *Seminole Tribe* prevents Congress from abrogating a state’s immunity

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Eleventh Amendment as example of Court’s reliance on purpose of rule instead of its text and noting that “[n]othing in the language of that amendment could even remotely be construed to bar the use of the federal courts by citizens suing their *own* states”).

<sup>23</sup> See *Seminole Tribe*, 116 S. Ct. at 1144 n.18 (Stevens, J., dissenting) (describing *Hans v. Louisiana*, 134 U.S. 1 (1890), as “the first case in which the Court held that a State could not be sued in federal court by one of its citizens”).

<sup>24</sup> See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (holding that state retains same immunity in suits brought by foreign states as in suits brought by citizens of United States).

<sup>25</sup> U.S. Const. amend. XI (emphasis added).

<sup>26</sup> See *Seminole Tribe*, 116 S. Ct. at 1122-23 (noting that “it is undisputed that Florida has not consented to the suit”); id. at 1136 n.9 (Stevens, J., dissenting) (observing that “‘plain text’ of Eleventh Amendment” does not allow state to consent to suit in federal court, but citing Court’s contrary decision in *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

<sup>27</sup> See id. at 1123-24.

<sup>28</sup> Id. at 1123 (emphasis added).

<sup>29</sup> See id. at 1122 (noting that Eleventh Amendment confirms principles of federalism and sovereign immunity (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890))); see also *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) (finding Congress did not intend to abrogate states’ Eleventh Amendment immunity in Education of the Handicapped Act); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 (1985) (holding that Rehabilitation Act does not abrogate state’s Eleventh Amendment immunity and state’s acceptance of funds under Act does not establish consent to suit in federal court).

under the Eleventh Amendment when Congress acts pursuant to the Indian Commerce Clause or the Interstate Commerce Clause.<sup>30</sup>

The dissenters in *Seminole Tribe* interpreted the Eleventh Amendment differently, but they, too, were willing to explore the Amendment's broader purposes. Justice Stevens focused on the case that prompted the adoption of the Eleventh Amendment—*Chisholm v. Georgia*<sup>31</sup>—as a justification for reading the Eleventh Amendment more narrowly.<sup>32</sup> If the purpose of the Amendment was to overrule *Chisholm*, then it should be interpreted to reestablish the status quo ante. Justice Stevens acknowledged that the text of the Eleventh Amendment is broader than would have been necessary simply to reject *Chisholm*,<sup>33</sup> but he nonetheless contended that Justice Iredell's dissent in *Chisholm* "correctly stated the law" applicable today.<sup>34</sup> Justice Souter's dissent sought to demonstrate that the Eleventh Amendment did not constitutionalize eighteenth-century common law notions of sovereign immunity. He chastised the majority for its departure from the Eleventh Amendment's text, but he was unwilling to reverse the case that served as the primary point of departure.<sup>35</sup> Justice Souter focused more on history than text, too, as demonstrated by the forty-one pages he wrote to explain the meaning of the forty-three words of the Eleventh Amendment.

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<sup>30</sup> See *Seminole Tribe*, 116 S. Ct. at 1124-32. The Court thus overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a badly divided Court had allowed Congress to rely on its Interstate Commerce Clause power to abrogate a state's Eleventh Amendment immunity. The Court's unwillingness to distinguish between the Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, doomed the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994), at issue in *Seminole Tribe*. Indeed, the Court said that *no* Article I power could be used to abrogate the Eleventh Amendment, see *Seminole Tribe*, 116 S. Ct. at 1131-32, thereby confining such abrogation power to the provisions of subsequent Amendments. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976) (upholding congressional power under Fourteenth Amendment to subject states to suit in federal court).

<sup>31</sup> 2 U.S. (2 Dall.) 419 (1793). *Chisholm* held that the federal courts possessed jurisdiction to decide a suit brought by a citizen of South Carolina to collect money that the state of Georgia allegedly owed for the sale of military goods during the Revolutionary War. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1467-73 (1987) (stating that holding in *Chisholm* provoked call for constitutional amendment); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1920-26 (1983) (relating decision in *Chisholm* and subsequent adoption of Eleventh Amendment to concerns about enforceability of provisions of Treaty of 1783 with Britain). The Eleventh Amendment followed in 1795. See, e.g., *Seminole Tribe*, 116 S. Ct. at 1145 (Souter, J., dissenting) (mentioning ratification of Eleventh Amendment in 1795).

<sup>32</sup> See *Seminole Tribe*, 116 S. Ct. at 1134-37 (Stevens, J., dissenting).

<sup>33</sup> See *id.* at 1136 (Stevens, J., dissenting).

<sup>34</sup> *Id.* at 1134 (Stevens, J., dissenting).

<sup>35</sup> See *id.* at 1159 (Souter, J., dissenting) (asserting that "the *Hans* Court misread the Eleventh Amendment" but refusing to overrule *Hans* because of *stare decisis*).

The lesson of *Seminole Tribe* and prior Eleventh Amendment cases is that the purposes of a constitutional provision can provide rules for decision far in excess of the constitutional text. This is not a new insight.<sup>36</sup> Such purposive interpretation lives elsewhere in constitutional law. The Court will often "strive, when interpreting . . . seminal constitutional provisions, to effectuate their purposes."<sup>37</sup> But such statements usually appear in the course of interpreting the First Amendment,<sup>38</sup> the Fourteenth Amendment,<sup>39</sup> or similar open-ended constitutional provisions. The implications of such purposive theories for some of the forgotten provisions of the Constitution have gone unnoticed.

## II

The interpretive method employed in *Seminole Tribe* gives the Twentieth Amendment a whole new meaning. For the purpose of the Twentieth Amendment was to abolish lame-duck sessions of Congress. That was the universal understanding voiced by the Congress that approved the Amendment,<sup>40</sup> the earlier Congresses that considered similar proposals,<sup>41</sup> contemporary legal

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<sup>36</sup> See, e.g., Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342, 1344-45 (1989) (observing that all current theories of Eleventh Amendment rely on its purposes more than its text); Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. Rev. 729, 744 (1992) (noting Court's willingness to consider constitutional arguments that rely on provision's purpose instead of its words).

<sup>37</sup> *Oliver v. United States*, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting); see *id.* at 187 n.4 ("[W]e must never forget, that it is *a constitution* we are expounding." (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819))).

<sup>38</sup> See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part) (indicating that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings").

<sup>39</sup> See *Miller v. Johnson*, 115 S. Ct. 2475, 2482 (1995) (interpreting Equal Protection Clause to further "[i]ts central mandate [of] racial neutrality in governmental decisionmaking").

<sup>40</sup> See, e.g., 75 Cong. Rec. 3836 (1932) (statement of Rep. Cartwright) ("This amendment will free Congress of the dead hand of the so-called 'lame duck.'"); *id.* at 3833 (statement of Rep. Dickinson) ("This will put an end to the 'lame-duck' Congress . . ."); *id.* at 3823 (statement of Rep. Stafford) (describing purpose of Amendment as "to discontinue, to put a stop for all time to these lame-duck sessions of Congress"). For similar statements, see *id.* at 3868 (statement of Rep. Dickinson); *id.* at 3824 (statement of Rep. Greenwood); *id.* at 3870 (statement of Rep. Howard); *id.* at 3832 (statement of Rep. Lozier); *id.* at 3841 (statement of Rep. Norton).

<sup>41</sup> See, e.g., 74 Cong. Rec. 5892 (1931) (statement of Rep. Johnson of Tex.) (stating that Amendment "would abolish what is popularly known as the lame-duck session of Congress, so that all sessions of Congress convening after congressional elections would not have in its membership those who were not elected at the last preceding election"); *id.* at 5891 (statement of Rep. Johnson of Okla.) (asserting that purpose of Amendment "is to eliminate what is commonly called the lame-duck session of Congress"); *id.* at 5908 (state-



scholars,<sup>42</sup> and everyone else.<sup>43</sup> Indeed, what we now know as the Twentieth Amendment was commonly described as the "lame-duck amendment" while it was being debated.<sup>44</sup> The long-standing popular outcry over the actions of defeated or retiring officials during the period after an election and before the inauguration of their replacements finally resulted in the ratification of the Twentieth Amendment in January 1933, only ten months after it had been approved by Congress.<sup>45</sup>

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ment of Rep. Selvig) ("The principal change involved is the abolition of the so-called 'lame-duck' session of Congress."). But see *id.* at 5894 (colloquy between Rep. Oliver of N.Y. and Rep. Gifford indicating confusion about whether an outgoing Congress could meet after election but before January 3).

<sup>42</sup> See, e.g., Andrew C. McLaughlin, *A Constitutional History of the United States* 788 (student ed. 1935) (explaining that the Twentieth Amendment "ended . . . the power of Congress to legislate for several months after a new Congress was chosen by the people"); G.A.C., Jr., *The Proposed Twentieth Constitutional Amendment*, 21 *Geo. L.J.* 63, 64 (1932) ("This proposed Amendment, popularly called the 'Lame Duck' Amendment, has for its primary object the abolishment of 'lame ducks' and 'lame duck' sessions of Congress."); Bruce L. Keenan, *Twentieth Amendment Kills Lame Ducks*, 4 *Okla. St. B.J.* 91, 91 (1933) (stating that Twentieth Amendment curbed potential for legislators to serve in congressional session after defeat in elections).

<sup>43</sup> See, e.g., *The Lame-Duck Amendment*, *Saturday Evening Post*, Dec. 17, 1932, at 20 (observing that "the major provision [of the Twentieth Amendment] is the elimination of lame-duck sessions of Congress, in which members sit after having been defeated for re-election"). See generally 74 *Cong. Rec.* 5886 (1931) (statement of Rep. Knutson) (observing that "for years it has been one of the favorite pastimes of newspapers and magazines to attack the so-called lame-duck sessions of Congress"); Richard Lowitt, *George W. Norris: The Persistence of a Progressive* 518 (1971) (noting that Senator Norris "congratulated the newspapers owned by William Randolph Hearst for 'the magnificent fight they made in behalf of the "Lame Duck" Amendment'").

<sup>44</sup> See, e.g., 75 *Cong. Rec.* 3839 (1932) (statement of Rep. Glover) ("This amendment has been freely referred to by the press and others as the 'lame-duck amendment.'"); *id.* at 4118 (statement of Sen. Norris) (referring to "the so-called 'lame duck' amendment"); *id.* at 3822 (statement of Rep. Pou) ("[The Amendment] is known throughout the country, I believe, as the so-called 'lame duck' amendment to the Constitution."); 74 *Cong. Rec.* 5893 (1931) (statement of Rep. Stobbs) (noting that "the newspapers, in commenting on this amendment, have universally described it as the lame-duck amendment"). The Amendment dealt with both lame-duck Congresses and lame-duck Presidents, though the former received the most attention.

<sup>45</sup> The commencement date for congressional sessions was the subject of well over 100 proposed constitutional amendments and bills between 1795 and 1932. See G.A.C., *supra* note 42, at 63 (noting proposal of at least 90 constitutional amendments and 93 bills concerning congressional sessions). Sections 1 and 2 of the Twentieth Amendment evolved from numerous amendments considered by Congress in the decade before 1932. Senator George Norris, a Progressive Republican from Nebraska, was widely acknowledged as the father of the part of the Amendment that dealt with lame-duck Congresses. See, e.g., 75 *Cong. Rec.* 3829 (1932) (statement of Rep. LaGuardia) ("Senator George Norris is the author of this resolution."); 74 *Cong. Rec.* 5898 (1931) (statement of Rep. McCormack of Mass.) (explaining that portion eliminating lame-duck sessions of Congress was "more familiarly known as the Norris amendment"). See generally Lowitt, *supra* note 43, at 155-57, 274-77, 515-18 (describing Norris's effort to abolish lame-duck Congresses); George W. Norris, *Fighting Liberal* 328-43 (1945) (chapter in Norris's autobiography entitled "The

Lame-duck sessions of Congress were targeted for a number of reasons. The original justifications for the lame-duck period had become outdated. Advances in transportation shortened the months it took to travel across the country to Washington in 1789 to a few days by 1933. Advances in communications made it possible to learn the results of an election within a matter of hours or days instead of weeks. Passage of the Seventeenth Amendment in 1917, authorizing the direct popular election of Senators, precluded the need to wait for state legislatures to meet to elect Senators. Each reason suggested that the dates provided in Article I and the Twelfth Amendment had outlived their usefulness.<sup>46</sup>

Experience with lame-duck Congresses yielded still more complaints. Lame-duck members of Congress suffered from perverse incentives. On the one hand, once defeated, members were unaccountable to the electorate. On the other hand, outgoing members were viewed as susceptible to pressure from the President and from special interests. Many feared that the desire to obtain new employment once service in Congress ended—voluntarily or involuntarily—would influence the votes of an outgoing Senator or Representative. As Representative Celler argued:

[T]his is the lame-duck resolution. What is a lame duck? A lame duck is a wild bird that has been hit with a bullet by a hunter and is

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Lame Duck Amendment"). Norris himself credited a resolution introduced by Senator Caraway in 1922 calling for defeated members not to participate in anything besides routine legislation during a lame-duck session. See *id.* at 329-30; see also 63 Cong. Rec. 25-27 (1922) (statement of Sen. Caraway).

<sup>46</sup> Representative Norton discussed each reason:

[I]f we did not have our modern means of communication, if we had no telegraphs, no telephones, no radios, and no fast-mail service, we would be compelled to wait, as they were in those days, for weeks before the result of an election in one part of the country could be known in another part thereof. . . . If conditions were now what they were 145 years ago, we would not have our present system of good roads, but would have roads that would be almost impassable; there would be no automobiles, no train service, no airplanes, and we would be compelled to rely on the stagecoach and the saddle horse for our travel. Under such conditions it would take weeks, and perhaps months, even after the result of the election had been learned, before the Congress could assemble and become organized. . . . Following the ratification of the Constitution, and in fact until quite recently, the United States Senators were elected by the legislatures of the various States. The State legislature did not meet until in January, and since contests often developed, it was considerably later than that before selections were announced. Senators so elected could not have attended a session of Congress convening in the month of January.

75 Cong. Rec. 3841 (1931) (statement of Rep. Norton); accord S. Rep. No. 72-26, at 2 (1932) (discussing how modern technology and transportation make Constitution's previous commencement dates moot); see also Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 125-27 (1995) (discussing framers' concern with when and where federal government should meet).

brought down. It is not killed, merely lamed and wounded. It is usually tractable, docile, and is easily tamed. So it is with lame ducks in this House and probably in the other House. They have been hit with the shot of defeat by their constituents, and they have become very lame, docile, and tractable, and when they have jobs dangled before them they do the bidding of the Executive or those who may be in power.<sup>47</sup>

Most importantly, the actions of lame-duck Congresses were seen as inconsistent with representative democracy. The supporters of the Twentieth Amendment proclaimed that the voice of the people in an election was supreme.<sup>48</sup> That proposition demanded that the electoral mandate of the people should be put into effect immediately. New members of Congress should take their seats soon after the election.<sup>49</sup> Outgoing members of Congress who lost their bids for reelection were characterized as no longer representative of the people and no longer entitled to participate in legislative actions.<sup>50</sup> Indeed, one of the more

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<sup>47</sup> 75 Cong. Rec. 3828 (1932) (statement of Rep. Celler); see id. at 3843 (statement of Rep. Black) (reasoning that lame duck's anxieties for future make him amenable to Executive's suggestions); id. at 3836 (statement of Rep. Cartwright) (noting influence of favors from White House on lame ducks); id. at 3833-34 (statement of Rep. Dickinson) (warning of special interest groups' special influence over lame ducks); id. at 3842 (statement of Rep. Norton) (stating that promise of later appointment may sway lame duck); 63 Cong. Rec. 26 (1922) (statement of Sen. Caraway) (same); Norris, *supra* note 45, at 332 (discussing President's use of potential appointments to sway lame-duck members of Congress).

<sup>48</sup> See, e.g., 75 Cong. Rec. 3864 (1932) (statement of Rep. Stafford) ("The voice of the people in the election of their representatives is the supreme law of the land."); 74 Cong. Rec. 5880 (1931) (statement of Rep. Glover) ("We are a Nation that says the people ought to rule . . ."); id. at 5898 (statement of Rep. McCormack of Mass.) ("The making of a legislative body responsive to the will of the people is the object of self-government and of representative government.").

<sup>49</sup> As Representative McCormack declared, "In a representative government it is essential that the will of the voters immediately go into effect and operation." 74 Cong. Rec. 5898 (1931) (statement of Rep. McCormack of Mass.); see 75 Cong. Rec. 3842 (1932) (statement of Rep. Black) (arguing government should act on people's will as soon as possible after election); id. at 3831 (statement of Rep. Cable) (same); id. at 3828 (statement of Rep. Celler) (same); id. at 3834 (statement of Rep. Dickinson) (same); id. at 3839 (statement of Rep. Glover) (same); id. at 3824 (statement of Rep. Greenwood) (same); id. at 3829 (statement of Rep. LaGuardia) (same); 74 Cong. Rec. 5890 (1931) (statement of Rep. Leavitt) (same); id. at 5887-88 (statement of Rep. Maas) (same); id. at 5888 (statement of Rep. Nolan) (same); id. at 5899 (statement of Rep. Quin) (same); id. at 5893 (statement of Rep. Stobbs) (same).

<sup>50</sup> For example, Representative Barton noted:

The defeat of a candidate is often the rejection by the electorate of the laws he advocates. It is an anomaly, to say the least, for a man to hold a commission by which he can write into law principles after they have been rejected and repudiated by his constituents.

75 Cong. Rec. 3874 (1932) (statement of Rep. Barton); see id. at 3842 (statement of Rep. Black) ("Their very presence, after repudiation, is a denial of representation."); 74 Cong. Rec. 5886 (1931) (statement of Rep. Lozier) (arguing that "it is un-American, undemocratic, unrepugnant to allow him to remain in office two or three months after the repudia-

restrained supporters of the Amendment argued that “for a person to continue to represent a constituency after his defeat, is contrary to the whole plan and philosophy of a representative system of government.”<sup>51</sup> Thus, the proponents of the Twentieth Amendment assured that it would eliminate unrepresentative lame-duck sessions of Congress.

Such sessions posed another threat. The Twelfth Amendment charged the House with choosing the President in the event that no candidate received a majority of the electoral college votes.<sup>52</sup> Three Presidents—Thomas Jefferson, John Quincy Adams, and Rutherford B. Hayes—had been elected by the vote of the House.<sup>53</sup> They were chosen by the lame-duck House, not the incoming House elected at the same time that they ran for President. The supporters of the Twentieth Amendment wanted to ensure that any future selections of the President would be made by the new members of the House who would take office on January 3.<sup>54</sup>

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tion of his policies by his constituents”). Others voiced similar sentiments. See, e.g., 75 Cong. Rec. 3831 (1932) (statement of Rep. Jeffers) (calling lame-duck government contrary to people’s wishes); id. at 3832 (statement of Rep. Lozier) (same); id. at 3842 (statement of Rep. Norton) (same); id. at 3824 (statement of Rep. Greenwood) (criticizing lame ducks as contrary to principles of representative government); 74 Cong. Rec. 5898 (1931) (statement of Rep. McCormack of Mass.) (same); id. at 5881 (statement of Rep. Celler) (calling it travesty to allow lame ducks to continue legislating); id. at 5891 (statement of Rep. Johnson of Okla.) (same); id. at 5897 (statement of Rep. Luce) (same); Norris, *supra* note 45, at 332 (observing that permitting men to mold legislation after their repudiation by people is contrary to reason and precedent).

<sup>51</sup> 74 Cong. Rec. 5885 (1931) (statement of Rep. Sumners).

<sup>52</sup> See U.S. Const. amend. XII.

<sup>53</sup> See 74 Cong. Rec. 5881 (1931) (statement of Rep. Celler) (noting that lame-duck members participated in House’s election of those three Presidents). The House elected Thomas Jefferson pursuant to its power under Article II, section 1, clause 3, which was superseded by the Twelfth Amendment in 1804.

<sup>54</sup> For example, Representative McKeown insisted:

[T]he vital thing that underlies this legislation is, in the event an election of the President of the United States is thrown into the House of Representatives that that election will be conducted by new Congressmen coming directly from the people, who have the interest of the people at heart when they come to cast their votes in that election.

75 Cong. Rec. 3857 (1932) (statement of Rep. McKeown); see S. Rep. No. 72-26, at 5 (1932) (noting that proposed amendment would mean House of Representatives with fresh popular mandate would select President if duty to elect devolved to House); 75 Cong. Rec. 3824 (1932) (statement of Rep. Greenwood) (criticizing ability of lame-duck members to vote for next President); id. at 3842 (statement of Rep. Norton) (same); 74 Cong. Rec. 5897 (1931) (statement of Rep. Luce) (same). Like the desire to eliminate lame-duck congressional sessions entirely, instructions concerning which Congress is to elect the President in the event that no candidate receives a majority of the electoral college votes are conspicuously absent from the text of the Twentieth Amendment. See Amar, *supra* note 4, at 218 (speculating on resolution of electoral college deadlocks in absence of explicit direction from Twentieth Amendment text); cf. Amar & Amar, *supra* note 46, at 131-32 (explaining

The opponents of the Twentieth Amendment shared this understanding of the impact of the Amendment on lame-duck Congresses. Indeed, they championed lame-duck members of Congress as worthy legislators even if the people had decided to replace them. Some of these comments betrayed highly elitist tendencies by depicting defeated members as the victims of an ignorant and ungrateful populace.<sup>55</sup> Lame-duck members were also praised as independent from partisan and popular demands.<sup>56</sup> They were seen as deserving of the opportunity to finish their legislative agenda, to counsel their replacements, and to make the transition back to private life.<sup>57</sup> The lame-duck period was glamorized as a necessary cooling-off period during which electoral passions could subside.<sup>58</sup> The most fervent opponents of eliminating the lame-duck period characterized the Twentieth Amendment as an attack on the Congress and the framers of the Constitution, though they could not agree who was responsible for such a plot.<sup>59</sup> But their position failed to carry the day. For the most part,

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how Speaker of the House who lost November election could nonetheless serve as President during subsequent two years).

<sup>55</sup> See 74 Cong. Rec. 5879 (1931) (statement of Rep. Underhill) (describing lame duck as "a victim of mob psychology"); *id.* at 5878 (defining lame duck as "'a defeated statesman,' particularly recently, for those who have been defeated for office in recent years were more entitled to the designation of 'statesmen,' as a rule, than those who succeeded them").

<sup>56</sup> See 75 Cong. Rec. 3853 (1932) (statement of Rep. Tilson) (arguing that lame-duck session "is one time in the life of a Member of Congress when he can vote his real convictions without the hope of reward or the fear of punishment").

<sup>57</sup> See, e.g., 74 Cong. Rec. 5890 (1931) (statement of Rep. Blanton) ("A man who has given 20 years of his life in service here, after being unexpectedly defeated in the November election, should have a few months in which to readjust himself back into private life again."); *id.* at 5878 (statement of Rep. Underhill) ("This lame-duck session has given [outgoing Representative Cramton] an opportunity to gather up the loose ends, to put across many of the measures which have been proposed from year to year, to finish up his work and to prepare the place for his successor."); see also *id.* at 5890 (statement of Rep. Blanton) (defending lame-duck period as helpful for training new members and as fair to outgoing members).

<sup>58</sup> See 75 Cong. Rec. 3837 (1932) (statement of Rep. Montague) (advocating a "cooling time" to "give them some time to get free of the atmosphere of partisanship"). Representative Knutson elaborated:

In the heat of campaigns candidates are apt to make rash promises that are incapable of fulfillment, and I may say to you it would be dangerous to convene a new Congress within 60 days after an election unless we took the newly elected Members and placed them on ice, thereby giving them an opportunity to reflect and cool off before taking their seats in this body.

74 Cong. Rec. 5886 (1931) (statement of Rep. Knutson). But see 75 Cong. Rec. 3841-42 (1932) (statement of Rep. Norton) (arguing against "cooling-off period"); 74 Cong. Rec. 5888-89 (1931) (statement of Rep. LaGuardia) (same); *id.* at 5888 (statement of Rep. Maas) (same); *id.* at 5888 (statement of Rep. Nolan) (same).

<sup>59</sup> Compare 75 Cong. Rec. 3836 (1932) (statement of Rep. Montague) ("I think 'lame-duck Members' is a capitalistic terminology to destroy the usefulness of the legislative

the supporters of the Amendment refrained from criticizing individual lame-duck members, but they insisted that it would be undemocratic for such members to continue to legislate after the people had spoken in the election.

Yet the text of the Twentieth Amendment does not seem to *abolish* lame-duck Congresses; it only *shortens* the lame-duck period from four months to two months. That unavoidable fact suggests that (a) the proponents of the Twentieth Amendment were astonishingly poor drafters, (b) the commitment to abolish lame-duck Congresses was qualified by some other consideration, or (c) the drafters expected that changing the beginning of congressional terms to January 3 would accomplish the goal of abolishing lame-duck congressional sessions. The probability of (a) is diminished by the attention focused on the Amendment during the ten years that it was debated in Congress. Indeed, one overconfident supporter announced that the Amendment had achieved "practically a perfect form, that is, embodying the last and best word that could be said upon the subject involved."<sup>60</sup> But rather than exploring that hyperbole further, I want to focus on the evidence that supports (b) and the greater likelihood that (c) offers the best explanation.

How the drafters of the Twentieth Amendment expected the move from March 4 to January 3 to abolish lame-duck Congresses requires an understanding of congressional sitting practices prior to the adoption of the Amendment. As originally drafted in 1787, the Constitution provided that Congress must meet at least annually and that its session must begin on the first Monday in December (unless Congress passed a statute specifying a different date).<sup>61</sup> The framers chose a December date to avoid interrupting spring planting and fall harvesting.<sup>62</sup> The Constitution neglected, however, to specify when the

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branch of our Government, which is the desire of some people."), with id. at 3878 (statement of Rep. Griffin) (reluctant supporter of Amendment complaining that "[t]he hue and cry about 'lame-duck' sessions is simply furnishing fodder to bolshevists"). While many opponents of the Amendment claimed that there was no need to disrupt the work of the framers, Representative Underhill pressed that point with special vigor. See 74 Cong. Rec. 5879 (1931) (statement of Rep. Underhill) (asking "which amendment has brought to this country greater peace or prosperity?" and arguing that if Senator Norris's "gospel of government is sound, . . . then George Washington was a piker, Jefferson was a bum, Madison and Patrick Henry were morons, Jefferson and John Marshall were socialists, Ben Franklin was senile, and John Rutledge and Charles Pinckney were ward heelers").

<sup>60</sup> 75 Cong. Rec. 3832 (1932) (statement of Rep. Lozier).

<sup>61</sup> See U.S. Const. art. I, § 4, cl. 2.

<sup>62</sup> Madison had proposed that Congress begin its annual session in May because it would be easier to travel then than in the winter. See James Madison, 2 *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 350 (Gaillard Hunt & James Brown Scott eds., Prometheus Books 1987) (1920). Elseworth responded that "[t]he summer [would] interfere too much with private business,

terms of members of Congress would begin and end. The traditional date of March 4 that prevailed before 1933 resulted from the happenstance of the ratification of the Constitution by the requisite number of states in September 1788 and the direction of the Continental Congress that the new Congress should meet on the first Wednesday in March of the next year—March 4, 1789.<sup>63</sup> Congress kept the March 4 date through most of the nineteenth and early twentieth century, albeit with exceptions from time to time.<sup>64</sup> Meanwhile, not all congressional elections were held on the first Tuesday in November: House elections occurred throughout the summer and the fall, while Senatorial elections were held when state legislatures happened to be in session (until the approval of the Seventeenth Amendment in 1913).

The combination of these dates resulted in a congressional practice far different from what we are used to today. While today newly elected representatives take office and begin legislating within two months of their election, before 1933 new representatives might wait over a year to participate in their first legislative session. For example, Abraham Lincoln was elected on August 3, 1846, to represent Illinois's Seventh Congressional District in the Thirtieth Congress.<sup>65</sup> After he was elected, the Twenty-Ninth Congress returned to Washington in December 1846, where it sat until it expired on March 4, 1847. Congress did not sit between March and December 1847. Lincoln and the other members of the Thirtieth Congress took office in December 1847—sixteen months after Lincoln was elected.<sup>66</sup> That first session of the Thirtieth Congress continued until August 1848.<sup>67</sup> Lincoln returned for the second session of the Thirtieth Congress from December 1848 to March 1849, after abiding by his pledge not to seek reelection in August 1848, thus making his second session a lame-duck session.<sup>68</sup>

That schedule was familiar to the members of the Seventy-Second Congress who approved the Twentieth Amendment. The two sessions

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that of almost all the probable members of the Legislature being more or less connected with agriculture," and Randolph added that a December date would better coincide with state elections. *Id.* The framers chose December instead of May by a vote of eight states to two. *See id.*

<sup>63</sup> *See* 75 Cong. Rec. 3873 (1932) (statement of Rep. Barton); Norris, *supra* note 45, at 331.

<sup>64</sup> The history of the beginning dates of congressional sessions is discussed in 75 Cong. Rec. 3880 (1932) (statement of Rep. Gibson) and *id.* at 3852 (statement of Rep. Tilson).

<sup>65</sup> *See* David Herbert Donald, *Lincoln* 115 (1995).

<sup>66</sup> *See id.* at 119.

<sup>67</sup> *See id.* at 130.

<sup>68</sup> *See id.* at 124, 133-41. Lincoln's congressional speech opposing the Mexican War would have made a bid for reelection problematic; his position undermined his preferred Whig successor and led to his district electing a Democrat instead. *See id.* at 132-33.

of each Congress included a long session (beginning in December and continuing until some time the next spring or summer) and a short, lame-duck session (beginning in December after the election and ending on March 4). The only difference between Lincoln's Congress and subsequent Congresses is that by 1933 elections were held in November (not August). Thus, supporters of the Twentieth Amendment repeatedly complained about the thirteen months—from November of an election year until December of the next year—that elapsed before a newly elected Senator or Representative actually began serving in Congress.<sup>69</sup> The thirteen-month delay also meant that members began to run for reelection before they had much of an opportunity to demonstrate their worthiness (or lack thereof) to the people who had elected them.<sup>70</sup> The delay and its consequences provided yet another justification for the Twentieth Amendment.

But why did everyone in 1933 believe that moving the beginning of each congressional term to January 3 would abolish lame-duck sessions? The answer is simple: no one expected the outgoing Congress to meet during the lame-duck period from election day in November until January 3. Those who feared that the Twentieth Amendment would result in a Congress that remained in session throughout the entire year were assured that Congress would finish its work in an election year by the summer political conventions.<sup>71</sup> More specifically, Senator Norris and other sponsors of the Amendment affirmed that Congress would not meet in December under the new system.<sup>72</sup>

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<sup>69</sup> See, e.g., 75 Cong. Rec. 3831 (1932) (statement of Rep. Cable); *id.* at 3836 (statement of Rep. Cartwright); *id.* at 3833-34 (statement of Rep. Dickinson); *id.* at 3839 (statement of Rep. Glover); *id.* at 3832 (statement of Rep. Lozier).

<sup>70</sup> See, e.g., *id.* at 3842 (statement of Rep. Norton) (criticizing thirteen-month delay because "the people whom [a member] has been chosen to represent have not had a proper chance to properly weigh his qualifications, so as to know whether he comes up to their expectations, before they are called upon to vote for or against his renomination"); 74 Cong. Rec. 5888 (1931) (statement of Rep. LaGuardia) ("We are hardly in session when the time runs right into the next primary and the next election.").

<sup>71</sup> See 75 Cong. Rec. 3828-29 (1932) (statement of Rep. Celler) ("The Congress would not continue indefinitely [for] two years. That is inconceivable. . . . [I]nstead we will adjourn around June 15—the latest July 1—to enable us to attend the national convention."); see also *id.* at 3839 (statement of Rep. Glover) ("Beginning with the 4th day of January Congress will have ample time for the completion of all its work, and Congress could easily discharge all of its duties by the 1st of June unless some emergency should arise that would require a longer term."); 74 Cong. Rec. 5903 (1931) (statement of Rep. Browne) (challenging "anyone" to give example of Congress ever remaining in session past summer political conventions); *id.* at 5893 (statement of Rep. Johnson of Tex.) ("During my service the long session has never adjourned later than July.").

<sup>72</sup> See 75 Cong. Rec. 5086 (1932) (relating that when asked by Senator Bingham if Twentieth Amendment "does away with the December session of Congress," Senator Norris answered "[y]es"); *id.* at 3839 (statement of Rep. Glover) (explaining that Amendment would eliminate expense of holding Congress in December, a "time that very little or



The period from election day in November until inauguration day in January would be used for transitional purposes only;<sup>73</sup> no one mentioned the possibility that any legislative business would take place during that period.<sup>74</sup> Repeated promises that the *incoming* House would choose the President if necessary—even though the Twelfth Amendment directs the House to act “immediately” after counting the electoral votes—confirms that a meeting of the lame-duck Congress was unimagined by the drafters of the Twentieth Amendment.<sup>75</sup> The unwavering understanding of the Twentieth Amendment, therefore, was that one Congress would complete its work sometime in the summer, that the election would occur in November, and that the new Congress would assemble in Washington on January 3. And that understanding shows how the Seventy-Second Congress intended the Twentieth Amendment to abolish lame-duck sessions of Congress.

This argument is strong, but not quite airtight. Obviously, the case against lame-duck Congresses would be more convincing if the Twentieth Amendment included a provision specifying the date on which Congress must adjourn in an election year. If the Amendment stated that Congress cannot sit past, say, May 4 in an election year, then the possibility of a lame-duck session would be eliminated by the constitutional text. Indeed, such a provision was proposed—by Speaker of the House Nicholas Longworth, no less—but it was defeated. The House adopted Longworth’s addition in 1931, only to see the entire amendment die after that issue blocked an agreement with the Senate.<sup>76</sup> The House then declined to reinsert a specific congress-

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nothing is usually accomplished”); 74 Cong. Rec. 5880 (1931) (statement of Rep. Glover) (explaining that Congress will meet in January instead of December).

<sup>73</sup> See 74 Cong. Rec. 5912 (1931) (statement of Rep. Schneider) (defending January 4 date because “[s]ufficient time is thereby allowed newly elected Members to arrange their private affairs prior to leaving for the Capital City”); see also 75 Cong. Rec. 3878 (1932) (statement of Rep. Griffin) (suggesting that allowing new Congress to begin meeting on March 4—instead of following December—would eliminate thirteen-month delay while providing sufficient transition period for incoming and outgoing members).

<sup>74</sup> See *infra* text accompanying notes 78-80 (noting that Congress was aware of possibility of year-round session, but that it was assured such session would not occur because Congress would not meet during lame-duck period).

<sup>75</sup> See U.S. Const. amend. XII (stipulating that if no presidential candidate receives majority of electoral college votes, then “the House of Representatives shall choose immediately, by ballot, the President”).

<sup>76</sup> Longworth’s amendment provided that in even-numbered years—i.e., election years—“the session shall not continue after noon on the 4th day of May.” 74 Cong. Rec. 5902 (1931). The House approved the amendment on February 24, 1931, by a 229 to 148 vote. See *id.* at 5906-07. That left only seven days to reconcile the House proposal with the Senate’s version, which lacked an ending-date provision. Neither side budged, so the amendment failed to pass Congress in 1931. See 75 Cong. Rec. 3872 (1932) (colloquy between Rep. Burtness and Rep. Jeffers) (acknowledging role played by Longworth amendment in defeat of Twentieth Amendment in 1931); Norris, *supra* note 45, at 339-41

sional session ending date in its 1932 version of the Amendment<sup>77</sup>—and that version became law. Such a conscious refusal to include an adjournment date would seem to suggest that whatever its other rhetoric, Congress wanted to preserve the possibility of meeting in a lame-duck session.

Still, the rejection of a specific ending date can be reconciled with the assumption that lame-duck Congresses would be eliminated by the Twentieth Amendment. Congress offered two reasons for not adopting such a date; neither reason resurrects the possibility of a lame-duck session. First, Congress insisted on retaining the prerogative to decide when to adjourn instead of having a fixed date written into the Constitution.<sup>78</sup> In response to those who feared the absence of a fixed date would result in a Congress that met throughout the whole year, the opponents of a fixed adjournment date assured that Congress would adjourn for good well before the November election.<sup>79</sup> This assurance provided a rationale by which members could say they were eliminating lame-duck sessions even as they declined to establish a specific date for the end of congressional sessions. Second, Congress feared that a fixed deadline would perpetuate filibusters against bills under consideration as an inflexible date drew near, as had happened in the days before March 4 under the previous system.<sup>80</sup> Congress,

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(blaming Longworth amendment for failure of Congress to approve Twentieth Amendment in 1931).

<sup>77</sup> In 1932, the House considered a proposal that would have required Congress to conclude its session by June 4 in an election year. See 75 Cong. Rec. 3872-75 (1932) (reporting debate on proposal of Rep. Warren). The House rejected the proposal by a vote of 98 to 54. See *id.* at 3875.

<sup>78</sup> See, e.g., *id.* at 3872 (statement of Rep. Jeffers) (acknowledging need to allow for unforeseen factors impacting date of adjournment); *id.* at 3874 (statement of Rep. Mapes) (arguing that “time for adjournment . . . [should] be left to the discretion of future Congresses”); *id.* at 3872 (statement of Rep. Sumners) (asserting each Congress’s ability to determine its appropriate date of adjournment); 74 Cong. Rec. 5903 (1931) (statement of Rep. Browne) (insisting that “[t]he legislative branch . . . protect itself and its sovereignty and not be a party to tying its own hands”); *id.* at 5902 (statement of Rep. Jeffers) (“The Congress of the United States and the Congress alone should retain control of when it shall meet and when it shall end . . .”); *id.* at 5904 (statement of Rep. Lozier) (declaring that fixing date of adjournment is tantamount to admission of congressional “impotence”); *id.* (statement of Rep. Sumners) (“There is no reason why this particular Congress . . . should make it impossible by a constitutional limitation for another Congress . . . to remain in session longer, as the necessities . . . may require.”). The experience of states with constitutionally prescribed legislative session dates demonstrates the wisdom of Congress in this respect. See William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation* 255 (2d ed. 1995) (discussing judicial review of legislative session time limits).

<sup>79</sup> See *supra* text accompanying notes 71-75.

<sup>80</sup> See, e.g., 75 Cong. Rec. 3875 (1932) (statement of Rep. Mapes) (asserting that sessions with automatic adjournment dates are particularly susceptible to filibusters as adjournment approaches); *id.* at 3824 (statement of Rep. Greenwood) (decrying defeat of important legislation by tactics of minority when adjournment date is fixed); 74 Cong. Rec.

however, never anticipated that changing the beginning of congressional sessions to January 3 could operate in the same way—that a Congress could meet up until noon on January 3 to finish its legislative agenda. The fact that such an early January session was never mentioned in the debates indicates that Congress never contemplated a postelection session.

The President's power to call Congress into session presents another seeming contradiction to an understanding of the Amendment's purpose as eliminating lame-duck congressional actions. Article II empowers the President to convene Congress "on extraordinary occasions,"<sup>81</sup> and the supporters of the Amendment acknowledged that power.<sup>82</sup> An exercise of the President's power to convene Congress could thwart the presumed abolition of lame-duck sessions of Congress. Perhaps lame-duck sessions were to be prohibited except when the President instituted such sessions. This explanation fits with the congressional refusal to include a specific end date, but it conflicts with the event that motivated Congress to consider abolishing lame-duck Congresses: President Harding's call for a special congressional session after the 1922 elections to consider controversial ship-subsidy legislation.<sup>83</sup> Or perhaps no one could imagine a President convening a lame-duck Congress except in the gravest national emergencies, although that theory, too, conflicts with the original objection to Presi-

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5881 (1931) (statement of Rep. Celler) (advocating flexible date of adjournment which "would balk much filibustering" and allow majority to "vote as it saw fit and wise"); *id.* at 5888 (statement of Rep. Maas) (arguing against "any fixed date for adjourning, which permits filibustering and tricks to delay legislation and thereby defeat of the rule of the majority"); *id.* at 5904 (statement of Rep. Simmons) (stating that one reason for Amendment is to "get away from the necessity of bad legislation forced by a filibuster or the killing of good legislation by the same method").

<sup>81</sup> U.S. Const. art. II, § 3 (providing that President "may, on extraordinary Occasions, convene both Houses, or either of them").

<sup>82</sup> See, e.g., 75 Cong. Rec. 3823 (1932) (statement of Rep. Stafford) (assuring that "[n]either is the power vested in the President contravened from summoning the Congress in emergent session if required"); see also *id.* at 3852 (statement of Rep. Tilson) (opponent of Twentieth Amendment noting that "the President on many occasions has seen fit, when the public interests seemed to demand it, to convene Congress in a special session—not 13 months after election but immediately after the 4th day of March").

<sup>83</sup> President Harding called a special session of Congress to meet on November 20, 1922, to approve ship-subsidy legislation that had been an issue in the elections held earlier that month. The voters had rejected Harding's position. See Norris, *supra* note 45, at 328 (relating events precipitating Norris's resolution to abolish lame-duck Congresses). Nonetheless, Harding called for a lame-duck session because he thought it "loftier statesmanship to support and commend a policy designed to effect the larger good to the Nation than merely to record the too hasty impressions of a constituency." 63 Cong. Rec. 25 (1922) (Address of the President). Harding's implicit call to reject the recent election results prompted Senator Caraway to introduce the resolution that Senator Norris credited with beginning the movement to abolish lame-duck sessions of Congress. See *supra* note 45.

dent Harding's actions. Maybe Congress had some other solution in mind. Whatever the answer was, today one can only speculate. The means of reconciling the President's power to call Congress into session and the elimination of lame-duck Congresses cannot be found in the legislative record.

In light of this apparent loophole in the Twentieth Amendment text, it helps to remember how convincing the historical case against lame-duck Congresses needs to be under the *Seminole Tribe* approach to constitutional interpretation. The principle that informs most of the departures from the Eleventh Amendment's text presupposes that the Amendment implicitly codified existing state sovereign immunity. That principle is found neither in the constitutional text nor in direct statements in the records accompanying the ratification of the Amendment, but instead in the understanding of the historical context in which the Eleventh Amendment was adopted.<sup>84</sup> Moreover, as Justice Souter most recently demonstrated in his dissent in *Seminole Tribe*, the historical context itself is subject to contradictory interpretations.<sup>85</sup> Thus, the Court has taken a background assumption apparently held by the drafters of the Eleventh Amendment and transformed it into the principle used to decide Eleventh Amendment cases.

The evidence that the supporters of the Twentieth Amendment assumed that their handiwork would eliminate lame-duck Congresses is overwhelming by comparison. That is what everyone—supporters and opponents alike—understood to be the Amendment's effect. The scheduling practices historically followed by Congress explain why no one thought it necessary to refer explicitly to the elimination of lame-duck Congresses in the constitutional text. Furthermore, the inconsistencies between that background assumption and the real possibility that a lame-duck Congress could meet are far less troubling than the debate about the assumptions attending the enactment of the Eleventh Amendment. Therefore, if the background assumptions held by the drafters of the Constitution produce rules of constitutional law, then the proponents of the Twentieth Amendment's belief that they were doing away with lame-duck Congresses once and for all is of more than historical interest.

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<sup>84</sup> See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996) (noting Court's historical interpretation of Eleventh Amendment as based on "'the presupposition . . . which it confirms'" (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))).

<sup>85</sup> See *id.* at 1150 (Souter, J. dissenting) (asserting, contrary to majority, that "[t]he history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses" (footnote omitted)).

## III

The Twentieth Amendment thus suggests that the actions of a lame-duck Congress—or at least the actions of a lame-duck Congress not called into emergency session by the President—are unconstitutional. For example, the legislation implementing the General Agreement on Tariffs and Trade (GATT)<sup>86</sup> becomes invalid. GATT resulted from eight years of international negotiations culminating in a comprehensive trade agreement in April 1994. Five months later, on September 27, President Clinton submitted to Congress proposed legislation necessary to implement the agreement. He did so hoping for approval by the end of the year.<sup>87</sup> Congress accommodated him: the House passed the bill on November 29, and the Senate followed on December 1.<sup>88</sup>

Consideration of GATT by a lame-duck Congress drew significant opposition, even from erstwhile supporters of the agreement itself.<sup>89</sup> Members of Congress and others questioned the need to act so quickly.<sup>90</sup> They were especially critical because the election had produced a turnover of both the House and the Senate from a Democratic to a Republican majority.<sup>91</sup> Many of the comments in the

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<sup>86</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (to be codified in scattered sections of 7, 15, 17, 18, 19, 21, 26, 28, 29, 31, 35, 42, 47 U.S.C.).

<sup>87</sup> See H.R. Rep. No. 103-826, pt. 1, at 10-11 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3782-83 (summarizing history of negotiations and congressional actions relating to Uruguay Round Agreements).

<sup>88</sup> See 140 Cong. Rec. S15,379 (daily ed. Dec. 1, 1994) (recording Senate approval of GATT 76-24); 140 Cong. Rec. H11,535-36 (daily ed. Nov. 29, 1994) (recording House approval of GATT 288-146).

<sup>89</sup> See, e.g., 140 Cong. Rec. S15,287 (daily ed. Dec. 1, 1994) (statement of Sen. Roth) (voting for GATT even though "[a] lame-duck session is certainly not the best congressional process for deciding the final fate of such an important issue facing the Nation"); 140 Cong. Rec. E2349 (daily ed. Nov. 30, 1994) (statement of Rep. Glickman) (lame-duck member indicating reservations about considering GATT during lame-duck session despite his support for substance of agreement); 140 Cong. Rec. H11,501 (daily ed. Nov. 29, 1994) (statement of Rep. Lowey) (supporting GATT though opposing consideration of major issues by lame-duck Congress).

<sup>90</sup> See, e.g., 140 Cong. Rec. S15,273 (daily ed. Dec. 1, 1994) (statement of Sen. Hollings) (wondering why lame-duck session was necessary when no industrial country had yet adopted GATT); 140 Cong. Rec. S15,124 (daily ed. Nov. 30, 1994) (statement of Sen. Heflin) (arguing that "we shouldn't be forced to hurry this massive agreement through a lame duck session with inadequate consideration, deliberation, or debate").

<sup>91</sup> For example, Sanford Levinson has remarked:

Any true democrat should, at the very least, be troubled by the ratification of GATT by the lame-duck Congress in December 1994 instead of the newly elected Republican Congress that, for better or worse, represented an even sharper repudiation of the prior Democratic majority than did Clinton's election of the Bush Administration.

Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 *Const. Commentary* 183, 185 n.4 (1995).

debate over GATT echoed the debate over the Twentieth Amendment sixty-two years earlier.<sup>92</sup> A revived understanding of the purpose of that Amendment would vindicate the opponents' arguments against allowing a lame-duck Congress to approve GATT.

Likewise, the Twentieth Amendment renders the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>93</sup> unconstitutional. Indeed, courts routinely blame CERCLA's poor drafting on the hurry with which the lame-duck Ninety-Sixth Congress passed—and lame-duck President Carter signed—the bill after the November 1980 election but before President Reagan and a new Republican Senate majority took office in January 1981.<sup>94</sup> Congress had been debating hazardous waste legislation throughout 1980, but the House and the Senate had passed very different bills. The election produced a remarkable spirit of compro-

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<sup>92</sup> See 140 Cong. Rec. S15,128 (daily ed. Nov. 30, 1994) (statement of Sen. Inhofe) ("We should postpone this vote until next year and let the newly-elected Congress, the Congress which by definition is closer to the people, make this decision."); *id.* at S15,104 (statement of Sen. Byrd) (noting that lame-duck members "will not have to answer for their vote to the judgment bar of the people at the next election"); 140 Cong. Rec. H11,449 (daily ed. Nov. 29, 1994) (statement of Rep. DeFazio) (objecting to "a vote taken at the 11th hour on the last day in a lame duck session of Congress, voted upon by many people who have been asked to come home by the American voters because they think they are just a little bit out of touch"); see also 141 Cong. Rec. H3903 (daily ed. Mar. 29, 1995) (statement of Rep. Nadler) (arguing that a lame duck "is more likely to be thinking about his or her next job instead of thinking about representing the people as they wished to be represented [and] will be more accountable to the special interests with jobs to offer than to the people whose ballot will be debased to irrelevance").

<sup>93</sup> 42 U.S.C. §§ 9601-9675 (1994).

<sup>94</sup> See *Exxon Corp. v. Hunt*, 475 U.S. 355, 381 n.6 (1986) (Stevens, J., dissenting) (observing that CERCLA was passed hastily and noting inaccuracies in legislative debate surrounding its passage); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989) (noting that CERCLA "was hurriedly put together" and "was passed after very limited debate by a lame duck Congress"); *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (characterizing CERCLA as "eleventh hour compromise"); *Coburn v. Sun Chem. Corp.*, Civ. A. No. 88-0120, 1988 WL 120739, at \*3 (E.D. Pa. Nov. 9, 1988) (noting limited guidance provided by legislative history of CERCLA); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987) (grouping CERCLA with other statutes notable for "inartful draftsmanship" created in "'harried and hurried' atmosphere prevalent during the final days of a legislative session" and which achieve "a certain quirky notoriety precisely because they are so badly drafted as to be virtually incomprehensible" (citations omitted)); *Mayor & Bd. of Aldermen v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985) (interpreting ambiguous portions of CERCLA and remarking on rushed nature of legislative action); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985) (attributing awkwardness of statutory language to hurried passage of legislation in lame-duck session of Congress); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983) (same).

mise. House and Senate negotiators quickly drafted a bill that the Senate approved on November 24.<sup>95</sup> The House approved the bill on December 3, "groaning all the way."<sup>96</sup> Finally, President Carter signed CERCLA into law on December 11.<sup>97</sup> The implicit assumption for the rushed enactment of CERCLA was the concern that the incoming Congress and President would not approve similar legislation.<sup>98</sup> In other words, they acted for the precise reason that Congress and the states had disapproved by adopting the Twentieth Amendment nearly sixty years before.

Stephen Breyer's appointment to the United States Court of Appeals for the First Circuit becomes invalid as well. President Carter nominated Breyer to the First Circuit on November 13, 1980—nine days after Carter lost his bid for reelection.<sup>99</sup> Before then, Carter's judicial nominating commission had proposed eleven other candidates for that seat.<sup>100</sup> Breyer was widely known and respected by both Democrats and Republicans in Congress by virtue of his service as Chief Counsel to the Senate Judiciary Committee, a job he would soon have to forfeit when Republican Senator Thurmond became the committee's chair in January 1981. Senator Kennedy—the outgoing chair of the committee—championed Breyer's appointment to the court of appeals, and leading Republican members of the Judiciary Committee enthusiastically supported Breyer.<sup>101</sup> That bipartisan support explains why the Senate acted on Breyer's nomination instead of

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<sup>95</sup> See 126 Cong. Rec. 31,018 (1980) (tabulating Senate votes for November 24, 1980).

<sup>96</sup> Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1, 1 (1982); see also 126 Cong. Rec. 31,974 (1980) (statement of Rep. Biaggi) (complaining that Senate sent its CERCLA bill to House "on a take-it-or-leave-it basis"); id. at 31,979 (statement of Rep. Clinger) (speaking "in support of this bill, flawed though it may be, because I am convinced that [it] is the last train that is going to leave the station in this session of Congress"); id. at 31,970 (statement of Rep. Harsha) (objecting to Senate's "ultimatum" to "take it or leave it"); id. at 31,974 (statement of Rep. Moore) ("I do not believe we ought to vote for legislation in the closing hours, being told this is our last chance and pass bad legislation, hoping we can correct it later.").

<sup>97</sup> President's Remarks to Congress on Signing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 3 Pub. Papers: Jimmy Carter 2797, 2798 (Dec. 11, 1980) (recording signature of CERCLA by President Carter).

<sup>98</sup> See Grad, *supra* note 96, at 34 (1982) (explaining that "many supporters of the bill saw this as a final opportunity to get some resolution of the issues, even if imperfect, for fear that to wait for the next session of Congress might well bring them even less").

<sup>99</sup> See 126 Cong. Rec. 29,520 (1980) (acknowledging Senate receipt of Breyer's nomination).

<sup>100</sup> See id. at 31,450 (statement of Sen. Morgan) (listing candidates previously recommended for that seat).

<sup>101</sup> See, e.g., id. at 32,999-33,000 (statement of Sen. Hatch); id. at 31,441-42 (statement of Sen. Kennedy); id. at 31,442 (statement of Sen. Thurmond).

the seventeen other judicial nominations already proposed by President Carter.<sup>102</sup>

Nonetheless, the timing of the nomination provoked opposition. Senator Humphrey asserted that

it is most unwise for the Senate . . . to be moving to confirm a nomination in the closing week, the closing days, the closing hours, of a lameduck session, especially when that nomination has been made by a lameduck President, . . . a man whose programs and outlook have been repudiated by the voters.<sup>103</sup>

Senator Morgan—a defeated lame-duck member himself—complained that the nomination had bypassed standard procedures as it was rushed through the Senate.<sup>104</sup> Breyer's nomination was thus subjected to a filibuster. The Senate voted for cloture by a 68-28 vote,<sup>105</sup> and it confirmed Breyer's appointment on December 9 by an 80-10 vote.<sup>106</sup> He was the only judicial nominee approved by the lame-duck Senate in 1980. Breyer was thus rescued from a lame-duck job by the nomination of a lame-duck President and confirmation by a lame-duck Senate.<sup>107</sup>

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<sup>102</sup> See *id.* at 31,443 (statement of Sen. Humphrey) (listing four pending circuit court nominations and 13 pending district court nominations); *id.* at 31,459 (Judiciary Committee staff memorandum stating that "[t]he minority have made clear that they will approve Breyer but no one else").

<sup>103</sup> *Id.* at 31,443 (statement of Sen. Humphrey); see *id.* at 33,008 (statement of Sen. Humphrey) ("It is a nomination made by a lameduck President that is about to be acted upon by a lameduck Congress."); *id.* at 31,464 (statement of Sen. Humphrey) (arguing that any new judicial appointments should await newly elected Republican leadership); *id.* at 31,445 (statement of Sen. Humphrey) (objecting to "the bizarre, unique, and singular circumstances under which this particular nomination now pending was pushed to the point of appearing to be a subject of a railroading").

<sup>104</sup> See *id.* at 31,449 (statement of Sen. Morgan) (describing how Judiciary Committee, ABA, and FBI had all approved nomination six days after it was made); see also *id.* at 31,450-51 (statement of Sen. Morgan) (characterizing nomination as "a purely political maneuver" resulting from deal between President Carter and Senator Kennedy).

<sup>105</sup> See *id.* at 33,009.

<sup>106</sup> See *id.* at 33,013. The 1994 vote on Justice Breyer's elevation to the Supreme Court was nearly identical. See 140 Cong. Rec. S10,137 (daily ed. July 29, 1994) (recording 87-9 vote for confirmation).

<sup>107</sup> The constitutionality of Breyer's First Circuit appointment probably became moot once a Senate that was not sitting in a lame-duck session confirmed Justice Breyer's confirmation to the Supreme Court, but there is a contrary argument. Cf. Mark V. Tushnet, Clarence Thomas: The Constitutional Problems, 63 *Geo. Wash. L. Rev.* 466, 477 (1995) (concluding that Justice Thomas lied concerning his relationship with Anita Hill and suggesting that "the remedy for Thomas's perjury is that citizens should not regard cases decided by the Supreme Court by a vote of five to four, with Thomas in the majority, as law at all").



## CONCLUSION

The Twentieth Amendment watched decisions like *Seminole Tribe* unfold with wonder and pride. It had always been overlooked during the important debates over constitutional law, and now it saw an opportunity to take its own place in that fray. The Twentieth Amendment even began to suppose that the congressional declaration of war in December 1941 survived only because the attack on Pearl Harbor did not occur during an election year. Then someone told it that no court would actually hold that GATT or CERCLA is unconstitutional, or that Stephen Breyer's tenure on the First Circuit was in any way constitutionally tainted. That would never happen, it was said, because the Supreme Court liked textualist theories of interpretation. The Twentieth Amendment protested that its purpose was to abolish lame-duck congressional sessions as inconsistent with representative democracy, but it was reminded that this purpose was not achieved by the words of the Amendment itself. So the Twentieth Amendment resigned itself to live in obscurity under a theory of constitutional interpretation that requires a textual anchor for any rule of constitutional law. But then the Twentieth Amendment remembered *Seminole Tribe*. If purpose is more important than text, as *Seminole Tribe* and the history of Eleventh Amendment interpretation suggests, then the Twentieth Amendment might spring to life after all. Excitedly, the Twentieth Amendment spread the news about *Seminole Tribe* to the Third Amendment, the Twenty-Second Amendment, and its other forgotten friends. For who knows what surprises lay hidden in the history of other obscure constitutional provisions, if only a law professor has time enough to find them?