

ARTICLES

THE INTERNATIONAL LAW ORIGINS OF AMERICAN FEDERALISM

Anthony J. Bellia Jr.* & Bradford R. Clark**

Courts and commentators have long struggled to reconcile prominent federalism doctrines with the text of the Constitution. These doctrines include state sovereign immunity, the anticommandeering doctrine, and the equal sovereignty of the States. Supporters of such doctrines have generally relied on the history, structure, and purpose of the Constitution rather than its text. Critics have charged that the doctrines lack adequate support in the Constitution's text and are the product of improper judicial activism. This Article suggests a way to reconcile federalism and textualism by looking to a surprising source—international law. The Constitution contains numerous references to “States,” and the meaning of this term is central to a proper understanding of American federalism. Although it may not be possible to ascertain the original public meaning of constitutional terms with absolute certainty, “states” was a well-known term under the law of nations and carried with it a host of background assumptions. The Founding generation first used the term “States” in the Declaration of Independence to claim independence for the Colonies and declare that they were entitled to full sovereign rights under the law of nations. Both the Articles of Confederation and the Constitution continued to use this term to refer to these newly-independent States. The law of nations not only defined the rights of sovereign states but also provided rules governing how states could surrender these rights. Understood against this backdrop, the term “States” in the Constitution provides a precise textual basis for many of the Supreme Court's most significant federalism doctrines, and suggests that courts and commentators may be asking the wrong questions in assessing these

* O'Toole Professor of Constitutional Law, Notre Dame Law School.

** William Cranch Research Professor of Law, George Washington University Law School.

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doctrines. Under the law of nations, a “state” possessed full sovereignty unless and until it clearly and expressly surrendered some of its sovereign rights in a binding legal instrument. Thus, to determine the residual sovereignty of the “States” under the Constitution, the relevant question is not whether the constitutional text affirmatively grants them certain sovereign rights but whether the constitutional text clearly and expressly abrogates such rights.

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INTRODUCTION

Last term, in *Franchise Tax Board of California v. Hyatt*, the Supreme Court ruled that a State has sovereign immunity from suit in the courts of another State.¹ The Court’s decision is noteworthy both for the immunity it recognized and for the fact that it overruled a prior precedent.² Although these issues are significant, the nature of the analysis the Court used to reach its decision has broader implications for constitutional federalism. In *Hyatt*, the Court explicitly invoked principles drawn from the law of nations—today known as public international law—to determine the sovereign rights of the States under the Constitution. Writing for the Court, Justice Thomas began by observing that “[a]fter independence, the States considered themselves fully sovereign nations,” and as such were “exemp[t] . . . from all [foreign] jurisdiction.”³ The Court relied on “[t]he Constitution’s use of the term ‘States’” to support the States’ retention of this traditional aspect of sovereignty.⁴ The Court reasoned that the States continued to possess this immunity unless they affirmatively surrendered it in the Constitution. Although the Court acknowledged that the States surrendered some of their sovereign immunity by authorizing certain suits against them in *federal* court, it concluded that the Constitution contains no comparable surrender of their immunity from suits in *state* court.⁵

The *Hyatt* Court’s analysis has significance beyond the immunity of one State from suit in the courts of another.⁶ In resolving other important federalism questions, all of the Justices have focused in some measure on the original public meaning of the Constitution. Accordingly, the original meaning of the term “States”—understood in historical context—has important implications for these questions. Certain federalism doctrines have drawn criticism on the ground that they lack an adequate basis in constitutional text. The framework suggested by the Court in *Hyatt* has the potential to answer this criticism by tying these doctrines to the original

1. 139 S. Ct. 1485, 1490 (2019).

2. See *id.* (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

3. *Id.* at 1494 (alterations in original) (quoting 2 M. de Vattel, *The Law of Nations* bk. IV, § 108, at 158 (London, J. Coote ed., 1759) [hereinafter 2 Vattel, *The Law of Nations*]).

4. *Id.*

5. *Id.* at 1495–99.

6. For example, the *Hyatt* Court’s approach is directly relevant to understanding the proper scope of state sovereign immunity and Congress’s power to abrogate such immunity under its enumerated powers.

public meaning of the term “States” as used in the Constitution. The term “States” was a term of art drawn from the law of nations and typically signified a sovereign nation with a set of widely recognized sovereign rights. Under the law of nations, a “State” could only relinquish its sovereign rights by a clear and express surrender in a binding legal instrument (such as the Constitution). If, as *Hyatt* stated, the American States possessed full sovereignty following the Declaration of Independence, then many of the Court’s contested federalism doctrines can draw support from the original meaning of the term “State” as understood against background principles of the law of nations that were well known at the Founding.

Over the last three decades, the Supreme Court has demonstrated a renewed commitment to constitutional federalism. In addition to recognizing limits on Congress’s commerce power,⁷ the Court has upheld three important constitutional immunities possessed by the States. First, the Court has reaffirmed that States have sovereign immunity from suits brought by individuals, and that Congress generally lacks authority to abrogate state sovereign immunity pursuant to its Article I, Section 8 powers.⁸ Second, the Court has recognized that Congress lacks constitutional power to commandeer the legislative and executive departments of the States.⁹ Third, the Court has held that the States possess equal sovereignty under the Constitution, and that Congress has limited power to override such equality.¹⁰ The Court’s recognition of these three immunities has allowed the States greater freedom to govern themselves within a federal system. At the same time, the Court’s approach to federalism has sparked controversy both on and off the Court. Critics contend that the immunities in

7. See *United States v. Morrison*, 529 U.S. 598, 617–19 (2000) (holding that the civil remedy of the Violence Against Women Act exceeded Congress’s power to regulate interstate commerce); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the criminal prohibition of the Gun-Free School Zones Act of 1990 exceeded Congress’s power to regulate interstate commerce); cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558, 574 (2012) (upholding the individual mandate under the Affordable Care Act as a tax even though it exceeded the scope of Congress’s power to regulate interstate commerce).

8. See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress may not use its Article I, Section 8 powers to subject States to suits by private individuals in state courts); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that Congress may not use its Article I, Section 8 powers to subject States to suits by private individuals in federal court). The Court has recognized a narrow exception when Congress abrogates state sovereign immunity pursuant to its bankruptcy power. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377–78 (2006).

9. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress may not commandeer state executive officials to carry federal law into execution); *New York v. United States*, 505 U.S. 144, 178 (1992) (holding that Congress may not commandeer state legislatures to carry federal law into execution); see also *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475–78 (2018) (reaffirming and applying the anticcommandeering doctrine).

10. See *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (invalidating Congress’s 2006 renewal of the preclearance requirements of the Voting Rights Act of 1965 on the ground that the statute’s outdated coverage formula violated the equal sovereignty of the States).

question lack adequate support in the Constitution and that the Court has therefore overreached in recognizing and enforcing them. Some of this criticism has come from an unexpected quarter—proponents of textualism in constitutional interpretation. Because the text of the Constitution does not affirmatively grant States the immunities recognized by the Court, textualists claim that such recognition contradicts both the constitutional text and the compromises that it embodies.¹¹

For example, Dean John Manning has argued that the Supreme Court’s anticommandeering and sovereign immunity doctrines are incompatible with textualism¹² because they “lack any discernable textual source” in the Constitution.¹³ In his view, these “new federalism” decisions are problematic because they rely on “freestanding federalism.”¹⁴ As he uses the phrase, freestanding federalism “seeks the founders’ decisions not in the meaning of any discrete clause, but in the overall system of government they adopted in the document.”¹⁵ His objection to this approach is that it focuses not on the specific meaning of the constitutional text but instead on the broad general purpose—federalism—underlying the text.¹⁶ Manning regards the Court’s reliance on freestanding federalism as incompatible with textualism because such reliance disregards hard-fought compromises built into the constitutional text.¹⁷

A possible resolution of this apparent tension between textualism and federalism derives from a surprising source—international law. Most observers view the proper understanding of federalism under the U.S. Constitution as a pure question of domestic law. The term “State,” however, was a term of art drawn from the law of nations. The Founders employed this term—as well as other key concepts drawn from such law—in drafting the Declaration of Independence, the Articles of Confederation, and the Constitution. Accordingly, principles of the law of nations provide

11. See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2058–60 (2009) [hereinafter, Manning, *Federalism and the Generality Problem*].

12. Textualism seeks to ascertain the meaning of a legal provision by asking how a reasonably skilled user of language would have understood the text in its original context. See John F. Manning, *Textualism and Legislative Intent*, 91 *Va. L. Rev.* 419, 420 (2005) (“[I]n practice[,] [textualism] is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context . . .”).

13. Manning, *Federalism and the Generality Problem*, supra note 11, at 2009.

14. *Id.* at 2005, 2040.

15. *Id.* at 2006.

16. *Id.* at 2047.

17. *Id.* at 2040; see also Thomas B. Colby, *Originalism and Structural Argument*, 113 *Nw. U. L. Rev.* 1297, 1299 (2019) (observing that the Supreme Court’s anticommandeering and state sovereign immunity decisions “are grounded in abstract notions of constitutional structure, rather than the original meaning of the constitutional text”). For a defense of freestanding federalism, see Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 *Harv. L. Rev. Forum* 98, 99 (2009) (maintaining that “Manning’s argument is far more destabilizing to existing doctrines and long-established practices of constitutional interpretation than he acknowledges”).

crucial background context for understanding the federal system created by the constitutional text. These principles also help to resolve the tension between textualism and various federalism doctrines by illuminating the Constitution's delegation of powers to the federal government, its reservation of powers to the States, and the proper approach to interpreting the provisions apportioning these respective powers. Because the term "States" was derived from the law of nations, it is not surprising that the drafting and ratification history of the Constitution, as well as early judicial practice, suggests that the Founders understood the term by reference to such law. The law of nations not only defined the sovereign rights of "States" but also supplied background rules governing how "States" surrendered such rights. Thus, the Constitution's use of the term "States"—read against this background—suggests a textual basis for several of the Court's prominent federalism doctrines.

In an important article on this topic, Professor Michael Rappaport was the first scholar to emphasize the Constitution's use of the term "State." As he put it, "the textual basis for the immunities against being commandeered, taxed, and regulated is not the Tenth Amendment or the structure of the Constitution, but instead is the term 'State.'"¹⁸ In his view, "By calling the local governments 'States,' the Framers intended that these governments possess some of the traditional immunities that states enjoyed."¹⁹ He reasoned as follows: "In 1789, the principal meaning of the term ['State'] in this context was an independent nation or country that had complete sovereignty."²⁰

Rappaport, however, rejected the conclusion that the Constitution used the term "State" in this pure sense because "the states . . . did not retain all of the powers of independent countries."²¹ Rather, he argued that the term "should be interpreted as an entity that has some, but not all, of the sovereign powers of an independent country."²² In making these arguments, Rappaport relied on the Constitution's "structure, purpose, and history."²³ Although acknowledging that "this interpretation does depart from the ordinary meaning" of the term "State," he argued that such departures are "common and entirely appropriate."²⁴ In the end, he concluded that the term "State" should be read to confer at least three state immunities against the federal government—immunities against being

18. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 *Nw. U. L. Rev.* 819, 821 (1999).

19. *Id.*

20. *Id.* at 830.

21. *Id.* at 831.

22. *Id.*

23. *Id.* at 837.

24. *Id.* at 836.

“commandeered, taxed, and regulated.”²⁵ He singled out these immunities because, in his view, they “are necessary to ensure that the states possess at least some sovereignty and that they can perform their constitutional functions.”²⁶

Although Rappaport’s approach starts with the constitutional text, his conclusion that the term “States” had a narrower—yet unspecified—meaning in the Constitution has led prominent scholars to doubt that his approach is capable of reconciling the Court’s federalism decisions with textualism. For example, Manning observes that “[i]f the Constitution mixed and matched powers that had traditionally belonged indivisibly to sovereign ‘states,’ then the traditional definition of sovereignty cannot meaningfully inform the question of what residual powers remained in distinctly American ‘states’ after the ratification of the Constitution.”²⁷ Similarly, Professor Ernest Young questions “whether the term ‘state’ itself is really doing any of the interpretive work in his analysis.”²⁸ Young argues that because Rappaport “concedes that we cannot simply adopt the eighteenth-century definition of ‘state’ as a fully sovereign power,” his approach ultimately turns on “structural questions, not textual ones.”²⁹ Finally, Professor William Baude notes that Rappaport’s “theory has the virtue of pointing to an actual textual provision, but it still requires packing a single word with an awful lot of freight.”³⁰

In our view, Rappaport properly highlighted the use of the word “State” in the Constitution, but he was too quick to dismiss the original public meaning of the term—drawn from the law of nations—in favor of a novel meaning informed by his understanding of the Constitution’s “structure, purpose, and history.”³¹ In drafting and ratifying the Constitution, the Founders presumably understood the term “State” to refer to a separate sovereign possessing *all* of the rights and powers traditionally recognized by the law of nations. The term “State” was a term of art drawn from the law of nations and is still used today to refer to independent nation-states with full sovereignty.³² Accordingly, the crucial inquiry is

25. *Id.* at 821. Rappaport also argues that state sovereign immunity in both federal and state court can be traced to the Article III judicial power and the Constitution’s use of the term “States.” See *id.* at 869–74.

26. *Id.* at 838.

27. Manning, *Federalism and the Generality Problem*, *supra* note 11, at 2061 n.255.

28. Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 *Wm. & Mary L. Rev.* 1601, 1625 (2000).

29. *Id.* at 1626.

30. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 *Va. L. Rev.* 1, 7 (2017) [hereinafter Baude, *Sovereign Immunity*].

31. Rappaport, *supra* note 18, at 837.

32. See *infra* notes 45–48 and accompanying text (describing the use of the term “state” under the traditional law of nations); see also Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987) (“International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct

not whether “State”—without more—meant “State” in the Constitution (it did), but the extent to which the American States affirmatively relinquished aspects of their sovereignty in other parts of the Constitution. This latter inquiry can be answered only by consulting additional principles drawn from the law of nations that governed how sovereign “States” could be divested of sovereign rights.

When read against the background meaning of the term “state” and the rules that governed the surrender and divestiture of the sovereign rights of states under the law of nations, the text of the Constitution supports some of the Supreme Court’s most significant federalism doctrines. If the “States” referenced in the constitutional text possessed full sovereignty at the Founding, then they surrendered only those sovereign rights of which the text of the Constitution divested them. To be sure, in adopting the Constitution, the States surrendered certain basic aspects of traditional sovereignty, such as their rights to make treaties, engage in war, and govern exclusively within their own territories.³³ At the same time, however, they did not surrender—and thus retained—other sovereign rights traditionally recognized by the law of nations. It is not necessary to invoke abstract concepts of “freestanding federalism,” “structure,” or “purpose” to identify the residual sovereign rights of the States under the Constitution. Rather, one can ascertain the States’ residual sovereignty by interpreting the constitutional text in light of background principles of the law of nations. Reading the text in this light suggests with surprising precision which aspects of sovereignty the States partially or fully surrendered to the federal government in the Constitution and which aspects they partially or fully retained.

This approach reveals that critics of some federalism doctrines may be asking the wrong question regarding the scope of the States’ residual sovereignty under the Constitution. Instead of inquiring whether the Constitution contains an express provision affirmatively *conferring or preserving* a particular aspect of state sovereignty, one should ask whether the Constitution contains an express provision affirmatively *withdrawing or restricting* a particular aspect of state sovereignty. Under principles of the law of nations well known to the Founders, the “States” would have been understood to retain their preexisting sovereign rights unless they clearly and expressly surrendered them. For this reason, constitutional silence on a question of federalism ordinarily signifies retention—rather than surrender—of the States’ preexisting sovereignty.

Understanding the Constitution by reference to background principles provided by the law of nations helps to ground several of the Supreme Court’s most significant federalism doctrines in the constitutional text. These doctrines include state sovereign immunity, the rule against federal

of *states* and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.” (emphasis added)).

33. See *infra* section III.D.

commandeering of state legislative and executive departments, and the sovereign equality of the States. Critics maintain that these doctrines lack any apparent basis in the constitutional text and are the result of improper judicial activism. But this criticism arguably starts from the wrong baseline. Just as there was no need for the Constitution to spell out the governmental powers possessed by the preexisting States, there was no need for the document to spell out the rights and immunities of those States. Under the law of nations, sovereign states retained all rights, powers, and immunities that they did not affirmatively surrender in a binding legal instrument. The American States could have compromised their sovereign rights—including sovereign immunity, immunity from commandeering, and equal sovereignty—only by adopting constitutional provisions that clearly and expressly altered or surrendered them. Thus, unless the Constitution expressly overrides the States’ preexisting sovereign rights, the “States” necessarily retained such rights. This understanding of state sovereignty rests not on freestanding federalism or judicial activism but on an assessment of the original public meaning of the constitutional text taken in historical context.

This Article proceeds in four Parts. Part I describes the sovereign rights of the American “States” under the law of nations following the Declaration of Independence. The Founders were very familiar and experienced with the law of nations, a source of law that not only defined the rights, powers, and immunities of free and independent states but also provided rules governing their surrender. Part II discusses the States’ relatively modest surrender of sovereignty under the Articles of Confederation, and explains why this short-lived arrangement failed. Part III reviews the drafting and ratification of the Constitution and identifies the precise ways in which the States did—and did not—surrender important aspects of their sovereignty by adopting the Constitution. Finally, Part IV considers the implications of using the law of nations to ascertain the residual sovereignty of the “States” for three of the Supreme Court’s most prominent federalism doctrines—state sovereign immunity, the anti-commandeering doctrine, and the equal sovereignty of the States.³⁴ The Article concludes that the term “States,” understood against background principles of the law of nations, provides textual and historical support for each of these doctrines.

34. Our analysis may have implications for other disputed federalism questions, such as the scope of Congress’s commerce, spending, and Section 5 powers; as well as the extent to which the federal government has power to regulate States. Compare *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that Congress may not exercise the commerce power to regulate traditional state functions), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Usery*).

I. THE SOVEREIGN RIGHTS OF STATES UNDER THE LAW OF NATIONS

It is common ground that the Constitution established a federal system of government by dividing power between the individual States and an overarching federal government. At the same time, significant features of the federal system remain contested more than two centuries after its adoption. Disagreements about the system stem in part from differences over the proper method of constitutional interpretation. Some observers believe that courts may look beyond the text and understand federalism by reference to general conceptions of the federal–state balance reflected in the history, structure, and purpose of the Constitution.³⁵ Proponents of this approach tend to favor more robust federalism doctrines.³⁶ Other observers insist that federalism—like separation of powers—does not exist in the abstract but must be defined by precise provisions of the constitutional text.³⁷ Those who favor this approach tend to favor less robust federalism doctrines.³⁸ Beyond this divide, there are many other contested approaches to constitutional federalism.³⁹

35. In several important cases, the Supreme Court has relied on history and structure to resolve federalism issues. See, e.g., *Alden v. Maine*, 527 U.S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”); *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”). In addition, the Court has recited the purposes of the federal structure established by the Constitution. See, e.g., *Bond v. United States*, 564 U.S. 211, 221 (2011) (“The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure . . . assures a decentralized government . . . more sensitive to the . . . diverse needs of a heterogenous society; . . . increases opportunity for citizen involvement in democratic processes; . . . allows for more innovation and experimentation in government; and . . . makes government more responsive by putting the States in competition for a mobile citizenry.”).

36. See, e.g., Calvin Massey, *Federalism and the Rehnquist Court*, 53 *Hastings L.J.* 431, 435 (2002) (arguing that “federalism matters” and “the Court has a role to play in maintaining federalism”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1511 (1987) (arguing that the “[r]estoration of the constitutional order . . . requires a renewed sense by the people of the relation of state sovereignty to the public good, individual liberty, and popular government”); cf. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 128 (observing that at times Supreme Court Justices have “cabined federal or state powers, in the name of a founding balance thought inconsistent with a plain reading”).

37. See Manning, *Federalism and the Generality Problem*, *supra* note 11, at 2040.

38. See *id.* at 2067 (arguing that some “modern federalism” cases appear “to enforce a freestanding federalism that does not exist”).

39. In resolving constitutional federalism questions, the Supreme Court has largely embraced a theory of dual sovereignty federalism. See, e.g., *Gregory*, 501 U.S. at 457 (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle.”). Other scholars have debated the merits of cooperative federalism, “a vision of

One need not, however, endorse any particular approach over another in order to conclude that the term “States”—properly understood in historical context—provides textual support for several of the Supreme Court’s most significant federalism doctrines. The term “States” in the Constitution was a term of art drawn from the law of nations, and its meaning was well known to the Founders. The law of nations not only defined the rights of States but also provided rules for determining whether and to what extent the States surrendered such rights. As Part III discusses, both aspects of the law of nations help to ascertain the Constitution’s precise delegation of powers to the federal government and reservation of residual powers to the States.

The Founding generation employed the term “States” in the Declaration of Independence more than a decade before the Framers used it in the Constitution. The original Thirteen Colonies in North America were established as part of the British Empire in the seventeenth and eighteenth centuries. Dissatisfied with British rule, the Colonies declared their independence from Great Britain and proceeded to win their independence on the battlefield. In declaring their independence, the

independent governments working together to implement federal policy.” Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813, 815 (1998); see also, e.g., Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *Ariz. L. Rev.* 205, 216 (1997) (“Congress often enacts cooperative federalism statutes based on debatable beliefs that state regulation or implementation is more efficient, results in better decisionmaking or renders government more accountable than the federal equivalents. These beliefs are likely to be true, if at all, only on a retail basis.” (footnotes omitted)); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 667 (2001) (“[C]ooperative federalism both protects states from preemptive federalism and enables Congress to discipline federal agencies by threatening to delegate regulatory authority to the states.”). Still other scholars have described the U.S. federal system as one of “dynamic federalism,” a system in which “federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both the federal and state governments.” J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 *Calif. L. Rev.* 59, 103 (2010) (internal quotation marks omitted) (quoting Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 *Emory L.J.* 159, 176 (2006)). For discussions of dynamic federalism, see Engel, *supra*, at 176 (“Dynamic federalism rests upon and supports judicial doctrines that affirm the existence of the states and their independent lawmaking powers, but otherwise calls for a passive approach on the part of the courts”); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 249 (2005) (arguing that “it is the dynamic interaction among states and the national government that forms the true sound of federalism”). For arguments that federalism debates should not be framed in terms of dual sovereignty but that there are nonetheless benefits to decentralization, see Erin Ryan, *Federalism and the Tug of War Within* 3–5 (2011); Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1097–98 (2014); Heather K. Gerken, *Federalism 3.0*, 105 *Calif. L. Rev.* 1695, 1704–08 (2017); Abbe R. Gluck, *Our [National] Federalism*, 123 *Yale L.J.* 1996, 1998–2000 (2014). Some scholars even contend that federalism is an outdated artifact and should be generally disregarded. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 906–08 (1994).

United Colonies declared themselves to be “Free and Independent States” with “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”⁴⁰ The Colonies had no need to specify all of the rights and powers of “Free and Independent States” because they were well established under the law of nations. By referring to “all other Acts and Things which Independent States may of right do,” the Declaration of Independence claimed all of these sovereign rights for the American States.

All who read the Declaration—including Great Britain—understood that the Colonies were claiming for themselves all of the rights of free and independent States under the law of nations. Initially, Great Britain resisted independence through force of arms. After the War of Independence, Great Britain formally recognized the independence of the Colonies in terms that echoed the Declaration of Independence. Article I of the provisional peace treaty provided that “His Britannic Majesty acknowledges the said United States . . . to be free, Sovereign and independent States.”⁴¹ By recognizing the United States as “free, Sovereign and independent States,” Great Britain was acknowledging both the States’ independence from Great Britain and their possession of sovereign rights and powers under the law of nations.

After achieving their independence, the American States voluntarily surrendered aspects of their sovereignty, first in the Articles of Confederation and then in the Constitution. Before considering the precise extent of these surrenders, it is useful to describe the sovereign rights and powers that the States originally secured for themselves through the Declaration of Independence and the War of Independence. These rights defined what it meant to be a “State.”

This Part provides an overview of the rights of free and independent states under the law of nations, and then discusses several specific rights of sovereign states that have particular relevance to the Constitution’s division of powers between the federal government and the States. This Part also describes the rules that governed the means by which sovereign states could surrender portions of their sovereignty under the law of nations. After identifying the baseline of sovereignty that “Free and Independent States” enjoyed under the law of nations, we turn in Parts II and III to identify the rights that the States surrendered or compromised—and those that they retained—by adopting first the Articles of Confederation, and later the Constitution.

40. The Declaration of Independence para. 32 (U.S. 1776).

41. Provisional Articles, U.S.-Gr. Brit., art. I, Nov. 30, 1782, 8 Stat. 54.

A. *Overview of Sovereign Rights Under the Law of Nations*

The American States secured the complete array of sovereign rights and powers recognized by the law of nations when they achieved the status of “Free and Independent States.”⁴² As stated in the Declaration of Independence, these rights included “full Power to levy War, conclude Peace, contract Alliances, [and] establish Commerce.”⁴³ The Declaration also referred to “all other Acts and Things which Independent States may of right do.”⁴⁴ This reference was to the full body of rights enjoyed by sovereign states under the law of nations.

Sovereign “states”—also known as “nations”—possessed numerous important rights under the law of nations, including the rights of self-governance, territorial sovereignty, and equal sovereignty. The Founders were well versed in the law of nations, having claimed the rights of free and independent states in the Declaration of Independence, and having actively sought to avoid law of nations violations under the Articles of Confederation. *The Law of Nations* by Emmerich de Vattel⁴⁵ was the most influential treatise on the law of nations in England and America during the Founding period.⁴⁶ In this work, Vattel described the established rights of sovereign states under the law of nations. A “*sovereign state*,” Vattel explained, is any “nation that governs itself . . . without any dependence on a foreign power.”⁴⁷ The rights enjoyed by sovereign states under the law of nations provide a crucial baseline for understanding which rights the American States surrendered and which rights they retained by adopting the Constitution.⁴⁸

Nations had numerous specific and well-recognized rights under the law of nations. First and foremost, states enjoyed rights to self-government and territorial sovereignty.⁴⁹ In addition, nations enjoyed the right to self-protection and preservation,⁵⁰ including the right to be free from harm to

42. The Declaration of Independence para. 32 (U.S. 1776).

43. *Id.*

44. *Id.*

45. 1 M. de Vattel, *The Law of Nations* (London, J. Newbery et al. eds., 1760) [hereinafter 1 Vattel, *The Law of Nations*]; 2 Vattel, *The Law of Nations*, *supra* note 3.

46. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 15–16 (2009); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 *N.Y.U. J. Int’l L. & Pol.* 1, 67 (1999) (“[I]n the 1780s and 1790s, there were nine citations [by American courts] to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel.”); see also David Gray Adler, *The President’s Recognition Power*, in *The Constitution and the Conduct of American Foreign Policy* 133, 137 (David Gray Adler & Larry N. George eds., 1996) (“During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.”).

47. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. I, § 4, at 10.

48. See Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1815–16 (2012).

49. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, §§ 79–98, at 146–52.

50. *Id.*, bk. II, §§ 1–20, at 120–27.

one's citizens or subjects by another nation.⁵¹ Nations had the right to pursue, and establish the terms of, commerce with other nations,⁵² including the right to free and equal use of the high seas.⁵³ Inherent in all of these rights was the right to maintain sovereign dignity and equality with other nations,⁵⁴ such as the right to have one's judgments respected by other nations.⁵⁵ To uphold these rights, each nation enjoyed a "right to security"—"a right not to suffer any other to obstruct its preservation, its perfection, and happiness, that is, to preserve itself from all injuries."⁵⁶

The law of nations also recognized the means by which nations could enforce and adjust their rights vis-à-vis other nations. Nations had the right to conduct diplomatic relations with one another. "It is necessary that nations should treat with each other for the good of their affairs, for avoiding reciprocal damages, and for adjusting and terminating their differences."⁵⁷ Accordingly, each nation enjoyed the right of embassy—to send and receive ambassadors and other public ministers.⁵⁸ Ambassadors and other public ministers enjoyed important rights to security, "for if their person be not defended from violence of every kind, the right of embassies becomes precarious, and the success very uncertain."⁵⁹ Thus, "Whoever offers any violence to an ambassador, or any other public minister, not only injures the sovereign whom this minister represents, but he also hurts the common safety and well-being of nations."⁶⁰

In conducting diplomacy, nations enjoyed the right to enter into treaties and other public conventions with each other⁶¹ in accordance with the procedural requirements of domestic law.⁶² Nations used treaties both to adjust and to enforce their rights under the law of nations. When one nation was unable to obtain redress through diplomacy for another nation's violation of its rights under the law of nations, the offended nation enjoyed the right to pursue various unilateral actions, including retortion and reprisals.⁶³ Ultimately, if a sovereign was unable to obtain satisfaction for a violation of its rights through diplomacy or retaliatory measures, the state had the right to wage war against the offending nation.⁶⁴ Vattel extensively

51. *Id.*, bk. II, §§ 71–78, at 144–46.

52. *Id.*, bk. II, §§ 21–34, at 128–32.

53. *Id.*, bk. I, §§ 281–282, at 113–14.

54. *Id.*, bk. II, §§ 35–48, at 133–37.

55. *Id.*, bk. II, § 84, at 147–48.

56. *Id.*, bk. II, § 49, at 137.

57. 2 Vattel, *The Law of Nations*, supra note 3, bk. IV, § 55, at 132.

58. *Id.*, bk. IV, §§ 55–79, at 132–41.

59. *Id.*, bk. IV, § 81, at 142.

60. *Id.*

61. 1 Vattel, *The Law of Nations*, supra note 45, bk. II, §§ 152–217, at 171–202.

62. *Id.*, bk. II, § 154, at 171 ("In the fundamental laws of each state, we must see what is the power capable of contracting with validity in the name of the state.")

63. *Id.*, bk. II, §§ 341–342, at 249.

64. *Id.*, bk. II, § 22, at 6–7.

addressed the rights of nations to declare war, conduct war, and maintain neutrality in the wars of others.⁶⁵

B. *The Right to Self-Government and Independence*

Two rights of states under the law of nations have particular relevance to contested federalism doctrines under the Constitution. As Vattel explained, free and independent states enjoyed the right to self-government and independence, and the right to equality with other states. These rights are crucial to evaluating several of the Supreme Court’s most prominent federalism doctrines, including state sovereign immunity, the anticommandeering doctrine, and the equal sovereignty of the States—as Part IV discusses.

A fundamental right of sovereign states under the law of nations was the right of self-governance. This right prohibited any state from controlling how another state governed itself. For Vattel, the right to self-government was essential to the very meaning of a sovereign state. “Every nation that governs itself,” Vattel wrote, “under what form soever, without any dependence on a foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state.”⁶⁶ Because each sovereign state enjoyed the right to self-government, no state could interfere in the government of another. “It is a manifest consequence of the liberty and independence of nations,” Vattel explained, that “all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state.”⁶⁷ Given this right, “It does not . . . belong to any foreign power to take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”⁶⁸ Vattel characterized a state’s right to noninterference in its governance as its “most precious” right.⁶⁹ “Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.”⁷⁰

For Vattel, the purpose of a state’s right to govern itself was to enable its citizens or subjects to “procure their mutual safety and advantage by means of their union.”⁷¹ Accordingly, he described various objects subject to regulation by a sovereign’s governing authority, free from interference by other nations:

The society is established with the view of procuring to those who are its members, the necessities, conveniences, and even accommodations of life; and in general, every thing necessary to their

65. 2 Vattel, *The Law of Nations*, supra note 3, bk. III.

66. 1 Vattel, *The Law of Nations*, supra note 45, bk. I, § 4, at 10.

67. *Id.*, bk. II, § 54, at 138.

68. *Id.*, bk. II, § 55, at 138.

69. *Id.*, bk. II, § 54, at 138.

70. *Id.*

71. *Id.*, intro., § 1, at 1.

felicity; to take such measures that each may peacefully enjoy his own property, and obtain justice with safety; and, in short, to defend the whole from all violence from without.⁷²

In sum, a state had authority, free from interference by other nations, to (1) provide for the necessities of the nation,⁷³ (2) ensure its happiness,⁷⁴ and (3) fortify itself against external attacks.⁷⁵

Because the right of self-governance was foundational, a sovereign state had the right to oppose any interference with this right through all means necessary. For this reason, Vattel characterized the right to self-governance as a “perfect right,” the violation of which gave the offended nation just cause to protect the right through the use of force.⁷⁶ Because “foreign nations have no right to intrude themselves into the government of an independent state,” an offended state “has a right of refusing to suffer it. To govern itself according to its pleasure, is a necessary part of its independence.”⁷⁷

As Part IV discusses, the right of sovereign states to govern themselves provides crucial background for understanding the constitutional basis for the Supreme Court’s decisions recognizing the States’ sovereign immunity and their right not to be commandeered by the federal government. When the American States became “Free and Independent States,” they secured

72. *Id.*, bk. I, § 72, at 35.

73. First, “[t]he nation, or its conductor, should . . . apply to the business of providing for all the wants of the people, and producing a happy plenty of all the necessaries of life, with its conveniences and innocent and laudable enjoyments.” *Id.* Vattel described many ways in which a nation should secure “the necessaries of life” for the people. These ways included ensuring that land was used productively for agriculture, *id.*, bk. I, §§ 77–82, at 36–38; regulating domestic commerce and deciding how to engage in foreign commerce, *id.*, bk. I, §§ 83–99, at 38–44; providing a proper infrastructure, *id.*, bk. I, §§ 100–104, at 44–45; and coining money, *id.*, bk. I, §§ 105–109, at 45–47.

74. The second object of government, as described by Vattel, is to ensure the happiness of the people. *Id.*, bk. I, § 110, at 47 (“[T]he conductors of the nation . . . are to labour after its felicity, to watch continually over it, and to advance it to the utmost of their power.”). Toward this end, Vattel explained, the government should, among other objectives, provide for the education of youth, *id.*, bk. I, § 112, at 48; promote the arts and sciences, *id.*, bk. I, § 113, at 48–49; ensure the freedom of philosophical discussion, *id.*, bk. I, § 114, at 49–50; promote virtue and deter vice, *id.*, bk. I, § 115, at 50; inspire love of country, *id.*, bk. I, § 119, at 52; resolve matters of religion, *id.*, bk. I, §§ 125–157, at 54–71; and establish and enforce good laws in service of justice, *id.*, bk. I, §§ 158–176, 71–79.

75. The third object of government described by Vattel is to fortify itself from external attacks. *Id.*, bk. I, § 177, at 79 (“One of the ends of political society is to defend itself, by means of its union from all insults or violence from without.”). To serve this object, Vattel explained, a sovereign state may take measures to increase its population, assemble and train armed forces, and develop public and private wealth. *Id.*, bk. I, §§ 177–182, at 79–82. “The nation ought to put itself in such a state as to be able to repel and humble an unjust enemy; this is an important duty, which the care of its perfection, and even preservation itself imposes both on the state and its conductor.” *Id.*, bk. I, § 177, at 79.

76. *Id.*, intro., § 22, at 6–7.

77. *Id.*, bk. II, § 57, at 140.

the right to govern themselves free of these kinds of outside interference.⁷⁸ Unless they clearly and expressly compromised this right in the Constitution, the “States” referred to in the Constitution necessarily retained it. Judicial doctrines recognizing state sovereign immunity and denying federal power to commandeer the States uphold this basic aspect of state sovereignty.

C. *The Right to Equal Sovereignty*

Another important right of free and independent states was the right to equal sovereignty with other states. Although there is some dispute as to when this principle first emerged,⁷⁹ there is no doubt that it was well established prior to the Founding. Vattel described the equality of nations as a fundamental principle of the law of nations. The rationale for the equality of nations, Vattel explained, was the equality of the persons who comprise them:

Since men are naturally equal, and their rights and obligations are the same, as equally proceeding from nature, nations composed of men considered as so many free persons, living together in a state of nature, are naturally equal, and receive from nature the same obligations and rights. Power or weakness does not in this respect produce any difference . . . [A] small republic is as much a sovereign state as the most powerful kingdom.⁸⁰

As a result of their natural equality, nations enjoyed the same rights under the law of nations:

From a necessary consequence of this equality, what is permitted to one nation is permitted to all; and what is not permitted to one is not permitted to any other . . . Nations being free, independent and equal, and having a right to judge according to the dictates of conscience, of what is to be done in order to fulfil its duties; the effect of all this is, the producing, at least externally, and among men, a perfect equality of rights between nations, in the

78. The Declaration of Independence para. 32 (U.S. 1776).

79. Compare Hidemi Suganami, Grotius and International Equality, *in* Hugo Grotius and International Relations 221, 221–23 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1992) (arguing that Grotius’s work is consistent with the equality of states), with Benedict Kingsbury, A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull, 17 *Quinnipac L. Rev.* 3, 15 (1997) (observing that “Grotius had no general doctrine of the equality of sovereign entities”).

80. 1 Vattel, *The Law of Nations*, supra note 45, intro., § 18, at 6. Jean-Jacques Burlamaqui provided the same rationale for the equal rights of sovereigns under the law of nations. The society of nations, he wrote, is

a state of equality and independence, which establishes a parity of right between them; and engages them to have the same regard and respect for one another. Hence the general principle of the law of nations is nothing more than the general law of sociability, which obliges all nations that have any intercourse with one another, to practise those duties to which individuals are naturally subject.

1 J.J. Burlamaqui, *The Principles of Natural and Politic Law* 121 (Thomas Nugent trans., Boston, Joseph Bumstead, 4th ed. rev. and corrected 1792) (1747 & 1751).

administration of their affairs, and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one, is also permitted in the other, and they ought to be considered in human society as having an equal right.⁸¹

In short, the law of nations recognized that “nature has established a perfect equality of rights between independent nations. Consequently none can naturally pretend to prerogative: their right to freedom and sovereignty renders them equals.”⁸² One nation would violate another’s equality of right by claiming a superiority of rights or a “pre-eminence of rank” over it⁸³ or refusing to show appropriate respect for its rights.⁸⁴

The Founding generation was well versed in the law of nations and understood that free and independent states were entitled to equal sovereignty. Thus, in declaring the Colonies to be “Free and Independent States,” the Founders were declaring the newly independent American States to be the equals not only of each other but also of all sovereign states.⁸⁵ Under the law of nations, states could surrender this aspect of their sovereignty only by a clear and express surrender in a binding legal instrument.⁸⁶ By employing the term of art “States,” the Constitution necessarily recognized the equal sovereignty of the American States. Thus, as Part IV discusses, the relevant inquiry is not whether the Constitution contains a provision expressly conferring equal sovereignty on the States, but whether the Constitution contains a provision expressly altering the equal sovereignty of the States.

D. *Rules Governing the Surrender of Sovereign Rights*

Although states enjoyed a broad range of sovereign rights, the law of nations recognized that a state could voluntarily modify or surrender its rights in a treaty, convention, act, or other appropriate legal instrument. Surrender or modification of sovereign rights was a momentous act and was not to be inferred from vague or ambiguous provisions. If a legal instrument was misinterpreted to deny a state its rights under the law of nations, the offended state was entitled to retaliate against the offender, including by waging war.⁸⁷ To avoid such dangerous misunderstandings, the law of nations furnished a set of rules to govern the interpretation of documents alleged to alienate or divest sovereign rights. These rules provide important background context for understanding the sovereign rights and

81. 1 Vattel, *The Law of Nations*, supra note 45, intro., §§ 19–20, at 6.

82. *Id.*, bk. II, § 36, at 133.

83. *Id.*, bk. II, § 37, at 133.

84. *Id.*, bk. II, § 47, at 136.

85. The Declaration of Independence para. 32 (U.S. 1776).

86. See infra section I.D.

87. See supra notes 76–77.

powers of American States—and the extent to which they relinquished such rights and powers—by adopting the Constitution.

Typically, states used treaties to adjust their rights under the law of nations. For this reason, Vattel devoted an entire chapter of his treatise to rules governing the proper interpretation of treaties. He explained that most of the rules in this chapter applied broadly to “concessions, conventions, and treaties, [and] . . . all contracts as well as . . . laws.”⁸⁸ Vattel recognized that established rules of interpretation were necessary to prevent a party from taking advantage of the imperfections of language.⁸⁹ In this regard, he identified two key rules of interpretation: (1) legal provisions expressed in clear and precise terms should be interpreted according to their natural meaning (unless they lead to absurd results), and (2) if at all possible, vague or ambiguous legal provisions should not be interpreted to alter sovereign rights in favor of one party at the expense of the other. These rules enabled states to enter into legal arrangements adjusting their sovereign rights while reducing the chances of misunderstandings regarding such adjustments. The Founders were well versed in the law of nations, and prominent Founders understood these rules to govern the surrender of sovereign rights by the American “States” in both the Articles of Confederation and the Constitution. Indeed, as Part IV explains, the Supreme Court applied these rules in important early cases involving the scope of federal power under the Constitution.

1. *The Natural Meaning of Clear and Precise Provisions.* — Vattel’s first rule of interpretation was that a legal act expressed in clear and precise terms should be interpreted in accordance with its natural meaning at the time it was adopted:

The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents.⁹⁰

Vattel enumerated various related maxims of interpretation, designed to prevent fraud. “The interpretation of every act, and of every treaty, ought then to be made according to certain rules proper to determine the sense of them, such as the parties concerned must naturally have understood, when the act was prepared and accepted.”⁹¹ One such rule was that

88. 1 Vattel, *The Law of Nations*, supra note 45, bk. II, § 262, at 215.

89. In any of these written legal forms, “it is impossible,” he observed, “to foresee and point out, all the particular cases, that may arise.” *Id.* Because “fraud seeks to take advantage even of the imperfection of language; that men designedly throw obscurity and ambiguity into their treaties, to obtain a pretence for eluding them upon occasion,” it is “necessary to establish rules founded on reason, and authorized by the law of nature, capable of diffusing light over what is obscure, of determining what is uncertain, and of frustrating the attempts of a contracting power void of good faith.” *Id.*, bk. II, § 262, at 215–16.

90. *Id.*, bk. II, § 263, at 216.

91. *Id.*, bk. II, § 268, at 217 (emphasis omitted).

language generally should be understood according to its common usage. “In the interpretation of treaties, pacts, and promises, we ought not to deviate from the common use of the language, at least, if we have not very strong reasons for it.”⁹² Words, he explained, are “spoken according to custom.”⁹³

The custom of which we are speaking is, that of the time in which the treaty, or the act in general, was concluded and drawn up. Languages vary incessantly, and the signification and the force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms, at the time when it was written.⁹⁴

Vattel described several other specific rules of interpretation, including that technical rules should receive their technical meaning,⁹⁵ that figurative expressions should receive their figurative sense,⁹⁶ and that interpretations that lead to absurdity should be rejected.⁹⁷

The goal of these interpretative rules was to find and implement the natural, customary meaning of clear and precise terms used by sovereign states. These rules enabled sovereign states to make treaties and take other legal actions against a backdrop of shared understandings, and thus to adjust their sovereign rights while minimizing the chances of misunderstanding and conflict.

2. *Surrendering or Divesting Sovereign Rights.* — In keeping with the goal of avoiding conflict, Vattel laid out correlative rules to prevent the inadvertent surrender or divestiture of sovereign rights. As explained, if one sovereign expressly surrendered its rights under the law of nations in clear and precise terms, the parties were expected to give effect to the natural meaning of those terms. On the other hand, if a provision was ambiguous or vague with respect to the alteration of a state’s sovereign rights,

92. *Id.*, bk. II, § 271, at 219 (emphasis omitted); see also Hugo Grotius, *The Rights of War and Peace* 353 (J. Barbeyrac trans., London, W. Innys, R. Manby, J. and P. Knapton, D. Brown, T. Osborn & E. Wicksteed 1738) (“If no Conjecture guides us otherwise, the Words are to be understood according to their Propriety, not the grammatical one . . . but what is vulgar and most in Use . . .”); 2 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* bk. V, § 3, at 794 (C.H. Oldfather & W.A. Oldfather trans., Clarendon ed. 1934) (1688) (“[T]he rule is as follows: If there is no sufficient conjecture which leads in any other direction, words are to be understood in their proper and so-called accepted meaning, one that has been imposed upon them, not so much by their intrinsic force and grammatical analogy as by popular usage . . .”).

93. 1 Vattel, *The Law of Nations*, supra note 45, bk. II, § 271, at 219.

94. *Id.*, bk. II, § 272, at 219.

95. *Id.*, bk. II, § 276, at 220; see also Grotius, supra note 92, at 353 (“Terms of Art, which the common People are very little acquainted with, should be understood as explained by them who are most experienced in that Art . . .”); Pufendorf, supra note 92, bk. V, § 4, at 795 (“As to terms used in the arts, which the common sort scarcely comprehend, it should be observed that they are explained in accordance with the definitions of those who are skilled in the art.”).

96. 1 Vattel, *The Law of Nations*, supra note 45, bk. II, § 278, at 221.

97. *Id.*, bk. II, § 282, at 222.

then the provision did not constitute a surrender of such rights. For example, a nation could never surrender any aspect of its right to self-government unless it did so in clear and express terms. As Vattel explained:

A sovereign state cannot be constrained in this respect, except it be from a particular right which the state itself has given to others by treaties; and even in this case, in a subject of such importance as that of government, this right cannot be extended beyond the clear and express terms of the treaties. Without this circumstance a sovereign has a right to treat as enemies those who endeavour to interfere, otherwise than by their good offices, in his domestic affairs.⁹⁸

In other words, a state was incapable of alienating or compromising its right to self-government by implication; any surrender of this right had to be set forth in clear and express terms.

Accordingly, Vattel distinguished those provisions of legal instruments that were plain, clear, and determinate from those that were vague, unclear, or indeterminate.⁹⁹ He observed, however, that “ideas” and “language” are not always “exactly determined.”¹⁰⁰ In such cases, the proper approach turns on “the nature of the things” at issue. When the expressions of

the legislature, or of the contracting powers . . . are indeterminate, vague, or susceptible of a more or less expansive sense; if this precise point of their intention in the particular case in question, cannot be observed and fixed, by other rules of interpretation, it should be *presumed*, according to the laws of reason and equity: and for this purpose, it is necessary to pay attention to the nature of the things to which it relates.¹⁰¹

In this regard, Vattel drew a sharp distinction between indeterminate provisions relating to things that are “favourable” and indeterminate provisions relating to things that are “odious.”¹⁰² Vattel did not use these terms in the sense of good or bad in the abstract. Rather, he used “favourable” to refer to things that are favorable to all interested parties, and “odious” to refer to things that are potentially favorable to one party, and unfavorable to another. A “favourable” thing “tends to the common advantage in conventions, or . . . has a tendency to place the contracting powers on an equality.”¹⁰³ An “odious” thing is one that “contains a penalty”; “tends to

98. *Id.*, bk. II, § 57, at 140.

99. *Id.*, bk. II, § 300, at 232 (“[W]hen the dispositions of a law or a convention are plain, clear, determinate, and applied with certainty, and without difficulty, there is no room for any interpretation, or any comment.”).

100. *Id.*, bk. II, § 299, at 231.

101. *Id.*, bk. II, § 300, at 232 (emphasis added).

102. *Id.*

103. *Id.*, bk. II, § 301, at 232 (emphasis omitted).

render an act null, and without effect, either in whole or in part"; or "tends to change the present state of things."¹⁰⁴

According to Vattel, when an indeterminate provision of an act or treaty relates to "favourable" things, "we ought to give the terms all the extent they are capable of in common use."¹⁰⁵ On the other hand, when an indeterminate provision of an act or treaty relates to "odious" things, "we should . . . take the terms in the most confined sense, . . . without going directly contrary to the tenour of the writing, and without doing violence to the terms."¹⁰⁶

Of particular relevance to the rights of the American States under the Constitution, a provision of a treaty or other legal act was considered "odious" if it changed the status quo by surrendering or divesting sovereign rights previously possessed by one of the parties. Whether a provision was considered odious did not depend on whether the surrender was part of an overall favorable deal. Instead, the question was whether the surrender of a sovereign right was part of the new legal arrangement. Unless a legal instrument surrendered such a right in clear and express terms, it was to be interpreted not to alter preexisting sovereign rights. As Vattel explained:

[T]he proprietor can only lose so much of his right as he has ceded of it; and in a case of doubt, the presumption is in favour of the possessor. It is less contrary to equity, not to give to a proprietor what he has lost the possession of by his negligence, than to strip the just possessor of what lawfully belongs to him. The interpretation then is that we ought rather to hazard the first inconvenience, than the last. We might apply here, to many cases, the rule . . . that the cause of him who seeks to avoid a loss, is more favourable than that of him who desires to acquire gain.¹⁰⁷

104. *Id.*, bk. II, §§ 301–305, at 232–34. The distinction between "favourable" and "odious" terms was long recognized by writers on the law of nations. See Grotius, *supra* note 92, at 357 (providing as examples of "odious" provisions "those that lay the Charge and Burden on one Party only, or on one more than another; and those which carry a Penalty along with them, which invalidate some Acts and alter others"); Pufendorf, *supra* note 92, bk. V, § 12, at 806 (explaining that "odious" provisions are those "which burden one party only, or one more than the other; also such as carry with them punishments, and which make certain acts void, or effect some alteration in previous conclusions, as well as such as uproot friendship and society").

105. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, § 307, at 234 (emphasis omitted).

106. *Id.*, bk. II, § 308, at 235. Pufendorf and Grotius had described these same rules of interpretation. Drawing upon Grotius, Pufendorf wrote, "In cases not odious words are to be taken in accordance with their exact significance in popular usage." Pufendorf, *supra* note 92, bk. V, § 13, at 806. On the other hand, in odious cases, including those "connected with a diminution of the sovereign power," an indeterminate provision should be interpreted to avoid the hardship. *Id.* at 809. Grotius had written that "in Cases not odious we must understand the Words in their full Extent, as they are generally taken"; on the other hand, "in an odious Matter, even a figurative Speech is allowed to avoid a Grievance." Grotius, *supra* note 92, at 357–58.

107. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, § 305, at 233–34.

In modern parlance, Vattel was describing a clear statement rule designed to preserve preexisting sovereign rights. In short, under the law of nations, a legal instrument would not be interpreted to divest a sovereign right unless the instrument expressly divested that right in clear and precise terms. This rule ensured not only that states knowingly and voluntarily surrendered their sovereign rights but also that unclear provisions would not trigger disagreements that could lead to conflict, or even war.

II. THE STATES AND THE ARTICLES OF CONFEDERATION

State sovereignty in America began with the Declaration of Independence. Because of growing dissatisfaction with British rule, the Thirteen Colonies in North America issued the Declaration on July 4, 1776. In declaring themselves to be “Free and Independent *States*,” the Colonies chose a term of art drawn from the law of nations with an established meaning on both sides of the Atlantic.¹⁰⁸ The newly declared “States” proceeded to fight and win a War of Independence with Great Britain, securing their independence and sovereignty along with all of the rights and powers that accompanied that status under the law of nations.

During the war, the States unanimously adopted the Articles of Confederation.¹⁰⁹ This document was essentially a treaty among the newly free and independent States to enhance their collective strength and security.¹¹⁰ After the war, the States increasingly found that the Articles were not meeting their economic and security needs, in part because the member States retained too much individual sovereignty and often ignored Congress’s commands with impunity.¹¹¹ Accordingly, in 1787, the Constitutional Convention proposed that the States abandon the Articles of Confederation in favor of an entirely new Constitution.¹¹² By 1789, twelve of the original thirteen States had ratified the Constitution, and Rhode Island did the same in 1790.¹¹³ This Part examines the sovereignty enjoyed by the “States” under the Declaration of Independence and the Articles of Confederation, and Part III examines the scope of their sovereignty under the Constitution.

108. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added); see also *supra* sections I.A–.C (describing the rights enjoyed by states under the law of nations).

109. Articles of Confederation of 1781.

110. *Id.*, art. III (“The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare.”).

111. See Anthony J. Bellia Jr., *Federalism* 4 (2d ed. 2017) (describing defects in the Articles of Confederation).

112. See U.S. Const. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”).

113. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 *B.U. L. Rev.* 801 app. B at 842 (2007) (providing a chronology of the ratification of the Constitution).

A. *The Declaration of Independence*

After reciting “a history of repeated injuries and usurpations” by King George III against the colonies,¹¹⁴ the Declaration of Independence asserted that the colonies were “Free and Independent States”:

[T]hese United Colonies are, and of Right ought to be, Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as Free and Independent states, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.¹¹⁵

This document asserted that the American States, being free and independent, now enjoyed all of the sovereign rights recognized by the law of nations.

The powers claimed by the States in the Declaration of Independence—“to levy war, contract alliance, establish commerce”—were drawn directly from the law of nations.¹¹⁶ As we have explained elsewhere:

The use of the phrase, “Free and Independent States,” was a clear reference to the law of nations. If these “United States” achieved this status, then other nations would have to respect their rights to prevent and vindicate injuries by other nations (“Power to levy War” and “conclude Peace”), make treaties (“contract Alliances” and “establish Commerce”), enjoy neutral use of the high seas (“establish Commerce”), and exercise territorial sovereignty and diplomatic rights (“all other Acts and Things which Independent States may of right do”).¹¹⁷

In short, when the “United Colonies” asserted their independence from Great Britain, they declared themselves to be free and independent States entitled to exercise all of the rights of sovereign states under the law of nations.

114. The Declaration of Independence para. 2 (U.S. 1776).

115. *Id.* para. 32.

116. *Id.*

117. Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va. L. Rev. 729, 754 (2012) [hereinafter Bellia & Clark, *The Law of Nations as Constitutional Law*]. Mike Rappaport observed that “[i]n 1789, the principal meaning of the term [‘state’] in this context was an independent nation or country that had complete sovereignty.” Rappaport, *supra* note 18, at 830. In contrast, Professor Jack Rakove has contended that “[t]he word [‘state’] itself was multivalent, and its various meanings shaded into one another in confusing and even ironic ways.” Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 166 (1996) [hereinafter Rakove, *Original Meanings*]. In the context of the Declaration of Independence, it seems clear that the word “state” referred to a free and independent nation that enjoyed sovereign rights under the law of nations.

There has been disagreement about whether the American States became “Free and Independent States” individually or collectively when they broke free from Great Britain.¹¹⁸ In other words, were the States merely free and independent of Great Britain collectively, or were they free and independent of each other as well? This is an interesting theoretical question, and there have been thoughtful arguments on both sides.¹¹⁹ Actual events, however, indicate that the States understood themselves to possess individual sovereignty following the Declaration of Independence.

First, the Continental Congress assumed that the individual States would possess full sovereignty following the Declaration and could unite for their common defense only if each individual State consented to do so. Accordingly, just one day after appointing a commission to draft the Declaration of Independence, the Continental Congress set up a separate commission to draft the Articles of Confederation.¹²⁰ The States believed that a treaty or compact surrendering portions of their individual sovereignty to a central authority was necessary to secure their mutual security

118. For example, in *Ware v. Hylton*, Justice Chase described the Declaration of Independence as:

a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 224 (1796) (Chase, J.); see also Thomas Jefferson, *Autobiography of Thomas Jefferson*, reprinted in 1 *The Writings of Thomas Jefferson* 1, 12–13 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (“It was argued by Wilson, Robert R. Livingston, E. Rutledge, Dickinson, and others, . . . if the delegates of any particular colony had no power to declare such colony independent, certain they were, the others could not declare it for them; the colonies being as yet perfectly independent of each other . . .”). Some have argued, however, that the States became free and independent collectively. See, e.g., Jack N. Rakove, *American Federalism: Was There an Original Understanding?*, in *The Tenth Amendment and State Sovereignty* 107, 110 (Mark R. Killenbeck ed., 2002) [hereinafter Rakove, *American Federalism*] (“[T]he most persuasive story we can tell is one that emphasizes the simultaneity with which concepts of both statehood and union emerged in the revolutionary crucible of the mid-1770s.”).

119. See, e.g., Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 200 (1993) (“No colony declared its independence separately or gave itself a constitution before being authorized to do so by the Continental Congress.”); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559, 1576 (2002) (“When the United States broke free from Great Britain, . . . the individual states were not exactly thirteen separate countries.”); James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 *Calif. L. Rev.* 555, 584 (1994) (“During the period that preceded the framing, the states regarded themselves and one another as sovereign states within the meaning of the law of nations . . .”); cf. Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. Rev.* 1027, 1049 (2002) (stating that “the founding generation . . . perceived the States as sovereign nation-states in some respects and accordingly drafted constitutional text to incorporate certain useful international law rules”).

120. See 5 *Journals of the Continental Congress 1774–1789*, at 429–33 (Worthington C. Ford ed., 1906) (directing the formation of a committee to draft the Declaration of Independence).

and independence, but neither the instrument's precise content nor its successful adoption was a foregone conclusion. In debating and adopting the Articles of Confederation, the States understood themselves to be separate sovereigns with complete authority to adopt or reject the plan under consideration. Moreover, the States understood that any State that did not ratify the Articles would not be bound thereby.¹²¹

Second, because of concerns about how much sovereignty each State would surrender by uniting under the Articles of Confederation, the compact took over a year to draft and ultimately included a provision specifying that “[e]ach State retains its Sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this Confederation expressly delegated.”¹²² This provision made clear, if it was not before, that each State was an independent sovereign with all of the rights and powers that accompanied that status minus only those it expressly delegated in the Articles. As the next section discusses, even if one believed that the status of the States as individual sovereigns was unclear following the Declaration of Independence, this question was settled by the Articles of Confederation.

B. *The Articles of Confederation*

The States realized that declaring independence would require them to join together in some capacity for their mutual defense and survival. The Continental Congress established a commission to draft the Articles of Confederation in June 1776.¹²³ In November 1777, Congress approved the proposed Articles and sent them to the individual States for ratification. The Articles took effect in 1781 when Maryland—the last State to act—approved them. The instrument, as understood at the time, was a compact among thirteen “Free and Independent States.”¹²⁴ By adopting

121. The same assumption carried through to the drafting and ratification of the Constitution. See *infra* notes 151–152 and accompanying text.

122. Articles of Confederation of 1781, art. II.

123. See *supra* note 120 and accompanying text.

124. For examples of contemporaneous understandings of the Articles of Confederation as a confederation among individual states see 6 *Journals of the Continental Congress 1774–1789*, at 1103 (Worthington C. Ford ed., 1906) (statement of Dr. Witherspoon) (“[T]hat the colonies should, in fact be considered as individuals; and that as such in all disputes they should have an equal vote. [T]hat they are now collected as individuals making a bargain with each other, and of course had a right to vote as individuals.”); *id.* at 1104 (statement of John Adams) (“[I]t has been said we are independent individuals making a bargain together. [T]he question is not what we are now but what we ought to be when our bargain shall be made. [T]he confederacy is . . . to form us . . . into one common mass.”). Even the more nationally minded James Wilson characterized the Articles of Confederation as allowing consolidated action only with respect to those matters that the States referred to Congress. See *id.* at 1105 (statement of James Wilson) (“[I]t is strange that annexing the name of ‘State’ to ten thousand men, should give them an equal right with forty thousand . . . [A]s to those matters which are referred to Congress, we are not so many states; we are one large state.”).

the Articles, each State expressly surrendered some of its sovereign rights, but retained all others.

In keeping with Vattel's rules governing the surrender of sovereign rights, each State retained all the sovereign rights that it did not clearly and expressly surrender in the Articles of Confederation. As explained, the document memorialized this understanding in the provision declaring that "[e]ach State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled."¹²⁵ The Articles' reference to "[e]ach State" in this provision confirms that the States understood the Articles to be a compact among thirteen separate and independent States. Other indications of the States' separate sovereignty included the facts that each State individually adopted the Articles, each State appointed its own delegates to Congress under the Articles, and each State had one vote in that body (consistent with each State's right to equal sovereignty with all others under the law of nations).¹²⁶

In light of these circumstances, Professor Gordon Wood characterized the States as separate sovereigns who entered into a treaty of confederation for their mutual benefit and protection:

Given the Americans' long experience with parceling power from the bottom up and their deeply rooted sense of each colony's autonomy, forming the Articles of Confederation posed no great theoretical problems. Thirteen Independent and sovereign states came together to form a treaty that created a "firm league of friendship," a collectivity not all that different from the present-day European Union [T]he Confederation Congress was merely a replacement for the Crown. It possessed the Crown's former prerogative powers, but it could not tax or regulate commerce, as the Crown had not had the authority to do these things either.¹²⁷

125. Articles of Confederation of 1781, art. II.

126. *Id.*, art. V.

127. Gordon S. Wood, *Federalism from the Bottom Up*, 78 *U. Chi. L. Rev.* 705, 724–25 (2011) (book review) (footnote omitted) (quoting Articles of Confederation of 1781, art. III). On the other hand, Rakove has argued that "[l]ittle in the surviving records of debate and deliberation suggests that its congressional drafters were much troubled by questions about the location of sovereignty or the nature of the federal system." Rakove, *Original Meanings*, *supra* note 117, at 167. In his view:

Rather than agonize over the location of sovereignty in a federal system, the drafters of the articles moved instead to adopt a fairly pragmatic and largely noncontroversial division of powers between Congress and the states. There was broad agreement that Congress would exercise exclusive control over the great affairs of state, war, and foreign relations, while the states would retain exclusive control over the entire realm of "internal police"—the matters of governance that involved all the ordinary aspects of domestic or municipal legislation.

Rakove, *American Federalism*, *supra* note 118, at 111. Regardless of whether the Founders agonized over the location of sovereignty in a federal system, it is beyond question that the

The individual sovereignty of the original thirteen States is confirmed by the fact that the Articles would bind only those States that adopted them. Had one of the States declined to ratify the Articles, there was no suggestion that it would have been bound by the Articles or that its sovereignty would have been otherwise compromised by that instrument. Because each State ratified the Articles, each State surrendered some of its sovereignty but retained all aspects of sovereignty not expressly surrendered.

The Articles empowered Congress to act primarily in matters of war and foreign relations and imposed certain corresponding limitations on the States. For example, the Articles gave Congress “the sole and exclusive right and power of determining on peace and war,” “of sending and receiving ambassadors,” and “entering into treaties and alliances”¹²⁸—all recognized sovereign powers in “external” relations under the law of nations.¹²⁹ The Articles also gave Congress limited powers over matters of “internal” governance, such as “the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states,” and “fixing the standards of weights and measures throughout the United States.”¹³⁰

In addition, the Articles authorized Congress to requisition or command each State to provide money to fund the government, and supply troops for the armed forces in proportion to its population.¹³¹ Such requisitions were the only means Congress had under the Articles to raise revenue and supply the military. The Articles obligated each State to comply with these commands by declaring that “[e]very state shall abide by the determination of the united states in congress assembled, on all questions which by this confederation are submitted to them.”¹³² In practice, however, the States frequently violated this provision with impunity because the Articles gave Congress no means of enforcing its commands.

Not surprisingly, the Articles of Confederation quickly proved to be inadequate. First, the Confederation Congress lacked certain substantive powers necessary to secure the peace and harmony of the United States, including the power to uphold and enforce the law of nations and treaties of the United States,¹³³ the power to foster and protect commerce among

Articles delegated limited powers to the Confederation Congress and took care to reserve to the States any powers not expressly delegated.

128. Articles of Confederation of 1781, art. IX.

129. See *supra* notes 57–65 and accompanying text.

130. Articles of Confederation of 1781, art. IX, para. 4.

131. *Id.*, para. 5.

132. *Id.*, art. XIII.

133. At the start of the Federal Convention, Edmund Randolph enumerated defects in the Articles of Confederation, including:

[T]he confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority— Of this he cited many examples; most of whi[ch] tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished.

the States and with other nations,¹³⁴ and the power to resolve disputes between and among the States.¹³⁵ Second, as noted, Congress lacked the power to enforce even its limited substantive powers because it had no means of enforcing its power to requisition the States. Thus, during the War of Independence, States violated the Articles by failing to supply all of the men and revenue called for by Congress.¹³⁶ After the War, States complied even less frequently with requisitions, leaving the central government with no reliable source of funds.¹³⁷

As Hamilton explained in Federalist No. 21, a weakness “of the subsisting confederation, is the total want of a *sanction* to its laws. The United States as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts by a suspension or divestiture of privileges, or in any other constitutional mode.”¹³⁸ Thus, he concluded, under the Articles of Confederation, “the United States afford the extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws.”¹³⁹

Prior to the Constitutional Convention, James Madison served on several commissions charged with proposing amendments to make the Articles more effective.¹⁴⁰ Madison consistently favored amending the Articles to authorize Congress to use military force to coerce States to comply with its commands.¹⁴¹ Congress, however, never sent this proposal to the States. Instead, on February 21, 1787, the Confederation Congress passed a resolution calling for a convention to revise the Articles of Confederation. The resolution stated:

1 The Records of the Federal Convention of 1787, at 18–19 (Max Farrand ed., 1966) [hereinafter 1 Farrand’s Records] (alterations in original).

134. Randolph further observed at the start of the Convention “that there were many advantages, which the U.S. might acquire, which were not attainable under the confederation,” such as: “a productive impost,” the “counteraction of the commercial regulations of other nations,” and “the pushing of commerce ad libitum.” *Id.*

135. Under the Articles, Randolph observed, “[T]he foederal government could not check the quarrels between states, nor a rebellion in any not having constitutional power . . .” *Id.*

136. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 *Harv. L. Rev.* 1817, 1840–41 (2010) [hereinafter Clark, *The Eleventh Amendment*].

137. See *Vices of the Political System of the United States* (Apr. 1787), in 2 *The Writings of James Madison* 361, 364 (Gaillard Hunt ed., 1901) [hereinafter *Madison Writings*] (stating that because acts of Congress depend “for their execution on the will of the State legislatures,” they are “nominally authoritative, [but] in fact recommendatory only”).

138. *The Federalist* No. 21, at 129 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

139. *Id.* at 130. In part, this defect resulted from the lack of a judiciary of the United States. See *The Federalist* No. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“A circumstance, which crowns the defects of the confederation, remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.”).

140. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1841–42.

141. See *id.*

[I]t is expedient that . . . a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.¹⁴²

The Philadelphia Convention began in May 1787 as planned, but the delegates quickly exceeded their original charge of merely revising the Articles of Confederation. Instead, the Convention undertook to draft and propose an entirely new constitution that would serve as a comprehensive replacement of the Articles.

III. THE STATES AND THE CONSTITUTION

The Constitutional Convention crafted a plan of government that took a fundamentally different approach than the Articles of Confederation to federal power and state sovereignty. In the Constitution, the States surrendered important sovereign rights that they had retained in the Articles, but they also chose to retain certain rights that they had previously surrendered in the Articles. They compromised more of their sovereignty by giving the United States government concurrent authority to raise revenue and regulate individuals directly within the territory of the States. At the same time, the States surrendered less of their sovereignty by withholding the power that Congress enjoyed under the Articles to issue commands to the States for these purposes. In other words, rather than authorizing the federal government to order the States to take certain actions (as the Articles had), the Constitution gave the new government novel power to regulate individuals within the States directly—a power withheld under the Articles.¹⁴³ This fundamental change enabled Congress itself to raise revenue and supply the armed forces without relying on the States to carry out its commands. In addition, this change eliminated the need to adopt more controversial measures, such as empowering Congress to use military force to coerce state compliance with federal commands.

The shift from congressional regulation of States under the Articles to congressional regulation of individuals under the Constitution enabled the United States to exercise its powers more effectively than it had under the Articles.¹⁴⁴ The Constitution, however, did not envision the wholesale

142. Resolution of Confederation Congress (Feb. 21, 1787), reprinted in 1 *The Documentary History of the Ratification of the Constitution* 185, 187 (Merrill Jensen ed., 1976) [hereinafter 1 DHRC].

143. The only arguable exceptions were found in Article III, discussed below, see *infra* section IV.A.

144. Of course, the Constitution contains several built-in political and procedural safeguards of federalism that frequently render the federal government incapable of exercising

abrogation of state sovereignty. Under background principles of the law of nations, only clear and express terms would suffice to alter state sovereignty. For example, the States surrendered significant aspects of their sovereignty by clearly conferring on the federal government enumerated regulatory powers to be exercised and enforced against individuals within their respective territories. At the same time, however, the States necessarily retained all sovereign rights and powers that they did not clearly and expressly surrender in the Constitution. Thus, ascertaining the residual sovereignty of the States requires careful identification of the clear and express surrenders set forth in the constitutional text.

A. *Abandoning the Articles of Confederation*

Congress charged the Philadelphia Convention with revising the Articles of Confederation, and it has been widely observed that the Convention exceeded its mandate by abandoning the Articles in favor of an entirely new Constitution.¹⁴⁵ Indeed, some maintain that the States' subsequent adoption of the Constitution actually violated the Articles, which were styled the "Articles of Confederation and Perpetual Union." The Articles provided that they

shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterward confirmed by the legislatures of every state.¹⁴⁶

The States arguably violated this provision both by using a convention to propose the Constitution, and by proceeding to replace the Articles with the Constitution through State ratifying conventions rather than State legislatures.

Scholars have long debated whether the States' adoption of the Constitution violated the Articles of Confederation,¹⁴⁷ but the answer is of little practical importance. Because all thirteen States ratified the Constitution, they eventually reached unanimous consensus to abandon

its enumerated powers over individuals. See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 *Tex. L. Rev.* 1321, 1369–71 (2001) (discussing the effect of the procedural safeguards of federalism on federal lawmaking).

145. See Gregory E. Maggs, A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution, 80 *Geo. Wash. L. Rev.* 1707, 1711 (2012).

146. Articles of Confederation of 1781, art. XIII.

147. Compare Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 *U. Chi. L. Rev.* 475, 536 (1995) (arguing that the States' ratification of the Constitution was "illegal"), with Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 *U. Chi. L. Rev.* 1043, 1048 (1988) [hereinafter Amar, Philadelphia Revisited] (arguing that the States had a legal right to adopt the Constitution because of repeated violations of the Articles).

the Articles in favor of the Constitution.¹⁴⁸ In addition, there is a strong argument that all States were free to disregard the Articles by 1787 because most, if not all, States had violated its terms by failing to comply with all of Congress's requisitions. Under the law of nations, when one State violated a compact or treaty, the other participating States were released from their obligations and free to withdraw.¹⁴⁹ As Akhil Amar has explained:

[T]he Articles of Confederation were a mere treaty among thirteen otherwise free and independent nations. That treaty had been notoriously, repeatedly, and flagrantly violated on every side by 1787. Under standard principles of international law, these material breaches of a treaty freed each party—that is, each of the thirteen states—to disregard the pact, if it so chose. Thus, if in 1787 nine (or more) states wanted, in effect, to secede from the Articles of Confederation and form a new system, that was their legal right, Article XIII notwithstanding.¹⁵⁰

This background helps to explain why the Convention's proposal to abandon the Articles did not generate stronger objections either at the Convention or during the ratification debates. It also explains why each State considered itself free to accept or reject the proposed Constitution, and why it was entirely possible that some States would decline to ratify it and remain outside the Union. Article VII of the Constitution reflected these realities by specifying that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."¹⁵¹ Under this provision, no State would be bound by the Constitution unless it expressly consented through ratification. Had the States not considered themselves to possess individual sovereignty during the ratification period, then this provision would have made no sense. Thus, Article VII supports the conclusion that the Founders understood each State considering ratification to possess full sovereignty both to abandon the Articles and to accept or reject the new Constitution.¹⁵²

148. It is true that the States dissolved their compact and adopted the Constitution through state ratifying conventions (rather than state legislatures as specified in the Articles), but the States' repeated violations of the Articles arguably released them from their obligation to comply with that instrument. See *infra* notes 149–150 and accompanying text. In any event, the Founders widely understood state legislatures merely to be exercising powers delegated by the people—the ultimate source of state sovereignty. See *infra* notes 165–167 and accompanying text.

149. See 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, § 200, at 214 (explaining that the breach of a treaty gives the offended party the option to cancel the treaty); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 258 (1796) (Iredell, J.) (explaining that when one party broke a treaty, the treaty was voidable at the option of the other party).

150. Amar, *Philadelphia Revisited*, *supra* note 147, at 1048 (emphasis omitted) (footnotes omitted).

151. U.S. Const. art. VII.

152. As explained, the Founding generation had the same assumption in drafting and ratifying the Articles of Confederation. See *supra* note 121 and accompanying text.

Furthermore, this background dispels the notion that the States had somehow irrevocably compromised their individual sovereignty by 1787. Once it became clear—through repeated violations of its terms—that the Articles of Confederation could no longer serve its intended function, the States considered themselves free to pursue other arrangements as independent sovereigns, including leaving the Union. The Constitutional Convention’s debate over whether the States should have equal suffrage in the Senate reflects this understanding. The large States urged proportional representation in the Senate, while the small States insisted upon equal suffrage. In this debate, all States considered themselves at liberty to form new alliances not only with each other, but even with foreign states. For example, Gunning Bedford, representing Delaware, went so far as to declare that if the large States dared to dissolve the confederation, “the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.”¹⁵³ In danger of disbanding, the Convention appointed a Grand Committee to break the deadlock over the proper basis of representation in the Senate. The Committee returned with two proposals—first, that “all Bills for raising or appropriating money” shall originate in the House, and second, that “each State shall have an equal Vote” in the Senate.¹⁵⁴ Large-State delegates James Madison (Virginia),¹⁵⁵ Gouverneur Morris (Pennsylvania),¹⁵⁶ and James Wilson (Pennsylvania)¹⁵⁷ strongly opposed this proposal as involving no real compromise. Small-State Luther Martin (Maryland) responded that “[h]e was for letting a separation take place if [the large States] desired it. He had rather there should be two Confederacies, than one founded on any other principle than an equality of votes in the 2d branch at least.”¹⁵⁸ The small

153. James Madison, Notes on the Constitutional Convention (June 30, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 481, 492. Although Bedford later apologized for this remark, James Madison, Notes on the Constitutional Convention (July 5, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 526, 531, others shared his view that States considered themselves free to determine their own political status relative to each other and foreign nations. For example, John Dickinson, also of Delaware, told Madison that the smaller states would “sooner submit to a foreign power” than be deprived of equal suffrage in the upper house. James Madison, Notes on the Constitutional Convention (June 15, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 242 & n.*. Likewise, William Paterson declared that New Jersey would “rather submit to a monarch, to a despot,” than to equal representation. James Madison, Notes on the Constitutional Convention (June 9, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 175, 179.

154. See William Jackson, Minutes of the Constitutional Convention (July 5, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 524.

155. James Madison, Notes on the Constitutional Convention (July 5, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 527.

156. James Madison, Notes on the Constitutional Convention (July 7, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 551–52.

157. James Madison, Notes on the Constitutional Convention (July 14, 1787), *in* 2 The Records of the Federal Convention of 1787, at 4 (Max Farrand ed., 1966) [hereinafter 2 Farrand’s Records]

158. *Id.*

States ultimately prevailed with the Convention voting five States to four in favor of the proposals.¹⁵⁹

This episode reveals that the individual States at the Convention considered themselves free to pursue a wide range of options, such as disbanding without an agreement, forming two (or more) distinct confederacies, or even entering into alliances with foreign states if they could not reach an acceptable arrangement with other States. That the delegates openly discussed these options without objection indicates that the individual States understood themselves to possess full sovereignty notwithstanding their previous commitments under the Articles of Confederation. If the “States” that met in Philadelphia had lacked full sovereignty to pursue all options, then these discussions would not have taken place. The Articles prohibited the States, without the consent of Congress, from either entering into “any conference, agreement, alliance or treaty” with any foreign state, or entering into “any treaty, confederation or alliance” with any other American State.¹⁶⁰ The debate over equal suffrage demonstrates that by the time they convened in Philadelphia, the States no longer considered themselves bound by these—or any other—restrictions on their individual sovereignty set forth in the Articles.

Article VII of the Constitution underscores this understanding by providing that the Constitution would be binding only upon those “States so ratifying the Same.”¹⁶¹ Article VII’s reference to “States” thus referred to States with full sovereignty to accept or reject the proposed Constitution. Because the proposed Constitution used the identical term “States” without qualification throughout the document, Article VII provides strong evidence that the Constitution used the term to describe free and independent States with full sovereignty. Of course, the proposed Constitution contained numerous clear and express surrenders of sovereign rights that would necessarily diminish the preexisting sovereignty of those States that ratified it, but those surrenders occurred by virtue of ratification rather than any preratification events. As explained, a sovereign could not surrender its rights under the law of nations without adopting clear and express terms to that effect in a treaty or other legal instrument. By ratifying the Constitution, each State voluntarily surrendered some—but not all—of its preexisting sovereign rights.¹⁶² Thus, following ratification, each “State” possessed the rights of free and independent States minus those that it had clearly and expressly given up in the Constitution.

159. See James Madison, Notes on the Constitutional Convention (July 16, 1787), in 2 Farrand’s Records, supra note 157, at 15.

160. Articles of Confederation of 1781, art. VI, para. 1.

161. U.S. Const. art. VII.

162. This approach to sovereignty was consistent with Vattel’s writings. See Alison L. LaCroix, The Ideological Origins of American Federalism 79 (2010) (“Vattel’s theories provided a normative vision of multiplicity, positing that a ‘republic of republics’ could be capable of operating as a ‘sovereign among sovereigns.’”) (quoting Peter Onuf & Nicholas Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–

This conclusion is not inconsistent with the Founders' understanding that ultimate sovereignty rested with the people. As the Preamble states, the Constitution was ordained and established by "We the People of the United States."¹⁶³ At first glance, popular sovereignty might seem to contradict the sovereignty of the individual States.¹⁶⁴ If "the People of the United States" ordained and established the Constitution, then why did Article VII permit the people of each State to opt out by failing to ratify the instrument?

James Madison resolved this tension in Federalist No. 39 by explaining that "the People of the United States" who established the Constitution were not the undifferentiated people of all the States, but only the people of the individual States who elected to have their State become part of the "United States" by ratifying the proposed Constitution:

[I]t appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves.¹⁶⁵

Madison described "the people of the United States" not as one undifferentiated mass, but as a collection of the people of each independent State that chose to ratify the Constitution. As he explained, "the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States."¹⁶⁶ Rather, "Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others,

1814, at 5–7 (1993)). This is not to say that States ratified the Constitution free from any pressure to do so. For example, Rhode Island, which did not send a delegation to the Convention, ratified only after Congress threatened trade sanctions against it. See Ackerman & Katyal, *supra* note 147, at 538–39. It was not uncommon, however, for sovereigns to submit to unfavorable surrenders of sovereign rights under economic or military pressure. The same rules of interpretation applied to treaties, compacts, and other legal instruments adjusting sovereign rights regardless of the circumstances that generated the adjustment. Even a unilateral attempt to divest sovereign rights by one sovereign against another was subject to the same rules of interpretation. See *supra* notes 98–107 and accompanying text (explaining that the same rules applied in these circumstances).

163. U.S. Const. pmb.

164. See Beer, *supra* note 119, at 313–14 (describing the tension between the nationalist view of popular sovereignty and a compact theory of state sovereignty).

165. The Federalist No. 39, at 253–54 (James Madison) (Jacob E. Cooke ed., 1961).

166. *Id.* at 254; cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.").

and only to be bound by its own voluntary act.”¹⁶⁷ The actual ratification process confirmed Madison’s understanding. Rather than participating in a national convention, each State convened its own individual convention (as required by Article VII) for the purpose of ratifying or rejecting the proposed Constitution on its own behalf,¹⁶⁸ and only those States that chose to ratify the Constitution became part of the “United States.” Thus, Madison understood the preamble’s use of the phrase “We the People of the United States” to be merely a collective reference to the people of the individual States that chose to ratify the Constitution.

Even if one disagreed with Madison’s understanding and believed (counterfactually) that the undifferentiated “people of the United States” somehow imposed the Constitution on the individual States, any resulting divestiture of sovereign rights would have been governed by the same rules supplied by the law of nations. According to Vattel, all alienations of sovereign rights—whether voluntary or involuntary—were regarded as “odious” and thus had to be set forth in clear and express terms.¹⁶⁹ Under the

167. The Federalist No. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961). Madison offered a similar account four decades after the Founding. The Constitution, he explained, “was formed by the States, that is by the people of each State, acting in their highest sovereign capacity,” not “by a majority of the people of the U.S. as a single community, in the manner of a consolidated Government.” Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 *The Writings of James Madison* 383 n.1 (Gaillard Hunt ed., 1910). Nonetheless, Samuel Beer has argued that Madison’s account of sovereignty in Federalist No. 39 stands in tension with his statement in Federalist No. 46 that the federal and state governments should be considered “as substantially dependent on the great body of citizens of the United States,” *The Federalist* No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961), and that the view expressed in Federalist No. 46 is more in line with the historical realities of the Founding. Beer, *supra* note 119, at 321. Any perceived tension, however, is more imagined than real. The Constitution, once established, renders the United States government politically accountable to the people of the United States as a whole but does not alter the fundamental principles that the people of each State adopted the Constitution and that the people of each State continue to possess the residual sovereignty of their individual States. Federalist No. 46 recognizes this distinction by referring to the “common constituents” of the federal and State governments. *The Federalist* No. 46, at 320 (James Madison) (Jacob E. Cooke ed., 1961). Each State has constituents in common with the federal government, but the States do not have constituents in common with each other because each State retains a separate and independent existence under the Constitution.

168. Like Article VII, Article V of the Constitution permits each State to decide for itself whether to ratify new constitutional proposals. But unlike Article VII, Article V permits a supermajority of States to bind nonconsenting States. U.S. Const. art. V. As Professor Henry Monaghan has explained, the States surrendered their right individually to veto constitutional amendments “only on the premise that Article V’s requirements would make it very difficult to change the terms according to which the states came together.” Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 129 (1996). Accordingly, Monaghan rejected the claim, made by Professor Akhil Amar, that a national majority of “We the People” can amend the Constitution outside of the requirements of Article V. See Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 457 (1994).

169. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, §§ 300–305, at 232–34.

law of nations, a legal instrument that failed to contain such clear and express terms would be construed not to divest sovereign rights. Thus, whichever “people” adopted the Constitution, prevailing rules of interpretation required that the States retain all sovereign rights of which the Constitution did not clearly and expressly divest them.

In sum, the Constitution did not employ the term “State” in a new or unknown sense. By using the term “States,” the Constitution referred to the sovereign and independent American States described in the Declaration of Independence and the Articles of Confederation. Starting from this baseline, the Constitution elsewhere set forth in clear and express provisions the ways in which those States surrendered many of their sovereign rights and powers to the United States as a whole.

B. *The Residual Sovereign Rights of the States*

Of course, the law of nations allowed free and independent States to surrender sovereign rights voluntarily, and the American States did so in various ways in the Constitution. Thus, following ratification, the “States” referred to in the Constitution possessed full sovereignty minus those specific rights they clearly and expressly surrendered in the document.

1. *Using the Law of Nations to Divide Sovereignty.* — In keeping with background principles of the law of nations, the Founders understood the States to have retained all of their preexisting sovereign rights and powers that they did not surrender to the federal government in the Constitution. Initially at least, this understanding was not the product of the Tenth Amendment. Rather, this understanding predated the Amendment and stemmed from a relatively straightforward application of principles drawn from the law of nations. As discussed, states possessed a well-known set of rights and powers that they could alienate only by making clear and express surrenders in an appropriate legal instrument. Accordingly, under the law of nations, the States necessarily retained all aspects of their sovereignty that they did not expressly surrender in the Constitution. The Tenth Amendment was a “truism” in the sense that it merely confirmed—rather than created—this background understanding of state sovereignty.¹⁷⁰

170. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”). As many commentators have observed, the Tenth Amendment differed from a comparable provision of the Articles of Confederation by omitting the word “expressly.” See, e.g., Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 *Notre Dame L. Rev.* 1889, 1895 (2008) (observing this shift in language and arguing that although Madison “feared adding the term ‘expressly’ might erroneously suggest that Congress had no implied powers whatsoever,” he agreed that the Constitution granted Congress only expressly delegated powers). The Articles provided that “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” *Articles of Confederation of 1781*, art. II. In contrast, the Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor

George Washington's letter of September 17, 1787, transmitting the proposed Constitution to Congress, reflects this understanding. He described the new charter as a surrender of certain sovereign rights to the United States government, and a reservation of the remaining "Rights of independent Sovereignty" to the States:

It is obviously impracticable [] in the foederal Government of these States to secure all Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all. Individuals entering into Society must give up a Share of Liberty to preserve the Rest. The Magnitude of the Sacrifice must depend as well on Situation and Circumstances as on the Object to be obtained. It is at all Times difficult to draw with Precision the Line between those Rights which must be surrendered and those which may be reserved And on the present Occasion this Difficulty was encreased by a Difference among the several States as to their Situation[,] Extent[,] Habits[,] and particular Interests.¹⁷¹

Hamilton and Madison based their defense of the Constitution in *The Federalist* on the same understanding of divided sovereignty. They sought to allay the fears of Anti-Federalists that the Constitution could lead to a consolidated government because it did not provide sufficient safeguards for maintaining the reserved powers of the States against overreaching by the federal government.¹⁷² As Madison famously explained in Federalist No. 45:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects,

prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In our view, the omission of the word "expressly" was a conscious and significant change by the Founders, but it does not alter the baseline meaning of the term "States" in the Constitution. The apparent purpose of this omission was to ensure that Congress could employ incidental means to execute its enumerated powers under the Necessary and Proper Clause. The precise scope of Congress's necessary and proper power remains contested, but here again the law of nations provides some guidance. See *infra* section III.D.4.

171. 2 Farrand's Records, *supra* note 133, at 666–67.

172. As Rakove has explained, "If Anti-Federalists could be polled . . . as to whether they thought . . . the original Constitution . . . adequately secured the reserved powers of the states, the logic of their position would have compelled them to answer in the negative. Their original understanding . . . was that it was a formula for consolidation . . ." Rakove, *American Federalism*, *supra* note 118, at 122.

which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.¹⁷³

Hamilton provided a similar description of the sovereign rights retained by the States in the course of rejecting claims that Article III would permit individuals to sue States:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.¹⁷⁴

Hamilton went on to deny that the Constitution contained such a surrender of sovereign immunity by recalling “[t]he circumstances which are necessary to produce an alienation of state sovereignty.”¹⁷⁵ He directed the reader to an earlier essay in which he described “the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour.”¹⁷⁶ Applying this rule, he concluded:

A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.¹⁷⁷

In explaining the Constitution in terms of what rights the States surrendered to the federal government and what rights they retained for themselves, Washington, Hamilton, and Madison relied on background

173. The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961). Madison repeated this description of the federal structure in other papers. For example, Madison explained in Federalist No. 14:

[I]t is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the Convention to abolish the governments of the particular States, its adversaries would have some ground for their objection, though it would not be difficult to shew that if they were abolished, the general government would be compelled by the principle of self-preservation, to reinstate them in their proper jurisdiction.

The Federalist No. 14, at 86 (James Madison) (Jacob E. Cooke ed., 1961).

174. The Federalist No. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

175. *Id.* at 549.

176. The Federalist No. 32, at 203 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

177. The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

rules drawn from the law of nations governing the interpretation of legal instruments claimed to divest sovereign rights. Specifically, they invoked the principles, described by Vattel, that a legal instrument should not be interpreted to divest sovereign powers or violate sovereign rights unless the legal instrument did so explicitly. In accordance with these principles, they explained that the federal government would possess only those sovereign powers the States clearly and expressly surrendered in the Constitution, and the States would necessarily retain all other sovereign rights and powers not so surrendered.¹⁷⁸

In Federalist No. 32, Hamilton invoked this principle in describing the effect of the Constitution's delegation of powers to the federal government upon the sovereign powers of the States. He emphasized that the Constitution did not divest the States of any preexisting sovereign rights except where its language did so in express terms.¹⁷⁹ It is worth quoting Hamilton at length on this point:

But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty, would only exist in three cases; where the Constitution *in express terms* granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant* . . .

It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not a theoretical consequence of that division, but is clearly admitted by the

178. It is true that the Constitution not only divested the States of traditional sovereign rights, but also divided sovereignty in innovative ways, including by giving two governments jurisdiction over the same people in the same territory. Notwithstanding the innovative nature of these legal arrangements, leading Founders described all alienations of state sovereignty—whether sovereign rights, sovereign powers, sovereign immunities, attributes of sovereignty, sovereign authorities, or simply state sovereignty itself—as constrained by the same rules of interpretation. See *supra* notes 171–177, and *infra* notes 179–182 (explaining that the Founders understood the alienation of any of these aspects of state sovereignty to be governed by these rules). For this reason, when we refer to surrenders of “sovereign rights” by American States, we are referring to any alienation of an aspect of state sovereignty, whether rights, powers, immunities, or other incidents of sovereignty.

179. The Federalist No. 32, at 202–03 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

whole tenor of the instrument which contains the articles of the proposed constitution.¹⁸⁰

In this passage, Hamilton understood the Constitution not to divest the States of sovereign rights except (1) where it did so in express terms, or (2) where a state power “would be absolutely and totally repugnant” to the express powers granted to the federal government by the Constitution.¹⁸¹ By requiring a clear and express surrender, Hamilton’s account tracks Vattel’s approach to the interpretation of legal instruments that sought to alter sovereign rights and powers.¹⁸²

2. *Withholding Congressional Power to Commandeer States.*— A threshold inquiry at the Constitutional Convention was whether the Constitution should follow the Articles of Confederation and authorize Congress to commandeer the States, and—if so—whether the Constitution should grant Congress additional power to use military force to coerce state compliance with such commands. As evidenced by the Virginia Plan, James Madison initially favored both reauthorizing Congress’s power under the Articles to commandeer States and adding congressional power to coerce compliance with such commands. The Plan originally proposed that “the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”¹⁸³ In addition, to make Congress’s power to commandeer States effective, the Virginia Plan proposed that the National Legislature be empowered “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”¹⁸⁴

The proposal to authorize Congress to use military force against States immediately raised alarms among the delegates. For example, George Mason argued that coercion and punishment could not be used against the States collectively.¹⁸⁵ For these reasons, Mason objected to commandeering and argued that “such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required

180. *Id.* at 200, 202–03 (second emphasis added).

181. As Professor Kurt Lash has observed, it was advocates of the Constitution, seeking to allay Anti-Federalist concerns, who insisted that the federal government could exercise only those powers expressly delegated to it. Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 *Wm. & Mary L. Rev.* 1577, 1593–97 (2009).

182. See *id.* at 1639–40 (discussing the relationship between early arguments over constitutional interpretation and rules of interpretation under the law of nations); *supra* section I.D.

183. James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 *Farrand’s Records*, *supra* note 133, at 21.

184. *Id.*

185. James Madison, Notes on the Constitutional Convention (May 30, 1787), in 1 *Farrand’s Records*, *supra* note 133, at 34.

it.”¹⁸⁶ In response to these remarks, Madison “observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually.”¹⁸⁷ Thus, Madison moved to postpone the initial proposal to give Congress power to coerce States, and expressed the hope “that such a system would be framed as might render this recourse unnecessary.”¹⁸⁸ Ultimately, the Convention decided to abandon Congress’s power to command States in favor of giving Congress power to regulate individuals instead. By withholding power from Congress to command the States, the Convention eliminated the need to give Congress power to enforce such commands against them. As Mason explained: “Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt.”¹⁸⁹ In the end, Madison agreed that regulation of individuals was superior to trying to perfect congressional regulation of States: “Any Govt. for the U. States formed on the supposed practicability of using force agst. the <unconstitutional proceedings> of the States, wd. prove as visionary & fallacious as the Govt. of Congs. [under the Articles of Confederation].”¹⁹⁰

As Part IV discusses, the delegates at the Convention viewed the question of how the federal government should exercise its powers as a binary choice: either build on the Articles by authorizing Congress to command States and use military force to coerce their compliance with such commands, or adopt an entirely new Constitution that would empower Congress to regulate individuals instead of States (thus eliminating the need to command and coerce States). The Convention chose the latter course because it thought the former approach could lead to civil war. By failing to authorize Congress to command or coerce States, the States surrendered less of their sovereignty in the new Constitution than they had under the Articles of Confederation. On the other hand, the States surrendered—for the first time—a fundamental aspect of their traditional sovereignty by authorizing Congress to regulate the individuals within the territorial limits of the States.

C. *The Powers Delegated to the Federal Government*

The Articles of Confederation delegated important powers to “the United States, in Congress assembled,” but required Congress to rely on

186. *Id.*

187. James Madison, Notes on the Constitutional Convention (May 31, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 54.

188. *Id.*

189. James Madison, Notes on the Constitutional Convention (June 6, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 133.

190. James Madison, Notes on the Constitutional Convention (June 8, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 164–65 (footnote omitted). This debate is described in greater detail *infra* section IV.B.

the States to carry out its commands. As discussed, the Constitution took a fundamentally different approach. The Constitution gave Congress power to regulate individuals directly but withheld power to issue commands to the States. In this way, the States expressly surrendered a significant aspect of their sovereignty in the Constitution that they had retained under the Articles. At the same time, the States took back some of their sovereignty by withholding congressional power under the Constitution to command and coerce States. In sum, the Constitution divested the States of their preexisting sovereign rights in two important ways: (1) by granting the federal government expanded regulatory and foreign relations powers; and (2) by authorizing the federal government to exercise its regulatory powers directly upon individuals within the territorial limits of the States.

First, the Constitution not only transferred many of the substantive powers of the Confederation Congress under the Articles to the new federal government but also conferred new and important powers on the federal government. Most of the federal powers that the Constitution continued from the Articles concerned the external relations of the United States. As Hamilton explained in *Federalist No. 23*, “[t]he principal purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between States—the superintendence of our intercourse, political and commercial, with foreign countries.”¹⁹¹ In this realm, the Constitution granted the federal government roughly the same powers to conduct foreign relations and decide matters of war and peace that the Articles had granted to the Confederation Congress.¹⁹²

Specifically, the Constitution gave the Senate and the President powers to conduct diplomatic relations with other nations, including the power “to make Treaties,”¹⁹³ and the power to “appoint Ambassadors, other public Ministers and Consuls.”¹⁹⁴ The Constitution gave the President alone the power to “receive Ambassadors and other public Ministers.”¹⁹⁵ In addition, the Constitution empowered Congress “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”¹⁹⁶ and “[t]o raise and support Armies . . . and [t]o provide and maintain a Navy.”¹⁹⁷ And it assigned responsibility to the President to serve as “Commander in Chief” of the

191. *The Federalist No. 23*, at 146–47 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

192. For more extensive discussions of these powers, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations and the United States Constitution* 50–67 (2017) [hereinafter Bellia & Clark, *The Law of Nations and the Constitution*]; Bellia & Clark, *The Law of Nations as Constitutional Law*, *supra* note 117, at 764–79.

193. U.S. Const. art. II, § 2.

194. *Id.*

195. *Id.* § 3.

196. *Id.* art. I, § 8.

197. *Id.*

armed forces.¹⁹⁸ Moreover, the Constitution gave Congress some of the same powers over internal matters that the Articles had given the Confederation Congress, such as power “[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”¹⁹⁹

But the Constitution also granted the federal government new express powers to regulate various matters that the Articles had not entrusted to the Confederation Congress. For example, the Constitution enabled the federal government to redress U.S. violations of the law of nations and treaties in more effective ways, including by creating federal courts and empowering Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”²⁰⁰ The Constitution also granted Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁰¹ Perhaps most importantly, the Constitution granted Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁰² In granting the federal government these new powers, the States ceded significantly more sovereignty than they had in the Articles of Confederation.

The second respect in which the States transferred more sovereignty under the Constitution was by giving Congress novel power to regulate individuals within the territory of the States. The Articles of Confederation contained no comparable surrender of state sovereignty. Under the law of nations, a free and independent state had exclusive territorial sovereignty to govern its citizens within its own territory, and any attempt by another sovereign to regulate such individuals would have violated its sovereignty and given it just cause for war. By expressly authorizing the federal government to regulate individuals within their borders, the States compromised this aspect of their sovereignty for the first time. Given its novelty and importance to the success of the Constitution, the States’ decision to share their exclusive power to regulate individuals within their territories was arguably the most significant and transformative surrender of sovereignty contained in the Constitution.

Once the Constitutional Convention made the fundamental decision to shift from congressional power to regulate States to congressional power to regulate individuals, the delegates had to design a federal government capable of enforcing such regulations on its own (lest they again leave the federal government dependent on the States with no effective

198. *Id.* art. II, § 2.

199. *Id.* art. I, § 8; see also *supra* note 130 and accompanying text.

200. U.S. Const. art. I, § 8.

201. *Id.* Vattel had described such powers as sovereign powers belonging to states under the law of nations. See *supra* note 74.

202. U.S. Const. art. I, § 8.

means of enforcement). Under the Articles of Confederation, the federal government consisted primarily of a Congress of the States, without adequate means to exercise its powers effectively.²⁰³ Within this structure, Congress had to rely almost exclusively on state legislative, executive, and judicial officers to carry out its commands.²⁰⁴ Under the new Constitution, the federal government would have its own legislative, executive, and judicial branches to implement the exercise of federal powers. Of course, this arrangement would sometimes permit the federal government and the States to exercise concurrent authority over the same individuals acting within the same territory at the same time. The States further compromised their sovereignty by adopting the Supremacy Clause, which provided that the Constitution, laws made in pursuance thereof, and treaties constituted the supreme law of the land, notwithstanding contrary state law.²⁰⁵ When conflicts arose, the Supremacy Clause required state courts to apply valid federal laws over state law. And the Constitution gave federal courts—including the Supreme Court—corresponding power to uphold the supremacy of federal law pursuant to the Arising Under Clause of Article III.²⁰⁶ These mechanisms allowed the federal government to enforce the supremacy of federal law against individuals without the need to command or coerce the States themselves.

D. *How the States Surrendered Aspects of Sovereignty*

In granting powers to the federal government in the Constitution, the States surrendered or compromised portions of their sovereignty by making four kinds of delegations, as this section explains: (1) express delegations of exclusive power to the federal government; (2) express delegations of power to the federal government coupled with express prohibitions on the States' exercise of the same power; (3) express delegations of power to the federal government, the concurrent exercise of which by the States would be absolutely and totally contradictory and repugnant; and (4) delegation of incidental powers to the federal government. The fourth category is the most controversial and is the one that has generated many of the Supreme Court's most prominent federalism decisions. This section briefly examines the extent to which the States surrendered portions of their sovereignty in the Constitution in each of these ways. Part IV discusses three important federalism doctrines that relate to the fourth category.

203. The term “Congress” often referred to a meeting attended by the representatives of sovereign states, such as the “Congress of Vienna” held from 1814 to 1815. See 1 Vattel, *The Law of Nations*, supra note 45, bk. II, § 330, at 245 (using the word “congress” in this sense).

204. The Articles of Confederation did establish a federal tribunal with limited jurisdiction to hear “the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of captures.” Articles of Confederation of 1781, art. IX, § 1.

205. U.S. Const. art. VI, cl. 2.

206. *Id.* art. III, § 2.

As explained, in Federalist No. 32, Alexander Hamilton maintained that States could alienate their sovereignty only by virtue of the first three kinds of delegations described above. In his discussion, he applied the principle drawn from the law of nations that legal instruments should not be interpreted to alienate sovereign rights and powers unless the text of the instrument did so *clearly and expressly*.²⁰⁷ Some surrenders were complete because they expressly granted the federal government *exclusive* power to regulate certain matters. Other surrenders were partial in that they granted the federal government *concurrent* power to regulate certain matters subject to simultaneous state regulation. In either case, Hamilton assured opponents of ratification that the Constitution would not divest the States of any aspect of their preexisting sovereignty except when it did so (1) “in express terms,” or (2) when the exercise of state power “would be absolutely and totally . . . *repugnant*” to the exercise of powers that the Constitution expressly allocated to the United States government.²⁰⁸ This understanding aligns with the principles Vattel described to govern the interpretation of legal instruments altering sovereign rights and powers.²⁰⁹

Hamilton’s approach to federal power differs from the “strict construction” approach favored by Thomas Jefferson. In the early years of the republic, prominent figures debated whether the Constitution should be strictly construed against federal power or given its ordinary and natural meaning.²¹⁰ The rules of interpretation described by Vattel and invoked by

207. See supra note 180 and accompanying text.

208. The Federalist No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

209. Although this analysis has long provided the framework under which the Founders, government officials, and the Supreme Court have considered questions about the respective constitutional powers of the federal government and the States, these actors did not always agree about the answers. For example, prominent figures disagreed over whether Congress could establish a Bank of the United States and whether Article III abrogated the States’ sovereign immunity from certain suits by individuals. More fundamentally, prior to the Civil War, there was sharp disagreement over whether the individual States possessed the right to secede from the Union. On the one hand, Jefferson Davis argued that under the Constitution the people of each State retained “the power to resume the authority delegated for the purposes of government.” Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), in 5 Jefferson Davis, *Constitutionalist* 49, 50 (D. Dunbar Rowland ed., 1923). On the other hand, Abraham Lincoln argued that a State could not secede because, among other reasons, any such right was utterly incompatible with certain provisions of the Constitution, including the power of the federal government to assume debts for the United States as a whole. See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 The Collected Works of Abraham Lincoln 421, 426, 429–30 (Roy P. Basler ed., 1953). For all intents and purposes, the Civil War established that secession was unlawful, and the Supreme Court subsequently affirmed that “[t]he Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.” *Texas v. White*, 74 U.S. 700, 725 n. 12 (1869).

210. The conventional account is that strict constructionists, such as Thomas Jefferson and St. George Tucker, believed that the words of the Constitution should be strictly construed against federal power. See The Kentucky Resolutions of 1798, reprinted in 30 The Papers of Thomas Jefferson 550–55 (Barbara B. Oberg ed., Princeton University Press 2003)

Hamilton did not categorically embrace either approach. Whether a constitutional provision should be construed narrowly or given its ordinary meaning turned on whether it was a clear and express surrender of state sovereignty. Under Vattel's approach, terms that clearly or expressly abrogated sovereign rights (such as the legislative powers set forth in Article I that clearly abrogated the States' exclusive right to regulate their own citizens within their own territories) would be given their ordinary or natural meaning.²¹¹ On the other hand, terms that were vague or ambiguous as to whether they abrogated the States' sovereign rights (such as various constitutional provisions claimed to empower Congress to commandeer the States) would not be interpreted to divest such rights.²¹² Thus, Vattel's principles of interpretation for legal instruments alienating sovereign rights relied alternatively on both ordinary meaning and strict construction, depending on whether the surrender of state sovereignty was clear or uncertain. As this Article explains, early explanations of the Constitution and judicial practice more closely align with Vattel's nuanced approach than with any universal acceptance of either a strict construction or an ordinary meaning approach to constitutional interpretation. This background helps to illuminate the contours of the four types of delegated power that the Constitution grants to the federal government.

1. *Express Delegations of Exclusive Federal Power.* — The first category of power granted by the States—express delegations of *exclusive* power to the federal government—provides a clear example of the surrender of sovereign rights by the States consistent with the law of nations. By its terms, the Constitution makes certain express allocations of exclusive power to the federal government. For example, the Constitution gives Congress exclusive authority to govern certain territorial enclaves of importance to the federal government. Specifically, the Constitution grants Congress power “[t]o exercise *exclusive* Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular

(arguing that the powers delegated to Congress in the Constitution should be strictly construed to avoid the federal government from assuming unlimited powers); see also 1 William Blackstone, Commentaries app. n.D at 155 (St. George Tucker ed., William Young Birch & Abraham Small 1803) (arguing that the powers delegated to the federal government should be strictly construed). On the other hand, proponents of federal power, such as John Marshall, believed that the words of the Constitution should be given their ordinary or natural import. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824) (rejecting strict construction and arguing instead that the Constitution should be interpreted in accord with the natural sense of its words); see also 1 Joseph Story, Commentaries on the Constitution of the United States § 411, at 394–95 (Hilliard, Gray & Co. 1833) [hereinafter Story, Commentaries] (rejecting and refuting the theory of strict construction). The predominant view has been that over time the ordinary meaning approach prevailed over strict constructionism. See Kurt T. Lash, “Tucker’s Rule”: St. George Tucker and the Limited Construction of Federal Power, 47 Wm. & Mary L. Rev. 1343, 1344–46 (2006) (describing this account).

211. See *supra* notes 90–97 and accompanying text.

212. See *supra* notes 98–107 and accompanying text.

States, and the Acceptance of Congress, become the Seat of the Government of the United States.”²¹³ The same clause gives Congress power “to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.”²¹⁴ Through these clauses, the States gave Congress exclusive authority to govern places of special significance to the federal government.

2. *Express Delegations with Express Prohibitions.* — In the second category, the Constitution provides several express delegations of power to the federal government accompanied by express prohibitions on the exercise of the same powers by the States. Taken together, these provisions expressly grant the federal government exclusive power to regulate the matters in question. As explained, in the realm of “external” relations,²¹⁵ the Constitution grants the federal political branches several express powers to conduct foreign relations and decide matters of war and peace.²¹⁶ In addition to allocating these powers to the federal government, Article I, Section 10 of the Constitution expressly prohibits the States from exercising almost all of these powers. For example, the Constitution gives the President power “to make Treaties” with other nations subject to concurrence of two-thirds of the Senate,²¹⁷ and elsewhere expressly provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation,” or “enter into any Agreement or Compact . . . with a foreign Power.”²¹⁸ Likewise, the Constitution gives Congress power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”²¹⁹ and “[t]o raise and support Armies . . . and [t]o provide and maintain a Navy.”²²⁰ It also assigns responsibility to the President to serve as “Commander in Chief” of the armed forces.²²¹ In Article I, Section 10, the Constitution expressly provides that the States may not “grant Letters of Marque and Reprisal” or “keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”²²²

213. U.S. Const. art. I, § 8, cl. 17 (emphasis added).

214. *Id.*

215. The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (“The powers delegated . . . to the Federal Government . . . will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.”).

216. See *supra* notes 191–200 and accompanying text.

217. U.S. Const. art. II, § 2, cl. 2.

218. *Id.* art. I, § 10.

219. *Id.* § 8, cl. 11.

220. *Id.*

221. *Id.* art. II, § 2, cl. 1.

222. *Id.* art. I, § 10, cl. 5.

The Constitution also grants the federal government express authority over certain “internal” matters²²³ while expressly prohibiting the States from exercising the same authority. For example, the Constitution gives Congress the power “[t]o coin Money,”²²⁴ but expressly forbids the States from doing so.²²⁵ Similarly, the Constitution grants Congress “power to lay and collect taxes, duties, imposts and excises,”²²⁶ while simultaneously providing that a State may not, “without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.”²²⁷

In all cases in which the Constitution delegates an express power to the federal government and imposes an express prohibition on the States, the States have clearly and expressly surrendered sovereignty over the matters in question to the federal government. Because they are clear and explicit, these surrenders have been relatively uncontroversial.²²⁸

3. *Express Delegations Without Express Prohibitions.* — The third category consists of instances in which the Constitution expressly delegates powers to the federal government but does not expressly prohibit the States from exercising them. The Supreme Court has not treated these instances in a uniform manner. Rather, as Hamilton maintained, alienation of state sovereignty in this category turns on whether the States’ exercise of concurrent power would be totally contradictory and repugnant to the federal government’s exercise of the power in question. Accordingly, on some occasions, the Court treats express delegations to the federal government as exclusive of State authority, effectively interpreting the States’ surrender of sovereignty over these matters as complete. In these cases,

223. The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that States would have primary authority over the “internal order, improvement, and prosperity of the State.”).

224. U.S. Const. art. I, § 8.

225. Id. § 10, cl. 1.

226. Id. § 8, cl. 1.

227. Id. § 10, cl. 2.

228. As the next section explains, controversies more typically arise when litigants seek to oust state authority on the basis of provisions that do not do so expressly. For example, in 1833 the Court considered whether the Bill of Rights operated as a limitation on state power. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In accordance with well-established rules governing the surrender of sovereign rights under the law of nations, the Court held that the Bill of Rights did not apply to the States because the Constitution limits state power only where it does so expressly:

Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

Id. at 250.

the Court regards the States' exercise of the same powers to be incompatible with their exercise by the federal government. On other occasions, the Court treats such delegations to the federal government as nonexclusive, allowing States to continue to exercise concurrent authority. This category of federal power involves difficult questions of line-drawing, and we do not attempt to resolve them here. Rather, for present purposes, we simply describe how this category has been understood historically and how it relates to rules of interpretation drawn from the law of nations.

a. *Exclusive Federal Authority by Unavoidable Implication.* — Some delegations of power to the federal government are regarded as necessarily exclusive of state authority even though the Constitution neither expressly declares them to be exclusive nor expressly prohibits the States from exercising the same power. If one regards these delegations as involving the kind of authority that may be exercised by only one sovereign at a time, then such delegations to the federal government necessarily convey a clear and express surrender of concurrent state sovereignty. Some delegations of this kind are relatively uncontroversial. For instance, Article II, Section 2, Clause 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.”²²⁹ The Constitution does not expressly prohibit the States from appointing federal officers and judges, but almost no one would suggest that the Constitution leaves the States free to do so. Similarly, Clause 1 of the same Section specifies that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States.”²³⁰ Given the nature of the Commander in Chief power, few would suggest that the States have concurrent authority to command the armed forces of the United States—either because the Constitution divests the States of such authority by unavoidable implication, or because the States had no preexisting authority to control federal institutions created or authorized by the Constitution.

The exclusivity of other delegations may be less obvious. For example, the same provision of Article II that grants the President power to appoint judges and other officers of the United States grants the President power to “appoint Ambassadors, other public Ministers, and Consuls,” subject to the consent of the Senate.²³¹ Article II also gives the President the power to “receive Ambassadors and other public Ministers.”²³² Historically, sending and receiving ambassadors was one of the primary means by which nations recognized each other's separate sovereignty and independence under the law of nations.²³³ As Jack Goldsmith has argued, because the

229. U.S. Const. art. II, § 2, cl. 2.

230. *Id.* cl. 1.

231. *Id.* cl. 2.

232. *Id.* § 3.

233. Bellia & Clark, *The Law of Nations and the Constitution*, *supra* note 192, at 53–57.

Constitution does not expressly prohibit States from exchanging ambassadors with foreign nations, “it is far from inconceivable that states retain some authority to ‘send and receive ambassadors.’”²³⁴ Nonetheless, the Supreme Court has long held that the recognition power inherent in such exchanges is an exclusive federal power.²³⁵

Regardless of the merits of these examples, they illustrate that the Court sometimes finds a specific allocation of power to the federal government to be exclusive of the exercise of the same power by the States even though the Constitution contains no express prohibition on the States. The Court appears to rest such decisions on the assumption that the States’ exercise of a given power assigned to federal officials would be fundamentally incompatible—or irreconcilable—with its exercise by the federal government. So conceived, this category of exclusive federal power is consistent with the law of nations and was anticipated by Hamilton in Federalist No. 32.²³⁶

b. *Concurrent Federal and State Authority.* — In other instances, the Supreme Court has understood express delegations of power to the federal government to allow concurrent exercise of the same powers by the States. In these instances, the Court interprets the Constitution to permit the federal government and the States to regulate the same matters at the same time in the same territory. For example, under Article I, Congress has power “[t]o lay and collect Taxes,” to spend for the “general Welfare,” and “[t]o borrow Money.”²³⁷ The Constitution does not expressly or by unavoidable implication preempt States from exercising these same powers within their respective jurisdictions, and indeed the States have continuously exercised these powers since the Constitution was adopted. Unlike

234. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1707 (1997).

235. Recognition, the Supreme Court recently explained, “is a ‘formal acknowledgment’ that a particular ‘entity possesses the qualifications for statehood’ or ‘that a particular regime is the effective government of a state,’” and “may also involve the determination of a state’s territorial bounds.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 203 cmt. a (1986)). In the Court’s view, States have no power to recognize foreign nations because such power is incompatible with the Constitution’s allocation of the recognition power to the federal government. See *United States v. Pink*, 315 U.S. 203, 233 (1942) (“The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system.”); *United States v. Belmont*, 301 U.S. 324, 332 (1937) (reasoning that no state power “can be interposed as an obstacle to the effective operation of federal constitutional power” to recognize the Soviet Union). The Supreme Court went a step further in *Zivotofsky* when it held that the President has the sole power under the Constitution to recognize foreign nations, exclusive not only of States but also of Congress. See *Zivotofsky*, 135 S. Ct. at 2094 (holding that “the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone”).

236. See *supra* notes 179–182 and accompanying text.

237. U.S. Const. art. I, § 8, cls. 1, 2.

some of the powers described above, a State's exercise of taxing and spending powers has not been regarded as totally incompatible with the federal government's simultaneous exercise of the same powers. As Hamilton explained in Federalist No. 32, the power to tax (except imports and exports) "is manifestly a concurrent and coequal authority in the United States and in the individual States."²³⁸

Hamilton gave two reasons for this conclusion that accord with the rules supplied by the law of nations for ascertaining when a state had surrendered a sovereign right. First, Hamilton explained that no provision of the Constitution expressly divested the States of the general power to tax. "There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it."²³⁹ Second, Hamilton explained that the Constitution's express provisions empowering Congress to tax and spend do not give rise to an unavoidable implication of exclusivity that divests the States of their sovereign power to exercise the same powers.²⁴⁰ True, he explained, a state tax on a particular power might be "inexpedient" for the Union, but that was not enough for the Constitution to divest a State of power by implication.²⁴¹ For a legal instrument to divest a State of power because of a conflict, there must be a "direct contradiction of power" or an "immediate constitutional repugnancy" between an *express* federal power and the exercise of the same power by the States: "It is not however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty."²⁴²

238. The Federalist No. 32, at 201 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

239. *Id.*

240. *Id.* at 202.

241. *Id.* (emphasis omitted).

242. *Id.* In *United States v. Nicholls*, 4 Yeates 251 (Pa. 1805), the Supreme Court of Pennsylvania invoked Federalist No. 32 to conclude that Congress's authority to give itself priority as a tax creditor was not exclusive of a State's authority to give itself such priority. *Id.* at 259–60. The question in *Nicholls* was whether a 1797 Act of Congress providing that "debts due to the United States, shall be first satisfied" extended to cases where a State held a prior lien. *Id.* at 251. The Supreme Court of Pennsylvania addressed both whether the Act of Congress should be read to extend to cases where a State held a lien and whether Congress had power under the Constitution to take priority over a State as creditor. *Id.* at 258. On the constitutional question, Justice Yeates applied the same method of analysis that the Justices had in *Chisholm*, see *infra* section IV.A.2, explaining that the Constitution should not be read to divest States of their antecedent sovereign rights absent express language to that effect:

[I]t is a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication, nor in any manner whatever, but by their own voluntary consent, or by submission to a conqueror It would certainly require strong, clear, marked expressions, to satisfy a reasonable mind, that the constituted authorities of the union contemplated by any public law, the divesting of any pre-existing right or interest in a state; or that the representatives of any state would have agreed thereto, even supposing the legitimate powers of congress in such

Chief Justice Marshall endorsed Hamilton's understanding in *Gibbons v. Ogden*:

The power of taxation is indispensable to [the States'] existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States.²⁴³

Under these principles, delegations of constitutional power to the federal government are exclusive only when the exercise of the same power by the States would be utterly incompatible with its exercise by the federal government.

4. *Delegation of Incidental Federal Power.* — The fourth category of federal power involves the States' delegation of incidental powers to the federal government. As discussed, the States surrendered important sovereign rights in the Constitution, perhaps most significantly by granting Congress novel powers to tax and regulate individuals within the territory of the States. Rather than attempting to spell out all of the means by which Congress could execute these powers, the Constitution included the Necessary and Proper Clause, which gives Congress supplemental authority to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²⁴⁴ In *McCulloch v. Maryland*, the Supreme Court interpreted the Clause to permit Congress to incorporate a bank as an incidental means of carrying into execution its "great powers, to lay and

particular, to be perfectly ascertained and settled Hence it results that congress have the *concurrent* right of passing laws to protect the interest of the union, as to debts due to the government of the *United States* arising from the public revenue; but in so doing, they cannot detract from the uncontrollable power of individual states to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent state. Federalist Letters, No. 32, 33. The consequences of a contrary doctrine are too obvious to be insisted upon.

Nicholls, 4 Yeates at 258–59 (opinion of Yeates, J.).

243. 22 U.S. (9 Wheat.) 1, 199 (1824).

244. U.S. Const. art. I, § 8, cl. 18.

collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”²⁴⁵ In the course of its opinion, the Court explained that Congress has broad discretion to select the means by which the federal government pursues the ends entrusted to it by the Constitution.²⁴⁶

Critics of the Supreme Court’s modern federalism doctrines maintain that the Court has unduly restricted Congress’s choice of means under the Necessary and Proper Clause by invalidating federal statutes that conflict with certain aspects of state sovereignty. For example, in an important article, Manning argues that the text, history, and structure of the Constitution suggest that “the Court should defer to Congress’s reasonable judgments under the Necessary and Proper Clause.”²⁴⁷ He maintains that in recent federalism decisions, the Court has taken it upon itself to judge the propriety of Congress’s chosen means by reference to its own conceptions of federalism unmoored from the constitutional text. Manning points to the Court’s anticcommandeering decision in *Printz v. United States* as the “archetype of the Court’s new structuralism.”²⁴⁸ He notes that the issue involved in the case was not whether “Congress had the power to regulate the purchase and sale of firearms,” but rather “whether Congress could do so by means of commandeering state officials to implement the law.”²⁴⁹ Manning argues that the Court should have deferred to Congress’s preferred choice of means in *Printz* because “the Constitution says nothing” one way or the other about commandeering.²⁵⁰

In keeping with the law of nations, however, prominent defenders of the Constitution argued that Congress had no authority to override the States’ preexisting sovereign rights (including the right not to have their governmental functions commandeered by another sovereign), except where the Constitution clearly and expressly authorized it to do so. As explained, under principles of the law of nations well known at the Founding, “states” could alienate their sovereign rights only by clearly and expressly surrendering them in a formal legal instrument.²⁵¹ Proponents of broad federal power might respond that the Necessary and Proper

245. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 422–25 (1819).

246. See *id.* at 422–25 (“[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department . . .”).

247. John F. Manning, Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 62 (2014) [hereinafter Manning, *The Means of Constitutional Power*].

248. *Id.* at 39–41; see also *Printz v. United States*, 521 U.S. 898, 918–19 (1997).

249. Manning, *The Means of Constitutional Power*, *supra* note 247, at 34.

250. See *id.* at 36. Although Manning has argued in favor of broad deference to Congress’s choice of means under the Necessary and Proper Clause, he does acknowledge the possibility that “support for some of the Court’s [federalism] holdings [may] remain[] to be found in parts of the historical record it has yet to explore.” See *id.* at 80 & n.454 (citing Clark, *The Eleventh Amendment*, *supra* note 136; Rappaport, *supra* note 18).

251. See *supra* section I.D.

Clause should be construed as just such a surrender. The difficulty with this claim, however, is that all surrenders of sovereign rights had to be clear and express, and the Necessary and Proper Clause is notoriously indeterminate as to which aspects of state sovereignty—if any—it subjects to congressional control.

Courts and commentators have long debated the meaning of the Necessary and Proper Clause, and no consensus has emerged. For example, Professor Gary Lawson and Patricia Granger have argued that “the word ‘proper’ serves a critical, although previously largely unacknowledged, constitutional purpose by requiring . . . that such laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals.”²⁵² Other scholars, however, have rejected such restrictions. For example, Professor Randy Beck has argued that the “propriety” limitation of the Clause is best understood as requiring an appropriate relationship between congressional ends and means but does not support a state sovereignty restriction of the kind imposed in *Printz*.²⁵³

More recently, several scholars have published a book attempting to recover lost usages and meanings of the phrase “necessary and proper.”²⁵⁴ Professor Robert Natelson suggests that the phrase incorporates fiduciary obligations derived from trust law, including reasonableness, impartiality, good faith, and due care.²⁵⁵ Lawson and Professor Guy Seidman conclude that the Clause reflects standards of “reasonableness” imported from English administrative law, including fairness, proportionality, and respect for preexisting rights.²⁵⁶ Finally, Professor Geoffrey Miller observes that the language of the Clause has ties to the language of eighteenth-century corporate charters, and suggests that the Clause requires a “reasonably close connection” between means and ends and seeks to avoid discrimination among stakeholders.²⁵⁷

252. Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 *Duke L.J.* 267, 271 (1993).

253. See *Printz*, 521 U.S. at 923–24; J. Randy Beck, The New Jurisprudence of the Necessary and Proper Clause, 2002 *U. Ill. L. Rev.* 581, 641–42.

254. See Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, *The Origins of the Necessary and Proper Clause* 119 (2010).

255. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *Case W. Res. L. Rev.* 243, 284–85 (2004).

256. Lawson et al., *supra* note 254, at 121–43.

257. *Id.* at 160–75. Sam Bray has argued that the phrase “necessary and proper” “can be read as [an] instance[] of an old but now largely forgotten figure of speech” known as hendiadys. Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: Hendiadys in the Constitution, 102 *Va. L. Rev.* 687, 688 (2016). A hendiadys involves “two terms separated by a conjunction [that] work together as a single complex expression.” *Id.* Bray argues that understanding “necessary and proper” as this kind of expression makes sense of the historical debate over the meaning of the phrase and suggests that the Clause “invoked a general principle of incidental powers, drawing a line for congressional action that is on the leeway side of a strict word.” *Id.* at 692.

Building on this work, Baude has argued that the Necessary and Proper Clause authorizes Congress to exercise “minor” or “incidental” powers, but not “great” powers.²⁵⁸ In his view, “some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, even if they might help effectuate an enumerated power.”²⁵⁹ Baude draws support for this approach from *McCulloch* itself, which distinguished between great and incidental powers: “The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.”²⁶⁰

Although some of these theories have gained adherents on the Supreme Court,²⁶¹ skeptics like Manning remain unconvinced. In his view, judicial doctrines that restrict Congress’s choice of means improperly transfer power from Congress to the judiciary. He believes that restrictive approaches to the Necessary and Proper Clause necessarily employ “discretionary standards that inevitably delegate interpretative lawmaking power to someone.”²⁶² In his view, the Constitution vests this lawmaking power in “Congress rather than the judiciary.”²⁶³

Whatever meaning one ascribes to the Necessary and Proper Clause, the Clause does not appear to qualify as a clear and express surrender of any and all aspects of state sovereignty that Congress might seek to override as a means of implementing its other powers. Indeed, its meaning was sharply contested during the Founding era and remains so today. Under background principles of the law of nations, the scope of an indefinite provision—such as the Necessary and Proper Clause—turned on whether its application was considered to be “favourable” or “odious.”²⁶⁴ A *favorable* application was one that furthered the common interest of both parties.

258. William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1749 (2013).

259. *Id.* (emphasis omitted).

260. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 411 (1819).

261. See *Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring in the judgment, joined by Thomas, J.); *United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring in the judgment); *Alden v. Maine*, 527 U.S. 706, 732–33 (1999); *Printz v. United States*, 521 U.S. 898, 924 (1997) (stating that a law is not “proper” under the Necessary and Proper Clause if it “violates the principle of state sovereignty reflected in . . . various constitutional provisions”) (citing Lawson & Granger, *supra* note 252, at 297–326, 330–33).

262. Manning, *supra* note 247, at 60.

263. *Id.* John Harrison has also acknowledged the indeterminacy of distinguishing between great powers and incidental powers. Although sympathetic to that distinction in principle, he conceded that “filling in the substance is famously difficult.” John Harrison, Enumerated Federal Power and the Necessary and Proper Clause, 78 U. Chi. L. Rev. 1101, 1125 (2011).

264. 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, §§ 299–300, at 231–32.

With respect to favorable applications, indefinite terms were to be interpreted “to give [them] all the extent they are capable of in common use.”²⁶⁵ By contrast, an *odious* application was one that benefitted one party at the expense of another. Of particular relevance, the application of a legal provision would be considered odious if it purported to change the status quo by divesting a state of its preexisting rights. If a provision divesting a state of sovereign rights was clear, then the instrument would be given its natural meaning even though its application was odious. On the other hand, if a provision was vague or ambiguous as to whether it divested a sovereign right, then, as Vattel explained, “we should . . . take the term in the most confined sense . . . , without going directly contrary to the tenour of the writing, and without doing violence to the terms.”²⁶⁶

Under these rules of interpretation, the Necessary and Proper Clause should be read to avoid “odious” applications—including divesting States of preexisting rights under the law of nations—unless the language of the Clause or another provision of the Constitution clearly and expressly requires such divestiture. As discussed, the States clearly compromised their exclusive sovereign right to regulate their own citizens within their own territory by giving Congress express powers to tax and regulate these same individuals. To be sure, these surrenders were “odious” in Vattel’s taxonomy. But because they were clear and express, the Necessary and Proper Clause empowered Congress to enact incidental legislation regulating individuals as far as the natural meaning of “necessary and proper” allowed. Although the natural meaning of the Necessary and Proper Clause is disputed,²⁶⁷ it clearly authorizes Congress to exercise *some* incidental powers to carry into execution its Article I, Section 8 powers over individuals, including—as the Court held in *McCulloch*—the power to charter a bank.²⁶⁸ When Congress uses the Clause to regulate individuals in furtherance of its enumerated powers, it is exercising a type of sovereign power already clearly surrendered. On the other hand, when Congress attempts to use the Clause to require state legislative and executive officials to carry federal law into execution, it is claiming a power to override the States’ distinct

265. *Id.*, bk. II, § 307, at 234 (emphasis omitted).

266. *Id.*, bk. II, § 308, at 235.

267. In *McCulloch v. Maryland*, the Supreme Court held that the Necessary and Proper Clause empowers Congress to enact “all means which are appropriate, which are plainly adapted” to carrying into execution its enumerated powers. 17 U.S. (4 Wheat.) 316, 421 (1819). The Justices still dispute what “plainly adapted” means. The Court has held in recent times that the Clause empowers Congress to enact means that are “rationally related to the implementation of a constitutionally enumerated power.” *United States v. Comstock*, 560 U.S. 126, 134 (2010). Justice Thomas has argued, however, that “plainly adapted” means not that a law has a mere “rational connection” to an enumerated power but instead that it has an “obvious, simple, and direct relation” to an enumerated power. *Sabri v. United States*, 541 U.S. 600, 612–13 (2004) (Thomas, J., concurring in the judgment). Justice Alito has suggested that for a law to be “necessary and proper,” it must have “a substantial link to Congress’ enumerated powers.” *Comstock*, 560 U.S. at 158 (Alito, J., concurring).

268. *McCulloch*, 17 U.S. (4 Wheat.) at 316, 424.

sovereign right not to be commandeered by another sovereign. Because the States—quite consciously—did not clearly and expressly surrender this right in any provisions of the original Constitution, the Necessary and Proper Clause should be applied in this context “in the most confined sense” under the rules of interpretation that the Founders invoked to defend the Constitution and to set up a federal government.²⁶⁹ As discussed, these rules of interpretation were meant to prevent the inadvertent surrender of sovereign rights.

Even proponents of a broad understanding of the Necessary and Proper Clause embraced these rules of interpretation. For example, Hamilton invoked these interpretive principles in his 1791 opinion on the constitutionality of the Bank of the United States. Hamilton argued that an act of Congress that has “an obvious relation” to an end “clearly comprehended within any of the specified powers” enjoys “a strong presumption in favor of its constitutionality” *unless* “the proposed measure abridge[s] a pre-existing right of any State.”²⁷⁰ The preexisting rights of a State were defined by the law of nations, and only a clear and express constitutional provision could surrender or abrogate them. By giving Congress concurrent legislative authority to regulate matters within the traditional jurisdiction of the States, the Constitution clearly and expressly abrogated the States’ preexisting right to exercise exclusive governance authority within their respective territories. The Constitution did not, however, clearly and expressly abrogate the States’ right not to be commandeered by another sovereign.

Although the Supreme Court did not explicitly invoke these background principles of interpretation in *McCulloch v. Maryland*, they are reflected in its analysis of the Necessary and Proper Clause. In *McCulloch*, the Court upheld Congress’s power to charter a bank as a means of regulating individuals and carrying out its own governmental objectives. In the process, the Court rejected restrictive interpretations of the Clause based on its use of the term “necessary”:

If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.²⁷¹

269. 1 Vattel, *The Law of Nations*, supra note 45, bk. II, § 308, at 235. For a discussion of the Constitutional Convention’s conscious decision to withhold federal power to commandeer States, see *infra* section IV.B.

270. Opinion of Alexander Hamilton on the Constitutionality of a National Bank (Feb. 23, 1791), reprinted in *Legislative and Documentary History of the Bank of the United States* 95, 99 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832).

271. 17 U.S. (4 Wheat.) at 413–14.

The Court observed in its analysis that the people of the States, in adopting the Constitution, authorized the federal government to exercise its powers directly upon them:

But when, ‘in order to form a more perfect union,’ it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.²⁷²

Accordingly, to the extent that the States expressly compromised their exclusive right to govern their own citizens by adopting the Constitution, the Court’s decision to construe the Necessary and Proper Clause according to the ordinary and natural meaning of the word “necessary” was fully consistent with the rules governing surrender of sovereign rights prescribed by the law of nations.

At the same time, the *McCulloch* Court made clear in the course of its decision that Congress could not use the Necessary and Proper Clause to command the States to create or control state-chartered banks as a means of achieving Congress’s objectives.²⁷³ Opponents of the Bank of the United States argued that it was not necessary for Congress to create the Bank because Congress could rely on state banks to support the operations of the federal government.²⁷⁴ Significantly, Chief Justice Marshall rejected this argument on the ground that Congress had no constitutional power to commandeer the legislative powers of the States: “To impose on [the federal government] the necessity of resorting to means *which it cannot control*, which another Government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other Governments which might disappoint its most important designs, and is incompatible with the language of the constitution.”²⁷⁵ In other words, foreshadowing Justice O’Connor’s analysis in *New York v. United States*, Marshall reasoned that the Necessary and Proper Clause gives Congress the power to charter a bank; it does not give Congress the power to require a State to charter a bank.²⁷⁶

272. *Id.* at 404–05.

273. *Id.* at 358–59.

274. Joseph Hopkinson argued to the Court in *McCulloch* that the state banks were competent to serve all the purposes asserted to justify a Bank of the United States. *Id.* at 333 (argument of counsel).

275. *Id.* at 424 (emphasis added).

276. See *New York v. United States*, 505 U.S. 144, 166 (1992) (“The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”). This method of analysis is consistent with other opinions of the

Nearly two centuries later, in *Printz v. United States*, the Supreme Court reaffirmed that Congress may not use the Necessary and Proper Clause to commandeer state executive officers to enforce federal law. According to the Court:

When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier[,] . . . it is not a “La[w] . . . *proper* for carrying into Execution the Commerce Clause,” and is thus, in the words of The Federalist,

Marshall Court. In *Gibbons v. Ogden*, Marshall, after first observing that under the Articles of Confederation the States “were sovereign, were completely independent, and were connected with each other only by a league,” contended that under the Constitution “the whole character in which the States appear, underwent a change.” 22 U.S. (9 Wheat.) 1, 187 (1824). But his analysis did not convey that the word “State” meant something different under the Constitution than it had meant under the Articles. Under rules derived from the law of nations, a State could only change its character—that is, surrender sovereign rights—in clear and express terms. See *supra* section I.D. Accordingly, Marshall wrote that “the extent” of any change in the character of the States “must be determined by a fair consideration of the instrument by which that change was effected.” *Gibbons*, 22 U.S. (9 Wheat.) at 187. The rules that he proceeded to apply to determine the scope of federal power aligned with Vattel’s rules of interpretation. Marshall wrote in *Gibbons* that the Constitution “contains an enumeration of powers expressly granted by the people to their government.” *Id.* He explained that when the Constitution expressly confers a power, the Court should not strictly construe it but instead should understand the Framers and the people “to have employed words in their natural sense, and to have intended what they have said.” *Id.* at 188.

Justice Story applied the same rules of interpretation in *Martin v. Hunter’s Lessee*:

The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

14 U.S. (1 Wheat.) 304, 236 (1816); see also Story, Commentaries, *supra* note 210, § 424 (“Where the power is granted in general terms, the power is to be construed, as co-extensive with the terms, unless some clear restriction upon it is deducible from the context.”). Both Marshall and Story explained that express grants of power to the federal government should be interpreted in light of their ordinary or natural meaning. But neither read the Constitution to divest the States of sovereign rights absent an express surrender of the right in question. For example, as explained, in interpreting the Necessary and Proper Clause, Marshall took as given that Congress could not compel States to create state banks. See *infra* notes 275–276 and accompanying text. Similarly, in *Prigg v. Pennsylvania*, Story found that the federal government lacked power to require state magistrates to enforce a federal law. 41 U.S. (16 Pet.) 539, 621–22 (1842). Although Story rejected the strict construction of express terms in the Constitution—that is, interpreting them in their most limited sense rather than in their natural sense—he did not understand the Constitution to empower Congress to override the sovereign rights of the States absent express language doing so. See Story, Commentaries, *supra* note 210, § 411. If, as Marshall believed, the Articles of Confederation used the term “States” to refer to free and independent sovereigns, then the Constitution could divest them of their sovereign rights, and thus change their character, only by virtue of express terms or unavoidable implication. *Martin*, 14 U.S. (14 Wheat.) at 326.

“merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”²⁷⁷

Manning has criticized the Court’s reasoning in *Printz* on the ground that it “authorized the Court to derive and enforce a zone of inviolable state sovereignty from its own reading of the constitutional structure as a whole.”²⁷⁸ As Part IV discusses, however, the Court’s anticommandeering doctrine (including its restrictive interpretation of the Necessary and Proper Clause) should not be dismissed as judicial activism divorced from the constitutional text. Rather, properly understood, the doctrine results from the Constitution’s use of the term “States” read in light of background principles of the law of nations. Manning’s reading of the Necessary and Proper Clause would give Congress virtually unlimited power to override the residual sovereignty of the States—not only by commandeering State actors but also (to take a real example) by dictating the locations of the States’ capitals.²⁷⁹ This conclusion would be flatly inconsistent with the historical meaning of the term “States” and the rules of interpretation governing their surrender of sovereign rights. In short, because the “States” did not clearly and expressly surrender these rights in the Constitution, they necessarily retained them under well-recognized principles of the law of nations.

In keeping with background rules of the law of nations, the Marshall Court correctly upheld congressional power to charter a bank as a means of regulating individuals to further legitimate federal objectives under the Necessary and Proper Clause in accordance with the ordinary and natural meaning of the word “necessary.” That is because the Constitution clearly and expressly abrogated the exclusive sovereign right of States to govern individuals within their own territories. At the same time, the Marshall Court correctly reasoned that the Necessary and Proper Clause did not give Congress power to command States to create or regulate state banks to achieve federal objectives because nothing in the Clause or any other provision of the Constitution clearly and expressly surrendered this distinct aspect of state sovereignty.

As the next Part explains, in at least three contexts, the Supreme Court has held that Congress lacks power to override the sovereign rights of the States in the absence of constitutional provisions clearly and expressly surrendering such rights. Understanding the Constitution—and American federalism—against background principles drawn from the law of nations places all three doctrines on a firmer foundation.

277. *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (alteration in original) (citation omitted) (quoting Federalist No. 33, at 204 (Alexander Hamilton)).

278. Manning, *supra* note 247, at 39.

279. See *Coyle v. Smith*, 221 U.S. 559, 579 (1911) (invalidating Congress’s attempt to limit Oklahoma’s ability to move its state capital as a condition of admission to the Union).

IV. IMPLICATIONS

In resolving certain federalism questions, the Supreme Court has frequently relied less on the constitutional text and more on historical understandings of the structure of government created by the Constitution to restrain federal power and uphold state sovereignty. Textualists have criticized such decisions on the ground that the Constitution contains no specific text to support them. This critique does not account, however, for the original public meaning of the term “States” and the background rules governing the surrender of a state’s sovereign rights under the law of nations.

As this Article explains, the term “State” as used in the Constitution was a term of art drawn from the law of nations. A “State” referred to a sovereign nation entitled to a well-recognized set of rights under such law.²⁸⁰ To be sure, “States” could surrender or compromise their sovereign rights, but only by clearly and expressly alienating them in a binding legal document.²⁸¹ For this reason, textualists have been too quick to insist that courts may only uphold the sovereign rights of the States if they can point to a specific constitutional provision affirmatively granting such rights. At the Founding, a “State” possessed all of the rights and powers recognized by the law of nations minus only those it expressly surrendered. For this reason, the rights and powers of the American States were not conferred by, but predated, the Constitution. Thus, the relevant constitutional question is not whether the text expressly grants sovereign rights, powers, and immunities to the States, but whether it expressly takes them away.

This Part discusses three important Supreme Court doctrines that are largely consistent with this understanding of state sovereignty: state sovereign immunity, the anticommandeering doctrine, and the equal sovereignty of the States. Each of these doctrines upholds a traditional sovereign right of the States against federal interference unauthorized by the express terms of the Constitution.²⁸²

First, the Supreme Court has long held that the States enjoy sovereign immunity under the Constitution from suits brought by individuals against them.²⁸³ Critics charge that this immunity lacks an adequate basis in the text of the original Constitution, and that the Eleventh Amendment provides only limited support for the Court’s recognition of broad state sovereign immunity. As discussed, this critique has things backwards. The question is not whether the text of the Constitution affirmatively grants the

280. See *supra* sections I.A–.C.

281. See *supra* section I.D.

282. Reading the Constitution against the backdrop of the law of nations undoubtedly has implications for other provisions of the Constitution as well. See, e.g., Ryan C. Williams, *The “Guarantee” Clause*, 132 *Harv. L. Rev.* 602, 673 (2018) (arguing that the language of the Guarantee Clause should be viewed through the lens of eighteenth-century international law).

283. See *infra* section IV.A.

States sovereign immunity; rather, the question is whether the text expressly withdraws the sovereign immunity traditionally enjoyed by sovereign “States.” Taking into account the Eleventh Amendment’s authoritative gloss on Article III, the original Constitution contains no express provisions purporting to override the States’ traditional sovereign immunity from suits by individuals. Thus, the Court’s general doctrine of state sovereign immunity is not only consistent with, but affirmatively required by, the text of the original Constitution.

Second, the Supreme Court has recognized that Congress may not commandeer the States either by requiring state legislatures to adopt state law in the service of a federal program or by compelling state executive officials to enforce federal law.²⁸⁴ Again, critics charge that this doctrine lacks an adequate basis in the Constitution because the constitutional text contains no provisions affirmatively granting the States a right to be free from commandeering by the federal government. Again, however, this critique poses the wrong question. The question is not whether the text of the Constitution expressly gives the States a right not to be commandeered; rather, the question is whether the Constitution expressly divested the “States” of their preexisting right to exercise their legislative and executive powers free from the control of another sovereign. Because the Constitution contains no provision of the latter kind, the Court’s anticommandeering decisions are consistent with the constitutional text.

Third, at the Founding, independent “States” were entitled to absolute equality under the law of nations.²⁸⁵ This background context suggests that the Court has correctly recognized the equal sovereignty of the States under the original Constitution. Because the original Constitution contains no provisions expressly surrendering equal sovereignty, the States necessarily retained it. To be sure, the Civil War Amendments altered the constitutional equality of the States, but only to the extent expressly set forth in the Amendments.

A. *State Sovereign Immunity*

Although the Supreme Court initially rejected state sovereign immunity in the early case of *Chisholm v. Georgia*,²⁸⁶ the Court embraced the doctrine following the States’ ratification of the Eleventh Amendment.²⁸⁷ The precise terms of the Amendment support some—but not all—of the Court’s decisions.²⁸⁸ For this reason, the Court has struggled to provide a

284. See *infra* section IV.B.

285. See *supra* section I.C.

286. 2 U.S. (2 Dall.) 419 (1793).

287. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1894.

288. Although the text of the Eleventh Amendment bars federal courts from hearing suits against States “by Citizens of another State,” U.S. Const. amend. XI, the Supreme Court has long held that the States enjoy immunity from suits brought by their own citizens. See *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). The Court has also held that States enjoy sovereign

textual basis for its doctrine of state sovereign immunity,²⁸⁹ relying instead on the expectations of the Founders,²⁹⁰ the “dignity” of the States,²⁹¹ and the “fundamental postulates implicit in the constitutional design.”²⁹² The Court’s failure to articulate a persuasive rationale grounded in the text of either the original Constitution or the Eleventh Amendment has left the doctrine open to charges of illegitimacy.²⁹³

Understanding state sovereign immunity as an inherent part of the original public meaning of the term “States” in the Constitution alleviates the apparent conflict between textualism and federalism in this context. As Part I discusses, a “state” possessed a broad range of sovereign rights—including immunity from suit in the courts of another sovereign—under the law of nations. A state could surrender its rights, but only if it did so clearly and expressly in a binding legal instrument. Accordingly, the Founders would have reasonably understood the “States” mentioned in the Constitution to possess sovereign immunity from suit except to the extent that the Constitution clearly and expressly abrogated such immunity. As the ratification debates show, the Citizen–State diversity provisions of Article III were the only provisions in the original Constitution that anyone suggested could qualify as a clear and express surrender of the States’ sovereign immunity from suit by individuals. The Founders—and the early Supreme Court—debated the Constitution’s effect on state sovereign immunity in precisely these terms.

In considering the proposed Constitution, Anti-Federalists feared that U.S. courts would read the Citizen–State diversity provisions of Article III as a clear and express surrender of state sovereign immunity in the party alignments they described. Federalists responded that these provisions were ambiguous at best, and thus should not be construed as a surrender of the States’ immunity from suit. Notwithstanding these assurances, the Supreme Court ruled in *Chisholm v. Georgia* that the plain language of the

immunity in their own courts, see *Alden v. Maine*, 527 U.S. 706, 730–31 (1999), even though the Eleventh Amendment is written as a restriction on “[t]he Judicial power of the United States.” U.S. Const. amend. XI.

289. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (stating that “we long have recognized that blind reliance upon the text of the Eleventh Amendment is ‘to strain the Constitution and the law to a construction never imagined or dreamed of’” (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934))).

290. See *Hans*, 134 U.S. at 15 (“Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?”).

291. See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

292. *Alden*, 527 U.S. at 730–31.

293. See, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L.J.* 1, 3–7 (1988); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 *Notre Dame L. Rev.* 1011, 1027–28 (2000); Young, *supra* note 28, at 1664–75.

Citizen–State diversity provisions did indeed authorize suits against States by citizens of other States. In response, Congress and the States quickly and overwhelmingly adopted the Eleventh Amendment to countermand the Supreme Court’s ruling and reinstate their preferred construction of Article III. By foreclosing further reliance on the only provisions of the Constitution that arguably divested the States of sovereign immunity from suit by individuals, the Eleventh Amendment affirmed that the States had retained—rather than surrendered—their preexisting sovereign immunity in the Constitution. As explained below, this account best explains both the initial controversy surrounding the proper construction of Article III and why proponents of the Eleventh Amendment considered it to be a complete revocation of any plausible surrender of such immunity found in the original Constitution.

1. *Immunity Under the Proposed Constitution.* — The Constitutional Convention did not discuss whether the proposed Constitution included a surrender of the States’ sovereign immunity from suit by individuals, but the issue quickly arose as a potential roadblock to ratification. Anti-Federalists worried that the Citizen–State diversity provisions of Article III could be construed to authorize suits against States. These provisions extended federal judicial power to controversies “between a State and Citizens of another State” and “between a State . . . and foreign . . . Citizens or Subjects.”²⁹⁴ Anti-Federalists believed that courts would construe the word “between” to refer to suits by and against a State, and thus read those provisions to be a surrender of state sovereign immunity.²⁹⁵

As Part I discusses, the law of nations supplied background rules to govern the interpretation of instruments purporting to surrender or divest sovereign rights. Under these rules, a clear and express surrender was to be interpreted according to its ordinary and natural meaning. On the other hand, courts would interpret vague or ambiguous provisions to avoid an “odious” reading, including one that would divest a state of its sovereign rights under the law of nations. Thus, the crucial question was whether the text of Article III’s Citizen–State diversity provisions was clear or ambiguous. The Founders debated the meaning of Article III in just these terms.

This background provides crucial context for understanding the ratification debates over the effect of Article III on state sovereign immunity. Anti-Federalists feared that courts would treat the Citizen–State diversity provisions as a clear and express surrender of state sovereign immunity, whereas Federalists insisted that these provisions were at best ambiguous and therefore would have no such effect. For example, Brutus objected that “it is humiliating and degrading to a government” to subject “a state

294. U.S. Const. art. III, § 2, cl. 1.

295. See, e.g., Federal Farmer, Letters to the Republican III (Oct. 10, 1787), reprinted in 14 *The Documentary History of the Ratification of the Constitution* 30, 41–42 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

to answer in a court of law, to the suit of an individual.”²⁹⁶ Similarly, George Mason objected that the Citizen–State diversity provisions could override state sovereignty:

Is this State to be brought to the bar of justice like a delinquent individual?—Is the sovereignty of the State to be arraigned like a culprit, or private offender?—Will the States undergo this mortification?—I think this power perfectly unnecessary.²⁹⁷

Leading supporters of the Constitution, including James Madison, Alexander Hamilton, and John Marshall, responded by assuring critics that the Citizen–State diversity provisions would not be construed to authorize suits *against* States because these provisions did not constitute a sufficiently clear and express surrender of the States’ preexisting immunity from such suits. Responding to Mason’s objections, Madison acknowledged that “this part” of the Constitution “might be better expressed.”²⁹⁸ He maintained, however, that “a fair and liberal interpretation upon the words” would not authorize the federal government “to commit the oppressions [Mason] dreads.”²⁹⁹ Instead, Madison insisted that “[i]t is not in the power of individuals to call any State into Court.”³⁰⁰ Accordingly, he stressed that “[t]he only operation [the provisions] can have, is, that if a State should wish to bring suit against a citizen [of another State or of a foreign State], it must be brought before the Federal Court.”³⁰¹

Patrick Henry dismissed Madison’s construction of Article III as “perfectly incomprehensible,” and argued that “[i]f Gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument.”³⁰² In response, John Marshall insisted that the Citizen–State diversity provisions would not authorize “the sovereign power” to “be dragged before a Court.”³⁰³ He maintained that “this construction is warranted by the words,” but also stressed that this partiality in favor of the States “cannot be avoided” because “I see a difficulty in making a State a defendant, which does not prevent its being plaintiff.”³⁰⁴

296. Brutus, Letter XIII, N.Y.J., Feb. 21, 1788, reprinted in 20 *The Documentary History of the Ratification of the Constitution* 795, 796 (John P. Kaminski & Gaspare J. Saladino eds., 2004).

297. George Mason, Address to the Virginia Convention (June 19, 1788), reprinted in 10 *The Documentary History of the Ratification of the Constitution* 1403, 1406 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DHRC] (footnote omitted).

298. James Madison, Address to the Virginia Convention (June 19, 1788), reprinted in 10 DHRC, *supra* note 297, at 1409, 1409.

299. *Id.*

300. James Madison, Address to the Virginia Convention (June 20, 1788), reprinted in 10 DHRC, *supra* note 297, at 1412, 1414.

301. *Id.*

302. Patrick Henry, Address to the Virginia Convention (June 20, 1788), reprinted in 10 DHRC, *supra* note 297, at 1419, 1422–23.

303. John Marshall, Address to the Virginia Convention (June 20, 1788), reprinted in 10 DHRC, *supra* note 297, at 1430, 1433.

304. *Id.*

In Marshall's view, the intent was "to enable States to recover claims of individuals residing in other States."³⁰⁵

Hamilton explicitly invoked principles drawn from the law of nations to allay the Anti-Federalists' fears. In Federalist No. 81, he sought to refute "a supposition which has excited some alarm upon very mistaken grounds."³⁰⁶ Rejecting the Anti-Federalists' claim that the Citizen-State diversity provisions clearly encompassed suits against States, he explained:

It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. *Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states*, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorise suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, *by mere implication*, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.³⁰⁷

305. *Id.* As Chief Justice, Marshall acknowledged the Supreme Court's contrary interpretation of the Citizen-State diversity provisions in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the Eleventh Amendment's superseding command. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (describing the abrogation of state sovereign immunity as "a principle originally ingrafted in that instrument, though no longer a part of it"). Over ten years later, in *Cohens v. Virginia*, Marshall wrote in dicta that under the Constitution "the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to the parties." See 19 U.S. (6 Wheat.) 264, 412 (1821). This dicta, which could be read to contradict Marshall's earlier views, was never adopted as a holding by the Court.

306. *The Federalist* No. 81, at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

307. *Id.* at 548–49 (emphasis added).

Hamilton's discussion closely tracks Vattel's understanding of state sovereignty and the means by which a state could surrender sovereign rights under the law of nations.³⁰⁸ Hamilton observed that "the government of every state in the union" now enjoys "the attributes of sovereignty," including the right "not to be amenable to the suit of an individual *without its consent*."³⁰⁹ Hamilton explained that "[t]his is the general sense, and the general practice of mankind"—a clear reference to the law of nations.³¹⁰ Given the States' preexisting sovereignty, he asserted that immunity from suit by individuals "will remain with the states" unless "there is a surrender of this immunity in the plan of the convention."³¹¹

Hamilton found the Constitution to contain no such surrender. To support his conclusion that the States would not surrender their right to sovereign immunity by adopting the Constitution, Hamilton directed the reader to his earlier explanation of the "circumstances which are necessary to produce an alienation of state sovereignty."³¹² In the relevant portion of Federalist No. 32, Hamilton explained that "the State Governments would clearly retain all the rights of sovereignty which they before had" minus only those rights expressly delegated to the United States in the Constitution:

An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty, would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.³¹³

Applying these principles to determine the effect of the Constitution on state sovereign immunity, Hamilton concluded in Federalist No. 81 that

308. Hamilton's discussion also undoubtedly reflected his experience at the Constitutional Convention, where he strongly opposed any proposals to authorize Congress to regulate States and enforce such regulations through military force. See *infra* notes 433–436 and accompanying text. This explains his observation at the end of his discussion: "To what purpose would it be to authorise suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state . . ." The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

309. The Federalist No. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

310. *Id.* at 548–49.

311. *Id.* at 549.

312. *Id.*

313. The Federalist No. 32, at 199–200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

“there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.”³¹⁴ In his view, reading Article III to destroy “a pre-existing right” of the States “by mere implication . . . would be altogether forced and unwarrantable.”³¹⁵

Hamilton’s analysis reflected a central principle of the law of nations. At the time, a sovereign state could abrogate its sovereign rights only through a clear and express surrender. Like Madison and Marshall, Hamilton did not regard the Citizen–State diversity provisions of Article III (or any other part of the proposed Constitution) as an adequate surrender of the State’s preexisting right to sovereign immunity from suit by individuals. Thus, all three of these leading Federalists argued that the States retained all sovereign rights they did not expressly surrender in the proposed Constitution, and that the proposed Constitution did not contain a clear surrender that would permit individuals to override the States’ traditional immunity from suits.

Significantly, the Anti-Federalists did not disagree with Hamilton’s framework for evaluating the extent to which the States surrendered their sovereign rights under the Constitution. Rather, they disputed his conclusion that the text was insufficiently clear to constitute a valid surrender. Like Hamilton, they started from the assumption that the States retained all sovereign rights they did not clearly and expressly surrender in the Constitution. Unlike Hamilton, however, Anti-Federalists considered the Citizen–State diversity provisions (especially their use of the term “between”) to be a clear and express surrender of state sovereign immunity with respect to suits brought by the parties specified in these provisions.³¹⁶ The important point for present purposes is not whether one side or the other had the better argument on the merits, but rather that all sides in the debate agreed that the States could surrender their preexisting sovereign rights only by clearly and expressly surrendering them in the Constitution. With the Federalists’ repeated assurances that Article III would not be construed to override state sovereign immunity, the States proceeded to ratify the Constitution.

2. *Chisholm and the Eleventh Amendment.* — Notwithstanding the Federalists’ assurances during ratification, the Supreme Court ruled a few years later in *Chisholm v. Georgia* that the States had in fact surrendered part of their sovereign immunity by adopting the Citizen–State diversity provisions of Article III.³¹⁷ *Chisholm* considered whether a citizen of South

314. The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

315. *Id.*

316. See *supra* note 302 and accompanying text (discussing Patrick Henry’s remark that the text was clear).

317. 2 U.S. (2 Dall.) 419 (1793).

Carolina could sue Georgia in federal court to recover a debt.³¹⁸ The Citizen–State diversity provisions of Article III extend the federal judicial power “to Controversies . . . between a State and Citizens of another State.”³¹⁹ The question before the Court was whether this provision constituted a surrender of the States’ sovereign immunity from suit. In keeping with the Court’s practice at the time, each Justice issued a separate opinion, but all five Justices analyzed the question in accordance with the rules of interpretation set forth in Vattel’s treatise. Four Justices concluded that the text of the Citizen–State diversity provisions qualified as an express surrender. Justice Iredell, the lone dissenter, applied the same interpretive principles, but concluded—as Hamilton, Madison, and Marshall had—that these provisions did not amount to an adequate surrender of state sovereign immunity.

Justice Blair characterized the constitutional question as whether a State surrendered its right to sovereign immunity when it adopted the Constitution. “[I]f sovereignty be an exemption from suit in any other than the sovereign’s own Courts,” Justice Blair wrote, “it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”³²⁰ Justice Blair stressed that the States gave up this right expressly in Article III:

What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is *expressly* extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is . . .³²¹

Justice Blair saw no basis to distinguish between cases in which a State was the plaintiff as opposed to the defendant. “Both cases,” he concluded, “were intended.”³²² Accordingly, he determined that the Court could hear a suit by a citizen of South Carolina against Georgia because “*clear and positive directions . . . of the Constitution*” authorized it to do so.³²³

Even Justice Wilson, who wrote the most nationalist opinion, applied the same rules of interpretation. Justice Wilson did not believe that the law of nations was directly applicable because the States and the federal government comprised one nation, formed by the sovereign act of the people.³²⁴ Thus, in his view, the question was: “[C]ould the *people* of those [American] States, among whom were those of *Georgia*, bind those *States*,

318. See *id.* at 20.

319. U.S. Const. art. III, § 2.

320. *Chisholm*, 2 U.S. (2 Dall.) at 452 (opinion of Blair, J.).

321. *Id.* at 450 (emphasis added).

322. *Id.*

323. *Id.* at 451 (emphasis added).

324. *Id.* at 453 (opinion of Wilson, J.) (“From the law of nations little or no illustration of this subject can be expected. By that law the several States and Governments spread over our globe, are considered as forming a *society*, not a nation.”).

and *Georgia* among the others, by the Legislative, Executive, and Judicial power so vested?”³²⁵ This question, he thought, “must unavoidably receive an affirmative answer.”³²⁶ He thus proceeded to consider whether the people divested the States of sovereign immunity by adopting the Constitution.³²⁷ Undertaking essentially the same inquiry as Blair, Wilson wrote that “[t]hese questions may be resolved, either by *fair and conclusive deductions*, or by *direct and explicit declarations*.”³²⁸ Like Blair, Wilson concluded that the express words of the Constitution divested the States of their right to sovereign immunity in this case:

But, in my opinion, this [conclusion] rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct and explicit declaration* of the Constitution itself “The judicial power of the United States shall extend to controversies, between a state and citizens of another State.” Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal?³²⁹

Justice Cushing likewise concluded that the Constitution expressly divested the States of sovereign immunity. Justice Cushing explained that “[w]hatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States.”³³⁰ He found that the people had given the federal courts power to hear cases against States, notwithstanding the States’ preexisting sovereign immunity, because “[t]he judicial power . . . is *expressly* extended to ‘controversies between a State and citizens of another State.’”³³¹ He concluded that “[t]he case, then, seems clearly to fall within the letter of the Constitution.”³³²

Finally, after observing that the Constitution transferred “many prerogatives . . . to the national Government,”³³³ Chief Justice Jay proceeded “to [enquire] whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State.”³³⁴ For Jay, “[t]his enquiry naturally leads our attention, 1st. To the design of

325. *Id.* at 463.

326. *Id.*

327. *Id.* at 464 (“The next question . . . is,—Has the Constitution done so? Did those people mean to exercise this their undoubted power?”).

328. *Id.* (emphasis added).

329. *Id.* at 466 (emphasis omitted) (footnote omitted).

330. *Id.* at 468 (opinion of Cushing, J.) (emphasis omitted).

331. *Id.* at 467 (emphasis added).

332. *Id.*

333. *Id.* at 471 (opinion of Jay, C.J.).

334. *Id.* at 473 (emphasis omitted).

the Constitution. 2nd. To the letter and *express declaration* in it.”³³⁵ Jay explained that “the Constitution (to which Georgia is a party) authorises . . . an action against her” by a citizen of another State³³⁶ because Article III extends the judicial power to “controversies between a state and citizens of another state.”³³⁷ Jay applied the “ordinary rules for construction” and rejected the suggestion “that this [provision] ought to be construed to reach none of these controversies, excepting those in which a State may be Plaintiff.”³³⁸ In Jay’s view, “If we attend to the words, we find them to be *express, positive, [and] free from ambiguity.*”³³⁹ Thus, all four Justices in the *Chisholm* majority essentially concluded—in accord with the rules supplied by the law of nations—that the States had clearly and expressly surrendered their right to sovereign immunity by adopting Article III.

Only Justice Iredell dissented. Although he was prepared to decide the case on the grounds that the Judiciary Act of 1789 had not authorized the Supreme Court to hear it, he proceeded—like his colleagues—to address whether “upon a fair construction of the Constitution of the United States, the power contended for really exists.”³⁴⁰ Justice Iredell explained that the States possessed all sovereign powers not delegated to the United States:

Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.³⁴¹

To determine whether the States surrendered their right to sovereign immunity, Justice Iredell invoked the law of nations, which “furnish[ed] rules of interpretation” to govern the question presented.³⁴² Applying those rules, he explained that his “present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money.”³⁴³ Echoing Hamilton’s and Madison’s arguments during the ratification debates, Iredell contended: “[E]very word in the Constitution may have its

335. *Id.* at 473–74 (emphasis added).

336. *Id.* at 470.

337. *Id.* at 476 (internal quotations omitted) (quoting U.S. Const. art. III, § 2, cl. 1).

338. *Id.*

339. *Id.* (emphasis added).

340. *Id.* at 449 (opinion of Iredell, J.).

341. *Id.* at 435 (emphasis omitted).

342. *Id.* at 449.

343. *Id.*

full effect without involving this consequence, and . . . nothing but *express words*, or an *insurmountable implication* (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.”³⁴⁴ Having found no adequate surrender in the Constitution, Iredell concluded that Georgia retained its right to sovereign immunity.³⁴⁵

Significantly, although the Justices disagreed over whether Article III authorized suits against States by citizens of other States, they all approached the constitutional question the same way—namely, by asking whether the States had clearly and expressly surrendered their sovereign immunity from such suits in the Constitution. This approach was drawn directly from the law of nations. The *Chisholm* majority ascribed the ordinary meaning to the term “between” in the Citizen–State diversity provisions (reading it to mean both “by” and “against”). On this understanding, the majority concluded that the States had clearly and expressly surrendered their sovereign immunity from suits by citizens of another State. Justice Iredell disagreed and endorsed the narrow construction of the text favored by Hamilton, Madison, and Marshall during the ratification debates. Although Justice Iredell’s construction coincided with Federalist assurances given during the ratification debates, it was in tension with the ordinary meaning of the term “between,” which the majority deemed sufficiently clear and express to divest the States of their right to sovereign immunity.

Regardless of the merits of the *Chisholm* decision, efforts began immediately to countermand it. Within days, Representative Theodore Sedgwick and Senator Caleb Strong (both of Massachusetts) introduced constitutional amendments in the House and the Senate to reinstate the States’ sovereign immunity.³⁴⁶ Massachusetts was keenly interested in the issue because it faced a pending suit by a British subject for allegedly confiscating his property in violation of the Treaty of Peace.³⁴⁷ During Congress’s scheduled recess, Massachusetts took the lead in urging other States to demand that Congress amend the Constitution to overturn *Chisholm*. On September 27, 1793, the Massachusetts General Court resolved broadly that the “power claimed . . . of compelling a State to be made defendant . . . at the suit of an individual . . . is . . . unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and

344. *Id.* at 450 (emphasis added).

345. See *id.* at 435.

346. See 5 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 597 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC].

347. See *Vassall v. Massachusetts*, discussed in 5 DHSC, *supra* note 346, at 352–61. For the prohibition at issue, see Definitive Treaty of Peace, U.S.–Gr. Brit., art. VI, Sept. 3, 1783, art. VI, 8 Stat. 80 (providing that “there shall be no future confiscations made . . . against any person or persons for, or by reason of the part which he or they may have taken in the present war”).

independence of the several States.”³⁴⁸ The General Court further resolved:

That the Senators from this State . . . are instructed, and the Representatives requested to adopt the most speedy and effectual measures . . . to obtain such amendments in the Constitution . . . as will remove any clause or article . . . which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.³⁴⁹

The General Court directed the Governor to send this resolution to all other States.³⁵⁰ As a consequence, four States quickly adopted very similar resolutions.³⁵¹ With only minor variations, they all urged the adoption of an amendment to remove or explain any provision of the Constitution that could be construed to authorize any suit by an individual against a State in federal court.³⁵²

At the start of the next session of Congress, Senator Strong introduced a slightly revised version of his original proposal to carry out his State’s instructions.³⁵³ This version added language to make clear that it

348. Resolution of the Massachusetts General Court, Sept. 27, 1793, reprinted in 5 DHSC, supra note 346, at 440.

349. *Id.*

350. *Id.* Following Governor Hancock’s death on October 8, 1793, Samuel Adams assumed his duties and distributed the resolution to the States. Samuel Adams to the Governors of the States (Oct. 9, 1793), reprinted in 5 DHSC, supra note 346, at 442–43.

351. See Proceedings of a Joint Session of the New Hampshire General Court, Jan. 23, 1794, reprinted in 5 DHSC, supra note 346, at 618; Resolution of North Carolina General Assembly, Jan. 11, 1794, reprinted in 5 DHSC, supra note 346, at 615; Proceedings of the Virginia House of Delegates, Nov. 28, 1793, reprinted in 5 DHSC, supra note 346, at 338; Resolution of the Connecticut General Assembly, Oct. 29, 1793, reprinted in 5 DHSC, supra note 346, at 609.

Congress approved the Eleventh Amendment on March 4, 1794, see Eleventh Amendment, reprinted in 5 DHSC, supra note 346, at 600, while three additional States were in the process of adopting similar resolutions. See Proceedings of the Maryland House of Delegates, Dec. 27, 1793, reprinted in 5 DHSC, supra note 346, at 611–12; Proceedings of the South Carolina Senate, Dec. 17, 1793, reprinted in 5 DHSC, supra note 346, at 610–11; Proceedings of the Georgia House of Representatives (Nov. 9, 1793), *Augusta Chronicle*, Nov. 16, 1793, reprinted in 5 DHSC, supra note 346, at 236–37. In addition, Pennsylvania and Delaware appointed special committees, but took no action before Congress acted. See Proceedings of the Delaware Senate, Jan. 10, 1794, reprinted in 5 DHSC, supra note 346, at 614–15; Proceedings of the Pennsylvania House of Representatives, Dec. 30, 1793, reprinted in 5 DHSC, supra note 346, at 612–13.

352. See, e.g., *Journal of the House of Delegates of the Commonwealth of Virginia: Oct. 1793*, at 99 (1793), reprinted in 5 DHSC, supra note 346, at 338–39 (calling on Virginia’s Senators and Representatives to amend the Constitution to “remove or explain any clause or article . . . which can be construed to . . . justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States”).

353. Representative Sedgwick’s proposal was abandoned presumably because it went well beyond the terms of the States’ resolutions by proposing to bar all suits against States not only by individuals, but also by “any body politic or corporate, whether within or without

was an “explanatory” amendment designed to correct the Supreme Court’s erroneous construction of the Constitution retroactively.³⁵⁴ As proposed (and ultimately adopted), the Amendment provided: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”³⁵⁵ The Amendment thus resolved the debate in *Chisholm* about the proper interpretation of relevant text by directing federal courts not to construe the judicial power to extend to any suits *against* States by the individuals in question. The Supreme Court subsequently interpreted the Amendment to apply retroactively to require dismissal of all pending suits against States.³⁵⁶

3. *Immunity After the Eleventh Amendment.* — The Eleventh Amendment has perplexed modern readers. Depending on one’s view of sovereign immunity, the Amendment seems to be arbitrarily too narrow or too broad.³⁵⁷ For this reason, both on and off the Court, “the [E]leventh [A]mendment is universally taken *not* to mean what it says.”³⁵⁸ The Supreme Court has generally understood the Amendment to mean more than it says, and has upheld broad sovereign immunity beyond the precise terms of the Amendment.³⁵⁹ On the other hand, many academics and some dissenting Justices read the Amendment to recognize less immunity than the text provides.³⁶⁰ Not surprisingly, textualists have criticized both approaches and urged the Court to enforce “the Eleventh Amendment as written.”³⁶¹

Reading the Eleventh Amendment against background principles of the law of nations helps to make sense of the text in historical context. In

the United States.” Proceedings of the United States House of Representatives (Feb. 19, 1793), *Gazette of the United States*, Feb. 20, 1793, reprinted in 5 DHSC, *supra* note 346, at 605–06. Anti-Federalists generally accepted the need for jurisdiction over suits between States, and perhaps even suits between States and foreign states. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1891 n.441.

354. See James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269, 1333 (1998).

355. U.S. Const. amend. XI.

356. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). Because the Eleventh Amendment only addresses suits by individuals against States, it does not by its terms affect suits between States or suits against States by the United States or foreign states. Thus, whether States are subject to such suits turns on whether the States clearly and expressly authorized them in the text of the original Constitution.

357. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1825–32 (describing the “immunity” and “diversity” theories of the Eleventh Amendment).

358. Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 *U. Pa. L. Rev.* 515, 516 (1977).

359. Clark, *The Eleventh Amendment*, *supra* note 136, at 1826.

360. See *infra* notes 372–374 and accompanying text.

361. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1720–22 (2004) [hereinafter Manning, *The Eleventh Amendment*]; see also Lawrence C. Marshall, *Commentary, Fighting the Words of the Eleventh Amendment*, 102 *Harv. L. Rev.* 1342, 1343 (1989).

accordance with the law of nations, the Founders understood the “States” to retain all of their traditional sovereign rights—including sovereign immunity—except to the extent they clearly and expressly surrendered them in the Constitution.³⁶² The Citizen–State diversity provisions of Article III were the only provisions of the original Constitution that anyone at the time suggested could qualify as a surrender of the States’ immunity from suits by individuals.³⁶³ As discussed, the Founders were sharply divided over whether these provisions constituted a clear and express surrender of state sovereign immunity. After ratification, the *Chisholm* Court found them to qualify as such a surrender. The Eleventh Amendment was drafted as an explanatory amendment to correct this reading. By specifying that the judicial power of the United States “shall not be construed” to permit suits against States by the individuals specified in the Citizen–State diversity provisions, the Amendment neutralized the only text in the original Constitution that plausibly could have been construed as an express surrender of state sovereign immunity from such suits. On this understanding, the preexisting sovereign immunity of the States was fully reinstated—rather than limited—by the Eleventh Amendment.

The modern controversy regarding the scope of state sovereign immunity began with *Hans v. Louisiana*, a decision that recognized general immunity beyond the precise terms of the Eleventh Amendment.³⁶⁴ *Hans* was a suit brought by a citizen of Louisiana against Louisiana alleging that the State’s repudiation of its bonds violated the Contracts Clause.³⁶⁵ The plaintiff argued that he was “not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State.”³⁶⁶ The Supreme Court acknowledged that “the amendment does so read,”³⁶⁷ but treated the Amendment as merely indicative of a broader unwritten principle of state sovereign immunity.³⁶⁸

In recent decades, the Supreme Court has reaffirmed *Hans* and upheld state sovereign immunity in additional contexts. For example, in *Seminole Tribe of Florida v. Florida*, the Court reaffirmed the States’ sovereign immunity from suits in federal court by their own citizens, and also held that Congress cannot abrogate such immunity pursuant to its Article

362. See *supra* Part III.

363. See *supra* notes 294–315 and accompanying text.

364. 134 U.S. 1, 14–15 (1890).

365. *Id.* at 1–2.

366. *Id.* at 10.

367. *Id.*

368. According to the Court, the Amendment “shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*.” *Id.* at 12. The Court regarded as “almost an absurdity on its face” the suggestion that those who drafted and ratified the Eleventh Amendment would have authorized suits against States by their own citizens. *Id.* at 15.

I, Section 8 powers.³⁶⁹ In *Alden v. Maine*, the Court held that Congress also cannot use these powers to abrogate the States' sovereign immunity in state court.³⁷⁰ In the Court's view, a literal reading of the Eleventh Amendment to prohibit only suits by citizens of other States in federal court would be unacceptably underinclusive and inconsistent with the expectations of those who ratified both the original Constitution and the Eleventh Amendment.³⁷¹ The Court thus embraced a broad theory of state sovereign immunity beyond the text of the Eleventh Amendment under which States enjoy immunity regardless of the citizenship of the individual plaintiff and regardless of whether the suit is brought in federal or state court.

Academic critics have charged that the Supreme Court's recognition of such broad immunity lacks any discernable basis in the constitutional text. In place of the Court's broad approach, many favor the so-called diversity theory of the Eleventh Amendment.³⁷² This theory would permit individuals to sue States using any provision of Article III other than the Citizen-State diversity provisions even if the suit falls within the literal prohibition of the Eleventh Amendment.³⁷³ On this reading, the Amendment simply prevents federal courts from hearing suits against States when the *only* available basis for jurisdiction is Citizen-State diversity. Like the Court's broad theory, however, the diversity theory itself contradicts the constitutional text by ignoring the Eleventh Amendment's command that the judicial power not be construed to encompass "any suit" commenced or prosecuted by a prohibited plaintiff.³⁷⁴

Thus, like proponents of broad sovereign immunity, diversity theorists depart from the text of the Eleventh Amendment to avoid what they perceive to be its anomalous distinction between in- and out-of-state citizens. Applying the Amendment "literally" to bar "any suit" with the prohibited party alignment, they contend, would lead to the "unlikely result"

369. 517 U.S. 44, 72–73 (1996).

370. 527 U.S. 706, 712 (1999).

371. See *Hans*, 134 U.S. at 14–15.

372. See, e.g., William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 *Stan. L. Rev.* 1033, 1034 (1983) (contending that the Eleventh Amendment "merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction and that the amendment did nothing to prohibit federal court jurisdiction."); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 *Colum. L. Rev.* 1889, 1894 (1983) (arguing that the Eleventh Amendment intended to narrowly redefine Article III jurisdiction and not create a constitutional "doctrine of state sovereign immunity").

373. See Fletcher, *supra* note 372, at 1060–63.

374. See Marshall, *supra* note 361, at 1347 (observing that "the diversity theory goes on completely to ignore the operative words of the amendment"). But see Akhil Reed Amar, Of Sovereignty and Federalism, 96 *Yale L.J.* 1425, 1481–83 (1987) (arguing that the diversity theory "makes perfect sense of all the words of the Amendment itself").

that “[a]ll suits brought against a state by an out-of-state citizen are prohibited regardless of the existence of a federal question, but at the same time any suit brought against a state by a citizen of that state is permitted, provided a federal question exists.”³⁷⁵ In their view, the Founders could not have intended such an arbitrary distinction, so courts should narrow the scope of the Amendment to avoid this result.

One need not choose between these two atextual readings of the Eleventh Amendment. Instead, it is possible to reconcile state sovereign immunity with the constitutional text by reference to background principles drawn from the law of nations. The “States” referred to in the Constitution adopted that instrument as equal and independent sovereigns, with all of the rights that accompanied that status. Under the law of nations, the States could alienate their sovereign rights only by clearly and expressly surrendering them in the Constitution. These principles help to explain not only why abrogation of state sovereign immunity was contested under Article III but also why the Founders regarded the Eleventh Amendment as adequate to bring about a complete restoration of the States’ sovereign immunity from all suits by individuals in federal court.

No one during the drafting or ratification process ever suggested that any provision of the Constitution other than the Citizen–State diversity provisions of Article III could be construed to permit individuals to sue States.³⁷⁶ Modern observers anachronistically maintain that other provisions of Article III—such as those conferring federal question and admiralty jurisdiction—also abrogated state sovereign immunity by authorizing individuals to sue States.³⁷⁷ But, unlike the Citizen–State diversity provisions, these provisions make no mention—clear or ambiguous—of suits against States.³⁷⁸ For this reason, the Founders—operating against the backdrop of the law of nations—would not have understood any of these other provisions as plausible surrenders of the States’ preexisting right to sovereign immunity.³⁷⁹ That is why the Founders singled out the Citizen–State diversity clauses as the only provisions of Article III that arguably authorized individuals to sue States under the prevailing rules governing the surrender of sovereign rights.

In light of this background, the Eleventh Amendment was well tailored to satisfy Massachusetts’s post-*Chisholm* demand (echoed by other

375. Fletcher, *supra* note 372, at 1060–61.

376. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1870–73.

377. See Fletcher, *supra* note 372, at 1060–63.

378. See U.S. Const. art. III, § 2, cl. 1.

379. Indeed, two acknowledged misstatements made during the ratification debates confirm that the Citizen–State diversity provisions were the only portions of Article III that anyone thought could authorize individuals to sue States without their consent. Two participants, one a Federalist and one an Anti-Federalist, mistakenly asserted that Article III would permit citizens of a State to sue their own State in federal court. Both acknowledged, and apologized for, the mistake when it was pointed out. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1871–73.

States) that the Constitution be amended to “remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.”³⁸⁰ By directing that the Citizen–State diversity provisions of Article III not be construed to permit suits *against* States, the Eleventh Amendment authoritatively narrowed the only provisions that could have been construed to have expressly surrendered the States’ immunity from suit by individuals. After the adoption of the Eleventh Amendment, the States’ right to sovereign immunity—like the rest of their residual sovereignty—depended not on whether the Constitution expressly recognized the right in question but on whether the States expressly surrendered it elsewhere in the document.

From this perspective, the Supreme Court’s recognition of broad state sovereign immunity—if not its reasoning—is consistent with the original public meaning of the constitutional text (other than the Citizen–State diversity provisions).³⁸¹ Under background principles drawn from the law of nations, the States retained their sovereign rights—including sovereign immunity—unless they clearly and expressly surrendered them in the Constitution. Although the States arguably surrendered their right to sovereign immunity by adopting the Citizen–State diversity provisions in Article III, the Eleventh Amendment instructs that Article III “shall not be construed” to constitute such a surrender.³⁸² The same rules of interpretation suggest that the Eleventh Amendment should not be read to convey a negative implication that state sovereign immunity is limited to the suits specified by its terms.³⁸³

380. Resolution of the Massachusetts General Court, reprinted in 5 DHSC, *supra* note 346, at 440; see also *supra* note 351 and accompanying text.

381. See generally Steven Menashi, Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity, 84 *Notre Dame L. Rev.* 1135 (2009) (arguing that textualists should honor the inherent compromise built into the original public meaning of Article III by upholding a background principle of state sovereign immunity). Baude has reached a similar conclusion, albeit on somewhat different grounds. See Baude, *Sovereign Immunity*, *supra* note 30, at 8–9. Building on Professor Steve Sachs’s theory of “constitutional backdrops,” Baude argues that sovereign immunity is a common law backdrop that “can’t be changed [by Congress] because of the properly limited nature of Articles I and III.” *Id.* at 8. In his view, this approach “makes sense of both the text and the Court’s sovereign immunity cases.” *Id.* at 9.

382. The fact that the original Constitution, as amended by the Eleventh Amendment, did not authorize individuals to sue States did not leave individuals with no redress for a State’s misconduct. As Monaghan has explained, “In suits for prospective relief, states are still accountable in federal court—through their officers—for the violation of federal law.” Henry Paul Monaghan, Comment, The Sovereign Immunity “Exception”, 110 *Harv. L. Rev.* 102, 103 (1996); see also Clark, *The Eleventh Amendment*, *supra* note 136, at 1903–07 (stating that the right to trial by jury “was considered essential to the enforcement of all other restrictions on government conduct because—even assuming sovereign immunity—it ensured that government officers could be held accountable by the people”).

383. Although he considers it a close case, Manning argues that “the specific text of the Eleventh Amendment, read in context, appears to convey a negative implication that should preclude the derivation of further classes of state sovereign immunity from suit in federal

These background principles also support the Court's distinction between congressional abrogation of state sovereign immunity pursuant to Article I, Section 8 and abrogation pursuant to the Civil War Amendments. With one exception, the Court has rejected congressional power to abrogate state sovereign immunity under Article I, Section 8 because these powers do not expressly authorize Congress to do so.³⁸⁴ By contrast, the Court generally upholds congressional abrogation of state sovereign immunity under the enforcement powers of the Civil War Amendments because the Court reads these Amendments to contain express prohibitions on the States and express authorizations for Congress to enforce such prohibitions against States by appropriate legislation.³⁸⁵

4. *Immunity in Other States' Courts.* — Understanding state sovereign immunity through the lens of the law of nations also sheds light on a related issue—the immunity of States in the courts of other States. Under the law of nations, free and independent States enjoyed sovereign immunity from suit in the courts of all other sovereigns. Thus, unless the American States clearly surrendered this aspect of their sovereignty in the Constitution, they retained it. The only provisions of the Constitution that arguably authorize suits against States in the courts of another sovereign (the United States) are found in Article III, Section 2, and they make no mention of suits in state courts. Specifically, Article III permits *federal courts* to hear “Controversies between two or more States; between a State and

court.” Manning, *The Eleventh Amendment*, *supra* note 361, at 1671. In other words, because the Amendment is precisely drawn to prevent the exercise of judicial power over suits against States by citizens of another State or of a foreign state, it carries a negative implication that States enjoy no constitutional immunity from suits by their own citizens or in their own courts. Although deciding whether a legal text conveys a negative implication generally involves a complex inquiry, see *id.* at 1736–49, the Constitution should never be read to surrender the States' sovereign rights by implication. As discussed, under the law of nations, sovereign states could only alienate sovereign rights through a clear and express surrender in a legal instrument. The Founders were familiar with this principle and it animated many of the Founding-era debates over the meaning of the Constitution, including Article III. Against this backdrop, it would be improper to read a constitutional amendment designed to restore the States' sovereign immunity from certain suits to have surrendered—by implication—any and all residual sovereign immunity the States might have otherwise retained. Whether the States possess immunity beyond the terms of the Eleventh Amendment turns on whether the Constitution contains a clear and *express* surrender of the immunity in question.

384. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (invalidating the abrogation of state sovereign immunity under the Indian Commerce Clause). But see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (upholding the congressional power to abrogate state sovereign immunity under the Bankruptcy Clause). The Court recently reaffirmed Congress's general inability to abrogate state sovereign immunity under Article I, Section 8, and limited *Katz* to the bankruptcy context. See *Allen v. Cooper*, No. 18-877, 2020 WL 1325815, at *5 (U.S. Mar. 23, 2020).

385. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (upholding the abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment). For an argument that the Civil War Amendments should not be read to abrogate state sovereign immunity, see generally John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 *Sup. Ct. Rev.* 353.

Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”³⁸⁶ As just discussed, even if one read the Citizen–State diversity provisions to authorize federal courts to hear suits against States by the individual citizens of another State (or of a foreign State), such authorization was withdrawn by the Eleventh Amendment. Finally, Article III expressly grants the Supreme Court power to hear controversies between two or more States.³⁸⁷ This grant undoubtedly constitutes a clear and express surrender of sovereign immunity and was uncontroversial at the Founding.³⁸⁸

Notably, the Constitution contains no provisions purporting to surrender the immunity of the States in the courts of another State. Nonetheless, the Supreme Court rejected this immunity in *Nevada v. Hall*, a case brought by California residents against Nevada in California state court.³⁸⁹ The Court based its decision in large part on the lack of any constitutional text *affirmatively granting* States immunity in the courts of other States.³⁹⁰ As explained, however, this approach to sovereign rights contradicts background principles of the law of nations. A constitutional provision granting the States immunity in the courts of another State was unnecessary because, under the law of nations, the “States” already possessed the sovereign right to immunity from suit in the courts of another State.³⁹¹ Thus, the proper question in *Hall* was whether the States *affirmatively surrendered* this immunity in the Constitution. Because the Constitution contains no surrender of this kind, the States retained their preexisting immunity.

Last term, the Supreme Court overruled *Hall* in *Franchise Tax Board of California v. Hyatt*, a suit brought by a Nevada resident against a California State agency in Nevada state court.³⁹² The Nevada Supreme Court rejected the agency’s claim of immunity, but on this occasion the Supreme Court upheld it.³⁹³ The Court’s rationale closely tracks the approach set forth in this Article and has implications far beyond the question of state immunity in a sister State’s courts. The Court began by observing that “[a]fter independence, the States considered themselves fully sovereign nations”

386. U.S. Const. art. III, § 2, cl. 1.

387. *Id.*

388. Although Article III grants federal courts power to hear controversies “between” a State and foreign States, the Supreme Court has declined to read this grant as a surrender of the States’ sovereign immunity from suit. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (finding Mississippi immune from suit by a foreign State).

389. 440 U.S. 410, 411–12 (1979).

390. See *id.* at 426 (“Nothing in the Federal Constitution authorizes or obligates this Court to frustrate [California’s] policy [of exercising jurisdiction] out of enforced respect for the sovereignty of Nevada.”). As Professor Ann Woolhandler pointed out, *Hall* was something of an outlier because its analysis differed from the Court’s general approach to state sovereign immunity. See Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 250–51.

391. See *supra* section I.D.

392. 139 S. Ct. 1485, 1491 (2019).

393. *Id.* at 1499.

pursuant to the Declaration of Independence.³⁹⁴ The Court then quoted Vattel for the proposition that “[i]t does not . . . belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”³⁹⁵ Accordingly, the Court explained, “The sovereign is ‘exemp[t] . . . from all [foreign] jurisdiction.’”³⁹⁶

After surveying the Founding history, the *Hyatt* Court concluded that “Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued in the courts of other States”³⁹⁷ and enjoyed immunity “under both the common law and the law of nations.”³⁹⁸ The Court reasoned that the States retained this immunity unless they affirmatively surrendered it: “The Constitution’s use of the term ‘States’ reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, ‘except as altered by the plan of the Convention or certain constitutional Amendments.’”³⁹⁹ The Court acknowledged that Article III contains several provisions that altered the States’ immunity from suit in *federal* court, but stressed that the Constitution contains no provisions that altered the States’ preexisting immunity from suit in the courts of another State. Accordingly, the Court held that the States did not surrender this immunity by adopting the Constitution.

The *Hyatt* Court also addressed and rejected the argument that the States retained a distinct sovereign right to reject a sister State’s claim of immunity when sued in their courts. Hyatt argued that “before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns; thus, the States must retain that power today with respect to each other because ‘nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states.’”⁴⁰⁰ The Court rejected this argument because, in its view, “the Constitution affirmatively altered the relationships between the

394. *Id.* at 1493.

395. *Id.* (internal quotation marks omitted) (quoting 1 Vattel, *The Law of Nations*, *supra* note 45, bk. II, § 55, at 138).

396. *Id.* at 1494 (quoting 2 Vattel, *The Law of Nations*, *supra* note 3, bk. IV, § 108, at 158).

397. *Id.*

398. *Id.*

399. *Id.* at 1494–95 (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

400. *Id.* at 1496. Baude has made a similar argument. He argues that no provision of the Constitution limits one State’s authority to abrogate the immunity of another State in its courts. See Baude, *supra* note 30, at 24 (concluding States have no immunity from suit in another State’s courts because “[t]he Constitution doesn’t limit states to enumerated powers and imposes relatively few constraints on their treatment of one another”). Notably, Baude’s argument agrees with the premise of this Article—namely, that the States retained all sovereign authority they did not expressly surrender in the Constitution.

States, so that they no longer relate to each other solely as foreign sovereigns.”⁴⁰¹ Traditionally, disputes of this kind between sovereigns were settled not in the courts of either party but through negotiation or, if necessary, armed conflict.⁴⁰² Because the Constitution deprived the States of these tools, the *Hyatt* Court concluded that the States surrendered any power they had to override the immunity of sister States in their courts.⁴⁰³

For our purposes, the framework adopted by the *Hyatt* Court is more important than its specific application. The Court started with the proposition that, in adopting the Constitution, the States retained their preexisting sovereignty except to the extent that they affirmatively surrendered it. The Court found no indication in the Constitution that the States surrendered their preexisting immunity from suit in the courts of sister States. At the same time, the Court identified several constitutional provisions that—in the Court’s view—deprived the States of any power to override another State’s immunity in their courts.⁴⁰⁴ The important point for present purposes is that the Court sought to ascertain the sovereign rights of the States by starting with the baseline established under the law of nations and then examining the extent to which the States affirmatively surrendered their rights in the Constitution.

B. *The Anticommandeering Doctrine*

The original public meaning of the term “States,” and the rules of interpretation governing the surrender of sovereign rights by states, also support the Supreme Court’s anticommandeering doctrine. The doctrine prohibits Congress from requiring States to use their legislative and executive powers to implement and enforce federal regulatory programs against individuals. Although commentators have criticized the doctrine as an example of “freestanding federalism,”⁴⁰⁵ this characterization overlooks the potential significance of the term “States” in the Constitution and the associated rules drawn from the law of nations. At the Founding, a sovereign state enjoyed complete independence from other states, and

401. *Hyatt*, 139 S. Ct. at 1497.

402. See 1 Vattel, *The Law of Nations*, supra note 45, bk. II, §§ 326–330, at 243–45 (discussing diplomatic means of dispute resolution); id. § 338, at 248 (explaining that an offended nation’s “own advantage, and that of human society, oblige him to attempt, before he takes up arms, all the pacific methods of obtaining, either the reparation of the injury, or a just satisfaction”); id., bk. II, §§ 339–342, at 248–49 (discussing means of retaliation, such as retortion, reprisals, and captures); id., bk. II, § 354, at 254 (discussing war as the final resort).

403. *Hyatt*, 139 S. Ct. at 1498 (“Some subjects that were decided by pure ‘political power’ before ratification now turn on federal ‘rules of law.’”) (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737 (1838)).

404. See id. at 1497 (noting, among other examples, Article I’s divestiture from the States of traditional diplomatic and military tools, as well as the Article IV requirements that States accord full effect to judgments in other State’s courts and provide privileges and immunities to citizens of other States).

405. See Manning, *The Means of Constitutional Power*, supra note 247, at 34.

no state could command another state to exercise its legislative or executive powers against its will.⁴⁰⁶ Such “commandeering” by an outside state would have contradicted the other state’s independence. Under the law of nations, a state could relinquish this aspect of sovereignty only by a clear and express surrender.⁴⁰⁷ Accordingly, a plausible rationale for the anti-commandeering doctrine rooted in the text of the Constitution is that the American “States” retained their right not to be commandeered by another sovereign because they never surrendered it in clear and express terms.

1. *Commandeering Under the Articles of Confederation.* — To understand why the States first gave Congress limited authority to commandeer them under the Articles of Confederation but then withheld this power from Congress in the Constitution, one must appreciate the difficulties created by commandeering during the Confederation era. Under the Articles, the States expressly authorized Congress to command them to provide money to fund the government and personnel to staff the armed forces.⁴⁰⁸ Specifically, Article IX gave “the united states in congress assembled” authority “to ascertain the necessary sums of Money to be raised for the service of the united states,” and “to make requisition from each state for its quota” of land forces.⁴⁰⁹ Article XIII made such requisitions binding on the States by providing that “[e]very state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them.”⁴¹⁰ Although the Articles obligated the States to comply with Congress’s commands, the States often disobeyed them with impunity.⁴¹¹ The Articles gave Congress no means of enforcing its commands against States, and thus the United States had no reliable means of raising revenue or maintaining the armed forces.

Congress tasked several Committees with crafting amendments to make the Articles of Confederation more effective. James Madison served on these Committees and favored authorizing Congress to use military

406. See *supra* section I.B.

407. See *supra* section I.D.

408. Article VIII provided that federal expenses “shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state.” Articles of Confederation of 1781, art. VIII. Article VIII also specified that the “taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.” *Id.*

409. *Id.*, art. IX.

410. *Id.*, art. XIII.

411. As George Washington explained in 1780: “One State will comply with a requisition of Congress; another neglects to do it; a third executes it by halves; and all differ either in the manner, the matter, or so much in point of time, that we are always working up hill, and ever shall be . . .” Letter from George Washington to Fielding Lewis (July 6, 1780), *in* Writings of George Washington 154, 157 n.1 (Lawrence B. Evans ed., 1908) (quoting Letter from George Washington to Joseph Jones (May 31, 1780)).

force to coerce state compliance with its commands. A 1781 report written largely by Madison initially suggested that Congress might have implied power to coerce States under the Articles,⁴¹² but rejected this conclusion on the ground that it is “most consonant to the spirit of a free constitution that on the one hand all exercise of power should be explicitly and precisely warranted, and on the other that the penal consequences of a violation of duty should be clearly promulgated and understood.”⁴¹³ This rationale reflected the well-established rule of interpretation that indefinite legal provisions should not be given odious readings, which included readings that would impose penal consequences.⁴¹⁴ Because the Articles did not expressly give Congress power to use military force to coerce the States to comply with federal commands, the report urged amending the Articles to give Congress express power to do so.⁴¹⁵

Congress never acted on Madison’s proposal, perhaps because of concerns raised by Alexander Hamilton. In 1782, Hamilton warned that giving Congress coercive power over the States could trigger a civil war:

A mere regard to the interests of the confederacy will never be a principle sufficiently active to curb the ambition and intrigues of different members. Force cannot effect it: A contest of arms will seldom be between the common sovereign and a single refractory member; but between distinct combinations of the several parts against each other.⁴¹⁶

Leading up to the Constitutional Convention of 1787, Madison continued to favor authorizing Congress to use coercive force against States. For example, before the Convention, Madison wrote to George Washington to share the “outlines of a new system.”⁴¹⁷ In addition to proposing various new federal powers, Madison stated that “the right of coercion should be expressly declared” and could be exerted “either by sea or land.”⁴¹⁸ He also acknowledged, however, the potential dangers

412. Amendment to Give Congress Coercive Power over the States and Their Citizens (1781), reprinted in 1 DHRC, *supra* note 142, at 141–42 (stating that Article XIII of the Articles vests “a general and implied power . . . in Congress . . . to enforce and carry into effect all the Articles . . . against any of the States . . . , but no determinate and particular provision is made for that purpose”).

413. *Id.* at 142.

414. See *supra* notes 102–107 and accompanying text.

415. See Amendment to Give Congress Coercive Power over the States and Their Citizens, *supra* note 412, at 142–43; see also Jack N. Rakove, *James Madison and the Creation of the American Republic* 25 (3rd ed. 2007) [hereinafter *Rakove, James Madison*] (explaining that Madison’s proposal would have amended the Articles of Confederation to “give the Union the power literally to coerce delinquent states into doing their duty, either by marching the Continental army within their borders or by stationing armed ships outside their harbors”).

416. Alexander Hamilton, *The Continentalist* No. VI (1782), reprinted in 3 *The Papers of Alexander Hamilton* 99, 105 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

417. Letter from James Madison to George Washington (Apr. 16, 1787), in 2 *Madison Writings*, *supra* note 137, at 344.

418. *Id.* at 348.

of giving Congress coercive power over States. Specifically, he observed that “the difficulty & awkwardness of operating by force on the collective will of a State, render it particularly desirable that the necessity of it might be precluded” by reliance on other means.⁴¹⁹

2. *Rejecting Commandeering Under the Constitution.* — At the outset of the Constitutional Convention, Edmond Randolph proposed the Virginia Plan (prepared with Madison’s input).⁴²⁰ As introduced, the Plan proposed that the “National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”⁴²¹ If adopted, this provision would have continued Congress’s power to commandeer the States. For this power to be effective, however, Madison thought the new plan of government would have to give the National Legislature an express power to coerce compliance. Accordingly, the Virginia Plan not only called for continuing Congress’s power to requisition States but also proposed giving the National Legislature novel power “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”⁴²²

The delegates strongly objected to the Virginia Plan’s proposal to authorize the central government to use force against States, and this aspect of the Plan was quickly set aside in favor of crafting a less dangerous alternative. Mason admitted that the present Confederation was “deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that punishment could not <in the nature of things be executed on> the States collectively, and therefore that such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required it.”⁴²³

Moved by these objections, Madison acknowledged that giving Congress power to coerce States could lead to the destruction of the Union and expressed the hope that the Convention could devise a plan that avoided this feature:

419. *Id.*

420. James Madison, Notes on the Constitutional Convention (May 29, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 17, 20.

421. *Id.* at 21.

422. *Id.* The Pinckney Plan also endorsed coercive power over the States. See Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention (May 28, 1787), *in* 3 Farrand’s Records, *supra* note 133, at 106, 119. Pinckney observed that “the present Confederation” lacked such power and warned that “[u]nless this power of coercion is infused, and exercised when necessary, the States will most assuredly neglect their duties.” *Id.*

423. James Madison, Notes on the Constitutional Convention (May 30, 1787), *in* 1 Farrand’s Records, *supra* note 133, at 33, 34 (alteration in original).

Mr. <Madison>, observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. . . . A Union of States <containing such an ingredient> seemed to provide for its own destruction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this recourse unnecessary, and moved that the clause be postponed.⁴²⁴

The Convention ultimately did frame a system, as Madison had hoped, that rendered recourse to the use of force against States unnecessary. The proposed Constitution withheld power from Congress to command States and authorized it instead to regulate individuals. This fundamental shift eliminated the need to empower Congress to enforce its commands against States because Congress would be given no power to command them in the first place. Under this alternative approach, the federal government would enforce its commands against individuals through ordinary law enforcement mechanisms.⁴²⁵

As Mason explained at the Convention: “Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt.”⁴²⁶ Following these early discussions, a consensus emerged that the “national government had to be reconstituted with power to enact, execute, and adjudicate its own laws, acting directly on the American people, without having to rely on the cooperation of the states.”⁴²⁷ Madison himself went from favoring congressional power to command and coerce the States to strongly opposing this approach: “Any Govt. for the U. States formed on the supposed practicability of using force agst. the <unconstitutional proceedings> of the States, wd. prove as visionary & fallacious as the Govt. of Congs. [under the Articles of Confederation].”⁴²⁸

The ensuing debate over the New Jersey Plan illustrates the stark choice the Convention faced: either revise and expand the Articles of Confederation (by authorizing Congress to command and coerce

424. James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 Farrand’s Records, supra note 133, at 47, 54 (alteration in original).

425. See The Federalist No. 15, at 94 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that “the New Constitution” deviated from “a principle which has been found the bane of the old,” thereby allowing reliance on “the mild influence of the Magistracy” without the need to resort to “the violent and sanguinary agency of the sword”).

426. James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 Farrand’s Records, supra note 133, at 132, 133.

427. Rakove, James Madison, supra note 415, at 53.

428. James Madison, Notes on the Constitutional Convention (June 8, 1787), in 1 Farrand’s Records, supra note 133, at 164, 165 (footnote omitted).

States) or abandon the Articles in favor of an entirely new system (under which Congress would command and coerce individuals rather than States). Dissatisfied with the evolving Virginia Plan, William Paterson offered the New Jersey Plan as a complete substitute.⁴²⁹ Paterson's Plan would have merely "revised, corrected & enlarged" the Articles of Confederation rather than replace them with an entirely new system.⁴³⁰ The Plan would have retained and expanded Congress's power to command States, and would have given the federal government express power to coerce the States' compliance through military force.⁴³¹

The delegates strongly objected to the New Jersey Plan's reliance on force against States. Edmund Randolph pronounced coercion "to be *impracticable, expensive, cruel to individuals.*"⁴³² Alexander Hamilton conceded that the Virginia Plan "departs itself from the *federal* idea, as understood by some, since it is to operate eventually on individuals."⁴³³ Nonetheless, he agreed with Randolph "that we owed it to our Country, to do on this emergency whatever we should deem essential to its happiness."⁴³⁴ Hamilton distinguished between "*coertion of laws*" and "*coertion of arms,*"⁴³⁵ and denied that force could ever be used against States: "But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue."⁴³⁶ Madison offered a similar critique. He asked the smaller States most attached to the New Jersey Plan "to consider the situation in which it would leave them."⁴³⁷ Madison explained: "The coercion, on which the efficacy of the plan depends, can never be exerted but on themselves. The larger States will be impregnable, the smaller only can feel the vengeance of it."⁴³⁸ Following Madison's speech, the Convention rejected the New Jersey Plan and re-reported the Virginia Plan (which had long been stripped of any provisions empowering Congress to command or coerce States).⁴³⁹

429. James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 Farrand's Records, supra note 133, at 242, 242–45.

430. Id. at 242.

431. Id. at 245.

432. Id. at 255–56.

433. James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 Farrand's Records, supra note 133, at 282, 283.

434. Id.

435. Id. at 284.

436. Id. at 285 (explaining that "[the Amphyctionic Council] had in particular the power of fining and using force agst. delinquent members. What was the consequence. Their decrees were mere signals of war").

437. James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 Farrand's Records, supra note 133, at 313, 319.

438. Id. at 320.

439. Id. at 322. Nonetheless, John Lansing again urged the Convention to adhere to "the foundation of the present Confederacy" rather than depart so completely. James

Once the Convention ended, Madison sent Jefferson a copy of the proposed Constitution and explained why the Convention chose to abandon (rather than merely revise) the Articles, and to empower Congress to regulate individuals rather than States in the new plan:

It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. A *voluntary* observance of the federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent & the guilty, the necessity of a military force both obnoxious & dangerous, and in general a scene resembling much more a civil war than the administration of a regular Government. Hence was embraced the alternative of a Government which instead of operating on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation.⁴⁴⁰

Madison was not alone in his efforts to explain why the Convention felt compelled to abandon regulation of States under the Articles of Confederation in favor of regulation of individuals under the Constitution. Prominent Federalists, including Alexander Hamilton, echoed his views during the state ratifying debates.⁴⁴¹

As adopted, the Constitution departed sharply from the Articles of Confederation by failing to give Congress power to command States to take legislative or executive action. Because of this omission, the new Constitution had no need to empower Congress to use military force to coerce the States' compliance with such commands. The States' failure to authorize these actions in the Constitution meant that they did not surrender—but retained—these aspects of their sovereignty. Under the law of nations, only an express surrender of their rights would have sufficed to alienate their sovereignty on these matters. To be sure, by authorizing Congress to issue requisitions to the States, the Articles of Confederation had contained a surrender of this kind, but this power was not included in the new Constitution. Instead, the Constitution abandoned reliance on commandeering the States in favor of regulating and coercing individuals. Because the Constitution proposed by the Convention contained no provisions giving Congress power to command or coerce States, the States necessarily retained this portion of their sovereignty under well-known rules drawn from the law of nations.

Madison, Notes on the Constitutional Convention (June 20, 1787), in 1 Farrand's Records, supra note 133, at 335, 336. Mason responded by reminding Lansing that the New Jersey "plan could not be enforced without military coercion," and that such "military execution" was completely incompatible with "civil liberty." Id. at 339–40 (footnote omitted). The Convention then rejected Lansing's motion. Id. at 344.

440. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 Farrand's Records, supra note 133, at 131–32.

441. See Clark, The Eleventh Amendment, supra note 136, at 1853–62.

Although the Constitution does not empower Congress to command or coerce States, it does impose certain important restrictions and obligations on the States and their officials. As discussed, Article I, Section 10 prohibits the States from taking certain actions deemed detrimental to the nation as a whole.⁴⁴² In addition, Article VI provides that all state and federal legislative, executive, and judicial officers “shall be bound by oath or affirmation, to support this Constitution.”⁴⁴³ Article VI also declares the Constitution, laws, and treaties of the United States to be “the supreme Law of the Land,” and provides that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴⁴⁴ Noting these provisions, Hamilton observed in *Federalist No. 27* that “the Legislatures, Courts, and Magistrates of the respective members will be incorporated into the operations of the national government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.”⁴⁴⁵ Taken in their full historical context, these observations conveyed that state institutions and officials would be bound by both the Oath Clause and the Supremacy Clause to follow valid federal law in the performance of their duties under state law. They say nothing, however, about a freestanding federal power to command and coerce the States to enact and implement federal programs—a power that Hamilton consistently rejected.

Several commentators nonetheless maintain that the Constitution empowers Congress to commandeer the States. For example, in a recent article, Professor Jud Campbell argues that the Oath Clause and other sources of “historical evidence strongly support[]” the constitutionality of commandeering state executive and judicial officers.⁴⁴⁶ In his view, leading Founders implicitly assumed during ratification debates that Congress could require state officials to enforce federal law and that this power finds support in the text of the Constitution. There are at least three problems with Campbell’s argument. First, he misreads the Founders’ views, particularly Alexander Hamilton’s. Second, even if his reading were

442. U.S. Const. art. I, § 10. It is worth noting, however, that enforcement of these prohibitions did not require commandeering. Rather, “all of the prohibitions placed on the states in the original Constitution could be enforced through ordinary litigation between individuals or suits brought by states” against individuals. Clark, *The Eleventh Amendment*, *supra* note 136, at 1903–04.

443. U.S. Const. art. VI, cl. 3.

444. *Id.* cl. 2.

445. *The Federalist No. 27*, at 175 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

446. Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 *Yale L.J.* 1104, 1110 (2013). Campbell is equivocal on whether Congress has constitutional power to commandeer state legislatures. For earlier arguments that Congress may commandeer state executive officials to enforce federal law, see, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 *Colum. L. Rev.* 1001, 1059 (1995); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 *Va. L. Rev.* 1957, 1960 (1993).

correct, unadopted assumptions cannot suffice to abrogate the sovereign rights of the States. Third, the constitutional provisions he invokes do not include a clear and express surrender of the States' sovereign right to control their governmental institutions free from interference by another sovereign.

First, Campbell simply misreads Hamilton's views in Federalist No. 27, a source that is central to his argument. Campbell quotes Hamilton out of context for the proposition that "one of the principal advantages of the proposed Federal Constitution over the Articles of Confederation . . . was that the Constitution would not 'only operate upon the States in their political or collective capacities' but would also 'enable the [federal] government to employ the ordinary magistracy of each [State] in the execution of its laws.'"⁴⁴⁷ In fact, in the quoted language, Hamilton was not arguing that "a government like the one proposed [under the Constitution]" would "operate upon the States in their political or collective capacities." Rather, Hamilton was pointing out that, in contrast to the Constitution, the "species of league contended for by most of [the Constitution's] opponents" would operate "upon the States in their political or collective capacities."⁴⁴⁸

Hamilton regarded the shift from federal regulation of States to federal regulation of individuals as a crucial advantage of the Constitution over a league or confederacy such as the Articles of Confederation. Echoing his discussion in earlier essays, Hamilton reiterated his objection "that in such a confederacy, there can be no sanction for the laws but force," and that the delinquencies of the members "can only be redressed, if at all, by war and violence."⁴⁴⁹ In his view, it was "evident" that "a government like the one proposed, would bid much fairer to avoid the necessity of using force, than that species of league contended for by most of its opponents."⁴⁵⁰ The reason the proposed government would avoid the necessity of using force was that it would operate upon individuals rather than upon its member states.

447. Campbell, *supra* note 446, at 1106 (alteration in original) (quoting The Federalist No. 27, at 174 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

448. It is worth quoting this passage in full:

One thing at all events, must be evident, that a government like the one proposed, would bid much fairer to avoid the necessity of using force, than that species of league contended for by most of its opponents; the authority of which should *only operate upon the States in their political or collective capacities*. It has been shewn, that in such a confederacy, there can be no sanction for the laws but force; that frequent delinquencies in the members, are the natural offspring of the very frame of the government; and that as often as these happen they can only be redressed, if at all, by war and violence.

The Federalist No. 27, at 174 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

449. *Id.*

450. *Id.*

Campbell nonetheless contends that the Constitution did not abandon federal power to commandeer States, but somehow retained this power while adding a new federal power to regulate individuals.⁴⁵¹ As explained above, however, the Constitution could not grant the federal government a general power to commandeer States by mere silence or omission. Under the law of nations, all surrenders of state sovereignty had to be set forth in clear and express terms. The Articles of Confederation contained such an express surrender by authorizing Congress to requisition the States.⁴⁵² The Constitution, by design, omitted any surrender of this kind. The Convention rejected both the Virginia Plan's initial proposal to transfer "the Legislative Rights vested in Congress by the Confederation" to the new National Legislature⁴⁵³ and the New Jersey Plan's attempt to continue commandeering and introduce coercion.⁴⁵⁴ Because the Constitution as proposed contains no provisions expressly authorizing commandeering, it is not surprising that Hamilton and Madison understood Congress's power to regulate individuals not as a supplement to its previous power to regulate States, but as a complete substitute.

This reading of Federalist No. 27 accords with Hamilton's earlier discussion of the same issues in Federalist Nos. 15 and 16. In the first of these essays, Hamilton characterized "the principle of legislation for States" as the "great and radical vice in the construction of the existing Confederation."⁴⁵⁵ He explained that the approach employed by the Articles of Confederation—and favored "with blind devotion" by the Constitution's opponents—involved "the political monster of an *imperium in imperio*."⁴⁵⁶ In his view, reliance on this approach was not viable because the States' disobedience of federal commands could only be punished by "military force," or "the coercion of arms."⁴⁵⁷ Because such commands "can only be carried into execution by the sword," "every breach of the laws must involve a state of war."⁴⁵⁸ Hamilton remarked that "[s]uch a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it."⁴⁵⁹

Thus, Hamilton did not advocate empowering the National Legislature to continue the objectionable practice of "legislation for States." Rather, in his view, such legislation produced evils that flowed from "fundamental errors in the structure of the building which cannot be amended otherwise than by an alteration in the first principles and main

451. Campbell, *supra* note 446, at 1134.

452. Articles of Confederation of 1781, art. IX, para. 5.

453. James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 Farrand's Records, *supra* note 133, at 17, 21.

454. See *supra* notes 420–439 and accompanying text.

455. The Federalist No. 15, at 93 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

456. *Id.*

457. *Id.* at 95.

458. *Id.* at 95–96.

459. *Id.* at 96.

pillars of the fabric.”⁴⁶⁰ The “New Constitution,” he explained, would “deviat[e] from a principle which has been found the bane of the old; and which is in itself evidently incompatible with the idea of government.”⁴⁶¹ In the new Constitution, he argued, “we must extend the authority of the union to the persons of the citizens,—*the only proper objects of government.*”⁴⁶²

Hamilton continued these themes in Federalist No. 16. There, he argued that in order to avoid a civil war and “dissolution of the Union,”⁴⁶³ the federal government “must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution. It must carry its agency to the persons of the citizens.”⁴⁶⁴ He identified the “principle contended for by the opponents of the proposed constitution” as the “exceptionable principle” of “legislation for States.”⁴⁶⁵ Throughout *The Federalist Papers*, Hamilton made clear that the proposed Constitution would not—and should not—continue the Articles’ approach of *legislation for States*. To the contrary, the new Constitution would abandon this approach in favor of exclusive reliance on *legislation for individuals*—“the only proper objects of government.”⁴⁶⁶ Campbell’s claim that Hamilton understood the Constitution to authorize both forms of legislation simply misreads Federalist No. 27 and disregards the unmistakable import of his earlier essays on the question.

Second, Campbell speculates that various failed attempts to authorize Congress to collect imposts on foreign goods during the Confederation era may have persuaded Hamilton and other Federalists to favor federal power to commandeer state officials under the Constitution.⁴⁶⁷ In 1781,

460. *Id.* at 93.

461. *Id.* at 94.

462. *Id.* at 95 (emphasis added).

463. The Federalist No. 16, at 101 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

464. *Id.* at 102.

465. *Id.* at 99.

466. Hamilton’s arguments were repeated by Federalists in numerous State ratifying conventions. See Clark, The Eleventh Amendment, *supra* note 136, at 1856–62. Critics of the anticommandeering doctrine sometimes point to other statements in *The Federalist Papers* as evidence that the Founders authorized and endorsed federal commandeering of the States. For example, Jeff Powell points to Federalist Nos. 27, 36, 45, and 81 for the proposition that “the proposed federal government would have the authority to use state officers to carry out federal activities.” See H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 661–63 (1993). Nothing in these essays contradicts the much more precise discussions at the Convention and in Federalist Nos. 15 and 16 rejecting federal power to command and coerce the States. At most, the essays Powell cites stand for the proposition that Congress has the option of enlisting the voluntary assistance of state revenue collectors and state courts to accomplish federal goals.

467. Campbell, *supra* note 446, at 1107 (suggesting that after the impost debate, Hamilton “relented and gave the Anti-Federalists exactly what they wanted: an assurance that the federal government would commandeer state officers to enforce federal law”).

Congress asked the States to empower it to levy a tariff on foreign imports,⁴⁶⁸ but the proposal failed because of “deep-seated divisions . . . over the proper method of collection.”⁴⁶⁹ Although “[o]bjections to the impost varied,” a “common theme was that congressional power to appoint and supervise federal collectors might give way to tyranny and corruption.”⁴⁷⁰ To allay concerns over potential abuses by new federal collectors, the proposed Impost of 1783 provided that “the collectors of the said duties shall be appointed by the states, within which their offices are to be respectively exercised, but when so appointed, shall be amendable to, and removable by the United States in Congress assembled, alone.”⁴⁷¹ This proposed compromise would have given Congress authority to commandeer state officials, but the proposal again failed due in part to the objection that such congressional control over state officials would be “degrading . . . to a sovereign and independent state.”⁴⁷²

Campbell acknowledges that the Constitutional Convention *rejected* the only proposals that mentioned “commandeering of state executive and judicial officers.”⁴⁷³ Nonetheless, he argues that “[t]he impost controversy . . . critically shaped the subsequent ratification-era debates about federal use of state officers.”⁴⁷⁴ For example, in responding to Brutus’s objection that the proposed federal power to lay and collect taxes “opens the door to a swarm of [federal] revenue and excise officers,”⁴⁷⁵ Hamilton reassured skeptics that the federal government “will make use of the State officers and the State regulations, for collecting the additional imposition[s].”⁴⁷⁶ Campbell believes that this statement reflects the Federalists’

468. *Id.*

469. *Id.* at 1112–13.

470. *Id.* at 1114.

471. *Id.* at 1119 (quoting 24 Journals of the Continental Congress, 1774–1789, at 278 (Gaillard Hunt ed., 1992)).

472. *Id.* at 1121 (quoting Abraham Yates, A Rough Hearer, Advocates for a Congressional Revenue in the State of New-York (Mar. 17, 1785), in *Political Papers, Addressed to the Advocates for a Congressional Revenue* 16 (New York, S. Kollock 1786)).

473. *Id.* at 1126. The “rejected proposals” to which Campbell refers are the New Jersey Plan and a separate proposal apparently drafted by Roger Sherman. *Id.* The goal of the New Jersey Plan, of course, was to retain and expand the basic features of the Articles of Confederation, so it is no surprise that it proposed to retain congressional power to commandeer the States and augment it with new congressional power to coerce state compliance through military force. See *supra* notes 429–431 and accompanying text. As discussed, this proposal was rejected on the grounds that it was impracticable, would be cruel to individuals, and could lead to a civil war. See *supra* notes 432–439 and accompanying text.

474. Campbell, *supra* note 446, at 1127.

475. Brutus No. V, N.Y. J., Dec. 13, 1787, reprinted in 2 *The Complete Anti-Federalist* 388, 390 (Herbert J. Storing ed., 1981).

476. *The Federalist* No. 36, at 227 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Campbell, *supra* note 446, at 1129. Campbell also relies on Madison’s statement that “the eventual collection [of taxes] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several states.” *The Federalist* No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); see also

belief that “state officers would be compelled to enforce federal law.”⁴⁷⁷ In light of Hamilton’s consistent opposition to federal regulation and coercion of States, however, Professor Michael Collins correctly observes that statements like these simply reflect the Founders’ “implicit understanding that federal use of state officers required state permission, or at least was subject to state refusal.”⁴⁷⁸

Campbell disagrees with this conclusion because “the impost controversy” made it “unnecessary for Federalists to explain that state officers would be compelled to enforce federal law.”⁴⁷⁹ In his view, “contemporaries would not have thought that Federalist *silence* signaled a tacit denial of federal commandeering power.”⁴⁸⁰ Under the law of nations, however, silence could never suffice to alienate state sovereignty. As discussed, the only way the States could have surrendered their sovereign right not to be commandeered by another sovereign was through a clear and express provision in a binding legal instrument. Although provisions of this kind were proposed at the Convention, they were soundly rejected (as Campbell acknowledges). Thus, the impost controversy actually refutes rather than supports Campbell’s position.

Third, Campbell believes that “[d]irect acknowledgements of commandeering authority . . . arose during discussions about the Oath Clause.”⁴⁸¹ The Oath Clause provides that “Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this

Campbell, *supra* note 446, at 1129. Like Hamilton, Madison was most likely seeking to appease Anti-Federalists who preferred state officials to collect federal taxes. If that was the case, then he was referring to voluntary—rather than mandatory—participation of state officials for this purpose.

477. Campbell, *supra* note 446, at 1133.

478. See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 142 (arguing that the Anti-Federalists’ failure to raise the alarm against commandeering “is itself strong evidence that such a prospect was not part of the perceived message of *The Federalist*”).

479. Campbell, *supra* note 446, at 1133.

480. *Id.* (emphasis added).

481. *Id.* At the same time, Campbell concedes that another provision sometimes invoked to support commandeering—the Supremacy Clause—does not provide a constitutional basis for the practice. *Id.* at 1164 (“In short, the Supremacy Clause requires state courts to exercise judicial review vis-à-vis federal law; it does not create or even suggest federal power to commandeer state courts.”). Arguments that the Supremacy Clause authorizes commandeering have conflated commandeering with the duty of state officials to follow valid federal law in the performance of their duties under state law. Powell, for instance, points to *The Federalist Papers*’ discussion of the Supremacy Clause for the proposition that “the federal government’s proposed powers would extend to the states as subordinate institutions as well as to individuals.” Powell, *supra* note 466, at 659. But this confuses a rule of decision to resolve conflicts between state and federal law with authorization to enforce federal law directly against States. The Constitution contains a clear and express provision—the Supremacy Clause—establishing a rule of decision but contains no provision clearly and expressly authorizing enforcement of federal commands against States.

Constitution.”⁴⁸² Campbell argues that “it was commonly thought at the Founding” that this Clause not only required state and federal officials to swear allegiance to the United States, but also “implied that state officers would have to execute federal laws.”⁴⁸³

Even if Campbell were correct that certain Founders read the Oath Clause to imply such an obligation,⁴⁸⁴ the Clause would not qualify as an adequate surrender of the States’ right not to be commandeered by another sovereign. By its terms, the Oath Clause requires state officials to support the Constitution, but the Clause says nothing about congressional power to command state officials to carry federal law into execution. Nonetheless, in Campbell’s view, the Oath Clause “implied . . . federal authority to commandeer state officers.”⁴⁸⁵ Again, however, implied terms could never suffice to surrender sovereign rights. Under the law of nations, surrender of a state’s right not to be commandeered by another state would have been considered “odious,” and thus could have been accomplished only through clear and express terms.⁴⁸⁶ For this reason alone, federal commandeering of the States cannot be justified by the Oath Clause.⁴⁸⁷

After extensive debate, the Constitutional Convention consciously declined to include any general federal power to command and coerce the States⁴⁸⁸ because the Founders were convinced that the federal government could accomplish all its ends by relying on “legislation for

482. U.S. Const. art. VI.

483. Campbell, *supra* note 446, at 1134. He says that some Founders took the expansive view that the Clause itself obligated state officers to enforce federal law, while others thought the Clause merely obligated “state officers to execute federal laws *when specifically directed by Congress.*” *Id.*

484. The Founders’ assumptions are unclear. For example, Campbell relies on a statement by Anti-Federalist James Winthrop that the Oath Clause “cannot be understood otherwise than as binding the state judges and other officers, to execute the continental laws in their own proper departments within the state.” *Id.* at 1135 (quoting *Aggripa V*, *Mass. Gazette*, Dec. 11, 1787, reprinted in 1 *DHRC*, *supra* note 142, at 406–07 (John P. Kaminski et al. eds., 1997)). Whereas Campbell suggests that the Founders understood the Oath Clause to apply to federal law broadly, Sai Prakash emphasizes that under the Clause “state executives and legislatures are only bound to the Constitution and not federal law” generally. Prakash, *supra* note 446, at 2001 n.231.

485. Campbell, *supra* note 446, at 1137.

486. See *supra* notes 102–107 and accompanying text.

487. Campbell also relies on Hamilton’s statement in *Federalist No. 27* that because of the Supremacy and Oath Clauses, “the Legislatures, Courts and Magistrates of the respective members will be incorporated into operations of the national government, *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.” Campbell, *supra* note 446, at 1136–37 (quoting *The Federalist No. 27*, at 174–75 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). This passage refers not to the existence of any congressional power to require state officials to carry federal law into execution, but merely to the obligation of state officials to follow federal law in the performance of their duties under state law.

488. See *supra* notes 420–439 and accompanying text.

individuals” while forgoing “legislation for States.”⁴⁸⁹ No matter how one reads the commentary in *The Federalist Papers*, nothing but a clear and express surrender in the constitutional text would suffice under the law of nations to authorize the federal government to conscript state legislatures or executive officials into implementing federal programs against their will.⁴⁹⁰

3. *Reassessing the Anticommandeering Doctrine.* — This background suggests that the Supreme Court’s recent anticommandeering decisions are supported by the original public meaning of the term “States” as used in the Constitution. By using a term of art drawn from the law of nations, the Constitution signified that the States retained all of the sovereign rights they secured by issuing the Declaration of Independence and winning the

489. One potential exception is the Militia Clause, which gives Congress power to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art I, § 8, cl. 15. At the Founding, the term militia “included all citizens who qualified for military service (*i.e.*, most adult males).” Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 *Ala. L. Rev.* 103, 106 (1987). Defining the militia to refer to a subset of the citizenry prevented the States from running afoul of Article I, Section 10’s prohibition on States “keep[ing] Troops . . . in time of Peace” “without the Consent of Congress.” U.S. Const. art I, § 10, cl. 3. Even if the “militia” included state officers at the Founding, the Militia Clause is the exception that proves the rule because it constitutes a clear and express surrender of the States’ sovereignty to command these specific officers. Under the law of nations, this limited surrender of state sovereignty would not imply that Congress could commandeer any and all state officers. Campbell also points to Hamilton’s discussion of the posse comitatus as support for federal commandeering. Although the Constitution contains no clause authorizing Congress “to call out the posse comitatus,” Hamilton argued that the Necessary and Proper Clause empowered it to do so or, as he put it, to “requir[e] the assistance of the citizens to the officers who may be entrusted with the execution” of federal laws. *The Federalist No. 29*, at 182–83 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Campbell acknowledges that Hamilton’s discussion is not dispositive but believes that “it supports the view that Hamilton envisioned Congress invoking the Necessary and Proper Clause to commandeer state officers.” Campbell, *supra* note 446, at 1142. In England and early America, however, the posse comitatus referred not to government officials, but to the individuals in the community when called upon by the sheriff to help keep the peace. See 2 James Wilson, *Of Sheriffs and Coroners*, in *Collected Works of James Wilson* 1012, 1016 (Kermit L. Hall & Mark David Hall eds., 2007) (describing the posse comitatus as “the high power of ordering to [the sheriff’s] assistance the whole strength of the county over which he presides”). Thus, the Necessary and Proper Clause gave Congress power to call forth the posse comitatus to assist federal officers in the enforcement of federal law; it did not give Congress power to commandeer state officials who could also call forth the posse comitatus to enforce state law.

490. One might read the provision of Article III extending the judicial power of the United States “to controversies between two or more States” as necessarily including authority to enforce any resulting judgments directly against States. U.S. Const. art. III, § 2, cl. 1. If one reads the provision this way, then the States clearly and expressly surrendered this aspect of their sovereignty by adopting the Constitution. On the other hand, the Founders may have assumed that judgments in disputes between States—such as border disputes—could be enforced fully against individuals, including by holding individual state officers accountable in ordinary cases in law and equity for exceeding their lawful authority. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1903–08.

War of Independence, minus only those rights that they clearly and expressly surrendered in the Constitution. Because the original Constitution gave Congress no express power to commandeer the States, the States did not surrender—but necessarily retained—their traditional sovereign right to control their own legislative and executive powers free from interference by another sovereign.

This rationale provides support for each of the Supreme Court's prominent anticommandeering decisions. The Court's modern anticommandeering decisions began with *New York v. United States*, which held that Congress lacks constitutional power to compel state legislatures to enact laws implementing a federal regulatory program.⁴⁹¹ Justice O'Connor's opinion for the Court acknowledged that "Congress has substantial powers to govern the Nation directly," but stressed that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁴⁹² As she recognized, the shift from the Articles of Confederation to the Constitution "substitut[ed] a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."⁴⁹³ Review of the Founding-era debates convinced the Court that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."⁴⁹⁴

In *Printz v. United States*, the Supreme Court applied these principles to hold that Congress also lacks constitutional authority to compel state executive officers to enforce a federal regulatory scheme.⁴⁹⁵ Although Justice Scalia's opinion for the Court relied on many of the same sources cited in *New York v. United States*, his opinion acknowledged that "there is no constitutional text" addressing the question whether "compelling state officers to execute federal laws is unconstitutional."⁴⁹⁶ The Court stated that "the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."⁴⁹⁷ The Court's review of these sources led it to conclude that Congress's attempt to command state executive officers to enforce federal law was unconstitutional.⁴⁹⁸

Critics of the Supreme Court's decision in *Printz* have emphasized Justice Scalia's concession that "there is no constitutional text" addressing

491. 505 U.S. 144, 178 (1992).

492. *Id.* at 162.

493. *Id.* (internal quotation marks omitted) (quoting *Lane County v. Oregon*, 74 U.S. 71, 76 (1869)).

494. *Id.* at 166.

495. 521 U.S. 898, 935 (1997).

496. *Id.* at 905.

497. *Id.*

498. *Id.* at 935.

commandeering to suggest that the doctrine is made up or illegitimate.⁴⁹⁹ As discussed, however, the absence of constitutional text addressing commandeering supports—rather than undermines—the Court’s anticommandeering doctrine. Under background principles of the law of nations, Congress could commandeer the “States” only if they clearly and expressly empowered Congress to take such action in the Constitution.

Critics also have suggested that the Supreme Court’s acceptance of congressional power to commandeer state courts is inconsistent with its broader anticommandeering doctrine. In *New York*, for example, Justice O’Connor recognized “the well established power of Congress to pass laws enforceable in state courts.”⁵⁰⁰ If Congress may rely on state courts to enforce federal law, then why may it not rely on state legislatures and executive officials for this purpose as well? According to the Court, the constitutional text provides the answer. As Justice Scalia explained in *Printz*, the “proposition that state courts cannot refuse to apply federal law . . . [is] mandated by the terms of the Supremacy Clause (‘the Judges in every State shall be bound [by federal law]’).”⁵⁰¹ Regardless of the merits of the Court’s conclusion, the Court’s rationale is consistent with the background rules governing the surrender of sovereign rights. In other words, the Court regards the text of the Supremacy Clause as a clear and express abrogation of the States’ sovereignty over their courts.⁵⁰²

499. See Manning, Federalism and the Generality Problem, *supra* note 11, at 2031 (“In *Printz v. United States* . . . the Court confirmed the atextual, purposive nature of its analysis.”); cf. Powell, *supra* note 466, at 674 (arguing that the “state-immunities approach [endorsed in *New York v. United States*] . . . is entirely unguided by constitutional text”).

500. *New York v. United States*, 505 U.S. 144, 178 (citing *Testa v. Katt*, 330 U.S. 386 (1947)); see also *Printz*, 521 U.S. at 928 (addressing *Testa* and the application of federal law by state courts).

501. *Printz*, 521 U.S. at 928–29 (alteration in original) (quoting *Testa*, 330 U.S. at 389).

502. If one were to conclude that the Supremacy Clause is not a clear and express surrender of this aspect of state sovereignty, then the States would retain the same degree of sovereignty over their courts as they do over their legislative and executive functions. For example, dissenting in *Haywood v. Drown*, Justice Thomas concluded that “[a]s a textual matter, . . . the Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow if it adjudicates the claim.” 556 U.S. 729, 751 (2009) (Thomas, J., dissenting). Because, in his view, no provision of the Constitution divests the States of their preexisting sovereignty over their own courts, Justice Thomas determined that “[u]nder our federal system, . . . the States have unfettered authority to determine whether their local courts may entertain a federal cause of action.” *Id.* at 749.

For a discussion of how early debates over congressional regulation of state courts drew upon rules of the law of nations setting the bounds of jurisdiction between sovereigns, and how arguments that diverged from these rules relied on specific constitutional provisions interpreted to override them, see Anthony J. Bellia Jr., Congressional Power and State Court Jurisdiction, 94 *Geo. L.J.* 949, 966–77 (2006); see also Anthony J. Bellia Jr., Federal Regulation of State Court Procedures, 110 *Yale L.J.* 947, 977–81 (2001) (arguing that under the traditional rules of the law of nations that defined the bounds of state sovereignty, Congress lacks power to regulate state court procedures in state law cases).

Most recently, in *Murphy v. National Collegiate Athletic Association*, the Supreme Court reaffirmed and applied the anticommandeering doctrine to invalidate the Professional and Amateur Sports Protection Act (“PASPA”), which made it unlawful for States to enact laws authorizing gambling on competitive sports events.⁵⁰³ The Act contained a grandfather provision excepting Nevada and gave New Jersey a limited period to opt into this exception.⁵⁰⁴ After the time expired, New Jersey voters approved a constitutional amendment permitting the state legislature to authorize sports gambling.⁵⁰⁵ The Court first found that the legislature had authorized sports gambling within the meaning of PASPA by repealing state laws prohibiting such conduct, and then held that the Act violated the anticommandeering doctrine.⁵⁰⁶ The Court explained its decision in terms that echo principles drawn from the law of nations. According to the Court, the Constitution grants Congress enumerated powers, but “conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.”⁵⁰⁷ As the Court put it, “[t]he anti-commandeering doctrine simply represents the recognition of this limit on congressional authority.”⁵⁰⁸

Commentators have criticized the anticommandeering doctrine on the ground that the Constitution does not expressly deny Congress the power to commandeer States. But the Constitution does not give Congress all powers except those expressly withheld. Rather, under the approach described here, the Constitution gives Congress only those powers expressly granted in the document. Under background principles of the law of nations defining what it meant to be a “State” and governing how “States” could surrender their sovereign rights, the “States” mentioned in the Constitution retained all aspects of their preexisting sovereignty that they did not clearly and expressly surrender in the Constitution. Accordingly, Congress lacks power to commandeer the States in violation of their residual sovereignty unless the Constitution explicitly authorizes such action. From this perspective, constitutional silence does not undermine, but affirmatively supports, the Court’s anticommandeering doctrine.

503. 138 S. Ct. 1461, 1485 (2018).

504. *Id.* at 1471 (citing 28 U.S.C. § 3704(a)(1)–(3) (2012)).

505. *Id.*

506. *Id.* at 1474, 1478.

507. *Id.* at 1476.

508. *Id.* Professor Vikram Amar questions whether *Murphy* went too far in its language, if not its result. As he put it, “At times *Murphy* defined unconstitutional commandeering in incredibly broad terms—to include federal laws ‘that direct[] . . . the States . . . to refrain from enacting a regulation of the conduct of activities occurring within their borders.’” Vikram David Amar, “Clarifying” *Murphy’s* Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?, 2018 Sup. Ct. Rev. 299, 300 (quoting *Murphy*, 138 S. Ct. at 1479). In his view, this formulation is at least in tension with the conditional preemption doctrine. He argues that “the best reading of *Murphy* is one under which Congress’s conditional preemption powers remain intact but can be exercised only when Congress lays out its conditions with clarity.” *Id.* at 301.

C. *The Equal Sovereignty Doctrine*

Finally, understanding the Constitution's use of the term "States" by reference to the law of nations supports the Supreme Court's long-standing recognition that the States possess equal sovereignty under the Constitution.⁵⁰⁹ The constitutional equality of the States is not the product of abstract structural reasoning or judicial activism, as some commentators have suggested. To the contrary, when the Constitution was adopted, the Founders understood free and independent states to possess equal sovereignty under the law of nations. By employing the term "States" in the Constitution, the Founders incorporated this background understanding. Under principles drawn from the law of nations, the States retained their equal sovereignty except to the extent that they clearly and expressly surrendered it in the Constitution.

Although the Supreme Court has long recognized the constitutional equality of the States, there has been renewed interest in the equal sovereignty doctrine following the Court's decision in *Shelby County v. Holder*.⁵¹⁰ The decision invalidated Congress's 2006 renewal of the preclearance requirements of the Voting Rights Act of 1965 on the ground that the statute's outdated coverage formula violated the equal sovereignty of the States.⁵¹¹ In reaching this conclusion, the Court embraced the proposition that "[n]ot only do States retain sovereignty under the Constitution," but "there is also a 'fundamental principle of *equal* sovereignty' among the States."⁵¹²

In the exercise of its power to enforce the Fifteenth Amendment, Congress originally enacted the Voting Rights Act of 1965 as a short-term, five-year measure to remedy well-documented voting discrimination in certain States and localities.⁵¹³ Shortly after the Act's original adoption in 1965, the Supreme Court upheld the statute as a proper exercise of Congress's power to enforce the Fifteenth Amendment.⁵¹⁴ Congress reenacted the statute without alteration several times over the years,⁵¹⁵ and most recently reauthorized it in 2006 for an additional twenty-five years.⁵¹⁶ By 2006, however, African American voting rates in the covered jurisdictions met or exceeded white voting rates.⁵¹⁷ Rather than adopting a new coverage formula based on new findings, Congress "instead reenacted a

509. See, e.g., *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

510. 570 U.S. 529 (2013).

511. *Id.* at 556–57.

512. *Id.* at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

513. *Id.* at 536–38.

514. *Id.* at 538 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

515. *Id.* at 538–39.

516. *Id.*

517. *Id.* at 548.

formula based on 40-year-old facts having no logical relation to the present day.”⁵¹⁸ For this reason, the *Shelby County* Court found Congress’s 2006 extension of the coverage provisions to violate the States’ equal sovereignty.⁵¹⁹

Critics of *Shelby County* charge that the Supreme Court simply made up the equal sovereignty doctrine and that it is unsupported by the constitutional text.⁵²⁰ For example, Professor Leah Litman has claimed that “[t]here is little basis in the constitutional text or the drafting history for any constitutional rule that requires Congress to treat the states equally.”⁵²¹ She argues that “the textual arguments for the equal sovereignty principle are not particularly compelling,”⁵²² and that “an analysis of the original meaning of the Constitution reveals no clear understanding or expectation that the Constitution prohibits Congress from distinguishing among the states.”⁵²³ Similarly, Professor Richard Hasen has characterized the equal sovereignty doctrine as “unjustified” and “made up.”⁵²⁴ In short, as Professor Neil Katyal and Thomas Schmidt have observed, “[t]he legal commentariat generally viewed the doctrine as an invention.”⁵²⁵

A few scholars have defended the legitimacy of the equal sovereignty doctrine, at least in certain circumstances. Writing before *Shelby County*, Professor Gillian Metzger embraced the equal footing doctrine—requiring new States to be admitted on “equal footing” with existing States⁵²⁶—and concluded (on the basis of various features of the constitutional design) that the “Court’s intuition that states must be admitted on equal terms” “appears correct.”⁵²⁷ Similarly, Professor Douglas Laycock observed that “[t]he Constitution assumes, without ever quite saying so, that the several states are of equal authority.”⁵²⁸ These scholars did not consider

518. *Id.* at 554.

519. *See id.* at 557.

520. Justice Ginsburg’s dissent did not go this far but argued that the doctrine should be limited to the admission of new States. *See id.* at 587–88 (Ginsburg, J., dissenting). Some scholars have criticized the decision on other grounds, including the claim that the Court’s use of the doctrine undermines the availability of constitutional remedies. *See, e.g.,* Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 *La. L. Rev.* 83, 113–19 (2015).

521. Leah M. Litman, *Inventing Equal Sovereignty*, 114 *Mich. L. Rev.* 1207, 1229 (2016).

522. *Id.* at 1230.

523. *Id.* at 1233.

524. Richard L. Hasen, *Shelby County* and the Illusion of Minimalism, 22 *Wm. & Mary Bill Rts. J.* 713, 714, 733 (2014).

525. Neil Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 *Harv. L. Rev.* 2109, 2133 n.103 (2015); accord Jeffrey M. Schmitt, *In Defense of Shelby County’s Principle of Equal State Sovereignty*, 68 *Okla. L. Rev.* 209, 210 (2016) (“Scholars have attacked the equal sovereignty principle with a surprising degree of unanimity and contempt.”).

526. *Coyle v. Smith*, 221 U.S. 559, 566–67 (1911).

527. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 *Harv. L. Rev.* 1468, 1518 (2007).

528. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *Colum. L. Rev.* 249, 288 (1992).

whether the Supreme Court properly applied the equal sovereignty doctrine in *Shelby County*, but two scholars have subsequently defended the Court's reliance on the doctrine in that case.

Professor Thomas Colby concluded that “there is indeed a deep structural principle of equal sovereignty that runs through the Constitution.”⁵²⁹ Although the Supreme Court had applied the principle most prominently to ensure the equal footing of newly admitted States, Colby argued that “the equal footing doctrine is just a particular, concrete aspect of a broader and deeper principle.”⁵³⁰ He agreed that this broader principle of equal sovereignty lacks “a clear textual mandate,”⁵³¹ but argued that it draws “powerful support” from the history, caselaw, and “underlying structure of our constitutional system.”⁵³² Thus, although the principle of “perfect equality” “was not spelled out in so many words in the Constitution,” Colby concluded that it was “a background assumption on which the Constitution was drafted.”⁵³³

Similarly, Professor Jeffrey Schmitt has argued that the principle of equal sovereignty “is entirely consistent with, and perhaps even supported by,” constitutional text and precedent.⁵³⁴ In his view, “[b]ecause the states existed prior to Ratification, it is not surprising that the framers omitted any mention of equal state sovereignty [in the constitutional text].”⁵³⁵ In addition, he argued that “the Court’s reasoning [in prior precedent] clearly applies beyond the context of the admission of new states.”⁵³⁶ Finally, he concluded that “[t]he idea of equal state sovereignty has been a fundamental assumption of our constitutional order throughout United States history.”⁵³⁷

We agree that the equal sovereignty of the States was an important background assumption against which the Constitution was drafted and ratified. But both critics and supporters of the doctrine have paid too little attention to the constitutional term used by the Founders—“States”—to convey that assumption. As discussed, the original Thirteen Colonies declared themselves to be “Free and Independent States” in the Declaration of Independence.⁵³⁸ Under the law of nations, “Free and Independent States” were entitled to the “perfect equality and absolute independence of sovereigns.”⁵³⁹ The notion of a “State” with fewer sovereign rights than

529. Thomas B. Colby, In Defense of the Equal Sovereignty Principle, 65 *Duke L.J.* 1087, 1091 (2016) [hereinafter Colby, Equal Sovereignty Principle].

530. *Id.* at 1108.

531. *Id.* at 1102.

532. *Id.*

533. *Id.* at 1140 (citation omitted) (internal quotation marks omitted).

534. Schmitt, *supra* note 525, at 222.

535. *Id.* at 223.

536. *Id.* at 229.

537. *Id.* at 238.

538. The Declaration of Independence para. 32 (U.S. 1776).

539. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

another “State” was unknown to the law of nations. By using the term “States,” the Constitution recognized the traditional sovereign rights of the States minus only those rights that they expressly surrendered in the document. Accordingly, “[a]lthough the states necessarily compromised their ‘absolute independence’ by uniting under the Constitution, it does not follow that they forfeited their ‘absolute equality.’”⁵⁴⁰ Thus, in order to restrict the sovereign rights of some States but not others, Congress must act pursuant to an express constitutional provision authorizing it to do so.⁵⁴¹ Although the original Constitution contains no such provisions, the Civil War Amendments empower Congress to take such action when necessary to enforce the guarantees set forth in the Amendments.

It is not surprising that the original Constitution contains no provisions expressly authorizing Congress to override the equal sovereignty of the States. As explained, in drafting and ratifying the Constitution, the Founders decided to withhold all authority from Congress to regulate the States directly.⁵⁴² Although the original Constitution was designed to forgo federal regulation of the States, the Civil War Amendments were designed to do just the opposite. In the aftermath of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments imposed important restrictions on the governance prerogatives of the States by prohibiting slavery, defining citizenship, and guaranteeing equal protection, due process, and the right to vote without regard to race. In addition, all three Amendments gave Congress express power to enforce their provisions “by appropriate legislation.”⁵⁴³ Thus, by adopting these Amendments, the States expressly surrendered part of their traditional immunity from regulation by another sovereign and compromised their right to equal sovereignty with regard to enforcement of the prohibitions set forth in the Amendments.

540. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1328 (1996). The sovereign equality of the States under the original Constitution supports the Supreme Court’s reliance on such equality in formulating and applying rules of decision to resolve disputes between States. Although these rules are sometimes characterized as federal common law, many are best understood as a means of implementing the constitutional equality of the States. *Id.* at 1322–31. More broadly, the residual sovereignty of the States has also informed the Court’s decisions in disputes between States. See *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (refusing to find an implied duty of good faith and fair dealing in interstate compacts in order to avoid the federalism concerns “that would arise were we to rewrite an agreement among sovereign States”).

541. As Thomas Colby has correctly explained, “unequal or discriminatory federal laws implicate the equal sovereignty principle only when they grant more regulatory authority or capacity for self-government to some states than to others (or allow some states a greater role than others in the federal government).” Colby, *Equal Sovereignty Principle*, *supra* note 529, at 1150. Accordingly, “federal laws that are drafted in general, nongeographic terms, but have a disparate impact on some states,” do not violate the equal sovereignty of the States under the Constitution. *Id.*

542. See Clark, *The Eleventh Amendment*, *supra* note 136, at 1838–39 (arguing that the ratification debates over whether to amend or replace the Articles reflect the Founders’ decision to grant Congress the power to regulate individuals rather than States).

543. See U.S. Const. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

The Supreme Court confirmed this surrender of state sovereignty in *Fitzpatrick v. Bitzer*,⁵⁴⁴ which held that “the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.”⁵⁴⁵ The Civil War Amendments authorize Congress to enforce their commands not only by abrogating state sovereign immunity, but also by overriding the sovereign equality of the States in appropriate circumstances.

Thus, in analyzing the Supreme Court’s decision in *Shelby County*, the proper question is not whether the States have equal sovereignty under the original Constitution (they do). Nor is the proper question whether the States surrendered aspects of their equal sovereignty in the Civil War Amendments (they did). Rather, the proper question is whether Congress’s 2006 extension of the Voting Rights Act was a valid exercise of its power to enforce the Fifteenth Amendment. Congress undoubtedly has enforcement power to treat States that violate the Fifteenth Amendment (by denying their citizens the right to vote on account of race) differently than States that comply with the Amendment. Although such disparate treatment overrides the equal sovereignty of the States, it is expressly authorized in this context by the Civil War Amendments and thus rests on an express surrender of the States’ right to sovereign equality. Accordingly, the Supreme Court had little difficulty upholding the original coverage provisions of the Voting Rights Act of 1965.⁵⁴⁶ As the Court explained at the time, Congress’s decision to impose stricter conditions on some States than others was based on “evidence of actual voting discrimination” in violation of the Fifteenth Amendment.⁵⁴⁷

Shelby County presented a more difficult question—namely, whether Congress’s 2006 extension of the 1965 restrictions without any updated findings of discrimination by the covered jurisdictions was a valid exercise of Congress’s power to enforce the Fifteenth Amendment.⁵⁴⁸ This question

544. 427 U.S. 445 (1976).

545. *Id.* at 456 (citation omitted). By contrast, the Court has long held that Congress generally lacks authority under Article I, Section 8 to override the States’ sovereign immunity. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding that the Eleventh Amendment prohibits Congress from authorizing Indian tribes to file suit against States to enforce the Indian Gaming Regulatory Act). The only exception the Court has recognized is when Congress acts pursuant to its bankruptcy power. See *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006).

546. See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

547. *Id.* at 330. In particular, Congress imposed restrictions on jurisdictions with two characteristics: “the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.” *Id.*

548. *Shelby County v. Holder*, 570 U.S. 529, 550 (2013). This question turns on the proper scope of Congress’s power to enforce the Civil War Amendments. The Supreme Court has recognized broad congressional power to enforce these Amendments, see *Katzenbach*, 383 U.S. at 326–27 (comparing Congress’s enforcement power conferred by the Civil War Amendments to that conferred by the Necessary and Proper Clause), but the Court has also made clear that congressional enforcement legislation must be “congruen[t]

turns on the proper interpretation of the Amendment. If the Fifteenth Amendment authorized the extension (as the dissent believed), then there was no violation of the States' equal sovereignty because they had surrendered it by adopting the Amendment. On the other hand, if the Fifteenth Amendment did not authorize the extension (as the Court held), then Congress violated the equal sovereignty retained by the States outside the Amendment. Thus, the equal sovereignty issue in *Shelby County* turned not on the existence of the equal sovereignty doctrine itself, but on the proper application of the Fifteenth Amendment to the case at hand. The latter question is beyond the scope of this Article. The important point for present purposes is that the States retained their equal sovereignty under the original Constitution, and Congress can override such equality only pursuant to an express surrender by the States in a subsequent constitutional amendment.

CONCLUSION

Commentators have argued that the Supreme Court's most prominent federalism doctrines lack any apparent basis in the constitutional text, and thus are inconsistent with the Court's commitment to textualism. This charge overlooks the original public meaning of the term "States." Read against the backdrop of the law of nations, the Constitution's use of the term "States" provides a plausible textual basis for many of the Court's most significant federalism doctrines. At the country's Founding, a "State" was a term of art drawn from the law of nations, referring to an independent state entitled to a well-known set of sovereign rights and powers. Moreover, under the law of nations, a State could alienate portions of its sovereignty only by a clear and express surrender in a binding legal instrument. In ratifying the Constitution, the American States surrendered some, but not all, of their sovereign rights. The rights they did not surrender, they necessarily retained. There was no need for the constitutional text to "confer" or "preserve" these rights because the States never surrendered them. This background context provides textual support for the Supreme Court's decisions upholding state sovereign immunity, prohibiting federal commandeering of the States' legislative and executive functions, and upholding the sovereign equality of the States.

and proportiona[1]" to judicially recognized violations of the prohibitions set forth in the Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).