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The International Law Origins of American Federalism

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The International Law Origins of American Federalism

Anthony J. Bellia Jr.*

Bradford R. Clark**

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INTRODUCTION

Last Term, in *Franchise Tax Board of California v. Hyatt*,¹ the Supreme Court ruled that States have sovereign immunity from suit in the courts of another State. Attention has focused both on the merits of such immunity and on the fact that *Hyatt* 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 our understanding of constitutional federalism. 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. Justice Thomas began his opinion for the Court by observing that “[a]fter independence, the States considered themselves fully sovereign nations,”³ and as such were “‘exemp[t] . . . from all [foreign] jurisdiction.’”⁴ The Court relied on “[t]he Constitution’s use of the term, ‘States’” to support the States’ retention of this traditional aspect of sovereignty.⁵ 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 nothing in the Constitution sufficed to surrender their immunity from suits in *state* court.

The *Hyatt* Court’s analysis has significance far beyond the immunity of one State in the courts of another.⁶ The original public meaning of the term “States” has important implications for several of the Court’s most prominent federalism doctrines. These doctrines have been controversial both on and off the Court because critics charge that they lack an adequate basis in the constitutional text. The framework employed by the Court in *Hyatt* answers these criticisms by grounding the doctrines in the 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 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

¹ 139 S. Ct. 1485 (2019).

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

³ *Hyatt*, 139 S. Ct. at 1493.

⁴ *Id.* at 1494 (quoting E. DE Vattel, *THE LAW OF NATIONS* § 108, at 486).

⁵ *Id.*

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—questions that will come before the Court this Term. See *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018), *cert. granted* 139 S. Ct. 2664 (2019).

surrender in a binding legal instrument (such as the Constitution). If, as *Hyatt* stated, the American States possessed full sovereignty at the founding, then many of the Court’s most controversial federalism decisions have a forgotten basis in the original public meaning of the term “State” as understood against background principles of the law of nations.

Over the last three decades, the Supreme Court has demonstrated a renewed commitment to constitutional federalism. In addition to enforcing the limits of 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 has no constitutional power to commandeer the legislative and executive departments of the States.⁹ Third, the Court has reiterated that the States possess equal sovereignty under the Constitution, and that Congress has limited power to override such sovereignty.¹⁰ The Court’s recognition of these three immunities has allowed the States greater freedom to operate as distinct sovereigns within a federal system. At the same time, these developments have sparked controversy both on and off the Court. Critics contend that these immunities 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 confer these state immunities, textualists claim that these judicial doctrines are inconsistent with fidelity to the constitutional text and the compromises that it embodies.¹¹

As *Hyatt* suggests, this apparent tension between textualism and federalism can be resolved by resort to a surprising source—international law. Most observers regard the proper understanding of federalism under the U.S. Constitution as a pure question of domestic law. It is impossible, however, to understand American federalism without consulting background principles of the law of nations invoked by the Declaration of

⁷ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (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 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The Court has recognized a narrow exception when Congress abrogates state sovereign immunity pursuant to its bankruptcy power. See *Central Va. Comm. College v. Katz*, 546 U.S. 356 (2006).

⁹ See *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018); *Printz v. United States*, 532 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹⁰ See *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹¹ See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

Independence and reflected in both the Articles of Confederation and the Constitution. These principles help to resolve the apparent tension between textualism and several important federalism doctrines by clarifying 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 allocating these respective powers. The term "States" was a term of art drawn directly from the law of nations, and the founders presumably understood the term by reference to such law. Accordingly, the law of nations provides crucial background context for understanding both the original sovereign rights enjoyed by States and the extent to which they relinquished such rights by adopting the Constitution. Read in light of the law of nations, the Constitution provides a firm textual basis for many of the Court's most prominent—and controversial—federalism doctrines.

Several commentators have argued that the Supreme Court's renewed commitment to federalism is incompatible with its embrace of textualism. 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.¹² The Court has used textualism to interpret both statutes and, to a lesser extent, the Constitution. Federalism refers to the Constitution's division of governmental authority between the federal government and the States. In the decades following the New Deal, the Court interpreted the Constitution to impose few, if any, constraints on federal power vis-à-vis the States. In a series of decisions over the past three decades, however, the Court has renewed its commitment to federalism by upholding the governance prerogatives of the States against various forms of unwarranted federal regulation. The Court's simultaneous embrace of federalism and textualism is among the most striking features of the Court's jurisprudence in recent decades.

Critics charge that the Supreme Court's federalism doctrines are incompatible with textualism. For example, John Manning has argued that the Supreme Court's anti-commandeering and sovereign immunity doctrines "lack any discernable textual source" in the Constitution.¹³ In his view, these "new federalism" decisions are problematic because they rest on nothing more than "freestanding federalism."¹⁴ Freestanding federalism, as he uses the phrase, "seeks the founders' decisions not in the meaning of any discrete clause, but in the overall system of government they adopted in the

¹² See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (stating that "in 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 *Id.* at 2009.

¹⁴ *Id.* at 2005, 2040.

document.”¹⁵ The problem he sees with 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 Dean 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

In an important early article on this topic, Mike Rappaport sought to reconcile textualism and federalism by arguing that “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, “[b]y 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 He did not contend, however, that the Constitution used the term “State” in this pure sense because “the states did not retain all 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 reaching this conclusion, Professor Rappaport relied on the Constitution’s “structure, purpose, and history.”²³ Although he acknowledged 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 “commandeered, taxed, and regulated.”²⁵ In his view, these

¹⁵ *Id.* at 2006.

¹⁶ *Id.* at 2047.

¹⁷ *Id.* at 2040. See also Thomas B. Colby, *Originalism and Structural Argument*, 113 N.W.U. L. REV. 1297, 1299 (2019) (observing that the Supreme Court’s anti-commandeering 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. F. 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”).

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.* at 821.

²⁰ *Id.* at 830.

²¹ *Id.* at 831.

²² *Id.*

²³ *Id.* at 837.

²⁴ *Id.* at 836.

²⁵ *Id.* at 821. Professor 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.

immunities “are necessary to ensure that the states retain at least some sovereignty and that they can perform their constitutional functions.”²⁶

Although Professor Rappaport’s approach starts with the constitutional text, his conclusion that the term “States” had a narrower—yet unspecified—meaning has led prominent scholars to doubt that his approach is capable of reconciling textualism with the Court’s federalism decisions. For example, Dean Manning observes that “[i]f the Constitution mixed and matched powers that had traditionally belonged indivisibly to sovereign ‘states,’ then the traditional meaning of sovereignty cannot meaningfully inform the question of what residual powers remained in distinctly American ‘states’ after the ratification of the Constitution.”²⁷ Similarly, Ernie Young questions “whether the term ‘state’ itself is really doing any of the interpretive work in his analysis.”²⁸ Professor 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, Will 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, it is possible to resolve the apparent conflict between federalism and textualism by looking to crucial background context provided by international law. Professor Rappaport properly emphasized 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.” In drafting and ratifying the Constitution, the founders would have understood the term “State” to refer to a separate sovereign possessing *all* of the rights traditionally recognized by the law of nations. The term “State” was a term of art drawn straight from the law of nations and is still used today to refer to independent nation-states with full sovereignty. Accordingly, the crucial inquiry is not whether “State” meant “State” in the Constitution (it did), but the extent to which the American States affirmatively relinquished portions of their sovereignty in the Constitution. This latter inquiry can be answered only by consulting additional principles supplied by the law of nations to govern the surrender of sovereign rights.

²⁶ *Id.* at 838.

²⁷ Manning, *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).

Using international law both to define the meaning of the term “State” and to identify the extent to which the American States surrendered key aspects of their sovereignty in the Constitution reconciles many of the Supreme Court’s most significant federalism doctrines with textualism. Under this textual and historical approach to federalism, courts should determine the scope of state sovereignty under the Constitution by starting with the baseline assumption that “States” possessed full sovereignty at the founding, and then ascertaining the extent to which they surrendered aspects of their sovereignty in the constitutional text. To be sure, in adopting the Constitution, the States surrendered many important aspects of traditional sovereignty, such as their rights to make treaties, engage in war, and govern exclusively within their own territories. But they also did not surrender—and thus retained—many of the sovereign rights traditionally recognized by the law of nations. One need not rely on general concepts of “freestanding federalism,” “structure,” or “purpose” to identify these areas of residual state sovereignty under the Constitution. Rather, one can ascertain such sovereignty with precision by examining the constitutional text in light of background principles of the law of nations. Such examination reveals with surprising precision which aspects of sovereignty the States partially or fully surrendered to the federal government in the Constitution.

This approach to federalism suggests that courts and commentators frequently ask 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, they should be asking whether the Constitution contains a 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 necessarily retained their preexisting sovereign rights unless they clearly and expressly surrendered them. For this reason, constitutional silence on a question of federalism signifies retention—rather than surrender—of the States’ pre-existing sovereignty.³¹

This background context provided by the law of nations reveals a forgotten constitutional basis for many of the Supreme Court’s most significant federalism doctrines, including state sovereign immunity, the rule against federal commandeering of state legislative and executive departments, and the sovereign equality of the States. Critics insist that these immunities lack a firm basis in the constitutional text and are necessarily the result of improper judicial activism. But this criticism has

³¹ This approach to constitutional interpretation is different than a “strict construction” approach, as that approach is typically understood. See *infra* note 176, and accompanying text.

things backwards. There was no need for the Constitution to spell out the rights of sovereign States in the text because—under the law of nations—States retained all rights that they did not affirmatively surrender. The American States could have compromised their sovereign rights—including sovereign immunity, immunity from commandeering, and equal sovereignty—only by adopting constitutional provisions that expressly altered or surrendered them. Thus, unless the Constitution expressly overrides the States’ pre-existing sovereign rights, the “States” necessarily retained them. This understanding of state sovereignty is based on the original public meaning of the constitutional text taken in historical context rather than on freestanding federalism or judicial activism.

This Article proceeds in four Parts. Part I examines the sovereign rights of the American “States” under the law of nations following the Declaration of Independence. The law of nations not only defined the rights and immunities of “free and independent States,” but also provided rules governing their surrender. Part II discusses the sovereignty of the States under the Articles of Confederation, and explains why this short-lived arrangement failed. Part III reviews the drafting and ratification of the Constitution and the precise ways in which the States did—and did not—surrender portions of their sovereignty by adopting the Constitution. Finally, Part IV considers the implications of our understanding of the term “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. The Article concludes that reading the term “States” against background principles of the law of nations provides substantial textual and historical support for each of these doctrines.

I. STATE SOVEREIGNTY 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. Perhaps surprisingly, significant features of this 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 should sometimes downplay or ignore 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.³² This camp tends to favor more robust federalism

³² In several important cases, the Supreme Court has relied on history and structure to resolve federalism issues, *see, e.g.*, *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 CLEOs’ challenge must be sought in historical understanding

doctrines.³³ 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.³⁴ This camp tends to favor less robust federalism doctrines. Beyond this divide, there are many other contested approaches to constitutional federalism.³⁵

One need not endorse one particular approach over the others, however, in order to conclude that the constitutional text—properly understood in historical context—supports several of the Supreme Court’s most significant federalism doctrines. The original public meaning of the term “States” in the Constitution supports the Court’s adherence to these doctrines. “States” 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 governing how States surrendered their rights. As discussed in Part III, both aspects of the law of

and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”); *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.”); as well as recited purposes of the federal structure established by the Constitution, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); *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.”).

³³ *See* LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 75-94 (2019); Calvin Massey, *Federalism and the Rehnquist Court*, 53 *HASTINGS L.J.* 431 (2002); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *S. Ct. Rev.* 125; Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. CHI. L. REV.* 1484 (1987).

³⁴ *See* Manning, *supra* note 11.

³⁵ 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 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, e.g.*, Philip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. REV.* 663 (2001); Joshua Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *ARIZ. L. REV.* 205 (1997). 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 *CAL. L. REV.* 59, 103 (2010). For discussions of dynamic federalism, *see* Kirsten Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 *EMORY L.J.* 159 (2006); Robert Schapiro, *Toward a Theory of Interactive Federalism*, 91 *IOWA L. REV.* 243 (2005). For arguments that federalism debates should not be framed in terms of dual sovereignty but that there are nonetheless benefits to decentralization, *see* Heather Gerken, *Federalism 3.0*, 105 *CAL. L. REV.* 1695 (2017); Abbe Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996 (2014); Jessica Bulman-Pozen, *Partisan Federalism*, 127 *HARV. L. REV.* 1077, 1119 (2014); ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011). 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 (1994).

nations are relevant to a proper understanding of state sovereignty under the Constitution.

The founding generation initially employed the term “States” in the Declaration of Independence more than a decade before they 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 United Colonies declared themselves to be “free and independent States” with “full power to levy war, conclude peace, contract alliances, establish commerce, and to all other acts and things which independent states may of right do.”³⁶ The law of nations defined the rights and obligations of independent states vis-à-vis one another, and the Declaration of Independence clearly claimed these rights for the American States.

Because the sovereign rights of independent states would have been well known to members of the Continental Congress (who were waging a war to secure them), they had no need to spell out all such rights in the Declaration. It was sufficient to refer to several prominent rights along with “all other acts and things which independent states may of right do.” 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. 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.”³⁷ By recognizing the United States as “free, sovereign and independent States,” Great Britain was acknowledging both the independence of the States from Great Britain and their possession of sovereign rights under the law of nations.

After achieving their independence, the American States voluntarily surrendered some of their sovereign rights first in the Articles of Confederation and then in the Constitution. Before considering the precise effect of these instruments on state sovereignty, it is useful to identify the rights that the States secured for themselves through the Declaration of Independence and the War of Independence. These rights were not mere platitudes but 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

³⁶ THE DECLARATION OF INDEPENDENCE, para. 32 (U.S. 1776).

³⁷ Provisional Articles, U.S.-Gr. Brit., art. I, Nov. 30, 1782, 8 Stat. 54.

nations, and then discusses several specific rights of sovereign states that have particular relevance to the Constitution's allocation of sovereignty between the federal government and the States. This Part also describes the rules that governed how 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—and retained—by adopting first the Articles of Confederation, and later the Constitution.

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

The American States secured a broad array of important sovereign rights recognized by the law of nations when they achieved the status of "free and independent States." As stated in the Declaration of Independence, these rights included "full power to levy war, conclude peace, contract alliances, [and] establish commerce." The Declaration also referred to "all other acts and things which independent states may of right do." 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 rights of self-governance, territorial sovereignty, and equal sovereignty. *The Law of Nations* by Emmerich de Vattel³⁸ was the most influential treatise on the law of nations in England and America during the founding period.³⁹ 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."⁴⁰ The rights that sovereign states enjoyed under the law of nations provide a crucial backdrop for understanding which rights the States surrendered and which rights they retained by adopting the Constitution.⁴¹

³⁸ 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS* (London, J. Newberry et al. eds., 1760) [hereinafter 1 VATTEL, *THE LAW OF NATIONS*]; 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS* (London, J. Coote ed., 1759) [hereinafter 2 VATTEL, *THE LAW OF NATIONS*].

³⁹ 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) (explaining that in decisions of American courts, "in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and staggering ninety-two to Vattel"); 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.").

⁴⁰ 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 38, bk. I, § 4, at 10.

⁴¹ See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

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.⁴² In addition, nations enjoyed the right to self-protection and preservation,⁴³ including the right to be free from harm to one's citizens or subjects by another nation.⁴⁴ Nations had the right to pursue, and establish the terms of, commerce with other nations,⁴⁵ including the right to free and equal use of the high seas. Inherent in all of these rights was the right to maintain sovereign dignity and equality with and among other nations,⁴⁶ such as the right to have one's judgments respected by other nations.⁴⁷ 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."⁴⁸

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 each other. "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."⁴⁹ Accordingly, each nation enjoyed the right of embassy—to send and receive ambassadors and other public ministers.⁵⁰ 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."⁵¹ Thus, "[w]ho ever 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."⁵²

In conducting diplomacy, nations enjoyed the right to make treaties and enter into other public conventions with each other⁵³ in accordance with the procedural requirements of domestic law.⁵⁴ Nations used treaties both to adjust and to enforce their rights under the law of nations. When diplomacy failed to redress one nation's violation of another's rights under the law of nations, the offended nation enjoyed the right to pursue various

⁴² 1 Vattel, *THE LAW OF NATIONS*, *supra* note 38, bk. II, §§ 79-98, at 146-52.

⁴³ *Id.*, bk. II, § 1-20, at 120-27.

⁴⁴ *Id.*, bk. II, §§ 71-78, at 144-46.

⁴⁵ *Id.*, bk. II, §§ 21-34, at 128-32.

⁴⁶ *Id.*, bk. II, §§ 35-48, at 133-37.

⁴⁷ *Id.*, bk. II, § 84, at 147-48.

⁴⁸ *Id.*, bk. II, §§ 49, at 137.

⁴⁹ 2 Vattel, *THE LAW OF NATIONS*, *supra* note 38, bk. IV, § 55, at 132.

⁵⁰ *Id.*, bk. IV, § 55-79, at 132-41.

⁵¹ *Id.*, bk. IV, § 81, at 142.

⁵² *Id.*

⁵³ 1 Vattel, *THE LAW OF NATIONS*, *supra* note 38, bk. II, §§ 152-217, at 171-202.

⁵⁴ *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.").

means of redress, including retortion and reprisals.⁵⁵ 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 offender. Vattel extensively addressed the rights of nations to declare war, conduct war, and maintain neutrality in the wars of others.⁵⁶ As discussed in Part III, the American States gave up some, but not all, of their sovereign rights in the Constitution.

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 nations. These rights are crucial to evaluating several of the Supreme Court's most prominent federalism doctrines, including state sovereign immunity, the anti-commandeering doctrine, and the equal sovereignty of the States—as Part IV discusses.

A basic 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.”⁵⁷ 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.”⁵⁸ Given this right, “[i]t 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.”⁵⁹ Vattel characterized a state's right to non-interference in its governance as its “most precious” right. “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.”⁶⁰

⁵⁵ *Id.*, bk. II, §§ 341-42, at 249.

⁵⁶ 2 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. III.

⁵⁷ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. I, § 4, at 10.

⁵⁸ 2 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. II, § 54, at 138.

⁵⁹ *Id.*, bk. II, § 55, at 138.

⁶⁰ *Id.*

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."⁶¹ Accordingly, he described various objects subject to regulation by a sovereign's governing authority, free from interference by other nations. Overall, "[t]he 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 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."⁶² In sum, a state had authority, free from interference by other nations, (1) to provide for the necessities of the nation,⁶³ (2) to ensure its happiness,⁶⁴ and (3) to fortify itself against external attacks.⁶⁵

Because the right of self-governance was foundational, a sovereign state had the right to oppose any interference with this right through whatever means necessary. For this reason, Vattel characterized the right to self-government as a "perfect right," the violation of which gave the offended nation just cause to protect the right through the use of force. 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."⁶⁶

As discussed in Part IV, the right of sovereign states to govern themselves provides crucial background for understanding the constitutional

⁶¹ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, intro., § 1, at 1.

⁶² *Id.*, bk. I, § 72, at 35.

⁶³ 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.

⁶⁴ The second object of government, as described by Vattel, is to ensure the happiness of the people. "[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." *Id.*, bk. I, § 110, at 47. Toward this end, Vattel explained, the government should 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, § 125-57, at 54-71; and establish and enforce good laws in service of justice, *id.*, bk. I, § 158-76, 71-79—among other objects.

⁶⁵ The third object of government described by Vattel was fortify itself from external attacks. "One of the ends of political society is to defend itself, by means of its union from all insults or violence from without." *Id.*, bk. I, § 177, at 79. 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, §§ 177-82, 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.

⁶⁶ *Id.* bk. II, § 57, at 140.

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 the right to govern themselves free of these kinds of outside interference. Unless they clearly and expressly surrendered this right in the Constitution, the "States" referred to in the Constitution necessarily retained it. Judicial doctrines recognizing state sovereign immunity and prohibiting federal commandeering of 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,⁶⁷ 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.⁶⁸

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

⁶⁷ Compare Hidemi Suganami, *Grotius and International Equality*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS (Bull et al., eds 1992) (arguing that Grotius' work is consistent with the equality of states); with Benedict Kingsbury, *A Groatian 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").

⁶⁸ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, intro., § 18, at 6. 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 175 (Nugent trans., Boston, Joseph Bumstead, 4th ed. rev. and corrected 1792) (1747 & 1751).

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 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.⁶⁹

In short, “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.”⁷⁰ One nation would violate another’s equality of right by claiming a superiority of rights or a “pre-eminence of rank” over it⁷¹ or refusing to show appropriate respect for its rights.⁷²

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 of all sovereign states. Under the law of nations, states could surrender this aspect of their sovereignty only by a clear surrender in a binding legal instrument. By employing the term of art “States,” the Constitution necessarily recognized the equal sovereignty of the American States. Thus, as discussed in Part IV, the relevant inquiry is not whether the Constitution contains a provision expressly conferring equal sovereignty on the States, but whether the Constitution contains any provision expressly compromising the equal sovereignty of the States.

⁶⁹ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, intro., §§ 19-20, at 6.

⁷⁰ *Id.*, bk. II, § 36, at 133.

⁷¹ *Id.*, bk. II, § 37, at 133.

⁷² *Id.*, bk. II, § 47, at 136.

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. If a legal instrument were misinterpreted to deny a state its rights under the law of nations, the offended state might retaliate for any violation of its rights, including by waging war. To avoid such misunderstandings, the law of nations recognized a set of rules to govern the interpretation of documents purporting to alienate sovereign rights. These rules provide important background context for understanding the sovereign rights of American States—and the extent to which they relinquished such rights—in 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 for interpreting treaties. As he explained, however, most of the rules were not limited to treaties, but rather applied to “concessions, conventions, and treaties, and . . . all contracts as well as . . . laws.”⁷³ Vattel recognized that established rules of interpretation were necessary to prevent a party from taking advantage of the imperfections of language.⁷⁴ 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) indeterminate legal provisions should not be interpreted to alter sovereign rights in favor of one party at the expense of the other if at all possible. These rules enabled states to enter into agreements adjusting their sovereign rights while reducing the chance of misunderstandings regarding such rights. The founders were well versed in the law of nations and reasonably would have expected these rules to govern the surrender of sovereign rights by the American “States” in the Constitution.

⁷³ *Id.* bk. II, § 262, at 215.

⁷⁴ 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 mean 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.” ⁷⁴ *Id.*, bk. II, § 262, at 215-16.

1. The Natural Meaning of Clear and Precise Provisions

Vattel's first rule 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.⁷⁵

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 must naturally have understood, when the act was prepared and accepted."⁷⁶ One such rule was that language generally should be understood in 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."⁷⁷ Words, he explained, are "spoken according to custom."⁷⁸

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.⁷⁹

Vattel described several other specific rules of interpretation, including that technical rules should receive their technical meaning,⁸⁰ that figurative

⁷⁵ *Id.*, bk. II, § 263, at 216.

⁷⁶ *Id.*, bk. II, § 268, at 217 (emphasis omitted).

⁷⁷ *Id.*, bk. II, § 271, at 219 (emphasis omitted). See also 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO bk. V, ch. 12, § 3, at 794 (C.H. Oldfather & W.A. Oldfather trans., Clarendon ed. 1934) (1688) ("About words the 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, which is the final authority and is the law and norm of speech."); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 353 (London, W. Innys, et al. 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 . . .").

⁷⁸ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. II, § 271, at 219.

⁷⁹ *Id.*, bk. II, § 272, at 219.

⁸⁰ *Id.*, bk. II, § 276, at 220. See also PUFENDORF, *supra* note 77, 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."); GROTIUS, *supra* note 77, 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 . . .").

expressions should receive their figurative sense,⁸¹ and that interpretations that lead to absurdity should be rejected.⁸²

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 interpretive rules, 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 divesting 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, then the parties were not to interpret it as 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.⁸³

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 clear and explicit.

Accordingly, Vattel distinguished those provisions of legal instruments that were plain, clear, and determinate from those that were vague, unclear, or indeterminate. Vattel reiterated that “when 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

⁸¹ 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 38, bk. II, § 276, at 220.

⁸² *Id.*, bk. II, § 282, at 222.

⁸³ *Id.*, bk. II, § 57, at 140.

interpretation, or any comment.”⁸⁴ He observed, however, that “ideas” and “language” are not always “exactly determined.”⁸⁵ 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.⁸⁶

In this regard, Vattel drew a sharp distinction between indeterminate provisions relating to things that are “favorable” and indeterminate provisions relating to things that are “odious.”⁸⁷ Vattel did not use these terms in the sense of good or bad in the abstract. Rather, he used “favorable” 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 the other. A “favorable” thing “tends to the common advantage in conventions, or that has a tendency to place the contracting powers on an equality.”⁸⁸ An “odious” thing is one that “contains a penalty,” “tends to render an act null, and without effect, either in whole or in part, and consequently every thing that introduces any change in the things agreed upon,” or “tends to change the present state of things.”⁸⁹

In Vattel’s view, when an indeterminate provision of an act or treaty relates to “favorable” things, “we ought to give the terms all the extent they are capable of in common use.”⁹⁰ On the other hand, when an indeterminate provision of an act or treaty relates to “odious” things, “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.”⁹¹

⁸⁴ *Id.*, bk. II, § 300, at 232.

⁸⁵ *Id.*, bk. II, § 299, at 231.

⁸⁶ *Id.*, bk. II, § 300, at 232 (emphasis added).

⁸⁷ *Id.*

⁸⁸ *Id.*, bk. II, § 301, at 232.

⁸⁹ *Id.* The distinction between “favorable” and “odious” terms had long use among writers on the law of nations. See PUFENDORF, *supra* note 77, bk. 5, ch. 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”); GROTIUS, *supra* note 77, 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”).

⁹⁰ 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. II, § 307, at 234 (emphasis omitted).

⁹¹ *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 77, bk. 5, ch. 12, at 806. On the other hand, in odious

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. Unless a legal instrument surrendered such a right in clear and precise terms, it was to be interpreted not to alter the pre-existing right. 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.⁹²

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

II. STATE SOVEREIGNTY UNDER THE ARTICLES OF CONFEDERATION

State sovereignty in America began with the Declaration of Independence. Because of their 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. 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 that accompanied that status under the law of nations.

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 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 77, at 357-58.

⁹² 1 VATTEL, THE LAW OF NATIONS, *supra* note 38, bk. II, § 305, at 233-34.

During the war, the States unanimously signed onto the Articles of Confederation. This document was essentially a treaty among the newly free and independent States to enhance their collective strength and security. When the war ended, the States increasingly found the Articles to be ineffective to meet their economic and security needs, in part because the member States retained too much sovereignty and often ignored Congress's commands with impunity. Accordingly, by 1789, twelve of the original thirteen States had abandoned the Articles of Confederation by ratifying an entirely new Constitution to replace them, and Rhode Island did the same by 1790. This Part examines the sovereignty enjoyed by the "States" under the Declaration of Independence and the Articles of Confederation, and Part III will examine their sovereignty under the Constitution.

A. *The Declaration of Independence*

After reciting "a history of repeated injuries and usurpations" by King George III against the colonies,⁹³ the Declaration of Independence asserted that the colonies were "free and independent states":

these 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 all other acts and things which independent states may of right do.⁹⁴

This document asserted that the American States, being free and independent, 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. 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

⁹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁹⁴ *Id.* para. 32.

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”).⁹⁵

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.

There has been disagreement about whether the American States became “free and independent States” individually or collectively when they originally broke free from Great Britain.⁹⁶ In other words, there has been disagreement about whether the States were merely free and independent of Great Britain collectively, or free and independent of each other as well. This is an interesting theoretical question, and there have been thoughtful arguments on both sides.⁹⁷ 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 by giving their individual consent. 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. The States regarded a treaty or compact surrendering portions of their individual sovereignty to a central authority to be necessary

⁹⁵ Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 754 (2012) [hereinafter “*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 (1999). In contrast, 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). 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.

⁹⁶ Compare 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 56-57 (Jonathan Elliot ed., 1888) (hereinafter “ELLIOT’S DEBATES”) (“It was argued by Wilson, Robert R. Livingston, E. Rutledge, Dickinson, and others,— . . . That, 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”); with Jack N. Rakove, *American Federalism: Was There an Original Understanding*, in THE TENTH AMENDMENT AND STATE SOVEREIGNTY 107, 110 (Mark R. Killenbeck, ed. 2002) (“[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.”).

⁹⁷ See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1576 (2002) (stating that 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 CAL. 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, 1040 (2002) (stating that “the founding generation . . . perceived the States as nation-states in some respects and accordingly drafted constitutional text to incorporate certain useful international law rules”).

to secure their mutual security 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 each other to be separate sovereigns with complete authority to accept or reject the plan under consideration. Moreover, the States assumed that any State that did not ratify the Articles would not be bound thereby.⁹⁸

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.”⁹⁹ This provision made clear, if it was not before, that each State was a separate sovereign. As discussed in the next section, any ambiguity over whether the States possessed individual or collective sovereignty following the Declaration of Independence was settled by the Articles of Confederation.

B. *The Articles of Confederation*

The States realized immediately that they needed 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. 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.”¹⁰⁰ By adopting the Articles, each State expressly

⁹⁸ The same assumption carried through to the drafting and ratification of the Constitution. The States sent delegates to the Philadelphia Convention of 1787 and each State had one vote at the Convention. Following the Philadelphia Convention, each State held a convention of its own to decide whether the State would ratify the new plan. Under Article VII, only those States that ratified the Constitution were bound thereby. Thus, both before and after the adoption of the Constitution, each State possessed individual sovereignty including the power to accept or reject proposals to form a federal union. See *McCullough 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.”).

⁹⁹ ARTICLES OF CONFEDERATION OF 1777, art. II.

¹⁰⁰ For examples of contemporaneous understandings of the Articles of Confederation as a confederation among individual states see 1 ELLIOT'S DEBATES, *supra* note 96, at 75 (Statement of Dr. Witherspoon) (“That the colonies should, in fact, be considered as individuals; and that, as such, in all disputes they should have an equal vote; that they are now collected as individuals making a bargain with each other, and, of course, had a right to vote as individuals.”); *id.* at 76 (Statement of John Adams) (“It has been said we are independent individuals, making a bargain together. The question is not what we are now, but what we ought to be when our bargain shall be made. The confederacy is to make us one individual only; it is to form us, like separate parcels of metal, into one common mass. We shall no longer retain our separate individuality, but become a single individual, as to all questions submitted to the confederacy.”). 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

surrendered some of its sovereign rights, but retained all of its remaining sovereignty.

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. 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."¹⁰¹ The Articles' reference to "each 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 fact that each State appointed its own delegates to Congress, and each State had one vote in that body (consistent with each State's right to sovereign equality with all others under the law of nations).

In light of these circumstances, Gordon Wood has 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.¹⁰²

referred to Congress. See *id.* at 78 (Statement of James Wilson) ("It is strange that annexing the name of 'state' to ten thousand men, should give them an equal right with forty thousand. This must be the effect of magic, not of reason. As to those matters which are referred to Congress, we are not so many states; we are one large state.").

¹⁰¹ ARTICLES OF CONFEDERATION OF 1777, art. II.

¹⁰² Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724-25 (2011). On the other hand, Jack 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, *supra* note 95, 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."

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, no one suggested that it would have been bound by the Articles or that its sovereignty would have been otherwise compromised. 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”¹⁰³—all recognized sovereign powers in “external” relations under the law of nations.¹⁰⁴ 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.”¹⁰⁵

The Articles also 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.¹⁰⁶ 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.”¹⁰⁷ In practice, however, the States frequently violated this provision by failing to comply fully with Congress’s directives, and 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,¹⁰⁸ the power to foster and protect commerce with other

Rakove, *supra* note 96, at 111. Regardless of whether the founders agonized over the location of sovereignty in a federal system, it is beyond question that the Articles delegated limited powers to the Confederation Congress and took care to reserve to the states any powers not expressly delegated.

¹⁰³ *Id.* art. IX.

¹⁰⁴ *See supra* notes 42-56, and accompanying text.

¹⁰⁵ ARTICLES OF CONFEDERATION OF 1777, art. IX.

¹⁰⁶ *Id.*

¹⁰⁷ ARTICLES OF CONFEDERATION OF 1777, art. XIII.

¹⁰⁸ At the start of the Federal Convention, Edmund Randolph enumerated defects in the Articles of Confederation, including “that the confederation produced no security agai[nst] foreign invasion; congress not

nations,¹⁰⁹ and the power to resolve disputes between and among the States.¹¹⁰ Second, as noted, Congress lacked the power to enforce even its limited substantive powers because it had no means of enforcing its commands against the States. Thus, during the War of Independence, States violated the Articles by failing to supply all of the men and revenue requisitioned by Congress. After the War, States complied even less frequently with requisitions, effectively leaving the central government with no source of funds.¹¹¹

As Hamilton explained in *The Federalist*, a “palpable defect 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 by any other constitutional mode.”¹¹² 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.”¹¹³

Prior to the Constitutional Convention, James Madison served on several commissions charged with proposing amendments to make the Articles more effective. Madison consistently favored amending the Articles to authorize Congress to use military force to coerce States to comply with its commands. 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:

It is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and

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.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1966) [hereinafter FARRAND’S RECORDS].

¹⁰⁹ 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—counteraction of the commercial regulations of other nations—pushing of commerce ad libitum . . .” *Id.*

¹¹⁰ Under the Articles, Randolph observed, “the federal government could not check the quarrels between states, nor a rebellion in any not have constitutional power.” *Id.*

¹¹¹ See Vices of the Political System of the United States (Apr. 1787), in 2 THE WRITINGS OF JAMES MADISON 361, 364 (Gaillard Hunt ed., 1900) (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”) [hereinafter MADISON WRITINGS].

¹¹² THE FEDERALIST NO. 21, at 129 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹¹³ *Id.* In part, this defect resulted from the lack of a judiciary of the United States. See THE FEDERALIST NO. 22, *supra* note 112, at 143 (Alexander Hamilton) (“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.”).

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 & the preservation of the Union.¹¹⁴

The Philadelphia Convention began in May 1787 as planned, but the delegates quickly abandoned the original goal 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. STATE SOVEREIGNTY UNDER THE CONSTITUTION

The Constitutional Convention crafted a plan of government that took a different approach than the Articles of Confederation to federal power and state sovereignty. In the Constitution, the States surrendered both more sovereignty overall than they had in the Articles, but they also chose to retain certain rights they had previously surrendered in the Articles. They surrendered more of their sovereignty by giving the United States government more regulatory powers than the Confederation Congress had enjoyed, including by providing the federal government with new means to exercise those powers effectively. At the same time, the States surrendered less of their sovereignty by withholding power from Congress to command the States themselves. Rather than authorizing Congress to order the States to take certain actions (as the Articles had), the Constitution gave Congress direct power to regulate individuals—a power withheld under the Articles.¹¹⁵ This 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 fundamental 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.¹¹⁶ The Constitution's success in

¹¹⁴ Resolution of Confederation Congress (February 21, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC].

¹¹⁵ The only arguable exceptions were the Citizen-State diversity provisions of Article III, discussed in Part IV.

¹¹⁶ Of course, the Constitution contains several built-in political and procedural safeguards of federalism that frequently render the federal government incapable of exercising its enumerated powers over individuals. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

this regard, however, did not rest on the wholesale abolition of state sovereignty. To be sure, the States surrendered significant aspects of their sovereignty by conferring on the federal government new regulatory powers and new means for exercising and enforcing those powers.¹¹⁷ Under background principles of the law of nations governing the surrender of sovereign rights, however, the States necessarily retained all sovereign rights that they did not clearly and expressly surrender in the Constitution.

A. *Abandoning the Articles of Confederation*

Congress charged the Philadelphia Convention with revising the Articles of Confederation, and it is commonly acknowledged that the Convention exceeded its mandate by abandoning the Articles in favor of an entirely new Constitution. Indeed, some maintain that the States' 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 afterwards confirmed by the legislatures of every State."¹¹⁸ The States arguably violated this provision both by using a convention to propose that the Constitution be adopted in place of the Articles, and by adopting this change through state ratifying conventions rather than state legislatures.

Scholars have long debated whether the States' adoption of the Constitution violated the Articles of Confederation,¹¹⁹ but the answer is of little practical importance. Because all thirteen States ratified the Constitution, each State exercised its sovereign prerogative to abandon the Articles in favor the Constitution.¹²⁰ Arguably, all States were free to disregard the Articles by 1787 because many, if not all, States had violated its terms by failing to comply with all of Congress's commands. Under the law of nations, when one State violated a compact or treaty, the other

¹¹⁷ See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

¹¹⁸ ARTICLES OF CONFEDERATION OF 1777, art. XIII.

¹¹⁹ Compare Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (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 (1988) (arguing that the States had a legal right to adopt the Constitution because of repeated violations of the Articles).

¹²⁰ It is true that the States altered their compact through state ratifying conventions (rather than state legislatures as specified in the Articles), but the founders widely understood state legislatures merely to be exercising powers delegated by the people—the ultimate source of state sovereignty. In any event, the States' repeated violations of the Articles released them from their obligation to comply with that instrument. See *infra* notes 121–122, and accompanying text.

participating States were released from their obligations and free to withdraw.¹²¹ 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.¹²²

This background helps to explain why the Convention’s proposal to abandon the Articles did not face greater opposition 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. 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.”¹²³ Under this provision, the Constitution would take effect only if at least nine States ratified it, and 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 era, then this provision would have made no sense. Thus, Article VII supports the conclusion that the founders understood each State to possess full sovereignty both to abandon the Articles and to accept or reject the new Constitution.¹²⁴

This background dispels the notion that the States had somehow irrevocably compromised their individual sovereignty by 1787. Once it became clear that the Articles of Confederation could no longer serve their intended function, the States considered themselves free to consider alternative proposals as independent sovereigns. The 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

¹²¹ See 1 VATTTEL, *THE LAW OF NATIONS*, *supra* note 38, bk. II, § 200, at 214 (explaining that the breach of a treaty gives the offended party the option to cancel the treaty).

¹²² Amar, *supra* note 119, at 1048 (footnotes omitted).

¹²³ U.S. CONST. art. VII.

¹²⁴ See *supra* note 98.

debate, the large and small states alike considered themselves at liberty to form new alliances with each other or 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.”¹²⁵ 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.¹²⁶ Large-State delegates James Madison (Virginia),¹²⁷ Gouveneur Morris (Pennsylvania),¹²⁸ and James Wilson (Pennsylvania)¹²⁹ strongly opposed this proposal as involving no real compromise. Luther Martin, representing 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.”¹³⁰ The small States ultimately prevailed with the Convention voting five States to four in favor of the proposals.¹³¹

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 unimpeded by their previous commitments under the Articles of Confederation. If the “States” that met in Philadelphia lacked full sovereignty to pursue all options, then these discussions made no sense. 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

¹²⁵ James Madison, *Notes on the Constitutional Convention* (June 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

¹²⁶ See James Madison, *Notes on the Constitutional Convention* (July 2, 1787), in 1 FARRAND'S RECORDS, *supra* note 125, at 524.

¹²⁷ *Id.* at 527.

¹²⁸ *Id.* at 551.

¹²⁹ James Madison, *Notes on the Constitutional Convention* (July 14, 1787), in 2 FARRAND'S RECORDS, *supra* note 125, at 4.

¹³⁰ *Id.*

¹³¹ See James Madison, *Notes on the Constitutional Convention* (July 16, 1787), in 2 FARRAND'S RECORDS, *supra* note 125, at 15.

any other American State.¹³² The debate over equal suffrage reveals that the States at the Convention did not consider themselves bound by these—or any other—restrictions on their individual sovereignty.

Indeed, Article VII underscores this understanding by providing that the Constitution would be binding only upon those “States so ratifying the Same.”¹³³ 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 confirms that the Constitution used the term to describe free and independent States with full sovereignty. Of course, the proposed Constitution also contained numerous clear and express surrenders of sovereign rights that would necessarily diminish the sovereignty of those States that elected to ratify it, but those surrenders occurred by virtue of ratification rather than any pre-ratification surrender. 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 pre-existing sovereignty.¹³⁴ Thus, following ratification, each “State” possessed the rights of free and independent States minus only those rights that it had clearly and expressly given up in the Constitution.

This conclusion is not contradicted by 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.”¹³⁵ At first glance, popular sovereignty might seem inconsistent with the sovereignty of the individual States. If “the People of the United States” ordained and established the Constitution, then why did Article VII permit each State to opt out by failing to ratify the instrument? Any apparent conflict between the Preamble and Article VII disappears once one recalls that prior to the Civil War “Americans understood ‘the United States’ to be a plural noun and used it to refer collectively to the several

¹³² ARTICLES OF CONFEDERATION OF 1777, art. VI.

¹³³ U.S. CONST. art. VII.

¹³⁴ This approach to sovereignty was consistent with Vattel’s writings. See ALISON L. LECROIX, *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.’”).

¹³⁵ U.S. CONST. pmbl.

states.”¹³⁶ Thus, at the founding, “the United States” were a “they,” not an “it.”¹³⁷

James Madison shared this view. In *The Federalist No. 39*, Madison reconciled any tension between the relevant provisions as follows:

it 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.¹³⁸

Madison made clear that “the people of the United States” referred not to one undifferentiated mass, but to the people of each independent State ratifying 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.”¹³⁹ Rather, “[e]ach State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.”¹⁴⁰ The actual ratification process confirmed Madison’s understanding. Rather than participating in a national convention, each State convened a distinct convention (as required by Article VII) for the purpose of ratifying or rejecting the proposed Constitution on its own behalf.¹⁴¹

¹³⁶ Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though it is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1929 (2018).

¹³⁷ This usage persisted at least through the Civil War Amendments. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to *their* jurisdiction.” (emphasis added)).

¹³⁸ THE FEDERALIST NO. 39, *supra* note 112, at 253-54 (James Madison)

¹³⁹ *Id.* at 254.

¹⁴⁰ *Id.* Even if one believed (counterfactually) that the Constitution was adopted by the undifferentiated “people of the United States,” the Constitution would still be subject to the same rule of interpretation—namely, the instrument could alienate the pre-existing sovereign rights of the States only through clear and express terms. Under the law of nations, no legal instrument would be read to interfere with the sovereign rights of a state unless the instrument sought to do so in clear and express terms. The same rules of interpretation applied to an involuntary divestiture of sovereign rights as applied to a voluntary one, and thus the same rules would apply to the interpretation of the Constitution even if it had been forced upon the States by an undifferentiated popular majority of the United States.

¹⁴¹ Like Article VII, Article V of the Constitution permits each State to decide for itself whether to ratify new constitutional proposals. Unlike Article VII, however, Article V permits a supermajority of States to bind nonconsenting States. As Henry Monaghan has explained, however, 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).

In sum, the Constitution did not use the term “State” in a new or unknown sense. By continuing to use the term “States,” the Constitution referred to the sovereign and independent American States described in the Declaration of Independence and the Articles of Confederation. Such States could alienate their rights under the law of nations only if a they surrendered them in a binding legal instrument through clear and express terms.

B. *Residual State Sovereignty*

Of course, the law of nations allowed free and independent States to surrender parts of their sovereignty voluntarily, and the American States did so 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.

Not surprisingly, the predominant understanding of the Constitution during its drafting and ratification was that all powers not delegated to the federal government were necessarily reserved to the States. Initially at least, this understanding was not the product of the Tenth Amendment. Rather, this understanding pre-dated the Amendment and stemmed from a relatively straightforward application of principles drawn from the law of nations. As discussed, sovereign states could alienate aspects of their sovereignty only by making clear and express surrenders in an appropriate instrument. Accordingly, the States necessarily retained all aspects of their sovereignty that they did not expressly surrender in the Constitution. The Tenth Amendment merely confirmed—rather than created—this understanding of state sovereignty.¹⁴²

George Washington’s letter of September 17, 1787, transmitting the Constitution to Congress, reflects this understanding. He described the new charter as an allocation of particular sovereign rights to the United States

Accordingly, Professor Monaghan rejected the claim, made by 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 (1994)

¹⁴² As many commentators have observed, the Tenth Amendment differed from a comparable provision of the Articles of Confederation by omitting the word “expressly.” 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 1777, art. II. By contrast, the Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor 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 meaning of the term “States” in the Constitution. The primary effect of this omission was to allow Congress to employ incidental means to execute its enumerated powers under the Necessary and Proper Clause. The precise scope of Congress’s incidental powers remains contested, but here again the law of nations provides some guidance. See *infra* Part III.D.4.

government, and a reservation of the remaining “rights of independent sovereignty” to the States:

It is obviously impracticable, in the federal 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 circumstance, 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 increased by a difference among the several states as to their situation, extent, habits, and particular interests¹⁴³

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.¹⁴⁴ As Madison famously explained in *The 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 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.¹⁴⁵

¹⁴³ 1 ELLIOT’S DEBATES, *supra* note 96, at 17.

¹⁴⁴ As Jack Rakove has explained, “[i]f Anti-Federalists could be polled, then, as to whether they thought that the original Constitution of 1787 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 of the Constitution was that it was a formula for consolidation, perhaps immediately, certainly over time.” Rakove, *supra* note 96, at 122.

¹⁴⁵ THE FEDERALIST NO. 45, *supra* note 112, at 313 (James Madison). Madison repeated this description of the federal structure in others papers. For example, Madison explained in *The 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

Hamilton provided a similar description of residual state sovereignty 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.¹⁴⁶

Hamilton denied 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.”¹⁴⁷ 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 favor of the Union, remain with them in full vigor.”¹⁴⁸ Applying this rule, he concluded: “A recurrence to the principles there established will satisfy us, that there is no color 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.”¹⁴⁹

In explaining the Constitution in these terms, Hamilton and Madison relied on background 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 clearly and expressly. In accordance with these principles, they explained that the federal

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 objections, 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, *supra* note 112, at 86 (James Madison).

¹⁴⁶ THE FEDERALIST NO. 81, *supra* note 112, at 548-49 (Alexander Hamilton).

¹⁴⁷ *Id.* at 549

¹⁴⁸ THE FEDERALIST NO. 32, *supra* note 112, at 203 (Alexander Hamilton) (emphasis added).

¹⁴⁹ THE FEDERALIST NO. 81, *supra* note 112, at 549 (Alexander Hamilton).

government would possess only those sovereign powers the States clearly and expressly surrendered in the Constitution, and the States would necessarily retain all other rights and powers not surrendered. In *The Federalist No. 32*, Hamilton invoked this principle in describing the effect of the delegation of powers to the federal government upon the sovereign powers of the States. He explained that the Constitution's allocation of powers to the federal government did not divest the States of any pre-existing sovereign rights except where its language did so in express terms. 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 favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.¹⁵⁰

In this passage, Hamilton understood the Constitution not to divest the States of sovereign power except (1) where it did so in express terms, or (2) where a state power “would be absolutely and totally repugnant” to the powers expressly granted to the federal government by the Constitution.¹⁵¹

¹⁵⁰ THE FEDERALIST NO. 32, *supra* note 112, at 200, 202-03 (Alexander Hamilton) (first emphasis added).

¹⁵¹ As 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.

This understanding tracks Vattel’s approach to the interpretation of legal instruments that sought to alter sovereign rights and powers.¹⁵²

A threshold inquiry at the Constitution 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. At the outset of the Convention, James Madison favored giving Congress power both to commandeer and to coerce the States, as evidenced by the Virginia Plan. The Plan initially proposed that 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.”¹⁵³ In addition, to make Congress’s power to commandeer States effective, the Virginia Plan also 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.”¹⁵⁴

The proposal to allow Congress to use military force against States raised alarms among the delegates. For example, George Mason argued that coercion and punishment could not be used against the States collectively.¹⁵⁵ For these reasons, Mason argued that “such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required it.”¹⁵⁶ 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.”¹⁵⁷ 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.”¹⁵⁸ Ultimately, the Convention decided to abandon Congress’s power to command States in favor of giving Congress

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).

¹⁵² See *id.* at 1639-40 (discussing the relationship between early arguments over constitutional interpretation and rules of interpretation under the law of nations).

¹⁵³ James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 21.

¹⁵⁴ *Id.*

¹⁵⁵ James Madison, Notes on the Constitutional Convention (May 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 33, 34.

¹⁵⁶ *Id.*

¹⁵⁷ James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 47, 54 (brackets in original) (footnote omitted).

¹⁵⁸ James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 47, 54 (brackets in original) (footnote omitted).

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. 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.”¹⁵⁹ 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].”¹⁶⁰

The delegates at the Convention viewed the question of how the federal government could most effectively exercise its powers as a binary choice: either authorize Congress to command States and use military force to coerce their compliance with such commands, or adopt an entirely new Constitution in which Congress would regulate individuals instead of States. In choosing the latter course, the founders chose not to grant Congress power to command or coerce the States in the new Constitution. As discussed in Part IV, by failing to authorize Congress to command or coerce States, the States surrendered less of their sovereignty than they had under the Articles of Confederation. On the other hand, the States surrendered—for the first time—a fundamental aspect of their 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 the States to carry out its commands. As discussed, the Constitution took an entirely different approach. The Constitution gave Congress power to regulate individuals directly rather than power to regulate through commands issued to the States. In this way, the States expressly surrendered a significant aspect of their sovereignty in the Constitution that they had not surrendered in the Articles of Confederation, while simultaneously withholding congressional power to command and coerce States. Thus, the Constitution divested the States of their pre-existing sovereign rights in two important ways: (1) by granting the federal

¹⁵⁹ James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 132, 133.

¹⁶⁰ James Madison, Notes on the Constitutional Convention (June 8, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 164, 165 (footnote omitted). This debate is described in greater detail in Part IV.B.

government new and important regulatory and foreign relations powers; and (2) by authorizing the federal government to exercise its regulatory powers directly upon individuals within the territorial jurisdiction of the States.

First, the Constitution not only transferred many of the 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 *The 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.”¹⁶¹ 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.¹⁶²

Specifically, the Constitution gave Congress and the President powers to conduct diplomatic relations with other nations, including power to the President to “to make Treaties” subject to concurrence of two-thirds of the Senate,¹⁶³ to “appoint Ambassadors, other public Ministers and Consuls” subject consent of a majority of the Senate,¹⁶⁴ and power to “receive Ambassadors and other public Ministers.”¹⁶⁵ The Constitution also empowered Congress “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”¹⁶⁶ and “[t]o raise and support Armies . . . and [t]o provide and maintain a Navy”¹⁶⁷; and assigned responsibility to the President to serve as “Commander in Chief” of the armed forces.¹⁶⁸ In addition, 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.”¹⁶⁹

¹⁶¹ THE FEDERALIST NO. 23, *supra* note 112, at 146-47 (Alexander Hamilton).

¹⁶² For more extensive discussions of these powers, see ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE CONSTITUTION* 50-67 (2017); Bellia & Clark, *The Law of Nations as Constitutional Law*, *supra* note 95, at 764-779.

¹⁶³ U.S. CONST. art. II, § 2.

¹⁶⁴ *Id.*

¹⁶⁵ U.S. CONST. art. II, § 3.

¹⁶⁶ U.S. CONST. art. I, § 8.

¹⁶⁷ *Id.*

¹⁶⁸ U.S. CONST. art. II, § 2.

¹⁶⁹ U.S. CONST. art. I, § 8.

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.”¹⁷⁰ 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.”¹⁷¹ 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.”¹⁷² In granting the federal government these new powers, the States ceded more sovereignty than they had in the Articles of Confederation.

The second respect in which the states transferred more sovereignty under the Constitution than they had under the Articles was by giving Congress novel power to regulate individuals within the territory of the States. The Articles of Confederation contained no such surrender of this aspect of state sovereignty. Under the law of nations, a free and independent state had exclusive territorial sovereignty to govern individuals within its 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. 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 their most significant surrender of sovereignty in the Constitution.

Once the Constitutional Convention made the fundamental decision to shift from congressional regulation of States to congressional regulation of 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 means of enforcement). Under the Articles of Confederation, the federal government consisted primarily of a Congress of the States, with no real executive or

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Vattel had described both of these powers as sovereign powers belonging to states under the law of nations. *See supra* note 64, and accompanying text.

¹⁷² U.S. CONST. art. I, § 8.

judicial powers of its own.¹⁷³ Within this structure, Congress had to rely on state legislative, executive, and judicial officers to carry out its commands. 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 permit the federal government and the States to exercise concurrent authority over the same individuals in certain circumstances. The States amplified the significance of this concession 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. When conflicts arose, the Supremacy Clause required state courts to apply valid federal laws over state law. And the Constitution gave federal courts corresponding power to uphold the supremacy of federal law pursuant to the Arising Under Clause of Article III.

D. *The Powers Surrendered by the States*

In allocating powers to the federal government in the Constitution, the States surrendered or compromised portions of their sovereignty by making four kinds of delegations of power to the federal government: (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 not accompanied by express prohibitions on the States; and (4) delegation of incidental powers to the federal government. The fourth category is the most controversial and is the one that has given rise to many of the Supreme Court's most prominent federalism decisions. This section will briefly describe each of these four ways in which the States surrendered portions of their sovereignty in the Constitution. Part IV will discuss three important federalism doctrines that relate to the fourth category.

As explained, Alexander Hamilton discussed in *The Federalist No. 32* the first three ways in which states surrendered sovereignty in the Constitution. In his discussion, he relied on 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*.¹⁷⁴ Some surrenders were complete in that they granted the federal government *exclusive* power to regulate certain matters. Other

¹⁷³ 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 1777 art. IX, § 1.

¹⁷⁴ See *supra* note 150, and accompanying text.

surrenders were partial in that they granted the federal government *concurrent* power to regulate certain matters. In either case, Hamilton assured opponents of ratification that the Constitution would not divest the States of any aspect of their pre-existing sovereignty except when it did so (1) “in express terms,” or (2) when a state power “would be absolutely and totally repugnant” to powers that Constitution expressly allocated to the United States government.¹⁷⁵ This understanding accords with the principles Vattel described to govern the interpretation of legal instruments altering sovereign rights and powers.¹⁷⁶

1. Express Delegations of Exclusive Federal Power

The first category—express delegations of *exclusive* power to the federal government—provides a clear example of the surrender of sovereign rights by the States. 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 States, and the acceptance of Congress, become the

¹⁷⁵ THE FEDERALIST NO. 32, *supra* note 112, at 200 (Alexander Hamilton).

¹⁷⁶ It is important to note that this approach to interpretation differs from a “strict construction” approach. The rules of interpretation that Vattel described were more nuanced. 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, in 30 THE PAPERS OF THOMAS JEFFERSON 536 (Barbara B. Oberg ed., 2003) (arguing that the powers delegated to Congress in the Constitution should be strictly construed to avoid the federal government from assuming unlimited powers); 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. Note D at 155 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (arguing that the powers delegated to the federal government should be strictly construed); while others, 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, at § 411 (Lawbook Exch. 2001) (1833) (also rejecting and refuting the theory of strict construction). Over time, the conventional account goes, the ordinary meaning approach prevailed over strict constructionism. *See* Kurt Lash, *Tucker’s Rule: St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1344-45 (2006) (describing this account).

The lines of debate, however, in early constitutional interpretations were more nuanced than this story suggests. Vattel’s principles of interpretation for legal instruments allocating sovereign powers—whether they be treaties, compacts, conventions, constitutions, legislative acts, or other legal instruments—included elements of both ordinary meaning and strict construction. First, he explained that the clear and express terms of a legal instrument should be given their ordinary or natural meaning. *See supra* notes 75-82, and accompanying text. Second, he explained that terms of a legal instrument that were vague or indeterminate should be interpreted against divesting a sovereign state of its preexisting rights. *See supra* notes 83-92, and accompanying text. As we explain in this Article, early explanations of the Constitution and judicial practice more closely align with Vattel’s approach than with any categorical acceptance of either a strict construction or an ordinary meaning approach to constitutional interpretation.

Seat of the Government of the United States.”¹⁷⁷ 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.”¹⁷⁸ Through these clauses, the States gave Congress complete power—exclusive of state authority—to govern places of special significance to the federal government.

2. Express Delegations with Express Prohibitions

In the second category, the Constitution includes 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 necessarily give the federal government exclusive power to regulate the matters in question. As explained, in the realm of “external relations,” the Constitution grants the federal political branches several express powers to conduct foreign relations and decide matters of war and peace.¹⁷⁹ 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,¹⁸⁰ 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.”¹⁸¹ Likewise, the Constitution gives Congress power to “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”¹⁸² and “[t]o raise and support Armies . . . and [t]o provide and maintain a Navy”¹⁸³; and assigns responsibility to the President to serve as “Commander in Chief” of the armed forces.¹⁸⁴ Elsewhere, 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.”¹⁸⁵

The Constitution also grants the federal government express authority over certain “internal” matters while expressly prohibiting the

¹⁷⁷ U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* notes 161-170, and accompanying text.

¹⁸⁰ U.S. CONST. art. II, § 2.

¹⁸¹ U.S. CONST. art. I, § 10.

¹⁸² U.S. CONST. art. I, § 8.

¹⁸³ *Id.*

¹⁸⁴ U.S. CONST. art. II, § 2.

¹⁸⁵ U.S. CONST. art. I, § 10.

States from exercising the same authority. For example, the Constitution gives Congress the power “[t]o coin Money,”¹⁸⁶ but expressly forbids the States to do so.¹⁸⁷ Similarly, the Constitution grants Congress “power to lay and collect taxes, duties, imposts and excises,”¹⁸⁸ while simultaneously prohibiting the States from exercising the same powers in limited circumstances. Specifically, the Constitution provides 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.”¹⁸⁹

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 complete sovereignty to the federal government over the matters in question. Because they are clear and explicit, these surrenders have generated few controversies in the Supreme Court.¹⁹⁰

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 them to the States. The Supreme Court has not treated these instances in a uniform manner. On some occasions, the Court treats such delegations to the federal government as exclusive of state authority, effectively interpreting the States’ surrender of sovereignty as complete. In these cases, the Court regards the States’ exercise of the power in question to be irreconcilable with its exercise by the federal government. On other occasions, the Court treats such delegations to the federal government as non-exclusive, allowing States to continue to exercise concurrent authority over the same matters. This category of federal power presents difficult

¹⁸⁶ U.S. CONST. art. I, § 8.

¹⁸⁷ U.S. CONST. art. I, § 10.

¹⁸⁸ U.S. CONST. art. I, § 8.

¹⁸⁹ U.S. CONST. art. I, § 10.

¹⁹⁰ As the next section explains, controversies have arisen 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. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), 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. Thus, in accordance with well-established rules governing the surrender of sovereign rights under the law of nations, the Court held that the restrictions in Bill of Rights do not apply to the States.

interpretive questions, and we do not attempt to resolve them here. Rather, for present purposes, we simply describe this category and how it has been understood historically.

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 does not say they are exclusive or expressly prohibit the States from exercising the same power. For instance, Article IV grants Congress the power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹⁹¹ Nothing in the Constitution expressly prohibits the States from regulating the territories or property of the United States. By necessary implication, however, this congressional power is generally thought to be exclusive because the exercise of concurrent state authority in such cases is thought to be incompatible with federal authority. Similarly, Article II 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.”¹⁹² 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.

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.¹⁹³ Article II also gives the President the power to “receive Ambassadors and other public Ministers.”¹⁹⁴ Although the Constitution does not expressly prohibit States from appointing and receiving ambassadors, there is good reason to believe that the Supreme Court would find these federal powers to be exclusive of state authority.

First, the States have little need to send and receive ambassadors. Ambassadors represent sovereign states and enable them to conduct diplomatic relations and negotiations. The Constitution expressly disables States from making treaties, waging war, and exercising other diplomatic prerogatives, such as laying imposts or duties, issuing letters or marque and reprisal, forming alliances, or making any agreement or compact whatsoever with a foreign nation. Because all of these diplomatic

¹⁹¹ U.S. CONST. art. IV.

¹⁹² U.S. CONST. art. II, § 2, cl. 2.

¹⁹³ U.S. CONST. art. II, § 2.

¹⁹⁴ U.S. CONST. art. II, § 3.

prerogatives are allocated exclusively to the United States, the States have little need to exchange ambassadors with foreign nations.

Second, sending and receiving ambassadors is one of the primary ways in which nations have historically recognized each other's separate sovereignty and independence under the law of nations. The Supreme Court has long held that the power to recognize foreign nations is an exclusive federal power. Recognition, as 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."¹⁹⁵ States have no power to recognize foreign nations because, in the Court's view, such power would be incompatible with the Constitution's allocation of the recognition power to the federal government.¹⁹⁶

Regardless of the merits of such 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 have rested such decisions on the assumption that the States' exercise of the same powers assigned to federal officials would be fundamentally inconsistent—or irreconcilable—with their exercise by the federal government.

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 Constitution does not prevent the federal government and the States from regulating the same matters at the same time in the same territory. For example, under Article I, Congress has power "To lay and collect Taxes," to spend for "the general welfare," and "to borrow Money."¹⁹⁷ The Constitution does not expressly or by unavoidable implication prohibit States from exercising these same powers within their respective jurisdictions, and indeed the States have

¹⁹⁵ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a, p. 84 (Am. Law Inst. 1986)).

¹⁹⁶ 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 the Soviet Union. Such power is not accorded a State in our constitutional system."); *United States v. Belmont*, 301 U.S. 203, 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").

¹⁹⁷ U.S. CONST. art. I, § 8, cls. 1, 2.

continuously exercised these powers since the Constitution was adopted. Unlike the recognition power described above, the exercise of taxing and spending powers by a State is not incompatible with the exercise of the same powers by the federal government. As Hamilton explained in *The 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.”¹⁹⁸

Hamilton gave two reasons for this conclusion that accorded 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.”¹⁹⁹ 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. 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. For a legal instrument to divest a State of power by implication, 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.”²⁰⁰

¹⁹⁸ THE FEDERALIST NO. 32, *supra* note 112, at 201 (Alexander Hamilton).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* In *United States v. Nicholls*, 4 Yeates 251 (1805), the Supreme Court of Pennsylvania invoked *The 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. The question *Nichols* 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. On the constitutional question, Justice Yeates applied the same method of analysis as the Justices had in *Chisholm*, explaining 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 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 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

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

The power of taxation is indispensable to their 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.²⁰¹

Applying these principles, the Supreme Court has sometimes held that certain constitutional allocations of power to the federal government are exclusive even though the Constitution does not expressly make them exclusive or expressly prohibit States from exercising them (such as the power to recognize foreign nations). On other occasions, however, the Court has determined that certain constitutional allocations of power to the federal government (such as the power to tax) are not exclusive of state authority because concurrent authority is not incompatible with the allocation of the power in question to 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 aspects of their sovereignty in the Constitution,

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.

Id. at 258-59 (Opinion of Yeates, J.).

²⁰¹ 22 U.S. (9 Wheat.) 1, 199 (1824).

perhaps most significantly by granting Congress various enumerated 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 exercise these powers, the Constitution included the Necessary and Proper Clause, which gives Congress catch-all 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 thereof.”²⁰² In *McCulloch v. Maryland*,²⁰³ 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 collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”²⁰⁴ 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.

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 violate certain aspects of state sovereignty. For example, in an important article, John 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.”²⁰⁵ 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 anti-commandeering decision in *Printz v. United States* as the “archetype of the Court’s new structuralism.”²⁰⁶ He notes that the issue involved in the case was not whether “Congress had the power to regulate the purchase and sale of firearms,”²⁰⁷ but rather “whether Congress could do so by means of commandeering state officials to implement the law.”²⁰⁸ 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.²⁰⁹

²⁰² U.S. CONST. art. I, § 8, cl. 18.

²⁰³ 17 U.S. (4 Wheat.) 316 (1819).

²⁰⁴ *Id.* at 407.

²⁰⁵ John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014).

²⁰⁶ *Id.* at 34.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.* at 36. Although Dean 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.”

As discussed, however, mere constitutional silence gives Congress no authority to override the pre-existing sovereign rights of the States. Rather, under principles of the law of nations well known to the founders, “States” could alienate their sovereign rights only by expressly surrendering them in a formal legal instrument. Proponents of broad federal power might respond that the Necessary and Proper Clause should be considered 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.

Courts and commentators have long debated the meaning of the Necessary and Proper Clause. For example, Gary Lawson and Patricia Granger have argued that “the word ‘proper’ serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executory laws to be peculiarly within Congress’s domain or jurisdiction—that is, 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.”²¹⁰ Other scholars, however, have rejected such restrictions. For example, 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*.²¹¹

More recently, several scholars have published a book attempting to recover lost usages and meanings of the phrase “necessary and proper.”²¹² Robert Natelson suggests that the phrase incorporates fiduciary obligations derived from trust law, including reasonableness, impartiality, good faith, and due care.²¹³ Gary Lawson and Guy Seidman conclude that the Clause reflects standards of “reasonableness” imported from English administrative law, including fairness, proportionality, and respect for pre-existing rights.²¹⁴ Finally, 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.²¹⁵

See id. at 80 & n.454 (citing Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010), and Rappaport, *supra* note 18.).

²¹⁰ Gary Lawson and Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

²¹¹ *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581.

²¹² *See* GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, AND GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (Cambridge, 2010).

²¹³ *Id.* at 119. *See also* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243 (2004).

²¹⁴ *Id.* at 121-43.

²¹⁵ *Id.* at 160-74. 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*

Building on this work, Will Baude has argued that the Necessary and Proper Clause authorizes Congress to exercise “minor” or “incidental” powers, but not “great” powers.²¹⁶ 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.”²¹⁷ 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.”²¹⁸

Although some of these theories have gained adherents on the Supreme Court,²¹⁹ skeptics like John 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 lawmaking power to someone.”²²⁰ In his view, the Constitution vests this lawmaking power in “Congress rather than the judiciary.”²²¹

Whatever meaning one ascribes to the Necessary and Proper Clause, the fact that there are so many plausible interpretations confirms that the Clause does not qualify as a clear and express surrender of any and all sovereign rights Congress might seek to override as a means of implementing its other powers. Under background principles of the law of nations, the scope of an indefinite provision turned on whether its application was considered to be “favorable” or “odious.” A *favorable* application was one that furthered the common interest of both parties. With respect to favorable applications, indefinite terms were to be

Proper” and “Cruel and Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016). Hendiadys involve “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.

²¹⁶ William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013).

²¹⁷ *Id.*

²¹⁸ *McCulloch*, 17 U.S. at 411.

²¹⁹ See *Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., joined by Thomas, J., concurring in the judgment); *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 210, at 297-326, 330-33).

²²⁰ Manning, *supra* note 205, at 60.

²²¹ *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).

interpreted “to give [them] all the extent they are capable of in common use.”²²² By contrast, an *odious* application was one that benefitted one party at the expense of another. In particular, the application of a legal provision would be considered odious if it purported to change the status quo by divesting a state of its pre-existing 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.”²²³

These rules of interpretation suggest that the Necessary and Proper Clause should not be read to divest the States of rights that they did not clearly and expressly surrender. As discussed, the States compromised their exclusive sovereign right to regulate their own citizens within their own territory by giving Congress express powers to tax and regulate these 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 in 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,²²⁴ it clearly authorizes Congress to exercise *some* incidental powers to carry into execution its Article I, Section 8 powers over individuals. When Congress uses the Clause to regulate individuals in furtherance of its enumerated powers, it is exercising a form of sovereign power already clearly surrendered. On the other hand, when Congress attempts to use the Clause to regulate States rather than individuals, it is claiming a power to override the States’ distinct sovereign right against being commandeered by another sovereign. Because the States never clearly and expressly surrendered this right either in the Necessary and Proper Clause or in any other provision of the original Constitution, the Clause must be taken in this context “in the most confined sense.” This rule

²²² 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 38, bk. II, § 307, at 234 (emphasis omitted).

²²³ *Id.*, bk. II, § 308, at 235.

²²⁴ In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), 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. *Id.* at 421. 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 a law have a mere “rational relation” to an enumerated power, but instead that it have an “obvious, simple, and direct relation” to an enumerated power. *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., dissenting). 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).

of interpretation was designed to prevent the inadvertent surrender of sovereign rights.

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 regulation of individuals to charter a bank, rejecting 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.²²⁵

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.²²⁶

Accordingly, to the extent that the States surrendered 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.

Significantly, the *McCulloch* Court made clear in the course of its decision that Congress could not achieve its ends by using the Necessary

²²⁵ *Id.* at 413-14.

²²⁶ *McCulloch*, 17 U.S. at 404-05.

and Proper Clause to command the States to create or tailor the operations of state-chartered banks. 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. Significantly, Chief Justice Marshall rejected this argument on the ground that Congress had no constitutional power to control 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.”²²⁷ 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 the States to charter a bank.²²⁸

²²⁷ *Id.* at 424.

²²⁸ 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 Marshall Court. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall, after first observing that under the Articles of Confederation “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.” *Id.* at 187. 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, *i.e.* surrender sovereign rights, in clear and express terms. 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.” *Id.* 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.* (emphasis added). 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*, 14 U.S. (1 Wheat.) 304 (1816):

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.

Id. at 326. 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 force States to create state banks. See *supra* notes 227-228, and accompanying text. Similarly, in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), Story found that the federal government lacked power to force state magistrates to enforce a federal law. *Id.* at 621-22. If, as Marshall believed, the Articles of Confederation used the term “State” to refer to a free and independent sovereign, then the Constitution could divest them of their sovereign rights, and thus change their character, only by virtue of express terms or unavoidable implication.

Nearly two centuries later, in *Printz v. United States*, the Supreme Court explicitly rejected Congress’s use of the Necessary and Proper Clause to commandeer the States. In striking down Congress’s attempt to commandeer state executive officers to enforce federal law, the Court dismissed the argument that Congress could rely on the Necessary and Proper Clause to support such action. 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*, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”²²⁹

Dean 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.”²³⁰ As discussed in Part IV, however, the Court’s anti-commandeering doctrine (including its restrictive interpretation of the Necessary and Proper Clause) should not be dismissed as mere judicial activism. 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 sovereign rights of the States—not only by commandeering state officers, but also (to take a real example) by dictating the locations of the States’ capitals.²³¹ 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 expressly surrender these rights in the Constitution, they necessarily retained them under well recognized principles of the law of nations.

Reading the Necessary and Proper Clause in light of background principles of the law of nations suggests that the Marshall Court correctly applied the Clause to uphold broad congressional discretion to regulate individuals as a means of implementing Congress’s enumerated powers. At the same time, read in light of the law of nations, the Clause cannot be taken as an independent surrender of the States’ residual sovereignty not to be commandeered by the federal government. As the next Part explains, in at

²²⁹ See *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

²³⁰ Manning, *supra* note 205, at 39.

²³¹ See *Coyle v. Smith*, 221 U.S. 559 (1911) (invalidating Congress’s attempt to limit Oklahoma’s ability to move its state capital as a condition of admission to the Union).

least three contexts, the Supreme Court has rejected congressional efforts to override the sovereign rights of the States in the absence of express constitutional provisions surrendering such rights. Understanding the Constitution—and American federalism—in light of the law of nations places all three doctrines on a firmer foundation.

IV. IMPLICATIONS

In resolving important federalism questions, the Supreme Court has relied less on the constitutional text and more on historical understandings of the structure of government created by the Constitution. Textualists have criticized the Court's decisions restraining federal power and upholding state sovereignty on the ground that the Constitution contains no specific text justifying these decisions.

There are at least two problems with this critique. First, as we argue in this Article, it overlooks the term “States” in the Constitution. At the founding, “State” was a term of art drawn from the law of nations and referred to a sovereign nation entitled to a well-recognized set of rights under such law. To be sure, “States” could surrender or compromise their sovereign rights, but only by doing so expressly in a binding legal document. Second, the textualist critique has things backwards by insisting that courts should only uphold the sovereign rights of the States if they can point to a specific constitutional provision protecting those rights. At the founding, a “State” was entitled to all of the rights recognized by the law of nations minus those it expressly surrendered. Thus, the relevant question is not whether the constitutional text expressly confers sovereign rights on the States, but whether the constitutional text expressly takes them away.

This Part discusses three important Supreme Court doctrines that comport with this understanding of state sovereignty at the founding—state sovereign immunity, the anti-commandeering 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.²³²

First, the Supreme Court has long held that the States enjoy sovereign immunity under the Constitution from suits brought by individuals without a State's consent. 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

²³² 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 (2018) (arguing that the language of the Guarantee Clause should be viewed through the lens of eighteenth century international law).

recognition of state sovereign immunity. As discussed, this critique has things backwards. The question is not whether the text of the Constitution affirmatively grants the States sovereign immunity; rather the question is whether the text expressly withdraws the sovereign immunity traditionally enjoyed by sovereign “States” under the law of nations. Taking into account the Eleventh Amendment’s authoritative gloss on Article III, the original Constitution contains no express provisions purporting to override the States’ sovereign immunity. Thus, the Court’s broad doctrine of state sovereign immunity is not only consistent with, but affirmatively required by, the constitutional text.

Second, the Supreme Court has recognized that Congress may not commandeer the States by requiring state legislatures to adopt state law or state executive officials to enforce federal law. 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. And again, the critics are posing 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 pre-existing right to conduct their governmental operations free from the control of another sovereign. Because the Constitution contains no provision of this kind, the Court’s anti-commandeering decisions are fully consistent with textualism.

Third, at the founding, independent “States” were entitled to absolute equality under the law of nations. 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*,²³³ the Court broadly embraced the doctrine following the States’ ratification of the Eleventh Amendment.²³⁴ The precise terms of the Amendment support some—but

²³³ 2 U.S. (2 Dall.) 419 (1793).

²³⁴ See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010).

not all—of the Court’s decisions.²³⁵ For this reason, the Court has struggled to provide a textual basis for its broader doctrine of state sovereign immunity,²³⁶ relying instead on the expectations of the founders,²³⁷ the “dignity” of the States,²³⁸ and the “fundamental postulates implicit in the constitutional design.”²³⁹ The Court’s failure to articulate a persuasive rationale grounded in the text of either the original Constitution or the Eleventh Amendment has left its broad doctrine of state sovereign immunity open to charges of illegitimacy.²⁴⁰

Understanding state sovereign immunity as part of the original public meaning of the term “States” in the Constitution resolves the apparent conflict between textualism and federalism in this context. As discussed in Part I, a “State” possessed a broad range of sovereign rights—including sovereign immunity—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 “States” mentioned in the Constitution possessed sovereign immunity from suit except to the extent they expressly surrendered it in the document. As the ratification debates show, the Citizen-State diversity provisions of Article III were the only provisions in the original Constitution that even arguably constituted an express surrender of the States’ sovereign immunity from suit by individuals. The founders—and the early Supreme Court—debated 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 an express surrender of state sovereign immunity in the controversies they described. Federalists responded that these provisions were ambiguous at best, and thus could not be construed as an express surrender of the States’ immunity from suit. Notwithstanding these assurances, the Supreme

²³⁵ 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 (1890). The Court has also held that States enjoy sovereign immunity in their own courts, see *Alden v. Maine*, 527 U.S. 706 (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.

²³⁶ 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)).

²³⁷ See *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (““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, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?”).

²³⁸ See *Federal Maritime Commission v. South Carolina State Ports Authority*, 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.”).

²³⁹ *Alden v. Maine*, 527 U.S. 706, 729 (1999).

²⁴⁰ See, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000); Young, *supra* note 28, at 1664–75.

Court ruled in *Chisholm v. Georgia* that the plain language of the Citizen-State diversity provisions authorized suits against States. In response, Congress and the States quickly and overwhelmingly adopted the Eleventh Amendment to counteract 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 even arguably divested the States' of sovereign immunity from suit by individuals, the Eleventh Amendment removed any argument that the States had surrendered their pre-existing sovereign immunity in the Constitution. As explained below, this account best explains both the initial controversy surrounding Article III and why the Eleventh Amendment constituted a complete revocation of any surrender of state sovereign immunity in the original Constitution.

1. Immunity Under the Proposed Constitution

The Constitutional Convention did not discuss whether the 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 objected 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."²⁴¹ Anti-Federalists feared that courts would construe the word "between" to refer to suits by and against a State, and thus treat those provisions as an express surrender of state sovereign immunity.²⁴²

As discussed in Part I, 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. This background provides crucial context for understanding the ratification debates over the effect of Article III on state sovereign immunity. Anti-Federalists thought 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.

²⁴¹ U.S. CONST. art. III, § 2, cl. 1.

²⁴² 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., 1883) [hereinafter 14 DHRC].

For example, Brutus objected that “it is humiliating and degrading to a government” to subject “a state to answer in a court of law, to the suit of an individual.”²⁴³ Similarly, George Mason objected that the Citizen-State diversity provisions were inconsistent with 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.²⁴⁴

Leading supporters of the Constitution, including Madison, Hamilton, and 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. In his response, Madison first acknowledged that “this part” of the Constitution “might be better expressed.”²⁴⁵ He maintained, however, that “a fair and liberal interpretation upon the words” would not authorize the federal government “to commit the oppressions [Mason] dreads.”²⁴⁶ Instead, Madison insisted that “[i]t is not in the power of individuals to call any State into Court.”²⁴⁷ 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.”²⁴⁸

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

²⁴³ 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) [hereinafter 20 DHRC].

²⁴⁴ George Mason, Address to the Virginia Convention (June 19, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1403, 1406 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (footnote omitted) [hereinafter 10 DHRC].

²⁴⁵ James Madison, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 244, at 1409, 1409.

²⁴⁶ *Id.*

²⁴⁷ James Madison, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 244, at 1412, 1414.

²⁴⁸ *Id.* Similarly, John Marshall also argued that the Citizen-State diversity provisions of Article III should be construed narrowly to avoid authorizing federal courts to hear suits against States. In his view, “[i]t is not rational to suppose, that the sovereign power shall be dragged before a Court.” John Marshall, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 244, at 1430, 1433. He contended 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.” *Id.* Anti-Federalists remained unconvinced by these assurances. Patrick Henry remarked that Madison’s construction was “perfectly incomprehensible,” and objected 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.” Patrick Henry, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 244, at 1419, 1422.

people, there is an end of all argument.”²⁴⁹ In response, John Marshall insisted that the Citizen-State diversity provisions would not authorize “the sovereign power” to “be dragged before a Court.” Rather, in his view, “[t]he intent is, to enable States to recover claims of individuals residing in other States.”²⁵⁰

Alexander Hamilton explicitly invoked principles drawn from the law of nations to allay the Anti-Federalists’ fears. In *The Federalist No. 81*, he sought to refute “a supposition which has excited some alarm upon very mistaken grounds.”²⁵¹ Rejecting the Anti-Federalists’ claim that the Citizen-State diversity provisions would permit 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 color 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

²⁴⁹ Patrick Henry, Address to the Virginia Convention, (June 20, 1788), in 10 DHRC, *supra* note 244, at 1419, 1422.

²⁵⁰ John Marshall, Address to the Virginia Convention, (June 20, 1788), in 10 DHRC, *supra* note 244, at 1430, 1433.

²⁵¹ THE FEDERALIST NO. 81, *supra* note 112, at 548 (Alexander Hamilton) (emphasis added).

will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, 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.²⁵²

Hamilton's discussion reflects several important principles drawn from the law of nations about the nature of state sovereignty and the steps necessary for a State to alienate its sovereignty. 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*."²⁵³ Hamilton explained that "[t]his is the general sense, and the general practice of mankind"—a clear reference to the law of nations.²⁵⁴ 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."²⁵⁵ This approach precisely tracks Vattel's discussion of state sovereignty and the means by which a state may surrender sovereign rights under the law of nations.²⁵⁶

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." In the relevant portion of *The 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 entire 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

²⁵² *Id.* at 548-49.

²⁵³ *Id.* at 548.

²⁵⁴ *Id.* at 549.

²⁵⁵ *Id.*

²⁵⁶ 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 by force. See *infra* notes 358-361, and accompanying text. This explains his observation at the end of his discussion: "To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State"

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.²⁵⁷

Applying these principles in *The Federalist No. 81* to determine the effect of the Constitution on state sovereign immunity, Hamilton concluded that “there is no color 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.”²⁵⁸ In his view, reading Article III to destroy “a pre-existing right” of the States “by mere implication . . . would be altogether forced and unwarrantable.”²⁵⁹

Hamilton’s analysis relied on a central principle of the law of nations. At the time, a sovereign state could abrogate its sovereign rights only through an 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 pre-existing right to sovereign immunity. Thus, all three leading Federalists argued that the States retained all sovereignty they did not expressly surrender in the proposed Constitution, and that the proposed Constitution did not contain a clear surrender of the States’ immunity from suits brought by individuals.

Significantly, the Anti-Federalists did not disagree with Hamilton’s framework for evaluating extent to which the States surrendered their sovereignty under the Constitution. Like Hamilton, they started from the assumption that the States retained all sovereignty not clearly and expressly surrendered in the Constitution. Unlike Hamilton, however, they 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 citizens specified by these

²⁵⁷ THE FEDERALIST NO. 32, *supra* note 112, at 199-200 (Alexander Hamilton).

²⁵⁸ THE FEDERALIST NO. 81, *supra* note 112, at 549 (Alexander Hamilton).

²⁵⁹ *Id.*

provisions. 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 assumed that the States could only surrender their pre-existing sovereign rights by clearly and expressly surrendering them in the Constitution. Based in part on the Federalists' assurances that Article III would be construed narrowly, the States ultimately ratified the Constitution despite the Anti-Federalists' concerns.

2. *Chisholm* and the Eleventh Amendment

Notwithstanding the Federalists' assurances during ratification, a majority of the Supreme Court ruled in *Chisholm v. Georgia*²⁶⁰ that the States had in fact surrendered part of their sovereign immunity by adopting the Citizen-State diversity provisions of Article III. *Chisholm* considered whether a citizen of South Carolina could sue Georgia in federal court to recover a debt. The Citizen-State diversity provisions of Article III extend the federal judicial power "to Controversies . . . between a State and Citizens of another State."²⁶¹ The question before the Court was whether this provision constituted an express surrender of the States' sovereign immunity from suit. Although each Justice issued a separate opinion, in keeping with the Court's practice at the time, 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 that these provisions did not constitute an adequate surrender of state sovereign immunity.

Justice Blair characterized the constitutional question as whether the States surrendered their right of sovereign immunity when they 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."²⁶² 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

²⁶⁰ 2 U.S. (2 Dall.) 419 (1793).

²⁶¹ U.S. CONST. art. III, § 2.

²⁶² *Id.* at 452 (Opinion of Blair, J.)

controversies between a State and citizens of another State.
Is then the case before us one of that description?
Undoubtedly it is.²⁶³

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.”²⁶⁴ 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.²⁶⁵

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 sovereign act of the people.²⁶⁶ Thus, in his view, the question was: “could the people of those [American] States, among whom were those of Georgia, bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested?”²⁶⁷ This question, he thought, “must unavoidably receive an affirmative answer.”²⁶⁸ He thus proceeded to consider whether the people divested the States of sovereign immunity by adopting the Constitution.²⁶⁹ 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*.”²⁷⁰ 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, but 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

²⁶³ *Id.* at 450 (emphasis added).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 451 (emphasis added).

²⁶⁶ *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 the globe, are considered as forming a society, not a NATION.”).

²⁶⁷ *Id.* at 463.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 464 (“The next question . . . is, Has the Constitution done so? Did those people mean to exercise this their undoubted power?”).

²⁷⁰ *Id.* (emphasis added).

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?²⁷¹

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 curtailment of the power and prerogatives of States.”²⁷² He found that the people had given the federal courts power to hear cases against States, notwithstanding the States’ pre-existing sovereign immunity, because “[t]he judicial power . . . is *expressly* extended to ‘controversies between a State and citizens of another State.’”²⁷³ He concluded that “[t]he case, then, seems clearly to fall within the letter of the Constitution.”²⁷⁴

Finally, after observing that the Constitution transferred “many prerogatives . . . to the national government,”²⁷⁵ 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.”²⁷⁶ For Jay, “[t]his enquiry naturally leads our attention, 1st. To the design of the Constitution. 2nd. To the letter and *express declaration* in it.”²⁷⁷ Jay explained that “the Constitution (to which Georgia is a party) authorises . . . an action against her” by a citizen of another State²⁷⁸ because Article III extends the judicial power to “controversies between a State and citizens of another State.”²⁷⁹ 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.”²⁸⁰ In Jay’s view, “[i]f we attend to the words, we find them to be *express, positive, and free from ambiguity*.”²⁸¹

Only Justice Iredell dissented in *Chisholm*. Although he was prepared to decide the case on the ground 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

²⁷¹ *Id.* (emphasis added).

²⁷² *Id.* at 468 (Opinion of Cushing, J.).

²⁷³ *Id.* at 467.

²⁷⁴ *Id.* (emphasis added).

²⁷⁵ *Id.* at 470 (Opinion of Jay, J.).

²⁷⁶ *Id.* at 474.

²⁷⁷ *Id.* (emphasis added).

²⁷⁸ *Id.* at 470 (opinion of Jay, C.J.).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 476.

²⁸¹ *Id.* at 476 (emphasis added).

Constitution of the United States, the power contended for really exists.”²⁸² 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.²⁸³

Although Justice Iredell did not believe that the law of nations applied directly to the case,²⁸⁴ he described the law of nations as “furnishing rules of interpretation” applicable to the question presented.²⁸⁵ Applying those rules, he explained that his “present opinion is strong against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money.”²⁸⁶ Echoing Hamilton’s and Madison’s arguments during the ratification debates, Justice Iredell thought that “every word in the Constitution may have its full effect without involving this consequence, and that nothing but *express words*, or an *insurmountable implication* (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.”²⁸⁷

Significantly, although the Justices disagreed over whether Article III clearly 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 expressly surrendered their sovereign immunity from such suits in the Constitution. This approach was drawn directly from the law of nations. All five Justices started with the assumption that the States retained all of their pre-existing sovereign rights—including sovereign immunity—unless they clearly surrendered them in the constitutional text. Their disagreement was over whether the Citizen-State diversity provisions constituted an adequate surrender. The *Chisholm* majority ascribed the

²⁸² *Id.* at 449 (Opinion of Iredell, J.).

²⁸³ *Id.* at 435.

²⁸⁴ *Id.* at 449 (explaining that “unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples”).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 450.

²⁸⁷ *Id.* (emphasis added).

ordinary meaning to the term “between” in the Citizen-State diversity provisions (rather than reading it to mean “by” but not “against”). On this understanding, the majority concluded that the States had clearly and expressly surrendered their sovereign immunity in these provisions. Justice Iredell disagreed and endorsed the narrow construction of the text favored by Madison, Marshall, and Hamilton during the ratification debates. Although Justice Iredell’s construction coincided with the assurances given during the ratification debates, it was at least in tension with the ordinary meaning of the term “between.”

Regardless of the merits of the *Chisholm* decision, efforts began immediately to override it. Within days, Representative Theodore Sedgwick and Senator Caleb Strong (both of Massachusetts) introduced constitutional amendments in the House and the Senate to restore the States’ sovereign immunity. Massachusetts was keenly interested in the issue because it faced a pending suit by a British subject for confiscating his property in violation of the Treaty of Peace.²⁸⁸ 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 independence of the several States.”²⁸⁹ The General Court further resolved:

That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power, to obtain such amendments in the Constitution of the United States as will 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.²⁹⁰

²⁸⁸ See *Vassall v. Massachusetts*, discussed in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 352-61 (Maeva Marcus ed., 1994).

²⁸⁹ RESOLUTION OF THE MASSACHUSETTS GENERAL COURT (Sept. 27, 1793), reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 440 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC].

²⁹⁰ RESOLUTION OF THE MASSACHUSETTS GENERAL COURT (Sept. 27, 1793), reprinted in 5 DHSC, *supra* note 289, at 440.

The General Court directed the Governor to send this resolution to all other States.²⁹¹ As a consequence, four States quickly adopted very similar resolutions,²⁹² and three additional States were in the process of doing so when Congress approved the Eleventh Amendment on March 4, 1794.²⁹³ Although these state resolutions differed slightly, 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.²⁹⁴

At the start of the next session of Congress, Senator Strong introduced a slightly revised version of his original proposal to accomplish the States' request.²⁹⁵ This version added language to make clear that it was an "explanatory" amendment designed to correct the Supreme Court's erroneous construction of the Constitution retroactively.²⁹⁶ As written (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."²⁹⁷ This Amendment reinstated the Federalists' preferred construction of the Constitution by forbidding courts from construing Article III to authorize

²⁹¹ See Letter from Samuel Adams to the Governors of the States (Oct. 9, 1793), in 5 DHSC, *supra* note 289, at 442, 442. On Oct. 8, 1793, Governor Hancock died and Samuel Adams assumed his duties. *Id.* at 443–44.

²⁹² See 5 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, 1792–1797 *reprinted in* 5 DHSC, *supra* note 289, at 609; JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA: OCT. 1793, at 99 (1793), *reprinted in* 5 DHSC, *supra* note 289, at 338–39; Resolution of North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, *supra* note 289, at 615, 615; JOURNAL OF THE PROCEEDINGS OF THE HON. HOUSE OF REPRESENTATIVE, OF THE STATE OF NEW-HAMPSHIRE: DEC. 1793, at 111 (1794), *reprinted in* 5 DHSC, *supra* note 289, at 618, 618.

²⁹³ See JOURNAL OF THE SOUTH CAROLINA SENATE (1793), *reprinted in* 5 DHSC, *supra* note 289, at 610–11; VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND: NOV. 1793, at 115–16 (1794), *reprinted in* 5 DHSC, *supra* note 289, at 611; Proceedings of the Georgia House of Representatives, Nov. 19, 1793, AUGUSTA CHRONICLE, Nov. 23, 1793, *reprinted in* 5 DHSC, *supra* note 289, at 236. In addition, Pennsylvania and Delaware appointed special committees, but took no action before Congress acted. See JOURNAL OF THE FIRST SESSION OF THE FOURTH HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 61–62 (1794), *reprinted in* 5 DHSC, *supra* note 289, at 612–13; JOURNAL OF THE SENATE OF THE STATE OF DELAWARE: JAN. 1794, at 9 (1794), *reprinted in* 5 DHSC, *supra* note 289, at 614, 615.

²⁹⁴ 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 289, at 338 (calling on Virginia's Senators and Representatives "to obtain such amendments in the constitution of the United States, as will remove or explain 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").

²⁹⁵ 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 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 289, at 605–06. Antifederalists generally accepted the need for jurisdiction over suits between States, and perhaps even suits between States and foreign States. See Clark, *supra* note 234, at 1891 n.441.

²⁹⁶ See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1304–13 (1998).

²⁹⁷ U.S. CONST. amend. XI.

any suits *against* States by individuals. The Supreme Court subsequently interpreted the Amendment to apply retroactively to require dismissal of all pending suits against States.²⁹⁸

3. Immunity After the Eleventh Amendment

The Eleventh Amendment has been something of a mystery to modern readers. Depending on one's view of sovereign immunity, the Amendment seems to be arbitrarily too narrow or too broad.²⁹⁹ For this reason, both on and off the Court, "the [E]leventh [A]mendment is universally taken *not* to mean what it says."³⁰⁰ 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. On the other hand, many academics read the Amendment to recognize less immunity than the text provides. Not surprisingly, textualists have criticized both approaches and urged the Court to enforce "the Eleventh Amendment as written."³⁰¹

Reading the Eleventh Amendment against background principles of the law of nations makes sense of the text in historical context. In accordance with the law of nations, the founders understood the "States" to retain all of their traditional sovereign rights—including sovereign immunity—unless they clearly and expressly surrendered them in the Constitution.³⁰² The Citizen-State diversity provisions of Article III were the only provisions of the original Constitution that even arguably surrendered the States' immunity from suits by individuals. 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 parties specified in the Citizen-State diversity provisions, the Amendment eliminated the only text in the original Constitution that could have been

²⁹⁸ See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (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 authorized them in the text of the original Constitution.

²⁹⁹ See Clark, *supra* note 234, at 1825-32.

³⁰⁰ Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1977).

³⁰¹ John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 1153 YALE L.J. 1663, 1720 (2004); see Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

³⁰² See *supra* Part III.

construed as an express surrender of state sovereign immunity from such suits. On this understanding, the pre-existing sovereign immunity of the States was not limited—but merely restored—by the Eleventh Amendment.

The modern controversy regarding the scope of state sovereign immunity began with *Hans v. Louisiana*,³⁰³ a decision that recognized broad immunity beyond the cases covered by the Eleventh Amendment. *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. 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.”³⁰⁴ The Supreme Court acknowledged that “the amendment does so read,”³⁰⁵ but treated the Amendment as merely indicative of a broader unwritten principle. 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*.”³⁰⁶ Invoking the remarks by Hamilton, Madison, and Marshall during the ratification debates, the Court concluded that “the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States.”³⁰⁷ In the Court’s view, the Eleventh Amendment confirmed that the States retained their pre-existing immunity from suit by individuals (regardless of citizenship). The Court regarded as “almost an absurdity on its face”³⁰⁸ the suggestion that those who drafted and ratified the Eleventh Amendment would have authorized suits against States by their own citizens.

In recent decades, the Supreme Court has reaffirmed and even extended *Hans*. For example, in *Seminole Tribe of Florida v. Florida*,³⁰⁹ 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 I, Section 8 powers. In *Alden v. Maine*,³¹⁰ the Court held that Congress also cannot use these powers to abrogate the States’ sovereign immunity in state court. In the Court’s view, a literal reading of the Eleventh Amendment to prohibit only suits by

³⁰³ 134 U.S. 1 (1890).

³⁰⁴ *Id.* at 10.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 12.

³⁰⁷ *Id.* at 15.

³⁰⁸ *Id.*

³⁰⁹ 517 U.S. 44 (1996).

³¹⁰ 527 U.S. 706 (1999).

citizens of other States in federal court would be unacceptably under-inclusive and inconsistent with the expectations of those who ratified both the original Constitution and the Eleventh Amendment. The Court thus embraced a broad theory of state sovereign immunity 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 been quick to charge that the Supreme Court's decisions lack any discernable basis in the constitutional text. In place of the Court's broad approach, many would adopt the so-called diversity theory of the Eleventh Amendment.³¹¹ 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. 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. The diversity theory itself contradicts the constitutional text, however, because the Eleventh Amendment withdraws federal judicial power to hear "any suit" commenced or prosecuted by a prohibited plaintiff.³¹²

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" 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."³¹³ In their view, the founders could not have intended this distinction, so courts should narrow the scope of the Amendment to avoid this result.

One need not choose between these two flawed readings of the Eleventh Amendment. Instead, it is possible to reconcile state sovereign immunity with the constitutional text by using background principles drawn from the law of nations. As Hamilton and other founders recognized, the "States" adopted the Constitution as equal and independent sovereign

³¹¹ 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 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

³¹² See Marshall, *supra* note 301, 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 (1987) (arguing that the diversity theory "makes perfect sense of all the words of the Amendment itself").

³¹³ Fletcher, *supra* note 311, at 1060–61.

States, 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 state sovereign immunity was a close question under Article III, but also why the founders understood the Eleventh Amendment to restore to the States full sovereign immunity.

No one during the drafting or ratification process ever suggested that any provision of the Constitution other than the Citizen-State diversity provisions could be construed to permit individuals to sue States.³¹⁴ Modern observers anachronistically maintain that other provisions of Article III—including those conferring federal question and admiralty jurisdiction—authorized individuals to sue States. But, unlike the Citizen-State diversity provisions, these provisions make no mention—clear or ambiguous—of suits against States. For this reason, the founders—operating against the backdrop of the law of nations—would not have understood any of these provisions to constitute a plausible surrender of the States’ preexisting right to sovereign immunity.³¹⁵ Rather, the founders identified the Citizen-State diversity clauses as the only provisions of Article III that could have authorized individuals to sue States under the prevailing rules governing the surrender of sovereign rights.

In light of this background, the Eleventh Amendment was perfectly tailored to satisfy Massachusetts’ demand (echoed by other 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.”³¹⁶ By clarifying that the Citizen-State diversity provisions of Article III did not permit suits against States, the Eleventh Amendment neutralized the only provisions of the Constitution that could have been construed as an express surrender of the States’ immunity from suit by individuals. After the adoption of the Eleventh Amendment, the States’ right to sovereign immunity—like all of their sovereign rights—depended not on whether the Constitution expressly granted the right, but on whether the States expressly surrendered it.

From this perspective, the Supreme Court’s broad conception of state sovereign immunity is consistent with the original public meaning of

³¹⁴ See Clark, *supra* note 234, at 1870-73.

³¹⁵ 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 *id.* at 1871-73.

³¹⁶ RESOLUTION OF THE MASSACHUSETTS GENERAL COURT (Sept. 27, 1793), *reprinted in* 5 DHSC, *supra* note 289, at 440.

the constitutional text.³¹⁷ 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 contain any such surrender.³¹⁸

These principles 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 under Article I, Section 8 because its provisions do not expressly authorize Congress to override the States’ sovereign immunity.³¹⁹ By contrast, the Court generally upholds abrogation under the enforcement powers of the Civil War Amendments because they were designed to regulate the States and expressly authorize Congress to enforce such regulations by appropriate legislation.³²⁰

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 other sovereigns. Thus, unless the American States clearly surrendered this aspect of sovereign immunity in the Constitution, they retained it. The only provisions of the Constitution that arguably authorize suits against States in the courts of another sovereign are found in Article III, Section 2, and none of them authorizes suits in state courts. Article III permits *federal courts* to

³¹⁷ Will Baude has reached a similar conclusion, albeit on somewhat different grounds. See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017). Building on 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.

³¹⁸ 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 Henry Monaghan has explained, “[i]n suits for prospective relief, states are still accountable in federal court—through their officers—for the violation of federal law.” Henry P. Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 103 (1996); see also Clark, *supra* note 234, at 1903-07.

³¹⁹ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (invalidating abrogation of state sovereign immunity under the Indian Commerce Clause). But see *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (upholding congressional power to abrogate state sovereign immunity under the Bankruptcy Clause).

³²⁰ See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment). For an argument that the scope of Congress’s power to enforce the Civil War Amendments against States is analogous to the scope of its power to regulate individuals under the Necessary and Proper Clause, see Bradford Russell Clark, Note, *Judicial Review of Congressional Section 5 Power: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1983-90 (1984).

hear “Controversies between two or more States;—between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” In addition, as just discussed, the Citizen-State diversity provisions arguably authorized federal courts to hear suits against States by citizens of another State (or of a foreign State), but jurisdiction under these provisions was withdrawn by the Eleventh Amendment. Finally, Article III expressly grants the Supreme Court power to hear controversies between two or more States. This grant undoubtedly constitutes a specific surrender of sovereign immunity but was uncontroversial and widely seen as a necessity at the founding.³²¹

Notably, the Constitution contains no provisions purporting to surrender the immunity of States in the courts of another State. Nonetheless, the Supreme Court denied this immunity in *Nevada v. Hall*,³²² a case brought by California residents against Nevada in California state court. The Court based its decision to deny Nevada’s claim of sovereign immunity in large part on the lack of any constitutional text *affirmatively granting* States such immunity.³²³ As explained in this Article, however, this approach has things backwards. A constitutional provision granting the States immunity in the courts of another State would have been superfluous because, under the law of nations, the “States” already possessed sovereign immunity from suit in the courts of another State. Thus, the relevant question in *Hall* was whether the States *affirmatively surrendered* this immunity in the Constitution. Because the Constitution contains no such surrender, the States necessarily retained sovereign immunity in cases of this kind.

The Supreme Court overruled *Hall* in *Franchise Tax Board of California v. Hyatt*,³²⁴ a suit brought by a Nevada resident against a California State agency in Nevada state court. The Nevada Supreme Court rejected the agency’s claim of immunity, but the Supreme Court upheld it. The Court’s rationale closely tracks the approach offered by this Article and has implications far beyond the question of state immunity in sister-state courts. The Court began by observing that “[a]fter independence, the States considered themselves fully independent nations” pursuant to the

³²¹ Article III also grants federal courts power to hear controversies “between” a State and foreign States, but the Supreme Court has declined read this grant as a surrender of the States’ sovereign immunity from suit. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (finding Mississippi immune from suit by a foreign State).

³²² 440 U.S. 410 (1979).

³²³ 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 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.

³²⁴ 139 S. Ct. 1485 (2019).

Declaration of Independence.³²⁵ 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.”³²⁶ Accordingly, the Court explained, “[t]he sovereign is “exemp[t] . . . from all [foreign] jurisdiction.”³²⁷

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”³²⁸ and enjoyed immunity “under both the common law and the law of nations.”³²⁹ 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.’”³³⁰ 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’ pre-existing 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 sister States’ claims of immunity from suit 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.’”³³¹ The Court rejected this argument because, in the Court’s view, “the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns.”³³² Traditionally, disputes of this kind between

³²⁵ *Id.* at 1493.

³²⁶ *Id.*

³²⁷ *Id.* at 1494.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 1494-95 (quoting *Alden*, 527 U.S. at 713).

³³¹ *Id.* at 1496. Will 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 317, 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, Professor 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.

³³² *Hyatt*, 139 Sup. Ct. at 1497.

sovereigns were not settled in the courts of either party, but through negotiation or, if necessary, armed conflict. 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.³³³

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 pre-existing sovereignty except to the extent they affirmatively surrendered it. The Court found no indication in the Constitution that the States surrendered their pre-existing 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.³³⁴ The important point for present purposes is that the Court sought to ascertain the sovereign rights of the States by examining the extent to which they affirmatively surrendered them in the Constitution.

B. *The Anti-Commandeering Doctrine*

The original public meaning of the term “States”—and the rules governing their surrender of sovereign rights—also support the Supreme Court’s anti-commandeering doctrine. The doctrine prohibits Congress from requiring States to use their legislative and executive powers to implement federal regulatory programs. Although commentators have disparaged the doctrine as an example of “freestanding federalism,”³³⁵ this characterization overlooks the significance of the term “States” in the Constitution and associated rules drawn from the law of nations. At the founding, a sovereign state enjoyed complete independence from other states, and no state could command another state to exercise its legislative or executive powers. 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 an express surrender. Accordingly, the true original basis for the anti-commandeering doctrine is that the American “States” retained all of their pre-existing sovereign rights that they did not expressly surrender in the Constitution.

³³³ *Id.* at 1498 (“Some subjects that were decided by pure ‘political power’ before ratification now turn on federal ‘rules of law.’”).

³³⁴ *See id.*

³³⁵ *See* Manning, *supra* note 205, at 34.

1. Commandeering Under the Articles of Confederation

To understand why the States authorized Congress to commandeer them in the Articles of Confederation but withheld this power from Congress in the Constitution, one must first appreciate the difficulties associated with commandeering during the Confederation era. Under the Articles, the States expressly authorized Congress to command them to provide money, supplies, and personnel for the armed forces.³³⁶ 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 requisitions from each state for its quota” of land forces.³³⁷ Article XIII made such requisitions binding on the States by providing that “Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them.”³³⁸ Although the Articles obligated the States to comply with Congress’s commands, the States often disobeyed them with impunity.³³⁹ 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 supplying 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 force to coerce 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,³⁴⁰ 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

³³⁶ 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 1777, 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.*

³³⁷ *Id.* art. IX.

³³⁸ *Id.* art. XIII.

³³⁹ 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, in Congress (May 31, 1780)).

³⁴⁰ Amendment to Give Congress Coercive Power Over the States and Their Citizens (Mar. 16, 1781), reprinted in 1 DHRC, *supra* note 114, at 141, 142 (stating that Article XIII of the Articles vests “a general and implied power . . . in the United States in Congress assembled to enforce and carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said Articles, but no determinate and particular provision is made for that purpose”).

duty should be clearly promulgated and understood.”³⁴¹ This language applied the well-established rule of interpretation that indefinite legal provisions should not be given odious readings, which included readings that would impose penal consequences. Because the Articles did not expressly give Congress express power to use military force against the States to coerce compliance with federal commands, the report urged amending the Articles to give Congress that power expressly.³⁴²

Congress never acted on Madison’s proposal perhaps because of concerns identified by Alexander Hamilton. In 1782, Hamilton warned that giving Congress coercive power over the States could trigger a civil war (just as he later warned that abrogating state sovereign immunity could do the same):

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.³⁴³

Leading up to the Constitutional Convention of 1787, Madison continued to favor coercive force against States and to lament the ineffectiveness of the Articles of Confederation. For example, before the Convention, Madison wrote to George Washington to share the “outlines of a new system.”³⁴⁴ 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.”³⁴⁵ He also acknowledged, however, the potential dangers 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 other means ensuring the effective enforcement of federal law.³⁴⁶

³⁴¹ *Id.*

³⁴² *See id.* at 142-43; JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 25 (2d ed. 2002) (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”).

³⁴³ Alexander Hamilton, *The Continentalist No. VI* (July 4, 1782), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON 1779-1781, at 105 (Harold C. Syrett ed., 1961).

³⁴⁴ Letter from James Madison to George Washington (Apr. 16, 1787), in 2 MADISON WRITINGS, *supra* note 111, at 344, 344.

³⁴⁵ *Id.* at 348.

³⁴⁶ *Id.*

2. Rejecting Commandeering Under the Constitution

At the outset of the Constitutional Convention, Edmond Randolph introduced the Virginia Plan (prepared with Madison's input). The Plan proposed that 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."³⁴⁷ Madison thought that continuing Congress's power to commandeer the States would necessitate giving the National Legislature a new express power to coerce compliance. Accordingly, as initially introduced, the Virginia Plan included a provision empowering the National Legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."³⁴⁸

The delegates strongly objected to this aspect of the Virginia Plan and it was quickly set aside in favor of crafting a less dangerous alternative. George Mason admitted that the present Confederation was "deficient in not providing for coercion & punishment agst. delinquent States; but he 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."³⁴⁹

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:

Mr. M<adison>, 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

³⁴⁷ James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND'S RECORDS, *supra* note 108, at 17, 21 (Max Farrand ed., rev. ed. 1937).

³⁴⁸ *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, in Philadelphia (May 28, 1787), in 3 FARRAND'S RECORDS, *supra* note 108, at 106, 119. Pinckney observed that "the present Confederation" lacked such power, *id.*, and warned that "[u]nless this power of coercion is infused, and exercised when necessary, the States will most assuredly neglect their duties." *Id.*

³⁴⁹ James Madison, Notes on the Constitutional Convention (May 30, 1787), in 1 FARRAND'S RECORDS, *supra* note 108, at 33, 34 (brackets in original).

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.³⁵⁰

The solution ultimately embraced by the Convention was to withhold power from Congress to command States and instead empower it to regulate individuals directly. This fundamental shift eliminated any need to empower Congress to enforce its commands against States because Congress would be given no power to command them. Rather, under this alternative approach, the federal government would enforce its commands through ordinary law enforcement against individuals.

As George 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.”³⁵¹ 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.”³⁵² 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].”³⁵³

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 States) or abandon the Articles entirely in favor of a new system (under which Congress would command and coerce individuals rather than States). Dissatisfied with the Virginia Plan, William Paterson offered the New Jersey Plan as complete substitute.³⁵⁴ Paterson’s Plan would have merely “revised, corrected & enlarged” the Articles of Confederation rather than

³⁵⁰ James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 47, 54 (brackets in original) (footnote omitted).

³⁵¹ James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 132, 133.

³⁵² RAKOVE, *supra* note 144, at 53.

³⁵³ James Madison, Notes on the Constitutional Convention (June 8, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 164, 165 (footnote omitted).

³⁵⁴ James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 108, at 242, 242–245.

replace them with an entirely new system.³⁵⁵ The Plan would have retained and expanded Congress's power to command States, and would have augmented it by expressly authorizing the federal government to coerce the States' compliance through military force.³⁵⁶

The delegates strongly objected to the New Jersey's Plan's reliance on coercion against States. Edmund Randolph pronounced coercion "to be *impracticable, expensive, cruel to individuals*."³⁵⁷ 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."³⁵⁸ 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."³⁵⁹ Hamilton distinguished between "*coertion of laws*" and "*coertion of arms*,"³⁶⁰ 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."³⁶¹ 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."³⁶² 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."³⁶³ Following Madison's speech, the Convention rejected the New Jersey Plan and re-reported the Virginia Plan.³⁶⁴

Despite this vote, John Lansing again urged the Convention to adhere to "the foundation of the present Confederacy"³⁶⁵ rather than depart so completely. Mason responded by elaborating on his objections to the introduction of coercive power:

It was acknowledged by (Mr. Patterson) that his plan could not be enforced without military coercion. Does he consider

³⁵⁵ *Id.* at 242.

³⁵⁶ *Id.* at 245.

³⁵⁷ *Id.* at 255-56.

³⁵⁸ James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra* note 108, at 282, 283.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 284.

³⁶¹ *Id.* at 285; *see also id.* ("[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.").

³⁶² James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND'S RECORDS, *supra* note 108, at 313, 319.

³⁶³ *Id.* at 320.

³⁶⁴ *Id.* at 322.

³⁶⁵ James Madison, Notes on the Constitutional Convention (June 20, 1787), in 1 FARRAND'S RECORDS, *supra* note 108, at 335, 336.

the force of this concession. The most jarring elements of nature; fire & water themselves are not more incompatible tha[n] such a mixture of civil liberty and military execution. Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the citizens of the invaded State assist one another till they rise as one Man, and shake off the Union altogether?³⁶⁶

Following Mason's remarks, the Convention rejected Lansing's motion and entertained no further proposals to grant Congress power to command or coerce the States.³⁶⁷

Once the Convention ended, Madison sent Thomas Jefferson a copy of the proposed Constitution and explained why the Convention chose to empower Congress to regulate individuals rather than States:

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.³⁶⁸

Madison was not alone in his efforts to explain why the Convention decided to abandon regulation of States under the Articles of Confederation in favor of regulation of individuals under the Constitution. Prominent Federalists echoed his views during the state ratifying debates. For example, in *The Federalist No. 15*, Alexander Hamilton explained that "the present Confederation" could not be retained because there were

³⁶⁶ *Id.* at 339–40 (footnote omitted).

³⁶⁷ *Id.* at 344.

³⁶⁸ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND'S RECORDS, *supra* note 108, at 131, 131–32.

“fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.”³⁶⁹ Hamilton maintained that this alteration consisted of abandoning legislation for States (under the Articles) in favor of authorizing legislation for individuals (under the proposed Constitution). In his view, “[t]he great and radical vice in the construction of the existing Confederation is in the principle of legislation for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist.”³⁷⁰ Hamilton stressed that if we wished to avoid the possibility of civil war, “we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.”³⁷¹

Hamilton continued these themes in *The Federalist No. 16*. There, he argued that in order to avoid a civil war and “dissolution of the Union,”³⁷² 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 the agency to the persons of the citizens.”³⁷³ The “principle contended for by the opponents of the proposed Constitution” was the “exceptionable principle” of “legislation for States.”³⁷⁴ Thus, Hamilton made clear that the proposed Constitution would forgo legislation for States and rely exclusively on legislation for individuals. Hamilton’s arguments were repeated by Federalists in numerous state ratifying conventions.³⁷⁵

As adopted, the Constitution departed sharply from the Articles of Confederation by giving Congress no power to command States to take legislative or executive action. Because of this omission, the 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 these aspects of their sovereignty. Under the law of nations, only an express surrender of

³⁶⁹ THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 112, at 105, 108.

³⁷⁰ *Id.* at 108.

³⁷¹ *Id.* at 109.

³⁷² THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 112, at 114.

³⁷³ *Id.* at 116.

³⁷⁴ *Id.* at 113.

³⁷⁵ See Clark, *supra* note 234, at 1856-62. Critics of the anti-commandeering 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 *The 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, 662-63 (1993). Nothing in these essays contradicts the much more precise discussions at the Convention and in *The 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.

their rights would have sufficed to alienate their sovereignty on these matters. To be sure, the Articles of Confederation contained a partial 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 these aspects of their sovereignty under well-known rules supplied by the law of nations.

Although the Constitution does not empower Congress to command or coerce States, it does impose certain 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.³⁷⁶ 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.”³⁷⁷ 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, anything in the Constitution or laws of any State to the contrary notwithstanding.”³⁷⁸ Noting these provisions, *The Federalist No. 27* observed 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.”³⁷⁹ Taken in historical context, these observations conveyed that state institutions and officials would be bound by both the Supremacy Clause and the Oath or Affirmation Clause to follow valid federal law in the performance of their duties under state law. They say nothing, however, about federal power to command and coerce the States, as some have argued.³⁸⁰ The Convention quite

³⁷⁶ U.S. CONST. art. I, § 10.

³⁷⁷ U.S. CONST. art. VI, cl. 3.

³⁷⁸ U.S. CONST. art. VI, cl. 2.

³⁷⁹ THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 112, at 175.

³⁸⁰ Professor Powell’s critique of the Court’s anti-commandeering doctrine appears to have made this mistake by conflating these distinct modes of enforcement. He points to *The Federalist’s* 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 375, 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. Indeed, in *The Federalist No. 27*, Hamilton was arguing *against* the Anti-Federalist contention that the proposed federal government under the Constitution would have to rely on “military force to execute its laws.” THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 112, at 171. Rather, because Hamilton recognized that States might prefer to enforce federal law in some circumstances, he assured Anti-Federalists that the Constitution would permit States to employ their ordinary means of government for this purpose. Likewise, in *The Federalist No. 45*, James Madison dispelled fears over federal collection of internal taxes by pointing out that

consciously withheld this authority after extensive debate³⁸¹ because the founders were convinced that the federal government could accomplish all its ends by relying exclusively on “legislation for individuals” while forgoing “legislation for States.”³⁸² However one reads *The Federalist*, nothing but an express surrender in the constitutional text would suffice under the law of nations to authorize the federal government to conscript state legislatures or executives into carrying federal laws into execution.

3. Reassessing the Anti-Commandeering Doctrine

This background provides a straightforward rationale for the Supreme Court’s recent anti-commandeering decisions grounded in the original public meaning of the term “States.” 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 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 sovereignty to control their own legislative and executive powers free from interference by another sovereign.

This rationale supports each of the Supreme Court’s anti-commandeering decisions. The Court’s modern anti-commandeering decisions began with *New York v. United States*,³⁸³ which held that Congress lacks constitutional power to compel state legislatures to enact laws implementing a federal regulatory program. 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.”³⁸⁴ 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

if the federal government chose not to collect such taxes directly “an option will then be given to the States to supply their quotas by previous collections of their own.” THE FEDERALIST NO. 45, *supra* note 112, at 312-13 (James Madison). Giving States the option to participate in the enforcement of federal law is not the same thing as giving Congress authority to command or coerce them to do so—authority that was explicitly and repeatedly denied in *The Federalist Nos. 15 and 16*. See *supra* notes 369-375, and accompanying text.

³⁸¹ See *supra* notes 153-160, and accompanying text.

³⁸² See Clark, *supra* note 234, at 1903-04 (explaining that “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”).

³⁸³ 505 U.S. 144 (1992).

³⁸⁴ *Id.* at 162.

restricted, only upon the States.”³⁸⁵ 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.”³⁸⁶

In *Printz v. United States*,³⁸⁷ 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. 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 speaking to the precise question whether congressional action compelling state officers to execute federal laws is unconstitutional.”³⁸⁸ 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.”³⁸⁹ 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.

Critics of the Supreme Court’s decision in *Printz* have seized upon Justice Scalia’s concession that “there is no constitutional text” addressing commandeering to argue that the doctrine is made up or illegitimate.³⁹⁰ As discussed, however, this critique misunderstands the role of the constitutional text—and its absence—in determining the residual sovereignty of the States. Under background principles of the law of nations, Congress could commandeer the “States” only if they clearly and expressly authorized such action in the Constitution. The *absence* of any constitutional text addressing commandeering thus does not contradict but affirmatively supports the anti-commandeering doctrine.

Critics also have suggested that the Supreme Court’s position on federal commandeering of state courts is inconsistent with its broader anti-commandeering doctrine. In *New York*, for example, Justice O’Connor recognized “the well established power of Congress to pass laws enforceable in state courts.”³⁹¹ 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

³⁸⁵ *Id.* (quoting *Lane County v. Oregon*, 74 U.S. 71, 76 (1869)).

³⁸⁶ *Id.* at 166.

³⁸⁷ 532 U.S. 898 (1997).

³⁸⁸ *Id.* at 905.

³⁸⁹ *Id.*

³⁹⁰ Manning, *supra* note 11, at 2031. *Cf.* Powell, *supra* note 380, at 674 (arguing that the “state immunities approach [endorsed in *New York v. United States*] . . . is entirely unguided by constitutional text”).

³⁹¹ 505 U.S. at 178 (citing *Testa v. Katt*, 330 U.S. 386 (1947)); *see Printz*, 521 U.S. at 928.

State shall be bound [by federal law]’).”³⁹² In other words, rightly or wrongly, the Court appears to regard the text of the Supremacy Clause as a clear and express surrender of this portion of state sovereignty.³⁹³

Most recently, in *Murphy v. National Collegiate Athletic Association*,³⁹⁴ the Supreme Court reaffirmed and applied the anti-commandeering 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. The Act contained a grandfather provision excepting Nevada and gave New Jersey a limited period to opt into this exception. After the time expired, New Jersey voters approved a constitutional amendment permitting the state legislature to authorize sports gambling. 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 anti-commandeering doctrine. 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.”³⁹⁵ As the Court put it, “[t]he anticommandeering doctrine simply represents the recognition of this limit on congressional authority.”³⁹⁶

³⁹² 521 U.S. at 928-29.

³⁹³ 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*, 556 U.S. 729, 751 (2009), 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.” *Id.* at 751 (Thomas, J., dissenting). Because, in his view, no provision of the Constitution divests the States of their pre-existing 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 (Thomas, J., dissenting).

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 (2006); see also Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L. J. 947 (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).

³⁹⁴ 138 S. Ct. 1461 (2018).

³⁹⁵ *Id.* at 1476.

³⁹⁶ *Id.* Vik Amar questions whether *Murphy* went too far in its language, if not its result. As he put it, “[a]t times *Murphy* defined unconstitutional commandeering in incredibly broad terms—to include federal laws ‘that direct[] . . . 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. 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.

Commentators have criticized the anti-commandeering 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 well-known principles drawn from the law of nations, the Constitution gives Congress only those powers expressly granted in the document. This understanding of congressional power is a necessary consequence of background principles of the law of nations governing the surrender of sovereign rights. Under those principle, the “States” mentioned in the Constitution retained all aspects of their pre-existing sovereignty that they did not expressly surrender in the Constitution. Accordingly, Congress lacks power to commandeer the States in violation of their residual sovereignty unless the Constitution expressly authorizes such action. From this perspective, constitutional silence on the matter does not support—but conclusively refutes—congressional power to commandeer the States.

C. *The Equal Sovereignty Doctrine*

Finally, understanding the Constitution’s use of the term “State” by reference to the law of nations supports the Supreme Court’s long-standing recognition that the States possess equal sovereignty under the Constitution. The constitutional equality of the States is not the product of freestanding federalism or judicial activism, as some commentators have suggested. When the Constitution was adopted, the founders understood independent states to possess equal sovereignty under the law of nations. By employing the term “States” in the Constitution, the founders adopted this background understanding. Under principles drawn from the law of nations, the States retained their equal sovereignty except to the extent that they expressly surrendered it in the Constitution.

There has been renewed interest in the equal sovereignty doctrine following the Supreme Court’s decision in *Shelby County v. Holder*.³⁹⁷ 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. The Court endorsed 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.”³⁹⁸ Applying this principle, the Court invalidated the statute’s unequal treatment of the States.

³⁹⁷ 570 U.S. 529 (2013).

³⁹⁸ *Id.* at 544.

Congress originally enacted the Voting Rights Act of 1965 pursuant to its power to enforce the Fifteenth Amendment as a short-term, five-year measure to remedy well-documented voting discrimination in certain States and localities. Congress reenacted the statute without alteration several times over the years, and most recently reauthorized it in 2006 for an additional twenty-five years. 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. By 2006, however, minority voting rates in the covered jurisdictions met or exceeded majority voting rates. Rather than make new findings, Congress "instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."³⁹⁹ For this reason, the *Shelby County* Court found Congress's 2006 extension of the coverage provisions to violate the States' equal sovereignty.⁴⁰⁰

Critics of *Shelby County* charge that the equal sovereignty doctrine is simply made up and unsupported by the constitutional text.⁴⁰¹ For example, Leah Litman has charged 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."⁴⁰² She argues that "the textual arguments for the equal sovereignty principle are not particularly compelling,"⁴⁰³ 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."⁴⁰⁴ Similarly, Richard Hasen has characterized the equal sovereignty doctrine as "made up" and "unjustified."⁴⁰⁵ Overall, as Neil Katyal and Thomas Schmidt have observed, "[t]he legal commentariat generally viewed the doctrine as an invention."⁴⁰⁶

A few scholars have defended the legitimacy of the equal sovereignty doctrine, at least in certain circumstances. Writing before *Shelby County*, Gillian Metzger concluded (on the basis of on various

³⁹⁹ *Id.* at 554.

⁴⁰⁰ *See id.* at 557.

⁴⁰¹ 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. 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* Seth Davis, *Equal Sovereignty as a Rights Against a Remedy*, 76 LA. L. REV. 83 (2015).

⁴⁰² Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1229 (2016).

⁴⁰³ *Id.* at 1230.

⁴⁰⁴ *Id.* at 1233.

⁴⁰⁵ Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714, 733 (2014).

⁴⁰⁶ Neil Kumar Katyal and 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 Sovereignty*, 68 OK. L. REV. 209, 210 (2016) ("Scholars have attacked the equal sovereignty principle with a surprising degree of unanimity and contempt.").

features of the constitutional design) that “the intuition that states must be admitted on equal terms” “appears correct.”⁴⁰⁷ Similarly, Douglas Laycock observed that “[t]he Constitution assumes, without ever quite saying so, that the several states are of equal authority.”⁴⁰⁸ These scholars did not consider whether the Supreme Court properly applied the equal sovereignty doctrine in *Shelby County*, but two scholars have subsequently defended the Court’s use of the doctrine in that case.

More recently, Thomas Colby has concluded that “there is a deep structural principle of equal sovereignty that runs through the Constitution.”⁴⁰⁹ Although the Supreme Court had applied the principle most prominently to ensure the equal footing of newly admitted States, Colby argues that “the equal footing doctrine is just a particular, concrete aspect of a broader and deeper principle.”⁴¹⁰ He agrees that this broader principle of equal sovereignty lacks “a clear textual mandate,”⁴¹¹ but argues that it draws “powerful support” from the history, caselaw, and “underlying structure of our constitutional system.”⁴¹² Although “[t]hat equality was not spelled out in so many words in the Constitution,” Colby concludes that it was “a background assumption on which the Constitution was drafted.”⁴¹³

Similarly, Thomas Schmitt has argued that the principle of equal sovereignty “is entirely consistent with, and perhaps even supported by,” constitutional text and precedent.⁴¹⁴ 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 text].”⁴¹⁵ In addition, he maintains that “the Court’s reasoning [in longstanding precedent] clearly applies beyond the context of the admission of new states.”⁴¹⁶ Finally, he concludes that “[t]he idea of equal state sovereignty has been a fundamental assumption of our constitutional order throughout United States history.”⁴¹⁷

We agree that the concept of equal sovereignty 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 embody that assumption. As discussed, the original Thirteen Colonies

⁴⁰⁷ Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1518 (2007).

⁴⁰⁸ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 288 (1992).

⁴⁰⁹ Thomas B. Colby, *In Defense of Equal Sovereignty*, 65 DUKE L. J. 1087, 1091 (2016).

⁴¹⁰ *Id.* at 1108.

⁴¹¹ *Id.* at 1102.

⁴¹² *Id.* at 1102.

⁴¹³ *Id.* at 1140.

⁴¹⁴ Schmitt, *supra* note 406, at 222.

⁴¹⁵ *Id.* at 223.

⁴¹⁶ *Id.* at 229.

⁴¹⁷ *Id.* at 238.

declared themselves to be “Free and Independent States” in the Declaration of Independence.⁴¹⁸ Under the law of nations, “Free and Independent States” were entitled to the “perfect equality and absolute independence of sovereigns.”⁴¹⁹ The notion of a “State” with fewer sovereign rights than 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.’”⁴²⁰ Thus, in order to restrict the sovereign rights of some States but not others, Congress would have to point to an express constitutional provision authorizing it to do so.⁴²¹ Although the original Constitution contains no such provisions, the Civil War Amendments empower Congress to take such action when necessary to enforce their guarantees.

The original Constitution contains no provisions expressly authorizing Congress to override the equal sovereignty of the States. Indeed, as explained, in drafting and ratifying the Constitution, the founders decided not to give Congress *any* authority to regulate the States.⁴²²

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 prohibitions “by appropriate legislation.”⁴²³ 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. The Supreme Court confirmed this surrender in *Fitzpatrick v. Bitzer*,⁴²⁴ which held that “the Eleventh Amendment, and the principle of state sovereignty which it

⁴¹⁸ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

⁴¹⁹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

⁴²⁰ Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1328 (1996).

⁴²¹ We agree with Thomas Colby that “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, *supra* note , 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.*

⁴²² See Clark, *supra* note 234, at 1838-62 (describing the debates surrounding the founders’ decision to grant Congress power to regulate individuals rather than States).

⁴²³ See U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

⁴²⁴ 427 U.S. 445 (1976).

embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.”⁴²⁵

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 who violate the Fifteenth Amendment (by denying their citizens the right to vote on account of race) differently than States who comply with the Amendment. Although such disparate treatment overrides the equal sovereignty of the States, it is expressly authorized by the Civil War Amendments and thus rests on an express surrender of the States’ right to sovereign equality in this context. Accordingly, the Supreme Court had little difficulty upholding the original coverage provisions of the Voting Rights Act of 1965.⁴²⁶ 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.⁴²⁷

Shelby County presented a different question—namely, whether Congress’s 2006 extension of the 1965 restrictions without any new findings of current discrimination was a valid exercise of Congress’s power to enforce the Fifteenth Amendment.⁴²⁸ 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 to this extent. 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. Thus, the equal sovereignty issue in *Shelby County* turned on the proper interpretation of the Fifteenth

⁴²⁵ *Id.* at 456 (citation omitted). By contrast, the Court has long held that Congress generally lacks power under its Article I, Section 8 powers to override the States’ sovereign immunity. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The only exception the Court has recognized is when Congress acts pursuant to its bankruptcy power. *See Central Va. Comm. College v. Katz*, 546 U.S. 356 (2006).

⁴²⁶ *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁴²⁷ *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.*

⁴²⁸ We express no view here on the validity of Congress’s 2006 extension of the Voting Rights Act under its power to enforce the Fifteenth Amendment. This question is beyond the scope of this Article and 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 South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (comparing Congress’s enforcement power to that conferred by the Necessary and Proper Clause), but has also made clear that congressional enforcement legislation must be “congruen[t] and proportiona[l]” to judicially recognized violations of the prohibitions set forth in the Amendments, *see City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Amendment. The latter question is beyond the scope of this Article. The important point for present purposes is that States retained their equal sovereignty under the original Constitution, and Congress can only override such equality pursuant to an express surrender by the States in a subsequent Amendment.

CONCLUSION

Commentators have charged that the Supreme Court's most prominent federalism doctrines lack an adequate 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 textual basis for many of the Court's most significant doctrines. At the founding, a "State" was a term of art drawn from the law of nations and referred to an independent state entitled to a well-known set of sovereign rights. Moreover, under the law of nations, a State could alienate its sovereign rights only by a clear and express surrender. 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" these rights on the States because they were never surrendered. This background context provides a firm textual basis for the Supreme Court's decisions upholding state sovereign immunity, prohibiting federal commandeering of the States' legislative and executive functions, and recognizing the sovereign equality of the States.