William & Mary
Law Review

VOLUME 66 NO. 2, 2024

CONSTITUTIONAL FEDERALISM AND THE NATURE OF THE UNION

ANTHONY J. BELLIA JR.* & BRADFORD R. CLARK**

ABSTRACT

Federalism is an essential feature of the Constitution's design and structure, but the Constitution does not spell out every respective authority of the federal government and the States in precise detail. This omission has led some observers to embrace broad—if not unlimited—federal power and reject certain longstanding federalism doctrines—such as state sovereign immunity, the anti-commandeering doctrine, and the equal sovereignty of the States. The objection to such doctrines is that the Constitution does not affirmatively grant States these sovereign rights and powers. This charge overlooks long-forgotten background context essential to faithful interpretation of the Constitution. The former British Colonies in North America

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

** William Cranch Research Professor of Law, George Washington University Law School. We thank Tricia Bellia, Paul Berman, Tom Colby, Bob Cottrol, Bill Dodge, Renée Lerner, John Manning, Maeva Marcus, Alan Morrison, Sean Murphy, Barak Richman, Joshua Schwartz, Jonathan Siegel, and Ed Swaine for insightful comments and suggestions. We also thank Tristan Barron, Nate Delmar, and Matt Novotny for very helpful research.

became "Free and Independent States" following the Declaration of Independence—a status that entitled them to all of the rights and powers of every other sovereign state under the law of nations. Under that law, states could alienate their sovereign rights and powers in a binding legal instrument, but only if the instrument met certain requirements. As Vattel explained, and Hamilton echoed in The Federalist*, all instruments used to alienate such rights and powers were subject to an important background rule designed to avoid misunderstandings and war: a legal instrument could alienate sovereign rights and powers only if it did so in clear and express terms or by unavoidable implication. Instruments that failed this test left sovereign rights and powers with the original holder. Hamilton explained that because the Constitution involved a "division of the sovereign power," this rule was "clearly admitted by the whole tenor of the instrument." Thus, as this Article and our prior work reveal, the proper question in federalism cases is not whether the Constitution affirmatively grants the States sovereign rights and powers (it does not), but whether it includes text sufficient to alienate the rights and powers they enjoyed when they became "Free and Independent States." From this perspective, the Court's leading federalism doctrines have a firm basis in the original meaning of the constitutional text—understood in its full legal and historical context. In defending this thesis, the Article responds to several scholars who have recently challenged our approach. Their critiques do not withstand scrutiny and are refuted by substantial evidence found not only in America's pre-constitutional founding documents and background law, but also in* The Federalist Papers*, the ratification debates, and significant early opinions of the Supreme Court.*

TABLE OF CONTENTS

INTRODUCTION

The two most significant features of the Constitution's design and structure are separation of powers—the allocation of federal powers among three coequal branches of government—and federalism—the division of sovereign rights and powers between the States and the federal government. Both features were designed to safeguard individual liberty and prevent the abuse of government power.[1] Both features were also central elements of the compromises that the Founders built into the Constitution to secure its adoption.[2] And both features continue to generate significant questions of constitutional interpretation. Thus, not surprisingly, courts and commentators have examined these features of the constitutional structure from the Founding to the present.

In recent work, we have endeavored to illuminate constitutional federalism with greater precision by highlighting rules of interpretation that are an inherent part of the Constitution's division of sovereign rights and powers between the federal government and the States. In particular, we have sought to provide a more complete picture of the legal and historical background that informs the meaning of the Constitution's text in context.[3] Key aspects of this background have been lost or forgotten, and their recovery can help lawyers and judges more accurately discern the Constitution's division of sovereign authority. The former British Colonies in North America became "Free and Independent States" by first declaring, and then winning, their independence from Great Britain. In so doing, the American States acquired all of the sovereign rights and powers that accompanied this status under the law of nations.[4] From this baseline, the Articles of Confederation and later the

1. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485, 545 (2024) [hereinafter Bellia & Clark, *State Sovereign Immunity*].

2. *See id.* at 544-45.

3. *See id.* at 502-03. *See generally* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835 (2020) [hereinafter Bellia & Clark, *International Law Origins of Federalism*]. For an earlier inquiry, see generally Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010) [hereinafter Clark, *Eleventh Amendment*].

4. Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 502-04.

Constitution alienated certain rights from the States in accord with "background principles provided by the law of nations."[5] As Alexander Hamilton put it, these rules of interpretation were "admitted by the whole tenor" of the Constitution.[6] Accordingly, these rules help to reveal the original public meaning of the Constitution and the nature of the Union it created: a Union in which the people transferred an important subset of sovereign rights and powers from the States to a new federal government, but left to the States all other rights and powers that the Constitution did not alienate in clear and express terms or by unavoidable implication. Examples of rights retained by the States include the right to sovereign immunity, the right not to be commandeered by another government, and the right to equal sovereignty with other States—all of which were well-established rights of free and independent states under the law of nations.

Several scholars have recently engaged our thesis and claimed that it misunderstands the nature of the Union and applies the wrong rules to interpret the Constitution. With respect to constitutional interpretation, however, the precise nature of the Union is less important than the nature of the Constitution. The Constitution was indisputably a legal instrument used to transfer sovereign rights and powers from the States to a new federal government.[7] Thus, it can only be understood in its full legal and historical context by applying the rules of interpretation that governed all such instruments under the law of nations. These rules applied to the Constitution whether one understood the States to possess full, partial, individual, or collective sovereignty prior to ratification. No matter which understanding of the States' pre-constitutional sovereignty one prefers, the Constitution necessarily admitted the applicable background rules because it was an instrument used to alienate sovereign rights and powers.[8] In the course of recovering this background context, we examine and respond to various claims made by each commentator. We also explain in more depth the proper understanding of constitutional federalism by identifying key

5. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 842.
6. THE FEDERALIST NO. 32, at 203 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
7. *See id.*
8. *See id.*

rights and powers that the States alienated and those that they retained.

First, Professor Jud Campbell identifies four Founding Era views of the nature of the Union and suggests that social contract theory offers an alternative to the law of nations for evaluating the consolidation of political authority that occurred when previously independent entities agreed to consolidate their sovereignty.[9] He maintains that "one could not know how to approach constitutional law without first knowing the locus of sovereignty in the federal system."[10] We disagree with this premise. Under any of the conceptions Professor Campbell describes, the Constitution remained an instrument used by the States—or their people—to alienate a portion of their sovereign rights and powers in favor of a new federal government.[11] All instruments that performed this function were governed by rules supplied by the law of nations—the same law that recognized and defined the rights and powers that the States possessed and sought to alienate.[12] As Alexander Hamilton explained in *The Federalist No. 32*, because the Constitution involved a "division of the sovereign power," it admitted "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[13] It is only by applying this rule that one can accurately ascertain the nature of the Union created by the Constitution.

Second, Professor David Schwartz claims that our approach to constitutional federalism amounts to a "compact theory" that would allow the States both to secede from the Union and to nullify federal law.[14] These claims are false and reveal a fundamental misunderstanding of our thesis. From the start, the Supreme Court recognized that the Constitution was a legal instrument used to transfer sovereign rights and powers[15] and interpreted it in accordance with

---

9. *See* Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 34-35 (2024).

10. *Id.* at 37.

11. *See infra* Part I.A.

12. *See infra* Part I.B.

13. *See* THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

14. *See* David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629, 629, 635 (2023).

15. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 423 (1793).

the rules that governed such instruments, as we explain. But recognizing that the Constitution performs this self-evident function does not mean that it was a compact. Nor does it generate the parade of horribles that Professor Schwartz imagines. As discussed below, the Constitution was more than a compact because it irrevocably alienated the States' sovereign right to exercise exclusive legislative authority over their own citizens within their own territory. And by so doing, under governing background rules of interpretation, the Constitution divested the States of any right to nullify supreme federal law or secede from the Union. Schwartz's claims to the contrary rest on a distorted caricature of our understanding of constitutional federalism.

Third, Professor Martin Flaherty challenges both our approach to interpreting the Constitution and our conclusions regarding its implications for constitutional federalism.[16] In the process, he mischaracterizes several aspects of our thesis. In addition, he broadly discounts or denies the ability of the legal profession to ascertain the original public meaning of the Constitution's division of sovereign rights and powers. His skepticism stems primarily from his belief that lawyers, judges, and law professors are not qualified to evaluate the relevant historical materials that inform the meaning of legal texts.[17] In his view, such evaluations should be left exclusively to professional historians.[18] This demand asks lawyers and judges to abdicate one of their basic responsibilities. Legal texts— including constitutions—are historical documents. It is the province and duty of lawyers and judges to interpret such instruments—a task that includes ascertaining the meaning of the relevant text in historical context. As the Supreme Court has long recognized, courts are affirmatively required "to say what the law is" in the course of deciding cases.[19] Given this requirement, debating whether lawyers or historians should own this turf exclusively serves little purpose. Both legal and historical scholarship can assist lawyers and judges. Thus, there is no basis for an

16. *See* Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 671, 673-74 (2023) [hereinafter Flaherty, *Peerless*].

17. *See id.* at 690.

18. *Id.*

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

artificial presumption against originalist legal scholarship. All scholarship should be evaluated on its own merits.

Fourth, Professor Ryan Williams "seeks to steer a middle path" between compact theory and Schwartz and Flaherty's unqualified nationalism by recognizing "that the Constitution of 1787 reflected a clear break with the 'pure' treaty model on which the Articles of Confederation had been premised," while "conclud[ing] that law-of-nations principles might nonetheless usefully guide and inform modern understandings of federalism to at least some degree."[20] Although we note some minor disagreements with Professor Williams below, we agree with his nuanced conclusion that the Constitution "blended aspects of purely national and purely federal systems in innovative ways."[21] Thus, Williams' account of the nature of the Union is more accurate and insightful than those proffered by Schwartz and Flaherty.

In the course of evaluating these commentaries, we deepen and expand our explanation of how historical context can, and should, illuminate the original understanding of the Constitution's division of sovereign rights and powers. This context includes Hamilton's recognition that the Constitution admitted "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[22] On the one hand, this rule confirms that the Constitution left intact several of the States' sovereign rights and powers—namely, the rights to sovereign immunity, to be free from commandeering by another government, and to equal sovereignty with other States. On the other hand, the same rule reveals that the Constitution alienated whatever rights the States may have possessed to secede from the Union and to nullify federal law. With respect to these, and all other questions of constitutional federalism, taking account of such background context is essential to faithful interpretation.

This article proceeds as follows. Part I considers the nature of the Union and, more specifically, the nature of the Constitution. Because the Constitution was a legal instrument used to alienate a

---

20. Ryan C. Williams, *Federalism, The Law of Nations, and the Excluded Middle*, 1 J. AM. CONST. HIST. 721, 721-22 (2023).

21. *Id.* at 722.

22. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

portion of the States' sovereign rights and powers, it necessarily admitted—and can only be fully understood by reference to—background rules of interpretation supplied by the law of nations to govern instruments that performed this function. Part II examines the role of background context in ascertaining the Constitution's division of sovereign rights and powers, and refutes Professor Schwartz's claim that rules drawn from the law of nations have no bearing on constitutional interpretation. Part III applies these rules to examine which of the States' rights and powers the Constitution alienated and which it left undisturbed. Contrary to Schwartz's assertion, these rules reveal that the Constitution alienated the States' ability to secede from the Union and to nullify federal law. Finally, Part IV refutes Professor Flaherty's proposed presumption against originalist legal scholarship.

I. THE NATURE OF THE CONSTITUTION

Following the Declaration of Independence and the War of Independence, the thirteen former British Colonies in North America became "Free and Independent States."[23] This clear reference to the law of nations signified that they possessed all of the sovereign rights and powers that accompanied that status. The States alienated some of these rights and powers first in the Articles of Confederation and then in the Constitution.[24] Although the Constitution alienated sovereign rights in novel ways, there was nothing novel about the use of legal instruments to alienate sovereign rights, whether by voluntary treaty agreements or by unilateral governmental acts. To avoid unnecessary conflict and misunderstanding, the law of nations provided an important rule to govern the interpretation of such instruments: no legal instrument could alienate sovereign rights and powers unless it did so in clear and express terms or by unavoidable implication.[25] This rule constitutes part of the background context that informs the Constitution's original public meaning and "ground[s] several of the

23. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
24. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 504-14.
25. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 852-53.

Supreme Court's most significant federalism doctrines in the constitutional text."[26]

As we have explained, the primary function of the Constitution was to replace the failed Articles of Confederation with a more stable and robust form of government.[27] The States' delegates to the Constitutional Convention set out to create an effective central government while maintaining the States as distinct sovereigns with residual authority to govern most conduct by their own citizens within their own territory.[28] The delegates recognized that in order to accomplish this goal, the States would have to transfer a different and more significant portion of their sovereign rights and powers to a new central government than they had in the Articles.[29] At the same time, the delegates were unwilling to abolish the States in favor of a central government with plenary national power. Instead, the Convention engaged in extensive debates and negotiations to reach a compromise that would divide sovereign power by giving the federal government authority over matters of common concern to the States while preserving the individual States' ability to govern their own citizens within their own territory with respect to matters of local concern.[30] One can understand the Constitution's division of sovereign authority only by reading the constitutional text in light of background rules supplied by the law of nations to govern all legal instruments used for this purpose. Reading the Constitution through this lens clarifies the Constitution's division of sovereign rights and powers. It also resolves any apparent tension between textualism and several longstanding federalism doctrines recognized by the Supreme Court.

A. The Shift from the Articles to the Constitution

The emergence of "States" in North America originated with the Declaration of Independence. The former British Colonies gained their independence first by declaring themselves to be "Free and

---

26. *Id.* at 842.
27. Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 508.
28. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 864.
29. *See id.*
30. *See id.* at 864-95.

Independent States" in 1776 and then by winning the War of Independence in 1783.[31] The people of the American States did not invent the idea of "Free and Independent States" but employed this phrase because they wanted their States to enjoy the benefits of this well-established status under the law of nations.[32] Regardless of whether the States attained their independence collectively or individually, they secured for themselves the full set of sovereign rights and powers recognized by the law of nations. They—or their people as the ultimate source of sovereignty—could transfer those rights in a legal instrument, but only if the text expressed the transfer in the manner prescribed by the law of nations.

Even before they adopted the Articles of Confederation, the States banded together by voluntarily participating in the First and Second Continental Congresses, which met periodically between 1774 and 1781 to manage relations, and ultimately war, with Great Britain.[33] These "Congresses" did not possess independent sovereign authority but merely coordinated the States' efforts to achieve independence in accordance with the original meaning of the term "congress" (derived from the Latin *congressus*), which referred to a meeting or an assembly. The States formalized their relationship by adopting the Articles in 1781, and a new Congress (of the Confederation) oversaw the end of the war and its aftermath.[34] By 1787, however, the Articles had proved inadequate, and Congress called upon the States to send delegates to a Convention in Philadelphia to seek a solution.[35]

All thirteen States had adopted the Articles of Confederation, but the instrument made clear that the States had alienated as few of their sovereign rights and powers as possible to achieve the limited aims of the Articles. As others have observed, the Articles were little more than a treaty or compact among free and independent states.[36] Although the Articles authorized Congress to make certain decisions

31. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 503.

32. *See id.* at 518.

33. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 860.

34. *Id.* at 857.

35. *Id.* at 863-64.

36. *See* Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724-25 (2011) (reviewing ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010)).

and obligated the States to comply, it gave Congress no effective means of enforcement.[37] For example, Congress could order—or requisition—the States to provide revenue and military personnel, but it lacked power either to force States to comply or to bypass the States and raise and support armies on its own.[38] The States' compliance with Congress's commands was mixed at best during the war and decreased following the Treaty of Peace. Thus, by 1787, the United States (still used as a plural noun) had little ability to pay their debts, honor their international obligations, and defend their borders against future threats.[39] These circumstances led James Madison to characterize the federal system created by the Articles as "nothing more than a treaty of amity of commerce and of alliance, between independent and Sovereign States."[40]

In response to this state of affairs, Congress called a Convention of the States to meet in Philadelphia.[41] Although originally convened "for the sole and express purpose of revising the Articles of Confederation,"[42] the Convention quickly concluded that the Articles were beyond repair and sought to devise a new system.[43] There was broad agreement that the central government should continue to be responsible for conducting war and foreign relations on behalf of the States and that additional powers were needed. Because the Confederation Congress was dependent on voluntary compliance by the States, the delegates appreciated that merely increasing Congress's powers under the Articles would be ineffective without also empowering Congress to enforce its commands against the States. The only means of ensuring the States' compliance with requisitions, however, was to authorize the use of military force against them.[44] The delegates regarded this approach as too dangerous because it would punish the innocent with the guilty and

37. *See id.*

38. *See* ARTICLES OF CONFEDERATION of 1781, art. IX.

39. *See* James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 1 THE WRITINGS OF JAMES MADISON 361 (Gaillard Hunt ed., 1900).

40. *Id.* at 363.

41. Confederation Congress Calls the Constitutional Convention (Feb. 21, 1787), *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (Merrill Jensen ed., 1976).

42. *Id.*

43. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 864-65.

44. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 509.

risk civil war and dissolution of the Union.[45] Accordingly, the Convention made the decision to replace the Articles with a fundamentally different instrument.[46] This decision entailed withholding power to requisition the States and instead granting Congress direct legislative power over persons and things within the States.[47] This shift rendered enforcement of congressional commands against the States unnecessary because federal legislative power could be enforced in the same way that the States enforced their own legislative powers—through the exercise of ordinary executive and judicial powers against delinquent individuals.

But this shift also required the States to alienate—for the first time—their sovereign right to exercise exclusive governmental authority (free from interference by another sovereign) over persons and things within their territory. The voluntary alienation of this core right in a binding legal instrument was unprecedented. Traditionally, independent states retained this essential right when joining a confederation with other states under a compact (as the States had under the Articles). If a state lost this right, it was because another state conquered it through military force and annexed its territory. Thus, the Constitution was unique in two respects. First, the people alienated their States' exclusive territorial sovereignty voluntarily, not by succumbing to military conquest. Second, they alienated their territorial sovereignty in part, not in full, by giving the federal government limited and enumerated, rather than plenary, powers. Under the proposed Constitution, two different sovereigns—the States and the federal government—would exercise simultaneous and partially overlapping legislative authority over the same people and things, in the same place, at the same time.[48]

---

45. *See id.* at 509-11; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 875-76.

46. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 876.

47. *See id.*

48. Professor Schwartz argues that the States ceased to qualify as independent sovereigns under the law of nations after they alienated their right to exercise exclusive territorial sovereignty. *See* Schwartz, *supra* note 14, at 640-41. Whether or not this conclusion is correct, the scope of the States' residual rights and powers under the Constitution remains a question of constitutional law to be determined by interpretation of the Constitution, not the law of nations. *See infra* Part I.C.

Because this change marked a sharp departure from the Articles, skeptics feared that the new central government could abuse its powers and threaten the States' residual sovereignty or even their very existence.[49] Federalists sought to reassure the public by arguing that the Constitution alienated only those sovereign rights and powers necessary to serve the States' collective interests and left all others to the States.

For example, in transmitting the Constitution to the States, George Washington emphasized that the instrument transferred specific sovereign rights to the government of the United States "for the interest and safety of all," while reserving all remaining "rights of independent sovereignty" to the States.[50] James Madison made a similar argument 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."[51] The powers granted to the federal government, he explained, "will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce."[52] By contrast, the powers "reserved to the several States will extend to ... the internal order, improvement, and prosperity of the State."[53]

Notwithstanding these assurances, many Anti-Federalists remained skeptical that the federal government would stay within its enumerated powers. To allay these fears, proponents emphasized several additional safeguards built into the Constitution's design and structure. One involved the composition and selection of the federal legislature.[54] The delegates reached general agreement that Congress should be a bicameral legislature with a House of Representatives chosen by the people and a Senate chosen by the

---

49. *See* Brutus, Letter VII, N.Y.J. (Jan. 3, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 400 (Herbert J. Storing ed., 1981) ("[T]he authority of the individual states will be totally supplanted.").

50. George Washington, Letter to Congress (Sept. 17, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 666 (Max Farrand ed., rev. ed. 1937) [hereinafter 1 FARRAND'S RECORDS].

51. THE FEDERALIST NO. 45, *supra* note 6, at 313 (James Madison).

52. *Id.*

53. *Id.*

54. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1360 (2001) [hereinafter Clark, *Separation of Powers*].

state legislatures.[55] They disagreed sharply, however, about the basis of representation in the Senate.[56] The larger States favored proportional representation based on population in both the House and the Senate.[57] The smaller States, by contrast, insisted that the States have equal suffrage in the Senate.[58] The debate was protracted and so contentious that the Convention almost adjourned without agreement.[59] In the end, the Convention reached a compromise that gave the States equal suffrage in the Senate in exchange for a requirement that bills for raising revenue originate in the House.[60] This resolution gave the Senate (representing the States) an absolute veto over all federal legislation, as well as all other federal actions requiring Senate approval.[61] These political and procedural safeguards of federalism were designed to provide the States (through the Senate) with a potent means of checking the exercise of federal power.[62]

In addition, the Convention established a novel judicial safeguard to uphold the Constitution's division of sovereign powers. By allowing Congress and the States to exercise overlapping legislative authority, the Constitution would inevitably generate conflicts of law requiring some means of resolution. After rejecting both coercive military force and congressional power to negative state laws, the Convention adopted the Supremacy Clause.[63] The Clause

---

55. *See id.* at 1329.

56. *See id.* at 1358.

57. *See id.*

58. *See id.*

59. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 590-92 (2022) [hereinafter Bellia & Clark, *Constitutional Law of Interpretation*].

60. *See id.* at 591.

61. A second structural question was whether federal legislation should be subject to an external veto and, if so, who should exercise it. Madison favored giving this power to a council of revision consisting of the President and the judges of the Supreme Court. James Madison, Notes on the Constitutional Convention (May 29, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 21. The Convention, however, decided to give the veto to the President subject to override by two-thirds of the House and Senate. James Madison, Notes on the Constitutional Convention (June 4, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 104.

62. *See* Clark, *Separation of Powers*, *supra* note 54, 1344-45; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547-48 (1954).

63. *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 109 (2003) [hereinafter Clark, *Supremacy Clause*].

resolved conflicts between state and federal law by establishing that the Constitution, "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under [their authority] shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[64] In order to identify "the supreme Law of the Land," state courts would have to determine whether federal statutes that otherwise applied as rules of decision were constitutional.[65]

The Constitution did not leave the task of resolving conflicts between state and federal law (and, if necessary, determining the constitutionality of federal law) to the Supremacy Clause alone. Article III established a Supreme Court with life tenure and salary protection and empowered Congress to create lower federal courts to hear cases arising under the Constitution, Laws, and Treaties of the United States.[66] In addition, it gave the Supreme Court appellate jurisdiction to hear all such cases whether brought in state or federal court.[67] These provisions invested the federal judiciary with the ultimate authority to resolve conflicts between state and federal law—a mechanism wholly unknown to the Articles.[68] This jurisdiction would enable the Supreme Court both to uphold the supremacy of federal law and to invalidate acts that exceeded limited federal powers.[69] Thus, a key question during the

---

64. U.S. CONST. art. VI, cl. 2.

65. *See* Clark, *Supremacy Clause*, *supra* note 63, at 92. Of course, in the absence of an applicable provision of "the supreme Law of the Land," state law continues to provide the applicable rule of decision in both state and federal court. *See* Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1302 (2007) ("[I]n the absence of an applicable rule of decision supplied by the 'Constitution,' 'Laws,' or 'Treaties' of the United States, federal courts simply lack constitutional authority to disregard state law.").

66. U.S. CONST. art. III, §§ 1-2.

67. *Id.* § 2.

68. *See* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 298-304 (2007) [hereinafter Bellia, *"Arising Under" Jurisdiction*].

69. *See* Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 328 (2003). Given the Supremacy Clause and Article III, prominent Founders had good reason to believe "that courts would exercise judicial review in the course of identifying 'the supreme Law of the Land.'" *Id.* at 330. For example, in opposing a council of revision, Luther Martin assumed judicial review, arguing that "the Constitutionality of laws ... will come before the Judges in their proper official character," and thus including judges on a Council of Revision would give them "a double negative." James Madison, Notes on the Federal Convention (July 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 76 (Max Farrand ed., rev. ed. 1937) [hereinafter 2 FARRAND'S RECORDS]. In Pennsylvania, James Wilson assured

ratification debates was whether the Court could be trusted to perform these functions fairly and effectively.

B. The Constitution's Admission of Background Rules

Notwithstanding these political and judicial safeguards, Anti-Federalists remained skeptical of the Constitution. One of their concerns was that the Supreme Court—an arm of the federal government with unreviewable authority—would misinterpret the Constitution in favor of federal power at the expense of the States. For example, Brutus charged that federal judges "will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[70] He feared that, although the Supreme Court "will be authorised to decide upon the meaning of the constitution," it could go beyond "the natural and ob[vious] meaning of the words."[71] In the event of an error, the States would have no recourse: "The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits."[72] Moreover, because of life tenure and salary protection, the Court's judges "cannot be removed from office or suffer a diminution of their salaries, for any error in judgment or want of capacity."[73] In short, Brutus argued "that the supreme court under this

skeptics that if Congress passed a law that "transgress[ed] the bounds assigned to it," the judges would have a "duty to pronounce it void." James Wilson, Statement at the Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450-51 (Merrill Jensen ed., 1976) [hereinafter 2 DHRC]. Similarly, in Virginia, John Marshall explained: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard." John Marshall, Statement at the Virginia Ratifying Convention (June 20, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1431 (John P. Kaminski & Gaspere J. Saladino eds., 1993) [hereinafter 10 DHRC].

70. Brutus, Letter XI, N.Y.J. (Jan. 31, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 49, at 420.

71. Brutus, Letter XV, N.Y.J. (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 49, at 440 (alteration in original).

72. *Id.* at 439.

73. *Id.*

constitution would be exalted above all other power in the government, and subject to no controul."[74]

This was a powerful charge that, with others, threatened to derail the Constitution if not rebutted. Leading Federalists such as Alexander Hamilton made two arguments to refute it. First, Hamilton maintained that Supreme Court judges would be unlikely to abuse their power by "exercis[ing] WILL instead of JUDGMENT" because the selection process—combined with the nature of the office—would ensure that only people with the requisite skill and integrity would serve on the Court.[75] Even if some judges might substitute "their pleasure to that of the legislative body," that fact, he contended, would prove only "that there ought to be no judges distinct from that body."[76] An independent federal judiciary, however, was necessary to establish a fully functioning federal government with adequate checks and balances, even if some judges might occasionally abuse or exceed their power.

Second, and perhaps most important for present purposes, Hamilton maintained that established rules of interpretation diminished the risk that judges would abuse their powers by reading the Constitution too broadly. Specifically, he denied that the Supreme Court would "exercise WILL instead of JUDGMENT" because it would be constrained to read the Constitution according to established rules of interpretation.[77] As he put it: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[78] The strict rules to which Hamilton referred

---

74. *Id.* at 437-38. *See also* George Clinton, Statement at the New York Ratifying Convention (July 11, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2146 (John P. Kaminski & Gaspare J. Saladino eds., 2008) [hereinafter 22 DHRC] ("[I]t will not require an extraordinary stretch of legal ingenuity in the judges to extend their power to every conceivable case and to collect into the sphere of their jurisdiction every judicial power which the States now posses[s]." (second alteration in original)).

75. THE FEDERALIST NO. 78, *supra* note 6, at 526, 529-30 (Alexander Hamilton) (arguing that individuals appointed to the federal bench would have "requisite integrity" and the "requisite knowledge" to follow the applicable "strict rules and precedents" and refrain from "exercis[ing] WILL instead of JUDGMENT").

76. *Id.* at 526.

77. *Id.*

78. *Id.* at 529.

included the rules of interpretation supplied by the law of nations to govern all legal instruments used to alienate sovereign rights and powers.

In *The Federalist No. 32*, Hamilton carefully described these rules to allay Anti-Federalists' fears. In only three circumstances, he wrote, would the proposed Constitution divest the States of their preexisting sovereign rights under governing rules of the law of nations.[79] He stressed that because the Constitution involved a "division of the sovereign power,"[80] it was subject to "the rule that all authorities of which the States are not *explicitly* divested in favour of the Union remain with them in full vigour."[81] This was an apparent reference to the well-established rule drawn from the law of nations that a legal instrument could deprive a state of a sovereign right or power only if it did so clearly and expressly or by unavoidable implication.[82] This rule applied not only to treaties but also to legal instruments of any kind claimed to alienate sovereign rights and powers.[83]

As we have explained, a sovereign state's alienation of rights and powers was a momentous act that interpreters were not to attribute to vague or ambiguous provisions.[84] If a purported beneficiary misinterpreted a legal instrument to deprive a state of its sovereign rights, the beneficiary violated the law of nations and gave the offended state just cause to retaliate, including by waging war.[85] To avoid dangerous misunderstandings, the law of nations established the rule of interpretation that Hamilton described: to alienate sovereign rights and powers, a legal instrument had to do so in clear and express terms or by unavoidable implication.[86]

---

79. THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

80. *Id.* at 203.

81. *Id.* (emphasis added).

82. *See* 1 M. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. II, § 305, at 233-34 (London, J. Newbery et al. eds., 1760).

83. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 853; Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 526-27. Professor Williams is correct that there were differences in the rules of interpretation that applied to treaties and statutes, *see* Williams, *supra* note 20, at 746, but the rule against implied alienation of sovereign rights applied to *any* legal instrument.

84. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 852.

85. *Id.*

86. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 500. As Vattel

This rule tracked the law of nations, and Hamilton understood it to be an inseparable part of the meaning of the proposed Constitution. The rule that the States retain all powers "not explicitly divested," he explained, "is not only a theoretical consequence of that division [of sovereign powers], but is clearly admitted by *the whole tenor of the instrument* which contains the articles of the proposed constitution."[87] In other words, because the function of the Constitution was to transfer a portion of the States' sovereign rights and powers to a new federal government, it necessarily incorporated or "admitted" the background rule of interpretation that determined when a legal instrument was alienating sovereign rights and powers.

After describing the governing rule, Hamilton applied it to reject Anti-Federalist charges that the Constitution could be read to alienate the States' preexisting sovereign power to tax within their borders. Anti-Federalists feared that the Constitution—by giving Congress the power to tax—would enable that body to limit or oust the States' traditional sovereign authority to tax the same matters.[88] Hamilton assured skeptics that a rule of interpretation admitted by the Constitution would not permit this construction.[89] He stressed that the Constitution would alienate the States' preexisting power to tax only where it did so in no uncertain terms. Hamilton wrote that because "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."[90] He explained that the Constitution would give the federal government

---

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.

VATTEL, *supra* note 82, bk. II, § 305, at 233-34.

87. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton) (emphasis added). Similarly, Hamilton saw the fact that the Constitution set forth *express* prohibitions on the States in Article I, Section 10 as "furnish[ing] a rule of interpretation *out of the body of the act* which justifies the position I have advanced, and refutes every hypothesis to the contrary." *Id.* (emphasis added).

88. *Id.* at 199.

89. *Id.* at 200.

90. *Id.*

exclusive authority, and thus alienate corresponding state authority, in only three circumstances.

According to Hamilton, each circumstance required express terms that alienated preexisting rights or powers of the States clearly or by unavoidable implication:

> 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*.[91]

Hamilton did not invent these three categories. He was paraphrasing the background rules supplied by the law of nations to govern the interpretation of all instruments claimed to alienate sovereign rights and powers.

Applying this framework to the States' preexisting power to tax, Hamilton "affirm[ed] that (with the sole exception of duties on imports and exports) [the States] would under the plan of the Convention retain that authority in the most absolute and unqualified sense."[92] He reasoned that the Constitution contained only one explicit, and relatively narrow, alienation of the States' sovereign power to tax. Article I, Section 10 provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."[93] This provision alienated—or limited—the States' power to tax imports and exports, but left undisturbed their power to impose all other taxes. Hamilton concluded "that an attempt on the part of the national Government

---

91. *Id.* (first emphasis added). Hamilton also applied these principles to address the Anti-Federalists' fears that the citizen-state diversity provisions of Article III would override the States' sovereign immunity from suit by individuals. Again invoking the rule drawn from the law of nations, Hamilton wrote: "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 FEDERALIST NO. 81, *supra* note 6, at 549 (Alexander Hamilton).

92. THE FEDERALIST NO. 32, *supra* note 6, at 199 (Alexander Hamilton).

93. U.S. CONST. art. I, § 10, cl. 2.

to abridge [the States] in the exercise of [their power to tax] would be a violent assumption of power unwarranted by any article or clause of its Constitution."[94]

Hamilton's assurances that courts would apply background rules governing the alienation of sovereign rights and powers to uphold the States' reserved sovereign rights and powers under the Constitution were important to its ratification. Hamilton's arguments were repeated in other States, and no one denied that such rules governed instruments used to alienate sovereign rights. For example, at the Virginia Convention, John Marshall paraphrased Hamilton's arguments that federal power is exclusive when "it is expressed to be exclusive" in the Constitution.[95] Otherwise, "when power is given to the General Legislature, if it was in the State Legislatures before, both shall exercise it; unless there be an incompatibility in the exercise by one, to that by the other; or negative words precluding the State Governments from it."[96]

Notwithstanding the force and clarity with which Hamilton and others expressed the applicable rule, Professor Schwartz dismisses the Federalists' assurances as disingenuous propaganda and credits the Anti-Federalists' fears as reflecting the true meaning of the Constitution.[97] His position is not tenable. First, both groups sought to convince the ratifiers of their preferred position, so if "propaganda" was involved, it was on both sides. Second, Anti-Federalists did not take the position that the Constitution—if properly interpreted—would give the federal government unlimited authority, but rather that federal officials (including judges) could not be trusted to read it faithfully.[98] Anti-Federalists certainly did not

94. THE FEDERALIST NO. 32, *supra* note 6, at 199 (Alexander Hamilton).

95. John Marshall, Statement at the Virginia Ratifying Convention (June 16, 1788), *in* 10 DHRC, *supra* note 69, at 1307.

96. *Id.*

97. *See* Schwartz, *supra* note 14, at 643, 647-49, 654.

98. *See, e.g.*, John Smilie, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DHRC, *supra* note 69, at 407-08 (acknowledging that the words of the Constitution do not "expressly announce that the sovereignty of the several states, their independency, jurisdiction, and power are at once absorbed and annihilated by the general government," but arguing that "the stronger must eventually subdue and annihilate the weaker institution"). Federalists insisted that the Constitution was designed to prevent such abuse. *See, e.g.*, James Wilson, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DHRC, *supra* note 69, at 405 ("[W]hen gentlemen assert that it was the intention of the Federal Convention to destroy the sovereignty of the states, they must conceive themselves

advocate—or purport to accept—the legitimacy of such federal overreaching.[99]

Thus, it is disingenuous to suggest that the Anti-Federalists' fears and predictions that the federal government would *abuse* or *exceed* its authority represent the true meaning of the Constitution. In the end, it is more accurate to say that, although Federalists and Anti-Federalists agreed that the Constitution gave the federal government only limited and enumerated powers, they disagreed about whether courts would respect those limits. If one were seeking to interpret the Constitution faithfully, then one would read the instrument to uphold the careful compromises described by its proponents rather than to authorize the very *abuses* feared by its opponents.[100]

C. The Nature of the Union

In a thoughtful essay, Professor Jud Campbell questions the relevance of the law of nations to constitutional interpretation and suggests that social contract theory offers an alternative lens through which to understand consolidations of political authority at the Founding.[101] He summarizes four Founding Era views about the nature of the Union and offered some potential implications of these views. Without taking a firm position on which view is correct, Campbell uses the writings of Thomas Jefferson, James Madison, John Marshall, and James Wilson to exemplify four conceptions of the nature of the Union.[102] He argues that employing interpretive principles drawn from the law of nations to understand the Constitution makes sense only if one subscribes to Jefferson's

---

better qualified to judge of the intention of that body than its own members, of whom not one ... entertained so improper an idea."); Thomas McKean, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DHRC, *supra* note 69, at 412 ("[T]he suggestions which represent this system as being expressly calculated to annihilate the sovereignty and independence of the states are groundless and delusive.").

99. *See* Brutus, Letter VII, N.Y.J. (Jan. 3, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 49, at 400.

100. If any presumption were warranted, it would be that the views of those who successfully persuaded others to ratify the Constitution are entitled to at least as much weight as the views of those who opposed ratification.

101. Campbell, *supra* note 9, at 34.

102. *Id.* at 14.

understanding that "the Constitution was a compact among sovereign states."[103] For his part, Campbell suggests that a "social-contractarian account of political authority, rather than one framed by the law of nations ... made sense when previously independent entities agreed to consolidate their sovereignty, retaining it among themselves but now exercising it collectively through a new polity."[104]

There are at least two problems with Professor Campbell's analysis. First, interpretive principles drawn from the law of nations applied not only to compacts, but to all other legal instruments used to alienate sovereign rights and powers.[105] Thus, under at least three of the four views he describes, the Constitution remained subject to the interpretive rule that Hamilton described. Second, social contract theory and the law of nations are not mutually exclusive when it comes to understanding the Constitution and the nature of the Union. One might plausibly understand the political consolidation at the Founding through the lens of social contract theory, but that understanding does not alter Hamilton's conclusion that the Constitution was subject to—or "admitted"—"the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[106] Of course, it is possible that the application of this rule to the Constitution might reveal that the people forged themselves into a national whole through a social contract, just as it might reveal that they did something different. The effect of the Constitution, however, can only be determined by reference to the background rules Hamilton invoked that governed all legal instruments used to alienate sovereign rights and powers.[107] Unless the States possessed *no* sovereign rights and powers before the Constitution was adopted—an untenable position that would obviate the very need for the Constitution—the rules necessarily applied.

---

103. *Id.* at 34.
104. *Id.* at 34-35.
105. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 500.
106. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).
107. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 500-02.

Professor Campbell begins by summarizing four Founding Era views of the nature of the Union: (1) compact theory, (2) quasi-nationalism, (3) 1787 nationalism, and (4) 1776 nationalism.[108] First, he attributes compact theory to Thomas Jefferson. According to Campbell, Jefferson denied national sovereignty and regarded the peoples of the several States as the only true sovereigns.[109] On this understanding, "the federal Constitution was merely a 'compact under the style & title of a Constitution,'"[110] and thus, according to Campbell, "it naturally made sense to interpret it as an agreement among sovereigns under the law of nations."[111] This understanding, Campbell further explains, "also meant that federal institutions lacked final interpretive authority regarding constitutional questions and probably also that states could secede, at least in certain situations."[112]

Second, Professor Campbell attributes a hybrid position to James Madison. On this view, "the Framers had blended confederal and national features through what we might call a *quasi-nationalist* approach."[113] The Constitution was partly federal because it "was authorized by the peoples of the several states, acting as 'independent States, not as forming one aggregate nation.'"[114] At the same time, Madison viewed the Constitution as partly national because "federal legislation would directly bind 'the individual citizens, composing the nation, in their individual capacities,' rather than having to rely on states as intermediating institutions, as occurred under the Articles of Confederation."[115] In the end, Madison understood the Constitution to be "neither a national nor a federal constitution; but a composition of both."[116]

Third, Professor Campbell attributes a similar but slightly more nationalist understanding of the Constitution to John Marshall. According to Campbell, "Marshall thought that a federal polity was

108. Campbell, *supra* note 9, at 17.

109. *Id.* at 17-18.

110. *Id.* at 19 (quoting Thomas Jefferson, Draft of the Kentucky Resolutions of 1798, *in* 30 THE PAPERS OF THOMAS JEFFERSON 536 (Barbara B. Oberg ed., 2003)).

111. *Id.* at 20.

112. *Id.*

113. *Id.* at 22.

114. *Id.* (quoting THE FEDERALIST NO. 39, *supra* note 6, at 254 (James Madison)).

115. *Id.* at 23 (quoting THE FEDERALIST NO. 39, *supra* note 6, at 255 (James Madison)).

116. *Id.* (quoting THE FEDERALIST NO. 39, *supra* note 6, at 257 (James Madison)).

created through the Constitution's ratification, whereby individual sovereign states had transferred portions of their sovereignty to a federal polity."[117] At the same time, he recognized that, following the Constitution's ratification, "the United States form, for many, and for most important purposes, a single nation ... [with] one people."[118] Campbell uses "basic precepts of social-contract theory" to reconcile these positions.[119] As he puts it, "[a]lthough the parties to a social contract began as individuals, they forged themselves together into a unitary whole—a body politic."[120]

Fourth, Professor Campbell summarizes James Wilson's view "that national sovereignty inhered in a national social contract created in 1776."[121] Whereas Jefferson, Madison, and Marshall all "agreed that states were fully sovereign prior to ratification of the Constitution,"[122] Wilson believed that "the act of declaring independence vested the people of the United States with certain national rights and national powers" immediately.[123] On this view, the United States "became a freestanding political entity in 1776—not one created by the several states in 1787."[124]

While Professor Campbell takes no firm position on which view of the Union was correct, he suggests our thesis—that the Constitution should be interpreted using rules drawn from the law of nations—is convincing only "[i]f Jefferson was right about the nature of the Union."[125] In other words, "*[i]f* the Constitution was a compact among sovereign states and merely assigned certain powers to a federal government, then using interpretive principles from the law of nations made sense."[126] We agree that Jefferson's view of the nature of the Union would support applying interpretive rules drawn from the law of nations to the Constitution. Acceptance of Jefferson's view, however, is by no means a prerequisite to the use

117. *Id.* at 26-27.
118. *Id.* at 27 (alteration in original) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413 (1821)).
119. *Id.* at 28.
120. *Id.*
121. *Id.* at 31.
122. *Id.* at 30.
123. *Id.* at 31.
124. *Id.*
125. *Id.* at 34.
126. *Id.*

of such rules. Indeed, both Alexander Hamilton and John Marshall—hardly Jeffersonian compact theorists—applied these very rules to interpret the Constitution.[127]

As discussed in Part II.B, we tend to favor Madison's understanding that the government created by the Constitution was partly federal and partly national.[128] Marshall's view was similar, although he arguably placed greater emphasis on the Constitution's creation of a national government capable of operating directly on the people without reliance on—or interference by—the States.[129] Any differences, however, are immaterial to whether the Constitution admitted the rule Hamilton described. Under either Madison's or Marshall's view, the powers possessed by the federal government resulted from the Constitution's transfer of sovereign rights and powers from the States to a newly created central government. All instruments used to perform this function, including the Constitution, were subject to interpretive rules that the law of nations prescribed to prevent misunderstandings or even war.[130] Even if the Constitution was designed to transfer all of the States' rights and powers save one insignificant one, the rules under the law of nations required the transfer to be unambiguous.[131] Thus, it is not possible to determine the precise nature of the Union created by the Constitution—or the precise scope of the transfer made—without first applying the rules of interpretation that governed all instruments used to transfer sovereign rights and powers.

---

127. As discussed in Part I.B, Hamilton famously explained in *The Federalist No. 32* that the whole tenor of the Constitution admitted the central interpretive rule established by the law of nations. *See supra* notes 75-91 and accompanying text. Similarly, Chief Justice Marshall applied the same rule in key opinions by the Marshall Court. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 566-76. Curiously, Professor Campbell neither cites nor discusses the application of this rule by these leading Federalists (and anti-Jeffersonians).

128. *See infra* notes 225-41 and accompanying text.

129. *See infra* Part IV.A.3.

130. Only Wilson's view of the nature of the Union, at least as portrayed by Campbell, might exempt the Constitution from the rules of interpretation recognized by the law of nations. On this view, the Constitution did not alienate any of the States' sovereign rights and powers because the individual States never possessed such rights and powers. Suffice it to say, any such view was an outlier that contradicted the States' actual course of dealing in both drafting and ratifying the Constitution. *See infra* Part II.A. Indeed, Wilson himself repeatedly contradicted this view at the Pennsylvania Ratifying Convention. *See supra* notes 69, 98.

131. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 852-53.

Accordingly, Professor Campbell errs to the extent he suggests that, if the nature of the Union is a social compact, then background rules of interpretation cannot apply to the Constitution. Assuming that both lenses clarify the nature of the Union, there is no reason to conclude that they are mutually exclusive. Even if "[a] social-contractarian account of political authority ... made sense when previously independent entities agreed to consolidate their sovereignty,"[132] that account does not deny, but openly acknowledges, that the Constitution was the instrument used to bring about such consolidation. As discussed, all instruments used for this purpose were subject to background rules of interpretation supplied by the law of nations. The Constitution was no exception, which is why Hamilton insisted that the whole tenor of the instrument admitted these rules.[133]

II. BACKGROUND CONTEXT AND THE CONSTITUTION

A primary goal of our scholarship has been to illuminate the original public meaning of the Constitution—particularly its division of sovereign rights and powers—by recovering a forgotten part of the background context that necessarily informed its meaning at the Founding. As discussed in Part III, one cannot fully understand the Constitution's numerous provisions dividing sovereign rights and powers between the federal government and the States without reference to background rules supplied by the law of nations. These rules both defined the rights and powers of sovereign "states" and governed the extent to which legal instruments could alienate them. Because the Constitution was fundamentally an instrument used by the people of the several "States" to transfer a portion of the States' rights and powers to a new

132. Campbell, *supra* note 9, at 34-35. Professor Jonathan Gienapp has also emphasized the argument by Founding Era nationalists "that the existence of a national social contract entitled the national government to expansive power." Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1786 (2021). Like Campbell, Gienapp identifies Alexander Hamilton as a proponent of social contract theory, yet neither scholar cites nor discusses Hamilton's simultaneous—and fully compatible—understanding that the Constitution "admitted" "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour." THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

133. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

federal government, the Constitution necessarily admitted these rules as part of the background context that established its original public meaning.[134] So understood, the Constitution transferred significant sovereign rights and powers from the States to the federal government but left others with the States.

Professor Schwartz contends that background rules governing alienation of sovereign rights do not apply to the Constitution because the instrument established a national government that extinguished any and all sovereign rights and powers that the States may have enjoyed prior to ratification.[135] In his view, because the States alienated all of their sovereign authority in the Constitution, the rules governing the alienation of sovereign rights have no relevance to constitutional interpretation.[136] The problem with this claim, however, is that it puts the cart before the horse. Because the Constitution was a legal instrument used to divest and transfer sovereign rights and powers, the extent to which it divested the States of preexisting rights and powers is the very question at issue. One can only answer this question by applying the background rules that governed the interpretation of all legal instruments claimed to alienate sovereign rights and powers. In other words, whether one believes that the Constitution alienated some, all, or none of the States' sovereign rights and powers, the actual extent of the alienation can only be determined by resort to the rules that governed such transfers. To accept this modest position, one need not embrace the theory that the Constitution was a mere compact or the radical suppositions that it allows nullification and secession by the States. As discussed below, the Constitution was much more than a compact because it irrevocably alienated the States' sovereign right to exercise exclusive territorial sovereignty over their own citizens within their own territory. And in doing so, under governing background rules of interpretation, it divested the States of any right to nullify supreme federal law or secede from the Union.

---

134. As Stephen Sachs has explained, constitutional backdrops of this kind illustrate "how atextual rules can enjoy continuing legal force under a written Constitution." *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1818 (2012).

135. *See* Schwartz, *supra* note 14, at 636.

136. *See id.* at 641.

Professor Schwartz offers at least three reasons why background rules drawn from the law of nations are inapplicable to constitutional interpretation. First, he maintains "that the American states were never Vattelian sovereign states—or at least, that there is a strong argument to that effect, an argument that was known and made in the founding era."[137] If the States never truly became "Free and Independent States," the argument goes, then rules supplied by the law of nations were simply inapplicable to any instruments they used to adjust their rights and powers. Second, he contends that any use of rules drawn from the law of nations to interpret the Constitution's division of sovereign rights and powers is tantamount to "compact theory."[138] In turn, treating the Constitution as a compact means that the States retained dangerous powers to nullify federal law and secede from the Union. Third, he argues that even if the States had sufficient independent sovereignty to trigger the application of such rules before ratification, the States ceased to be independent sovereigns when they authorized Congress to exercise legislative power within their borders.[139] He believes that the States' decision to relinquish this status precludes interpreters from relying on the law of nations to interpret the Constitution. None of these arguments is persuasive, as this Part explains.

Although Professor Schwartz rejects our understanding of the Constitution's division of sovereign rights and powers, he offers no alternative conception of constitutional federalism. Instead, he uses broad generalizations and catchphrases to describe conclusions he takes for granted. For example, he insists that the government created by the Constitution is a national government rather than a federal government.[140] He is unable to explain what implications this characterization might have for the States, however, because (in his view) "there was no clear consensus on what the Constitution meant for state sovereignty."[141] Thus, while he insists that we are interpreting the Constitution in the wrong way, he offers no account of the right way.

---

137. *Id.* at 638.
138. *See id.* at 631-32.
139. *Id.* at 660.
140. *See id.* at 632.
141. *Id.* at 646.

That said, even his bare critique of our theory falls flat. Each reason he asserts for why background rules of interpretation of the law of nations cannot inform constitutional meaning rests on a mistaken premise. First, contrary to his suggestion, it is immaterial to our argument whether the States became full Vattelian sovereign states after declaring and winning their independence from Great Britain. No one seriously contends that the newly independent States possessed no sovereign rights and powers, and any such contention would contradict innumerable Founding Era statements and the States' actual course of conduct. However one chooses to characterize the States after independence, they unquestionably possessed sufficient sovereignty both before and after the Articles of Confederation to trigger the background rules that governed all instruments used to alienate sovereign rights and powers. If the States possessed no sovereign rights and powers capable of being transferred, then both the Articles of Confederation and the Constitution were absurd gestures.

Second, the proper characterization of the government created by the Constitution cannot be reduced to the simple binary choice that Schwartz presents—either a national government with plenary authority and no reserved state powers, or a mere compact among fully free and independent states.[142] As Professor Campbell describes, there are several intermediate alternatives. For example, as Madison explained, the Constitution is "partly federal, and partly national."[143] Madison's characterization recognized that the Constitution comprises a series of hard-fought compromises designed to balance national and state interests. The task of interpretation is to ascertain as faithfully as possible the contours of these compromises, not to deny or ignore them by mischaracterizing the Constitution as either an unlimited national charter or a mere compact among Vattelian sovereign nation-states. That is a false choice.

Third, Schwartz wrongly claims that background rules of the law of nations cannot apply to the Constitution because the States were no longer free and independent states in the international sense (if

142. *See id.* at 658.

143. THE FEDERALIST NO. 39, *supra* note 6, at 257 (James Madison).

they ever were) following ratification.[144] As mentioned, this claim puts the cart before the horse. No one seriously contends that the States remained full sovereign states post-ratification. The Constitution expressly divested the States of fundamental sovereign rights and powers in establishing a new central government. But which of these rights and powers the Constitution divested is the very question at issue, and can only be answered by reference to the background rules that governed the interpretation of such instruments. Moreover, even when a sovereign state purported to alienate all of its sovereign rights and powers, the rules in question governed the interpretation of the instrument used to alienate such rights precisely to ensure that the instrument had the claimed effect. Regardless of the extent to which the States alienated their sovereign rights in the Constitution, the rules necessarily applied to determine the precise scope of that alienation. By presupposing that the Constitution deprived the States of all of their sovereign rights and powers, Professor Schwartz begs the very interpretive question that the rules serve to answer.

A. Free and Independent States

The American States staked their claim to independence in 1776. The former British Colonies proclaimed in the Declaration of Independence that:

> [T]hese United Colonies are, and of Right ought to be, Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.[145]

This passage declared the American States to be "Free and Independent States"—a status under the law of nations that entitled them to all of the sovereign rights and powers enjoyed by all other

144. *See* Schwartz, *supra* note 14, at 641.

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

states, including "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[146] Great Britain refused to relinquish its claim to sovereignty over the Colonies, so the States banded together to fight and win the War of Independence. In 1782, Great Britain formally recognized the independence of the States in terms that echoed the Declaration: "His Britannic Majesty acknowledges the said United States ... to be free, sovereign and independent States."[147] Once recognized as free and independent states by their former sovereign, the States indisputably enjoyed the rights and powers that attended that status under the law of nations.

Professor Schwartz nonetheless suggests that the individual States never attained this status because they conducted war and foreign relations collectively by establishing a Continental Congress of States to coordinate and lead these matters.[148] This informal arrangement continued throughout most of the war until the States ratified the Articles of Confederation in 1781.[149] The Articles formalized the States' delegation of war and foreign relations powers to a Congress of the United States.[150] The Constitution continued this approach by delegating the same powers to a new central government.[151] According to Schwartz, "if the states never had war and foreign affairs powers individually, then they were never truly sovereign Vattelian nation-states."[152] Schwartz purports to find support for this conclusion in Vattel's writings, which he claims establish that there was no such thing "as a nation-state that never had independent war or foreign affairs powers."[153] As discussed below, Schwartz's position assumes its conclusion and ignores persuasive counterevidence.

---

146. *Id.*

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

148. Schwartz, *supra* note 14, at 637-38.

149. *See generally* ARTICLES OF CONFEDERATION of 1781.

150. 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." ARTICLES OF CONFEDERATION OF 1781, art. IX, Para.1.

151. *See* Bellia & Clark, *International Law Origins of Federalism*, supra note 3, at 877.

152. Schwartz, *supra* note 14, at 639.

153. *Id.*

1. Informal Relations Among States

There are several legal, historical, and factual problems with Professor Schwartz's position. Coordination among independent states to conduct war and foreign relations did not suffice to negate their individual sovereignty. It would have surprised many members of the Founding generation to learn that the States never actually achieved the status of "Free and Independent States" simply because they coordinated their efforts to declare and win independence from Great Britain. Nothing in the law of nations precluded sovereign states from working together to defeat a common enemy in war without adopting a formal agreement.[154] The fact that the States elected not to conduct war and foreign relations separately does not mean that they lacked power to do so. The States were small and weak sovereigns compared to Great Britain. If they had any hope of winning the War of Independence, they had to coordinate their efforts through a central command. Even while maintaining this informal arrangement, however, they proceeded to negotiate and ratify the Articles of Confederation—a formal instrument adopted by each of the thirteen States to establish a weak confederation going forward. If, as Schwartz believes, the States never possessed sovereign powers over war and foreign relations, then how could they delegate these very powers to Congress in the Articles? More fundamentally, if the States were not states, then who formed the "[A]rticles of Confederation and perpetual Union *between* the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia"?[155] Schwartz's position blinks reality and ignores the historical record.

2. The Option to Retain Independence

Professor Schwartz's position also contradicts the States' understanding of their own status as free and independent states

154. *Cf.* VATTEL, *supra* note 82, bk. I, § 18, at 13 ("Since then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation.").

155. ARTICLES OF CONFEDERATION of 1781, preface (emphasis added).

capable of confederating or not, as each State saw fit. It was never a foregone conclusion that all thirteen States would ratify either the Articles of Confederation or the Constitution. Several States hesitated to adopt these instruments and seriously considered rejecting them. To take effect, the Articles required the assent of all thirteen States. Although the Continental Congress began drafting the Articles in 1777, they were not ratified until 1781 because of the time needed for all States to agree to the proposed terms.[156] If, as Schwartz suggests, the Founders did not regard the States as free and independent sovereigns, then it made no sense for them to proceed as if each State possessed the sovereign prerogative to accept or reject the Articles.

Similarly, after the Articles were adopted, the States considered themselves free to abandon the instrument because of breaches by other States.[157] The original goal of the Philadelphia Convention was merely to amend the Articles, but the delegates quickly concluded that they were beyond repair and proceeded to draft an entirely new plan.[158] One of the most contentious issues was the basis of representation in the upper chamber of the national legislature, with the larger States favoring proportional representation and the smaller States insisting on equal suffrage.[159] The only reason individual States had leverage in these debates is that they were free to reject any proposed instrument and go it alone. In addition, the debates over the structure and composition of Congress demonstrate that the States considered themselves free to seek other alliances if they could not reach agreement at the Convention. As discussed below, all of this evidence refutes Professor Schwartz's novel suggestion that the individual States never possessed sovereign rights and powers.

The Virginia Plan initially proposed that the States' representation in both the House and the Senate should be proportional based on population.[160] Delegates from the smaller States objected and

156. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 860.

157. *See id.* at 866 (explaining the right of the States to abandon the Articles because of breach by other States).

158. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 543 (describing this shift in plan).

159. *See* Clark, *Separation of Powers*, *supra* note 54, at 1358.

160. *Id.* at 1349.

pressed for equal "suffrage in the Natl. Legislature," as was the case under the Articles.[161] Because of the lack of equal suffrage, William Paterson declared that "N. Jersey will never confederate on the plan before the Committee."[162] James Wilson responded that "[i]f the small States will not confederate on this plan, Pena. & he presumed some other States, would not confederate on any other."[163] Roger Sherman proposed a compromise that would have allowed proportional representation in the House and equal suffrage in the Senate,[164] but it was narrowly defeated.[165]

The issue of representation arose again after Paterson introduced the New Jersey Plan as a complete alternative to the Virginia Plan.[166] Although the Plan was defeated, it triggered a protracted debate over equal suffrage in the Senate. Luther Martin insisted "that an equal vote in each State was essential to the federal idea."[167] He argued that although "the States may give up this right of sovereignty, yet they had not, and ought not."[168] Rufus King countered that "he never could listen to an equality of votes."[169] In response, Gunning Bedford insisted 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."[170] The Convention was deadlocked on the question, causing deliberations to come to a full stop.[171]

The Convention appointed a Grand Committee to find a compromise, and it proposed giving the States equal suffrage in the Senate

---

161. James Madison, Notes on the Constitutional Convention (June 9, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 176.

162. *Id.* at 179.

163. *Id.* at 180.

164. James Madison, Notes on the Constitutional Convention (June 11, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 196.

165. *Id.* at 202.

166. James Madison, Notes on the Constitutional Convention (June 15, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 242.

167. James Madison, Notes on the Constitutional Convention (June 27, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 437.

168. *Id.*

169. James Madison, Notes on the Constitutional Convention (June 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 490.

170. *Id.* at 492.

171. James Madison, Notes on the Constitutional Convention (July 2, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 510.

in exchange for the requirement that all bills for raising revenue originate in the House.[172] Elbridge Gerry, a member of the Committee, stated that he assented to the proposal even though "he had very material objections to it."[173] He explained that the members "were in a peculiar situation" because "[i]f no compromise should take place," the consequence would be a secession "the result [of which] no man could foresee."[174] In the end, the Convention narrowly approved the compromise, which included giving the States equal suffrage in the Senate.[175]

The debates in the Constitutional Convention regarding equal suffrage contradict Professor Schwartz's claim that the States never attained the status of free and independent sovereigns. The delegates understood each State to have the option to walk away if the plan was unsatisfactory.[176] Delegates on both sides declared that their States would not confederate under a new plan unless their demands were met.[177] During this debate, no one objected that the States were not sovereign or that they lacked the sovereign rights to leave the existing Union, confederate with a different group of States, or form an alliance with a foreign power.[178] Instead, the debate focused on the merits of the smaller States' demand for equal suffrage in the Senate—a demand that the Convention ultimately met precisely because of the ability of States to go it alone.[179] Professor Schwartz's position makes nonsense of these debates.

The Constitution itself recognized the States' ability to remain independent sovereigns if they elected not to ratify the instrument.

---

172. Journal of the Constitutional Convention (July 5, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 524.

173. *Id.* at 532.

174. *Id.*

175. James Madison, Notes on the Constitutional Convention (July 16, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 69, at 15.

176. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 867-68.

177. For example, Rufus King stated that "he never could listen to an equality of votes as proposed in the motion." James Madison, Notes on the Constitutional Convention (June 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 490. Luther Martin responded that he would "never confederate if it could not be done on just principles." *Id.*

178. Gunning Bedford stated that if the large States dissolved 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." *Id.* at 492.

179. James Madison, Notes on the Constitutional Convention (July 16, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 69, at 15.

Article VII established 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."[180] This provision made clear that if a State's convention chose not to ratify the Constitution, that State would not be bound by that instrument, but would instead retain its autonomy outside the Union as an independent sovereign.[181] As discussed, numerous delegates to the Constitutional Convention made statements to this effect without contradiction.

If nothing else, the Convention sought to forge a compromise that all States, large and small, could embrace. Ignoring this careful effort, Professor Schwartz asserts that any reliance on Article VII is "question-begging."[182] First, he questions whether "holding ratifying conventions in the States, and binding only 'the states so ratifying,' carries theoretical implications."[183] He suggests that the requirements found in Article VII may have been merely "concession[s] to practicality" rather than "fundamental theoretical commitments."[184] As he put it:

> In 1787, there was no machinery for a national election of any kind. Election machinery existed only in the states, each with their own laws and voting qualifications. A national convention elected by the people irrespective of state boundaries or state election laws would have required the erection of special election machinery, presumably by the confederation Congress. This was not feasible and would have entailed delays and complications predictably fatal to the ratification process.[185]

---

180. U.S. CONST. art. VII.

181. Article VII, like the rest of the Constitution, employs the term "States" to refer to the original thirteen "States" that declared and won their independence from Great Britain. As we noted, the term "States" was a term of art drawn from the law of nations, suggesting that the "States" mentioned in the Constitution possessed all of the rights and powers of sovereign states except those they alienated in accord with the rules governing instruments used for that purpose. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 896. Schwartz confuses original intent with original public meaning by arguing that reliance on "'a term of art' implies a focus on drafting intentions." Schwartz, *supra* note 14, at 632. As Professor Williams notes, "this confusion reflects a misunderstanding of the relationship between terms of art and public meaning originalism." Williams, *supra* note 20, at 742.

182. Schwartz, *supra* note 14, at 665.

183. *Id.* at 665-66.

184. *Id.* at 666 n.135.

185. *Id.*

On this account, the only reason that Congress did not hold a national ratifying convention (without regard to state borders) was that it was impractical and might fail. In other words, according to Schwartz, the problem with a national ratifying convention was logistics.

Schwartz's account ignores the fact that the Confederation Congress had no power under the Articles to convene a national convention outside the States for any purpose, let alone to make changes to the Articles or to adopt an entirely new Constitution. In fact, the Articles specifically prohibited making "any alteration ... 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."[186] Schwartz does not address this prohibition, identify the source of the Confederation Congress's supposed power to call a national convention, or explain why a national convention would have had unilateral authority to repeal and replace the Articles on behalf of the States.

Schwartz's claim appears to rest on the assumption that the States achieved their independence collectively rather than individually.[187] Even if that account were somehow true as an initial matter, the States subsequently established (or affirmed) that they enjoyed individual sovereignty by unanimously adopting the Articles of Confederation. Article II 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."[188] The reference to "each State" makes plain—at least from that point forward—that the States possessed individual sovereignty rather than collective sovereignty.[189] More fundamentally, Article II's statement that each State "retains its sovereignty" indicates that the Articles simply reaffirmed, rather than established, the States' individual sovereignty.[190] In either case, once they adopted the Articles, the States individually possessed all sovereign rights and

186. ARTICLES OF CONFEDERATION of 1781, art. XIII.
187. *See* Schwartz, *supra* note 14, at 636.
188. ARTICLES OF CONFEDERATION of 1781, art. II.
189. *See id.*
190. *See id.*

powers they had not expressly delegated to Congress in that instrument.

Professor Schwartz's imaginative effort to explain away the implications of Article VII of the proposed Constitution defies the understanding of individual state sovereignty that dictated the course of the Convention and ratification. On its face, Article VII invited each State to call a ratifying convention with the power to ratify or reject the Constitution on behalf of that State.[191] In addition, Article VII specified that only those States that ratified the Constitution would be bound thereby.[192] Schwartz's speculation that the Confederation Congress could have bypassed the States by calling a single national ratifying convention has no basis in—and is affirmatively refuted by—the text of the Articles of Confederation and the proposed Constitution.

Second, Professor Schwartz attempts to blunt the force of Article VII by arguing that its theoretical implications "do not necessarily entail the reservation of sovereign rights inherent in compact theory."[193] By such rights, he appears to mean those rights and powers possessed by all sovereign states under the law of nations at the Founding, including the right to enter into compacts with other sovereigns.[194] But if one or more of the original States had chosen not to ratify the Constitution, then such holdouts necessarily would have retained all of the rights and powers enjoyed by free and independent states. By hypothesis, if States did not ratify the Constitution, then they would have no longer been a party to either the now-defunct Articles of Confederation or the Constitution. Under these circumstances, any holdout States would have been essentially free agents, possessing all of the rights and powers of free and independent states. A contrary conclusion would have left such States in legal limbo as stateless states, neither free and independent nor bound by the Constitution. There is no legal or historical basis for such a novel conclusion.

Indeed, Chief Justice Marshall—who participated in the ratification debates—described, in one of his most famous opinions,

191. U.S. CONST. art. VII.
192. *Id.*
193. Schwartz, *supra* note 14, at 665-66.
194. *Id.* at 666.

Gibbons v. Ogden, this straightforward "political situation" of the States before and after the Constitution.[195] Marshall concluded that the Articles established a mere league among "completely independent" sovereigns, whereas the Constitution changed the "whole character" of the States in important respects.[196] As he explained:

> As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. *This is true.* But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.[197]

Schwartz does not address Marshall's characterization or numerous other contemporaneous sources that described the Constitution as alienating some—but not all—of the States' sovereign rights and powers. The extent of the alienation, as Marshall explained, could only "be determined by a fair consideration of the instrument by which that change was effected," not by claiming that the States were never actually states at all.[198]

Finally, even if (counterfactually) the States never became free and independent states—if somehow part of their collective sovereignty was informally and irrevocably held in receivership by an inchoate collective government—there is no question that the Constitution alienated a greater proportion of whatever sovereign rights and powers they possessed than the Articles had. The Constitution's expanded alienation, no matter how extensive or

195. 22 U.S. (9 Wheat.) 1, 187 (1824).
196. *Id.*
197. *Id.* (emphasis added).
198. *Id.*

limited, was necessarily governed by the background rules supplied by the law of nations. These rules applied to all legal instruments used to adjust sovereign rights, whether it entailed an initial alienation or a subsequent alienation; and whether it envisioned a limited alienation or a complete alienation. For this reason, even if the States possessed less than the complete complement of sovereign rights and powers at the Federal Convention, they could alienate whatever rights and powers they did possess only in clear and express terms or by unavoidable implication. Otherwise, their extensive deliberations and compromises over the scope of alienation was a complete waste of time.

In short, whatever the precise status of the States prior to ratification, history confirms that they possessed sovereign authority sufficient to (1) adopt and then withdraw from the Articles of Confederation, (2) negotiate the terms of a new arrangement, and (3) decide whether to ratify the proposed Constitution or go it alone. Because the States had at least this degree of sovereign power, the instrument that their delegates so carefully negotiated, and that their people ultimately adopted in their respective conventions, was subject to the established rules of interpretation that governed all instruments used to alienate sovereign rights and powers. The delegates to the Convention negotiated the Constitution's terms in the shadow of these rules, and the state ratifying conventions debated their meaning by reference to the same rules. That is why Hamilton observed in *The Federalist No. 32* that the whole tenor of the instrument "admitted" them.[199]

3. Using Background Rules to Interpret the Constitution

Finally, Professor Schwartz denies the relevance of the law of nations to constitutional interpretation, in part, because he conflates the status of the States *prior* to ratification with their status *after* ratification. In order to ascertain with precision which sovereign rights and powers the States alienated in the Constitution, one must consult the background rules governing instruments used to perform this function. As discussed, prior to adopting the

199. *See* THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

Constitution, the States—and their people as the ultimate source of sovereignty—possessed a set of sovereign rights and powers enjoyed by all free and independent states under the law of nations, including the power to adopt (or reject) a legal instrument alienating those rights and powers.[200] When the people of each State ratified the Constitution, they chose to alienate a significant portion of their State's sovereign rights and powers in favor of a new federal government. Schwartz argues that the law of nations is irrelevant to interpreting the Constitution's division of sovereign rights and powers because the States lost their status as full-fledged "Vattelian" states when they adopted the Constitution.[201] This observation is true but irrelevant because it focuses on the wrong point in time. If the States possessed sovereign rights and powers prior to ratification (which they did), and the Constitution transferred some of these rights and powers to a new federal government (which it did), then the relevant question remains: To what extent did the Constitution reallocate these rights and powers? This is a question of constitutional interpretation that can only be answered by applying background rules of interpretation that governed legal instruments used to alienate sovereign rights and powers. As Hamilton put it, because the Constitution involved a "division of the sovereign power," these rules were "admitted by the whole tenor of the instrument."[202]

This background has important implications for constitutional interpretation. Our claim is not that the relevant background rules govern constitutional interpretation of their own force. Rather, such rules form an essential part of the background context that informs the original public meaning of the Constitution. Reliance on such context to interpret legal texts is hardly novel. When a legal text is adopted against the background of a longstanding and well-established rule of interpretation governing the change that the text is claimed to make, the rule of interpretation is an inseparable part of the text because the rule itself helps to convey its meaning. As Justice Antonin Scalia explained in the context of statutory interpretation, when canons of interpretation "have been long

200. *See supra* notes 145-47 and accompanying text.
201. *See* Schwartz, *supra* note 14, at 641.
202. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language."[203] In other words:

> It might be said that rules like these, so deeply ingrained, must be known to both drafter and reader alike so that they can be considered *inseparable* from the meaning of the text. A traditional and hence anticipated rule of interpretation, no less than a traditional and hence anticipated meaning of a word, imparts meaning.[204]

As John Manning has elaborated, "[i]f the meaning of a text depends on the shared background conventions of the relevant linguistic community, then any reasonable user of language must know 'the assumptions shared by the speakers and the intended audience.'"[205] When the legal operation to which the background rule applies is extraordinary, the presumption that the lawmaker and the governed understand the text in light of the rule is all the more compelling. This was Hamilton's point when he wrote that the Constitution necessarily "admitted" the background rules of interpretation applicable to instruments used to divide "the sovereign power."[206]

This mode of interpretation as applied to the Constitution's alienation of sovereign rights and powers can be summarized in three steps. First, a well-established background rule of interpretation governs an operation that legal instruments have the capacity to perform. In the context of the Constitution, the law of nations provided that a legal instrument of any kind (treaty, statute, etc.) should not be interpreted to divest a preexisting sovereign right or power unless it did so in clear and express terms.[207] Second, it is fair to presume that lawmakers and the governed were aware of such a

---

203. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1990).

204. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31 (2012) (emphasis added).

205. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003) (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1991)).

206. *See* THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

207. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 852-53.

longstanding and well-established rule when the law was formulated and adopted, just as it is fair to presume that they understood the linguistic meaning of the words they used. And this presumption is stronger when the legal operation to which the rule applies is extraordinary. The legal operation that the Constitution performed—divesting States of sovereign rights and powers—was extraordinary, and misinterpreting an instrument to accomplish that result when it was unclear could lead to conflict or war.[208] As we have explained, there is abundant evidence that commenters on the Constitution—such as Alexander Hamilton—were aware of this rule.[209] Third, because the text is drafted and adopted on the presupposition that the rule will govern, the rule is inseparable from the text, and the rule, according to the terms of its own operation, imparts meaning to the text. Thus, the background rule governing alienation of preexisting sovereign rights contributed to the meaning of the constitutional text because the rule and the Constitution worked together to alienate a portion of the States' preexisting sovereign rights and powers.

In short, Hamilton's observation that the Constitution, by its "whole tenor," "admitted" the rule, followed a familiar and ongoing mode of textual interpretation.[210] On this understanding, Hamilton concluded, the States retained their preexisting sovereign immunity from suit by individuals unless the Constitution divested it clearly and expressly or by unavoidable implication.[211] We apply these insights in Part III to examine which rights and powers the States alienated and which rights and powers they retained by adopting the Constitution.

B. The False Choice Between Nationalism and Federalism

Professor Schwartz challenges our use of background context to determine the Constitution's division of sovereign rights and powers by denying that the Constitution created a federal system of any kind. In his view, the Constitution "is far better understood ... as

208. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 500-01.
209. *Id.* at 518, 518 n.142.
210. *See* THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).
211. *See supra* note 91 and accompanying text.

creating a *national* government."[212] In addition, he believes that any reliance on background rules of interpretation drawn from the law of nations would treat the States as "independent Vattelian nation-states"[213] and support compact theory—"the idea that the Constitution is a compact of sovereign states rather than the nation-creating act of a sovereign people."[214] He also insists that relying on "Vattelian international law theory in the U.S. constitutional context" would provide a "theoretical basis for nullification and secession."[215]

Each of these extravagant claims is false. As discussed, during the ratification period, the States had substantial independent sovereignty, and the Constitution was the instrument used by their people to alienate portions of this sovereignty for the greater good. The law of nations necessarily provides background context for understanding the effect of the Constitution on state sovereignty because the people of each State possessed the sovereign authority to accept or reject the Constitution *before* it was ratified. The application of the rules supplied by such law to determine the Constitution's allocation of sovereign rights and powers between the federal government and the States in no way requires the conclusion that the States remained "independent Vattelian nation-states"[216] *after* they ratified the Constitution. That is one of the very questions of constitutional interpretation to be decided. Under these rules, the people of each State were free to adopt an instrument that alienated as many or as few of their State's sovereign rights and powers as they saw fit. Our claim is simply that the law of nations provides relevant background context necessary to ascertain with precision the extent to which the Constitution alienated such rights and powers. As discussed in Part III, this approach does not lead to the conclusion that the States retained the power to nullify federal law or secede from the Union. To the contrary, it leads to the opposite conclusion.

Professor Schwartz insists that any reliance on the law of nations to interpret the Constitution would transform that instrument into

212. Schwartz, *supra* note 14, at 632.
213. *Id.*
214. *Id.* at 630.
215. *Id.* at 664.
216. *Id.* at 632.

"a compact of sovereign states."[217] In his view, if the States retained any residual sovereign rights and powers at all, then the Constitution formed a compact, not a nation. This all-or-nothing approach presents a false choice. The Constitution was neither a mere "compact" among fully-sovereign "states" nor an instrument that created a wholly "national government" under the most plausible views of the nature of the union that Professor Campbell recounts.[218] This dichotomy is counterfactual and a gross oversimplification. Properly understood, the Constitution struck a series of nuanced and hard-fought compromises between nationalism and federalism. The task of constitutional interpretation is not to impose one archetype or another on the people's choice, but to ascertain the precise contours of the compromise they actually reached in the document.

The need for compromise was evident throughout the Constitutional Convention. At the start of the Convention, Edmund Randolph proposed "that a *national* Government (ought to be established) consisting of a *supreme* Legislative, Executive & Judiciary."[219] This motion led to "a discussion ... on the force and extent of the particular terms *national* & *supreme*."[220] Charles Pinckney inquired whether Randolph "meant to abolish the State Governts. altogether."[221] Randolph denied such an intent and explained "that he meant by these general propositions merely to introduce the particular ones which explained the outlines of the system he had in view."[222] Following this exchange, the Convention made no further reference to creating a "national government." Instead, the Convention proceeded to develop a plan that would retain the States as individual sovereigns even while alienating a significant—but limited—portion of their sovereign rights and powers in favor of a new central government.[223] This novel hybrid approach, as both

217. *Id.* at 630.

218. *See supra* Part I.C.

219. James Madison, Notes on the Constitutional Convention (May 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 50, at 33.

220. *Id.* (footnote omitted).

221. *Id.* at 34.

222. *Id.*

223. Significantly, as adopted, the Constitution refers to "States," but makes no reference to a "national government." *See generally* U.S. CONST.

Madison and Marshall understood, was neither strictly national nor strictly federal.[224]

We favor Madison's approach, which we believe aligns in relevant respects with Marshall's approach. As Madison famously explained in *The Federalist No. 39*, the Constitution "is partly federal, and partly national."[225] He proceeded to explain the ways in which it is federal and those in which it is national. He began by pointing out that the foundation of the Constitution is federal because the assent and ratification of the Constitution "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."[226] He also stressed that neither a majority of the people of the Union nor a majority of the States can impose the Constitution on any state that does not wish to be bound. 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."[227] "The act therefore establishing the Constitution, will not be a *national* but a *federal* act."[228]

Even though Madison considered the act of establishing the Constitution to be federal, he also considered the arrangement it created to include both federal and national elements. Examining "the sources from which the ordinary powers of government are to be derived," Madison concluded that the government is "to be of a mixed character presenting at least as many *federal* as *national* features."[229] The government is national insofar as "[t]he house of representatives will derive its powers from the people of America."[230] On the other hand, the government is federal insofar as the Senate "will derive its powers from the States, as political and co-equal societies."[231] Finally, "[t]he executive power will be derived from a

224. *See* Campbell, *supra* note 9, at 22-23, 26-27.
225. THE FEDERALIST NO. 39, *supra* note 6, at 257 (James Madison).
226. *Id.* at 254.
227. *Id.*
228. *Id.*
229. *Id.* at 254-55.
230. *Id.*
231. *Id.* at 255.

very compound source" because of the nature and design of the electoral college.[232]

Madison then considered the operation of the government and concluded that it will be a national government because "in its ordinary and most essential proceedings" it will operate "on the people in their individual capacities" rather than on "the political bodies composing the confederacy, in their political capacities."[233] Thus, "on the whole [he] designate[d] it in this relation a *national* Government."[234]

Focusing next on the extent of the government's powers, Madison characterized the plan as federal rather than national. He reasoned that "[t]he idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things."[235] In the case of the Constitution, however, "the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[236]

Finally, Madison considered "the authority by which amendments are to be made," and found the Constitution to be "neither wholly *national*, nor wholly *federal*."[237] He reasoned that if this authority were "wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union."[238] Conversely, were it "wholly federal ... the concurrence of each State in the Union would be essential to every alteration that would be binding on all."[239] The Constitution, of course, embraced neither paradigm. Instead, it adopted the intricate procedures spelled out in Article V, which required amendments to be ratified by a supermajority—but not all—of the States.[240] Thus, taking all of these features into account, Madison concluded that "[t]he proposed Constitution

232. *Id.*

233. *Id.* at 255-56. He noted an exception to this operation for "the trial of controversies to which States may be parties." *Id.* at 255.

234. *Id.* at 256.

235. *Id.*

236. *Id.*

237. *Id.* at 257.

238. *Id.*

239. *Id.*

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

therefore is in strictness neither a national nor a federal constitution; but a composition of both."[241]

Professor Schwartz discounts or overlooks all of these compromises built into the Constitution by simply declaring that "[t]he Constitution is far better understood—both normatively and as a historical fact—as creating a *national* government."[242] But none of the four conceptions of the nature of the Union that Professor Campbell identifies, not even Wilson's, understood the Constitution to establish a national government that, contrary to the express terms of the instrument, had unlimited sovereign rights and powers.[243] Any fair reading of the Constitution must acknowledge that, by adopting the Constitution, the people alienated some (but not all) of their States' preexisting sovereign rights and powers and thus preserved some (but not all) of their States' sovereign rights and powers. Thus, the relevant question is not whether the Constitution is "national" or "federal," because it is exclusively neither one nor the other. Rather, the relevant question is which rights and powers the States lost and which rights and powers they retained when their people adopted the Constitution. This question can be answered only through careful interpretation of the Constitution, which necessarily includes consideration of relevant background context that informs the meaning of its terms.

Our previous work sought to engage in just this type of interpretation to understand the Constitution's division of sovereign rights and powers. We assume that Professor Schwartz is not an originalist, but his critique of our work nonetheless challenges our arguments on originalist grounds. Under any version of originalism, however, the Constitution did not transfer the States' sovereign rights and powers in their entirety to the federal government, but carefully divided them between the federal government and the States. It is surprising that anyone would challenge this feature of the Constitution because it reflects the self-evident meaning of the Constitution's text. The judiciary has accepted and repeated this understanding from the Founding to the present day, presumably because judges and lawyers do not believe that they are free to

241. THE FEDERALIST NO. 39, *supra* note 6, at 257 (James Madison).
242. Schwartz, *supra* note 14, at 632.
243. *See supra* Part I.C.

disregard the obvious import of the text.[244] The more relevant (and difficult) question is not whether the Constitution divided sovereign rights and powers (it did), but which rights and powers were transferred to the federal government and which rights and powers remained with the States. Our claim is simply that background rules that governed all instruments used to alienate sovereign rights help to answer this question.

C. Residual State Sovereignty and Original Public Meaning

Professor Schwartz also argues that background rules derived from the law of nations cannot inform the Constitution's meaning because, whatever the status of the States before ratification, they ceased to be sovereign states after the Constitution alienated their exclusive territorial sovereignty.[245] "[B]y ratifying an instrument that established a government for the people of the United States, a government empowered to regulate them directly," Schwartz argues, "the people placed themselves under the authority of the United States government and vested it with the authority to make 'the supreme law of the land.'"[246] Vattel, he claims, suggested "that at some point a union of formerly sovereign states might cross a line in which the members lose their independence."[247] Schwartz quotes the following passage from Vattel's treatise:

> [S]everal foreign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. They will form together a federal republic: the deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects, put some constraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil the engagements into which he has very willingly entered. But a people, that has

244. *See, e.g.*, Bond v. United States, 572 U.S. 844, 854 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.").

245. Schwartz, *supra* note 14, at 640-41.

246. *Id.* at 641.

247. *Id.*

> passed under the dominion of another, can no longer form a state, and in a direct manner make use of the law of nations.[248]

Based on this excerpt, Schwartz argues that a partial alienation of sovereign rights—even if limited on its face—can reach a tipping point at which the alienation becomes in effect complete.

As discussed in Part III.B, we agree that a sovereign state's alienation of certain sovereign rights—such as its exclusive right to govern individuals within its territory—can irretrievably compromise those specific rights. Contrary to Schwartz's assertion, however, a state's alienation of one right does not automatically alienate all of its other sovereign rights. Although Schwartz purports to find support for this novel proposition in Vattel, he takes the quoted passage out of context and ignores the very next sentence. In the passage he invokes, Vattel described the consequences of complete conquest, not the limited voluntary transfer of sovereign rights in a legal instrument. This distinction is confirmed by the next sentence, the one Schwartz omits, in which Vattel offers an example of a people that "has passed under the dominion of another."[249] His example is "the people and kingdoms which the Romans rendered subject to their empire."[250] It should go without saying that the people's voluntary (and limited) alienation of their State's sovereign rights in the Constitution created a different political arrangement than the Roman Empire's complete dominion over the people and kingdoms it conquered by force.[251]

By voluntarily adopting the Constitution, the people of the several States vested the United States government with limited and enumerated sovereign rights and powers and, unless clearly restricted by the text, left all residual rights and powers with the

---

248. *Id.* (quoting VATTEL, *supra* note 82, bk. I, § 10, at 11) (alteration in original).

249. VATTEL, *supra* note 82, bk. I, § 11, at 11.

250. *Id.*

251. Even James Wilson cited Vattel (among other public writers) in support of the proposition that the Constitution did not alienate all of the States' sovereign rights and powers. Applying the general maxim that rights and powers not granted are retained, Wilson observed: "There are two kinds of government; that where general power is intended to be given to the legislature and that where the powers are particularly enumerated. In the last case, the implied result is, that nothing more is intended to be given, than what is so enumerated." James Wilson, Statement at the Pennsylvania Ratifying Convention (Dec. 4, 1787), *in* 2 DHRC, *supra* note 69, at 470.

States. Even the most nationally minded defenders of the Constitution understood the proposed Constitution in this way.[252] This carefully negotiated arrangement did not give the United States government plenary authority with no residual authority in the States, in the way that conquest by the Roman Empire extinguished the ongoing existence of former states. Vattel's passing observation that one state may subsume the people of another by conquest says nothing about the meaning and effect of a voluntary legal instrument designed to alienate some, but not all, of the States' sovereign rights and powers. As we have discussed at length elsewhere, the law of nations required an instrument to alienate such rights in clear and express terms or by unavoidable implication.[253] The reason for this requirement was to avoid misunderstandings and mistakes that could lead to conflict or even war.[254] By focusing on an irrelevant passage from Vattel describing complete conquest, Schwartz completely ignores the numerous portions of the treatise that explain how to interpret instruments—such as the Constitution—used to alienate more limited portions of a state's sovereign rights and powers.

Relatedly, Professor Schwartz's analysis flatly contradicts Vattel's understanding that the people could give a sovereign government limited powers. Vattel explained that "the body of the society," in giving power to a sovereign, could limit that power and regulate its exercise.[255] "The prince," he wrote, by which he meant whoever is the sovereign "conductor of the society," "derives his authority from the nation; and it is exactly equal to what they have entrusted him

252. As John Marshall explained, "each Government derived its powers from the people; and each was to act according to the powers given it." John Marshall, Statement at the Virginia Ratifying Convention (June 16, 1788), *in* 10 DHRC, *supra* note 69 at 1306. Invoking the rule that powers not granted in the Constitution were retained by the States, Marshall asked rhetorically: "[D]oes not a power remain till it is given away?" *Id.* at 1307. The same rule was applied during the debate over the necessity of a bill of rights. *See, e.g.*, Jasper Yeates, Statement at the Pennsylvania Ratifying Convention (Nov. 30, 1787), *in* 2 DHRC, *supra* note 69, at 435-37 ("Whatever is not expressly ceded to the federal government is still reserved.... Nothing, indeed, seems more clear to my judgment than this, that in our circumstances, every power which is not expressly given is, in fact, reserved.").

253. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 494; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 853.

254. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 857.

255. VATTEL, *supra* note 82, bk. I, § 38, at 19.

with."[256] Thus, if "the sovereign power is limited and regulated by the fundamental laws of the state; those laws shew the prince the extent and bounds of his power, and the manner in which it ought to be exerted."[257] The sovereign "is therefore strictly obliged not only to respect, but also to support them."[258] Under Schwartz's account, the people were incapable of vesting a central sovereign with limited power and leaving the remainder with the States. This account flatly contradicts both the law of nations and Vattel.

Finally, for purposes of constitutional interpretation, it makes no difference whether one characterizes the rights and powers retained by the States under the Constitution as *sovereign* rights and powers or as *constitutional* rights and powers. The Supremacy Clause, which Schwartz regards as evidence of plenary national authority, makes only the "Constitution," "the Laws of the United States *which shall be made in Pursuance thereof*," and "Treaties," the "supreme Law of the Land."[259] Absent application of one of those three sources of federal law, the States remain free to govern and apply their own law. Do the States govern as partial "sovereigns" with enduring preexisting sovereign rights? Or do they govern because the Constitution incorporated their preexisting rights and powers as part of the instrument? The answer makes no difference. Either way, the meaning of the Constitution's text determines the scope and content of the States' residual authority. That meaning depends in part on the background rules supplied by the law of nations to govern the interpretation of all legal instruments claimed to alienate sovereign rights and powers.

III. ASCERTAINING THE STATES' RESIDUAL RIGHTS

Professor Schwartz rejects our understanding of constitutional federalism because he mistakenly believes that it gives a "scholarly imprimatur to compact theory, albeit by another name."[260] In his view, any reliance on background rules drawn from the law of

256. *Id.* §§ 43, 45, at 21.
257. *Id.* § 46, at 21.
258. *Id.*
259. U.S. CONST. art. VI, cl. 2 (emphasis added).
260. Schwartz, *supra* note 14, at 631.

nations would treat the States as "Vattelian sovereign nation-states" with full authority to nullify or secede from the Constitution.[261] Contrary to this contrived parade of horribles, interpreting the Constitution in light of these rules would have no such effect. The background rules are merely norms of interpretation that serve to identify and uphold the actual compromises struck at the Convention to divide sovereign rights and powers between the federal government and the States. As explained below, these compromises explicitly alienated many of the States' most significant sovereign rights and powers, including the rights to nullify federal law and secede from the Union, but left other rights and powers undisturbed. The background rules in question neither require nor support compact theory, nullification, or secession. The irony in Professor Schwartz's critique is that his view of national power, which acknowledges *no* residual sovereign rights and powers in the States, would itself nullify the hard-fought compromises embodied in the Constitution. Respect for such compromises lies at the heart of faithful constitutional interpretation.

We agree with Professor Schwartz that the States fundamentally altered their sovereign character in the Constitution. The relevant question, however, is to what extent they did so. Under the law of nations, a legal instrument transferred sovereign rights or powers if its express terms did so clearly or by unavoidable implication.[262] This rule was not, as Professor Schwartz caricatures it, a rule of strict construction.[263] It was a rule of ordinary and natural meaning. If the ordinary meaning of express terms in a legal instrument alienated a preexisting right or power clearly or by unavoidable implication, then the instrument alienated the right or power. If, however, the terms of the instrument did not alienate a sovereign right or power in these ways, then the instrument left the right or power with the original holder.[264] As explained below, the

261. *Id.* at 638, 645, 658.

262. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 854-55.

263. *See* Schwartz, *supra* note 14, at 632.

264. Professor Williams questions whether this rule of interpretation applied only if the provision claimed to divest the right was "odious" instead of "favourable." *See* Williams, *supra* note 20, at 749. As we explain in detail elsewhere, alienation of a sovereign right or power was per se "odious," not in any colloquial sense of "odious," but in the legal sense that divesting a sovereign right was a loss to the divested sovereign (even if the loss was offset by a

Constitution unquestionably alienated several of the States' fundamental sovereign rights and powers, including any rights to secede from the Union or nullify federal law. But the Constitution did not alienate all of the States' sovereign rights and powers. Among those retained by the States were the rights not to be commandeered, to sovereign immunity, and to equal sovereignty. Recognizing these rights does not signify that the Constitution is a mere compact. Rather, it simply acknowledges that the Constitution alienates some—but not all—of the States' sovereign rights and powers.

A. Ordinary vs. Strict Construction

As we have previously explained, the rules that governed alienation of sovereign rights did not require interpreters to engage in strict construction.[265] The rule, to repeat, was this: if the text of a legal instrument was unclear or silent as to whether it alienated a sovereign right, interpreters were to read the instrument to leave the right with the original holder.[266] But if the text of an instrument alienated a sovereign right in clear and express terms or by unavoidable implication, then that text was to receive its ordinary and natural meaning, not an artificially strict or narrow reading.[267] This approach does not constitute strict construction, which reads explicit provisions more narrowly than their ordinary meaning.[268] It does, however, appropriately prohibit finding an alienation of sovereign rights based on a *broad* construction of ambiguous or vague terms.[269] As applied to the Constitution, these background rules required judges to determine whether the ordinary meaning of the constitutional text alienated the States' sovereign rights in clear and express terms or by unavoidable implication.[270] And as

---

bargained-for corresponding gain), and the purpose of the rule was to ensure that the lawmaker(s) intended any such alienation. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 856-57.

265. Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563-66.

266. *See supra* notes 79-87 and accompanying text.

267. Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563, 565.

268. *See id.* at 564-65.

269. *Id.* at 566.

270. *Id.*

Hamilton explained in *The Federalist No. 32*, if the text did so, then judges were to find an alienation of the right in question.[271] But if not, then judges were to interpret the Constitution to leave the sovereign right with the original holder.[272]

Several Article I powers of Congress clearly and expressly alienated the preexisting rights of the States, as explained below. For example, several provisions alienated—for the first time—the traditional right of states to exercise exclusive territorial sovereignty over persons and things within their borders. The Commerce and Necessary and Proper Clauses are two prominent examples. By their terms, these provisions authorize Congress to regulate individuals and things within the territories of the States.[273] Because they clearly and expressly divest the States of that sovereign right, these Clauses must receive their ordinary and natural meaning, no matter how broad or how narrow. As we have explained elsewhere, and reiterate below, this is the very approach that the Marshall Court used to interpret these constitutional provisions in *Gibbons v. Ogden* and *McCulloch v. Maryland*.[274]

At the same time, the ordinary and natural meaning of these Clauses does not clearly divest the States of their separate and distinct sovereign right not to be commandeered by another government. Rather, historical context confirms that the framers and ratifiers of the Constitution consciously refrained from authorizing the federal government either to requisition the States (as the Articles had) or to use force against States to enforce such commands. *McCulloch* says as much in a passage that Schwartz ignores.[275] Under default rules supplied by the law of nations, if the Constitution's drafters and ratifiers had meant to give Congress power to require the States to act as federal enforcement agencies (or to otherwise control or restructure state governments), they would have included language that clearly manifested that intent. Because they did not, judges may not read Article I to empower Congress to commandeer state governments.

---

271. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

272. *See id.*

273. U.S. CONST. art. I, § 8, cls. 3, 18.

274. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 562-73; *infra* notes 278-80 and accompanying text.

275. *See infra* notes 504-17 and accompanying text.

None of this analysis relies on a general rule of strict construction. Early proponents of strict constructionism, such as Thomas Jefferson and St. George Tucker, distorted rules drawn from the law of nations by urging interpreters to construe even clear and express constitutional provisions narrowly to avoid alienation of sovereign rights.[276] For example, Tucker argued that "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."[277]

Opponents of strict construction, such as John Marshall and Joseph Story, correctly rejected this argument. In *Gibbons v. Ogden*, Marshall declined to give the Constitution "that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import."[278] And in *McCulloch v. Maryland*, Marshall interpreted the word "necessary" in the Necessary and Proper Clause in accord with its "common usage" in context.[279] This approach, rather than an artificially strict reading of the word "necessary," was in keeping with the law of nations. At the same time, Marshall recognized that the Necessary and Proper Clause did not empower Congress to commandeer the States. Rather, he understood the Clause to empower Congress to charter a bank, but not to empower Congress to require the States to

276. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 564-65. Professor Williams observes that it is "equally plausible" that law of nations interpretive principles were sufficiently open-ended to allow for arguments of strict construction as it is that proponents of strict construction misunderstood or mischaracterized them. Williams, *supra* note 20, at 748. We disagree for reasons that we have explained at length elsewhere. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563-73. The way that nationally minded lawyers such as John Marshall and Alexander Hamilton applied the rules best aligns with how writers on the law of nations described the rules. But even if the law of nations was open-ended enough in this regard to allow for arguments of strict construction, there is no dispute that the rules prohibited implied alienations of discrete sovereign rights from silence or unclear terms.

277. 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. at 154 (St. George Tucker ed., William Young Birch & Abraham Small 1803).

278. 22 U.S. (9 Wheat.) 1, 187-88 (1824).

279. 17 U.S. (4 Wheat.) 316, 414 (1819).

charter banks.[280] Marshall's analysis in *McCulloch* was a straightforward application of the background rules governing alienation of sovereign rights.

Hamilton, who was no strict constructionist, accurately described how these rules would apply to the Constitution's division of sovereign rights and powers. In *The Federalist No. 32*, he explained that because the Constitution involved a "division of the sovereign power," it was subject to "the rule that all authorities of which the States are not *explicitly* divested in favour of the Union remain with them in full vigour."[281] He proceeded to explain that the Constitution would give the federal government exclusive authority—and thus alienate corresponding state authority—in only three circumstances.[282] Each of these instances involved an explicit constitutional alienation of state authority either in clear and express terms or by unavoidable implication.

As discussed below, these categories help to identify which of the States' preexisting rights and powers the Constitution alienated and which of those rights and powers it did not.

B. Rights Alienated by the States

The Constitution alienated certain preexisting rights of the States in each of the three ways that Hamilton catalogued. We provide examples of all three categories below, but focus mostly on the third category because it involves less obvious alienations. Notably, this third category includes alienation of the States' rights to nullify federal law and to secede from the Union—rights that Professor Schwartz erroneously asserts that the States retained if one interprets the Constitution according to background rules supplied by the law of nations.

---

280. *See infra* notes 504-17 and accompanying text.

281. THE FEDERALIST NO. 32, *supra* note 6, at 200, 203 (Alexander Hamilton) (emphasis added).

282. *See id.* at 200; *supra* Part I.B.

1. Express Grants of Exclusive Federal Power

First, as Hamilton explained, several provisions of the Constitution "granted an exclusive authority to the Union" "*in express terms*."[283] For example, Article I grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the district that would serve as the United States seat of government, and over places that the United States would obtain for military installations and other federal needs.[284] This provision expressly grants exclusive authority to the United States over such places ceded by the States, thereby completely alienating the States' territorial sovereignty over such places.

2. Express Prohibitions of State Power

Second, as Hamilton observed, several provisions of the Constitution expressly "granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority."[285] For example, the Constitution grants the President power to make treaties by and with the consent of two-thirds of the Senate,[286] while also expressly prohibiting the States from entering into treaties.[287] Likewise, the Constitution grants Congress power to grant letters of marque and reprisal, declare war, and raise and support armed forces,[288] while expressly prohibiting the States from granting letters of marque and reprisal, engaging in war absent an emergency, and keeping troops or ships of war in time of peace.[289] Taken together, these express provisions alienated the preexisting rights of States to make treaties and to take certain measures in response to violations of the law of nations (except in specified emergency circumstances).[290]

283. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton) (emphasis added).

284. U.S. CONST. art. I, § 8, cl. 17.

285. THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

286. U.S. CONST. art. II, § 2, cl. 2.

287. *Id.* art. I, § 10, cl. 1.

288. *Id.* § 8, cls. 11-14.

289. *Id.* § 10, cls. 1, 3.

290. Similarly, the Constitution empowers Congress to coin money and expressly divests the States of their right to do so. *Id.* cls. 1-2.

3. Alienations by Unavoidable Implication

Third, as Hamilton recognized, certain provisions of the Constitution alienate state sovereign rights and powers by unavoidable implication—that is, by "grant[ing] an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."[291] Such alienation is an important category but only applies in limited circumstances. To be sure, which rights the Constitution alienated by unavoidable implication is open to debate, but as Hamilton put it, "[i]t is not ... a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a preexisting right of sovereignty."[292] For example, the mere fact that the Constitution grants Congress the power to tax does not create an unavoidable implication that the States alienated their parallel right to tax the same matters, even though retention of this right by the States could make federal taxation more difficult.[293] To the contrary, the Constitution alienates state power by unavoidable implication only when retention of that power creates an absolute and total repugnancy with a similar express federal power. We consider four examples of alienation by unavoidable implication below, including nullification and secession—two rights that Professor Schwarz erroneously claims that the States necessarily retained under the background rules governing the alienation of sovereign rights and powers.

a. Sending and Receiving Ambassadors

The Constitution grants the President express power to appoint ambassadors of the United States with the advice and consent of the Senate.[294] The Constitution also gives the President the power to receive ambassadors.[295] The Constitution does not explicitly declare these powers to be exclusive (Hamilton's first category), nor does it

291. THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).
292. *Id.* at 202.
293. *See id.*
294. U.S. CONST. art. II, § 2, cl. 2.
295. *Id.* § 3.

expressly prohibit the States from sending and receiving their own ambassadors to other nations (Hamilton's second category). But there is a strong argument that the Constitution, by unavoidable implication, alienated the States' preexisting rights to recognize foreign nations and to exchange ambassadors with such nations. Allowing the States to send and receive their own ambassadors, and thereby pursue their own foreign policy, would be completely incompatible with the function of ambassadors appointed by the United States. Traditionally, ambassadors appointed by the President with the advice and consent of the Senate communicated with foreign nations on behalf of the United States, negotiated treaties and other agreements, and conducted foreign policy more generally.[296] In addition, the President's power to receive foreign ambassadors was one of the principal means of recognizing foreign states and governments.[297] All of these traditional functions would be totally contradicted were the States permitted to send and receive their own ambassadors, and thus conduct their own foreign relations contrary to the foreign policy of the United States as a whole.[298]

b. Exclusive Territorial Sovereignty

Under the law of nations, free and independent states possessed the right to exercise exclusive territorial sovereignty—that is, the right to tax and regulate people and things within their borders without interference by another sovereign. States could alienate or compromise this right in a legal instrument, but only if they did so clearly and expressly or by unavoidable implication. The American States did not alienate this right in the Articles of Confederation because Congress had no power to tax and regulate within the

296. *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 53-56 (2017).

297. *Id.*

298. *See id.* at 55; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 884-85. More generally, because the Constitution prohibits the States from making treaties or other agreements with foreign nations from retaliating for harms inflicted by other nations, such as by issuing letters of marque and reprisal or by declaring war, the Constitution, by unavoidable implication, divests the States of authority to appoint ambassadors to undertake or facilitate those prohibited functions. *See* U.S. CONST. art. I, § 10, cl. 1.

States' territory. Instead, the Articles gave Congress specific powers to requisition the States to tax and regulate at its behest.[299] This approach proved largely ineffective because the States often failed to comply with such requisitions and the Articles gave Congress no means of enforcing its commands against States.[300]

The Virginia Plan considered giving Congress power to enforce its commands against States through the use of military force, but the Convention quickly rejected this approach as too dangerous and likely to lead to civil war.[301] Instead, the Convention decided to give Congress enumerated legislative powers to tax and regulate directly within the territory of the States, thereby bypassing the need to requisition or commandeer the States.[302] Within the scope of such enumerated powers, the proposed Constitution, for the first time, abrogated the States' traditional right to exercise exclusive territorial sovereignty within their borders.[303]

One could characterize the Constitution's alienation of this right as either clear and express or an unavoidable implication of the text. On the one hand, the Constitution expressly authorized Congress, among other things, to raise revenue, raise armies, and regulate interstate commerce—all within the territory of the States.[304] On the other hand, the Constitution nowhere explicitly states that it abrogates the States' right to exclusive territorial sovereignty. It simply does so by the unavoidable implication of the provisions granting Congress power to act within the territory of the States. Either way, it was plain to all who read the Constitution that the instrument would alienate the States' exclusive territorial sovereignty to the extent that it authorized Congress to tax and regulate

299. *See* ARTICLES OF CONFEDERATION of 1781, art. VIII.

300. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 862-63.

301. *See supra* notes 44-47, 63-65 and accompanying text.

302. *See* U.S. CONST. art. I, § 8, cl. 1.

303. Professors Coan and Schwartz challenge the long-held understanding that the powers of Congress are limited to those enumerated in the Constitution. *See* Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971 (2024). In their view, there are "strong arguments that the original public meaning of enumeration was indeterminate" at best because "the constitutional text nowhere says that the federal government is limited to its enumerated powers." *Id.* This argument gets things backwards, and not merely as a matter of common sense. Under the rules of interpretation described by Hamilton and admitted by the Constitution, constitutional indeterminacy forecloses the conclusion that the States alienated powers beyond those enumerated in the text.

304. U.S. CONST. art. I, § 8, cl. 3.

within the States' boundaries, leaving the federal government and the States to exercise concurrent legislative power with respect to Congress's non-exclusive enumerated powers.

At the same time, there are limits to the alienation of sovereign rights by unavoidable implication. For example, as Alexander Hamilton explained, the Constitution cannot be read to give the federal government *exclusive* power to tax and regulate within the territory of the States. To be sure, the Constitution's grant of federal power to tax necessarily alienated the States' exclusive power to tax within their borders, but it did not oust the States' residual concurrent authority. Hamilton addressed this question in *The Federalist No. 32*, in which he explained that the Constitution necessarily "admitted" the background "rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[305] Hamilton rejected the Anti-Federalists' claim that Congress could use its power to tax to restrict the States' parallel authority.[306] He reasoned that the Constitution would alienate the States' preexisting power only where it did so unambiguously, as in Article I, Section 10.[307] Accordingly, Hamilton "affirm[ed] that (with the sole exception of duties on imports and exports) [the States] would under the plan of the Convention retain [their tax] authority in the most absolute and unqualified sense."[308] Significantly, he rejected alienation by unavoidable implication in this context because the States' concurrent power to tax was not "absolutely and totally *contradictory* and *repugnant*" to Congress's power to lay and collect taxes.[309] He stressed that it was not enough that there was "a mere possibility of inconvenience in the exercise of [federal] powers."[310] Rather, Hamilton explained that only "an immediate constitutional repugnancy ... can by implication alienate and extinguish a

305. THE FEDERALIST NO. 32, *supra* note 6, at 202-03 (Alexander Hamilton).

306. *Id.*

307. *Id.* Article I, Section 10 provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws." U.S. CONST. art. I, § 10, cl. 2.

308. THE FEDERALIST NO. 32, *supra* note 6, at 199 (Alexander Hamilton).

309. *Id.* at 200.

310. *Id.* at 202.

preexisting right of sovereignty."[311] He concluded "that an attempt on the part of the national Government to abridge [the States] in the exercise of [their power to tax] would be a violent assumption of power unwarranted by any article or clause of its Constitution."[312]

c. Nullification

Professor Schwartz maintains that applying the background rules governing the alienation of sovereign rights would mean that the Constitution is a mere compact among "Vattelian nation-states."[313] On the basis of this erroneous conclusion, he contends that the member states necessarily retained the sovereign authority to nullify interpretations of federal law with which they disagree.[314] This account is mistaken. Under Hamilton's framework (which closely tracks these background rules), an unavoidable implication of the constitutional text is that the States alienated any right to nullify federal law.[315] As discussed, alienation of a state power or right is an unavoidable implication of constitutional text when there would be an absolute and total repugnancy between an explicit federal authority and the retention of similar authority by the States.[316] Broad inference or mere inconvenience is not enough. By this measure, the people relinquished any power possessed by their States to nullify federal law because they granted the federal government specific authorities in the Supremacy Clause and Article III that were wholly incompatible with nullification by the States.

The Constitution's alienation of any state power to nullify federal law contrasts sharply with the power retained by the States under the Articles of Confederation. As discussed, the Articles gave Congress the power to requisition the States, but no power to enforce such commands.[317] Consequently, the States disregarded—or nullified—congressional commands at will with impunity. At the

311. *Id.*
312. *Id.* at 199.
313. *See* Schwartz, *supra* note 14, at 667.
314. *Id.* at 658.
315. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200-01 (Alexander Hamilton).
316. *See supra* notes 291-93 and accompanying text.
317. *See supra* notes 37-38 and accompanying text.

Constitutional Convention, the delegates rejected proposals to continue congressional power to requisition the States and opted instead to give Congress novel power to regulate individuals.[318] The primary purpose of this shift was to avoid the need to enforce requisitions against the States through military force—a means of enforcement that the delegates considered too dangerous to confer.[319] By giving Congress legislative authority over individuals instead of States, the Constitution enabled the federal government to enforce its commands against individuals instead of States and thereby substitute "the mild influence of the Magistracy" for "the violent and sanguinary agency of the sword."[320]

In order to employ "the mild influence of the Magistracy," however, the Constitution had to establish the supremacy of federal law and create a federal judiciary capable of upholding that supremacy. The Supremacy Clause and Article III perform these functions. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[321] The Clause also provides that "the Judges in every State shall be bound [by supreme federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[322] Without more, however, this parchment command may have been no more effective than the Articles' command that states comply with requisitions. The Founders' solution was to create an independent federal judiciary with jurisdiction to enforce the supremacy of federal law against individuals within the territory of the States.

Accordingly, Article III, Section 1 vested the "judicial Power of the United States ... in one supreme Court, and in such inferior Courts

---

318. *See supra* note 47 and accompanying text.

319. *See supra* notes 44-45 and accompanying text.

320. THE FEDERALIST NO. 15, *supra* note 6, at 94 (Alexander Hamilton). To be sure, the Constitution established important negative prohibitions on the States, *see* U.S. CONST. art. I, § 10, but such prohibitions—unlike congressional requisitions under the Articles—generally could be enforced against individuals rather than States. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 924-29; Clark, *Eleventh Amendment*, *supra* note 3, at 1849-51, 1903-05.

321. U.S. CONST. art. VI, cl. 2.

322. *Id.*

as the Congress may from time to time ordain and establish."[323] In addition, Section 2 extended the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[324] It is no coincidence that this description of the judicial power closely tracks the Supremacy Clause. By giving federal courts jurisdiction to hear all cases arising under the supreme law of the land, the Constitution enabled them to uphold the supremacy of federal law.[325] The same section specified that "the supreme Court shall have appellate Jurisdiction" over all cases arising under federal law.[326] Thus, if state courts misinterpreted—or attempted to nullify—the supreme law of the land, the Supreme Court had appellate jurisdiction—and thus the last word—to correct any and all misinterpretations of the Constitution, laws, and treaties of the United States. In addition, the Constitution gave Congress power to augment this mechanism by creating inferior federal courts with jurisdiction over cases arising under federal law[327]—an option which Congress increasingly exercised over time.

Notwithstanding these constitutional provisions, certain Founding Era public figures notoriously argued that States retained the right to nullify federal law. For example, in 1798, Thomas Jefferson drafted the Kentucky Resolutions to challenge the constitutionality of the Alien and Sedition Acts. The Resolutions asserted that each State had the right to declare acts of Congress unconstitutional and to nullify such acts.[328] The claimed effect of nullification was that the federal law in question would have no force or effect in the territory of the nullifying State. James Madison drafted similar resolutions in Virginia, but stopped short of endorsing nullification.[329] Decades later, John Calhoun built upon Jefferson's theory by arguing that a State may nullify federal law subject to

323. *Id.* art. III, § 1.

324. *Id.* § 2.

325. *See* Bellia, *"Arising Under" Jurisdiction*, *supra* note 68, at 298-304.

326. U.S. CONST. art. III, § 2.

327. *See id.* § 1.

328. *See* Thomas Jefferson, Jefferson's Draft of the Kentucky Resolutions of 1798 (Oct. 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON 536, 536 (Barbara B. Oberg ed., 2003).

329. *See* James Madison, Resolutions of 1798 (Dec. 21, 1798), *in* 6 THE WRITINGS OF JAMES MADISON 326, 326 (Gaillard Hunt ed., 1906).

override by three-fourths of the States, the number of States necessary to amend the Constitution.[330]

In an 1830 letter, James Madison explained why nullification violated the Constitution.[331] The reasons Madison gave accord with the rules governing alienation of sovereign rights under the law of nations. As Madison argued, a power in the States to nullify federal law was utterly incompatible with the Constitution's express provisions "for expounding it."[332] The Constitution, he explained, expressly provided a judicial mechanism for expounding and enforcing the Constitution.[333] An unavoidable implication of this provision was that the States did not retain the unilateral right to elevate their interpretations of the Constitution over those of the Supreme Court. Madison observed that the Constitution involved "reciprocal concessions" and "articles conditioned on & balancing each other."[334] The Founders were well aware that questions would arise as to the meaning of the provisions embodying these compromises. Because such questions of interpretation would arise, Madison explained, the Constitution included, as part of the compromise, "the provision for expounding it," namely Article III.[335] "[N]one of the parties," he contended, "can rightfully renounce the expounding provision more than any other part" by deciding to expound the Constitution for itself.[336] The effect of nullification would be to destroy the "uniform authority" of federal laws "and in practice necessarily overturn" the government that the Constitution established for the United States.[337] In other words, the Constitution alienated any right to nullification by unavoidable implication.

In our view, Madison correctly resolved this issue under the background rules that governed the alienation of sovereign rights. The Constitution included express provisions to ensure uniform

---

330. Address to the People of South Carolina, by their Delegates in Convention, *in* STATE PAPERS ON NULLIFICATION: INCLUDING THE PUBLIC ACTS OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, 37, 49.

331. Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 383, 398 (Gaillard Hunt ed., 1910).

332. *Id.* at 401.

333. *Id.* at 400-01.

334. *Id.* at 400.

335. *Id.* at 401.

336. *Id.*

337. *Id.* at 390, 399.

enforcement and interpretation of federal law. In light of these provisions, there is no persuasive basis for Calhoun's (or Schwartz's) position that the States necessarily retained the right to nullify federal law if they retained any sovereign rights and powers at all. Under Hamilton's understanding of the background rules of interpretation supplied by the law of nations, the States clearly alienated this right by unavoidable implication of the Supremacy Clause and Article III. These provisions recognized the supremacy of the Constitution, laws, and treaties of the United States and gave federal courts judicial power to enforce all three forms of supreme federal law. The States' retention of a power to nullify either federal law or the Supreme Court's interpretation of such law would be "absolutely and totally *contradictory* and *repugnant*" to these explicit constitutional provisions.[338] Thus, as Madison explained, the States necessarily alienated this right by unavoidable implication under the applicable background rules of interpretation.[339]

d. Secession

Professor Schwartz also erroneously claims that if rules of interpretation drawn from the law of nations apply to the Constitution, the States must have a right to secede from the Union.[340] Jefferson Davis attempted to justify secession on the grounds that a State had the right to withdraw from "the compact of the Union" because it had "become destructive of the ends for which [it was] established."[341] Under the law of nations, the background default rule was that a party to a treaty could rescind the treaty if another party committed a material breach.[342] Professor Schwartz endorses Davis's reasoning by insisting that any reliance on the law of nations means the Constitution is a mere compact and the States

338. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

339. *See* Letter from James Madision to Edward Everett (Aug. 28, 1830), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 331, at 401-02.

340. *See* Schwartz, *supra* note 14, at 658-60.

341. Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY: INCLUDING THE DIPLOMATIC CORRESPONDENCE 1861-1865, at 32 (James D. Richardson ed., 1905).

342. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 545.

must have a right to secede.[343] There are two related and insurmountable flaws in Davis's (and Schwartz's) reasoning. First, as explained, the Constitution was not a treaty or a mere compact. It was a novel legal instrument that created a partly national, partly federal government by giving Congress enumerated powers to tax and regulate the people and property within the borders of the States directly. It thus alienated—for the first time—the States' exclusive right to territorial sovereignty. Because of this novel feature, the standard exit rules that governed treaty violations by member states who retained their exclusive territorial sovereignty did not apply. Second, careful examination of the text of the Constitution reveals that the instrument clearly alienated any right of secession by unavoidable implication.

First, unlike the Articles of Confederation, the Constitution was not a treaty. It was a novel legal instrument ratified by the people of each State that created a partly consolidated, partly confederated collective government by alienating, among other things, the States' right to exclusive territorial sovereignty. The Articles merely obligated the States to comply with Congress's requisitions but gave Congress no power to tax or regulate persons or property within the States' borders.[344] The Constitution, by contrast, gave Congress limited and enumerated powers to tax and regulate within the territory of the States[345]—effectively creating a second sovereign operating within the territory of each State. When secessionists alleged that the United States government was violating the Constitution, they were not alleging, and could not have alleged, that a treaty partner was violating a treaty arrangement. The United States government was not a party to the Constitution. It was the creation of it. Accordingly, the rules governing withdrawal from treaties because a treaty partner had violated the agreement were inapplicable to the Constitution.

Second, express provisions of the Constitution unavoidably implied that a State could not unilaterally withdraw from the Union following ratification. By giving Congress powers to raise revenue and regulate persons and things directly within the borders of the

343. *See* Schwartz, *supra* note 14, at 658.
344. ARTICLES OF CONFEDERATION of 1781, art. IX.
345. U.S. CONST. art. I.

States, the Constitution irrevocably alienated the States' traditional exclusive territorial sovereignty and transferred limited, but permanent, taxing and regulatory authority to a new federal government authorized to operate within the States. Under this arrangement of overlapping sovereignty within the same territory, the States lost their authority to withdraw unilaterally from the Constitution because that instrument gave the United States perpetual and lawful sovereign authority to exercise its enumerated powers within each State. Secession, as Abraham Lincoln explained in his July 4, 1861, Message to Congress, was utterly incompatible with this fundamental feature of the Constitution.[346]

One of the Constitution's primary goals and effects was to alienate the States' exclusive territorial sovereignty and thereby empower the federal government to operate directly within *and across* their territories without their permission or assistance. For this reason, recognizing a State's right to secede would be "absolutely and totally *contradictory* and *repugnant*" to the powers expressly granted to the federal government by the Constitution.[347] It was well established under the law of nations that interpreters would not read a legal instrument to render its express provisions inoperative.[348] Secession would override various provisions of the Constitution. Secession would permit States to diminish or even defeat Congress's express powers to tax and regulate within the territory of the States. Federal law does not operate in one State in isolation. Were Congress to lose its power to raise revenue in one or more States seeking to secede, its ability to carry into execution its other powers (including the spending power) could be severely impaired or even nullified.

In addition, were a State free to secede, the United States as a whole would lose its ability to exercise all of its other enumerated powers in that State, including its power to regulate interstate commerce with that State or to raise armies from among its residents. Secession would also lead to involuntary forfeiture of all federal lands, installations, buildings, and other instrumentalities

346. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 426, 440 (Roy P. Basler ed., 1953).

347. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

348. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 531.

and investments in those States. Foreign ministers present in those States would lose the pledged protection of the United States government to the detriment of the United States as a whole. Non-citizen resident aliens in those States would lose the protection of the United States as lawful residents. The Constitution gave Congress enumerated powers to operate within and across the territories of the States precisely so that it could bypass the States and perform crucial functions for itself. Permitting States to secede would nullify the exercise of these powers and thus be utterly incompatible with the constitutional provisions authorizing the federal government to operate within and across their territories.

Abraham Lincoln explained why secession was incompatible with various provisions of the Constitution. One such provision gave Congress power "[t]o borrow Money on the credit of the United States."[349] This provision, Lincoln explained, empowered the federal government to take on debt for the collective benefit of, and on the credit of, the United States as a whole.[350] The United States could not borrow money "on the credit of the United States" if a State, or the people thereof, could avoid the burden of the debt previously incurred by seceding.[351] Moreover, Lincoln pointed out, the United States took on significant debt in purchasing the territories out of which new States were formed and often assumed their old debts.[352] Allowing a State to avoid the burden of that debt by seceding would leave a diminished United States holding the bag and generate "unjust, or absurd consequences."[353] Secession was thus wholly incompatible with Congress's express power to borrow money on the credit of the United States.[354]

---

349. U.S. CONST. art. I, § 8, cl. 2.

350. *See* Abraham Lincoln, Message to Congress in Special Session, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 346, at 435.

351. *See id.*

352. *Id.*

353. *Id.*

354. Lincoln also invoked the Guarantee Clause to oppose secession. The Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. By adopting this provision, the people divested their States of their preexisting right to establish a non-republican form of government. This provision prohibited, we presume, a state legislature from establishing a monarchy for the State. If a State could secede, it could avoid this prohibition simply by including a secession clause in the act establishing the monarchy. As Lincoln observed, "if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so

In light of the foregoing, Professor Schwartz is simply wrong to claim that background rules drawn from the law of nations would enable States to nullify federal law or secede from the Union. Understood in light of these rules—summarized by Hamilton in *The Federalist No. 32*—the Constitution alienated both the right to secede and the right to nullify federal law. The reason is simple: the States' retention of either right would have "be[en] absolutely and totally *contradictory* and *repugnant*" to the federal powers expressly conferred by that instrument.[355]

C. Rights Retained by the States

Although the Constitution alienated significant sovereign rights and powers from the States, it left other important rights and powers undisturbed. If the Constitution had alienated all of the States' sovereign rights and powers, then Hamilton would have had no occasion to explain in such detail that the Constitution gave the federal government exclusive authority in only three circumstances.[356] His analysis presupposed that the States alienated some—but not all—of their sovereign rights and powers. As he put it, because "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" in one of the three ways he described.[357]

Hamilton's understanding of the Constitution's effect on the States' sovereign rights and powers provides a persuasive—and largely overlooked—basis for reconciling three of the Supreme Court's most prominent federalism doctrines with the constitutional text. Unlike nullification and secession, state sovereign immunity, the anti-commandeering doctrine, and the sovereign equality of the

---

that to prevent its going out, is an indispensable *means*, to the *end*, of maintaining the guaranty mentioned." Abraham Lincoln, Message to Congress in Special Session, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 346, at 440. This is another way of saying that alienation of the States' right to secede was an unavoidable implication of the Guarantee Clause. *Id.*

355. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

356. *See id.*

357. *Id.*

States all survived ratification because the original Constitution contained no language (with the possible exception of those portions of Article III countermanded by the Eleventh Amendment) sufficient to alienate these rights either expressly or by unavoidable implication. To be sure, the Civil War Amendments alienated additional portions of the States' sovereign rights, including sovereign immunity in certain cases, but they left these three doctrines largely intact. Skeptics have suggested that the doctrines in question amount to "freestanding federalism" because they lack an affirmative basis in the constitutional text.[358] But this characterization has things backwards. The relevant question is not whether the constitutional text affirmatively grants traditional sovereign rights and powers to the States (it did not), but whether it clearly alienated them in any of the accepted ways that Hamilton described. Under the law of nations, all states possessed—as incidents of sovereignty—sovereign immunity, the right not to be commandeered by another sovereign, and equal sovereignty with other states.[359] The same law provided that a legal instrument, such as the Constitution, could alienate these rights only if it did so expressly or by unavoidable implication.[360] Thus, as *The Federalist No. 32* explained, the Constitution's silence—or lack of text—regarding the existence of a traditional sovereign right means that the States necessarily retained that right.[361] This Part briefly highlights three of the sovereign rights retained by the States under Hamilton's framework.

1. State Sovereign Immunity

The background rules governing the interpretation of legal instruments used to alienate sovereign rights shed considerable light on the proper understanding of state sovereign immunity under the Constitution—both before and after the adoption of the Eleventh Amendment.[362] The original Constitution contained

358. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2005, 2040 (2009).

359. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 881.

360. *See id.*

361. THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

362. This discussion draws upon our recent article examining the textual basis for state

language that arguably sufficed under these background rules to alienate the States' sovereign immunity from suit by certain individuals. Specifically, the citizen-state diversity provisions of Article III extended the judicial power of the United States to "[c]ontroversies ... *between* a State and Citizens of another State, ... and *between* a State ... and foreign ... Citizens or Subjects."[363] The Constitutional Convention did not discuss how, if at all, these provisions would affect state sovereign immunity.[364] During the ratification debates, however, Anti-Federalists objected that these provisions would enable out-of-state citizens to sue States in federal court.[365] Leading Federalists (including Alexander Hamilton, James Madison, and John Marshall) denied that the language in question was explicit enough to alienate state sovereign immunity.[366]

All parties to the debate proceeded on the assumption that the question was governed by the rule drawn from the law of nations that Hamilton described in *The Federalist No. 32*.[367] Under this rule, the relevant question was whether the language of Article III was sufficient to alienate the States' preexisting immunity. The debate focused primarily on the effect of the word "between." Anti-Federalists maintained that the plain meaning of the word would permit suits both "by" and "against" States.[368] Federalists countered that the language of Article III would allow suits by—but not against—States. James Madison candidly admitted "that this part [of the Constitution] does not stand in that form, which would be freest from objection" and it "might be better expressed."[369] Nonetheless, he maintained that "[t]he only operation it can have, is, that if a

---

sovereign immunity under the original Constitution. For an extended discussion, see generally Bellia & Clark, *State Sovereign Immunity*, *supra* note 1.

363. U.S. CONST. art. III, § 2 (emphasis added).

364. These provisions were proposed and adopted relatively late in the Convention. The Committee of Detail proposed the language in question on August, 6, 1787. *See* James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 69, at 176, 186. The Convention adopted it without objection or discussion on August 28, 1787. *See* Journal of the Constitutional Convention (Aug. 28, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 69, at 422, 423-25, 434-35.

365. *See* Clark, *Eleventh Amendment*, *supra* note 3, at 1822.

366. *See id.*

367. *See* THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

368. *See* Clark, *Eleventh Amendment*, *supra* note 3, at 1823.

369. James Madison, Address to the Virginia Convention (June 19, 1788), *in* 10 DHRC, *supra* note 69, at 1409.

State should wish to bring suit against a citizen, it must be brought before the Federal Court."[370] John Marshall agreed, declaring "I see a difficulty in making a State defendant, which does not prevent its being plaintiff."[371] Alexander Hamilton read Article III the same way, concluding that "there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[372]

Notwithstanding these assurances, just a few years after ratification, the Supreme Court ruled in *Chisholm v. Georgia* that Article III had alienated state sovereign immunity by clearly and expressly authorizing citizens of one State to sue another State in federal court.[373] Although they split 4-1 on the outcome, all five Justices applied the rule that the States retained their sovereign immunity unless the Constitution alienated it explicitly. For example, Justice Blair stressed that Article III "expressly extended" federal judicial power "to controversies between a State and citizens of another State."[374] In his view, these "clear and positive directions ... of the Constitution" abrogated state sovereign immunity.[375] Likewise, Justice Cushing observed that "[t]he judicial power ... is *expressly* extended to 'controversies between a State and citizens of another State.'"[376] For this reason, the case before the Court "seems clearly to fall within the letter of the Constitution."[377] Chief Justice Jay employed similar reasoning. He applied the "ordinary rules for construction," and found the citizen-state diversity provisions to be

370. James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 69, at 1412, 1414.

371. John Marshall, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 69, at 1430, 1433.

372. THE FEDERALIST NO. 81, *supra* note 6, at 549 (Alexander Hamilton). Hamilton also cautioned that reading the Constitution to authorize suits against a State would serve no purpose because recoveries could not be enforced without "waging war" against the State. *Id.* In his view, "to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*

373. 2 U.S. (2 Dall.) 419, 431 (1793).

374. *Id.* at 450 (opinion of Blair, J.).

375. *Id.* at 451.

376. *Id.* at 467 (opinion of Cushing, J.) (emphasis added and emphasis omitted from internal quotation) (quoting U.S. CONST. art. III, § 2).

377. *Id.*

"express, positive, [and] free from ambiguity."[378] Accordingly, he rejected any suggestion that constitutional text reached only "those [controversies] in which a State may be Plaintiff."[379] Even Justice Wilson, the Court's most nationalist member, invoked "the *direct* and *explicit declaration* of the Constitution itself" to support his conclusion that the constitutional text alienated Georgia's sovereign immunity.[380]

Although Justice Iredell dissented, he relied on the same background rules applied by the majority. He invoked the law of nations by name, which "furnish[ed] rules of interpretation" to determine whether the States surrendered their sovereign immunity in the case before the Court.[381] Applying those rules, he stated that his "present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."[382] Like Hamilton, Madison, and Marshall, Iredell concluded that "every word in the Constitution may have its full effect without involving this consequence, and ... nothing but *express words*, or an *insurmountable implication* (neither of which I consider, can be found in this case) would authorize the deduction of so high a power."[383]

Following *Chisholm*, Congress and the States promptly adopted the Eleventh Amendment to countermand the Court's interpretation. The Amendment precluded the Court's reading of the text by declaring that "[t]he Judicial power of the United States shall *not* be construed to extend to any suit in law or equity, commenced or prosecuted *against* one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[384] The Amendment had its intended effect. For example, following the Civil War, individuals began suing States to enforce their bond obligations. The Court dismissed several initial suits on the ground that,

---

378. *Id.* at 476 (opinion of Jay, J.) (emphasis omitted).

379. *Id.* (emphasis omitted).

380. *Id.* at 466 (opinion of Wilson, J.). Of course, Wilson offered broader grounds as well, but it is significant that he joined his colleagues in applying the established rules of interpretation that governed legal instruments claimed to alienate sovereign rights. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 557.

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

382. *Id.*

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

384. U.S. CONST. amend. XI (emphasis added).

in substance, they involved suits against States by citizens of another State and thus violated the express prohibition of the Amendment.[385]

In *Hans v. Louisiana*, however, a Louisiana citizen sued Louisiana so the Eleventh Amendment was inapplicable on its face.[386] Thus, the case squarely raised the question whether the States enjoyed sovereign immunity beyond the terms of the Amendment. The Court found that they did and recognized that the States' sovereign immunity was neither conferred nor limited by the terms of the Amendment.[387] This decision can be puzzling to modern readers who fail to recognize the context provided by the background rules of interpretation governing instruments used to alienate sovereign rights. The *Hans* Court effectively invoked these rules by endorsing both Hamilton's arguments in *The Federalist* and the reasoning of Justice Iredell's *Chisholm* dissent.[388] Both sources recognized that the Constitution could deprive the States of a sovereign right only if it did so expressly or by unavoidable implication. According to the *Hans* Court, "looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things," the swift adoption of the Eleventh Amendment confirmed that these members of the founding generation "were clearly right" in their understanding that the original Constitution did not deprive the States of their preexisting sovereign immunity.[389]

Put another way, once the Eleventh Amendment negated the only language in the original Constitution that could have been construed as an express authorization for individuals to sue States, there was no other basis to conclude that the States had alienated their sovereign immunity from such suits. The Civil War Amendments, however, involved a new and clear alienation of the States' sovereign rights. In *Fitzpatrick v. Bitzer*, the Court distinguished

385. *See* New Hampshire v. Louisiana, 108 U.S. 76, 88-89 (1883) (dismissing a suit by New Hampshire because its citizen was the real party in interest); Louisiana *ex rel.* Elliott v. Jumel, 107 U.S. 711, 727-28 (1883) (holding that a suit against state officials by out-of-state bondholders was in effect a suit against the State).

386. 134 U.S. 1, 10-11 (1890).

387. *Id.* at 14.

388. *See id.* at 12-13.

389. *Id.* at 14.

Hans and stressed that the express provisions of the Fourteenth Amendment—adopted decades after the original Constitution—"themselves embody significant limitations on state authority."[390] Accordingly, "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by [these] provisions."[391] Two decades later, in *Seminole Tribe of Florida v. Florida*, the Court reaffirmed both *Hans* and *Fitzpatrick* in ruling that, although Section 5 of the Fourteenth Amendment empowers Congress to override state sovereign immunity, Article I of the original Constitution gives Congress no such authority.[392] The same background rules of interpretation that Hamilton applied in *The Federalist No. 32* support the Court's distinction. Whereas Article I contains no provisions sufficient to alienate the States' sovereign immunity, the Fourteenth Amendment expressly empowers Congress to enforce the Amendment's prohibitions against States.[393]

For the next decade, the Supreme Court maintained this sharp distinction between permissible congressional abrogation pursuant to the Fourteenth Amendment and impermissible abrogation pursuant to Article I.[394] Starting in 2006 and accelerating in the past few years, however, the Court has recognized several questionable "exceptions" that allow Congress to use certain Article I powers to override state sovereign immunity.[395] At least for the time being, the Court has continued to recite the general rule that Congress ordinarily lacks Article I power to abrogate state sovereign immunity.

---

390. 427 U.S. 445, 456 (1976).

391. *Id.* (citation omitted).

392. *See* 517 U.S. 44, 47 (1996).

393. *See* U.S. CONST. amend. XIV, §5.

394. *See, e.g.*, Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999).

395. *See, e.g.*, Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 584-85 (2022) (allowing Congress to override state sovereign immunity pursuant to the Army and Navy Clauses); PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 487-88 (2021) (allowing Congress to abrogate state sovereign immunity pursuant to federal eminent domain power); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 359 (2006) (upholding congressional power to abrogate state sovereign immunity under the Bankruptcy Clause). In our view, these exceptions depart from the original public meaning of the Constitution. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 549-59.

Examining state sovereign immunity against the backdrop provided by the rules governing the alienation of sovereign rights helps to make sense of both the Founding debates over the meaning of Article III and the Supreme Court's subsequent recognition of immunity beyond the terms of the Eleventh Amendment. If one applies the rule laid out in *The Federalist No. 32* "that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour,"[396] then the text of the original Constitution (construed as required by the Eleventh Amendment) was inadequate to alienate the States' sovereign immunity from suits by individuals and such immunity remains intact. The Fourteenth Amendment, by contrast, appears to satisfy Hamilton's test because it expressly prohibits States from denying certain rights to persons within their territory and expressly gives Congress power to enforce those prohibitions against States.[397] Thus, the constitutional text—understood against the background rules of interpretation "admitted" by the Constitution—supports the Supreme Court's traditional dichotomy permitting Congress to abrogate state sovereign immunity under the Fourteenth Amendment, but generally prohibiting such abrogation pursuant to Article I.[398]

2. The Anti-Commandeering Doctrine

Similarly, the background rules supplied by the law of nations also support the Supreme Court's anti-commandeering doctrine. The Court has long held that Congress lacks power to commandeer the States to take legislative or executive action to implement federal programs.[399] Under the law of nations, all sovereign states enjoyed the right not to be commandeered by another sovereign.[400] The States alienated this right in the Articles of Confederation but not in the Constitution. In fact, the shift from commandeering States (in the Articles) to regulating individuals instead of States (in the Constitution) was a fundamental difference between the two

396. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

397. *See* U.S. CONST. amend. XIV, §§ 1, 5.

398. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 555-59.

399. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

400. *See* VATTEL, *supra* note 82, bk. II, § 55, at 138.

instruments. Whereas the Articles explicitly empowered Congress to requisition the States, the Constitution withheld this power from Congress because the delegates to the Constitutional Convention considered it too dangerous to confer and enforce. As Chief Justice Marshall recognized in *McCulloch v. Maryland*, this omission of federal power to commandeer the States means that they did not alienate—but necessarily retained—their right not to be commandeered.[401] The reason is simple: under the rules admitted by the Constitution to govern instruments used to alienate sovereign rights, constitutional silence leaves preexisting sovereign rights and powers undisturbed.

3. The Equal Sovereignty Doctrine

The applicable background rules also support the Supreme Court's longstanding recognition that the States generally enjoy sovereign equality under the Constitution.[402] Under the law of nations, all sovereign states possessed equal sovereignty.[403] To be sure, they could alienate or compromise their equal sovereignty in a binding legal instrument, but they had to do so in explicit terms. Thus, by using the term "States," the Constitution adopted the default rule that its member States enjoyed all sovereign rights not explicitly alienated, including equal sovereignty with one another. Of course, the default rule gives way when the Constitution alienates sovereign rights in one of the three ways Hamilton described.[404] Thus, although equal sovereignty is the default rule, the Constitution can and does alter the States' equality in important respects. For example, the Constitution makes clear that although the States possess equal suffrage in the Senate, their representation in the House of Representatives is based on proportional representation tied to population.[405] Similarly, the electoral college used to

401. 17 U.S. (4 Wheat.) 316, 413-14 (1819). *See infra* notes 484-91 and accompanying text.

402. *See generally* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016).

403. *See* VATTEL, *supra* note 82, preliminaries §§ 18-20, at 6; bk. II, § 36, at 133.

404. THE FEDERALIST NO. 32, *supra* note 6, at 200 (Alexander Hamilton).

405. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives ... shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.").

select the President incorporates this departure from baseline equality by giving each State "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[406] These exceptions only serve to highlight the default rule that the States retained their sovereign equality in the absence of constitutional provisions to the contrary.

* * *

Professor Schwartz does not consider—let alone attempt to ascertain—the Constitution's precise division of sovereign rights and powers between the federal government and the States. Instead, he simply rejects our reliance on interpretive rules governing instruments used to alienate sovereign rights as the equivalent of compact theory.[407] While he acknowledges the possibility of reserved state powers under the Constitution,[408] he favors his own distortion of the Anti-Federalists' concern that the Constitution would be abused to create "a government with plenary powers."[409] More fundamentally, he regards these two options as mutually exclusive: either the Constitution preserved the States as fully sovereign and independent states or it created a national government with plenary authority.[410] But this all-or-nothing approach is far too simplistic and disregards all of the careful and nuanced compromises forged at the Constitutional Convention. It has been long accepted that the American project was "in effect calling 'sovereignty itself into question' and attempting to reconceive the basic principles of state authority" by dividing governmental power.[411] To borrow Justice Kennedy's phrase, the Constitution was innovative precisely because it "split the atom of sovereignty."[412]

406. *Id.* art. II, § 1, cl. 2. Interestingly, if no candidate receives a majority of the electoral votes, then the Constitution reverts to a form of state equality by providing that the House of Representatives shall choose the president, but "the votes shall be taken by states, the representation from each state having one vote." *Id.* amend. XII.

407. *See* Schwartz, *supra* note 14, at 658.

408. *Id.* at 656.

409. *Id.*

410. *Id.* at 632.

411. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 208 (1967) (quoting Edmund Burke, Address to British House of Commons (Apr. 19, 1774)).

412. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

By denying this alternative and simply concocting a (false) parade of horribles, Professor Schwartz makes no meaningful contribution to one of the most fundamental questions of constitutional law: how the instrument divides sovereign authority between two levels of government. We start from the basic premise—evident on the face of the Constitution and from the most cursory review of Founding Era debates—that the instrument created a novel division of sovereign rights and powers that envisioned meaningful governmental roles for both the federal government and the States. The task of constitutional interpretation is to ascertain the precise contours of this division, not simply to dismiss it out of hand. As we have endeavored to show, background rules governing instruments used to alienate sovereign rights and powers can help interpreters better understand the Constitution's division of these rights and powers. To be sure, interpreters may disagree regarding the proper application of these rules, but—as Hamilton explained—the rules themselves form an inseparable part of the Constitution itself because "the whole tenor of the instrument" admitted them.[413]

IV. HISTORY DEPARTMENT LAW

Professor Martin Flaherty's commentary on our scholarship declines to engage directly either our thesis or our evidence, although he mischaracterizes both. Instead, he considers our work "mainly in the broader context of originalist legal scholarship and its relationship as an appeal to historical expertise."[414] In the process, he considers "the feasibility of originalism as a method of constitutional interpretation."[415] Perhaps not surprisingly (to those familiar with his work), he concludes that participants in the legal profession should abandon efforts to recover original public meaning because they can create "conflicting narratives" that "undermine[ ] the idea of a useable past."[416] In making this claim, he goes so far as to suggest that all originalist legal scholars should be presumed to

413. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).
414. Flaherty, *Peerless*, *supra* note 16, at 674.
415. *Id.*
416. *Id.* at 719.

be acting essentially in bad faith.[417] His opposition to originalism rests, in part, on his objection that law professors do not employ the standards used by professional historians and thus are engaging in "history lite" or "law-office history."[418] In our view, these kinds of disparaging labels are unhelpful in advancing a nuanced understanding of the Constitution in historical context. But if we had to attach a counter-label to his approach—which categorically elevates the views of professional historians over the views of those formally trained in the law—it would be "history department law."

The approach upon which he insists appears to demand direct evidence of the Founders' subjective intent to support claims regarding the Constitution's original meaning.[419] According to Flaherty, without adherence to this approach, "originalism in any of its ingenious forms collapses upon itself."[420] Flaherty's brand of history department law would require lawyers and judges not to ascertain the historical meaning of legal texts in the course of interpreting them. This is not possible. The original public meaning of a legal text in the context in which it was adopted is at least relevant to, if not determinative of, its proper operation. Historians can certainly help to recover such context, but the interpretation of legal texts remains an unavoidable task for those who interpret and apply the law. While Flaherty bemoans "law-office history," his insistence that the legal profession embrace his conception of "history department law" would render the work of law professors, lawyers, and judges—not to mention historians—nearly impossible.

This Part proceeds as follows. First, we identify and correct the ways in which Professor Flaherty has mischaracterized and distorted our work. Second, we refute Flaherty's demand for an artificial presumption against originalist scholarship. As explained below, his brand of history department law contradicts the traditional role of lawyers and judges and ignores the judicial consensus that has prevailed since the Founding regarding the nature of the federal system created by the Constitution. In the end, Flaherty identifies no evidence that challenges our original thesis, and the

417. *See id.* at 690-96.
418. *Id* at 689 (emphasis omitted).
419. *See id.* at 716.
420. *Id.* at 719.

wedge he seeks to drive between lawyers and historians does little to advance actual constitutional understandings.

A. Professor Flaherty's Mischaracterizations

Professor Flaherty coined the phrase "history lite" and his essay employs the phrase repeatedly.[421] He uses the phrase to disparage legal scholarship—particularly originalist scholarship—that does not adhere to standards he attributes to professional historians.[422] Flaherty states at the beginning and end of his essay that he leaves "the more direct and detailed work [of assessing the merits of our thesis] to ... other scholars"—namely, David Schwartz and Ryan Williams.[423] Nonetheless, he proceeds to mischaracterize our thesis repeatedly. Three examples stand out. First, Flaherty charges that our article includes "not one direct piece of express evidence for its thesis."[424] Second, he claims that our thesis treats the Constitution as having been adopted by "We the States" rather than "We the People."[425] Third, he suggests that "Chief Justice Marshall's magisterial opinion in *McCulloch v. Maryland*" contrasts sharply with our analysis.[426] Each of these claims, no matter how strident Flaherty's rhetoric, is false. We briefly examine each example.

1. No Direct Evidence

First, Professor Flaherty claims that our thesis relies solely on one word ("State") and one book (Vattel's *The Law of Nations*).[427] He compares such reliance to the movie, *National Treasure*, in which "it only took a person as smart and open-minded as Nicholas Cage to

421. *Id.* at 673, 681, 686, 689, 694, 700. These references include eight citations to the article that began his preoccupation with the concept. *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) [hereinafter Flaherty, *History "Lite"*].

422. Flaherty, *History "Lite," supra* note 421, at 549-55.

423. Flaherty, *Peerless*, *supra* note 16, at 674; *see id.* at 719 (stating that he leaves "the further digging necessary to establish or refute [our] argument" to "the companion pieces by David Schwartz and Ryan Williams").

424. *Id.* at 712.

425. *Id.* at 706, 714.

426. *Id.* at 674.

427. *Id.* at 704-05.

figure out that, though completely overlooked for two centuries, [the Declaration of Independence] also contained a code that, once cracked, yields directions leading to a cache of untold riches."[428] According to Flaherty, such "clever decoding to something that was otherwise hiding in plain sight" might make for a good movie, but it should establish a presumption against originalist scholarship offering a novel thesis.[429] Although he acknowledges that evidence can rebut this presumption, he asserts that we fail to offer even "one direct piece of express evidence for [our] thesis."[430] We evaluate separately below the validity of Flaherty's general "presumption" against originalist scholarship. Here, we simply refute his false claim that we presented no direct evidence in support of our thesis that the Constitution alienated some—but not all—of the States' sovereign rights and powers under the rules prescribed by the law of nations to interpret such instruments.

Our prior scholarship argued that the Constitution transferred a subset of the States' sovereign rights and powers to the federal government and that the scope of this transfer is best understood by reference to background rules prescribed by the law of nations to govern the interpretation of instruments—such as the Constitution—used to alienate sovereign rights.[431] To be sure, we relied in part on the Constitution's use of the term "States" to support our thesis.[432] The term was (and remains) a term of art drawn from the law of nations. That body of law used the terms "state" and "nation" interchangeably to refer to an independent nation-state with all of the rights, powers, and obligations that accompanied that status.[433] Accordingly, to this day, nations (including the United States) refer to leaders of foreign nations as "heads of State" and hold "State dinners" in their honor. Given this backdrop, the Constitution's use

428. *Id.* at 690-91.

429. *Id.* at 691-93.

430. *Id.* at 712. It is unclear what Flaherty means by "direct evidence." If he means evidence of the Founders' subjective intent, then he is asking the wrong question. The relevant and abundant evidence upon which we rely is the background context that informs the original public meaning of the constitutional text.

431. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 514-18.

432. *Id.* at 507-11.

433. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 847-48.

of the term "States" was not novel; it merely confirmed its preexisting use. As discussed below, at least as probative as the Constitution's use of the term "States" was the former Colonies' use of the same term to signify their status as fully-sovereign states—both during their fight to achieve independence from Great Britain and during the critical period leading up to ratification. Accordingly, the Constitution's continued use of the same term did not establish, but merely confirmed, the accepted American usage.

Professor Flaherty's attempt to disclaim that the term "States" had any significance during the Founding period rests primarily on Samuel Johnson's 1755 *Dictionary of the English Language*.[434] Flaherty observes that only one "[o]f the five entries for 'State' ... possibly pertains to the Constitution's use of the word."[435] The same could be said, however, of any term used in a legal instrument that has multiple dictionary definitions. Just because a word has multiple meanings, it is not incapable of having a determinate meaning as used *in context*. No one would say that a law enacted today that described a polity asserting sovereign rights as a "state" was incapable of having a determinate meaning because "state" could mean nation or it could mean condition of being (as in, a nervous state). The relevant question is how a term is used in context. Accepting that Johnson's multiple definitions were accurate in England in 1755, the term was used in a particular context in American Founding documents beginning in 1776.

First, the Declaration of Independence used the term to refer to fully sovereign states or nations imbued with all of the rights and powers that accompanied that status. The Declaration left no uncertainty about how it was using the term. In declaring their independence from Great Britain, the former Colonies declared themselves to be "Free and Independent States" with all of the rights and powers that accompanied that status under the law of nations:

> [T]hese United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between

434. *See* Flaherty, *Peerless*, *supra* note 16, at 717.
435. *Id.*

> them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.[436]

As we have explained: "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."[437] Great Britain fought the War of Independence precisely to prevent its former Colonies from becoming sovereign "States" entitled to these rights.[438]

Second, when it became clear that it had lost the war, Britain renounced its claim of sovereignty over the Colonies and formally recognized the American States in terms that mirrored the Declaration of Independence.[439] Specifically, the provisional treaty of peace provided that "His Britannic Majesty acknowledges the said United States ... to be free, sovereign and independent States."[440] Going forward, these new "States"—and all foreign sovereigns with whom they dealt—understood the former British Colonies to be free and independent sovereign "States" within the meaning of the law of nations.[441] All of this is direct evidence of meaning.

Third, the former Colonies continued to refer to themselves as "States" after the War of Independence and throughout the period leading up to the adoption of the Constitution. For example, the Articles of Confederation, drafted in 1777 and formally adopted in 1781, was styled "articles of Confederation and perpetual Union between the *States* of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia."[442] And Article II declared that "[e]ach *State* retains its sovereignty, freedom and independence, and

436. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
437. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 846.
438. *Id.*
439. *Id.*
440. Provisional Articles, U.S.-Gr. Brit., art. I, Nov. 30, 1782, 8 Stat. 54.
441. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 846.
442. ARTICLES OF CONFEDERATION of 1781, preface (emphasis added).

every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[443] In light of these clear indications that the American States considered themselves to be "States" within the meaning of the law of nations, it is not surprising that professional historians such as Gordon Wood have recognized that the former Colonies had attained the status of independent sovereign states:

> 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.[444]

Curiously, Professor Flaherty fails to discuss or even acknowledge the use of the term "States" to describe the American States in (1) the Declaration of Independence, (2) Great Britain's formal recognition of its former Colonies as "free, sovereign and independent States," and (3) the Articles of Confederation. These foundational documents are obvious and direct evidence of the Founders' pre-constitutional understanding that the newly minted "States" possessed all of the rights and powers that accompanied that status under the law of nations. Oddly, the only time that Flaherty mentions the Declaration of Independence is in describing the film *National Treasure*, in which the character played by Nicolas Cage discovers a secret treasure map encoded in the document.[445] Perhaps this glib reference is meant to suggest that our understanding is equally implausible, but it is hard to know because he never actually discusses the Declaration or our reading of it.

Professor Flaherty also falsely claims that we "rely on a single work [Vattel] and proceed as if everyone used it as a proxy in all its

---

443. *Id.* art. II (emphasis added).

444. Wood, *supra* note 36, at 724 (quoting ARTICLES OF CONFEDERATION of 1781, art. III).

445. *See* Flaherty, *Peerless*, *supra* note 16, at 690-91; *see also id.* at 693 ("That the Declaration of Independence doubled as a treasure map pretty much challenges the old notion that the Second Continental Congress convened with other things on its mind.").

considerable detail."[446] To be sure, we described Vattel's summary of the rules governing transfers of sovereign rights in legal instruments.[447] But we also explained that writers on the law of nations who came before, including Hugo Grotius and Samuel Pufendorf, recited the same rules.[448] And we described how participants in ratification debates invoked those rules.[449] And we showed that proponents of strict construction distorted those rules.[450] And we detailed how early Justices of the Supreme Court, including the Marshall Court, applied those same rules.[451] Flaherty ignores all of this evidence while proclaiming we have none.

Perhaps the most striking evidence that Professor Flaherty disregards is evidence from ratification debates, including *The Federalist No. 32*, in which Alexander Hamilton discussed the circumstances under which the Constitution would—and would not—alienate the States' sovereign rights and powers.[452] The Constitution was designed to transfer a limited subset of those rights and powers to a new federal government.[453] Anti-Federalists feared that the federal judiciary would misread the Constitution to alienate more power than the States actually surrendered.[454] Hamilton responded that "it is indispensable that [courts] should be bound down by strict rules and precedents,"[455] including "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[456] This rule applied because "the plan of the Convention aims only at a partial Union or consolidation."[457] Under this rule, "the State Governments would clearly retain all the rights of sovereignty which they before

446. *Id.* at 715.

447. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 853-54.

448. *See id.* at 854 nn.92 & 94.

449. *Id.* at 871-75.

450. *Id.* at 880-81; *see also* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563-66.

451. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 887-93; *see also* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 566-76.

452. *See supra* notes 79-91 and accompanying text.

453. *See supra* notes 46-48 and accompanying text.

454. *See supra* notes 70-74 and accompanying text.

455. THE FEDERALIST NO. 78, *supra* note 6, at 529 (Alexander Hamilton).

456. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

457. *Id.* at 200.

had and which were not by that act *exclusively* delegated to the United States."[458]

We quoted and discussed Hamilton's analysis at length in prior work,[459] and pointed out that "Hamilton's account [closely] tracks Vattel's approach to the interpretation of legal instruments that sought to alter sovereign rights and powers."[460] Again, Flaherty simply ignores both *The Federalist No. 32* and our discussion of it, yet asserts that we present no direct evidence for our claim that the Constitution was an instrument used to alienate sovereign rights and should be understood according to the background rules admitted by the Constitution to govern the interpretation of such instruments.[461]

Flaherty also ignores Hamilton's explanation of the same principles in later essays. For example, in *The Federalist No. 82*, Hamilton again summarized the governing rules as follows:

> The principles established in a former paper teach us, that the states will retain all preexisting authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is in express terms granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states, or where

458. *Id.*

459. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 516-18; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 873-75.

460. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 875; *see also* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 518 (observing that Hamilton "was merely paraphrasing and applying the background rules that governed all instruments used to alienate sovereign rights and powers under the law of nations").

461. Flaherty, *Peerless*, *supra* note 16, at 719. Professor Flaherty also fails to acknowledge or engage our discussion of the Supreme Court's opinions in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). We discussed these opinions at length in our 2020 article, Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 903-07, and explained that all five Justices applied principles supplied by the law of nations:

> Significantly, although the Justices disagreed over whether Article III authorized suits against States by citizens of other States, they all approached the constitutional question the same way—namely, by asking whether the States had clearly and expressly surrendered their sovereign immunity from such suits in the Constitution. This approach was drawn directly from the law of nations.

Id. at 907. Flaherty's failure to acknowledge this obvious evidence—while asserting that we have no evidence—is disingenuous at best.

> an authority is granted to the union with which a similar authority in the states would be utterly incompatible.[462]

It is hard to imagine more direct evidence for Hamilton's understanding of residual state sovereignty than his repeated (and uncontradicted) defense of the Constitution based on the rule—drawn from the law of nations—"that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[463]

Beyond Hamilton's discussion in *The Federalist*, there is substantial evidence that the Constitution's defenders and opponents alike appreciated the applicable background rule and understood that it would govern the Constitution. Prominent defenders of the Constitution, including those who favored strong national power, invoked it repeatedly during the ratification debates. For example, James Wilson declared: "This Constitution is the act of the people and what they have not expressly *granted*, they have *retained*."[464] Similarly, Thomas McKean explained that "no proposition can, surely, be more clear than this, that in every grant, whatever is not mentioned must, from the nature of the thing, be considered as excluded."[465] Anti-Federalists did not deny the rule invoked, but feared that federal officials would ignore or misapply it. This is what prompted Hamilton's extended discussion of the rule and the duty of courts to enforce it.[466] No scholar could make an informed judgment about constitutional federalism and the nature of the Union without considering this evidence, especially in light of the early Supreme

462. THE FEDERALIST NO. 82, *supra* note 6, at 553-54 (Alexander Hamilton). Of course, Hamilton also applied these principles in *The Federalist No. 81* to evaluate whether Article III would alienate state sovereign immunity. *See supra* note 363 and accompanying text.

463. THE FEDERALIST NO. 32, *supra* note 6, at 200, 203 (Alexander Hamilton).

464. James Wilson, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *reprinted in* 2 DHRC, *supra* note 69, at 384.

465. Thomas McKean, Statement at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 DHRC, *supra* note 69, at 416; *see also* George Nicholas, Statement at the Virginia Ratifying Convention (June 16, 1788), *in* 10 DHRC, *supra* note 69, at 1328 ("It is agreed upon by all, that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? Liken it to any familiar case. If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred?").

466. *See supra* Part I.B.

Court's repeated application of the same principle to interpret the Constitution.[467]

2. "We the States"

Second, Professor Flaherty falsely claims that our thesis starts from the premise that the Constitution was established by "We the States" rather than "We the People."[468] Using Vattel's understanding of "states," he takes our position to be that "any delegation to the Federal government by 'We the States' must be express and narrowly construed, consistent with Vattel's articulation of the law of nations."[469] In fact, this caricature is the opposite of what we said in our scholarship. We made clear that the Constitution was adopted by the people of the several States and that the Constitution should be neither broadly nor narrowly construed.[470] Rather, in keeping with the background rules governing the interpretation of instruments claimed to alienate sovereign rights, we explained that the terms of such instruments should be given their ordinary and customary meaning as of the time of adoption.[471]

We started from the premise that the people of the States—as the ultimate source of sovereign authority in each State—established the Constitution. As we explained, the Preamble states that "the Constitution was ordained and established by 'We the People of the United States.'"[472] Moreover, we explained that our thesis did not turn on whether the Constitution was adopted by the people of each individual State or by the people as an undifferentiated collective.[473]

---

467. Flaherty inexplicably ignores our detailed explanation of the Marshall Court's adherence to background rules when interpreting the Constitution. *See* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 566-76 (discussing *McCulloch v. Maryland*, *Gibbons v. Ogden*, and *Barron v. Baltimore*); *see also* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 883 n.228, 887, 892-93 (discussing examples).

468. Flaherty, *Peerless*, *supra* note 16, at 706-10.

469. *Id.* at 711.

470. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 869-70, 880-81.

471. *See id.* at 881; *see also* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563-66.

472. *Id.* at 869.

473. *Id.* at 870-71.

To be sure, we highlighted James Madison's view that the Constitution was "the act of the people, as forming so many independent States, not as forming one aggregate nation."[474] We made clear, however, that on either view the same rules applied to the Constitution. As we put it, "whichever 'people' adopted the Constitution"—the people of each individual State or the people of the United States as a whole—"prevailing rules of interpretation required that the States retain all sovereign rights of which the Constitution did not clearly and expressly divest them."[475] We could not have made this point clearer.

That said, it is common for scholars, judges, and other public officials to use the shorthand expression that "the States" ratified the Constitution. This shorthand is natural because the Constitution itself uses it in Article VII: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[476] Article VII refers to the Conventions "of" nine States, not "in" nine States. And it refers to "the States so ratifying the Same," not "the people so ratifying the same."[477] Accordingly, we can forgive public officials ranging from Founding Era luminaries George Washington and James Madison to modern day jurists John Roberts and Stephen Breyer for using the shorthand that "the States" ratified the

474. *Id.* at 869 (quoting THE FEDERALIST NO. 39, *supra* note 6, at 254 (James Madison)).

475. *Id.* at 870-71. Professor Williams questions whether "if the people in the several states retained ultimate sovereignty within and over the new governmental framework established by the Constitution," it could "plausibly be argued that their sovereignty remained unimpaired and the Vattelian canon against implied 'surrenders' of sovereignty is simply inapplicable." Williams, *supra* note 20, at 745. This is a fair question, but the application of law of nations interpretive rules did not require the maker of the instrument to itself lose ultimate sovereignty. As we explain elsewhere, the law of nations rule applied to *any* alienation of a sovereign right, whether by agreement or unilateral act, whether a voluntary surrender or an involuntary divestiture. Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 869-71. That it was the people who transferred rights and powers from their States to the federal government does not avoid the rule any more than an act of one sovereign claiming to unilaterally divest another of sovereign rights would avoid the rule. *See id.* at 870-71. An interpreter seeking to determine whether a lawmaker (whether a people, legislature, prince, et cetera) manifested an intent to surrender or divest a preexisting sovereign right would read the legal instrument the lawmaker used in light of the rules governing such instruments. *See id.* Application of the rule would avoid the serious consequences of misinterpretation, regardless of the ultimate sovereignty of a lawmaker.

476. U.S. CONST. art. VII.

477. *Id.*

Constitution when, of course, it was the people of the States. For example, in his letter transmitting the proposed Constitution to Congress, George Washington hoped that the Constitution would "meet the full and entire approbation of every State."[478] In the same essay in which he described the people of each State as adopting the Constitution, Madison also referred to "[e]ach State" as "ratifying the Constitution."[479] Today, the same shorthand is commonplace. In *PennEast Pipeline Co. v. New Jersey*, Chief Justice Roberts wrote that "the States consented in the plan of the Convention" to certain federal powers, and thus "when the States entered the federal system, they renounced" certain sovereign rights.[480] Similarly, in *Torres v. Texas Department of Public Safety*, Justice Breyer stated that "[u]pon entering the Union, the States implicitly agreed" to waive their sovereign immunity in certain respects.[481]

Our occasional use of this phrasing—that the States ratified the Constitution, or that the States alienated sovereign rights and powers in the Constitution—is nothing more than a convenient shorthand. That should be clear to any reader of our work because we expressly and repeatedly embraced the position that it was the people, as ultimate source of sovereignty, who adopted the Constitution. We also explained in detail that well-established rules of interpretation applied to the Constitution as a legal instrument alienating sovereign rights and powers, regardless of whether it was the people of each State who adopted it, or the undifferentiated people of the United States as a whole. There is no need to repeat those arguments here. Suffice it to say, the charge that we denied the established narrative that the people adopted the Constitution overlooks or ignores what we actually said.

Finally, there is no merit to Professor Flaherty's assertion that, if the States became "Free and Independent States" within the meaning of the law of nations, then the Constitution must be construed narrowly.[482] As we discussed in Part III.A and our earlier work, Vattel adopted a more nuanced set of rules for interpreting

478. George Washington, Letter to Congress (Sept. 17, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 69, at 666-67.

479. THE FEDERALIST NO. 39, *supra* note 6, at 253-54 (James Madison).

480. 594 U.S. 482, 501 (2021).

481. 597 U.S. 580, 584 (2022).

482. Flaherty, *Peerless*, *supra* note 16, at 711.

instruments claimed to alienate sovereign rights.[483] If such an instrument alienated sovereign rights and powers in clear and express terms, then those terms were to be given their ordinary and customary meaning.[484] And we described how participants in ratification debates invoked those rules.[485] And we showed how proponents of strict construction distorted those rules.[486] And we explained how early Justices of the Supreme Court, including the Marshall Court, applied those same rules.[487] Flaherty's strident rhetoric is no substitute for meaningful engagement with actual evidence and arguments.

3. Misreading McCulloch v. Maryland

Third, both Professors Flaherty and Schwartz misread *McCulloch v. Maryland* and contend that our approach to constitutional interpretation contradicts Chief Justice John Marshall's embrace of popular sovereignty in that case.[488] Specifically, Flaherty and Schwartz argue that Marshall's reliance on popular sovereignty somehow forecloses using background rules drawn from the law of nations to interpret the Constitution.[489] For instance, Schwartz contends that because Marshall invoked popular sovereignty, our position aligns with the position "of counsel for Maryland famously rejected in *McCulloch v. Maryland*,"[490] and contradicts the "nationalist constitutional theory ... espoused by Chief Justice Marshall in *McCulloch v. Maryland*."[491] Marshall's position, however, did not reject the idea that the States retained certain preexisting sovereign rights and powers. To the contrary, Marshall embraced both the limited nature of federal power under the Constitution and the States' retention of those sovereign rights and powers that the

483. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 880-81.
484. *Id.* at 881.
485. *Id.* at 899-902.
486. *Id.* at 880-81; *see also* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 563-64.
487. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 887-93; *see also* Bellia & Clark, *Constitutional Law of Interpretation*, *supra* note 59, at 566-76.
488. *See* Flaherty, *Peerless*, *supra* note 16, at 674-76; Schwartz, *supra* note 14, at 632.
489. Flaherty, *Peerless*, *supra* note 16, at 710 n.148; Schwartz, *supra* note 14, at 631-32.
490. Schwartz, *supra* note 14, at 631.
491. *Id.* at 632.

Constitution did not alienate. Like Schwartz, Flaherty invokes a caricature of Marshall's "magisterial opinion" and then suggests that it is inconsistent with our core thesis.[492]

Even a casual reading of our work reveals that these arguments mischaracterize our views and misread Marshall's opinion in the process. A close reading of *McCulloch* reveals that Marshall's embrace of the people as the ultimate source of state sovereignty in no sense precluded application of the background rules of interpretation that governed transfers of sovereign rights under the law of nations. In fact, as we discuss below, his analysis in *McCulloch was an application of those rules*. These rules not only enabled Marshall to uphold Congress's power to charter a bank, but also led him to reject Maryland's suggestion that Congress could commandeer the States to charter their own banks. Moreover, Marshall's application of those rules in *McCulloch* was not an isolated occurrence. He applied the same rules to interpret the Constitution in other significant cases, including *Barron v. Baltimore*.[493]

In *McCulloch v. Maryland*, the Supreme Court famously held that Congress's enumerated powers included authority to charter a Bank of the United States because this measure was "plainly adapted" to carrying into execution Congress's great powers conferred by the Constitution.[494] The conventional account is that *McCulloch* read Article I broadly to give Congress certain implied powers incidental to its enumerated powers.[495] To be sure, *McCulloch* interpreted Article I to give Congress incidental power to charter a bank, but it also recognized that—because the Constitution granted only limited powers—the States necessarily retained a significant degree of sovereign authority for themselves. Thus, Chief Justice Marshall began his opinion by observing:

> This Government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends,

492. *See* Flaherty, *Peerless*, *supra* note 16, at 674.

493. 32 U.S. (7 Pet.) 243 (1833).

494. 17 U.S. (4 Wheat.) 316, 421, 424 (1819).

495. *See, e.g.*, John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 10-14 (2014).

> while it was depending before the people, found it necessary to urge.[496]

This language precludes reading *McCulloch* to have embraced a theory of plenary national power with no power reserved to the States. To the contrary, Marshall directly acknowledged that the Constitution divided sovereign authority between the federal government and the States.

The question in *McCulloch* was which powers the Constitution assigned to Congress and which powers it left to the States. In answering this question, Marshall applied traditional rules of interpretation, including rules supplied by the law of nations to govern instruments claimed to alienate sovereign rights.[497] He started by acknowledging that no provision of the Constitution explicitly granted Congress specific authority to charter a bank,[498] but he found that Congress's "great powers"—fairly read—included this choice of means to implement them.[499] Among Congress's enumerated powers, he observed, "we find the 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."[500] These powers expressly enabled Congress to pursue the most important ends of government, but they were silent regarding the means available to accomplish these ends.

The Marshall Court applied ordinary rules of interpretation to conclude that Congress's "great powers" conferred "ample means for their execution," including the power to charter a bank.[501] Maryland nonetheless argued that the Necessary and Proper Clause constrained the means of execution Congress may employ to those that are absolutely necessary, not merely convenient.[502] The Court rejected this argument because it found that the ordinary and natural meaning of the term "necessary" was broader than Maryland

---

496. *McCulloch*, 17 U.S. at 405.

497. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 892-93.

498. *McCulloch*, 17 U.S. at 406 ("Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.").

499. *Id.* at 407-08.

500. *Id.* at 407.

501. *Id.* at 407-08.

502. *See id.* at 330-39.

claimed. As Marshall explained: "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."[503] Because various Article I powers, including the Necessary and Proper Clause, clearly and expressly alienated the States' right to exclusive sovereignty over persons and things in their territories, the only task for the Court was to determine the ordinary and natural meaning of these powers, in accord with background rules of interpretation. The fact that the Constitution was established by "We the People" had no bearing on this task. The key point is that the Constitution—however adopted—gave Congress great powers that encompassed the lesser power to charter a bank.

Professors Schwartz and Flaherty regard Marshall's opinion as decidedly nationalist because it upheld federal power and invalidated Maryland's attempt to tax the Bank. The very fact that Marshall thought it necessary to evaluate whether the federal government had this specific power, however, refutes any idea that he viewed the federal government as enjoying a plenary national police power. If he thought that the United States enjoyed a national police power, then his analysis of whether the Constitution conferred the power to charter the Bank would have been entirely superfluous.

Moreover, Schwartz and Flaherty's nationalist account of *McCulloch* overlooks or ignores the fact that Marshall rejected the suggestion that Congress could commandeer state governments to charter state banks.[504] As discussed, one implication of our thesis is that the Constitution's failure to include any text alienating the States' sovereign right not to be commandeered by another government means that this right remains with the States. Flaherty is highly skeptical of our conclusion because he claims it rests on an "utterly unprecedented" understanding of the Constitution and "advances a modern jurisprudential result."[505] Yet *McCulloch* itself

503. *Id.* at 413-14.

504. For an extended analysis of *McCulloch*, see Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 563-65.

505. Flaherty, *Peerless*, *supra* note 16, at 703, 710.

recognized the States' right not to be commandeered—and Congress's lack of corresponding power—under the Constitution.[506] Although Flaherty acknowledges that "Marshall relied on how the Constitution was originally understood when it was adopted,"[507] he does not mention that more than two centuries ago, as we have pointed out in prior work, Marshall agreed with our conclusion that the Constitution does not give Congress power to commandeer the States.[508] This fact alone refutes Flaherty's claim that our conclusion is "utterly unprecedented."[509]

To summarize briefly, the commandeering question arose in *McCulloch* because opponents of the Bank argued that it was unnecessary for Congress to create a bank insofar as it could rely on state-chartered banks to support federal operations.[510] Chief Justice Marshall rejected this argument because he refused "[t]o impose on [the federal government] the necessity of resorting to means *which it cannot control*, which another government may furnish or withhold."[511] As he put it, requiring Congress to rely on state banks would "create a dependence on other governments, which might disappoint its most important designs."[512]

Marshall was right to reject congressional power to commandeer States because the people never conferred such power in the Constitution. Under the law of nations, all sovereign "states" enjoyed certain rights and powers, including (1) the right to exercise exclusive sovereign authority over all persons and things within their territory,[513] and (2) the right not to be commandeered by another sovereign.[514] Under the law of nations, a legal instrument could alienate either or both of these rights, but only if it did so clearly and expressly or by unavoidable implication.[515] In keeping

506. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 893.

507. Flaherty, *Peerless*, *supra* note 16, at 675.

508. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 893.

509. Flaherty, *Peerless*, *supra* note 16, at 703 (emphasis omitted).

510. Joseph Hopkinson argued to the Court in *McCulloch* that the state banks were competent to serve all the purposes asserted to justify a Bank of the United States. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 333 (1833) (argument of counsel).

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

512. *Id.*

513. *See* VATTEL, *supra* note 82, bk. II, § 79-98, at 146-52.

514. *See id.* § 54-55, at 138.

515. *See id.* § 305, at 233 ("For the proprietor can only lose so much of his right as he has

with these precepts, *McCulloch* recognized that the Constitution alienated the first right by giving Congress various enumerated powers that—fairly read—authorized Congress to charter a national bank within the territory of the States.[516] At the same time, *McCulloch* dismissed the notion that the Constitution empowered Congress to command States to charter their own banks because nothing in the Constitution clearly alienated the States' right not to be commandeered by another sovereign.[517] This is the same conclusion we reached in our scholarship and, as *McCulloch* shows, it is hardly novel.

B. A False Presumption Against Originalist Scholarship

Apart from his specific misrepresentations of our scholarship, Professor Flaherty is generally dismissive of originalist legal scholarship because it is not "produced by full-time historians."[518] In his view, "legal scholarship on the Founding ... has yielded more heat than light" and "has yet to produce greater clarity, or general agreement."[519] As a result, "one originalist law review article may be matched against another originalist law review article," effectively cancelling each other out.[520] The problem, he believes, has been exacerbated by "the Court's embrace of originalism," which has incentivized the production of originalist scholarship with "the promise of power [and] the possibility for profit."[521] He maintains

---

ceded of it; and in a case of doubt, the presumption is in favour of the possessor."). Alienation by unavoidable implication occurred when one sovereign granted another a right or power that was absolutely incompatible with retention of the same power by the original holder. For example, if one party agreed to recognize a second party's sovereignty over disputed territory, this created an unavoidable implication that the first party could no longer claim a right to access that land. *See id.* This kind of alienation was an application of the well-established rule that a legal instrument should not be interpreted to reserve a right or power that would render an express provision of that instrument a complete nullity. *See id.* at 233-34.

516. As we explained, "the States clearly compromised their exclusive sovereign right to regulate their own citizens within their own territory by giving Congress express powers to tax and regulate these same individuals." Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 891.

517. *See id.* at 893.

518. Flaherty, *Peerless*, *supra* note 16, at 673.

519. *Id.* at 685.

520. *Id.*

521. *Id.* at 687.

that originalist scholarship produced by non-historians is likely to be biased in favor of the political and policy preferences of its authors.[522] Thus, he repeatedly denigrates originalist scholarship as "law-office history" and "history lite."[523] He asserts that "[o]riginalist scholarship will continue to furnish more or less apt yet conflicting narratives," which "undermines the idea of a useable past."[524] His solution is to declare a presumption against originalist scholarship, especially work that advances a novel claim, rests on a single insight, contradicts an established scholarly narrative, or advances a modern jurisprudential result.[525] For Flaherty, this proclaimed presumption against legal scholarship would clear the way for those he regards as real historians to advance authoritative narratives about the past. This presumption adds no value, however, because it both misunderstands the judicial role under the Constitution and contradicts the Supreme Court's longstanding understanding of constitutional federalism.

1. Misunderstanding the Judicial Role

Professor Flaherty's presumption against originalism by non-historians contradicts basic aspects of the judicial role. To be sure, history is often relevant to how judges do their job, and they should be rigorous in evaluating historical materials and historical claims. But what distinguishes the role of judges from the role of "full-time historians" is that judges must evaluate historical materials for how they bear on the proper reasons for judicial action and then use those reasons to decide actual cases and controversies.[526] There is no

522. Here he speaks from personal experience and candidly acknowledges that his own scholarship is open to similar skepticism "due to [his] own work as an international human rights lawyer." *Id.* at 682. Flaherty does not explain why historians are immune from bias stemming from their own political and policy preferences.

523. *Id.* at 719.

524. *Id.*

525. *See id.* at 691-96, 705.

526. For example, it might be of great historical interest that James Wilson apparently stood to gain financially from suits against States in federal court. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 195 (1995) (explaining that Wilson was a shareholder in the Indiana Company and thus "had a direct and significant financial interest in the Court's jurisdiction to provide a remedy against a state"). But that historical fact does not have any direct bearing on whether Wilson's expressed views about sovereign immunity reflected a reasonable and more

bright line between historical facts and evidence that properly bear on the judicial task and those that do not. Thus, both lawyers and historians have important roles to play in evaluating historical evidence relevant to the judicial function. Scholars seeking to understand the Constitution in historical context should value both rigorous pursuit of historical evidence and the judiciary's need to say what the law is when deciding cases. Faithful interpretation requires judges to rely on both credible historical evidence and sound legal reasoning. It is counterproductive to presume that an entire category of legal scholars is acting in bad faith simply because they are pursuing the Constitution's original meaning—a traditional basis for judicial decision making. Any such presumption is a disservice to lawyers and historians alike.

Both historians and lawyers should agree that recovering relevant background context is an essential part of ascertaining the original public meaning of legal texts because such context necessarily informs the meaning of the text.[527] This context includes background rules of interpretation against which a legal text was adopted. As Justice Antonin Scalia explained in the context of statutory interpretation, canons of interpretation "acquire a sort of prescriptive validity" over time.[528] Such rules "can be considered inseparable from the meaning of the text" because they are "so deeply ingrained" and "known to both drafter and reader alike."[529] The law of nations provides crucial background context for understanding the Constitution because that law both identified the rights and powers of all sovereign states and established rules governing all legal instruments used to alienate such rights and powers. Because the Constitution was a legal instrument used to transfer a limited subset of the States' sovereign rights and powers to a new federal government, these background rules provide crucial

---

widely held public understanding.

527. *See* Manning, *supra* note 205, at 2457 (explaining that even strict textualists "believe that [legal instruments] convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts").

528. Scalia, *supra* note 203, at 583.

529. SCALIA & GARNER, *supra* note 204, at 31; *see also id.* ("A traditional and hence anticipated rule of interpretation, no less than a traditional and hence anticipated meaning of a word, imparts meaning.").

context for understanding the instrument. Even if some judges dispute whether original meaning is determinative in resolving constitutional questions, few, if any, deem it wholly irrelevant.

Originalist legal scholarship can assist judges in recovering such context—an essential part of the judicial role. In this instance, our federalism scholarship identified an established rule drawn from the law of nations that governed the interpretation of all legal instruments used to alienate sovereign rights and powers. This rule was well-known to the Founders, as *The Federalist Papers*, debates in state ratifying conventions, all five opinions in *Chisholm v. Georgia*, and multiple significant opinions of the Marshall Court confirm. Over time, however, the rule has largely faded from view with few references in recent legal scholarship or judicial opinions.[530] Perhaps this is because much of the Supreme Court's federalism and sovereign immunity jurisprudence had already internalized the rule in earlier times. In any event, because the background rule remains relevant to the proper resolution of current controversies,[531] we have endeavored to excavate the rule and highlight its role in the Founders' understanding of the Constitution's division of sovereign rights and powers.[532]

Contrary to Professor Flaherty's characterizations, our use of background rules drawn from the law of nations to interpret the Constitution does not rest on a single word ("States") or a "single 'eureka' insight."[533] Nor is our application of such rules to the

530. One notable exception is *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019), in which the Court held that States have sovereign immunity from suit in the courts of a sister State. The Court observed that "[a]fter independence, the States considered themselves fully sovereign nations." *Id.* at 237. The Court invoked both Vattel and the law of nations for the proposition that sovereign states possessed immunity from suit in the courts of other sovereigns because "[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." *Id.* at 239 (internal quotation marks omitted) (quoting VATTEL, *supra* note 82, bk. II, § 55, at 138). Under the Constitution, "the States retained these aspects of sovereignty, 'except as altered by the plan of the Convention or certain constitutional Amendments.'" *Id.* at 241 (quoting Alden v. Maine, 527 U.S. 706, 713 (1999)). Because the Constitution included no provisions alienating the States' traditional immunity from suit in the courts of another State, the Court held that the States retained this immunity. *Id.*

531. *See, e.g.*, Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580 (2022); PennEast Pipeline Co. v. New Jersey, 594 U.S. 482 (2021).

532. *See* Bellia & Clark, *State Sovereign Immunity*, *supra* note 1, at 514, 518; Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 852-53.

533. Flaherty, *Peerless*, *supra* note 16, at 704.

Constitution "utterly unprecedented."[534] Our identification of the applicable background rules arose from careful consideration of the Founding Era materials discussed in our scholarship. These materials make clear that a central issue for the Founders was the extent to which the newly independent States should alienate their rights and powers in favor of a central government. The Declaration of Independence expressly recognized the States as fully independent sovereigns with all of the rights and powers that accompanied that status.[535] Similarly, the Articles of Confederation expressly reserved most sovereign rights and powers to the States. When this modest arrangement failed, a consensus eventually emerged that whatever instrument replaced the Articles would have to transfer a larger and somewhat different set of the States' sovereign rights and powers to a new federal government.

It was well understood that the existing States possessed sovereign rights and powers, so background rules governing the alienation of such rights necessarily inform the scope of alienation in the Constitution. As discussed, when Anti-Federalists raised fears that the proposed Constitution would alienate or overwhelm the States' sovereign right to tax by giving Congress power to raise revenue,[536] Alexander Hamilton rejected those fears as unfounded.

---

534. *Id.* at 703 (emphasis omitted). We are not the first scholars to claim that unwritten background rules of interpretation that existed at the time of the Founding can help determine constitutional meaning. For example, Professors Will Baude and Stephen Sachs have argued that the Constitution, like all written laws, is governed by an unwritten body of law they call "the law of interpretation." *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1120, 1135 (2017). Professor Caleb Nelson has advanced a related argument that the original meaning of the Constitution depends on certain kinds of background interpretive conventions. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519-20 (2003). Similarly, Professors McGinnis and Rappaport have advocated what they call "original methods" originalism, which calls for the Constitution to "be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it." *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009).

535. *See* Bellia & Clark, *International Law Origins of Federalism*, *supra* note 3, at 858.

536. *See, e.g.*, Brutus, Letter I, N.Y.J. (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 49, at 363, 367; William Findley, Statement at Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* 2 DHRC, *supra* note 69, at 448 ("The powers given to the federal body for imposing internal taxation will necessarily destroy the state sovereignties for there cannot exist two independent sovereign taxing powers in the same community, and the strongest will, of course, annihilate the weaker.").

He explained that, because the Constitution involved a "division of the sovereign power," it necessarily "admitted" "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[537] Hamilton did not invent this rule; he was merely paraphrasing the established rule of interpretation set forth in Vattel and other treatises on the law of nations.

Applying this rule, Hamilton concluded that the Constitution would alienate the States' preexisting power to tax only where it did so clearly and expressly or by unavoidable implication. The Constitution contained only one narrow alienation of this kind, and thus it left the States' general power to tax largely intact. Article I, Section 10 provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws."[538] Thus, Hamilton "affirm[ed] that (with the sole exception of duties on imports and exports) [the States] would under the plan of the Convention retain that authority in the most absolute and unqualified sense."[539] He concluded "that an attempt on the part of the national Government to abridge [the States] in the exercise of [their power to tax] would be a violent assumption of power unwarranted by any article or clause of its Constitution."[540] Hamilton's application of the background rule demonstrates that the Founders not only were aware of the rules, but used them to interpret the Constitution.

Hamilton applied the same rule of interpretation to analyze whether the Constitution would diminish the States' sovereign immunity from suit by individuals. The citizen-state diversity provisions of Article III extended the judicial power "to Controversies ... between a State and Citizens of another State ... and between a State ... and foreign ... Citizens or Subjects."[541] The controversy focused on the meaning and effect of the word "between." Anti-federalists claimed that this language would alienate the States'

537. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).
538. U.S. CONST. art. I, § 10, cl. 2.
539. THE FEDERALIST NO. 32, *supra* note 6, at 199 (Alexander Hamilton).
540. *Id.*
541. U.S. CONST. art. III, § 2.

sovereign immunity by permitting suits *against* States.[542] Leading Federalists responded that "between" in this context should be read to permit suits *by* but not *against* States.[543] Whatever the merits of this reading, the important point is that the debate proceeded by asking whether the background rule permitted reading the Constitution to alienate sovereign immunity. In *The Federalist No. 81*, Hamilton began by acknowledging that immunity from suit by individuals was an inherent aspect of sovereignty:

> 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.[544]

In order to determine whether "there is a surrender of this immunity in the plan of the convention," Hamilton looked to "[t]he circumstances which are necessary to produce an alienation of state sovereignty" that he described in *The Federalist No. 32*.[545]

As discussed, Hamilton recognized in *The Federalist No. 32* that the Constitution "admitted" the "rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[546] Under this rule, an instrument could

---

542. *See* George Mason, Address to the Virginia Convention (June 19, 1788), *in* 10 DHRC, *supra* note 69, at 1403, 1406 ("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?").

543. For example, James Madison acknowledged that this part of the Constitution "might be better expressed," James Madison, Address to the Virginia Convention (June 19, 1788), *in* 10 DHRC, *supra* note 69, at 1409, but insisted: "It is not in the power of individuals to call any State into Court. The only operation it can have, is, that if a State should wish to bring suit against a citizen, it must be brought before the Federal Court." James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 69, at 1414. John Marshall read Article III the same way, stating "I see a difficulty in making a State defendant, which does not prevent its being plaintiff." John Marshall, Address to the Virginia Convention (June 20, 1788), *reprinted in* 10 DHRC, *supra* note 69, at 1433.

544. THE FEDERALIST NO. 81, *supra* note 6, at 548-49 (Alexander Hamilton).

545. *Id.* at 549.

546. THE FEDERALIST NO. 32, *supra* note 6, at 203 (Alexander Hamilton).

divest sovereign rights only if it did so clearly and expressly or by unavoidable implication. Hamilton's application of this rule to Article III convinced him "that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[547] Whether one agrees with Hamilton's application of this background rule to Article III, it is indisputable that on at least two occasions he applied the rule supplied by the law of nations to ascertain the scope of the States' residual sovereign rights under the proposed Constitution.

Just a few years later, in *Chisholm v. Georgia*, the Supreme Court applied the same rule to assess whether Article III alienated the States' sovereign immunity from suit by out-of-state citizens.[548] On this occasion, four Justices found the constitutional text to have alienated sovereign immunity in clear and express terms,[549] and one Justice found the text to lack the requisite clarity.[550] The important point for present purposes is that—like Hamilton—all five Justices applied the background rule of interpretation as described in *The Federalist No. 32*. Thus, although Professor Flaherty mischaracterized our reliance on this rule as novel and unprecedented, we merely identified a background rule well-known to, and repeatedly applied by, the Founders. Early courts, including the Supreme Court, applied this rule to determine the extent to which the Constitution divested the States of their sovereign rights. This understanding aligns with the Court's view, held consistently since the Founding, that the Constitution allocated certain rights and powers to the federal government and reserved the remainder to the States. This background supports judicial efforts to ascertain the original understanding of the Constitution using traditional methods of interpretation. At a minimum, the evidence justifies a debate on the merits rather than a cursory dismissal based on slogans like "law-office history" and "history lite."

---

547. THE FEDERALIST NO. 81, *supra* note 6, at 549 (Alexander Hamilton).
548. 2 U.S. (2 Dall.) 419, 420 (1793).
549. *See id.* at 425.
550. *See id.* at 479 (Iredell, J., dissenting).

2. Judicial Consensus vs. Historians' Consensus

More generally, Professor Flaherty appoints himself the arbiter of historical standards and proposes a presumption against almost all originalist scholarship. Such scholarship is presumptively wrong, he says, if (1) "[t]he claim is utterly unprecedented," (2) "[t]he claim turns on a single 'eureka' insight," (3) "[t]he claim flies in the face of a more general and established scholarly narrative," and (4) "[t]he claim obviously advances a modern jurisprudential result."[551] Additional red flags are that the work (5) provides "[n]o direct evidence," (6) takes "'Straussian' Shortcuts," and (7) makes a "Public Meaning Dodge."[552] Professor Flaherty suggests that these criteria create a presumption against our scholarship.[553] We have refuted some of these criteria above, but for the most part, we will refrain from evaluating the individual criteria themselves because they appear to represent little more than general hostility to originalism. Rather than indulge an artificial presumption, we would evaluate works of originalist scholarship on their merits and the evidence they present.

A more fundamental problem with Professor Flaherty's presumption against our thesis that the Constitution divides sovereign rights and powers between the federal government and the States is that it contradicts the judiciary's traditional understanding of constitutional federalism and its basic function of interpreting the Constitution in order to decide cases. Like Professor Schwartz, Flaherty suggests that the Constitution created a truly national government.[554] Thus, both critics reject our thesis—bolstered by background rules of interpretation—that the Constitution alienated only a portion of the States' preexisting sovereign rights and powers and left the remainder undisturbed. Our thesis, however, is hardly novel. Indeed, a judicial consensus has existed since the Founding that the Constitution alienated some but not all of the States' sovereign rights and powers. This longstanding consensus undercuts any suggestion that our assessment is unprecedented.

---

551. Flaherty, *Peerless*, *supra* note 16, at 691, 704-10.
552. *Id.* at 712-16.
553. *Id.* at 674.
554. *Id.* at 708-09.

For example, in *Gibbons v. Ogden*, Chief Justice Marshall observed that "many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system."[555] If, Marshall explained, "[n]o direct general power over [certain] objects is granted to Congress," then those objects "remain subject" to state control.[556] This understanding has been the conventional understanding of Supreme Court Justices from the Founding to the present. In 2022, in *Torres v. Texas Department of Public Safety*, a case upholding a congressional abrogation of state sovereign immunity, Justice Stephen Breyer explained: "The Constitution forged a Union, but it also protected the sovereign prerogatives of States within our government. Generally speaking, 'the States entered the federal system with their sovereignty,' including their sovereign immunity, 'intact.'"[557] The Court has never denied this basic understanding of the constitutional structure.

Even the Supreme Court's most nationally minded opinions have proceeded from the premise that the Constitution grants the federal government limited and enumerated powers and leaves the remainder with the States and the people. In *United States v. Darby*, which upheld Congress's power to require private employers pay a minimum wage, the Court famously described the enumerated powers of Article I and the Tenth Amendment as reflecting a "truism that," for the States, "all is retained which has not been surrendered."[558] In *Katzenbach v. McClung*, the Court held that Congress had "broad and sweeping" powers under the Commerce and Necessary and Proper Clauses to prohibit race-based discrimination, but nonetheless understood that Congress must "keep[ ] within its sphere."[559] In *Garcia v. San Antonio Metropolitan Transit Authority*, which upheld congressional power to impose minimum wage requirements on States, the Court again began from the premise that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.' They do so, however, only to the

555. 22 U.S. (9 Wheat.) 1, 198-99 (1824).

556. *Id.* at 203.

557. 597 U.S. 580, 587 (2022) (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

558. 312 U.S. 100, 124 (1941).

559. 379 U.S. 294, 305 (1964).

extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[560]

As these opinions show, our claim that the Constitution alienated some rights and powers from the States, but left others intact, is not novel. It is basic constitutional law. Thus, Flaherty's (and Schwartz's) brand of nationalism is far removed from how judges have actually understood the Constitution over time. Judges have no choice but to reconcile the past with appropriate reasons for judicial decisions. If any *legal* presumption were warranted, it would be that longstanding and widely shared judicial understandings of the Constitution should prevail over artificial presumptions that lawyers and judges who seek original meaning—unlike professional historians—are acting in bad faith.

CONCLUSION

Constitutional federalism continues to generate important interpretive questions relating to the residual rights and powers of the States and the nature of the Union. The Supreme Court has correctly recognized for over 230 years that the Constitution transferred some—but not all—of the States' sovereign rights and powers to a newly created federal government. A recurring question, however, has been how to ascertain with precision those rights and powers that the States alienated and those that they retained. Substantial guidance comes from a background rule that governed all legal instruments claimed to alienate sovereign rights and powers: a legal instrument of any kind could alienate sovereign rights or powers only if it did so in clear and express terms or by unavoidable implication. Hamilton understood the Constitution to have "admitted" this rule because its basic function was to divide the sovereign power. Under this rule, the Constitution clearly divested the States of significant rights and powers, including their rights to exercise exclusive territorial sovereignty, to make treaties, to exercise the right of embassy, to set the terms of interstate and foreign commerce, to secede from the Union created by the Constitution, and to judge the meaning of the Constitution for themselves.

560. 469 U.S. 528, 549 (1985) (internal citation omitted).

But the Constitution left many of the States' other preexisting rights and powers undisturbed. These include the States' rights to sovereign immunity, to avoid being commandeered by another government, and to enjoy equal sovereignty with other States. Had the proposed Constitution sought to alienate all of the States' sovereign rights, there would have been no need for the Founders to hammer out the numerous hard-fought compromises reflected in the Constitution's text.

The key to distinguishing the rights retained by the States from those they alienated is the background rule that Hamilton characterized as an inextricable part of the Constitution itself. This background context had considerable explanatory force at the Founding and continues to have such force today. Hamilton's rule confirms that the Supreme Court has correctly upheld several of the States' residual sovereign rights and powers. This conception of the nature of the Union is not based on compact theory. It does not embrace, but rather refutes, nullification and secession. It proceeds from the premise that "We the People," not "We the States," established the Constitution. And it relies on a method of interpretation that is as familiar to lawyers and judges today as it was to Hamilton in 1788—that well-established background rules of interpretation form an inseparable part of the meaning of legal instruments drafted and adopted against that background. Notwithstanding the false parade of horribles invoked by Professors Schwartz and Flaherty, interpreters cannot ignore such background rules without ignoring the judicial duty and the Constitution itself.