ARTICLES

THE CONSTITUTIONAL LAW OF INTERPRETATION

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

The current debate over constitutional interpretation often proceeds on the assumption that the Constitution does not provide rules for its own interpretation. Accordingly, several scholars have attempted to identify applicable rules by consulting external sources that governed analogous legal texts (such as statutes, treaties, contracts, etc.). The distinctive function of the Constitution—often forgotten or overlooked—renders these analogies largely unnecessary. The Constitution was an instrument used by the people of the several States to transfer a fixed set of sovereign rights and powers from one group of sovereigns (the States) to another sovereign (the federal government), while maintaining the "States" as separate sovereigns with residual authority. Thus, constitutional interpretation necessarily entails ascertaining the extent to which the Constitution transferred sovereign rights from the States to the newly created federal government. The law of nations prescribed rules that governed both the formation and the interpretation of instruments used to transfer sovereign rights. Under these rules, legal instruments (regardless of their form) could transfer sovereign rights only if they did so in clear and express terms, and those terms were to be given their ordinary and customary meaning as of the time of adoption. Because the Constitution was an instrument used for this purpose, the Founders recognized that the applicable rules were "clearly admitted by the whole tenor of the instrument." Accordingly,

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

** William Cranch Research Professor of Law, George Washington University Law School. We thank Larry Alexander, Joel Alicea, Randy Barnett, Will Baude, Tricia Bellia, Jud Campbell, Tom Colby, Jack Goldsmith, John Harrison, Bill Kelley, John Manning, John McGinnis, Sai Prakash, Mike Ramsey, Mike Rappaport, Eric Segall, Steven Smith, Larry Solum, Lee Strang, Amanda Tyler, Ingrid Brunk Wuerth, and participants in the 2022 Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference at the University of San Diego School of Law, for helpful comments and suggestions. We also thank John Seidman (GW Law School Class of 2022), Andrew Smith (Harvard Law School Class of 2021), and Elle Wentross (Notre Dame Law School Class of 2023) for outstanding research assistance. Professor Clark thanks the students in his Fall 2020 Originalism Reading Group at Harvard Law School for lively and insightful discussions.

these rules became an inextricable part of the legal content conveyed by the text of the Constitution. Not surprisingly, the Supreme Court used these rules to interpret the Constitution from the start. Recovering this constitutional law of interpretation has at least two important implications. First, by "admitting" the background rules of interpretation, the Constitution requires interpreters to employ some form of originalism in constitutional interpretation. Second, the nature of the Constitution and the rules governing its interpretation confirm that the Supreme Court has properly employed three doctrines to uphold the States' residual sovereignty—namely, sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine.

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INTRODUCTION

Commentators have long debated the proper method of constitutional interpretation and whether the Constitution itself provides meaningful guidance for its own interpretation. Arguments often focus on the extent to which the Constitution is analogous to other legal instruments—such as contracts, statutes, and state constitutions—and how, if at all, such analogies should inform its interpretation. When it comes to constitutional interpretation, however, the *function* of the Constitution is more important than its *form*. Under the law of nations, a legal instrument—in whatever form—could transfer sovereign rights and powers from one sovereign to another only through clear and express terms. If the customary meaning of the instrument at the time it was adopted did not clearly and expressly transfer a sovereign right, then the right in question remained undisturbed. These rules were an inextricable part of any legal instrument used to alienate sovereign rights. Accordingly, these rules were well known to the Founders and played an integral role in the drafting and ratification of the Constitution.

The Constitution was an instrument used by the people of the several States to transfer a significant—but limited—set of sovereign rights and powers from one group of sovereigns (the States) to another sovereign (the federal government). After declaring their independence from Great Britain, the former Colonies attained the status of "Free and Independent States." Under the law of nations, such States enjoyed all of the sovereign rights and obligations of every other independent state, no matter how large or how small. The States initially used the Articles of Confederation to transfer some of their sovereign rights and powers to a weak central government. When this approach failed, the Philadelphia Convention proposed an entirely new Constitution to replace the Articles. The Constitution retained the States but transferred a larger—albeit still limited—set of sovereign rights and powers to a new federal government.

The Constitution cannot be fully understood without resort to background rules supplied by the law of nations. The term "States," for example, was a term of art drawn from the law of nations. After declaring themselves to be "Free and Independent States," the former Colonies continued to use the term "States" to refer to themselves in both the Articles of Confederation and the Constitution. As used in these documents, the term "States" can only be understood by reference to the rules supplied by the law of nations that both defined and regulated the entities to which the term referred. These rules not only

spelled out the rights and powers of sovereign states, but also established the means by which states could adjust their rights vis-à-vis other sovereigns. States followed these rules when they transferred portions of their sovereign rights and powers to other sovereigns, and interpreters applied the same rules to determine the scope and effect of such transfers. For this reason, these rules were an inseparable part of every legal instrument—including the Constitution—used to transfer sovereign rights and powers. Under these rules, the "States" referred to in the Constitution possessed the full complement of sovereign rights and powers minus those that their people clearly and expressly transferred to the new federal government in the instrument. In addition, the ordinary and customary meaning of the instrument at the time of its adoption determined which rights and powers it clearly and expressly transferred.

The Founders were well-versed in the rules of interpretation governing instruments used to transfer sovereign rights and understood them to be part and parcel of the Constitution. During the debates over whether to ratify the Constitution, Alexander Hamilton explained that because the Constitution involved a "division of the sovereign power,"[1] 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."[2] Hamilton regarded this rule as an inextricable part of the Constitution itself. 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."[3]

Recognizing that the Constitution admitted the background rules governing the alienation of sovereign rights has important implications for constitutional interpretation. First, because the Constitution is inseparable from the rules prescribed by the law of nations to govern instruments used to transfer sovereign rights, the Constitution itself requires some form of originalism in constitutional interpretation. These rules require interpreters to give such instruments their customary meaning as of the time of adoption. The core tenets of originalism comply with these rules. This means that, with respect to the Constitution, some form of originalism was baked into the cake from the start. Second, the nature of the Constitution and the rules

1 THE FEDERALIST NO. 32, at 200, 203 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961).

2 *Id.*

3 *Id.*

governing its interpretation confirm that the Supreme Court has properly upheld the residual sovereign rights of the States through doctrines such as sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine. Under the applicable rules, the States necessarily retained these sovereign rights because they were not clearly and expressly alienated in the Constitution.

This Article proceeds in four parts. Part I recounts the rules of the law of nations that governed the interpretation of legal instruments claimed to transfer rights and powers from one sovereign to another. Under these rules, interpreters were to give such instruments their ordinary and customary meaning as of the time of adoption and find an alienation of sovereign rights only if set forth in clear and express terms. Ambiguous or vague terms could not alienate sovereign rights and powers. These rules avoided misunderstandings and prevented conflict among sovereigns. Part II explains that the Constitution was fundamentally an instrument used to transfer a fixed subset of the States' sovereign rights and powers to a new federal government. It begins by recounting the decision by the people of each State to transfer an important portion of their State's sovereign rights first by adopting the Articles of Confederation and then by ratifying the Constitution. It next explains that the Founders understood the effect of these instruments by reference to rules of interpretation supplied by the law of nations. Part III describes how, from its earliest days, the Supreme Court applied these rules to interpret the Constitution. Part IV examines two important implications of recognizing that the Constitution admitted the background rules governing instruments designed to transfer sovereign rights and powers. First, originalism is the constitutional law of interpretation because its core tenets uphold these rules. Second, the Supreme Court has properly recognized several doctrines upholding State sovereign rights and powers that the Constitution did not divest in clear and express terms.

I. RULES GOVERNING THE TRANSFER OF SOVEREIGN RIGHTS

Although the Constitution declares itself to be law—specifically, "the supreme Law of the Land"[4]—scholars have long observed that the Constitution did not fit neatly into any typical category of legal instruments. Accordingly, scholars have debated whether the Constitution was most akin to a statute, a treaty, a contract, or some other kind of instrument, subject to the corresponding rules of

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

interpretation that governed such instruments.[5] Although the Constitution's form did not precisely mirror any of these archetypes, it nonetheless performed a familiar legal function subject to well-known rules of interpretation. Specifically, the Constitution transferred sovereign rights and powers from one group of sovereigns (the preexisting "States") to another sovereign (the newly created federal government). Instruments used to make such adjustments were governed by a set of established rules supplied by the law of nations. Thus, the particular form of the Constitution was less important than its nature and function in determining the applicable law of interpretation.

Adjustments of sovereign rights among states were momentous acts with serious consequences and thus subject to strict rules. Under the law of nations, all sovereign states possessed a set of rights and powers that all other states were required to respect. A state could transfer or alienate its rights in a legal instrument, but only if it did so clearly and expressly. In addition, to establish a clear baseline and avoid dangerous misunderstandings, the law of nations required interpreters to give the terms of such instruments their ordinary and customary meaning as of the time of adoption. Thus, if a legal instrument—so interpreted—clearly and expressly altered sovereign rights, then interpreters would read the instrument to do so. On the other hand, if the terms of a legal instrument claimed to alienate sovereign rights were unclear, then interpreters would read the instrument not to alter sovereign rights.

These rules were designed to maintain peace and harmony among sovereign states. If a nation—whether by accident or fraud—misinterpreted a legal instrument to alienate more sovereign rights than the grantor actually relinquished, then the aggrieved nation had just cause to retaliate, including by force if necessary. Thus, any misreading of an instrument of this kind had the potential to generate significant conflict. To guard against this danger, the law of nations established rules that governed both the formation and the interpretation of such instruments. These rules were designed to ensure that interpreters would find an alienation of sovereign rights only when clearly warranted by the objective meaning of the instrument. The default rule was that only a clear and express legal provision—understood as of the time of adoption—could alter sovereign rights and powers; an unclear provision could not do so. This rule applied regardless

5 *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519–22 (2003); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636–38, 640–43 (1999); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998).

of whether the legal instrument was a statute, a treaty, or some other instrument claimed to adjust sovereign rights. Accordingly, any party that wished to transfer, divest, or otherwise alienate sovereign rights in a legal instrument had to employ one that did so in clear and express terms.

As the next Part explains, the Constitution was an instrument used to transfer a fixed subset of sovereign rights and powers from one group of sovereigns (the States) to another sovereign (the newly created federal government). Early defenders and interpreters of the Constitution generally understood the instrument to perform this function and construed it accordingly. To understand the interrelationship between the Constitution and the background law of interpretation, it is necessary first to understand the rules provided by the law of nations to govern legal instruments claimed to adjust sovereign rights. This Part describes those rules. It begins by recounting the rules of interpretation that applied generally to all legal instruments, including statutes, contracts, and treaties. It next identifies the more specific rules that governed instruments (of whatever kind) claimed to alienate sovereign rights and powers. Taken together, these rules established (1) that interpreters should understand legal provisions to adjust sovereign rights and powers only when the ordinary and customary meaning of their terms clearly and expressly did so at the time of adoption, and conversely (2) that interpreters should not read ambiguous legal provisions to alienate sovereign rights and powers.

A. General Rules of Interpretation

Prior to the Founding, the common law and the law of nations established rules of interpretation that applied to a broad range of legal instruments, including statutes, contracts, and treaties. Writers on the common law (most notably Blackstone) and writers on the law of nations (including Vattel, Grotius, and Pufendorf) recognized several common rules of interpretation. Each writer explained that the overarching goal of interpreting a legal instrument was to ascertain the intent of the parties who made it. For a statute, the goal was to determine the intent of the legislature.[6] For a contract, the goal was to determine the intent of the contracting parties.[7] For a treaty, the goal was to

6 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *59 (describing "[t]he fairest and most rational method to interpret the will of the legislator").

7 *See* T. RUTHERFORTH, INSTITUTES OF NATURAL LAW; BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS 404 (Baltimore, William & Joseph Neal 2d Am. ed. 1832) ("A promise, or a contract, or a will, gives us a right to whatever the promiser, the contractor, or the testator, designed or intended to make ours.").

interpret the intent of the sovereign parties who made it.[8] These treatise writers, however, were not naive enough to think that interpreters could determine such intent with absolute certainty. Writers on interpretation appreciated the problems inherent in discerning the intent behind a legal provision. These difficulties were challenging enough when determining the intent behind the words of a single actor (such as a party to a contract), but only multiplied when seeking to ascertain the intent behind the words approved by multiple actors (such as a body of legislators), who likely lacked a single uniform intent. Writers on interpretation also understood that a party adopting a law should not be able to impose a hidden intent on those governed by the law. Because of the difficulty of ascertaining subjective intent, writers regarded interpretation—whether of a statute, treaty, contract, or other instrument—as an objective enterprise that sought "signs . . . most natural and probable,"[9] or the "outward mark,"[10] of intent.

Because the task of interpreters was to examine the outward signs or objective marks of intent, writers from Grotius to Blackstone recognized a common set of interpretive rules designed to ascertain such intent. These rules were generally applicable to all legal instruments, including statutes, contracts, and treaties. For the Founders, perhaps the most useful explanation of rules for the interpretation of legal instruments was that of Emmerich de Vattel. At the time of the Founding, his treatise *The Law of Nations*[11] was the most influential treatment of the law of nations in England and America.[12] Although Vattel's treatise had particular relevance to treaties, it provided a systematic explanation of the general rules that governed contracts and

8 *See infra* notes 15–31 and accompanying text.

9 1 BLACKSTONE, *supra* note 6, at *59 (emphasis omitted).

10 RUTHERFORTH, *supra* note 7, at 404. "The collecting of a [person's] intention from such signs or marks is called interpretation." *Id.*

11 1 M. DE VATTEL, THE LAW OF NATIONS; OF PRINCIPLES OF THE LAW OF NATURE: APLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (London, J. Newbery et al. eds., 1760) [hereinafter 1 VATTEL, THE LAW OF NATIONS]; 2 M. DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (London, J. Coote 1759) [hereinafter 2 VATTEL, THE LAW OF NATIONS].

12 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 15–16 (2009); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 67 (1999) ("[I]n the 1780s and 1790s, there were nine citations [by American courts] to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel."); *see also* David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 137 (David Gray Adler & Larry N. George eds., 1996) ("During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.").

statutes as well. Vattel, like other writers addressing interpretation, identified several rules of interpretation that applied generally to all of these instruments.

First and foremost, the rules required interpreters to read the words of a legal provision in their most natural and customary sense.[13] If the ordinary meaning of the words was clear, then interpreters were generally to treat that meaning as the intent of the lawmaker. As explained in more detail below, Vattel described this practice as the first rule of interpretation.[14] The ordinary and natural meaning of words, however, was not always clear from the words in isolation. As Vattel observed, the ideas conveyed by language are not "always distinct, and perfectly determined," and in drafting laws "it is impossible to foresee and point out, all the particular cases, that may arise."[15] Accordingly, writers identified particular rules for interpreting expressions that were "obscure or equivocal" in and of themselves.[16]

The first rule for dealing with obscure or equivocal words instructed interpreters to examine the context of the words, including the sense in which lawmakers used the same terms in related provisions or instruments.[17] In other words, interpreters should read less clear expressions to be consistent with the established usage of the same terms in the same or a related instrument.[18] The reason for this rule, Vattel explained, is that "it is presumed that [a lawmaker's or treaty-maker's] thoughts have been the same on the same occasions; so that if he has any where clearly shewn his intention, with respect to any thing, we ought to give the same sense to what he has elsewhere said

13 *See* 1 BLACKSTONE, *supra* note 6, at *59 ("Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use."); RUTHERFORTH, *supra* note 7, at 407 (explaining that the "true signification" of words "must be looked for . . . in common use and custom"); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 353 (J. Barbeyrac trans., London, W. Innys, & R. Manby, J. & P. Knapton, D. Brown, T. Osborn & E. Wicksteed 1738) (footnote omitted) (explaining that "the Words are to be understood according to their Propriety, not the grammatical one . . . but what is vulgar and most in Use"); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO bk. V, ch. 13, § 3, at 794 (C.H. Oldfather & W.A. Oldfather trans., Clarendon 1934) (1688) (explaining "the rule" that "words are to be understood in their proper and so-called accepted meaning, one that has been imposed upon them, not so much by their intrinsic force and grammatical analogy as by popular usage").

14 *See infra* notes 17–22 and accompanying text.

15 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 215.

16 *Id.* at 224.

17 *See* 1 BLACKSTONE, *supra* note 6, at *60 (explaining that if words are "dubious," their meaning may be established from "the *context*," which includes "comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point").

18 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 224.

obscurely on the same affair."[19] Moreover, when terms were vague or ambiguous, an interpreter "ought to consider the whole discourse together,"[20] and "[t]he interpretation ought to be made in such a manner, that all the parts appear consonant to each other, that what follows, agree with what went before."[21] This rule, Vattel explained, rested on the presumption "that the authors . . . had an uniform and steady train of thought; that they did not desire things which ill-agreed with each other, or contradictions; but rather that they have intended to explain one thing by another; and, in a word, that one and the same spirit reigns throughout the same work."[22]

A second rule for provisions susceptible of multiple meanings was that interpreters should examine the subject matter of the provision to determine whether one sense or another was more appropriate for the subject.[23] As Vattel put it, an interpreter "ought always to give to expressions the sense most suitable to the subject, or to the matter to which they relate."[24] The reason, he explained, is that one "who has employed a word capable of many different significations" should "be presumed" to have "taken it in that which agrees with the subject."[25]

A third rule was that if the ordinary and customary meaning of the words would generate an absurd consequence or no effect at all, interpreters should read the words to avoid absurdity.[26] Because it should not be presumed, Vattel explained, "that any one desires what is absurd, it cannot be supposed, that he who speaks has intended that his words should be understood in a manner from which an absurdity follows."[27]

A fourth rule was that, when presented with obscure or equivocal language, interpreters could consider the reason for the law if that

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19 *Id.*

20 *Id.* at 224.

21 *Id.* at 224–25.

22 *Id.* at 225.

23 *See* 1 BLACKSTONE, *supra* note 6, at *60 (explaining that words should be "understood as having a regard" to the "*subject-matter*"); RUTHERFORTH, *supra* note 7, at 412 ("When any words, or expressions in a writing, are of doubtful meaning, the first rule in mixed interpretation is to give them such a sense, as is agreeable to the subject matter of which the writer is treating.").

24 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 221 (emphasis omitted).

25 *Id.*

26 *See* 1 BLACKSTONE, *supra* note 6, at *61 (explaining that "the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them"); RUTHERFORTH, *supra* note 7, at 413 (explaining that interpreters should "give all doubtful words or expressions, that sense which makes them produce some effect," and "this effect must, in general, be a reasonable one").

27 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 222.

reason was discernable and clear.[28] As Vattel explained, although an interpreter should not consider "[t]he reason of the law" when the language was clear, it was appropriate to examine the reason of the law to determine whether the language extended to doubtful cases.[29] Vattel was careful to point out, however, that "it is a dangerous abuse, to go, without necessity, in search of reasons and uncertain views, in order to turn, restrain, or destroy, the sense of a piece that is clear enough in itself."[30] Blackstone echoed this point when he wrote that courts must exercise discipline in using the reason of a law to determine its application. This practice, he explained, "must not be indulged too far; lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge."[31]

These four general interpretive rules were well-known at the Founding and applied to all legal instruments. Every established writer on interpretation—Vattel, Blackstone, Grotius, Pufendorf, and Rutherforth—had described them in one form or another. These rules remain familiar in modern law, and courts continue to apply them today.

B. Specific Rules Governing Transfers of Sovereign Rights

In addition to these general rules, there were additional rules that applied to legal instruments, of any kind, claimed to transfer, divest, or otherwise alienate sovereign rights and powers. At the time of the Founding, it was a common practice for sovereigns to use legal instruments, including statutes and treaties, to adjust their sovereign rights and powers. For example, nations commonly used treaties to adjust their sovereign rights, especially of territorial sovereignty over

28 *See* 1 BLACKSTONE, *supra* note 6, at *61 (explaining that "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it"); RUTHERFORTH, *supra* note 7, at 415 (explaining that if the meaning of a law is "uncertain," that meaning may "be determined by the reason of it"). As Vattel explained:

> The reason of the law, or the treaty, that is, the motive which led to the making of it, and the view there proposed, is one of the most certain means of establishing the true sense, and great attention ought to be paid to it, whenever it is required to explain an obscure, equivocal, and undetermined point, either of a law or of a treaty, or to make an application of them to a particular case.

1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 225 (emphasis omitted). According to Blackstone, "equitable" interpretation was the extension or retraction of general language of a legal provision to make its specific application accord with the discernable reason for the law. 1 BLACKSTONE, *supra* note 6, at *61–62.

29 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 225 (emphasis omitted).

30 *Id.* at 226; *see also id.* (describing the "incontestible maxim, that it is not permitted to interpret what has no need of interpretation").

31 1 BLACKSTONE, *supra* note 6, at *62.

certain lands. The Treaty of Paris of 1763, by which Britain, France, and Spain adjusted their territorial rights over vast areas of land, as well as ceded discrete rights to govern their own lands in particular ways, is just one example of numerous treaties adjusting sovereign rights in the decades surrounding the Founding.[32] Nations also used statutes to adjust sovereign rights by either ceding their own rights or divesting another nation of its rights. Chief Justice John Marshall acknowledged this practice in *Murray v. Schooner Charming Betsy*,[33] when he wrote that if an act of Congress means to divest another nation of a sovereign right, such as neutral rights to conduct commerce, Congress must "plainly express[]" that intent.[34] In this passage, the Court was applying a well-established rule drawn from the law of nations that governed the interpretation of legal instruments claimed to alienate sovereign rights.

Rules supplied by the law of nations to govern the alienation of sovereign rights specified that a legal instrument would be understood to alter sovereign rights and powers only if it did so in clear and express terms. Those terms, moreover, were to be given their ordinary and customary meaning as of the time the instrument was made. A legal instrument could alienate sovereign rights and powers in two ways. It could either transfer the right or power expressly, or grant one party an express right or power that by unavoidable implication divested the other party of a corresponding right.[35] In both cases, the clear and

32 *See* Definitive Treaty of Peace, Feb. 10, 1763, 42 Consol. T.S. 320 (Treaty of Paris of 1763). For additional examples, see Preliminary Treaty of Peace and Limits, Port.-Spain, Oct. 1, 1777, 46 Consol. T.S. 321 (Treaty of San Ildefonso of 1777, adjusting sovereign rights between Portugal and Spain); Treaty of Amity, Guarantee and Commerce, Port.-Spain, Mar. 11, 1778, 46 Consol. T.S. 479 (Treaty of El Pardo of 1778, same); Definitive Treaty, Austria-Neth., Nov. 8, 1785, 49 Consol. T.S. 369 (Treaty of Fontainebleau of 1785, adjusting sovereign rights between United Provinces and Austria); Treaty of Peace and Additional Secret Convention, Austria-Fr., Oct. 17, 1797, 54 Consol. T.S. 157 (Treaty of Campo Formio of 1797, adjusting sovereign rights between Austria and France).

33 6 U.S. (2 Cranch) 64 (1804).

34 *Id.* at 119; *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 229 (1796) (opinion of Chase, J.) ("It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet if in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States.") (emphasis omitted).

35 Vattel described 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. 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 233. For example, Vattel explained that if a party to a treaty expressly agreed to withdraw from the territories of the second party, then the first party could not later claim a reserved right to occupy particular territory on the ground that the occupied territory did not belong to the second party though it was within its boundaries. To exempt such territory would nullify the other party's right to exclude the first party. *Id.*

express terms of the instrument were to be given their ordinary and customary meaning as of the time of adoption.

The law of nations established these requirements in order to minimize the risk of misunderstanding, fraud, conflict, and even war. When the ordinary and customary meaning of a legal provision clearly and expressly altered sovereign rights and powers, there was little risk that the affected state would claim that the interpretation violated its sovereign rights. When such provisions were unclear, however, interpreters were to err on the side of caution and read them not to alter sovereign rights. This approach ensured that interpreters would not inadvertently violate sovereign rights and trigger conflict. These rules had direct application to the Constitution and, as discussed in Part III, were used by the Supreme Court to interpret the instrument in the decades following ratification.

Vattel's treatise described a broad range of sovereign rights that nations enjoyed under the law of nations, such as the rights to territorial sovereignty and self-government,[36] and the right to pursue commerce with other nations,[37] including the right to free and equal use of the high seas.[38] As discussed in Part II, these are the very rights that the American States declared themselves to possess—as "Free and Independent States"—in the Declaration of Independence. Vattel also described the means by which nations could enforce and adjust their rights vis-à-vis other nations, including by conducting diplomatic relations,[39] making treaties,[40] and taking retaliatory actions. Under the law of nations, if a nation was unable to obtain redress through diplomacy for another nation's violation of its sovereign rights, the offended nation had the right to pursue various unilateral actions, including retortion,[41] reprisals,[42] and, if necessary, waging war against the offending nation.[43]

Because the violation of another state's rights carried such serious consequences under the law of nations, such violations were extraordinary political acts, not trivial everyday occurrences. The law of nations sought to prevent violations of sovereign rights by prescribing rules of interpretation to prevent the misinterpretation of treaties, legislative acts, and other legal instruments claimed to adjust such rights.

36 *Id.* at 146–52.
37 *Id.* at 128–32.
38 *Id.* at 113–14.
39 2 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 132–41.
40 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 171–202.
41 *Id.* at 249.
42 *Id.*
43 *Id.* at 6–7.

These rules also operated to prevent one party from taking advantage of "obscurity and ambiguity" in a legal instrument to commit fraud or otherwise evade a legal obligation.[44] Vattel described these rules in his chapter on treaties, but he made clear that the rules applied equally to all legal instruments claimed to alienate sovereign rights, including "concessions, conventions, and treaties," and "all contracts as well as . . . laws."[45] A nation could violate another nation's rights not only by misreading a treaty, but also through the improper acts of its own government—including a judicial decision erroneously interpreting any of these instruments. Such misinterpretations could trigger serious consequences, including war.

These consequences were well known to members of the Founding generation. In April 1787, John Jay, Secretary of the Department of Foreign Affairs, admonished the States to refrain from asserting their own interpretations of the Treaty of Paris of 1781. In the course of explaining that the States had relinquished this power in the Articles of Confederation, he reminded them that "all doubts respecting the meaning of a Treaty, like all doubts respecting the meaning of a Law," must be determined "according to the rules and maxims established by the Laws of nations for the interpretation of Treaties."[46] The United States' failure to apply that law correctly and speak with one voice, he warned, would involve the nation "in disputes which would probably terminate in hostilities and war with the nations with whom we may have formed Treaties."[47]

To avoid such consequences, sovereigns followed two mutually reinforcing rules drawn from the law of nations when interpreting legal instruments claimed to alienate or compromise sovereign rights. The first was a general rule applicable to all legal instruments: legal provisions should be interpreted according to their ordinary and customary meaning as of the time of adoption (unless that interpretation led to absurd results). The second applied more specifically to legal provisions that had no clear ordinary and natural meaning: if at all possible, vague or ambiguous legal provisions should not be interpreted to alter preexisting sovereign rights in favor of one party at the expense of another.

The first and overarching rule of interpretation, as mentioned above, was that a legal instrument should be interpreted in accordance

44 *Id.* at 215.

45 *Id.*

46 Letter from John Adams, U.S. Sec'y of State, to the States (Apr. 6, 1787), https://www.loc.gov/resource/bdsdcc.21601/?st=text [https://perma.cc/K7VD-NACT].

47 *Id.*

with its customary meaning as of the time it was adopted.[48] Vattel described the rule this way:

> The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents.[49]

In connection with this maxim, Vattel described several subsidiary rules designed to ascertain and implement the customary meaning of legal instruments. "The interpretation of every act, and of every treaty," he explained, "ought then to be made according to certain rules proper to determine the sense of them, such as the parties concerned must naturally have understood, when the act was prepared and accepted."[50]

The most important of these rules was that a legal act should be interpreted in accord with "the common use of the language" at the time it was adopted.[51] "It is commonly very probable," Vattel explained, that language in a legal instrument was "spoken according to custom."[52] The relevant custom was the one existing at the time the legal instrument was made:

> The custom of which we are speaking is, that of the time in which the treaty, or the act in general, was concluded and drawn up. Languages vary incessantly, and the signification and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms, at the time when it was written; and this is known by carefully comparing with each other, an act of the same date, and contemporary writers.[53]

In accordance with this rule, Vattel described a number of related rules designed to ascertain the sense in which the language of a legal instrument was most naturally used and understood at the time of adoption. These include the rules that technical terms should receive their technical meaning,[54] and figurative expressions should be

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48 *See supra* note 13 and accompanying text.

49 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 216.

50 *Id.* at 217 (emphasis omitted).

51 *Id.* at 219 (emphasis omitted).

52 *Id.*

53 *Id.*

54 *Id.* at 220; *see also* GROTIUS, *supra* note 13, at 353 (explaining that "Terms of Art, which the common People are very little acquainted with, should be understood as explained by them who are most experienced in that Art"); 2 PUFENDORF, *supra* note 13, at 795 ("As to terms used in the arts, which the common sort scarcely comprehend, it should be observed that they are explained in accordance with the definitions of those who are skilled in the art.").

understood in their figurative sense.[55] In applying these rules, an interpreter should reject an interpretation that leads to an absurd result,[56] including one that renders all or part of a legal instrument null.[57] These rules enabled sovereign states to make legal instruments against a backdrop of shared conventions and expectations, thus permitting them to adjust their sovereign rights in a manner that minimized the risk of misunderstanding and conflict.

If, after applying these conventional rules, it was not clear whether a legal instrument transferred, divested, or alienated a sovereign right, then another important default rule came into play. Legal instruments that did not clearly alter sovereign rights were understood not to do so. In this regard, Vattel drew an important distinction between indeterminate provisions relating to things that are "favourable" and those relating to things that are "odious."[58] Vattel did not use these terms in the sense of good and bad in the abstract. Rather, he used "favourable" to refer to things that are favorable to all affected parties,[59] and "odious" to refer to things that are potentially favorable to one party and unfavorable to another. Of particular relevance to the rights of other nations, a provision was considered "odious" if it changed the status quo by divesting sovereign rights previously possessed by one of the parties.[60] This rule applied to legal instruments claimed to alienate sovereign rights or powers voluntarily,[61] as well as legal instruments ceding or divesting a sovereign right or power unilaterally, such as an instrument establishing conditions for peace

55 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 221.

56 *Id.* at 222.

57 *Id.* at 223, 233.

58 *Id.* at 232 (emphasis omitted).

59 As Vattel described it, a "favourable" thing "tends to the common advantage in conventions, or . . . has a tendency to place the contracting powers on an equality." *Id.* (emphasis omitted). When an indeterminate provision of a legal instrument relates to "favourable" things, he explained that "we ought to give the terms all the extent they are capable of in common use." *Id.* at 234 (emphasis omitted).

60 An "odious" thing was one that "contains a penalty"; "tends to render an act null, and without effect, either in the whole or in part"; or "tends to change the present state of things." *Id.* at 232–34 (emphasis omitted). The distinction between "favourable" and "odious" terms was long recognized by writers on the law of nations. *See* GROTIUS, *supra* note 13, at 356–57; 2 PUFENDORF, *supra* note 13, at 806.

61 *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 233–34. As Vattel explained, in a legal instrument the possessor of a legal right "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." *Id.* at 233. The reason, Vattel explained, is that "[i]t 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." *Id.* at 233–34.

following conquest.[62] As Vattel explained, when an indeterminate provision relates to "odious" things in any such way, "we should . . . take the terms in the most confined sense, . . . without going directly contrary to the tenour of the writing, and without doing violence to the terms."[63] In essence, Vattel was describing a clear statement rule that prevented legal instruments from alienating sovereign rights unless they did so in clear and express terms.[64]

Of necessity, these rules governed not only the interpretation of legal instruments claimed to transfer sovereign rights and powers, but also the formation and adoption of legal instruments intended to perform this function. Vattel explained that the rules he described served as both rules of interpretation and rules of formation. They were rules of interpretation because they governed the meaning of the instrument after it was adopted. They were rules of formation because parties had to account for them in formulating the instrument so that it would have its intended legal effect. "The interpretation of every act, and of every treaty," Vattel explained, "ought then to be made according to certain rules proper to determine the sense of them, such as the parties concerned must naturally have understood, when the act was *prepared* and *accepted*."[65] Under these rules, courts would interpret a provision to alienate sovereign rights and powers only if it did so in clear and express terms. There was no such thing as an ambiguous or open-ended transfer of sovereign rights. For this reason, parties forming and adopting legal instruments that alienated sovereign rights and powers had to be clear and express regarding the effect of the instrument on such rights. This clear statement rule thus governed both the formation and the interpretation of all instruments claimed to transfer

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62 *See id.* at 236 (explaining that "the cession of a right, or of a province made to a conqueror, in order to obtain peace, is interpreted in its most confined sense").

63 *Id.* at 235. Pufendorf and Grotius had described these same rules of interpretation. Drawing upon Grotius, Pufendorf wrote, "[i]n cases not odious words are to be taken in accordance with their exact significance in popular usage." 2 PUFENDORF, *supra* note 13, at 806. On the other hand, in odious cases, including those "connected with a diminution of the sovereign power," an indeterminate provision should be interpreted to avoid the hardship. *Id.* at 809. Grotius had written that "in Cases not odious we must understand the Words in their full Extent, as they are generally taken"; on the other hand, "in an odious Matter, even a figurative Speech is allowed to avoid a Grievance." GROTIUS, *supra* note 13, at 357–58 (footnotes omitted).

64 *See* 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 233–34 (stating that "in a case of doubt, the presumption is in favour of the possessor").

65 *Id.* at 217.

sovereign rights and powers.[66]

To describe these background rules is not to say that they were always easy to apply. Was a word used in its customary or in a figurative sense? Did a provision have a singular and clear motive? Was a provision odious or favorable to an interested party? These were context-dependent and often complex questions. The point for present purposes is that at the time the Constitution was adopted, there was an established body of interpretive rules that governed the formation and interpretation of legal instruments used to transfer, compromise, or otherwise alienate sovereign rights. These rules applied regardless of whether the provision was part of a statute, a treaty, or some other legal instrument. By its nature, the Constitution was a legal instrument used to transfer a limited set of sovereign rights from the States to the newly created federal government. In many instances, the Constitution transferred sovereign rights and powers in clear and express terms. In other respects, however, the Constitution did not abrogate the States' preexisting sovereign rights in such terms. To ascertain the legal effect of constitutional provisions (whether clear or unclear), it is not necessary to determine whether the Constitution most resembled a statute, treaty, or some other instrument. Rather, the key to proper interpretation is to recognize that the Constitution performed a specialized legal function—the transfer of sovereign rights and powers—and that the law of nations provided a set of well-established interpretive rules that both enabled and governed this function.

II. THE CONSTITUTION AS A TRANSFER OF SOVEREIGN RIGHTS

At its inception, the Constitution was designed and understood to be an instrument that transferred a fixed subset of sovereign rights and powers from the existing States to a new federal government. Given this function, the Constitution was formed within the legal framework that the law of nations established to govern such instruments. There is some disagreement as to whether the States originally became independent sovereigns individually or collectively, and thus whether the people of the several States transferred portions of their sovereign rights on a state-by-state basis or as an undifferentiated mass. Regardless of how the people transferred sovereign rights and powers

66 This clear statement rule was both a rule of interpretation and a rule of formation in the same way that the rule of lenity is both a rule of interpretation and rule of formation. As a rule of interpretation, lenity requires an interpreter to read a criminal provision that is unclear about whether it applies to certain conduct as *not* applying to that conduct. As a rule of formation, lenity requires a lawmaker who wishes to criminalize certain conduct to do so in language that clearly communicates that the conduct is criminal.

from the States to the federal government, the instrument they produced was subject to the same rules that governed all transfers of sovereign rights under the law of nations. The Constitution—however adopted—was unquestionably an instrument used to transfer sovereign rights. Thus, it remained subject to the established rules governing the alienation of sovereign rights.

In proclaiming their independence from Great Britain, the Colonies declared themselves to be "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[67] Britain acknowledged that its former colonies had become "free, sovereign and independent States" in the provisional peace treaty of 1782.[68] Under the law of nations, free and independent states possessed all of the sovereign rights and powers of every other nation. Such states were capable of compromising or transferring their sovereign rights in a binding legal instrument (such as a treaty, convention, or act), but only if they did so in clear and express terms. This rule avoided misunderstanding, fraud, and potential conflict. Because instruments used to transfer sovereign rights were governed by rules of interpretation supplied by the law of nations, such instruments (including the Constitution) had meaning and effect only by reference to those rules.

After achieving their independence, the States initially compromised some of their sovereign rights by confederating under the short-lived Articles of Confederation. The deficiencies of the Articles quickly became apparent, and the States abandoned them in favor of the novel and more robust federal system created by the Constitution. The Constitution established a complex system permitting two governments to exercise overlapping sovereign authority over the same people, in the same territory, at the same time. The Supremacy Clause of the Constitution resolved potential conflicts by conferring the status of "the supreme Law of the Land" on the Constitution, federal laws made in pursuance thereof, and treaties.[69] The States, however, retained a significant degree of sovereign authority because the Constitution recognized the continued existence of the "States," transferred only limited and enumerated powers from the States to the federal government, and imposed procedures that made those powers relatively difficult to exercise. By adopting the Constitution, the people of the several States simultaneously transferred a limited set of sovereign rights

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

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

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

and powers to the federal government and necessarily retained all remaining sovereign rights and powers for themselves.

A. The Declaration of Independence

To appreciate the Constitution's function as a transfer of sovereign rights, one must first recognize the status of the States leading up to the Constitutional Convention of 1787. The British Colonies in North America proclaimed themselves to be independent sovereign states when they issued the Declaration of Independence on July 4, 1776. In the Declaration, the Colonies asserted that they were "Free and Independent States," entitled to all the sovereign rights and powers that such states enjoyed 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 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.[70]

The use of the phrase, "Free and Independent States," was a clear reference to the law of nations. Under such law, sovereign states enjoyed an important set of sovereign rights and powers, including rights to "prevent and vindicate injuries by other nations ('Power to levy War' and 'conclude Peace'), make treaties ('contract Alliances' and 'establish Commerce'), enjoy neutral use of the high seas ('establish Commerce'), and exercise territorial sovereignty and diplomatic rights ('all other Acts and Things which Independent States may of right do')."[71]

Observers have debated whether the Colonies became "Free and Independent States" individually or collectively when they gained their independence from Great Britain.[72] We have previously argued

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

71 Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 754 (2012) (quoting THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)).

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

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

that actual events reveal that the Founders understood the individual States to be distinct sovereigns capable of making separate decisions, and that they acted in conformity with that understanding.[73] For example, in setting up a commission to draft the Articles of Confederation, the Continental Congress proceeded on the understanding that each State possessed full sovereign authority to decide whether or not to unite with other States under the Articles of Confederation.[74] Beyond this background understanding, the Articles of Confederation themselves made clear 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."[75] Consistent with the Declaration of Independence, this provision affirmed that each State was a separate and independent sovereign entitled to all the rights and powers that such states enjoyed under the law of nations.[76] Under Article VII of

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 224 (1796) (opinion of Chase, J.) (emphasis omitted); *see also* THOMAS JEFFERSON, AUTOBIOGRAPHY, *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 18–19 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) ("It was argued by Wilson, Robert R. Livingston, E. Rutledge, Dickinson, and others . . . if the delegates of any particular colony had no power to declare such colony independent, certain they were, the others could not declare it for them; the colonies being as yet perfectly independent of each other . . . ."). Some maintain, however, that the States became free and independent collectively. *See, e.g.*, Jack N. Rakove, *American Federalism: Was There an Original Understanding?*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES 107, 110 (Mark R. Killenbeck ed., 2002) ("[T]he most persuasive story we can tell is one that emphasizes the simultaneity with which concepts of both statehood and union emerged in the revolutionary crucible of the mid-1770s.").

73 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 859–60 (2020).

74 *Id.* at 860.

75 ARTICLES OF CONFEDERATION of 1781, art. II (emphasis added).

76 In a recent article, Professor Craig Green challenges the idea that States predated the forms of interstate governance provided in the Articles of Confederation and the Constitution. *See* Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020). He acknowledges that the conventional account is that "states historically preceded all forms of interstate government," *id.* at 3, but argues that neither the States nor the United States predated the other. *Id.* at 8. His "ambition is to implement a mezzanine-level history of legal statehood that focuses on how aspirationally legal ideas were expressed in operative documents and negotiations." *Id.* at 14. Although it is beyond the scope of this Article to provide a full response to his arguments, we believe that the text of the Articles of Confederation and the Constitution provide the best evidence for the prevailing view is that the States preceded the United States. First, the Colonies declared themselves to be "Free and Independent States" in the Declaration of Independence well before the Articles of Confederation were drafted, let alone adopted. Second, the Articles of Confederation were not binding on any State that did not ratify them. Third, the Articles expressly declared that "[e]ach State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly

the Constitution, the ratification process also assumed that the States possessed individual sovereignty by specifying that only those States that ratified the Constitution would be bound thereby.[77]

Whatever one's view on the question whether the States gained their independence individually or collectively, however, does not affect the fact that the Constitution was an instrument used to transfer a fixed subset of sovereign rights and powers from the States to the federal government. Whether individually or collectively, the States asserted in the Declaration that they were "Free and Independent States" possessed of all the rights and powers that status conferred under the law of nations. As free and independent States, they had the option under the law of nations to cede a portion of their sovereign rights and powers by adopting an appropriate instrument for that purpose. They exercised this option first by approving the Articles of Confederation and later by ratifying the Constitution. Regardless of whether the Constitution was adopted by the people of each State individually or by the people of all the States collectively, the Constitution—given its function—remained subject to the rules governing instruments used to transfer sovereign rights and powers.[78]

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delegated." ARTICLES OF CONFEDERATION of 1781, art. II. This provision would be quite odd if, as Green believes, each individual State never had any independent sovereignty to retain. Finally, as Article VII expressly indicates, the Constitution itself would not have been binding on any State that failed to ratify it. *See infra* note 77 and accompanying text. In support of his thesis, Green argues, among other things, that colonists in certain colonies sought instructions from the Second Continental Congress on how to set up new governments, Green, *supra*, at 17–26; that the Declaration of Independence was a collective assertion of interests, *see id.* at 29; that the States and the United States had mutual reliance on each other, *id.* at 29–35; and that States sought collective action to resolve territorial disputes, *see id.* at 35–40. None of this "evidence," however, is incompatible with individual statehood either at the Founding or today. Sovereign states were free to seek advice and direction from allies and supranational congresses, to collectively assert interests with other states, to be legally dependent on other sovereigns for commerce and protection, and to resolve disputes through treaties, leagues, and compacts. It is also noteworthy that, although Green purports to assess the legal status of States, he relegates Article II of the Articles ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated . . . .") to a footnote, *id.* at 40 n.199; and neither mentions nor discusses Article VII's presupposition that the Constitution would be binding only on those States that chose to ratify it.

77 U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."). *See also* Bellia & Clark, *supra* note 73, at 865–66.

78 Indeed, the same rules would govern even if one viewed the Constitution as an act of the undifferentiated people of the United States divesting the States of a portion of their sovereign rights. Under the law of nations, legal instruments compromising or divesting sovereign rights—however made—were subject to the same rules of interpretation. *See supra* notes 58–66 and accompanying text.

B. The Articles of Confederation

The Articles of Confederation were the first instrument used to transfer a portion of the States' sovereign rights and powers to a central authority. Congress proposed the Articles in November 1777, and they officially took effect in 1781 after each State approved them. At the time, the Articles were understood to be a compact among thirteen "Free and Independent States."[79] By adopting the Articles, the States expressly alienated some of their sovereign rights while retaining all others. As John Jay observed in 1787, "the Thirteen Independent Sovereign States have, by express delegation of power, formed and vested in us a general though limited sovereignty, for the general and national purposes specified in the Confederation."[80] Jay's understanding is evident in both the language and the form of the Articles.

First, the Articles continued to refer to the States as "States"—a term of art drawn from the law of nations and used by the Declaration of Independence. Second, the Articles themselves declared that they involved a limited transfer of sovereign rights by the States: "Each 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."[81] Third, the circumstances surrounding the adoption of the Articles of Confederation suggest that the States understood themselves to be "Free and Independent States" who voluntarily alienated a portion of their sovereign rights for their mutual benefit.[82] The States effected this transfer by using a standard method recognized by the law of nations—a treaty setting forth a clear and express, but strictly limited, alienation of

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

80 Letter from John Adams, *supra* note 46.

81 ARTICLES OF CONFEDERATION of 1781, art. II.

82 *See* Bellia & Clark, *supra* note 73, at 859–60.

sovereign rights. As Professor Gordon Wood has explained, the Articles of Confederation represented a straightforward treaty of confederation among thirteen separate and independent States. As he put it, "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."[83]

Although the Articles of Confederation involved a more limited transfer of sovereign rights than the Constitution, the instrument nonetheless delegated important responsibilities to Congress, most notably in matters of war and foreign relations.[84] The Articles reinforced the States' transfer of sovereign rights and powers in these areas by imposing corresponding restrictions on the States. To support the new government, the Articles authorized Congress to requisition or command each State to provide money to fund its operations and to supply troops to staff the armed forces.[85] Although the Articles obligated each State to comply with congressional requisitions,[86] they gave Congress no means of enforcing its commands. This deficiency allowed the States to violate their obligations with impunity, and ultimately led the States to abandon the Articles in favor of an entirely new Constitution.[87] By February 21, 1787, the situation had become untenable, and the Confederation Congress called upon the States to send delegates to a convention to

> be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall

83 Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724–25 (2011) (book review) (footnote omitted) (quoting ARTICLES OF CONFEDERATION of 1781, art. III).

84 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. The Articles also gave Congress limited powers over matters of "internal" governance, such as "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states," and "fixing the standard of weights and measures throughout the united states." *Id.* para. 4.

85 *Id.* para. 5.

86 The Articles provided that "[e]very state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them." *Id.* art. XIII, para. 1.

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

> when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.[88]

The Philadelphia Convention ultimately exceeded this charge by proposing an entirely new constitution to replace rather than revise the Articles.

C. *The Constitutional Convention*

Delegates to the Constitutional Convention quickly realized that they could not create a stable form of government by merely revising the Articles of Confederation. This realization occurred early in the Convention during consideration of the "Virginia Plan." Edmund Randolph introduced the Plan and made clear that it would not abolish the States, but instead establish a new central government imbued with enlarged powers to be implemented by distinct legislative, executive, and judicial branches.[89] As originally introduced, the Plan proposed that "the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[90] As noted, "the Legislative Rights vested in Congress by the Confederation" included the power to command States, but not the individuals within the States. This approach posed a significant enforcement problem for the Confederation Congress, and the Virginia Plan proposed to solve it by authorizing the National Legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."[91]

The delegates ultimately rejected the proposed use of force against States to enforce federal directives. Instead, they adopted the more peaceful—but novel—method of empowering the federal government to act upon individuals rather than States, with limited exceptions. George Mason objected to using military force on the ground that coercion and punishment could not be used safely against the

88 CONFEDERATION CONGRESS CALLS THE CONSTITUTIONAL CONVENTION (Feb. 21, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 185, 187 (Merrill Jensen ed., 1976).

89 *See infra* notes 305–308 and accompanying text.

90 James Madison, Notes on the Constitutional Convention (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 21 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS].

91 *Id.*

States collectively.[92] He argued for creation of "such a Govt. . . . as could directly operate on individuals, and would punish those only whose guilt required it."[93] In light of Mason's remarks, Madison stated "that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually."[94] Accordingly, he hoped that the delegates could frame a system that would "render this recourse unnecessary."[95] After rejecting the New Jersey Plan's attempt to revive and expand the Articles, the Convention fulfilled Madison's wish by adopting an amended Virginia Plan that withheld congressional power to regulate States and instead—for the first time—transferred to Congress limited sovereign authority to regulate individuals.[96] As Madison wrote to Thomas Jefferson, the Convention abandoned the principle of confederation because it required the use of "a military force both obnoxious & dangerous."[97] In its place, the delegates "embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them."[98] This approach required abandonment of the Articles of Confederation (including its reliance on requisitioning States) in favor of an entirely new Constitution (designed primarily to tax and regulate individuals rather than States).

To understand why rules drawn from the law of nations became an inextricable part of the Constitution, it is necessary to recognize two key features of the shift from the Articles to the Constitution. The first is that the States considered themselves free to abandon the Articles, reclaim their sovereign rights, and retain or redistribute them as they saw fit in a new instrument. This freedom arose from the widespread violation of the Articles by member States. Article XIII provided that the Articles

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92 *See* James Madison, Notes on the Constitutional Convention (May 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 33, 34.

93 *Id.*

94 James Madison, Notes on the Constitutional Convention (May 31, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 47, 54.

95 *Id.*

96 *See* Bellia & Clark, *supra* note 73, at 920–23.

97 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 90, app. A, at 131, 131.

98 *Id.* at 132. George Mason summarized this shift in similar terms: "Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt." James Madison, Notes on the Constitutional Convention (June 6, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 132, 133.

> shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.[99]

On the surface, the States violated this provision, first, when their delegates to the Constitutional Convention proposed a new constitution to be adopted without the unanimous consent of the States and, second, when the States used ratifying conventions (rather than state legislatures) to adopt the Constitution.

These "violations," however, were arguably justified under the law of nations because by 1787 most, if not all, of the States had previously violated the Articles in material ways.[100] Under the law of nations, when one state committed a material breach of an agreement, the other participating states were released from their obligations and had the option to withdraw. As Akhil Amar has explained:

> [T]he Articles of Confederation were a mere treaty among thirteen otherwise free and independent nations. That treaty had been notoriously, repeatedly, and flagrantly violated on every side by 1787. Under standard principles of international law, these material breaches of a treaty freed each party—that is, each of the thirteen states—to disregard the pact, if it so chose. Thus, if in 1787 nine (or more) states wanted, in effect, to secede from the Articles of Confederation and form a new system, that was their legal right, Article XIII notwithstanding.[101]

James Madison defended the States' actions in similar terms. "On what principle," he asked rhetorically, may "the confederation, which stands in the solemn form of a compact among the States, . . . be superceded without the unanimous consent of the parties to it?"[102] His answer was that

> [i]t is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorises them, if they please, to pronounce the treaty violated and void.[103]

Under this doctrine of the law of nations, the States were free to reclaim their sovereign rights and transfer a new subset of them to a new

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99 ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1.

100 Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1048 (1988) (arguing that the States had a legal right to adopt the Constitution because of repeated violations of the Articles).

101 *Id.* (emphasis omitted) (footnotes omitted).

102 THE FEDERALIST NO. 43, *supra note* 1, at 297 (James Madison).

103 *Id.*

government established by a new instrument—in this case, the Constitution.[104]

The second key feature of the shift from the Articles of Confederation to the Constitution is that the Constitution transferred a generally broader—but in at least one important respect more limited—set of sovereign rights from the States to a central authority. Most of the war and foreign relations powers granted by the Articles were continued in the Constitution, and the States relinquished certain additional sovereign rights and powers for the first time. First and foremost, the Constitution gave Congress legislative power to regulate individuals and transactions within the territory of the States, a power that the central government conspicuously lacked under the Articles. One of the most significant rights possessed by all sovereign states was the exclusive right to govern persons and property within their own territory. Under the Articles, the States retained this exclusive right. In the Constitution, by contrast, the States compromised this right for the first time by giving Congress certain concurrent (or in some instances exclusive) legislative powers over the conduct of individuals within the States. In particular, the Constitution gave Congress direct power to raise and support the armed forces[105] and to raise revenue through taxation within the States.[106] Congress lacked these powers under the Articles and could act only by commanding the States (with limited success) to perform these functions. The new Constitution did not give Congress the power to requisition States because the delegates considered it both impractical and dangerous.[107]

In addition to giving Congress unprecedented power to tax and regulate individuals directly, the Constitution created a novel Supreme Court of the United States and empowered Congress to establish lower federal courts to hear and decide cases within a limited jurisdiction. The Constitution also created a President to execute federal law and be the Commander in Chief of the armed forces. The

104 Under Article VII, the Constitution would take effect only if nine of the thirteen States approved it, and, even then, it would bind only those States that ratified it. U.S. CONST. art. VII. In *Federalist No. 43*, Madison posed the question: "What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it"? THE FEDERALIST NO. 43, *supra* note 1, at 297 (James Madison). His answer was that "the assenting and dissenting States" would have "no political relation." *Id.* at 298. Their only relations would be "moral." *Id.*

105 U.S. CONST. art. I, § 8, cls. 12–14.

106 *Id.* cl. 1.

107 In replacing the Articles with the Constitution, the States purposefully elected not to give Congress power to command and requisition the States themselves. Thus, the Constitution—unlike the Articles—was designed to rely on federal regulation of individuals rather than States. *See* Bellia & Clark, *supra* note 73, at 875–76.

Articles included none of these innovative features. The Convention expected the Constitution—once adopted—to establish these features as fixed and stable elements of a new federal system.

Recognizing that the Constitution was an instrument used to transfer sovereign rights and powers does not deny that ultimate sovereignty resided in the people.[108] Regardless of whether "the States" or "the People" of the States adopted the Constitution pursuant to Article VII, the instrument—once ratified—transferred a fixed set of sovereign rights and powers from the States to a novel federal government that the Constitution brought it into existence. The Constitution's essential function of transferring sovereign rights would remain the same even if (counterfactually) the undifferentiated "People of the United States" had somehow imposed it on the States.[109] Although we favor the understanding that the people of each individual State ratified the Constitution,[110] all legal instruments divesting sovereign rights—regardless of how adopted—were governed by the same rules under the law of nations.[111] Thus, because the Constitution was an instrument used to transfer a limited and fixed set of sovereign rights and powers from the States to the federal government, the rules governing its formation and interpretation were inseparable from the instrument itself.

D. The Ratification Debates

In debating whether to adopt the Constitution, the ratifiers understood that the proposed instrument would transfer an expanded but still limited set of sovereign rights from the States to the federal government. There was widespread agreement that, in order to avoid the pitfalls of the Articles of Confederation, the new charter would have to transfer significantly more sovereign rights than its predecessor did. At the same time, Antifederalists feared that the proposed Constitution would be (mis)construed to transfer more sovereign authority than the text authorized, and thus pose a threat to the residual

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108 *See id.* at 868–69.

109 For an insightful treatment of this question, see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

110 *See* Bellia & Clark, *supra* note 73, at 868–69. Of course, Article VII suggests that the responsibility for ratifying the Constitution rested with the people of each State since the Constitution would only be binding on those States that chose to adopt it. *See* U.S. CONST. art. VII. It is also worth noting that Madison believed that "the Constitution is to be founded on the assent and ratification of the people of America," but that "this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong." THE FEDERALIST NO. 39, *supra* note 1, at 253–54 (James Madison).

111 *See* Bellia & Clark, *supra* note 73, at 870–71.

authority of the States and to individual liberty. Federalists sought to allay these fears, in part, by invoking the applicable rules of interpretation drawn from the law of nations. Prominent advocates argued that by ratifying the Constitution the States would transfer only those sovereign rights that the instrument clearly and expressly alienated and would necessarily retain all others. The text, they explained, would be read in accordance with its ordinary and customary meaning—nothing more, nothing less. These assurances appear to have been persuasive, and all thirteen States ultimately ratified the Constitution.

In transmitting the Constitution to Congress on September 17, 1787, George Washington acknowledged the difficulties that the Convention faced in attempting to find the proper allocation of sovereign rights and powers between the States and the federal government. The proposed Constitution, he explained, would transfer certain 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.[112]

Madison likewise described the Constitution as involving a limited transfer of sovereign rights and powers from the States to the federal government, under which all rights not delegated were reserved to the States. As he explained in *Federalist No. 45*:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[113]

Notwithstanding these assurances, Antifederalists opposed ratification in part because they feared that federal officials, including judges, would read the Constitution too expansively. More, specifically, they regarded some provisions as vague or ambiguous and feared that federal courts might construe them broadly to deprive the States of sovereign rights never actually relinquished in the Constitution. For example, Brutus objected that the decisions of the Supreme Court of the United States would be unreviewable by any other institution of government and feared that in exercising its unconstrained power, the

112 2 FARRAND'S RECORDS, *supra* note 90, at 666, 666–67.

113 THE FEDERALIST NO. 45, *supra* note 1, at 313 (James Madison).

Court would interpret the Constitution too broadly. He lamented that "this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it."[114] Brutus worried that "[i]n the exercise of this power they will not be subordinate to, but above the legislature."[115]

Federalists rejected these fears as unfounded. First, they argued that the independence of the federal judiciary would enable it to be a fair and impartial arbiter of the respective powers of the state and federal governments. For example, at the Connecticut ratifying convention, Oliver Ellsworth insisted that federal courts would keep both the federal government and the States within their respective spheres as fixed by the Constitution. As he explained:

> If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.[116]

Second, and most important for present purposes, Federalists argued that federal courts would be bound to read the Constitution in accordance with well-known principles of interpretation—including the rules established by the law of nations to determine the extent to which a legal instrument transferred, compromised, or otherwise alienated sovereign rights. For example, in *Federalist No. 78*, Hamilton acknowledged the danger that judges could abuse their power if they exercised "will instead of judgment,"[117] but he maintained that this danger was offset by strict rules that would bind judicial discretion. "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

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114 Brutus, XV (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 440 (Herbert J. Storing ed., 1981).

115 *Id.*

116 Oliver Ellsworth, Debates in the Connecticut Ratification Convention (Jan. 7, 1788), *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 547, 553 (Merrill Jensen ed., 1978).

117 THE FEDERALIST NO. 78, *supra* note 1 at 528 (Alexander Hamilton) (emphasis omitted).

before them . . . ."[118]

The strict rules to which Hamilton referred necessarily included the rules of interpretation that governed legal instruments used to transfer sovereign rights. In *Federalist No. 32*, he carefully explained the effect of these rules on constitutional interpretation. There, he described the limited circumstances under which the Constitution would divest the States of their preexisting sovereign rights. He explained that because the Constitution involved a "division of the sovereign power,"[119] 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."[120] In this passage, Hamilton was reciting the well-established rule under the law of nations that only an explicit provision of a legal instrument could deprive a state of its sovereign rights and powers.[121]

Hamilton regarded this rule as an inextricable part of the legal content of the 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."[122] This understanding reveals that Hamilton was well-versed in the rules governing instruments used to transfer sovereign rights and appreciated the essential role they played in facilitating the peaceful adjustments of such rights. Because rules supplied by the law of nations determined the extent to which legal instruments altered preexisting sovereign rights, Hamilton had no difficulty in concluding that the instruments themselves necessarily "admitted" or incorporated these rules.[123] Hamilton was not engaging in empty

118 *Id.* at 529. Hamilton also opined that those appointed to the federal bench would have "requisite integrity" and the "requisite knowledge" to fulfill this duty and refrain from exercising will instead of judgment. *Id.* at 530.

119 THE FEDERALIST NO. 32, *supra* note 1, at 203 (Alexander Hamilton).

120 *Id.* (emphasis added).

121 *See supra* notes 57–63 and accompanying text.

122 THE FEDERALIST NO. 32, *supra* note 1, 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).

123 Hamilton again applied background rules when addressing fears that the Citizen-State diversity provisions of Article III would override the States' sovereign immunity from suit by individuals. Invoking the rule requiring an explicit alienation of sovereign rights, 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 1, at 548–49 (Alexander Hamilton); *see infra* notes 122–26 and accompanying text.

political rhetoric but drawing upon well-established rules governing instruments claimed to transfer sovereign rights. As Vattel had explained, if sovereigns "were to acknowledge no rules that determined the sense in which the expressions ought to be taken," then such instruments "would be only empty words; nothing could be agreed upon with security, and it would be almost ridiculous to place a dependence on the effect" of them.[124] Accordingly, sovereigns understood the background rules to be an inseparable part of the legal instruments they employed to adjust sovereign rights.

Reinforcing Hamilton's arguments, Madison insisted that the dangers occasioned by federal usurpation of state authority would deter such misconduct. In response to the Antifederalists' fears that the federal government would encroach on the residual sovereignty of the States, Madison argued that such encroachments would cause general alarm and threaten the Union to the same extent as a foreign encroachment. As he explained in *Federalist No. 46*, "unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other."[125] Such dangers were the very ills that the rules established by the law of nations sought to avoid. It was thus natural for Madison to assume that the federal government—like all sovereigns—would be bound to follow the rules established by the law of nations to govern instruments like the Constitution and thereby avoid such conflict.

In sum, the Philadelphia Convention understood that the Constitution they proposed would transfer a fixed set of sovereign rights from the States to a new federal government, and the States ratified it on the same understanding. Although the people of the several States transferred a portion of the States' sovereign rights and powers to the federal government by ratifying the Constitution, the States continued to retain and exercise all remaining sovereign authority. Prominent defenders of the Constitution assured the people that the Constitution would be interpreted to preserve the States' sovereign rights except where the Constitution explicitly alienated those rights according to the rules supplied by the law of nations. Failure to adhere to these basic rules when interpreting the Constitution risked generating all of the ills that it was designed to avoid—i.e., misunderstanding, fraud, and even conflict.

124 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 217.

125 THE FEDERALIST NO. 46, *supra* note 1, at 320 (James Madison).

III. EARLY INTERPRETATIONS OF THE CONSTITUTION

Founding-era rules of interpretation played an important role not only in the Constitution's adoption, but also in its subsequent interpretation. From its earliest days, the Supreme Court resolved disputes over the meaning of the Constitution by applying the rules of interpretation that determined whether, and to what extent, legal instruments alienated sovereign rights. As Hamilton stressed, these rules did not permit courts to read the Constitution to alienate more sovereign rights and powers than it actually divested from the States. At the same time, these rules did not require strict construction of the Constitution, as some opponents of federal authority had claimed. In keeping with these rules, where the Constitution transferred sovereign rights in clear and express terms, the Court interpreted the text according to its ordinary and natural meaning. Conversely, when the Constitution was unclear about whether it altered sovereign rights, the Court refused to read it to do so. This Part reviews several notable early Supreme Court opinions applying these rules.

A. *Interpretation by the Pre-Marshall Court*

From the start, the Supreme Court understood the Constitution to be subject to the conventional rules of interpretation that governed legal instruments claimed to transfer sovereign rights. First and foremost among these rules was that interpreters would read a legal instrument to transfer, compromise, or otherwise alienate sovereign rights only if it did so in clear and express terms. This Section reviews early Supreme Court opinions and highlights their application of well-established legal rules of interpretation to the Constitution. Even when the Justices did not agree on the precise application of those rules, they generally applied the same rules to interpret constitutional provisions claimed to transfer, compromise, or alienate sovereign rights.

Interpretation of the Constitution in accordance with these rules began almost immediately after ratification. The early Supreme Court addressed disputes over the meaning of the Constitution in two important early cases—*Chisholm v. Georgia*,[126] and *Calder v. Bull*.[127] During the ratification debates, defenders of the Constitution insisted that courts would interpret the Constitution according to established rules governing the adjustment of sovereign rights and powers. Early decisions reveal that, from the beginning, Supreme Court Justices did just

126 2 U.S. (2 Dall.) 419 (1793).
127 3 U.S. (3 Dall.) 386 (1798).

that. Whether or not the Justices applied these rules correctly in every case, the important point is that the Court invoked ordinary legal rules of interpretation (including rules governing adjustments of sovereign rights and powers) to ascertain the meaning of the Constitution.

1. *Chisholm v. Georgia*

Chisholm v. Georgia, decided in 1793, was the first Supreme Court decision to interpret a constitutional provision to determine whether it divested the States of a sovereign right. One of the traditional rights enjoyed by sovereign states was immunity from suit by individuals in the courts of another sovereign. The *Chisholm* Court considered whether Article III authorized a citizen of South Carolina to sue the State of Georgia in federal court to recover a debt.[128] The answer turned on whether the people of Georgia had alienated the State's sovereign immunity by ratifying the Constitution. All five Justices resolved this issue by applying the well-established rule of interpretation that a sovereign could alienate its right to sovereign immunity in a legal instrument only by doing so clearly and expressly. Applying this rule, each Justice examined whether the Citizen-State Diversity Clause of Article III authorized suits against States in federal court. The Citizen-State Diversity Clause extends the federal judicial power "to Controversies . . . between a State and Citizens of another State."[129] Thus, *Chisholm* turned on the meaning of "between" and whether it was clear enough to abrogate Georgia's sovereign immunity. Although the Justices split 4–1 on the answer, all members of the Court invoked the same basic rule of interpretation.

The potential effect of Article III on sovereign immunity was extensively debated during the ratification period.[130] Antifederalists feared that courts would interpret the Citizen-State Diversity Clause to override the States' sovereign immunity.[131] For example, Brutus objected that Article III would subject "a state to answer in a court of law, to the suit of an individual."[132] He regarded this as "humiliating and degrading to a government."[133] Leading Federalists denied that Article

128 *Chisholm*, 2 U.S. (2 Dall.) at 420.

129 U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI.

130 *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1862–70 (2010).

131 *Id.* at 1863–65.

132 Brutus, XIII (Feb. 21, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 795, 796 (John P. Kaminski, Richard Leffler, Gaspare J. Saladino & Charles H. Schoenleber eds., 2004).

133 *Id.*

III would be interpreted in this fashion. For example, Alexander Hamilton argued that such fears were unfounded in light of "the general practice of mankind"—a reference to the law of nations:

> 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.[134]

In assessing whether Article III amounted to a surrender of sovereign immunity, Hamilton recurred to the principles set forth in *Federalist No. 32*, 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."[135] Applying this rule to Article III, Hamilton found no such surrender, concluding that "there is no colour to pretend" that by adopting the Constitution the States would relinquish their sovereign immunity from suit by individuals.[136]

Antifederalists remained skeptical, and the debate flared again at the Virginia ratifying convention. George Mason objected strongly to Article III's Citizen-State Diversity Clause, arguing that "this power" was "perfectly unnecessary."[137] James Madison responded by acknowledging that the provision "might be better expressed," but insisted that "a fair and liberal interpretation upon the words" would not authorize suits against States.[138] Instead, he maintained that the provision's use of the term "between" would merely permit suits by, but not against, States: "It is not in the power of individuals to call any State into Court. The only operation [the provision] can have, is, that if a State should wish to bring suit against a citizen, it must be brought before the Federal Court."[139]

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134 THE FEDERALIST NO. 81, *supra* note 1, at 548–49 (Alexander Hamilton) (emphasis omitted).

135 THE FEDERALIST NO. 32, *supra* note 1, at 200, 203 (Alexander Hamilton).

136 THE FEDERALIST NO. 81, *supra* note 1, at 549 (Alexander Hamilton).

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

138 James Madison, Address to the Virginia Convention (June 19, 1788), *in* 10 DHRC, *supra* note 137, at 1409, 1409.

139 James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 137, at 1412, 1414.

Patrick Henry characterized Madison's reading as "perfectly incomprehensible,"[140] and stated that "[i]f Gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument."[141] Henry's comments prompted John Marshall to respond as follows:

> It is not rational to suppose, that the sovereign power shall be dragged before a Court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff.[142]

This debate reveals that there was strong disagreement as to whether the proposed language of Article III—authorizing suits "between a State and citizens of another State"—was clear and express enough to divest the States of their sovereign immunity. There was, however, no disagreement about the rule of interpretation that governed the alienation of sovereign rights. Both sides applied the rule that a legal instrument (such as the Constitution) could divest the States of sovereign immunity only if it did so in clear and express terms. Their disagreement was over the application of this rule—that is, whether the language of Article III satisfied this condition. In the end, Federalists succeeded in convincing the States to ratify the Constitution.

Following ratification, out-of-state citizens nonetheless began invoking the jurisdiction authorized by Article III to sue States. The question whether the Citizen-State Diversity Clause abrogated the States' sovereign immunity reached the Supreme Court in *Chisholm*. As was the practice at the time, each Justice issued a separate opinion, but all five Justices examined whether the Clause expressly authorized suits against States. Four Justices concluded that Article III divested the States of sovereign immunity in clear and express terms, and one Justice concluded that it did not.

Justice Blair described the question as whether the States ceded their right to sovereign immunity when they ratified the Constitution. He concluded that "when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she

140 Patrick Henry, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 137, at 1419, 1422.

141 *Id.* at 1423.

142 John Marshall, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 137, at 1430, 1433.

has, in that respect, given up her right of sovereignty."[143] Justice Blair emphasized that the Citizen-State Diversity Clause divested state sovereign immunity in clear and express terms: "What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is *expressly* extended, among other things, to controversies between a State and citizens of another State."[144] In his view, these "*clear and positive directions* . . . of the Constitution" authorized the Court to hear this suit by a citizen of South Carolina against Georgia.[145]

Although Justice Wilson wrote the most nationalist opinion overall, he nonetheless discussed the same rules of interpretation. He did not consider the law of nations directly applicable to the case because the States and the federal government formed one nation.[146] He devoted much of his opinion to explaining why the people held ultimate sovereignty in establishing the Constitution, and thus had authority to divest States of sovereign immunity if they wished to do so. For him, the question was whether "the people of those States, among whom were those of Georgia," could "bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested."[147] In his view, the answer was yes. Because the States were the work of the "people," "those people, and . . . the people of Georgia, in particular, could alter, as they pleased, their former work."[148] Specifically, "[t]o any given degree, they could diminish as well as enlarge it."[149] In other words, "[*a*]*ny or all of the former State-powers, they could extinguish or transfer.*"[150]

He proceeded to consider whether the people had in fact divested the States of sovereign immunity by adopting the Constitution.[151] In his view, "[t]hese questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations."[152] He first explained why he believed that the Constitution, by fair and conclusive deduction, gave federal courts jurisdiction to hear cases against a State. In his view, that the Constitution imposed certain legal

143 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452 (1793) (opinion of Blair, J.) (emphasis omitted).

144 *Id.* at 450 (emphasis added and omitted).

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

146 *Id.* at 453 (opinion of Wilson, J.).

147 *Id.* at 463 (emphasis omitted).

148 *Id.* at 463–64 (emphasis omitted).

149 *Id.* at 464 (emphasis omitted).

150 *Id.* (emphasis added).

151 *Id.*

152 *Id.*

obligations on States, such as the prohibition against impairing the obligation of contracts, necessarily implied that States could be sued to enforce those obligations. But Wilson chose not to rest his conclusion on this deduction, even though he thought it was a necessary implication of the constitutional text. Rather, he found that the express text of the Constitution divested the States of sovereign immunity in this case:

> But, in my opinion, this [conclusion] rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself . . . . "The judicial power of the United States shall extend to controversies, between a state and citizens of another State." Could . . . this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal?[153]

Although Wilson wrote the most expansive opinion of any Justice, he nonetheless invoked the established rules of interpretation that governed legal instruments claimed to alienate sovereign rights. After establishing that "the people" possessed ultimate sovereignty, he concluded that they had "extinguish[ed] or transfer[red]" the States' right to sovereign immunity "by the direct and explicit declaration of the Constitution itself."[154]

Justice Cushing also found that the Citizen-State Diversity Clause expressly divested the States of their sovereign immunity. He explained that "[w]hatever power is deposited with the Union by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States."[155] In his view, Article III gave the federal courts power to override Georgia's sovereign immunity in this case because "[t]he judicial power . . . is *expressly* extended to 'controversies between a State and citizens of another State.'"[156] "The case, then," he concluded, "seems clearly to fall within the letter of the Constitution."[157]

Chief Justice Jay applied the same interpretive rule to decide "whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State."[158] In interpreting the relevant language of Article III, he applied the

153 *Id.* at 466 (emphasis omitted).

154 *Id.* at 463–64, 466 (emphasis omitted).

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

156 *Id.* at 467 (emphasis added) (emphasis omitted from internal quotation) (quoting U.S. CONST. art. III, § 2).

157 *Id.*

158 *Id.* at 473 (opinion of Jay, C.J.) (emphasis omitted).

"ordinary rules for construction" to reject the suggestion that the Clause "ought to be construed to reach none of these controversies, excepting those in which a State may be Plaintiff."[159] In Jay's view, the words of the Clause were "express, positive, [and] free from ambiguity."[160]

Justice Iredell was the sole dissenter. Although he reached a different conclusion, he applied the same rules of interpretation as the other Justices. After noting his view that the case should have been decided on statutory grounds, he examined whether "upon a fair construction of the Constitution of the United States, the power contended for really exists."[161] Justice Iredell began by reciting some basic assumptions about the States' sovereignty under the Constitution:

> Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be . . . completely sovereign. . . . The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.[162]

To determine whether the States had alienated their right to sovereign immunity, Justice Iredell invoked the law of nations, which "furnish[ed] rules of interpretation" to govern the question.[163] Applying those rules, he explained that his "present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."[164] Echoing Hamilton's views in *The Federalist*, 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 authorise the deduction of so high a power."[165] Accordingly, he would have upheld Georgia's immunity from suit.[166]

159 *Id.*at 476 (emphasis omitted).

160 *Id.*

161 *Id.* at 449 (opinion of Iredell, J.) (emphasis omitted).

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

163 *Id.* at 449.

164 *Id.*

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

166 *See id.* at 449–50. Of course, given the Federalists' assurances during ratification that Article III would not be construed to abrogate the States' sovereign immunity, it is not

In *Chisholm*, all members of the Supreme Court examined whether the language of the Citizen-State Diversity Clause sufficed to abrogate state sovereign immunity. In doing so, all Justices applied the rule that legal instruments should be interpreted to alienate sovereign rights only if they did so in clear and express terms. Significantly, although the Justices disagreed on the *application* of this rule to Article III, they all applied the same rule to ascertain whether the Constitution alienated state sovereign immunity.

2. *Calder v. Bull*

Five years later, in *Calder v. Bull*, the Supreme Court again applied established rules of legal interpretation to the Constitution, this time to ascertain the effect of the Ex Post Facto Clause of Article I, Section 10 on the residual sovereign authority of the States.[167] That Clause provides that "No State shall . . . pass any . . . ex post facto Law."[168] The specific question before the Court was whether a Connecticut law reopening a probate proceeding constituted an ex post facto law within the meaning of this provision.[169]

Justice Chase began his opinion by reciting the "self-evident" principle of interpretation—drawn from the law of nations—that the States retain all powers that are not "expressly" divested in the Constitution:

> It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States. The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures: All the powers delegated by the people of the United States to the Federal Government are defined, and NO CONSTRUCTIVE powers can be exercised by it . . . .[170]

By characterizing this principle as "self-evident," Justice Chase was reflecting the widespread understanding that legal instruments—such as the Constitution—should be interpreted to transfer or divest sovereign

surprising that Federalists and Antifederalists quickly joined forces to introduce and ratify a constitutional amendment prohibiting *Chisholm*'s contrary construction of Article III. *See* Clark, *supra* note 130, at 1886–94.

167 Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

168 U.S. CONST. art. I, § 10, cl. 1.

169 *Calder*, 3 U.S. (3 Dall.) at 387 (opinion of Chase, J.).

170 *Id.* (emphasis omitted).

rights only when they did so clearly and expressly.

Calder is perhaps best known for a question that Justice Chase briefly raised but thought unnecessary to decide[171]—the question "[w]hether the Legislature of any of the States can revise and correct by law, a decision of any of its Courts of Justice, although not prohibited by the Constitution of the State."[172] After a brief discussion of this question (which he acknowledged was "not necessary NOW to be determined"),[173] Justice Chase addressed the question before the Court—namely, whether the Connecticut law violated the Ex Post Facto Clause. To resolve this question, he invoked three well-established rules of interpretation to conclude that "the plain and obvious meaning and intention" of the Ex Post Facto Clause was to restrain after-the-fact imposition of criminal, not civil liabilities.[174]

First, Justice Chase read the Clause in a way that would avoid rendering other constitutional restrictions on state power superfluous. As explained in Part I, a well-recognized, Founding-era rule of interpretation was that unclear provisions should not be read to nullify the effect of another provision in the same instrument. As he explained, if the Ex Post Facto Clause were read broadly to prohibit civil (as well as criminal) after-the-fact restrictions on personal rights, then other constitutional restrictions on state power—such as the prohibition against laws impairing the obligation of contracts or on taking private property for public use without just compensation—would have no effect.[175]

Second, Justice Chase explained that the phrase "ex post facto law" had a "technical" meaning. As explained in Part I, an established rule of interpretation was that interpreters should give technical words and phrases their technical meanings. In this case, the technical

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171 *Id.*

172 *Id.* He proceeded to opine that "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority." *Id.* at 388 (emphasis omitted). Regarding such an act, Justice Chase stated, "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Id.* It is not clear whether Justice Chase was suggesting that a court could refuse to enforce a state law that violated principles of natural right and justice but no express provision of the Constitution. Justice Iredell in his opinion explained that the most a court could do in that situation would be to observe the fact, but it could not void the law. *Id.* at 399 (opinion of Iredell, J.). Because the principles of natural justice, to his mind, were too open to debate, and legislatures had "an equal right of opinion" about them, it was not appropriate for a judge to void a law on the basis of them. *Id.*

173 *Id.* at 387 (opinion of Chase, J.).

174 *See id.* at 390, 394.

175 *Id.* at 390.

meaning of the phrase encompassed only retroactive criminal laws.[176] He gleaned the technical meaning from the writings of "Legislators, Lawyers, and Authors," including Blackstone, Wooddeson, state lawmakers, and Alexander Hamilton's understanding in *The Federalist.*[177]

Third, Justice Chase emphasized that interpreting the phrase "ex post facto law" to have a broader meaning than its accepted technical meaning would generate far-reaching unintended consequences—an outcome to be avoided under established rules of interpretation. "If the term ex post facto law is to be construed to include and to prohibit the enacting [of] any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."[178] For these reasons, he concluded that the Connecticut law was "not within the letter of the prohibition" of the Clause.[179]

Justice Paterson largely embraced Justice Chase's interpretation of the Ex Post Facto Clause and the rules of interpretation he applied. First, he agreed that "[t]he words, ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties."[180] Second, he agreed that giving a phrase a broader reading would render other constitutional restrictions on state authority, including the Contracts Clause, meaningless and without effect.[181] Accordingly, he concluded, "the framers of the Constitution . . . understood and used the words in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further."[182]

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176 *Id.* at 391.

177 *Id.* (emphasis omitted).

178 *Id.* at 393 (emphasis omitted).

179 *Id.* at 392 (emphasis omitted).

180 *Id.* at 396 (opinion of Paterson, J.) (emphasis omitted); *see also id.* at 397 (stating that ex post facto laws "must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense").

181 *Id.* at 397. Justice Paterson regretted that the rules of interpretation led him to this conclusion. As a matter of policy, he believed the Ex Post Facto Clause should extend more broadly to all retrospective laws. "I had an ardent desire," he wrote, "to have extended the provision in the Constitution to retrospective laws in general." *Id.* In his view, "retrospective laws of every description," not just criminal laws, "neither accord with sound legislation, nor the fundamental principles of the social compact." *Id.*

182 *Id.* Justice Iredell agreed with the conclusion of Justices Chase and Paterson that the Ex Post Facto Clause applied only to criminal prohibitions, not to private laws. *Id.* at 400 (opinion of Iredell, J.). Justice Cushing issued a short and cryptic opinion agreeing with the Court's disposition. *See id.* at 400–01 (opinion of Cushing, J.).

Whether or not *Chisholm* and *Calder* were decided correctly on the merits, they demonstrate that from the start the Justices regarded the Constitution as a legal instrument governed by established rules of interpretation. One of the most salient of these rules was that the Constitution would be read to transfer, divest, or alienate the sovereign rights and powers of the States only if it did so in clear and express terms.

B. Interpretation by the Marshall Court

The Marshall Court continued the practice of applying traditional rules of interpretation to determine whether and to what extent the Constitution alienated the States' sovereign rights. These rules required interpreters to give the clear and express terms of such instruments their ordinary and customary meaning, rather than an artificially strict (or broad) construction. On the other hand, when the ordinary meaning of an instrument did not clearly and expressly alter sovereign rights, the rules required interpreters to leave the rights with the original possessor. As the Court rose to prominence under Chief Justice John Marshall, it continued to adhere to these rules when interpreting the Constitution.

The Marshall Court is sometimes regarded as having broadly construed federal power under the Constitution. For example, Justices have characterized the Marshall Court as giving the Commerce Clause and the Necessary and Proper Clause a broad construction. To be sure, the Marshall Court rejected calls—by Thomas Jefferson, St. George Tucker, and others—to interpret the Constitution using a general rule of strict construction. But the Court did not reject strict construction in favor of a rule of "broad" construction. Instead, the Court simply embraced the traditional rules governing instruments used to alienate sovereign rights. Applying these rules, the Court both assigned the ordinary and customary meaning to constitutional provisions that clearly divested the States of preexisting sovereign rights, and refused to read ambiguous provisions to divest States of such rights.

To appreciate the Marshall Court's approach to constitutional interpretation, it is necessary to understand the general theory of strict construction that the Court rejected. Accordingly, this Section first recounts early arguments in favor of strict construction and then reviews the Marshall Court's rejection of these arguments in favor of ordinary interpretation.

1. Theories of Strict Construction

In the early years following ratification, members of the Founding Generation debated whether the Constitution should be strictly construed against federal power. The conventional account is that strict constructionists believed that the Constitution should be strictly construed,[183] while others, such as John Marshall, believed that a general rule of a strict construction was inapplicable to the Constitution.[184] On this account, Marshall's view ultimately prevailed, and the Supreme Court rejected strict construction in favor of giving the text of the Constitution a broader construction. This account is mostly correct but overlooks important nuances found in the background law of interpretation.

Significantly, both proponents and opponents of strict construction invoked rules of interpretation drawn from the law of nations. As discussed in Part I, Vattel instructed interpreters to give clear and express provisions their ordinary and customary meaning. At the same time, he explained that the proper interpretation of indeterminate provisions turned on whether they related to "odious" or "favourable" things.[185] When an indeterminate provision relates to "favourable" things, "we ought to give the terms all the extent they are capable of in common use."[186] Conversely, when an indeterminate provision relates to "odious" things, "we should . . . take the terms in the most confined sense, . . . without going directly contrary to the tenour of the writing, and without doing violence to the terms."[187] Proponents of strict construction invoked the latter rule but took it out of context by seeking to apply it even to clear and express provisions of the

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183 *See* Thomas Jefferson, Jefferson's Draft of the Kentucky Resolutions of 1798 (Oct. 4, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON 536 (Barbara B. Oberg, James P. McClure, Elaine Weber Pascu, Shane Blackman & F. Andrew McMichael eds., 2003) [hereinafter Jefferson, Kentucky Resolutions] (arguing that the powers delegated to Congress in the Constitution should be strictly construed to avoid the federal government from assuming unlimited powers); 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 155 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter Tucker] (arguing that the powers delegated to the federal government should be strictly construed).

184 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187–88 (1824) (rejecting strict construction and arguing instead that the Constitution should be interpreted in accord with the natural sense of its words); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 411 (Melville M. Bigelow ed., William S. Hein & Co. 1994) (1833) (rejecting and refuting the theory of strict construction).

185 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 232 (emphasis omitted).

186 *Id.* at 234 (emphasis omitted).

187 *Id.* at 235.

Constitution. In keeping with Vattel's rules, the Marshall Court both rejected strict construction of clear and express transfers of sovereign powers, and upheld the States' residual sovereign rights not clearly and expressly divested by the Constitution.

Thomas Jefferson and St. George Tucker are commonly associated with early claims that all provisions of the Constitution—whether clear or indeterminate—should be strictly construed against assertions of federal power. In the Kentucky Resolutions of 1798, Jefferson argued that the powers delegated to Congress in the Constitution should be strictly construed to prevent the federal government from assuming unlimited powers. He argued, for instance, that because the Constitution expressly delegates power to Congress to criminalize certain categories of conduct, the Constitution should be strictly construed not to authorize Congress to establish additional crimes outside those categories.[188] In his American version of *Blackstone's Commentaries*, St. George Tucker also urged strict construction of the Constitution. Tucker wrote 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 into question."[189] In making this argument,

188 *See* Jefferson, Kentucky Resolutions, *supra* note 183, at 536. In this regard, Jefferson argued that the Necessary and Proper Clause should not be construed to confer power on Congress to establish other crimes because a broad construction of that Clause would allow Congress to exercise potentially unlimited powers. *Id.* at 538–39. In making these arguments, he contended that the Constitution formed a "compact" among the States. *Id.* at 550. His theory of interpretation, however, was not dependent on a compact theory of the Constitution. A compact theory of government was necessary to his argument that each State had independent power to interpret the Constitution, not to his theory that the Constitution should be interpreted strictly, no matter who was doing the interpreting. *Id.* After describing his compact theory of the Constitution, Jefferson argued that "the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." *Id.*

189 Tucker, *supra* note 183, app. at 154. According to Tucker, the powers delegated to the federal government should be strictly construed regardless of whether the Constitution is viewed as forming a federal compact, a social compact, or a national form of popular government:

> Whether this original compact be considered as merely federal, or social, and national, it is that instrument by which power is created on the one hand, and obedience exacted on the other. As federal it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become

Tucker cited those sections of Vattel explaining that a legal instrument should not be interpreted to abrogate a sovereign right unless it did so in clear and express terms. But Tucker stretched this rule to apply to all constitutional provisions, not merely indeterminate ones. According to Tucker, because

> each state in becoming a member of the federal republic retains an uncontrolled jurisdiction over all cases of municipal law, every grant of jurisdiction to the confederacy . . . is to be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly.[190]

In other words, Tucker argued that each and every particular grant of power to the federal government to regulate within the States' preexisting territorial jurisdiction—even if clear and express—abrogated a sovereign right of the States and therefore should be strictly construed.

In keeping with background rules of interpretation, John Marshall and Joseph Story rejected the application of a general rule of strict construction to the Constitution in favor of giving its clear and express terms their ordinary meaning. For example, in *Gibbons v. Ogden*, Marshall refused 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."[191] Likewise, Story, in his *Commentaries on the Constitution*, rejected Tucker's theory of strict construction.[192] "[B]y strict construction," Story explained, "is obviously meant the most limited sense belonging to the words."[193] Story denied that Vattel's treatise supported this approach. Instead, he argued that no rule of strict construction should apply to the "express powers" granted to the federal government.[194]

It is sometimes suggested that the Marshall Court rejected strict construction of federal powers in favor of a broad construction of such

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> the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government.

Id. at 151 (emphasis omitted) (footnote omitted).

190 *Id.* at 152 (emphasis omitted).

191 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

192 1 STORY, *supra* note 184, at § 411.

193 *Id.*

194 *Id.* §§ 412–13.

powers.[195] To be sure, Marshall and Story rejected Tucker's argument that the rules of interpretation described by Vattel required every delegation of domestic power to the federal government to be strictly construed. But these Justices never advocated a broad construction of those powers. Instead, as the analysis below reveals, they believed that courts should give express grants of power to the federal government their ordinary and customary meaning. And, although often overlooked, they refused to read the Constitution to divest the States of rights and powers in the absence of an explicit provision to that effect. Thus, as this Section explains, the Marshall Court's approach—regarding both the scope of federal powers and the residual rights of the States—was generally consistent with the prevailing rules of interpretation that governed instruments used to adjust sovereign rights.

2. Ordinary Interpretation by the Marshall Court

In several landmark opinions, the Marshall Court interpreted both the scope of congressional power under the Constitution and the constitutional limits on state power. Although it is commonplace to characterize these opinions as giving the Constitution a broad construction, careful examination reveals that they simply applied the traditional rules of interpretation that governed instruments claimed to adjust sovereign rights. To be sure, the Marshall Court opinions took a "broader" view of federal power under the Constitution than strict constructionists advocated, but the Court did not employ a rule of "broad construction." To the contrary, the Court applied the standard rules of interpretation in order to give constitutional grants of federal power their ordinary and customary meaning, and to uphold residual state sovereignty in the absence of explicit alienation. We make no attempt to evaluate whether the individual cases discussed below were rightly or wrongly decided on their merits. Rather, our goal here is simply to identify the rules used to interpret the constitutional provisions at issue and to explain that these rules correspond to those governing instruments used to alienate sovereign rights.

a. *McCulloch v. Maryland*

In *McCulloch v. Maryland*,[196] the Court held that the Necessary and Proper Clause permitted Congress to charter a Bank of the United States because this measure was "plainly adapted" to carrying into

195 *See* Kurt T. Lash, "*Tucker's Rule*"*: St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1344–45 (2006) (describing this account).
196 17 U.S. (4 Wheat.) 316 (1819).

execution Congress's enumerated powers.[197] The conventional account is that *McCulloch* read Article I broadly to give Congress implied powers incidental to its enumerated powers. Although the Court declined to construe Congress's powers strictly, it did not adopt a rule of broad construction. Rather, it applied the traditional rules of interpretation governing instruments claimed to adjust sovereign rights and sought to give the constitutional text its most natural meaning.

Chief Justice Marshall began his opinion by observing that the Constitution assigns only limited and enumerated powers to the federal government and leaves the remainder with the States. "This government is acknowledged by all to be one of enumerated powers," and the "principle, that it can exercise only the powers granted to it," is "universally admitted."[198] Accordingly, the question before the Court was "the extent of the powers actually granted"—specifically, whether they included the power to charter a bank. In answering this question, the Court's stated goal was to give the Constitution's express power-conferring provisions "a fair and just interpretation."[199] This approach was consistent with the rules of interpretation that governed transfers of sovereign rights. Under these rules, the Court's task was to discern the ordinary and customary meaning of constitutional provisions that expressly granted powers to the federal government.[200] Marshall performed this task with respect to both Congress's "great powers"[201] and its necessary and proper power.

The precise question presented in *McCulloch* was, "has Congress power to incorporate a bank?"[202] Marshall acknowledged that no provision of the Constitution explicitly granted Congress specific authority to charter a Bank,[203] but he nonetheless found that Congress's express "great powers" necessarily included this authority. As he observed, among Congress's enumerated powers "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."[204] 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 Court understood

197 *Id.* at 421, 424.

198 *Id.* at 405.

199 *Id.* at 407.

200 *See supra* notes 47–54 and accompanying text.

201 *McCulloch*, 17 U.S. (4 Wheat.) at 407.

202 *Id.* at 401.

203 *Id.* at 406 ("Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.").

204 *Id.* at 407.

Congress's "great powers" to confer "ample means for their execution."[205] As Marshall asked rhetorically: "Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?"[206] The Court had little difficulty concluding that the Constitution authorized Congress to choose from a wide range of means—including the option of chartering a bank—in the exercise of its express powers over revenue, commerce, and war.[207]

The opinion might have rested solely on this understanding of Congress's great powers, but Maryland argued that the Necessary and Proper Clause affirmatively constrained Congress's choice of means. Specifically, the State argued that, notwithstanding its location among Congress's enumerated powers, the Clause restricted Congress's choice of means "to such as are indispensable, and without which the power would be nugatory."[208] Marshall rejected this claim on the ground that it contradicted the ordinary and natural meaning of the term "necessary." To determine its ordinary meaning, Marshall looked "to its use, in the common affairs of the world, or in approved authors."[209] Marshall concluded that "[t]o 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."[210]

In ascertaining the ordinary meaning of the Necessary and Proper Clause, Marshall employed several interpretive techniques described by Vattel. For example, Marshall explained that when a word is used in its "figurative sense," as the word "necessary" was here, it should be given its figurative meaning.[211] Vattel described the same rule of interpretation in explaining that courts should determine the natural meaning of the terms in a legal instrument.[212] In addition, in construing the term "necessary," Marshall considered other parts of

205 *Id.* at 407–08.

206 *Id.*

207 *Id.* at 411 ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.").

208 *Id.* at 413.

209 *See id.* ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that [the word 'necessary'] frequently imports no more than that one thing is convenient, or useful, or essential to another.").

210 *Id.* at 413–14.

211 *Id.* at 414.

212 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 221.

the Constitution, specifically the negative implication of Article I, Section 10's use of the phrase "absolutely necessary."[213] Vattel specifically endorsed the technique of determining the meaning of a word or phrase by examining how the same word is used in other parts of the same instrument.[214] Finally, Marshall explained that if the powers "expressly given" were not intended to include incidental powers to carry them into execution, then the federal government would be "incompetent to its great objects," and the Constitution would become a "splendid bauble."[215] This argument corresponded to the traditional rule that, in determining the meaning of a legal provision, courts should not adopt an interpretation that would render other parts of the legal instrument null or superfluous.[216]

It is worth emphasizing that the *McCulloch* Court's use of traditional rules of interpretation neither necessarily favored nor necessarily disfavored federal power. Because the Constitution was drafted against the backdrop of these rules, the Court's job was simply to apply them faithfully in order to ascertain the scope of the power conferred. *McCulloch* itself illustrates the point. As just noted, the Court applied these rules to conclude, first, that Congress's great powers authorized Congress to employ all means "plainly adapted" to carrying them into execution[217] and, second, that the ordinary and natural meaning of the word "necessary" did not constrain the power Congress otherwise possessed to charter a bank. In the same opinion, the Court applied these rules to conclude that Congress lacked constitutional authority to command the States to charter banks of their own. Under the rules recognized by the law of nations, a legal instrument could be read to alienate sovereign rights only if it did so in clear and express terms. While the Court read Article I, Section 8 to give Congress clear power to charter

213 *McCulloch*, 17 U.S. (4 Wheat.) at 414 (emphasis omitted) (quoting U.S. CONST. art. I, § 10).

214 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 224.

215 *McCulloch*, 17 U.S. (4 Wheat.) at 356–57, 418, 421.

216 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 223. Marshall also took account of the "motive" for the Necessary and Proper Clause. *McCulloch*, 17 U.S. (4 Wheat.) at 420. As Vattel explained, it was appropriate for interpreters to consider the drafters' motive when it was singular and clear. 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 225. Finally, Marshall followed Vattel's admonition that the goal of interpretation was to determine the intention of those who made a legal instrument and to give the words of the instrument the meaning they had "at the time when it was written." *Id.* at 219. Accordingly, throughout his opinion, Marshall referred to the "intention" of the "framers" of the Constitution, *McCulloch*, 17 U.S. (4 Wheat.) at 408, the meaning "obviously intended" by the words, *id.* at 414, "the intention of those who gave these powers," *id.* at 415, and the understanding that "[t]he framers of the constitution wished," *id.* at 420.

217 *McCulloch*, 17 U.S. (4 Wheat.) at 421.

a bank, it concluded that Congress's enumerated powers did not clearly and expressly alienate the States' sovereign right not to be commandeered by another government.

The commandeering issue arose when opponents of the Bank of the United States argued that it was not necessary for Congress to create the Bank because it could rely instead on state-chartered banks to support the operations of the federal government.[218] Marshall rejected this argument on the ground that the federal government lacks constitutional authority to commandeer the legislative powers of the States, and thus would be left at the mercy of the States if all other means were denied to it:

> To impose on [the federal government] the necessity of resorting to means *which it cannot control*, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.[219]

In short, the Court found that the express provisions of the Constitution gave Congress the power to charter a bank, but not the power to command the States to charter a bank.[220] In applying established rules

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

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

220 Some modern scholars have nonetheless argued that Congress may use its powers under the Necessary and Proper Clause to commandeer state governmental institutions to enforce federal law. For example, John Manning has argued that Congress may commandeer state governments because the Supreme Court's anticommandeering decisions lack a textual basis in the Constitution and are inconsistent with the Necessary and Proper Clause. *See* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 36, 78–79 (2014); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2029–32 (2009). As we have explained elsewhere, however, this argument misunderstands the nature of the Constitution and the rules that cases such as *McCulloch* applied to govern its interpretation. Instruments—such as the Constitution—could only alienate sovereign rights through the use of clear and express terms. Against this backdrop, the early Court understood Congress to have only those powers clearly and expressly spelled out in the Constitution, and the States to retain all sovereign rights not clearly and expressly alienated by the instrument. Thus, under background rules of interpretation, the fact that the constitutional text says nothing about commandeering confirms—rather than refutes—the conclusion that Congress lacks power to commandeer the States. The Necessary and Proper Clause, as interpreted in *McCulloch*, cannot fill this gap because it is—at most—an ambiguous authorization for commandeering. *See* Bellia & Clark, *supra* note 73, at 890–92. Moreover, under the law of nations, a provision authorizing one sovereign to commandeer another would have been considered odious. Under these circumstances, Vattel instructed that "we should . . . take the [provision] in the most confined sense . . . , without going directly contrary to the tenour of the writing, and without doing violence to the terms." 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 235.

of interpretation, *McCulloch* was not only the Court's seminal opinion on incidental powers, but also its first opinion on anticommandeering.

b. *Gibbons v. Ogden*

Several years later, in *Gibbons v. Ogden*,[221] the Supreme Court again applied established rules of interpretation to determine the Constitution's effect on federal and state powers. Specifically, the Court considered whether New York retained its power to grant a monopoly for the operation of steamboats on interstate waters notwithstanding an act of Congress authorizing broader use of the waters in question. The Court first inquired whether Congress had power under the Commerce Clause to license vessels to carry out trade by navigating the waters of the United States. In resolving this question, Chief Justice Marshall again applied rules of interpretation drawn from the law of nations. As in *McCulloch*, he rejected calls for strict construction and concluded that the constitutional provisions giving Congress power to regulate interstate commerce should receive their ordinary and customary meaning.

Marshall began by examining "the political situation" of the States under the Constitution. He contrasted the Articles of Confederation—which he described as a league among "completely independent" sovereigns—with the Constitution—which involved a much greater transfer of sovereign rights and powers from the States to the federal government:

> 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.[222]

To determine the scope of federal power granted in the Constitution, Marshall explained, the Court must give the express powers

221 22 U.S. (9 Wheat.) 1 (1824).

222 *Id.* at 187.

their ordinary and natural meaning. The Constitution, he wrote, "contains an enumeration of powers *expressly granted* by the people to their government."[223] According to Marshall, rather than construe such powers "strictly," courts should give the words their "natural and obvious import":

> It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for 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, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.[224]

In rejecting strict construction, Marshall explained that because lawmakers "generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[225]

In keeping with Vattel's rules of interpretation, Marshall then proceeded to determine the meaning of the word "commerce" in Article I, Section 8 by examining its ordinary and customary usage, the reason underlying the grant of authority, and other provisions of the

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223 *Id.* (emphasis added).

224 *Id.* at 187–88.

225 *Id.* at 188. Like Vattel, Marshall recognized that if the scope of an expressly granted power was uncertain due to "the imperfection of human language," then a court could examine "the objects for which it was given, especially when those objects are expressed in the instrument itself." *Id.* at 188–89. Marshall also rejected the argument that the Commerce Clause was "odious," and thus subject to strict construction under the law of nations. The Commerce Clause, he explained, "does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage." *Id.* at 189. Because the Commerce Clause was not odious in this sense, there is "no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred." *Id.*

Constitution that shed light on its meaning.[226] According to the Court, "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[227] Because the word "commerce" "comprehends, and has been always understood to comprehend, navigation within its meaning,"[228] the Court concluded that "a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'"[229]

Having concluded that the commerce power encompasses navigation, the Court proceeded to examine the conflict between state and federal law. As noted, New York had granted a monopoly for navigation in its waters, but Gibbons had obtained a federal license to operate a steamboat in the same waters pursuant to a 1793 federal statute. Because the New York law inhibited the use of a "vessel having a license under the act of Congress," the Court found the state monopoly to create a "direct collision with that act."[230] Having found the Act to be a valid exercise of the commerce power, Marshall was able to resolve the conflict by applying the express terms of the Supremacy Clause.[231] Of course, even if one disagreed with Marshall's application of the governing rules of interpretation, it is evident that the Court applied these rules to ascertain the meaning of the Commerce Clause and its effect on the residual sovereign authority of the States.

c. *Barron v. Baltimore*

Barron v. Baltimore[232] also illustrates the Marshall Court's use of the rules governing adjustments of sovereign rights to interpret the Constitution. The question presented in *Barron* was whether the Bill of Rights—specifically, the Fifth Amendment's prohibition on taking private property—applied against the States. The plaintiff's counsel maintained "that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government."[233] When the City of Baltimore refused to compensate the plaintiff for damage to his wharf, the plaintiff alleged a violation of the Fifth Amendment's command that

226 *Id.* at 189–93.
227 *Id.* at 190.
228 *Id.* at 193.
229 *Id.*
230 *Id.* at 221.
231 *Id.* at 210–11.
232 32 U.S. (7 Pet.) 243 (1833).
233 *Id.* at 248.

"private property [shall not] be taken for public use without just compensation."[234] Because this prohibition—like others in the Bill of Rights—is written in the passive voice, the Amendment arguably constrained both state and federal conduct. The Court nonetheless rejected application of the Bill of Rights to the States because the relevant provisions "contain no expression indicating an intention to apply them to the state governments."[235]

In reaching this conclusion, Chief Justice Marshall analyzed the Constitution in accordance with the rules of interpretation governing the alienation of sovereign rights under the law of nations. Specifically, Marshall relied on the nature of the Constitution to draw a sharp distinction between constitutional provisions claimed to constrain the federal government and those claimed to constrain the States. He acknowledged that many of the restrictions on the federal government—in both the original Constitution and the Bill of Rights—were expressed in general terms. Marshall saw no need for greater specificity because the powers the people "conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument."[236]

In keeping with the law of nations, however, Marshall applied a higher standard to evaluate constitutional provisions alleged to constrain the States—sovereign entities that were not created by, but predated, the Constitution. According to the Court, although "general terms" suffice to restrict the federal government, constitutional restrictions on States must be "expressed in terms."[237] The Court illustrated this distinction by contrasting the wording of Article I, Section 9's restrictions on the federal government with the wording of Article I, Section 10's restrictions on the States. Like those set forth in the Bill of Rights, many restrictions found in Article I, Section 9 are written in the passive voice. For example, one of the prohibitions reads: "No Bill of Attainder or ex post facto Law shall be passed."[238] According to the Court, "[n]o language can be more general, yet the demonstration is complete that it applies solely to the government of the United States."[239] Marshall reasoned that such general provisions do not limit "distinct governments, framed by different persons and for different

234 U.S. CONST. amend. V.
235 *Barron*, 32 U.S. (7 Pet.) at 250.
236 *Id.* at 247.
237 *Id.* at 248–49.
238 U.S. CONST. art. I, § 9, cl. 3.
239 *Barron*, 32 U.S. (7 Pet.) at 248.

purposes," but are merely "limitations of power granted in the instrument itself" to "the government created by the instrument."[240]

The States, he explained, stood in a different position than the federal government with respect to the Constitution. The States gained their status as "Free and Independent States" well before they adopted the Constitution. Thus, in keeping with the law of nations, constitutional restrictions on the States must be expressed in terms that "indicat[e] an intention to apply them to the state governments."[241] Unlike the general limits on governmental power expressed in Article I, Section 9, the limits found in Article I, Section 10 met this standard because—unlike Section 9—Section 10 begins with the words "No State shall."[242] As Marshall explained, the restrictions set forth in Section 10 "are by express words applied to the states."[243] Thus, understood against the backdrop provided by the governing rules of interpretation, "the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states."[244]

The same "line of discrimination," Marshall explained, governs the interpretation of the Bill of Rights. The general terms of these Amendments suffice to restrain the actions of the federal government, but not the States. "[I]t is universally understood," he observed, and "it is a part of the history of the day,"[245] that the Bill of Rights was proposed and adopted "to guard against the abuse of power" by the federal government.[246] "Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in *plain and intelligible language*."[247] Because the Bill of Rights failed to do so, the Court dismissed Barron's claim under the Fifth Amendment, emphasizing that "[t]hese amendments contain no expression indicating an intention to apply them to the state governments."[248]

Barron caps a string of early Supreme Court decisions

240 *Id.* at 247.
241 *See id.* at 250.
242 U.S. CONST. art. I, § 10.
243 *Barron*, 32 U.S. (7 Pet.) at 248.
244 *Id.* at 249.
245 *Id.* at 250.
246 *Id.*
247 *Id.* (emphasis added).
248 *Id.* at 250–51.

interpreting the Constitution in accordance with the rules prescribed by the law of nations to govern adjustments of sovereign rights. These cases reveal that the Court sought to give the power-conferring provisions of the Constitution their ordinary and customary meaning. At the same time, the Court declined to read the Constitution to restrict the sovereign authority of the States unless it did so in clear and express terms. This dual approach to federal and state power conformed to the rules that governed the formation and interpretation of instruments claimed to alienate sovereign rights and powers.[249]

IV. IMPLICATIONS

Recognizing that the Constitution was an instrument used to transfer sovereign rights and powers from the States to the federal government helps to resolve two important questions of constitutional interpretation. The first question is whether originalism or nonoriginalism is the proper method of constitutional interpretation. Because the Constitution was an instrument used to transfer sovereign rights, the "whole tenor" of the instrument "admitted" background rules of interpretation. This means that originalism—in one form or another—is the constitutional law of interpretation. The second question is whether the Supreme Court has properly recognized several doctrines designed to uphold the States' residual sovereignty. Under the rules governing interpretation of instruments used to transfer sovereign rights, the States retained all sovereign rights and powers that the

249 Significantly, Justice Story joined all three of these important Marshall Court opinions. He also discussed constitutional interpretation in his famous treatise. *See* 1 STORY, *supra* note 184. Like Marshall, Story rejected Tucker's theory of strict construction of federal powers. Thus, in addressing "how the express powers are to be construed," *id.* § 412, Story concluded that "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged," *id.* § 417 (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816)). Story arguably went beyond Marshall, however, in rejecting Vattel's distinction between favorable and odious provisions as applied to the Constitution. Marshall recognized that some constitutional provisions were odious in the sense that they abrogated the States' preexisting sovereign rights. The law of nations required such provisions to be set forth in clear and express terms and then instructed interpreters to give them their ordinary and customary meaning. Story seemed to reject the notion that the objects of the Constitution as stated in the Preamble could ever be considered "odious objects." *See id.* § 415. Accordingly, he refused to "require every grant of power withdrawn from the State governments to be deemed *strictissimi juris*, and construed in the most limited sense, even if it should defeat these objects." *Id.* If this statement simply rejects a general rule of strict construction, then he and Marshall were in accord. If, on the other hand, Story meant that ambiguous constitutional provisions could alienate the States' sovereign rights, then he sought to go much further by, in effect, adopting a rule of *broad* construction. This reading is refuted by Story's concurrence in the Marshall Court's opinions, especially *Barron v. Baltimore*.

Constitution did not abrogate in clear and express terms. Thus, doctrines that uphold these residual rights and powers are well-grounded in the Constitution. This Part examines each of these implications in turn.

A. *Originalism as Constitutional Law*

As an instrument used to transfer a fixed subset of sovereign rights from the States to the federal government, the Constitution itself requires that some form of originalism be used to interpret it. The States predated the Constitution and possessed all of the sovereign rights and powers recognized by the law of nations. For their mutual benefit, the people of the several States transferred some of the States' sovereign rights and powers to a new federal government and used the Constitution as their instrument to accomplish this transfer. At the Founding, the law of nations established precise rules that governed the adoption and interpretation of instruments used for this purpose. These rules enabled States to use a legal instrument to alienate their sovereign rights, but only if it did so in clear and express terms. In addition, these rules required interpreters to read such an instrument according to the ordinary and customary meaning of its terms as of the time of adoption. Sovereigns that wished to transfer some of their rights and powers to another sovereign acted against the backdrop provided by these rules when they crafted and adopted legal instruments for this purpose. An instrument that failed to comply with the applicable rules did not transfer sovereign rights under the law of nations and was interpreted not to do so. Thus, there was no such thing as a vague or open-ended transfer of sovereign rights that one of the affected parties could unilaterally expand or contract over time. Instead, vague or open-ended terms were inoperative and left preexisting sovereign rights undisturbed. Any attempt to (mis)read an instrument to alienate more rights than its clear and express terms contemplated was considered illegitimate and risked generating discord or conflict between the affected parties.

As Part II explained, the Constitution was an instrument used by the people of the several States to transfer a limited set of sovereign rights and powers from their States to a new federal government. The instrument was drafted, defended, and ratified within the framework established by the background rules governing the transfer of sovereign rights. Because the "States" referenced in the Constitution could transfer sovereign rights only in accordance with this background law, Hamilton recognized that the whole tenor of the instrument they

employed for this purpose necessarily admitted the applicable rules. If courts considered themselves free to construe the Constitution's limited transfer of sovereign rights more broadly (or narrowly) than the rules allowed, they could not claim the Constitution as authority for their action. The rules governing transfers of sovereign rights shaped the language employed in the Constitution on the front end, and determined its meaning and effect on the back end. Accordingly, as Hamilton explained, these rules were an inextricable part of the Constitution itself and cannot be disregarded without disregarding the Constitution itself.

Once one recognizes that the Founding-era rules governing the transfer of sovereign rights became part and parcel of the Constitution, it follows that interpreters must use some form of originalism to interpret the instrument. Virtually all mainstream theories of originalism maintain that the meaning of the constitutional text became fixed at the time of adoption and that this original meaning constrains interpreters. These core features of originalism accord with the rules prescribed by the law of nations to govern instruments used to adjust sovereign rights.

This Section proceeds as follows. First, it reviews a growing body of scholarship examining the background rules of interpretation that the Founders would have understood to apply to the Constitution. This scholarship supports originalism but fails both to identify the applicable rules with precision and to provide a complete rationale for their use in constitutional interpretation. Recognizing that the Constitution was an instrument used to transfer sovereign rights from the States to the federal government helps to fill these gaps. A relatively well-defined body of rules governed instruments used for this purpose, and these rules were woven into the fabric of such instruments. Thus, the Constitution itself required interpreters to ascertain its meaning by applying an identifiable set of background rules—rules that in today's parlance require some form of originalism.

Second, this Section explains why the Constitution requires adherence to the rules governing transfers of sovereign rights. As Hamilton put it, these rules were admitted by the whole tenor of the instrument, and thus they became part of the Constitution itself. The Constitution is comprised of innumerable compromises reached against the backdrop provided by the rules governing such instruments. The function of the instrument was to fix the allocation of sovereign rights and powers—according to these rules—as of the time of adoption. Any further adjustments of sovereign rights could be effected only by adopting another legal instrument (such as a constitutional

amendment) that clearly and expressly reallocated sovereign rights and powers.

Third, this Section explains why modern theories of textualism are compatible with reading the Constitution in accordance with the background rules of interpretation that governed instruments used to transfer sovereign rights and powers. Textualists regularly rely on background context to interpret legal instruments. In addition, they often consult settled background conventions of the legal system to interpret specialized legal texts. Properly understood, textualism not only relies on background context to read legal texts, but also precludes interpreters from disregarding such context in order to update the meaning of the text. Thus, textualism is fully consistent with interpreting the Constitution by reference to the background rules governing the alienation of sovereign rights.

Finally, this Section explains why some form of originalism is required in order to comply with the rules of interpretation admitted by the Constitution. Under these rules, a legal instrument is capable of transferring sovereign rights and powers only if it does so in clear and express terms. In addition, the rules require interpreters to give such terms their ordinary and customary meaning as of the time of adoption. Mainstream versions of originalism conform to these rules whereas prominent theories of nonoriginalism reject them. Thus, originalism—in one form or another—is the constitutional law of interpretation.

1. The Background Law of Interpretation

Prominent scholars have recognized that there was a body of unwritten general law at the Founding that governed the interpretation of legal instruments, and that the Constitution was adopted against this backdrop. Although these scholars do not define the general law of interpretation with precision, they maintain that it favors originalism over nonoriginalism in constitutional interpretation. In their view, this law of interpretation is either a form of general law or common law, and continues to constrain constitutional interpretation to this day. This important scholarship is helpful as far as it goes. We agree that the Constitution was drafted against the backdrop of a well-developed set of interpretive rules, but we believe that the obligation to apply such law today derives from the nature of the Constitution as an instrument used to alienate sovereign rights and powers. As discussed in Part I, such instruments were governed by a fairly well-developed body of rules derived from the law of nations. This subsection

reviews several previous accounts of the law of interpretation, and the next subsection explains why the Constitution necessarily admitted or incorporated certain background rules of interpretation derived from the law of nations.

Will Baude and Steve Sachs have argued that when the Constitution was adopted, unwritten background law provided various legal rules and conventions governing how courts should interpret legal instruments. These rules help interpreters understand the legal effect of new laws at the time they were adopted. Baude and Sachs maintain that these rules both support a form of originalism and provide a valuable source of original meaning. Specifically, Baude and Sachs argue that all forms of written law—including the Constitution—are governed by an unwritten body of law they call "the law of interpretation."[250] Such law does not merely seek the semantic meaning of the text, but "determines what a particular instrument 'means' in our legal system."[251] They conclude that this law of interpretation both favors originalism and remains in effect today largely unchanged.[252] Their argument builds both on their own prior work[253] and on the scholarship of others.

For example, Professor Caleb Nelson has advanced a related argument that the original meaning of the Constitution "does not depend solely upon the dictionary definitions of the individual words" used, but also depends on at least two kinds of interpretive conventions.[254] Some of those conventions are simply "part of the English language in general."[255] Other conventions are more specialized and include various canons that lawyers use to construe legal documents.[256] "Conventions of both sorts form part of the background against which laws are drafted and understood, and they can greatly affect what a law

250 *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

251 *Id.* at 1082.

252 *Id.* at 1135–36.

253 Sachs has previously advanced the idea of "original-law originalism," which seeks to identify and apply the principles of law that the Founding generation would have used to interpret the Constitution. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819, 823, 874–75 (2015). Similarly, Baude has argued that the Founders were originalists and that modern social facts suggest that originalism remains our law. *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2364, 2389 (2015).

254 Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519 (2003).

255 *Id.*

256 *Id.* at 519–20.

is taken to say."[257] In other words, Nelson maintains that interpretive conventions "formed the background for the Constitution,"[258] and thus "bear on the Constitution's 'meaning' (as that concept is understood by originalists) *even though the Constitution does not itself codify them.*"[259] He does not, however, attempt to resolve the precise content of these conventions, "which aspects of the founding generation's ideas about interpretation retain their importance for present-day interpreters," and how "originalists [should] decide which are which."[260] Rather, he simply points out that "originalists have made little systematic effort to identify the kinds of conventions that bear on what they think of as the Constitution's 'meaning,' or to investigate the content of such conventions at the time of the founding."[261]

Similarly, Professors McGinnis and Rappaport have advocated what they call "original methods" originalism.[262] This approach calls for the Constitution to "be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."[263] On this view, courts should rely on the original "interpretive rules in place when the Constitution was enacted" to decipher its meaning.[264] McGinnis and Rappaport found "strong evidence that these interpretive rules were essentially originalist."[265] This evidence led them to reject broad theories of constitutional "construction" or "new originalism" under which judges have "discretion to resolve ambiguities and vague terms based on extraconstitutional considerations."[266] McGinnis and Rappaport maintain that "the Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."[267] They acknowledge that it "is a complicated issue" to determine "what interpretive rules applied to the Constitution in a world with limited constitutional experience."[268] Without attempting to resolve this issue, they suggest that interpreters

257 *Id.* at 520.

258 *Id.* at 549.

259 *Id.*

260 *Id.*

261 *Id.* at 520–21.

262 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 (2009); *see also* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

263 McGinnis & Rappaport, *supra* note 262, at 751.

264 *Id.* at 752.

265 *Id.*

266 *Id.*

267 *Id.* at 751.

268 *Id.* at 769.

start by examining "the legal interpretive rules . . . that people at the time would have regarded as applying to a document like the Constitution."[269]

In more recent work, McGinnis and Rappaport have sought to ground their approach in the constitutional text. Specifically, they argue that the Constitution is written in "the language of the law,"[270] and that the applicable legal interpretive rules either are part of that language itself[271] or should be regarded as part of the context of that language.[272] Again, they take no firm position on the precise contours of the interpretive rules applicable to the Constitution,[273] but conclude that—whatever their content—these rules should determine the meaning of the Constitution.[274] Under their approach, Founding-era legal interpretive rules apply today because they were understood to apply at the Founding and reveal the original meaning of the constitutional text.

Baude and Sachs acknowledge in their work that the "law of interpretation" they identify resembles and overlaps with Nelson's "interpretative conventions" and McGinnis and Rappaport's "original methods" originalism, but they note several differences.[275] Their approach differs from Nelson's in that they think the present-day validity of various aspects of the Founding generation's ideas about interpretation is "generally determined by Founding-era law."[276] In their view,

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269 *Id.*

270 John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018).

271 *Id.* at 1335 (describing a broad conception in which "language is understood to include all rules that the author and audience follow in using language," including "legal interpretive rules that tell speakers how to interpret the language [of the law]").

272 *Id.* ("Under the narrow conception, the legal interpretive rules are not part of the language, but are instead part of the context of utterances made in the language of the law.").

273 *Id.* at 1343 n.100.

274 *Id.* at 1335 (arguing that "the result is the same under the two conceptions" because "legal interpretive rules are essential to determining the meaning of statements under both the broad and narrow conceptions of the language of the law"). *See also* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) ("We maintain that both the original intent and original public meaning approaches, when properly understood through the lens of original methods, require that the Constitution be interpreted using the same conventional interpretive rules.").

275 *See* Baude & Sachs, *supra* note 250, at 1135–36. Baude and Sachs also build on Professor Abbe Gluck's proposal that rules of statutory interpretation be conceptualized as a federal common law of interpretation. *Id.* at 1137–38. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013).

276 Baude & Sachs, *supra* note 250, at 1136.

"an interpretive rule's force turns on whether or not it was good law, and if so, of what kind."[277] Thus, "[a]dherence to the Constitution requires adherence to the original adoption rules (which happened to fix both the original linguistic rules and some of the nonlinguistic rules), as well as to original application rules that haven't yet been altered or amended."[278] On the other hand, they would "leave out both interpretive customs that weren't incorporated by law and any application rules that might have changed since adoption."[279]

Baude and Sachs argue that the unwritten law of interpretation favors originalism because "legal instruments, from deeds to statutes to constitutions, do their legal work when adopted."[280] A "reason to look to original linguistic conventions when construing an old text," they explain, is that "the law of interpretation, at the time, likely cross-referenced the linguistic practices of the time, and not any unknown practices to be developed in the future."[281] Under this form of originalism, a "constitutional provision generally has whatever legal content it was assigned when it was ratified—meaning the content determined by the original adoption rules, including their potential incorporation of then-current linguistic practice."[282]

Baude and Sachs maintain that the unwritten law of interpretation applies today to determine the legal effect of the Constitution.[283]

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277 *Id.*

278 *Id.* (emphasis omitted). Baude and Sachs distinguish between "adoption rules" and "application rules." *Adoption rules* "determine the legal content of a written instrument upon its adoption. As a result, the version of the rule relevant to a particular text is the one that governed at the time the text was adopted and made its impact on the law." *Id.* at 1133. "By contrast, *application rules* are framed as instructions to future decisionmakers, including judges, on what to do at the point of application." *Id.* Because application rules govern present decisions rather than the original content of the law in question, "a change to an application rule can have full effect in all future cases to which the rule applies, even if they involve texts that were adopted long ago." *Id.* at 1134.

279 *Id.* at 1136. Baude and Sachs differ from McGinnis and Rappaport in that they would expand original methods originalism by introducing "one crucial elaboration." *Id.* at 1135. Baude and Sachs generally agree that constitutional "interpretation should be 'based on the content of the interpretive rules in place when the Constitution was enacted,'" *id.* (quoting McGinnis & Rappaport, *supra* note 262, at 752), but they "would distinguish sharply between linguistic and legal rules." *Id.* In their view, linguistic rules should be used (and evaluated) based on their capacity to reveal the linguistic meaning of the text under consideration. *Id.* at 1108. By contrast, legal rules should be used (and evaluated) on the basis of whether they were part of the unwritten background law of interpretation when the relevant text was adopted. *Id.* at 1084.

280 *Id.* at 1133.

281 *Id.* at 1134–35.

282 *Id.* at 1135.

283 *Id.* at 1118; *see id.* at 1120 ("[J]ust as for statutes, we look to unwritten law to identify the Constitution's legal force and the object of constitutional interpretation.").

Although the Constitution is written, they contend that its text does not address how to resolve a variety of interpretive questions. In their view, the Constitution "can't settle how its own text should be understood—or whether its drafting materials count as part of the material to be interpreted, or whether it offers rules or guidelines, and so on."[284] Accordingly, they believe that questions regarding the Constitution's legal content must "be settled instead by unwritten law" outside the instrument.[285]

Baude and Sachs regard the law of interpretation as a species of general law that has the power to constrain both courts and legislatures. They note that "interpretive rules are primarily rules of *unwritten* law, even as they govern the interpretation of written law."[286] Although they frequently describe "the unwritten law of interpretation as a form of 'general law,'"[287] they also refer to it—apparently synonymously—as "common law."[288] At the same time, they reject the suggestion that such law is an example of "federal common law" because this label "suggests that the law of interpretation is up to federal courts and judges to revise as they see fit."[289] In their view, the older label of "general law" is more accurate because judges applying the law of interpretation are not "inventing rules of decision out of whole cloth."[290] Rather, "they might be recognizing elements of an existing general-law tradition—a tradition that makes its appearance in judicial decisions, but isn't merely their creature."[291]

Baude and Sachs identify a real phenomenon regarding the existence of unwritten background rules of interpretation. But even if such rules were considered general law at the Founding, this account leaves several important questions unanswered. How do we ascertain precisely which, if any, rules drawn from the general law of interpretation govern the Constitution? The Supremacy Clause recognizes only the Constitution, laws made in pursuance thereof, and treaties as the supreme law of the land.[292] By what authority is the general law of

284 *Id.* at 1120 (footnotes omitted).

285 *Id.*

286 *Id.* at 1084.

287 *Id.* at 1137.

288 *See id.* at 1084 n.15 (noting that the authors "follow the convention of describing the common law as 'unwritten'"); *id.* at 1104 ("In a common law system like ours, rules of interpretation can also be found in unwritten law.").

289 *Id.* at 1138.

290 *Id.* (quoting Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 7 (2015)).

291 *Id.*

292 *See* U.S. CONST. art. VI.

interpretation binding on state and federal judges when called upon to interpret the Constitution? Simply applying the law of interpretation as a form of general law does not answer these questions.

General law, of its own force, has never been understood to bind the courts of a particular sovereign. Rather, general law was "an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years."[293] Nations voluntarily incorporated such law into their municipal law for their mutual benefit (much the way the individual American States adopted the Uniform Commercial Code in the twentieth century).[294] General law addressed matters of concern to more than one sovereign, and thus no single nation had the ability to fix its meaning or dictate its use by another sovereign. Accordingly, Blackstone equated "general law" with the "law of nations," which he described as including the law merchant, the law maritime, and the law of state-state relations.[295]

As Blackstone explained, the common law of England incorporated the three main branches of the law of nations, making these sources of general law applicable in English courts without the need for statutory adoption.[296] The status of general law in the United States was more complicated because of the federal structure established by the Constitution. Unlike England, the United States as a whole never possessed a uniform body of common law into which general law could have been incorporated.[297] After the former Colonies in North

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293 Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279 (1996); *see also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889–91 (2005) (describing general law); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) ("The concept of 'general' law refers to rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions.").

294 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 664 (2013).

295 *See* 4 BLACKSTONE, *supra* note 6, at *66–67. General law was the opposite of *local law*—sovereign-specific law adopted by one nation or state to govern matters of local concern such as "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842); *see also* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516–17 (1984) (discussing the distinction between general and local law).

296 *See* 1 BLACKSTONE, *supra* note 6, at *67.

297 As the Supreme Court explained in 1834:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each

America declared their independence from Great Britain, each State adopted or received the common law of England as its own, typically by enacting a reception statute.[298] Accordingly, the original States adopted those branches of general law previously incorporated by English common law. The common law of each State was similar but diverged over time. State courts could—and often did—disagree over the proper content of general law,[299] and could refine their State's common law over time.[300]

All of this leaves the general law of interpretation in an uncertain position vis-à-vis the Constitution. Professors McGinnis and Rappaport have argued that background rules of interpretation arguably became part of the Constitution because the document is written in "the language of the law."[301] Similarly, Professors Baude and Sachs have suggested that Congress lacks general power to change the law of interpretation as applied to the Constitution because "constitutional provisions took on their legal content at the time of ratification, under the interpretive rules that governed at the time."[302] Although persuasive as far as they go, these arguments fail to explain, in and of themselves, why interpreters must respect "the language of the law" in accordance with its original meaning, or whether and why general law rules of interpretation are themselves part of the legal content of the Constitution. These arguments also fail to identify the precise contours of the general law of interpretation. There is, we believe, an alternative understanding that both helps to define the law of interpretation with greater precision and ties such law to the nature of the Constitution. As discussed, instruments used to transfer sovereign rights

> of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834). Congress never attempted to adopt the common law on behalf of the United States as a whole, and it arguably lacked enumerated power to do so because the common law was a complete system for the regulation of all aspects of human affairs.

298 *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554, 561 (1882).

299 *See, e.g.*, *Swift*, 41 U.S. (16 Pet.) 1 (discussing the New York courts' disagreement with other state courts regarding the content of general commercial law).

300 We agree with Baude and Sachs that the Founding-era law of interpretation could not have been federal common law. The Court did not recognize true federal common law until the twentieth century. Thus, whatever the legitimacy of such law today, it could not have been the source of the law of interpretation at the Founding. *See* Clark, *supra* note 293, at 1271–75; Nelson, *supra* note 293.

301 *See supra* notes 270–74 and accompanying text.

302 Baude & Sachs, *supra* note 250, at 1139.

and powers were governed by established rules of interpretation supplied by the law of nations. Because the Constitution was an instrument used to transfer a fixed set of sovereign rights and powers from the States to the federal government, it necessarily admitted these background rules to govern its own interpretation. And, as discussed below, this constitutional law of interpretation favors originalism over nonoriginalism.

2. The Constitution and Background Rules

Before ratifying the Constitution, the States possessed the full complement of sovereign rights recognized by the law of nations. Under the law of nations, a sovereign state could elect to alienate its rights and powers in favor of another sovereign in a legal instrument only by doing so in clear and express terms. In addition, the law of nations required interpreters to give the terms of such instruments their ordinary and customary meaning as of the time of adoption. Under these requirements, the precise scope of the transfer made by a legal instrument became fixed at the time of adoption. Thus, any further adjustment of sovereign rights beyond that made by the original instrument could occur only by virtue of a separate instrument or transaction. The applicable rules ensured that sovereigns alienated their rights and powers knowingly and intentionally, not accidentally or haphazardly. In doing so, the rules prevented misunderstandings, fraud, and potential conflict among sovereigns. To the extent that a legal instrument did not satisfy these requirements, it was incapable of alienating sovereign rights.

These rules were well known to the Founders and governed both the formation and interpretation of the Constitution. The Constitution was fundamentally a legal instrument used to transfer a fixed set of sovereign rights and powers from the States to a new federal government. Thus, the Constitution had meaning and effect only by reference to the rules prescribed by the law of nations to govern instruments used for this purpose. Failure to comply with these rules left sovereign rights and powers with the original possessor. The Constitution's repeated use of the term "States"—a term of art drawn from the law of nations—confirms the applicability of these rules. "States" referred to sovereign entities that possessed the full panoply of sovereign rights and powers recognized by the law of nations. "States" could alienate their rights and powers only according to these rules. Thus, in adopting the Constitution, the people of each American "State" used these rules to transfer a fixed subset of their State's sovereign rights

and powers to the federal government. The "States" necessarily retained all other sovereign rights and powers not transferred by the instrument.

Given the Constitution's core function of transferring a fixed subset of sovereign rights and powers from the States to the federal government, the instrument necessarily admitted—or incorporated—the background rules that governed both the formation and interpretation of such instruments. The rules enabled the Constitution to establish a stable and relatively precise allocation of sovereign rights and powers between two levels of government. In other words, the Constitution and the rules governing its creation were a package deal. Were courts to interpret the Constitution without regard to these rules, they would upend the precise allocation of sovereign rights and powers fixed by the instrument.

The Founders relied on these rules in drafting and ratifying the Constitution. The delegates to the Constitutional Convention engaged in protracted and sometimes heated debates regarding the precise scope of the transfer. Negotiations regarding the terms of the instrument were contentious precisely because the delegates understood—in accordance with the governing rules—that the Constitution would fix the scope of the transfer and constrain future interpreters to follow the ordinary and customary meaning of the text as of the time of adoption. It is true that some opponents of the Constitution feared that federal judges might abuse their power by misconstruing the Constitution to confer more power than the people of the several States sought to transfer.[303] Federalists assured them, however, that this fear was unfounded because judges would be bound to follow strict rules of interpretation that constrained discretion and forbade the exercise of will (as opposed to judgment).[304] Following these debates, all thirteen States ratified the Constitution.

Various episodes from the Constitutional Convention illustrate the essential role that compromise played in crafting an instrument capable of ratification. In its final form, the Constitution embodied a series of compromises regarding both how much sovereign authority the people of the several States would transfer from the States to the federal government and under what conditions. These compromises enabled the Convention to agree on a proposed Constitution and, in the end, convinced the States to ratify the proposal. The debates were

303 This fear was not meant to endorse or legitimate such action, but merely to highlight the potential for abuse of power by federal officials.

304 THE FEDERALIST NO. 78, *supra* note 1, at 529 (Alexander Hamilton); *see supra* notes 118–22 and accompanying text.

contentious precisely because all participants recognized that an instrument like the Constitution, if faithfully implemented, would establish a fixed allocation of sovereign rights and powers until changed by another instrument. This is not to say that the Founders did not expect difficult questions of constitutional interpretation to arise. It is also not to say that the Founders failed to see the risk that interpreters would sometimes misinterpret the Constitution. They believed, however, that the Constitution established a fixed allocation of powers and that interpreters acting in good faith—and sworn to support the Constitution—would uphold that allocation. No one in the process contemplated—or would have tolerated—the notion that the Constitution could be continually and unilaterally updated by judges. To the contrary, the contentious debates and intricate compromises that marked the Constitutional Convention presupposed that the Constitution would fix the respective rights and powers of the federal government and the States as of the time of its adoption.

This presupposition was evident throughout the Convention. A threshold issue of fundamental importance was whether the proposed Constitution would abolish the States and transfer all of their sovereign rights and powers to a new national government. At the start of the Convention, Edmund Randolph moved "that a *national* Government (ought to be established) consisting of a *supreme* Legislative, Executive & Judiciary."[305] This motion prompted "a discussion . . . on the force and extent of the particular terms *national* & *supreme*."[306] Charles Pinkney inquired whether Randolph "meant to abolish the State Governts. altogether."[307] Randolph disclaimed any such 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."[308] From this point forward, there was no suggestion that the plan being developed would abolish the States or bring about a complete cession of their sovereign rights. Indeed, the Constitution's repeated references to the "States" confirms that the instrument both assumed their continued existence as separate sovereigns and would transfer a limited and fixed set of sovereign rights and powers to a new federal government.

Once the Convention decided to retain the States as distinct sovereigns, it focused on precisely how much sovereign authority the

305 James Madison, Notes on the Constitutional Convention (May 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 33, 33.

306 *Id.* (footnote omitted).

307 *Id.* at 34.

308 *Id.*

Constitution should transfer from the States to the federal government and the safeguards needed to prevent abuse of federal power. Had the delegates been willing to abolish the States, the ensuing debates would have been more straightforward, focusing on the orderly transition from the existing thirteen States to a new single state entrusted with all of their sovereign rights and powers. Instead, the delegates proceeded to fashion a Constitution on the understanding that the States would retain their existence and relinquish only a fixed portion of their sovereign rights.

One of the most controversial issues at the Convention was how to structure the national legislature. The Convention quickly embraced a bicameral legislature with a lower house based on proportional representation keyed to state population. The composition of the upper chamber proved more contentious, and a sharp division developed between the larger and smaller States. The Convention initially voted to use "the rule 'established for the first'" branch to determine "the right of suffrage in the second branch,"[309] but this approach alarmed small state delegate William Patterson, who feared that New Jersey "would be swallowed up."[310] Soon thereafter, he introduced the New Jersey Plan as a complete alternative to the Virginia Plan. The New Jersey Plan proposed "that the articles of Confederation ought to be . . . revised, corrected & enlarged" rather than abandoned altogether.[311] Under this Plan, the States would have retained their equal suffrage in a unicameral Congress.[312] Although the Convention rejected the New Jersey Plan,[313] its introduction triggered a heated debate over the proper basis for representation in the Senate.

The larger States argued for proportional representation while the smaller States insisted on equal suffrage. Luther Martin set the

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309 1 FARRAND'S RECORDS, *supra* note 90, at 192–93.

310 James Madison, Notes on the Constitutional Convention (June 9, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 175, 179 (statement of William Patterson); *see also id.* at 176–77 (reporting David Brearley's statement that "[w]hen the proposition for destroying the equality of votes came forward, he was astonished, he was alarmed.").

311 James Madison, Notes on the Constitutional Convention (June 15, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 242, 242.

312 To redress the enforcement problem encountered under the Articles, the Plan would have authorized "the federal Executive . . . to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts" against "any State, or any body of men in any State" who "oppose or prevent ye. carrying into execution such acts." *Id.* at 245.

313 The Convention rejected all attempts to amend rather than replace the Articles of Confederation because the only way to make the Articles effective was to authorize Congress to use military force against States and the delegates wisely rejected this approach. *See* Bellia & Clark, *supra* note 73, at 917–24.

tone by warning "that he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of Va. Massts. And Penna."[314] The subsequent debate was so divisive that it almost caused the Convention to disband. Martin took the position that "he had rather see partial Confederacies take place, than the plan on the table."[315] Delegates from larger States were just as firmly committed to proportional representation, insisting that they "never could listen to an equality of votes" in the Senate.[316] Gunning Bedford responded that the "Large States dare not dissolve the confederation. If they do 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."[317]

Fearing that the Convention might "break up without doing something,"[318] the delegates appointed a Grand Committee to work out a compromise.[319] The resulting report proposed giving each State "an equal vote" in the Senate, and granting the House of Representatives the right to originate "all bills for raising or appropriating money."[320] Madison objected that this proposal did not involve "any concession on the side of the small States."[321] Elbridge Gerry, a member of the Committee, agreed with Madison's point, but explained that he "assented to the Report" in order to avoid secession, "the result [of which] no man could foresee."[322] When delegates from Pennsylvania objected to the report, Martin stated that "[h]e was for letting a separation take place if [the large States] desired it. He had rather there should be two Confederacies, than one founded on any other principle

314 James Madison, Notes on the Constitutional Convention (June 19, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 313, 324. Similarly, when Patterson raised his concerns, 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." James Madison, Notes on the Constitutional Convention (June 15, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 175, 180.

315 James Madison, Notes on the Constitutional Convention (June 28, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 444, 444–45.

316 James Madison, Notes on the Constitutional Convention (June 30, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 481, 490.

317 *Id.* at 492. After this debate, the Convention was deadlocked on the question. *See* James Madison, Notes on the Constitutional Convention (July 2, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 510, 510.

318 *Id.* at 511.

319 *Id.* at 516.

320 James Madison, Notes on the Constitutional Convention (July 5, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 526, 490.

321 *Id.* at 527.

322 *Id.* at 532.

than an equality of votes in the 2d branch at least."[323] In the end, by a vote of five States to four, the Convention narrowly approved the proposed compromise giving the States equal suffrage in the Senate.[324] As Jack Rakove has explained, the resolution of "the prolonged dispute over the Senate[] is usually regarded as the great turning point of the Convention."[325]

The intensity of the debate over the Senate highlights the delegates' core assumption—in conformity with background rules—that whatever compromises they forged in the text would become fixed features of the Constitution. In the end, a majority of the States regarded equal suffrage in the Senate as a nonnegotiable safeguard. Under the Constitution as adopted, the House was designed to represent the people and the Senate was designed to represent the States.[326] Because the Senate had an absolute veto over the adoption of all federal laws, the States (through their representatives in the Senate) could prevent the enactment of any and all laws that threatened their interests. As William Johnson put it, "if the States as such are to exist they must be armed with some power of self-defence."[327] Although Madison had opposed equal suffrage at the Convention, he invoked it during the ratification debates to reassure critics who thought the Constitution would allow the federal government to exercise too much authority at the expense of the States. As he explained in *Federalist No. 62*, "the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[328]

The settlement reached at the Convention regarding the Senate is just one of many substantive and procedural compromises hammered out in the course of drafting an instrument designed to transfer a fixed set of sovereign rights from the States to the federal government.[329] Other compromises included the scope of federal legislative

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323 James Madison, Notes on the Constitutional Convention (July 14, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 90, at 2, 4.

324 James Madison, Notes on the Constitutional Convention (July 16, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 90, at 15, 15.

325 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 58 (1997).

326 In addition to giving the States equal suffrage in the Senate, the proposed Constitution gave the state legislatures the right to appoint Senators.

327 James Madison, Notes on the Constitutional Convention (June 29, 1787), *in* 1 FARRAND'S RECORDS, *supra* note 90, at 461, 461.

328 THE FEDERALIST NO. 62, *supra* note 1, at 417 (James Madison).

329 *See* THE FEDERALIST NO. 14, *supra* note 1, at 86 (James Madison) ("In the first place it is to be remembered, that the general government is not to be charged with the whole

powers, the composition and jurisdiction of the federal judiciary, and the precise procedures required to create each form of supreme federal law (statutes, treaties, and constitutional amendments).[330] In each instance, compromise was required to craft an instrument that would garner the support of not only a majority of the States at the Convention, but also a supermajority of the state ratifying conventions. Thus, as Vicki Jackson has explained, "the entire Constitution of 1787 was in a sense founded on compromises."[331] Reaching these hard-fought compromises was possible only because the background rules governing instruments of this kind required interpreters to give the language ultimately agreed upon its ordinary and customary meaning as of the time of adoption.

Background rules also played an essential role in the ratification process. During the ratification debates, Federalists assured Antifederalists that the Constitution would be interpreted according to established background rules governing instruments used to transfer sovereign rights. Antifederalists opposed the Constitution, in part, because they feared that over time the federal government would usurp more and more of the sovereign rights and powers reserved to the States. Federalists attempted to allay these fears by invoking well-established rules governing the transfer of sovereign rights. For example, Alexander Hamilton emphatically denied that courts would have free rein to expand federal authority at the expense of the States.[332] In a clear reference to the law of nations, he explained 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."[333]

Hamilton also stressed "the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour."[334] This rule, he explained, "is not only a theoretical consequence of that division, but is clearly admitted by *the whole*

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power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.").

330 On the latter point, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

331 Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 997 (2000); *see* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008).

332 *See supra* notes 118–22 and accompanying text.

333 THE FEDERALIST NO. 32, *supra* note 1, at 200, 202–03 (Alexander Hamilton).

334 *Id.* at 203.

tenor of the instrument which contains the articles of the proposed constitution."[335] In other words, Hamilton understood the Constitution and the rules governing its interpretation to be a package deal. Ratification of the former necessarily incorporated the latter. It was impossible to disaggregate the two without defeating the instrument's essential function of transferring only the fixed set of sovereign rights hammered out at the Convention—no more and no less.[336]

Respect for the compromises reached during the lawmaking process is often cited as a compelling reason for adhering to the original meaning of a statute's text.[337] The case for upholding the compromises built into the Constitution is even stronger because its text—understood in historical context—recognized the continued existence of the "States" and sought merely to transfer a fixed subset of their sovereign rights to a new federal government. Under the rules governing the interpretation of such instruments at the Founding, a sovereign state could relinquish its rights only if the instrument alienated them in clear and express terms. Accordingly, the "States" referenced in the Constitution necessarily retained all sovereign rights and powers not transferred in this fashion. As Alexander Hamilton recognized, these background rules were admitted by the whole tenor of the instrument and thus became part and parcel of the Constitution itself. Upon ratification of the Constitution, these rules became the authoritative constitutional law of interpretation.

335 *Id.* (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).

336 Some might object to our claim that the Constitution requires originalism by arguing that we are using a form of originalism to justify originalism. To be sure, many arguments in favor of originalism fall into this category. Our account is somewhat different in that it starts with the indisputable observation that the Constitution was drafted, negotiated, and ratified on the understanding that it was a legal instrument used by the people of the several States to transfer some, but not all, of the States' sovereign rights to a new federal government. Once one acknowledges this historical fact, the nature of the instrument necessarily carries with it a set of rules of interpretation that are inseparable from the instrument itself. There was no such thing as an instrument for the transfer of sovereign rights that allowed the recipient to modify the instrument at will against the grantor(s). Any attempt to take such action would have been regarded as illegitimate. If interpreters seek to preserve the transfer of sovereign rights set forth in the Constitution, then they must employ a form of constitutional interpretation that conforms to the original rules governing such instruments. For this reason, the constitutional law of interpretation is originalism.

337 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–78 (2001).

3. Textualism and Background Rules

Understanding the Constitution to require adherence to the background rules that governed the transfer of sovereign rights raises the question whether this reading is consistent with modern theories of textualism. After all, the Constitution does not explicitly spell out the background rules of interpretation we have identified. Properly understood, however, modern textualism not only requires reading the constitutional text in accord with these rules, but also forbids interpreters from disregarding these rules in order to change or update the meaning of the Constitution. Thus, adherents of textualism should embrace this reading.

Textualists routinely rely on background context to interpret legal instruments. As John Manning has explained, "textualists ask how 'a skilled, objectively reasonable user of words' would have understood the text, in the circumstances in which it was uttered."[338] This inquiry relies heavily on the "context that lies beyond the face of" the enacted text.[339] Thus, textualists give great weight to "semantic context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words."[340] Accordingly, "[t]extualists start with contextual evidence that goes to customary usage and habits of speech."[341] In addition, "under the reasonable-user approach, textualists readily give effect to terms of art—phrases that acquire specialized meaning through use over time as the shared language of specialized communities (legal, commercial, scientific, etc.)."[342] For this reason, textualists seeking to interpret the Constitution readily consult the background law of nations and common law to discern the meaning of specialized constitutional terms and phrases such as "Treaties," "War," "Letters of Marque and Reprisal," "Ambassadors," "Suits at common law," "Grand Jury," and "Trial . . .

338 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 60, 65 (1988)). This discussion emphasizes the view of Dean Manning because he is the leading academic proponent of textualism.

339 *Id.* at 92.

340 *Id.* at 91 (emphasis omitted).

341 *Id.* at 92. Dean Manning notes that based on such context, textualists "believe that a statute may have a clear semantic meaning, even if that meaning is not plain to the ordinary reader without further examination." *Id.*

342 Manning, *supra* note 337, at 112; *see also* Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ." (quoting Morissette v. United States, 342 U.S. 246, 263 (1952))).

by Jury."

In addition, many textualists "draw upon settled background conventions of the legal system, which judges can use to fill in gaps left by the text alone."[343] Dean Manning has explained why this practice is consistent with textualism: "Using such extra-textual conventions, provided that they are firmly established, does not offend textualist premises. A reasonable user of language needs to identify the 'assumptions shared by the speakers and the intended audience.'"[344] Such extratextual conventions have particular relevance when interpreting specialized types of enactments, such as federal tort statutes, federal criminal statutes, and federal statutes of limitations.[345] None of these statutes could be understood properly without resort to "established background norms of general applicability."[346] Such norms are an indispensable part of the context that informs the meaning of the enacted text.

For this reason, textualism "does not confine judges to the four corners of the text (nor could it under the assumptions of modern language theory shared by contemporary textualists)."[347] To the contrary, textualists "believe that statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts."[348] Such conventions can include rules of interpretation, such as the rule of lenity. The meaning of a legal instrument imposing criminal liability is understood to include the rule that interpreters should resolve ambiguities or vagueness in favor of the defendant. A criminal statute thus admits the rule of lenity as if it had been expressly provided by the text. In the same way, legal instruments used (or claimed) to alienate sovereign rights and powers were subject to the rules that all alienations of sovereign rights must be set forth in

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343 Manning, *supra* note 337, at 113.

344 *Id.* (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990)).

345 *See id.* at 114 (explaining that textualists "accept that Congress passes federal tort statutes (such as section 1983) against the backdrop of common law rules of tort law, that it enacts criminal statutes in light of historically applicable norms concerning mental states, [and] that statutes of limitations must be read against the embedded practice of equitable tolling" (footnotes omitted)); *see also* Hallstrom v. Tillamook Cnty., 493 U.S. 20, 27 (1989) ("The running of . . . statutes [of limitations] is traditionally subject to equitable tolling."); Easterbrook, J., *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999) (arguing that criminal statutes are presumptively subject to established common-law defenses even though they do not incorporate them expressly).

346 Manning, *supra* note 337, at 115 (emphasis omitted).

347 *Id.*

348 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003).

clear and express terms and that interpreters must give the text is ordinary and customary meaning as of the time of adoption. These rules were an inextricable part of the meaning conveyed by instruments of this kind.

Thus, textualists should employ these rules to interpret legal instruments used (or claimed) to transfer sovereign rights and powers. Just as criminal statutes cannot be fully understood without consulting background rules drawn from the common law, instruments used to transfer sovereign rights cannot be fully understood without applying background rules drawn from the law of nations. Both are examples of legal instruments that take their meaning, in significant respects, from background rules that govern their interpretation. For this reason, these rules of interpretation also influence the formation and adoption of such instruments. When background rules are well known to skilled, objectively reasonable observers at the time of adoption, these rules provide "an intelligible basis for legislators and the public to identify and evaluate the legislative bargains struck."[349] As the ratification debates show, the Founders used relevant background rules in just this way to understand and evaluate the meaning and effect of the proposed Constitution.[350]

The Constitution's use of the term "State" provides additional support for applying background rules of interpretation to the Constitution. As we have recently explained, the term "State" "was a term of art drawn from the law of nations and typically signified a sovereign nation with a set of widely recognized sovereign rights."[351] The former British Colonies used this term in the Declaration of Independence to signify that—as "Free and Independent States"—they possessed "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."[352] The States continued to employ this term both in the Articles of Confederation and in the Constitution. It is impossible to understand the term "States" in these documents without resort to rules supplied by the law of nations. These rules recognized that all "states" enjoyed a set of well-established sovereign rights, including the rights to diplomacy, security, self-government, territorial sovereignty, neutral use of the high seas, and equal sovereignty with other states.[353] The same rules also recognized that states could use legal instruments

349 *Id.* at 2473.

350 *See supra* notes 118–22 and accompanying text.

351 Bellia & Clark, *supra* note 73, at 838.

352 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis omitted).

353 *See* Bellia & Clark, *supra* note 73, at 847–52.

to adjust their sovereign rights vis-à-vis other states, but only if they did so in clear and express terms (as understood at the time of adoption).

Thus, to ascertain the meaning of the term "States" in the Articles of Confederation, a textualist should start from the premise that the "States" possessed all sovereign rights and powers recognized by the law of nations, and then subtract those rights and powers that the States clearly and expressly alienated by adopting the Articles. One would use the same steps to ascertain the meaning of the term "States" in the Constitution. By abandoning the Articles and adopting the Constitution, the people reinstated their State's original complement of sovereign rights and powers minus only those that were clearly and expressly transferred to the federal government by the latter instrument.[354] In other words, it is possible to understand the meaning of the term "States" in the Constitution only by reference to the background rules that both defined the sovereign rights of states and established the means by which a legal instrument could divest states of their rights. Thus, textualists should regard these background rules as an inextricable part of the legal content communicated by the Constitution.

4. Originalism vs. Nonoriginalism

Once one recognizes that the Constitution admitted the background rules governing instruments claimed to transfer sovereign rights, then it follows that the Constitution itself requires some form of originalism in constitutional interpretation.[355] Of course, there are numerous versions of originalism,[356] including original intent,[357] original

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354 *See id.* at 871 ("Starting from this baseline, the Constitution elsewhere set forth in clear and express provisions the ways in which those States surrendered many of their sovereign rights and powers to the United States as a whole.").

355 For an insightful primer on originalism, see ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017).

356 *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (stating that originalism is "not a single, coherent, unified theory of constitutional interpretation").

357 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971). Judge Bork later embraced original public meaning. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.").

public meaning,[358] original methods originalism,[359] and original law originalism.[360] Although these approaches differ in certain respects, they all seek to fix and constrain constitutional meaning in two essential ways that accord with the background rules. As Professor Larry Solum has explained, originalism generally embraces what he refers to as "The Fixation Thesis" and "The Constraint Principle."[361] The fixation thesis maintains "that the linguistic meaning in context (communicative content) of the constitutional text is fixed at the time each provision is framed and ratified."[362] The constraint principle directs "that the original meaning should constrain constitutional practice."[363] Although there is significant disagreement about the precise mechanics of—and justifications for—originalism, there is broad acknowledgement that if a theory of interpretation does not embrace both fixation and constraint, then it should not be classified as a form of originalism.[364] Thus, as applied to a written constitution like the one adopted by the United States, originalism instructs that "the fixed meaning of that constitution is binding."[365]

These two core features of originalism closely track the basic tenets of the rules of interpretation that govern instruments used to transfer sovereign rights—such as the Constitution. As Vattel explained, at their core, these rules required courts and other interpreters to give the text of such instruments its ordinary and customary meaning as of the time of adoption.[366] Further, these rules forbade courts from using vague or ambiguous provisions to divest states of sovereign rights beyond those clearly and expressly relinquished. Almost all versions of originalism conform to these rules by requiring courts to give the text of the Constitution its customary meaning as of the time it was ratified.

On the other hand, nonoriginalist theories that reject these commitments are incompatible with the rules governing transfers of

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358 The search for original public meaning is often associated with Justice Antonin Scalia. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Larry Solum is one of the leading academic proponents of original public meaning. *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621.

359 *See* McGinnis & Rappaport, *supra* note 262.

360 *See* Sachs, *supra* note 253.

361 Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1249 (2019).

362 *Id.*

363 *Id.*

364 *See id.* at 1245–46.

365 *Id.* at 1266.

366 *See supra* notes 48–50 and accompanying text.

sovereign rights. Although there is no single canonical version of nonoriginalism, prominent versions seem to agree that the meaning of the Constitution is not fixed and that judges are not constrained to follow the original meaning as of the time of adoption. For these reasons, nonoriginalism is sometimes known as "living constitutionalism." For purposes of this discussion, we adopt Professor Solum's understanding that living constitutionalism loosely refers to a cluster of "nonoriginalist constitutional theories that affirm the view that constitutional practice can and should change in response to changing circumstances and values."[367] So defined, living constitutionalism rejects in material respects the fixation thesis and the constraint principle.[368] Because of these differences, "most constitutional theorists seem to understand *originalism* and *living constitutionalism* as opponents."[369]

Justice William Brennan famously explained his vision for a living Constitution in a 1985 speech at Georgetown University.[370] Brennan characterized the differences over how to read the Constitution as a debate "about constraints on what is legitimate interpretation,"[371] but he flatly rejected the notion that interpreters should be limited to the original meaning of the constitutional text.[372] Instead, he believed that courts should update the meaning of the Constitution to take account of changed circumstances. As he put it, "the genius of the Constitution

367 Solum, *supra* note 361, at 1246. Notable versions of living constitutionalism include evolving conceptions of human dignity, *see* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 443 (1986) (arguing that "the demands of human dignity will never cease to evolve"); common-law constitutionalism, *see* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that the Constitution should be interpreted using a common-law method that allows the meaning of the document to evolve over time); and popular constitutionalism, *see* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (arguing that the Constitution can be amended outside the Article V process through acts of popular sovereignty); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that popular opinion can change the meaning of the Constitution).

368 *See* Solum, *supra* note 361, at 1276. We take no position on any versions of living constitutionalism that do not reject originalism's essential elements of fixation and constraint.

369 *Id.* at 1277.

370 Brennan, *supra* note 367.

371 *Id.* at 435.

372 Justice Brennan raised two objections. First, he was skeptical that interpreters could reliably recover original meaning because "[a]ll too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention." *Id.* Second, even if one could ascertain original meaning, Brennan thought it improper to restrict "claims of right to the values of 1789 specifically articulated in the Constitution" because it would "turn a blind eye to social progress." *Id.* at 436.

rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[373] Brennan regarded the amended constitutional text as "a sparkling vision of the supremacy of the human dignity of every individual."[374] His goal of pursuing "human dignity" enabled him not only to find new rights in the Constitution, but also to disregard its express terms when they impeded his vision of human dignity. He also made clear that the living Constitution is ever-changing because "the demands of human dignity will never cease to evolve."[375]

Proponents of living constitutionalism typically advocate using their approach to achieve "liberal" goals, but this approach can just as easily be used to pursue "conservative" ends. For example, Professor Adrian Vermeule has recently argued that "originalism has now outlived its utility, and has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation."[376] In place of originalism, Vermeule would employ what he calls "common-good constitutionalism"[377]—a more robust alternative to "both originalism and left-liberal constitutionalism."[378] Vermeule's alternative is a form of living constitutionalism. As he describes it, this "approach should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution."[379]

All versions of living constitutionalism that reject fixation and constraint—whether used to implement liberal or conservative ends—

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373 *Id.* at 438.

374 *Id.* at 439.

375 *Id.* at 443. Following Justice Brennan's lead, scholars have proposed various forms of living constitutionalism, including common-law constitutionalism, *see* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010), popular constitutionalism, *see* FRIEDMAN, *supra* note 367; 1 ACKERMAN, *supra* note 367; and common good constitutionalism, *see* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022); James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMPAR. L. 515 (2014).

376 *See* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/G43A-HQ6V]; *see also* VERMEULE, *supra* note 375. For a response to Vermeule's rejection of originalism in favor of common good constitutionalism, see William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24 (2022).

377 Vermeule, *supra* note 376.

378 *Id.*

379 *Id.*

contradict the background rules that the Constitution admitted to govern its interpretation. Because these rules became an inseparable part of all instruments used to adjust sovereign rights, such living constitutionalism is incompatible with the Constitution itself. This does not leave interpreters without guidance in hard cases. To the extent that the written Constitution contains "majestic generalities and ambiguities," they were subject to well-established rules of interpretation. As explained, an important default rule was that ambiguous provisions were incapable of altering preexisting sovereign rights.[380] Thus, courts cannot—consistent with these rules—claim the authority of the Constitution to read such provisions to alter the States' preexisting sovereign rights even if doing so would further the judges' conceptions of "human dignity" or other "substantive moral principles that conduce to the common good." Under the Constitution and the interpretive rules that it admitted, once a court exhausts the original meaning of the Constitution's clear and express terms, it must leave the pursuit of such lofty goals to the lawmaking process.[381] The federal government and the States have substantial authority under the Constitution to protect human dignity and govern in accordance with moral principles. The rules of interpretation that govern the Constitution do not permit courts to usurp this authority by updating the Constitution on their own initiative.

Thus, nonoriginalism, whether used for liberal or conservative ends, is incompatible with the law of interpretation embedded in the Constitution. As an instrument used to transfer sovereign rights, the Constitution is incapable of evolving over time on its own. As Hamilton recognized, the rules of interpretation "clearly admitted by the whole tenor of the instrument"[382] prevent judges from treating the

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380 *See supra* notes 58–64 and accompanying text. Justice Brennan was apparently unaware of the background rules governing instruments like the Constitution because he rejected "a presumption of resolving textual ambiguities against the claim of constitutional right." Brennan, *supra* note 367, at 436; *see also id.* ("Nothing intrinsic in the nature of interpretation—if there is such a thing as the 'nature' of interpretation—commands such a passive approach to ambiguity.").

381 Moreover, even if it were theoretically possible for the States to have conferred an evolving or open-ended delegation of power on the federal government, the applicable rules still would have required them to have delegated this power in clear and express terms. The Constitution contains no delegation of this kind. *See* THE FEDERALIST NO. 45, *supra* note 1, at 313 (James Madison) (stressing that the powers transferred to the federal government by the Constitution are "few and defined").

382 THE FEDERALIST NO. 32, *supra* note 1, at 200, 202–03 (Alexander Hamilton). If the Supreme Court were to reject originalism in favor of living constitutionalism, then it is unclear why state courts and other government actors would be bound to follow the Court's

Constitution as a "living" document to be updated as they see fit. Instead, the generalities and ambiguities in the Constitution leave space for the ongoing project of democratic governance. The Constitution gave the federal government numerous important powers in clear and express terms, but left all remaining sovereign rights and powers to the States. The rules of interpretation admitted by the Constitution do not permit interpreters to expand or contract the sovereign rights and powers of either the federal government or the States. Under these rules, any alteration of the Constitution's original division of powers can be made legitimately only through the adoption of another instrument. Thus, if nonoriginalists seek to go beyond the original meaning of the Constitution, they cannot invoke the authority of the Constitution to do so. They must identify a source of authority external to the Constitution itself and then explain why that source takes precedence over the Constitution and the rules that it "admitted" to govern its interpretation.[383]

B. *Residual State Sovereignty Under the Constitution*

A second implication of recognizing that the Constitution admitted background rules governing the transfer of sovereign rights is that the Supreme Court has correctly upheld the residual sovereignty of the States through several prominent doctrines. These doctrines include sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine. The Constitution was an instrument used to transfer some, but not all, of the States' sovereign rights and powers to the federal government. By employing the term "States," the Constitution recognized the continued existence of member States with residual sovereignty. As discussed, "State" was a term of art referring to a free and independent sovereign possessed of all rights and powers that accompanied that status under the law of nations. Such "States" could voluntarily alienate their rights and powers in a legal instrument only by following the rules supplied by the law of nations to govern such instruments. Thus, by referring to the American States

decisions. To be sure, the original meaning of the Constitution suggests that federal courts have power to decide cases with finality and that the Supreme Court is the highest court in the land. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). If one understands the Constitution to be a living instrument, however, it is unclear why the Supreme Court's role would be incapable of evolving along with the rest of the Constitution.

383 For normative arguments requiring adherence to original meaning of the Constitution, *see, e.g.*, Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022). Such arguments would require adherence to, rather than disregard of, the rules of interpretation that were part and parcel of the instrument.

as "States," the Constitution acknowledged their continued existence and possession of all sovereign rights not clearly and expressly alienated by the Constitution. This understanding of the Constitution supports at least three doctrines that uphold the residual sovereignty of the States—state sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine. We have recently discussed these doctrines in detail,[384] so we review them only briefly here.

Before turning to the specific doctrines that the Supreme Court has employed to uphold the States' residual sovereignty, it is worth noting one way in which the shift from the Articles of Confederation to the Constitution permitted greater alienation of the States' sovereign rights and powers. Article II of the Articles of Confederation declared 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."[385] This provision preserved the sovereign rights of the States to the maximum extent possible by ensuring that the Articles could not be read to alienate such rights by implication. The Constitution, by contrast, does not include this limitation. Instead, the Tenth Amendment simply provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[386]

Understood against the background rules supplied by the law of nations, the Tenth Amendment's omission of the term "expressly" permits the Constitution to alienate more sovereign rights than the Articles. Under the law of nations, the default rule was that States could relinquish a sovereign right by adopting a legal instrument that alienated the right either expressly or by unavoidable implication.[387] By declaring that the States retained all sovereign rights not alienated "expressly," the Articles of Confederation arguably foreclosed alienation by unavoidable implication. By omitting this limitation, the Tenth Amendment left the default rules of the law of nations in place. Thus, under the Constitution, the States could relinquish their sovereign rights both expressly and by unavoidable implication.[388]

Alexander Hamilton acknowledged both forms of alienation in

384 *See* Bellia & Clark, *supra* note 73, at 896–940.

385 ARTICLES OF CONFEDERATION of 1781, art. II (emphasis added).

386 U.S. CONST. amend. X.

387 *See supra* notes 58–64 and accompanying text.

388 Another consequence of the omission of "expressly" in the Tenth Amendment, as we have explained elsewhere, was that it ensured Congress could employ incidental means to execute its enumerated powers under the Necessary and Proper Clause. *See* Bellia & Clark, *supra* note 73, at 871 n.170.

defending the Constitution. In *Federalist No. 32*, he explained that because the Constitution involved a "division of the sovereign power,"[389] 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."[390] As discussed, Hamilton regarded this rule as an inseparable part of the Constitution because it "is clearly admitted by the whole tenor of the instrument."[391] Under this rule, the Constitution could be understood to delegate exclusive sovereign authority to the federal government—and thereby deprive the States of residual authority—in only three circumstances. As he put it:

> 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*.[392]

The first two categories are instances in which the States expressly alienated their sovereign rights. The third category involves the alienation of such rights by unavoidable implication.[393]

Although the Constitution thus allowed States to alienate their sovereign rights in circumstances that the Articles apparently foreclosed, Hamilton's third category—in keeping with the law of nations—still acknowledged strict constraints on the alienation of sovereign rights and powers. As he explained, "[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 pre-existing right of sovereignty."[394] Thus, even under the Constitution's more permissive approach (as compared to that of the

389 THE FEDERALIST NO. 32, *supra* note 1, at 200, 203 (Alexander Hamilton).

390 *Id.* at 203.

391 *Id.* at 200.

392 *Id.* These categories tracked the background rules that governed all alienations of sovereign rights and powers under the law of nations. *See supra* notes 13–31 and accompanying text. This third category recited the well-established rule, described by Vattel, 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. 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 223, 233.

393 For an extended discussion of this category, see Bellia & Clark, *supra* note 73, at 883–87.

394 THE FEDERALIST NO. 32, *supra* note 1, at 202 (Alexander Hamilton). Hamilton's approach corresponds to the rules supplied by the law of nations to govern the alienation of sovereign rights. In a "case of doubt," Vattel explained, "the presumption is in favor of the possessor," not the grantee. 1 VATTEL, THE LAW OF NATIONS, *supra* note 11, at 233–34.

Articles), only a total and absolute repugnancy between an explicit constitutional power and the States' retention of a similar power would suffice to alienate state sovereign rights by unavoidable implication.[395]

In the course of this discussion, Hamilton made a broader point about the nature of state sovereignty under the Constitution that supports all three of the Supreme Court's federalism doctrines discussed below. As Hamilton explained, 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."[396] This principle, drawn from the law of nations, explains why the Constitution did not alienate—and thus preserved—the States' rights to sovereign immunity, not to be commandeered, and to equal sovereignty.

1. State Sovereign Immunity

The Supreme Court has long recognized that States generally enjoy sovereign immunity from suits by individuals. All sovereigns possessed such immunity under the law of nations and could voluntarily compromise or relinquish such immunity in a legal instrument only by doing so explicitly. Only two provisions of Article III even arguably satisfied this requirement, and the Eleventh Amendment was quickly adopted to ensure that the judicial power "shall not be construed" to permit such suits.[397] By neutralizing the only provisions in the original Constitution that could have been construed to alienate state sovereign immunity, the Amendment had the effect of restoring the States'

395 There are other potential instances of alienation by unavoidable implication in the Constitution. For example, Article II states that "[t]he President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. Although the text does not specify that this power is exclusive, a similar power in a state governor to be commander in chief of the militia on these occasions would be absolutely and totally contradictory and repugnant to the vesting of that power in the President. Two different governments cannot exercise this power at the same time because there can be only one "Commander in Chief." Another example is the Federal Appointments Clause, which expressly provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. Even though the Constitution does not expressly indicate that this power is exclusive or expressly prohibits the States from appointing federal officers and judges, the grant of this power to the President and Senate carries an unavoidable implication that the States may not exercise the same authority. Allowing the States to appoint federal officers would be "absolutely and totally contradictory and repugnant" to the finely wrought process expressly set forth in the Constitution.

396 THE FEDERALIST NO. 32, *supra* note 1, at 200 (Alexander Hamilton).

397 U.S. CONST. amend. XI.

traditional sovereign immunity from suit by individuals. Following the Civil War, the States adopted the Fourteenth Amendment, which both expressly constrained how States may treat individuals and explicitly empowered Congress to enforce these constraints against States. The Supreme Court has held that Congress may abrogate state sovereign immunity using this express authority, but generally lacks power to do so under Article I. This distinction is consistent with the background rules governing the interpretation of instruments used to transfer sovereign rights.

As we have explained, the ratifiers extensively debated whether the proposed Constitution would permit suits by individuals against States.[398] The Citizen-State diversity provisions of Article III provided that "[t]he judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State, . . . and between a State . . . and foreign . . . Citizens or Subjects."[399] Antifederalists feared that these provisions would be regarded as a clear and express abrogation of state sovereign immunity.[400] Prominent Federalists—including Alexander Hamilton, James Madison, and John Marshall—responded by denying that the language in question was explicit enough to have this effect. In essence, Federalists argued that the word "between" should not be read literally but construed narrowly to authorize suits *by*—but not *against*—States.[401]

Notwithstanding these assurances, the Court in *Chisholm v. Georgia*[402] gave the term its ordinary meaning and permitted a citizen of South Carolina to sue Georgia. As discussed, the Justices all invoked the same rules of interpretation, but disagreed regarding their application. Chief Justice Jay and Justices Blair, Cushing, and Wilson found that Georgia had abrogated its sovereign immunity because the Constitution expressly authorized federal courts to hear suits against a State by citizens of another State.[403] By contrast, Justice Iredell—like Hamilton, Madison, and Marshall—thought that the text of Article III

398 *See supra* notes 130–42 and accompanying text; Bellia & Clark, *supra* note 73, at 899–903; Clark, *supra* note 130, at 1862–70. This discussion addresses only state sovereign immunity from suit by individuals. It is worth noting that Article III clearly and expressly authorized the Supreme Court to hear suits "between States," and this authorization did not generate substantial objection during the ratification period. *See* Clark, *supra* note 130, at 1873.

399 U.S. CONST. art. III, § 2.

400 *See supra* notes 130–42 and accompanying text; Bellia & Clark, *supra* note 73, at 899–900.

401 *See supra* notes 130–42 and accompanying text; Bellia & Clark, *supra* note 73, at 900–03.

402 2 U.S. (2 Dall.) 419 (1793).

403 *See supra* notes 143–60 and accompanying text.

was inadequate to override state sovereign immunity.[404] Although the decision was controversial, the *Chisholm* Court sought to give the text of Article III its ordinary and customary meaning as required by the background rules governing the alienation of sovereign rights.[405]

Of course, the decision was short-lived because Congress and the States quickly adopted the Eleventh Amendment in order to reinstate their preferred construction of Article III. The Amendment declared 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."[406] The Amendment tracks the Citizen-State diversity provisions of Article III and thus does not address suits against States by their own citizens. Commentators sometimes argue anachronistically that the Amendment is irrationally overinclusive or underinclusive because its text bars all suits by out-of-state citizens (including federal question suits) but permits federal question suits by citizens against their own States.[407] Understood against the background rules of interpretation governing transfers of sovereign rights, however, the Eleventh Amendment was precisely tailored to ensure sovereign immunity in all suits by individuals (regardless of citizenship) against States.

To see why, it is necessary to view Article III through the lens of the background rules that governed its interpretation at the Founding. Under these rules, only clear and express constitutional provisions could override the States' immunity from suit by individuals. The Citizen-State diversity provisions of Article III plausibly fit this description. Modern observers sometimes assume that Article III's other grants of jurisdiction—such as federal question and admiralty jurisdiction—could also have been construed at the Founding to authorize suits against States.[408] Unlike the Citizen-State diversity provisions, however, these provisions make no mention—clear or ambiguous—of suits against States by individuals.[409] Accordingly, the Citizen-State diversity provisions were the only provisions of Article III to raise fears during ratification that the proposed Constitution could strip States of sovereign immunity. And because the Citizen-State diversity provisions

404 *See supra* notes 161–66 and accompanying text.

405 *See* Clark, *supra* note 130, at 1879 ("*Chisholm* was arguably the Supreme Court's first major textualist decision.").

406 U.S. CONST. amend. XI.

407 *See* Clark, *supra* note 130, at 1820–21.

408 *See id.* at 1830–32.

409 *Id.* at 1870.

were the only provisions of the original Constitution that plausibly could have been construed to abrogate the States' sovereign immunity from suit by individuals, the Eleventh Amendment fully restored such immunity simply by prohibiting that construction.[410]

Since the Eleventh Amendment's adoption, the Supreme Court has consistently upheld the States' sovereign immunity from suit by individuals with a few notable exceptions.[411] The most significant exception is based on the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*,[412] the Court upheld Congress's power to abrogate state sovereign immunity pursuant to its Section 5 power to enforce the Amendment. The Fourteenth Amendment imposes important restrictions on how States treat persons within their jurisdiction—including prohibitions on abridging privileges or immunities, failing to provide due process, and denying equal protection of the laws.[413] As the Court later explained, "by expanding federal power at the expense of state autonomy, [the Fourteenth Amendment] had fundamentally altered the balance of state and federal power struck by the [original] Constitution."[414] More specifically, the Amendment "contained prohibitions expressly directed at the States" and "expressly provided" that Congress shall have power to enforce those prohibitions.[415] Given these expressions, congressional abrogation of state sovereign immunity pursuant to the Amendment is consistent with the background rules governing the alienation of sovereign rights.

The same cannot be said of abrogation pursuant to Congress's Article I powers. As discussed, the Articles of Confederation expressly authorized Congress to command States to provide revenue and supply troops for the armed forces.[416] This was a clear and express alienation of the States' right not to be commanded by another sovereign. In drafting the Constitution, however, the Founders declined to grant Congress power to command States because they believed that enforcement of such commands could lead to civil war and dissolution of the Union.[417] Instead, they avoided the enforcement problem by

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410 *Id.* at 1900–03.

411 *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890).

412 427 U.S. 445 (1976).

413 U.S. CONST. amend. XIV.

414 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996).

415 *Id.* *See also Fitzpatrick*, 427 U.S. at 455 (stating that federal statutes authorizing suits against States to enforce the Fourteenth Amendment rest on express constitutional "authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment").

416 *See supra* notes 85–86 and accompanying text.

417 *See supra* notes 92–98 and accompanying text.

empowering Congress to raise revenue and raise and support armies on its own by "extend[ing] the authority of the union to the persons of the citizens,—the only proper objects of government."[418]

Modern commentators sometimes argue that Article I's substantive provisions can be read—alone or in combination with the Necessary and Proper Clause—to empower Congress to regulate States as well as individuals.[419] But these provisions are silent regarding federal power to command the States. Under the background rules governing alienation of sovereign rights, silence or even ambiguity does not suffice to override such rights. Nor does Article I—in contrast to Section 5 of the Fourteenth Amendment—grant Congress express power to enforce federal commands against the States. Thus, understood against the applicable background rules, Article I did not empower Congress to abrogate state sovereign immunity.

The Supreme Court reached this conclusion in *Seminole Tribe of Florida v. Florida*,[420] declaring that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[421] In that case, the Court invalidated Congress's attempt to use its commerce powers to authorize suits against States in federal court. In response, Congress authorized individuals to sue States in state court, but the Court again invalidated the attempt in *Alden v. Maine*.[422] Soon thereafter, the Court ruled in *Federal Maritime Commission v. South Carolina State Ports Authority* that States are also immune from suit before federal administrative agencies.[423]

Critics charge that the Supreme Court's decisions in *Alden* and *Federal Maritime Commission* lack a basis in the constitutional text because the Eleventh Amendment restricts federal judicial power but says nothing about state courts or federal administrative agencies.[424] This argument erroneously assumes that the Constitution is the source of the States' sovereign immunity. In fact, sovereign immunity—like all of the States' sovereign rights—predates the Constitution. Thus, the relevant question is not whether the Constitution conferred such rights, but whether it took them away. As discussed, under the

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418 THE FEDERALIST NO. 15, *supra* note 1, at 95 (Alexander Hamilton).

419 *See* Manning, *supra* note 220.

420 517 U.S. 44 (1996).

421 *Id.* at 73.

422 *See* 527 U.S. 706 (1999).

423 *See* 535 U.S. 743 (2002).

424 *See, e.g.*, Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 18–20 (2003); Daniel J. Meltzer, Essay, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1047 (2000); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1664–75 (2000).

background rules governing the alienation of sovereign rights, the Constitution could alienate sovereign rights only to the extent it did so in clear and express terms. Thus, the fact that the Constitution says nothing about state sovereign immunity in state court or before administrative agencies confirms—rather than refutes—the States' preexisting immunity in these venues.[425]

In 2006, the Supreme Court recognized a narrow exception to the general principle that Congress lacks Article I power to abrogate state sovereign immunity. In *Central Virginia Community College v. Katz*,[426] the Court found congressional power to abrogate state sovereign immunity pursuant to the Bankruptcy Clause. The Court accepted the petitioners' observation that "nothing in the words of the Bankruptcy Clause evinces an intent on the part of the Framers to alter the 'background principle' of state sovereign immunity."[427] Nonetheless, the Court found that, "text aside," the bankruptcy power "was understood to carry with it the power to subordinate state sovereignty."[428]

As recently as 2020, the Supreme Court described *Katz*'s analysis as "good-for-one-clause-only" and suggested that it would not find any additional waivers under Article I.[429] A pair of subsequent decisions, however, recognized two additional waivers of state sovereign immunity pursuant to what the Court described as "the plan of the Convention." In *PennEast Pipeline Co. v. New Jersey*,[430] the Court upheld provisions of the Natural Gas Act delegating federal eminent domain power to private companies and authorizing them to sue States to extinguish needed property interests. The Court acknowledged that "the Constitution and Bill of Rights . . . did not include the words 'eminent domain.'"[431] Nonetheless, it found that the negative implication of the Takings Clause of the Fifth Amendment implied such a power. The Court sidestepped *Seminole Tribe*'s prohibition on congressional abrogation under Article I by relying instead on "the plan of the Convention." According to the Court, "[t]he 'plan of the Convention' includes certain waivers of sovereign immunity to which all States

425 *See* Bellia & Clark, *supra* note 73, at 896–97 ("The question is not whether the text of the Constitution affirmatively grants the States sovereign immunity; rather, the question is whether the text expressly withdraws the sovereign immunity traditionally enjoyed by sovereign 'States.'").

426 546 U.S. 356 (2006).

427 *Id.* at 376 (emphasis omitted) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996)).

428 *Id.* at 377.

429 Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

430 141 S. Ct. 2244 (2021).

431 *Id.* at 2255.

implicitly consented at the founding."[432] The Court concluded that this implied consent waived state sovereign immunity in condemnation suits sanctioned by Congress.

The Supreme Court extended this reasoning in *Torres v. Texas Department of Public Safety*.[433] There, the Court held that sovereign immunity did not bar a suit by a former state trooper alleging that Texas violated the Uniformed Services Employment and Reemployment Rights Act by failing to accommodate his service-related disability and rehire him following his military deployment. The Court acknowledged that Congress adopted the Act pursuant to its Article I power to "raise and support Armies."[434] Nonetheless, it found that "the federal power at issue is 'complete in itself,'"[435] and that "the States implicitly agreed that their sovereignty 'would yield to that of the Federal Government so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'"[436]

Although space does not permit full consideration here, the Court's recent decisions in *Katz*, *PennEast*, and *Torres* appear to be inconsistent with background rules governing the alienation of sovereign rights.[437] The States were incapable of "implicitly" relinquishing their sovereign rights unless, as Hamilton explained, they "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant."[438] None of the Court's recent decisions attempted to meet this standard. In *Torres*, for example, the Court found it sufficient that sovereign immunity would merely burden federal military policy. It is undisputed that the Constitution gave Congress express authority to raise and support the armed forces. This grant clearly and expressly alienated the States' prior right to exercise exclusive sovereignty within their borders by enabling Congress to act upon their citizens directly. The Court's conclusion that this grant also abrogated the States' distinct right to sovereign immunity, however, fails Hamilton's test (which itself tracked the law of nations). As he explained, it is not "a mere possibility of inconvenience in the exercise of powers, but [only] an immediate constitutional repugnancy, that can by implication alienate and extinguish a

432 *Id.* at 2258 (emphasis added) (quoting Alden v. Maine, 527 U.S. 706, 755–56 (1999)).

433 142 S. Ct. 2455 (2022).

434 *Id.* at 2463 (quoting U.S. CONST. art. I, § 8, cl. 12).

435 *Id.* (quoting *PennEast*, 141 S. Ct. at 2244).

436 *Id.* (quoting *PennEast*, 141 S. Ct. at 2244).

437 We plan to address these decisions at greater length in future work.

438 THE FEDERALIST NO. 32, *supra* note 1, at 200, 202–03 (Alexander Hamilton) (emphasis omitted).

pre-existing right of sovereignty."[439] Undoubtedly, it would further federal objectives if Congress could subject States to suits for failing to employ injured service members, but the States' possession of sovereign immunity is not "absolutely and totally contradictory and repugnant" to the exercise of federal power in this instance.[440] The federal government has full power under the Constitution to raise armies and meet the needs of veterans with service-related disabilities without the need to authorize suits against the States themselves.

2. The Anticommandeering Doctrine

The Supreme Court's anticommandeering decisions also find support in the background law governing the transfer of sovereign rights. The anticommandeering doctrine provides that the federal government may not commandeer the legislative or executive authority of the States.[441] The sovereign right not to be commandeered by another sovereign was well-established at the Founding.[442] The States alienated this right in the Articles of Confederation by giving Congress clear and express power to make requisitions from the States.[443] In drafting the Constitution, however, the Founders consciously withheld this power from the federal government, primarily because they concluded that it would be too dangerous to enforce.[444] Instead, the Constitution gave Congress power to regulate individuals rather than States.[445] Because the original Constitution contained no clear and express provisions authorizing Congress to commandeer the States, the

439 *Id.* at 202. Hamilton's approach tracks Vattel's approach to the interpretation of legal instruments that sought to alter sovereign rights and powers. *See* Bellia & Clark, *supra* note 73, at 874–75.

440 To find preemption of state authority consistent with the background rules governing the transfer of sovereign rights, "the States' exercise of a given power assigned to federal officials [must] be fundamentally incompatible—or irreconcilable—with its exercise by the federal government." Bellia & Clark, *supra* note 73, at 885; *see supra* notes 392–95 and accompanying text.

441 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819) (rejecting the argument that Congress could rely on state-chartered banks to support the federal government's operations because that course would have required the federal government to rely on "means which it cannot control, [and] which another government may furnish or withhold"); *supra* notes 218–20 and accompanying text (discussing *McCulloch*).

442 *See* Bellia & Clark, *supra* note 73, at 849–51.

443 *Id.* at 918–20.

444 *Id.* at 920–22.

445 *Id.* at 923–31.

Supreme Court has correctly held that the States retained their sovereign right not to be commandeered by the federal government.[446]

3. The Equal Sovereignty Doctrine

Finally, understanding the Constitution in light of the background law of interpretation supports the Supreme Court's recognition that the States enjoy equal sovereignty under the Constitution. When the Constitution was adopted, the Founders understood "Free and Independent States" to possess the right to equal sovereignty under the law of nations.[447] By adopting the term "States," the Constitution acknowledged that the American States continued to possess equal sovereignty unless they alienated it in the instrument itself.[448] Under the background law of interpretation admitted by the Constitution, the States could compromise their right to equal sovereignty only by adopting a constitutional provision that did so in clear and express terms. The original Constitution does not clearly and expressly authorize Congress to override the equal sovereignty of the States.[449] The Civil War Amendments, by contrast, clearly and expressly authorize Congress to differentiate among the States in order to enforce the substantive prohibitions imposed by those Amendments on the States.

The Supreme Court has long recognized that the States are entitled to equal sovereignty under the original Constitution.[450] The issue initially arose in the context of Congress's admission of new States to the Union, but the principle applies more generally.[451] The Civil

446 *Id.* at 931–34.

447 Under the law of nations, "Free and Independent States" were entitled to the "perfect equality and absolute independence of sovereigns." The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812); THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

448 *See* Bellia & Clark, *supra* note 73, at 835.

449 The default rule is that the States enjoy equal sovereignty under the Constitution. This rule is reflected by the States' equal suffrage in the Senate. *See* U.S. CONST. art. I, § 3. When a different rule applies, the Constitution says so in clear and express terms. For example, the Constitution makes clear that the States do not enjoy equality in the House of Representatives or the Electoral College. *See id.* § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

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

451 *See, e.g.*, Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1091 (2016) (concluding that "there is indeed a deep structural principle of equal

War Amendments departed from the original Constitution on this issue. The Thirteenth, Fourteenth, and Fifteenth Amendments established important new restrictions on state action and gave Congress clear and express power to enforce these restrictions against States "by appropriate legislation."[452] By adopting these Amendments, the States expressly compromised their traditional right to equal sovereignty in this context. Accordingly, when Congress acts within the scope of its express powers to enforce the Civil War Amendments, it may of necessity differentiate among the States in order to enforce the relevant prohibitions.[453] On the other hand, when Congress acts outside these express powers, it lacks constitutional authority to override the equal sovereignty of the States.[454]

CONCLUSION

The Constitution cannot be understood without resort to the law of nations. As used in the Constitution, the term "States" was a term of art drawn from such law. The term referred to "Free and Independent States" entitled to all the rights and powers enjoyed by all other sovereign states minus any rights validly relinquished. The law of nations established rules to govern both the formation and interpretation of instruments claimed to alienate sovereign rights. Under these rules, a sovereign "State" could transfer or compromise its rights and powers only by adopting clear and express provisions to that effect in a binding legal instrument. The Constitution was such an instrument. It transferred a fixed subset of sovereign rights from the States to the federal government. Once made, such instruments were to be interpreted according to the customary meaning of their text as of the time of adoption. Any claimed alienation of sovereign rights outside these rules was ineffective, and the rights in question thus remained with the original holder. By its very nature and function, the Constitution—as

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sovereignty that runs through the Constitution"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 288 (1992) ("The Constitution assumes, without ever quite saying so, that the several states are of equal authority.").

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

453 *See* South Carolina v. Katzenbach, 383 U.S. 301, 329, 337 (1966) (upholding the imposition of stricter conditions on some States than others under the original coverage provisions of the Voting Rights Act of 1965 based on "evidence of actual voting discrimination" in violation of the Fifteenth Amendment.).

454 *See* Shelby County v. Holder, 570 U.S. 529, 550 (2013) (invalidating the 2006 extension of the Voting Rights Act because it was not a proper exercise of Congress's power to enforce the Fifteenth Amendment and therefore violated the equal sovereignty of the States).

Hamilton put it—clearly "admitted" these background rules. Not surprisingly, the Supreme Court applied these rules to interpret the Constitution from its earliest days.

Recognizing that the Constitution admitted the background rules governing instruments used to alienate sovereign rights has important implications for constitutional interpretation. First, these rules—and therefore the Constitution—require some form of originalism in constitutional interpretation. The applicable rules required instruments transferring sovereign rights to be set forth in clear and express terms according to their customary meaning as of the time of adoption. Originalism, in one form or another, complies with these requirements, whereas prominent theories of nonoriginalism and living constitutionalism reject them. Second, the constitutional law of interpretation confirms that the Supreme Court has properly upheld the States' residual sovereign rights, including sovereign immunity, the right not to be commandeered by another sovereign, and the right to equal sovereignty with other States. Properly understood, these doctrines are not extraconstitutional innovations, but the result of adherence to the constitutional law of interpretation.