

COMPLETING THE ANTICOMMANDEERING DOCTRINE

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INTRODUCTION

The United States Supreme Court’s anticommandeering doctrine is inconsistent. The Court has held that the federal government lacks the power to compel state legislatures to enact a particular policy.¹ If the federal government wants federal policies enacted, it can enact them pursuant to the limited powers granted to it in Article I of the United States Constitution, a process funded by federal taxpayer dollars.² The Court has also held that the federal government lacks the power to compel state law enforcement officers to enforce federal policies.³ If the federal government wants federal policies enforced, it can enforce them pursuant to the executive powers granted to it in Article II of the Constitution, using institutions and officers funded by federal taxpayer dollars.⁴ Yet, the Court has also held not only that the federal government has the power to compel state courts to hear federal claims,⁵ but also that the default rule is that the Constitution compels state courts to do so.⁶ Thus, if the federal government wants federal claims adjudicated, it does not have to adjudicate them pursuant to the

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1 See *New York v. United States*, 505 U.S. 144, 149, 161 (1992).

2 U.S. CONST. art. I, § 7, cl. 2; *id.* § 8.

3 See *Printz v. United States*, 521 U.S. 898, 935 (1997).

4 U.S. CONST. art. II, § 3.

5 See *Haywood v. Drown*, 556 U.S. 729, 740 (2009).

6 The *Haywood* Court did not explicitly say that States are required to entertain all federal claims. The Court suggested that States are not obligated to do so, but that if they are clearly “competent,” *id.* at 735 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)), which the Court held the New York trial courts were, then they must hear the federal claims. *Id.* at 735–36.

powers granted to it in Article III of the Constitution.⁷ Instead, it can effectively choose to mandate that state courts, funded by state taxpayers, open their doors to hear and decide federal claims.⁸ This Note aims to demonstrate that the current doctrine is both inconsistent, in that it treats the commandeering of state legislatures and executive officers differently than state judiciaries, and likely wrong as a matter of constitutional law, based on the original meaning of the Constitution's provisions. If the anticommandeering doctrine applies to state legislatures and state executive officers, as the Court has correctly held, then it must also apply to state judiciaries.

Part I lays out the Court's current doctrine concerning the federal compulsion of States to carry out federal prerogatives. Part II argues that the doctrine is faithful to the Constitution insofar as it is applied to state policymakers and state law enforcement officers. Part III argues that the doctrine misunderstands the Constitution when applied to state courts, and explains how applying the anticommandeering principle to state courts would make the Court's broader anticommandeering doctrine more consistent and more correct. In other words, by applying the anticommandeering doctrine to the third branch of tripartite state government, the Court would make the anticommandeering doctrine *complete*.

I. THE CURRENT DOCTRINE

A. *Commandeering the States to Make Policies*

In 1992, the Supreme Court decided *New York v. United States*, holding that the federal government cannot command state policymakers to enact regulations on its behalf.⁹ In *New York*, the Court had to decide whether a congressional statute that sought to compel the States to serve as instruments of a federal policy for the disposal of low-level radioactive waste was constitutional.¹⁰ The statute, the Low-Level Radioactive Waste Policy Amendments Act of 1985, created "incentives" for the States to provide for the disposal of such waste generated within their borders.¹¹ The most severe "incentive," the Act's "[T]ake [T]itle" provision, provided that if a State did not provide for such disposal by a specific date, then it would be required, upon request of the generator

7 U.S. CONST. art. III, § 1.

8 See *Haywood*, 556 U.S. at 740–41.

9 *New York v. United States*, 505 U.S. 144, 149, 161 (1992) ("Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161 (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))).

10 *Id.* at 161.

11 See *id.* at 152, 150–52 (citing Pub. L. No. 99-240, 99 Stat. 1842 (1986)).

or owner of the waste, to take title to and possession of said waste.¹² To the extent that a State did not do this, the statute made the State liable for all damages resulting from its failure to do so.¹³

The Court held that the take title provision was unconstitutional because it effectively “commandeer[ed] state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”¹⁴ It emphasized that “States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart.”¹⁵

To reach this conclusion, the Court relied heavily on ratification-era debates. It cited Alexander Hamilton in the *Federalist No. 15*, which argued that the “great and radical vice” in the Articles of Confederation was the principle that the laws of the Confederation Congress would apply to state governments, as opposed to the people in their individual capacities.¹⁶ It also referred to debates in the Constitutional Convention of 1787, with a particular focus on the Convention’s rejection of the New Jersey Plan in favor of the Virginia Plan and the debates surrounding that decision.¹⁷ In addition, it noted that one major objection to the New Jersey Plan was that it might require the federal government to coerce the States into enforcing federal laws.¹⁸ Under the Virginia Plan, on the other hand, Congress would legislate directly upon individuals, rather than upon the States.¹⁹ The Court noted that the Convention’s choice to adopt the Virginia Plan instead of the New Jersey Plan was made clear to the state ratifying conventions.²⁰ It specifically highlighted the words of Connecticut delegate Oliver Ellsworth—who would go on to be the chairman of the committee to establish the federal court system, the chief author of the Federal Judiciary Act of 1789, and the third Chief Justice of the Supreme Court of the United States—in the Connecticut Ratification Convention: “This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. . . . But this legal

12 See *id.* at 153.

13 See *id.* at 153–54.

14 *Id.* at 175.

15 *Id.* at 188.

16 See *id.* at 163 (quoting THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

17 See *id.* at 164–66.

18 See *id.* at 164 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244–45 (Max Farrand ed., 1911)).

19 See *id.* (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 21).

20 See *id.* at 165.

coercion singles out the . . . individual.”²¹ The Court also noted similar messages from Alexander Hamilton and other Convention delegates in their respective state conventions.²² Finally, the Court cited James Madison’s *Federalist No. 39* for the proposition that the Constitution “leaves to the several States a residuary and inviolable sovereignty.”²³

Despite this strong language reinforcing the sovereignty of the States, the Court distinguished federal directives to state legislatures from federal directives to state judges, stating that while the former directive is incompatible with the Constitution,²⁴ the latter directive “is mandated by the text of the Supremacy Clause.”²⁵

B. Commandeering the States to Administer and Enforce Federal Policies

Five years later, in 1997, the Supreme Court decided *Printz v. United States*, holding that the federal government cannot command state officers to carry out federal policies.²⁶ In *Printz*, the Court was tasked with deciding whether a congressional statute that attempted to compel state law enforcement officers to administer and enforce the federal law was constitutional.²⁷ The statute, the Brady Handgun Violence Prevention Act, “command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks.”²⁸ Those tasks included conducting background checks, providing, upon request, ineligible would-be purchasers with a written statement explaining why the purchaser was ineligible to receive the handgun, and destroying all records relating to transfers that the officer did not object to.²⁹ If the officer “knowingly violate[d]” those requirements, he faced fines, imprisonment, or both.³⁰

The Court determined that the Act “direct[ed] state law enforcement officers to participate . . . in the administration of a

21 *Id.* (alterations in original) (quoting 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 197 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co., 2d ed. 1866)); see also William R. Casto, *Oliver Ellsworth*, BRITANNICA, <https://www.britannica.com/biography/Oliver-Ellsworth> [https://perma.cc/E4S7-FEX4] (last visited Feb. 18, 2026).

22 *New York*, 505 U.S. at 165–66.

23 *Id.* at 188 (quoting THE FEDERALIST NO. 39, *supra* note 16, at 245 (James Madison)).

24 See *id.* at 175.

25 *Id.* at 178–79.

26 *Printz v. United States*, 521 U.S. 898, 935 (1997).

27 *Id.* at 902.

28 *Id.*

29 See *id.* at 903–04.

30 *Id.* at 904 (quoting 18 U.S.C. § 924(a)(5) (2018)).

federally enacted regulatory scheme.”³¹ Because those provisions of the Act commandeered state law enforcement officers to do the bidding of the federal government, the Court declared them unconstitutional.³² In concluding its opinion, the Court noted: “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.”³³

As it did in *New York*, the Court once again relied on history in coming to its conclusion. Specifically, it relied on the lack of Founding-era evidence of federal efforts to obligate state executive officers to enforce federal laws.³⁴ In addition, the Court pointed to an early federal statute that sought the States’ assistance in enforcing federal laws. The statute, enacted in 1789, sought the States’ aid in holding federal prisoners.³⁵ Instead of mandating that the States take action, it merely recommended that the state legislatures pass laws providing for the keeping of federal prisoners and offered to pay the States for undertaking the burden.³⁶ When a State refused to do so, Congress responded by authorizing the local federal marshal to rent a temporary jail, rather than by attempting to compel the States to hold the prisoners.³⁷ The Court found this to be evidence that Congress was aware that it could not directly coerce the States to enforce federal laws.³⁸ Though the dissent, written by Justice Stevens, relied on historical examples of state officers enforcing federal law, the Court reasoned that those were examples of voluntary, as opposed to involuntary, state action.³⁹

In addition to historical practice, the Court also grounded its decision in the Constitution’s structure. It reasoned that provisions such as Article IV, Section 3 (prohibition on the involuntary reduction of a State’s territory);⁴⁰ Article III, Section 2 and Article IV, Section 2 (referring to the “Citizens” of a State);⁴¹ Article V (requiring three-

31 *Id.*

32 *See id.* at 933–34.

33 *Id.* at 935.

34 *See id.* at 907–09.

35 *See id.* at 909 (citing Act of Sep. 23, 1789, ch. 27, 1 Stat. 96).

36 *See id.*

37 *See id.* at 909–10 (citing Resolution of Mar. 3, 1791, 1 Stat. 225).

38 *See id.* at 909.

39 *See id.* at 910–11 (“But none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States.*”); *id.* at 945–47 (Stevens, J., dissenting).

40 U.S. CONST. art. IV, § 3.

41 *Id.* art. III, § 2; *id.* art. IV, § 2.

fourths of the States to amend the Constitution);⁴² and Article IV, Section 4 (guaranteeing each state a republican form of government, thus presupposing the continued existence of the states)⁴³ reflect that “the Constitution established a system of ‘dual sovereignty,’” in which the States retained “a residuary and inviolable sovereignty.”⁴⁴ The Court relied on history, including the same Founding-era history it relied on in *New York*, to bolster its conclusion that the Constitution created a government of dual sovereigns, in which both sovereigns—the federal government and the state governments—could act directly on the people, while neither could act directly on the other.⁴⁵ Finally, the Court also interpreted the Constitution’s Necessary and Proper Clause as playing an important role in upholding the Constitution’s structure. It reasoned that no law that violates the well-known structural limitation of dual sovereignty by commandeering a State to carry out federal prerogatives can be “*proper* for carrying into Execution” an enumerated power.⁴⁶

Again, despite the otherwise strong language rejecting the commandeering of state governments by the federal government, the Court distinguished federal directives to state executive officers or legislatures from federal directives to state judges.⁴⁷ In doing so, the Court relied on the “Madisonian Compromise” and the Supremacy Clause.⁴⁸ Specifically, the Court reasoned that the Supremacy Clause could justify requiring state judges to enforce federal law because it explicitly stated that “Judges in every State shall be bound” by federal law.⁴⁹ The Court did, however, acknowledge the possibility that States

42 *Id.* art. V.

43 *Id.* art. IV, § 4.

44 *See Printz*, 521 U.S. at 918–19 (first quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); and then quoting THE FEDERALIST NO. 39, *supra* note 16, at 245 (James Madison)).

45 *See id.* at 919–22 (“As Madison expressed it: ‘[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.’” *Id.* at 920–21 (alteration in original) (quoting THE FEDERALIST NO. 39, *supra* note 16, at 245 (James Madison))).

46 *See id.* at 924, 923–24 (first quoting U.S. CONST. art. I, § 8, cl. 18; and then citing Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993)).

47 *See id.* at 907, 907–08.

48 *Id.* (citing U.S. CONST. art. VI, cl. 2; *id.* art. III, § 1); *see also* WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 9–10 (8th ed. 2025) (describing the Madisonian Compromise).

49 *Printz*, 521 U.S. at 907 (quoting U.S. CONST. art. VI, cl. 2). For what it’s worth, Justice Stevens expressly disavowed this reading of the Supremacy Clause in his dissent. *See id.* at 968 (Stevens, J., dissenting) (“That language commands state judges to ‘apply federal law’ in

could strip their courts of the power to do the type of work that the federal law conscripted them to do.⁵⁰

Thus, by the turn of the millennium, the Court had made the anticommandeering doctrine consistent, as applied to Congress's efforts to compel both state legislatures to make policy and state executive branch officers to carry out federal prerogatives. In both cases, the Court held that the Constitution prohibited Congress from doing so. Yet, in both cases, the Court was careful to distinguish the federal commandeering of state legislatures and executive officers from the federal commandeering of state judiciaries.

C. *Commandeering the States to Hear Federal Causes of Action*

Roughly a decade after *Printz*, the Court decided *Haywood v. Drown*, in which it declined to apply the anticommandeering doctrine to state courts.⁵¹ In *Haywood*, the Court had to decide whether New York state courts were obligated to hear certain federal claims if they lacked jurisdiction over analogous state claims.⁵² Put another way, the Court had to decide if the Constitution mandated that state courts hear federal claims of the type that the State had determined it would not allow its courts to hear. Though New York trial courts, which the State calls its supreme courts, are courts of general jurisdiction, New York stripped those courts of jurisdiction to hear civil actions for damages against state corrections officers.⁵³ This meant that New York general trial courts did not have the power to hear such claims arising from either state or federal law.⁵⁴

Both New York appellate courts below upheld the statute as consistent with the precedents set by the United States Supreme Court in *Mondou v. New York, New Haven & Hartford Railroad Co.*⁵⁵ and *Testa*

cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore.”).

50 See *id.* at 906 (majority opinion) (“It may well be, however, that these requirements applied only in States that authorized their courts to conduct [the relevant type of] proceedings.”).

51 *Haywood v. Drown*, 556 U.S. 729, 740–42, 740 n.7 (2009).

52 *Id.* at 731. The Court attempted to reframe the issue as whether the State could strip its courts of a certain subcategory of claims while hearing other similar claims arising out of the same statute. See *id.* Despite the Court's efforts, the point stands that the statute stripped New York state trial courts of their jurisdiction to hear the category of claims, whether arising out of state or federal law.

53 See *id.* (discussing N.Y. CORRECT. LAW § 24 (McKinney 2025)).

54 See *id.* at 732. New York allowed such claims to be brought against the State in the New York Court of Claims. See *id.* at 733–34.

55 *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912).

v. *Katt*.⁵⁶ In both *Mondou* and *Testa*, the Court held that state courts *with jurisdiction* to hear certain state claims must also hear “the same type” of federal claims.⁵⁷

The United States Supreme Court reversed the New York courts, holding that the New York statute violated the Supremacy Clause because New York was essentially attempting to “nullify a federal . . . cause of action [that it] believe[d] [was] inconsistent with [its] local policies.”⁵⁸ It is unclear exactly what the Court held, other than that the New York statute violated the Supremacy Clause.⁵⁹ The Court appeared to ultimately decide to replace the formal neutrality standard used in *Mondou* and *Testa* with a looser “analogous” actions standard, while also extending the neutrality principle to the motivation behind the rule.⁶⁰

The Court went on to say that a State is “not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy,”⁶¹ and “that the Supremacy Clause cannot be evaded by formalism.”⁶² Unsurprisingly, the majority opinion in *Haywood* was written by Justice Stevens—who wrote the main dissent in *Printz*—and only one Justice, Justice Kennedy, was in the majority for both *Haywood* and *Printz*.⁶³ Notably, though Justice Stevens based the Court’s holding

56 *Testa v. Katt*, 330 U.S. 386 (1947); see *Haywood v. Drown*, 881 N.E.2d 180, 183, 186 (N.Y. 2007) (affirming *Haywood v. Drown*, 826 N.Y.S.2d 542 (N.Y. App. Div. 2006)).

57 See *Mondou*, 223 U.S. at 56–57 (“[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, . . . but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion . . .”); *Testa*, 330 U.S. at 394 (“It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State’s courts. . . . Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners’ claim.” (footnote omitted)).

58 *Haywood*, 556 U.S. at 736.

59 See *id.* at 742.

60 At certain points in the opinion, the Court indicated that New York courts must hear federal damages claims against *corrections* officers because, although they do not hear any state damages claim against corrections officers, they hear “analogous” damages claims against *police* officers under the same federal statute and other “analogous” claims for *equitable relief* against corrections officers. See *id.* at 739–40, 740 n.6. This line of reasoning would suggest that the key thing that makes the New York statute unconstitutional is that New York supreme courts have the power to hear other similar claims. Yet, at other points in its opinion, the Court indicated that any state law promulgated with the intent to “dissociate [the State] from federal law because of disagreement with its content” would not be a neutral jurisdictional rule and thus would violate the Supremacy Clause. *Id.* at 736 (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)). This line of reasoning would suggest that the key thing that makes the New York statute unconstitutional is its *intent* to not provide for the adjudication of disfavored federal claims in its state courts. See *id.* at 740.

61 *Id.* at 740.

62 *Id.* at 742.

63 See *id.* at 730; *Printz v. United States*, 521 U.S. 898, 900–01 (1997).

in *Haywood* on the Supremacy Clause, he made no mention of the provision that “Judges in every State shall be bound” by federal law.⁶⁴ This is unsurprising, considering that he explicitly denounced giving those words any extra weight in the commandeering context in his dissent in *Printz*.⁶⁵

Thus, as the current doctrine stands, state policymakers cannot be obligated to do the work of federal policymakers (make federal policy), and state law enforcement officers cannot be obligated to do the work of federal law enforcement officers (enforce federal policy), but state judges can be obligated to do the work of federal judges (adjudicate federal claims).

This doctrine is inconsistent. Either the federal government can commandeer all three branches of state governments, pursuant to its limited powers, or it cannot force States to do any of its bidding, whether it’s the enactment of federal law, the administration of federal law, or the adjudication of federal causes of action. The fact that only one Justice, Justice Kennedy, sided with the majority in *New York*, *Printz*, and *Haywood* indicates that almost all of the Justices also know this doctrine is inconsistent.⁶⁶ Every other Justice that was on the Court for both *Printz* and *Haywood* voted consistently in those two cases. Justices Stevens, Breyer, Ginsburg, and Souter all voted that the federal government could command state officers to enforce federal laws⁶⁷ and that state courts were obligated to hear federal causes of action that the State did not empower them to hear.⁶⁸ Conversely, Justices Scalia and Thomas voted that Congress could not obligate state officers to enforce

64 See generally *Haywood*, 556 U.S. 729. Those words can be found only in a footnote that quotes the entire Supremacy Clause language. *Id.* at 731 n.2.

65 See *Printz*, 521 U.S. at 968 & n.31 (Stevens, J., dissenting) (“The majority focuses on the Clause’s specific attention to the point that ‘Judges in every State shall be bound.’ That language commands state judges to ‘apply federal law’ in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore.” *Id.* at 968 (citation omitted).).

66 Justice Souter was the only other Justice to vote differently in any of these cases. He joined the majority in *New York*, the dissent in *Printz*, and the majority in *Haywood*. See *New York v. United States*, 505 U.S. 144, 147 (1992); *Printz*, 521 U.S. at 900–01; *Haywood*, 556 U.S. at 730. His dissent in *Printz*, the only case of the three in which he wrote an opinion, explains his vote. There, he explained his belief that *The Federalist No. 27* expressly contemplated that state officials would be “bound by the sanctity of an oath” to enforce federal laws as “auxiliar[ies]” to the federal law enforcement. *Printz*, 521 U.S. at 971–72, 972 n.1 (Souter, J., dissenting) (quoting THE FEDERALIST NO. 27, at 175 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). In a footnote, he explained that the discretionary aspect of policymaking distinguished state legislatures from state executive officers and judges. *Id.* at 972 n.1.

67 See *Printz*, 521 U.S. at 939 (Stevens, J., dissenting).

68 See *Haywood*, 556 U.S. at 730, 740–41.

federal laws⁶⁹ and that the Constitution did not obligate state courts to hear federal causes of action that they do not have the power to decide.⁷⁰ Though Justice Thomas wrote the only dissenting opinion in *Haywood*, the other three dissenting Justices only joined the portion of his opinion arguing that the majority's decision "mischaracterize[d] and broaden[ed]" the Court's precedents.⁷¹

Justice Thomas, writing for himself in dissent, concluded that Founding-era history establishes that States have "plenary authority to decide whether their local courts will have subject-matter jurisdiction over federal causes of action,"⁷² and that "[t]here is no textual or historical support for the Court's incorporation of this antidiscrimination principle into the Supremacy Clause."⁷³ In Justice Thomas's view, the Madisonian Compromise gave Congress the choice of whether to create inferior federal courts, and it also created a presumption that the state courts had concurrent *power* to hear federal causes of action, but it did not impose a *duty* on the state courts to do so.⁷⁴ Viewing the Madisonian Compromise in context, he reasoned that the Convention's rejection of the New Jersey Plan, which would have required state courts to adjudicate federal claims, suggested that the Framers denied the option of obligating state courts to hear federal claims.⁷⁵ He further bolstered this conclusion with early decisions promulgated by Chief Justice John Marshall, Justice Smith Thompson, and Justice Joseph Story, as well as with Chancellor James Kent's influential treatise, *Commentaries on American Law*, each of which contained strong language suggesting that the States could not be coerced into hearing federal claims.⁷⁶ Justice Thomas then criticized the

69 See *Printz*, 521 U.S. at 900, 933. Chief Justice Rehnquist and Justice O'Connor both joined Justice Scalia's majority opinion in *Printz*. *Id.* at 900.

70 See *Haywood*, 556 U.S. at 742, 769–70 (Thomas, J., dissenting). Though Chief Justice Rehnquist and Justice O'Connor were no longer on the bench when the Court decided *Haywood*, both of their successors—Chief Justice Roberts and Justice Alito—were in dissent in *Haywood*. See *id.* at 742.

71 *Id.* at 742, 768.

72 *Id.* at 743.

73 *Id.* at 750.

74 *Id.* at 745–47. Justice Thomas did ultimately conclude that state courts had a duty to hear federal causes of action *if they had proper jurisdiction to hear the claim*. See *infra* note 84 and accompanying text.

75 *Id.* at 747, 744–45.

76 *Id.* at 748–49 (citing *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 821 (1824) (Chief Justice Marshall); *Stearns v. United States*, 22 F. Cas. 1188, 1189 (C.C.D. Vt. 1827–40) (No. 13,341) (Thompson, Circuit Justice); *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice); 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 375, 377 (New York, O. Halsted 1826)). At least one scholar has called Kent's *Commentaries* "the most influential American law book of the antebellum period." John H.

antidiscrimination principle that entered the Court's jurisprudence on the Supremacy Clause in the twentieth century.⁷⁷ He wrote that the Supremacy Clause "provides only a rule of decision that the state court must follow if it adjudicates the claim,"⁷⁸ and that it "does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal- and state-law claims."⁷⁹ Once again, Justice Thomas relied on Founding-era history to support his conclusion, specifically the context surrounding the Convention's adoption of the clause and the debates surrounding the First Judiciary Act.⁸⁰ In addition, Justice Thomas described how a State's decision not to provide a forum for federal causes of action does not impugn the supremacy of federal law. If a state court dismisses a claim without prejudice for lack of jurisdiction, then it never reaches the merits of the case.⁸¹ Without providing a rule of decision on the merits, a state court cannot subordinate federal law to an inferior law, such as state law, which the Supremacy Clause prohibits.⁸² Thus, Justice Thomas explained, States do not violate the Supremacy Clause when they deny their courts the jurisdiction to hear federal claims, even if that denial is solely because of the federal nature of the claims.⁸³ Justice Thomas distinguished the commandeering of state courts from that of state legislatures and law

Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 548 (1993).

77 *Haywood*, 556 U.S. at 750 (Thomas, J., dissenting).

78 *Id.* at 751.

79 *Id.* at 756.

80 *See id.* at 752–55. Justice Thomas described how the Supremacy Clause was adopted after Article III and in response to a proposal to give Congress the power to veto state laws. *Id.* at 751–52. That Congressional veto proposal was rejected, but the Supremacy Clause proposal that followed it was approved. *Id.* at 752. Justice Thomas found that the timing of these proposals "makes clear that the Supremacy Clause's exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the courts lack jurisdiction." *Id.* He explained that this conclusion is further supported by the fact that the Supremacy Clause was initially part of the New Jersey Plan, which had its own separate clause conferring a duty on state courts to hear federal claims. *Id.*; *see also supra* note 75 and accompanying text. Finally, he cited numerous examples of early post-ratification legislative history suggesting that Congress did not believe it had the power under the Constitution to compel state courts to hear federal claims. *Id.* at 754–55.

81 *See id.* at 755–56.

82 *See id.* at 754.

83 *Id.* at 756 ("Accordingly, the superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal- and state-law claims."). The possible exception to this rule would occur if Congress had the legitimate power to mandate a State to hear federal claims and then executed it. Perhaps it could do so under the power granted to it by Section V of the Fourteenth Amendment, which is clear and express enough to abrogate other sovereign rights, such as sovereign immunity. This is an interesting question, but beyond the scope of this Note.

enforcement officers in one key way: He maintained that state courts are compelled to hear federal claims if they possess the power—that is, the jurisdiction—to do so.⁸⁴

II. THE CORRECT DOCTRINE: STATE POLICYMAKERS AND LAW ENFORCEMENT OFFICERS

The Court was right in both *New York* and *Printz*: Congress cannot use state institutions to enact or enforce federal policies. Several scholars, including current Harvard University Provost John Manning,⁸⁵ have criticized the opinions as being overly reliant on the “general purpose[s]” of the Constitution, at an “unhelpful level of generality,” rather than on the original meaning of its text.⁸⁶ Those scholars make a fair point: the Court did not make much of an effort to ground either *New York* or *Printz* in the text of the Constitution.⁸⁷ In *Printz*, as these critics have noted, the Court explicitly said that “there is no constitutional text” addressing whether Congress could commandeer state executive officers.⁸⁸ As outlined above, the Court based its decision mostly on historical practice (or the lack thereof), the original intent of the Constitution’s ratifiers, and the vertical structure of government that the Constitution created.⁸⁹ Yet, other formalist scholars have defended the outcomes in *New York* and *Printz* as faithful to the Constitution’s original public meaning.⁹⁰

84 *Id.* at 757–58 (“[T]he ‘existence of the jurisdiction creates an implication of duty to exercise it” *Id.* at 758 (quoting—with approval—*Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 58 (1912))).

85 See John F. Manning, HARVARD L. SCH., <https://hls.harvard.edu/faculty/john-f-manning/> [<https://perma.cc/2HML-9LE2>] (last visited Feb. 16, 2026).

86 John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2058, 2058–61 (2009) [hereinafter Manning, *Federalism*]; John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 35 (2014) [hereinafter Manning, *Foreword*] (arguing that the Court’s reasoning was “functional” and that it “derived its anticommandeering rule from the broad goals of federalism”); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1299 (2019) (“The decisions in these cases are grounded in abstract notions of constitutional structure, rather than the original meaning of the constitutional text.”).

87 In *New York*, the Court stated that the Tenth Amendment restrains the power of Congress, but then quickly clarified that “this limit is not derived from the text of the Tenth Amendment itself.” *New York v. United States*, 505 U.S. 144, 156 (1992).

88 *Printz v. United States*, 521 U.S. 898, 905 (1997). For examples of critiques of *Printz* that have cited this quote, see Manning, *Federalism*, *supra* note 86, at 2031; Manning, *Foreword*, *supra* note 86, at 34; Colby, *supra* note 86, at 1299.

89 See *supra* Section I.B.

90 See Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 896, 931–32 (2020).

Professors A.J. Bellia and Bradford Clark⁹¹ emphasize that in order to properly interpret the Constitution—especially when determining questions of constitutional federalism—one must first understand the context in which it was written.⁹² After all, even an ardent textualist like John Manning has said that textualism seeks to discern the “meaning of the enacted text, understood in context (as all texts must be).”⁹³ In addition to the text, faithful formalists also interpret the Constitution by considering its history and structure.⁹⁴

A. *The Text*

Constitutional interpretation should always begin with the text, in context.⁹⁵ The dissents in both *New York* and *Printz* argued that the lack of a textual prohibition on commandeering suggests that the federal government, if acting within its enumerated powers, can compel the States to enact and enforce laws on its behalf.⁹⁶ Justice Scalia’s majority

91 See Bradford R. Clark, GW L., <https://www.law.gwu.edu/bradford-r-clark> [<https://perma.cc/A9P8-YWLZ>] (last visited Feb. 16, 2026); Anthony J. Bellia Jr., THE UNIV. OF NOTRE DAME: L. SCH., <https://law.nd.edu/directory/anthony-bellia/> [<https://perma.cc/8R2A-GJLD>] (last visited Feb. 16, 2026).

92 See Bellia & Clark, *supra* note 90, at 842–43.

93 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (“Textualists [interpret the written law] in the way a reasonable person *conversant with applicable conventions* would read the enacted words *in context*.” *Id.* at 438 (emphasis added)).

94 See, e.g., Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1918 (2014) (explaining that Chief Justice Marshall “resorted to ordinary principles of interpretation, using the text, history, and structure of the Constitution,” when interpreting it); Hon. Diarmuid F. O’Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 33 (2015) (“I suggest that the most effective way to ensure the judicial power is exercised legitimately is to employ a methodology that relies on the Constitution’s text, structure, and history as constraining forces. Without such constraints, judges are nothing more than politicians in robes, free to tackle the social problems of the day based on *avant-garde* constitutional theory or, worse yet, their own personal preferences.”).

95 See James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 TEX. REV. L. & POL. 161, 162 (2007) (explaining that when deciding a Constitutional question, one should “always” begin “with the text of the Constitution”); Kavanaugh, *supra* note 94, at 1908 (“[O]ne factor matters above all in constitutional interpretation . . . and that one factor is the precise wording of the constitutional text. It’s not the only factor, but it’s the anchor, the magnet, [and] the most important factor . . .”).

96 *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., concurring in part and dissenting in part) (“Given the scanty textual support for the majority’s position, it would be far more sensible to defer to [Congress].”); *id.* at 211 (Stevens, J., concurring in part and dissenting in part) (“There is no such limitation [against commandeering] in the Constitution.”); *Printz v. United States*, 521 U.S. 898, 944 (1997) (Stevens, J., dissenting) (“There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command

opinion in *Printz* even declared that “there is no constitutional text speaking to this precise question.”⁹⁷ Yet, roughly two decades after *Printz*, when deciding another case involving constitutional federalism, the Court finally acknowledged the critical importance of one particular word in the Constitution: “State[s].”⁹⁸

1. “State[s]”

Professors Bellia and Clark have endorsed this emphasis on the word “State[s],” when reading the Constitution against the backdrop of the Founding.⁹⁹ They explained that “the term ‘State’ as used in the Constitution was a term of art drawn from the law of nations”¹⁰⁰ that “typically signified a sovereign nation with a set of widely recognized sovereign rights.”¹⁰¹ At the time of ratification, the word “State[s]” was used seventy-two times throughout the original Constitution to refer to the individual states that comprise the union.¹⁰² Bellia and Clark suggest that to properly understand what that word meant at the Founding, one must read it in light of the two major national documents that preceded it—the Declaration of Independence and the Articles of Confederation—as well as the contemporary understanding of the law of nations.¹⁰³ In this context, the best reading of the word “State” is a sovereign polity possessing “all of the rights of sovereign states under the law of nations.”¹⁰⁴

In the Declaration of Independence, the colonies declared themselves, for the first time, to be “Free and Independent States:”

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

contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.”); *id.* at 978 (Breyer, J., dissenting) (“[T]he Constitution itself is silent on the matter. . . . Thus, there is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.”).

97 *Printz*, 521 U.S. at 905 (majority opinion).

98 *See* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1494, 1494–95 (2019) (finding that “[t]he Constitution’s use of the term ‘States’ reflects,” *id.* at 1494, an understanding that the States would retain sovereign immunities deriving from the law of nations and the common law, “except as altered,” *id.* at 1495, by the Constitution (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999))).

99 *See* Bellia & Clark, *supra* note 90, at 837–38, 871.

100 *Id.* at 896.

101 *Id.* at 838.

102 *See* U.S. CONST. This number does not include uses of the word when part of the terms “United States,” “foreign State[s],” nor the “State of the Union.” *Id.*

103 *See* Bellia & Clark, *supra* note 90, at 871.

104 *Id.* at 858.

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.¹⁰⁵

Bellia and Clark have explained that the powers to “levy War, conclude Peace, contract Alliances, [and] establish Commerce” derived from the law of nations.¹⁰⁶ Thus, in declaring themselves “Free and Independent States,” the Colonies implicitly declared that they possessed all the rights of sovereign states recognized by the law of nations.¹⁰⁷

This conclusion is bolstered by the debates surrounding the Articles of Confederation and by the final document’s specific text.¹⁰⁸ Specifically, the fact that the Articles bound a State only if it voluntarily adopted them suggests that the States retained all of their sovereignty that they did not expressly surrender in the Articles.¹⁰⁹ In addition, the Articles contained clear text stating that this was the case: “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.”¹¹⁰

This sort of language directly incorporated a core principle of the law of nations: a sovereign state could surrender a sovereign right only in “clear and express terms.”¹¹¹ In the government created by the Articles of Confederation, a State could only surrender a sovereign right if it “expressly delegated” that right to Congress in the Articles.¹¹² In his treatise, *The Law of Nations*, which some scholars have called “the most influential treatise on the law of nations in England and America during the Founding period,” Emmerich de Vattel described the requirements necessary for a sovereign state to surrender any of those rights.¹¹³ Vattel

105 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added).

106 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)).

107 Bellia & Clark, *supra* note 90, at 847, 858.

108 See *id.* at 860 n.124 (providing some “examples of contemporaneous understandings of the Articles of Confederation as a confederation among individual states”).

109 See ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2; 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 925 (Worthington Chauncey Ford ed., 1907) (“These articles shall be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive.”).

110 ARTICLES OF CONFEDERATION of 1781, art. II.

111 1 M. DE VATTEL, THE LAW OF NATIONS, bk. II, § 57, at 140 (London, J. Newbery et al. 1759); see also Bellia & Clark, *supra* note 90, at 852–55.

112 See ARTICLES OF CONFEDERATION of 1781, art. II.

113 See generally 1 VATTEL, *supra* note 111; see also Bellia & Clark, *supra* note 90, at 847 & n.46 (surveying different scholars who have agreed that Vattel’s treatise was the most

defined a sovereign state as any “nation that governs itself . . . without any dependence on a foreign power.”¹¹⁴ Relevant to commandeering, a sovereign had the right to govern itself without the interference of another. As Vattel explained:

It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury. . . . It does not then belong to any foreign power to take cognizance of the administration of this sovereign¹¹⁵

Finally, Vattel explained that the only way in which a sovereign could surrender such a right was by “clear and express terms” in a binding legal document:

After having established . . . that foreign nations have no right to intrude themselves into the government of an independent state, it is not difficult to prove, that this state has a right of refusing to suffer it. To govern itself according to its pleasure, is a necessary part of its independence. A sovereign state cannot be constrained in this respect, except it be from a particular right which the state itself has given to others by treaties; and even in this case, . . . this right cannot be extended beyond the *clear and express terms* of the treaties. Without this circumstance a sovereign has a right to treat as enemies those who endeavour to interfere . . . in his domestic affairs.¹¹⁶

This requirement of clear and express terms is not limited to the sovereign’s right not to have its government intruded upon. It applies to every instance in which a sovereign right is surrendered or diminished.¹¹⁷

influential treatise on the law of nations at the Founding); *id.* at 854–55 (describing requirements for surrendering sovereign rights).

114 1 VATTEL, *supra* note 111, bk. I, § 4, at 10.

115 *Id.* bk. II, §§ 54–55, at 138.

116 *Id.* bk. II, § 57, at 140 (emphasis added).

117 See *id.* bk. II, §§ 301, 305, 308, at 232–35 (explaining that because we favor the party “who seeks to avoid a loss,” *id.* § 301, at 233,—in this case, of a sovereign right—over the party who “endeavours to obtain profit,” *id.*,—in this case, at the expense of the other sovereign’s right—we should interpret the terms “in the most confined sense,” § 308, at 235, especially in cases of “unequal alliances,” § 301, at 233); see also 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*, bk. V, § 15, at 809 (C.H. Oldfather & W.A. Oldfather trans., Clarendon 1934) (1688) (remarking that in cases “connected with a diminution of the sovereign power,” we should interpret an unclear provision to avoid the diminution of the power). Pufendorf’s writings on the law of nations were also influential during the Founding era. See Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 67 (1999) (explaining that in the 1780s and 1790s, American courts cited Pufendorf in their opinions).

Upon signing the Declaration of Independence, it appears that the States viewed themselves as thirteen independent sovereigns, each possessing the right to govern itself without dependence on any other sovereign.¹¹⁸ Upon declaring their independence from Great Britain, the thirteen newly sovereign States set out to enter into an international alliance, or a compact, “for their common defence, the security of their liberties, and their mutual and general welfare.”¹¹⁹ Upon the ratification of this compact, the Articles of Confederation, each State retained all aspects of its sovereignty that it did not “expressly delegate[] to the United States” in the Articles.¹²⁰ Given that obvious language in the Articles, most legal scholars agree that under the Articles, each State retained its sovereignty to the extent that it did not clearly surrender it in the treaty.¹²¹ One such right that it did surrender clearly and expressly in the Articles was the right to govern itself without the interference of another, at least in some instances. Article VIII mandated the “Legislatures of the several States” to lay and levy taxes “within the time agreed upon by” Congress on its behalf.¹²² In addition, Article IX gave Congress the authority to require the States to provide members for the confederation’s military.¹²³ Article XIII further stated that “[e]very State shall abide by the determinations of the United States in Congress assembled.”¹²⁴

Yet, the Articles proved quite unsuccessful, and the States got back together within a few years of their ratification in order to find solutions to their many shortcomings, the most pressing of which were their lack of enforcement power and their lack of power to regulate national

118 See James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 584 (1994) (“During the period that preceded the framing, the states regarded themselves and one another as sovereign states within the meaning of the law of nations . . .”). This is further supported by the fact that “one day after appointing a commission to draft the Declaration of Independence, the Continental Congress set up a separate commission to draft the Articles of Confederation.” Bellia & Clark, *supra* note 90, at 859 & n.120 (citing 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 429–33 (Worthington Chauncey Ford ed., 1906)).

119 ARTICLES OF CONFEDERATION of 1781, art. III; see also Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724 (2011) (book review) (“Thirteen independent and sovereign states came together to form a *treaty* that created a ‘firm league of friendship.’” (quoting ARTICLES OF CONFEDERATION of 1781, art. III) (emphasis added)).

120 ARTICLES OF CONFEDERATION of 1781, art. II.

121 For example, Professor Akhil Amar, who believes that under the Constitution, true sovereignty lies only in the “American People” as a whole, acknowledges that under the Articles, each State retained its sovereign status to the extent it did not expressly surrender it to the Confederacy. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446–47, 1473 (1987).

122 ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 2.

123 *Id.* art. IX, para. 5.

124 *Id.* art. XIII, para. 1.

matters, such as interstate commerce and foreign affairs.¹²⁵ The dysfunctionality of the Articles, especially the Congress's lack of power to enforce its laws,¹²⁶ led many States to "notoriously, repeatedly, and flagrantly" violate them.¹²⁷ Under the law of nations, this material breach of the compact freed all the States from their obligations under it, thus allowing them to withdraw from the confederation and regain their full sovereignty.¹²⁸

The Constitution itself further supports the notion that the States retained their complete sovereignty before surrendering some of it to the Union in the Constitution. Article VII of the Great American Charter clearly contemplates that States could choose not to ratify it and thus remain out of the newly formed Union: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution *between the States so ratifying the Same*."¹²⁹ Thus, if any State did not voluntarily adopt the Constitution, it would have retained its full sovereignty as an independent nation-state. As noted above, under the law of nations, a sovereign state could only lose a sovereign right if it surrendered it in clear and express terms.¹³⁰

To recap, in the Declaration of Independence, the former colonies declared themselves to be "Free and Independent *States*."¹³¹ Then, the Articles of Confederation expressly incorporated the law-of-nations principle that "[e]ach *State* retain[ed] its sovereignty" to the extent that it did not "expressly" surrender it to the Confederation in the Articles.¹³² Then, because the States materially breached the terms of the Articles, which were nothing more than a treaty between thirteen separate sovereign *States*, each State was free to leave the Confederation and regain its full sovereignty. The Constitution itself contemplated that

125 See Bellia & Clark, *supra* note 90, at 862–63; Amar, *supra* note 121, at 1447.

126 See THE FEDERALIST NO. 21, *supra* note 16, at 138 (Alexander Hamilton) ("The next most palpable defect of the existing Confederation is the total want of a Sanction to its laws. The United States as now composed have no power to exact obedience, or punish disobedience to their resolutions . . .").

127 Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1048 (1988); Bellia & Clark, *supra* note 90, at 866 ("[M]ost, if not all, States had violated [the Articles of Confederation] by failing to comply with all of Congress's requisitions.").

128 Bellia & Clark, *supra* note 90, at 866 (citing 1 VATTEL, *supra* note 111, bk. II, § 200, at 190); see Amar, *supra* note 121, at 1448 (explaining how James Madison, in *The Federalist No. 43*, justified abandoning the Articles by arguing it was a failed treaty).

129 U.S. CONST. art. VII (emphasis added). James Madison explicitly endorsed this proposition in *The Federalist No. 39*, stating, "Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act." THE FEDERALIST NO. 39, *supra* note 16, at 244 (James Madison).

130 See *supra* notes 115–16 and accompanying text.

131 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added).

132 ARTICLES OF CONFEDERATION of 1781, art. II.

some “*States*” might remain fully independent sovereigns in the ratification process laid out in Article VII.¹³³ The Founding generation had every reason to be fully aware of the sovereignty-laden meaning of the term “*State*.”

As Professors Bellia and Clark noted, this context indicates that the Constitution used the term *State(s)* to denote “sovereign and independent American States,” consistent with the term’s meaning in the Declaration of Independence and the Articles of Confederation.¹³⁴ Moreover, because the term “*State*” refers to an independent and sovereign state possessing all of the rights of sovereign states under the law of nations, we must read the Constitution so as not to divest states of those rights except by clear and express terms. Thus, as we continue our inquiry into whether the Constitution allows the federal government to compel state institutions and officials to act as federal agents, we “should ask whether the Constitution contains an express provision affirmatively *withdrawing or restricting* a particular aspect of state sovereignty.”¹³⁵

2. The Textual Arguments by the Dissenters in *New York* and *Printz*

The dissenting opinions in both *New York* and *Printz* believed that the federal government could require state legislatures to enact a policy on behalf of the federal government and that it could require state executive officers to administer a federal policy.¹³⁶ Their main textual arguments were as follows: (a) the Constitution contains no express anticommandeering provision; (b) the law in question was within Congress’s power to enact laws that are “necessary and proper for carrying into Execution” a power vested in the federal government by the Constitution;¹³⁷ and (c) the Supremacy Clause, which renders federal laws to be “the supreme Law of the Land,”¹³⁸ combined with the Oaths Clause, which requires state officials to swear to support the

133 See U.S. CONST. art. VII (“The Ratification of the Conventions of nine *States*, shall be sufficient for the Establishment of this Constitution between the *States* so ratifying the Same.” (emphasis added)).

134 See Bellia & Clark, *supra* note 90, at 871.

135 *Id.* at 842.

136 See *New York v. United States*, 505 U.S. 144, 189 (1992) (White, J., concurring in part and dissenting in part); *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting).

137 U.S. CONST. art. I, § 8, cl.18; see, e.g., *id.* art. I, § 8, cl. 3 (power to regulate interstate commerce).

138 *Id.* art. VI, cl. 2.

Constitution,¹³⁹ authorizes the federal government to compel state actors to carry out federal directives.¹⁴⁰

a. The Argument from Silence

As explained above, the argument that the lack of an express anticommandeering provision allows Congress to commandeer the state governments is misguided. Given the Constitution's repeated use of the term "State[s]" and the context in which that text was enacted, the proper assumption is that the federal government cannot divest a State of its sovereign rights, absent clear and express constitutional language to the contrary.¹⁴¹ Furthermore, the right not to have one's government interfered with by that of another state was an established sovereign right under the law of nations at the Founding.¹⁴² Thus, the only way that the States could surrender the right not to be commandeered to the federal government was by clear and express language in the Constitution. As Justice Stevens pointed out, there is no express language concerning commandeering in the Constitution,¹⁴³ unlike in the Articles of Confederation.¹⁴⁴ In the context of the Founding-era

139 *Id.* art. VI, cl. 3.

140 *See New York*, 505 U.S. at 211 (Stevens, J., concurring in part and dissenting in part) ("There is no such limitation in the Constitution."); *Printz*, 521 U.S. at 941 (Stevens, J., dissenting) (arguing that the commerce power, combined with the Necessary and Proper Clause, "is surely adequate to support the temporary enlistment of local police officers" in the enforcement of federal law); *id.* at 943–44 (Because the Supremacy Clause makes federal laws "binding in every State," *id.* at 943, every federal law "establishes policy for the States just as firmly as do laws enacted by state legislatures." *Id.* at 944.); *id.* at 944 (finding that nothing in the Constitution supports the proposition that state officials cannot be commandeered by Congress); *id.* at 971–72 & 972 n.1 (Souter, J., dissenting) (determining that the Supremacy Clause imposes on state officers the duty to carry out federal law, if enlisted to do so); *id.* at 978 (Breyer, J., dissenting) ("[T]he Constitution itself is silent on the matter.").

141 *See supra* subsection II.A.1.

142 *See supra* note 115 and accompanying text.

143 *See Printz*, 521 U.S. at 944 (Stevens, J., dissenting).

144 The Articles had multiple provisions expressly declaring that Congress could require the States to enact and administer policies for the Confederacy, plus another provision stating 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." ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1; *see supra* notes 122–124 and accompanying text. Despite this clear language, the Articles did not contain an express provision giving Congress the power to sanction States that violated Congress's commands. *See supra* note 125 and accompanying text. Because of this, Congress did not try to impose such a sanction, though James Madison proposed amending the Articles to "express[ly]" give Congress such a power. *See Bellia & Clark, supra* note 90, at 919 (citing AMENDMENT TO GIVE CONGRESS COERCIVE POWER OVER THE STATES AND THEIR CITIZENS (1781), *reprinted in* 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 141–42 (Merrill Jensen ed., 1976)).

understanding of the law of nations, this constitutional silence settles the matter in favor of the States.¹⁴⁵

b. The Necessary and Proper Clause + a Vested Federal Power

The main dissent in *Printz*, written by Justice Stevens, argued that Congress's power to regulate interstate commerce,¹⁴⁶ combined with its power to make laws that are "necessary and proper for carrying into Execution" the interstate commerce power,¹⁴⁷ gave Congress ample authority to direct state officers to administer federal law.¹⁴⁸ For the Necessary and Proper Clause to divest the States of their sovereign right "not to have their governmental functions commandeered by another sovereign," it must do so in clear and express language.¹⁴⁹ The language of the clause on its face, the history of the Court's construction of the clause, and scholarship from some of America's greatest legal scholars all indicate that the clause fails to meet this clarity requirement.

First, the clause contains a clear qualification on Congress's power to pass laws for carrying into execution the federal government's delegated powers: those laws must be "necessary and proper."¹⁵⁰ Professor Gary Lawson and Patricia Granger have argued that the word "proper" restricts Congress from passing laws that, among other things, "infringe on the retained rights of the states."¹⁵¹ In *Printz*, Justice Scalia cited Lawson and Granger's article for the proposition that any executory law that violates the core constitutional "principle of state sovereignty" is not *proper*, so Congress lacks the power to enact such a law.¹⁵² Both the article and Justice Scalia cited *The Federalist No. 33* to support this reading of the Necessary and Proper Clause.¹⁵³ There, Alexander Hamilton wrote:

The *propriety* of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, *would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?* Suppose, again, that upon the

145 See 1 VATTEL, *supra* note 111, bk. II, §§ 57, 301, 305, 308, at 140, 232–35.

146 U.S. CONST. art. I, § 8, cl. 3.

147 *Id.* art. I, § 8, cl. 18.

148 *Printz*, 521 U.S. at 941 (Stevens, J., dissenting). Professor Manning agrees with the dissent on this point. See Manning, *Foreword*, *supra* note 86, at 33–39, 62–67.

149 See Bellia & Clark, *supra* note 90, at 888.

150 U.S. CONST. art. I, § 8, cl. 18.

151 Lawson & Granger, *supra* note 46, at 271.

152 *Printz*, 521 U.S. at 924, 923–24 (majority opinion).

153 *Id.*; Lawson & Granger, *supra* note 46, at 299.

pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; *would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments?*¹⁵⁴

In this passage, Hamilton clearly argues that federal interference with state sovereign functions is improper, even if Congress attempts to justify it, through a “forced construction[] of its authority,” as necessary to carry out an enumerated power, such as the taxing power.¹⁵⁵

Second, the Court’s early jurisprudence severely undermines the argument that the Necessary and Proper Clause gives Congress the power to commandeer the States, even if such an act would otherwise carry into effect another federal power. In *M’Culloch v. Maryland*, which many have called “one of the most famous Supreme Court decisions in history,”¹⁵⁶ the Court decided that Congress had the power to establish a national bank in order to carry into execution its enumerated powers to tax, borrow money, regulate interstate commerce, declare and conduct war, and maintain the military.¹⁵⁷ Writing for the Court, Chief Justice John Marshall determined that Congress could do so under the Necessary and Proper Clause, because the creation of the bank was “appropriate, . . . plainly adapted to that end [of carrying into execution said enumerated powers], . . . not prohibited [by the Constitution], [and] consist[ent] with . . . the constitution.”¹⁵⁸ Critically, the Court distinguished the power to charter the national bank from the power to command the States to maintain a bank on its behalf. In rejecting the argument that Congress could rely on state banks to do so, Chief Justice Marshall said:

154 THE FEDERALIST NO. 33, *supra* note 16, at 203–04 (Alexander Hamilton) (emphases added).

155 *Id.* at 204. This passage perfectly aligns with Bellia & Clark’s view that the Constitution did not divest the States of their sovereign rights except where it did so in clear and express terms (or by unavoidable implication). See Bellia & Clark, *supra* note 90, at 875. A State’s sovereign right to exclusively govern its local affairs, such as matters of local property law, could not be surrendered absent clear and express constitutional language stating so. Hamilton appears aware of this, as he writes that the federal government would not have the power to “vary the law of descent in any State,” as this would “infringe[] upon [the power] of the State[.]” See THE FEDERALIST NO. 33, *supra* note 16, at 204 (Alexander Hamilton).

156 See, e.g., Steven Gow Calabresi, Elise Kostial & Gary S. Lawson, *What McCulloch v. Maryland Got Wrong: The Original Meaning of “Necessary” is Not “Useful,” “Convenient,” or “Rational”*, 75 BAYLOR L. REV. 1, 23 (2023).

157 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 422–25 (1819).

158 *Id.* at 421, 424. The Court’s opinion used broader language to define “necessary” elsewhere: “we find that [“necessary”] frequently imports no more than that one thing is convenient, or useful, or essential to another.” *Id.* at 413.

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. . . . [O]n [federal] means *alone* was [the federal government] expected to rely for the accomplishment of its ends. To impose on it 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.¹⁵⁹

Notice Chief Justice Marshall's basic assumptions here: The federal government was not expected to rely on the States to carry out federal law. *The federal government cannot control the States*. The States are distinct governments from the federal government. The States may voluntarily choose to enforce federal law, but *they may also choose not to*. Roughly two decades after *M'Culloch*, the Court once again interpreted the Necessary and Proper Clause broadly and once again stated that it did not give Congress the power to compel the States to enforce federal law.¹⁶⁰ In *Prigg v. Pennsylvania*, in an opinion written by Justice Joseph Story, the Court held that the Necessary and Proper Clause gave Congress the power to carry into execution constitutional provisions that did not even vest a power in the federal government.¹⁶¹ This was a much more expansive reading of the clause than Chief Justice Marshall gave it in *M'Culloch*, where at least he tied the clause to vested federal powers.¹⁶² Despite this expansive construction of the clause, the *Prigg* Court explicitly stated that "[t]he states cannot . . . be compelled to enforce [federal laws]."¹⁶³ The Court added that "it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution."¹⁶⁴

Third, many of the nation's most distinguished originalist legal scholars have concluded that the Necessary and Proper Clause limits the types of laws Congress can enact to carry into effect constitutionally

159 *Id.* at 424 (emphases added); see Bellia & Clark, *supra* note 90, at 893.

160 See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615–16 (1842).

161 See *id.* at 619. The Necessary and Proper Clause grants Congress the power only "[t]o make all Laws which shall be necessary and proper for carrying into Execution *the foregoing Powers*, and *all other Powers vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphases added).

162 See *M'Culloch*, 17 U.S. at 407, 421.

163 *Prigg*, 41 U.S. at 615.

164 *Id.* at 616.

vested federal powers.¹⁶⁵ Many of these scholars disagree over the precise meaning of the clause, and some have even written that it essentially serves as a textual hook for a structural limitation on Congress's ability to interfere with the Constitution's separation of horizontal powers between the three departments and also of vertical powers between the federal government and the States.¹⁶⁶ Regardless of who is ultimately right in this debate, the existence of the debate itself strongly undermines the idea that the Necessary and Proper Clause *clearly and expressly* strips States of their sovereign rights that Congress may seek to override as a means of implementing federal powers.

To conclude the discussion about the Necessary and Proper Clause: the text of the clause on its face, the Court's early jurisprudence construing it, and the extensive debate among many of the nation's brightest originalist scholars concerning its meaning make it implausible that the clause "clear[ly] and express[ly]" divested the States of their sovereign right not to have their governmental functions commandeered by another government, as required by the law of nations.¹⁶⁷

165 See, e.g., Lawson & Granger, *supra* note 46, at 271 (concluding that requirement that executory laws be "proper" restricts Congress from passing such laws that "infringe on the retained rights of the states"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 819–20 (1996) (agreeing with Lawson & Granger and suggesting that most of Congress's laws that do violence to federalism are enacted pursuant to and should be constrained by the Necessary and Proper Clause); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 284–85 (2004) (suggesting that the term was a standard clause in agency instruments addressing the incidental powers of agents to carry out express powers); Samuel L. Bray, "Necessary and Proper" and "Cruel and Unusual": *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016) (suggesting that "necessary and proper" is a hendiadys—a single complex expression formed by the two terms—that "invoked a general principle of incidental powers," *id.* at 692); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013) (also arguing that the clause authorized minor or incidental powers, but not great powers); Calabresi et al., *supra* note 156, at 4–6 (suggesting that *M'Culloch* interpreted "necessary" too broadly and advocating for a narrower interpretation).

166 Compare Lawson & Granger, *supra* note 46, at 271–72 ("The Sweeping Clause . . . serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights."), and Gardbaum, *supra* note 165, at 813 n.64 (suggesting that the clause "imposes an independent constitutional constraint in the name of federalism on Congress's power"), with Bray, *supra* note 165, at 761 (disagreeing with the notion that "proper" holds any independent substantive weight, but suggesting that an incidental powers analysis could do much of the same work).

167 See *supra* notes 115–16 and accompanying text.

c. The Supremacy Clause and the Oaths Clause

Another argument proffered by the dissenters in *Printz* is that because, under the Supremacy Clause,¹⁶⁸ federal statutes “establish[] policy for the States just as firmly as do [state] laws,” and under the Oaths Clause, state officials are “bound by Oath or Affirmation[] to support [the] Constitution,”¹⁶⁹ state officials must enforce federal law if it directs them to do so.¹⁷⁰ Neither clause does the work that the dissents think it does.

The Supremacy Clause does not serve as a standalone power for the federal government. The Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁷¹

In a popular article about the Supremacy Clause, Professor Caleb Nelson noted that the clause is the Constitution’s way of saying that federal laws preempt state laws.¹⁷² By clearly and expressly stating that federal laws apply in state courts and that federal laws prevail over state laws, the clause “establishes a rule of decision for courts resolving conflicts between state and federal law.”¹⁷³ Though it clearly and expressly mandates that state courts adhere to this rule of decision, the Supremacy Clause is silent on federal commands directed at state institutions. Under the law of nations, such language would not be adequate to divest the States of their preexisting “sovereign right to control their governmental institutions free from interference by another sovereign.”¹⁷⁴

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

169 *Printz v. United States*, 521 U.S. 898, 943–944 (Stevens, J., dissenting) (quoting U.S. CONST. art. VI, cl. 3).

170 See *id.* at 943–44, 968; *id.* at 971–73 (Souter, J., dissenting).

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

172 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234–35 (2000).

173 Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1688 (2008); see also Bellia & Clark, *supra* note 90, at 929 n.481 (“The Constitution contains a clear and express provision—the Supremacy Clause—establishing a rule of decision but contains no provision clearly and expressly authorizing enforcement of federal commands against States.”); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 144 (detailing how constitutional legislative history suggested the Supremacy Clause merely provided a rule of decision); *RAOUL BERGER, CONGRESS V. THE SUPREME COURT* 223–25, 245 (1969) (same).

174 Bellia & Clark, *supra* note 90, at 925.

The Oaths Clause does not give the federal government power to commandeer state officials either. The clause provides:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.¹⁷⁵

Again, the Oaths Clause says nothing about the federal government's power to compel state institutions or officials to implement federal programs on its behalf. And under the law of nations, this silence indicates that the federal government lacks the power to do so.¹⁷⁶ The binding promise to support the Constitution cannot imply a binding commitment to enforce unconstitutional laws.¹⁷⁷ Executives have refused to enforce unconstitutional laws before, with perhaps the most famous example being Thomas Jefferson's refusal to enforce the Alien and Sedition Acts.¹⁷⁸ And even if the Oaths Clause could imply a duty to enforce unconstitutional laws, under the law of nations, a State was incapable of surrendering a sovereign right by implication.¹⁷⁹

In short, by using the legal term of art "States" to refer to the nation's local governments, the Constitution recognized their sovereignty. Under the law of nations, a sovereign state could only surrender its sovereign rights through clear and express language in a binding legal document. Because the Constitution does not contain clear and express language divesting the States of their right not to be commandeered, the best reading of the text is that the States retain this right.

B. The History

This textual argument is bolstered by the historical understanding of the federalist system surrounding the Constitution's ratification and by the nation's practices in its first few decades.

175 U.S. CONST. art. VI, cl. 3.

176 See *supra* notes 115–16 and accompanying text.

177 Indeed, Professor Sai Prakash believes that the Oaths Clause requires state officers to swear to support the Constitution, but not federal law. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2001 n.231 (1993).

178 See J. Randy Beck, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 430 (1999) (book review) (citing Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43–44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904)).

179 See Bellia & Clark, *supra* note 90, at 855.

1. The Historical Understanding of the Federalist System

The Articles of Confederation expressly allowed Congress to commandeer the States.¹⁸⁰ That said, the Articles did not provide a mechanism to enforce this power.¹⁸¹ At the Constitutional Convention, Edmund Randolph proposed the Virginia Plan, which would initially have given Congress the power to commandeer the States and enforce compliance against them through federal force.¹⁸² The delegates squarely rejected this aspect of the proposal, with George Mason arguing “very cogently” that the federal government could not punish the States in their collective capacities, so the federal government would need to be able to “directly operate on individuals.”¹⁸³ James Madison, who initially supported the use of force against the States,¹⁸⁴ soon changed his mind.¹⁸⁵ “The use of force [against] a State,” he reasoned, “would look more like a declaration of war, than an infliction of punishment”¹⁸⁶ This line of thinking is consistent with Hamilton’s in *The Federalist*.¹⁸⁷

The rest of the delegates ultimately shared Hamilton and Madison’s view, as they rejected William Paterson’s New Jersey Plan in favor of a revised version of the Virginia Plan.¹⁸⁸ The New Jersey Plan proposed continuing the Articles, but with a provision empowering Congress to use force to compel the States to comply.¹⁸⁹ The delegates ultimately adopted a version of the Virginia Plan that no longer contained any references to coercing the States in their governmental capacities.¹⁹⁰ In

180 *Id.* at 918.

181 *See id.* at 918–20; Prakash, *supra* note 177, at 1963 (“Even where the Articles appeared to bestow on the federal government a ‘right’ or an ‘authority,’ those rights and authorities were exercised at the sufferance of the states.”).

182 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 20–21 (“Resolved that [Congress] ought to be impowered . . . to call forth the force of the Union [against] any member of the Union failing to fulfill its duty under the articles thereof.” *Id.* at 21).

183 *Id.* at 34.

184 *See* Bellia & Clark, *supra* note 90, at 919–20.

185 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 54 (“Mr. (Madison), observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually.”).

186 *Id.*

187 *See* THE FEDERALIST NO. 15, *supra* note 16, at 109 (Alexander Hamilton) (stating that “the persons of the citizens” are “the only proper objects of government”); *id.* at 110 (explaining that because laws against the States would have to be enforced “by the sword,” “every breach of [such] laws must involve a state of war,” and observing that “[s]uch a state of things can certainly not deserve the name of government”).

188 *See* Bellia & Clark, *supra* note 90, at 922–23.

189 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 245.

190 *See* Bellia & Clark, *supra* note 90, at 922.

a letter confirming that Madison did not believe the Constitution empowered the federal government to commandeer the States' governments, Madison told fellow Virginian Thomas Jefferson that the delegates "generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States."¹⁹¹ He explained that the experience under the Articles confirmed that the federal government could not rely on the States to voluntarily observe federal law, but that compelling the States to do so would require force and resemble "much more a civil war than the administration of a regular Government."¹⁹² "Hence," Madison continued, the delegates decided on a "Government which[,] instead of operating[] on the States, should operate without their intervention on the individuals composing them."¹⁹³

2. Early Historical Practices

Faced with few examples of the federal government compelling state law enforcement officers to enforce federal law, critics of the Court's anticommandeering decisions have pointed to historical examples of state officers enforcing federal law. In his dissent in *Printz*, Justice Stevens pointed to examples of Congress "rely[ing] on state judges and the clerks of state courts to perform a variety of executive functions."¹⁹⁴ The majority responded by arguing that judges are different because of the Madisonian Compromise and the Supremacy Clause,¹⁹⁵ though it did qualify this statement by adding that state courts might need to already have state-conferred jurisdiction to conduct the work in question in order to be bound by the federal command.¹⁹⁶ The

191 See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131 (Max Farrand ed., 1911).

192 *Id.* at 132, 131–32.

193 *Id.* at 132; see also Bellia & Clark, *supra* note 90, at 927 & n.466 (providing examples of ratification-era evidence that people understood the Constitution as not being able to commandeer the functions of state governments); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1856–62 (2010) (same); *New York v. United States*, 505 U.S. 144, 164–66 (1992) (same). Due to its limited scope, this Note does not provide much coverage of the excerpts of *The Federalist Papers* that scholars and judges have used to support Congress's power to commandeer the States. For such arguments from scholars, see generally Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013); see also Prakash, *supra* note 177; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 661–63 (1993). For responses to those scholars, see Bellia & Clark, *supra* note 90, at 924–31; see generally Collins, *supra* note 173.

194 *Printz v. United States*, 521 U.S. 898, 949, 949–53 (1997) (Stevens, J., dissenting).

195 *Id.* at 907 (majority opinion).

196 *Id.* at 906 ("It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings.").

majority's distinction between executive officers and judges rests on a misreading of the Supremacy Clause. Part III takes up that argument.¹⁹⁷

Professor Michael Collins, relying on Founding-era history, has suggested that federal use of state officials was subject to state refusal.¹⁹⁸ When the States chose not to comply, judges generally upheld such decisions as valid.¹⁹⁹ Professor Josh Blackman has agreed with Collins, finding that the federal statutes could not be enforced “against the consent of the states.”²⁰⁰ To the extent that the States enforced the federal rules, they did so *voluntarily*. This would be consistent with Professor Collins's finding that the States' concern was the feared loss of state power (due to federal officials carrying out duties state officials were accustomed to), not about being asked to enforce federal laws.²⁰¹ *Prigg* provides strong support for Professors Collins's and Blackman's conclusions about voluntary enforcement. There, the Court explicitly stated that “[t]he states cannot . . . be compelled to enforce [federal laws].”²⁰²

Another (much earlier) Supreme Court case that supports the idea that States retained the sovereign rights that they did not expressly surrender in the Constitution is *Chisholm v. Georgia*.²⁰³ In *Chisholm*, a majority of the Court read the citizen-state diversity provision in Article III, Section 2, Clause 1²⁰⁴ of the Constitution to divest the States of their sovereign right not to be sued by citizens of other States without their consent.²⁰⁵ All five Justices on the bench asked whether the States had clearly and expressly surrendered their sovereign immunity from such suits in the Constitution,²⁰⁶ an interpretive approach that is consistent

197 See *infra* Part III.

198 See Collins, *supra* note 173, at 140–43.

199 See Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2053–57 (describing early federal naturalization laws and instances of voluntary state compliance and successful state refusals).

200 See *id.* at 2054 (emphasis omitted) (quoting *United States v. Jones*, 109 U.S. 513, 520 (1883)).

201 See Collins, *supra* note 173, at 141 (“[T]he debate was over the feared loss of state power, not over their duties—other than that of ‘support[ing] the Constitution’ and following federal norms in the judicial administration of state law.”).

202 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615, 615–16 (1842).

203 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

204 “The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . .” U.S. CONST. art. III, § 2, cl. 1.

205 See *Chisholm*, 2 U.S. at 450–52 (opinion of Blair, J.); *id.* at 466 (opinion of Wilson, J.); *id.* at 469 (opinion of Cushing, J.); *id.* at 476 (opinion of Jay, C.J.).

206 See *id.* at 449–50 (opinion of Iredell, J.); *id.* at 450 (opinion of Blair, J.); *id.* at 466 (opinion of Wilson, J.); *id.* at 467 (opinion of Cushing, J.); *id.* at 476 (opinion of Jay, C.J.); Bellia & Clark, *supra* note 90, at 907. Relevantly, Justice Iredell explicitly stated he was using rules of interpretation derived from the law of nations, while Justice Wilson explicitly stated that

with the law of nations.²⁰⁷ Though all five Justices based their decisions on whether they believed the citizen-state diversity provision was clear enough to strip the States of their sovereign immunity from suits, at least against citizens from other States, only Justice Iredell explicitly invoked the law of nations, and only Justice Iredell found that the provision was not clear enough to do so.²⁰⁸ Though Justice Iredell was in the minority in the Supreme Court, he found himself in the majority in the United States. Two years after *Chisholm*, the United States ratified the Eleventh Amendment,²⁰⁹ which, whatever one's views on its meaning, definitely overturned *Chisholm*.²¹⁰ Under the law of nations, because the citizen-state diversity provision was the only clause that could have been understood to clearly and expressly divest the States of their sovereign immunity from suit by individuals, the Eleventh Amendment fully restored the States' sovereign immunity from suits brought by individuals in federal court.²¹¹ This swift public reaction to *Chisholm* further supports Professors Bellia and Clark's claim that under the Constitution, States retain all sovereign rights that they did not clearly and expressly surrender to it.

C. The Structure

On top of the Constitution's text and the United States' early history, the Constitution's structure also suggests that the federal government cannot commandeer the States' governmental functions. For the purposes of federalism, the Constitution's structure is informed principally by the following provisions: Article I, Section 1; Article VII; Article V; the Tenth Amendment; and the Eleventh Amendment.²¹²

he did not believe the law of nations applied because the States and the federal government formed one nation. See *Chisholm*, 2 U.S. at 449 (opinion of Iredell, J.); *id.* at 453 (opinion of Wilson, J.).

207 See *supra* notes 115–16 and accompanying text.

208 See *Chisholm*, 2 U.S. at 449–50 (opinion of Iredell, J.).

209 The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

210 Compare Amar, *supra* note 121, at 1473–74 (stating that the amendment was "undeniably," *id.* at 1473, designed to overrule *Chisholm*, but that the Court's sovereign immunity jurisprudence stemming from it is "nonsense," *id.*), with Bellia & Clark, *supra* note 90, at 908–09, 912–13 (suggesting that, in overruling *Chisholm*, the Eleventh Amendment restored state sovereign immunity from citizen suits by clarifying the only provision in the Constitution that could have possibly been construed as a clear and express surrender of this immunity).

211 See Bellia & Clark, *supra* note 90, at 912–13.

212 These are not the only provisions in the Constitution that inform the structure of government that it creates. There are many other clauses within the document that might

The first clause in the first Article of the Constitution says: “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”²¹³ Scholars have suggested that the phrase “*herein granted*,” which is not found in the Article II or Article III vesting clauses, limits Congress’s powers to only those which are enumerated in Article I.²¹⁴ This reading is consistent with Madison’s words in *The Federalist No. 45*, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”²¹⁵ Here, Madison makes clear that while the Constitution grants the federal government its “few and defined” powers, it is not the source of the States’ powers. It follows that the States retained their sovereignty to the extent that they did not clearly surrender it.

As noted above, this idea is bolstered by the ratification process laid out in Article VII of the Constitution.²¹⁶ Because the Constitution contemplates that States could choose not to join the United States and thus retain their complete sovereignty, under the law of nations, it follows that a State can only surrender its sovereign rights if it does so in clear and express terms.²¹⁷

Article V of the Constitution plays a slightly different role.²¹⁸ It reinforces the notion that the States retain their sovereign identity in the new system. In *The Federalist No. 39*, James Madison explains that the amendment process is the perfect symbol of the Constitution’s balance between a “wholly national” government, with the one people as sovereign, and a “wholly federal” government, with the States as the sovereign.²¹⁹ Because Article V neither provides for a process in which a majority of the American people—regardless of their State—can amend the Constitution, nor requires the consent of all the States—a notable departure from the Articles of Confederation—it reinforces the concept of a dual system of sovereignty.

provide valuable context for how it allocates power between the federal and state governments. There are just a few highlights that are particularly illuminating.

213 U.S. CONST. art. I, § 1 (emphasis added).

214 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 563 (1994) (suggesting that the *expressio unius* canon applies to Article I because “Congress possesses only those legislative powers that are ‘herein granted’” (quoting U.S. CONST. art. I, § 1)); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1394 (1994) (“[T]he Vesting Clause of Article I is one of the most limited power grants conceivable.”).

215 THE FEDERALIST NO. 45, *supra* note 16, at 292 (James Madison).

216 U.S. CONST. art. VII, § 1; see *supra* notes 129–30 and accompanying text.

217 See *supra* notes 115–16 and accompanying text.

218 U.S. CONST. art. V.

219 THE FEDERALIST NO. 39, *supra* note 16, at 246 (James Madison).

The Tenth Amendment plays a slightly different, but critical role. It states 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.”²²⁰ As Justice O’Connor noted in her majority opinion in *New York*, the Amendment is “essentially a tautology.”²²¹ Yet, the Amendment is important because it reinforces the fact that the powers delegated to the national government are “few and defined,” whereas the States, to the extent they did not clearly surrender them, retain “numerous and indefinite” powers.²²² The provision is the Constitution’s analogue to Article II of the Articles of Confederation, which expressly incorporated the law-of-nations principle that a sovereign state could surrender a sovereign right only through clear and express terms in a binding legal instrument.²²³ Finally, the Eleventh Amendment adds context to the Tenth Amendment’s tautology by reinforcing the idea that the Founding generation understood the States to retain the sovereign rights that they did not clearly and expressly divest.²²⁴

In sum, the Court was right in both *New York* and *Printz* that the federal government cannot order state governments to carry out federal goals. The Court’s decisions have better grounding in the text of the Constitution than either opinion indicates. As used in the Constitution, the word “States” is a legal term of art derived from the law of nations. By using the same word that Americans used in the Declaration of Independence and the Articles of Confederation, the Constitution recognized these local governments as distinct sovereigns. Under the law of nations, sovereign states cannot surrender their sovereign rights unless they do so in clear and express terms in a binding legal document. The right not to have one’s governmental functions commandeered is a core sovereign right, and the Constitution does not contain clear and express language dispossessing the States of that right. Thus, the States retain their right not to have their governmental functions interfered with by the federal government. The beliefs of the Founding generation, the historical lack of commandeering in our country, early case law, and the structure of the Constitution all support this view.

220 U.S. CONST. amend. X.

221 *New York v. United States*, 505 U.S. 144, 157, 156–57 (1992).

222 See THE FEDERALIST NO. 45, *supra* note 16, at 292 (James Madison).

223 See *supra* notes 110–11.

224 For the discussion on how the Eleventh Amendment reinforces the Constitution’s federalist structure, see *supra* notes 203–11 and surrounding text.

III. THE CORRECT DOCTRINE: STATE COURTS

Congress cannot obligate state courts to hear federal claims for the same reason that it cannot obligate state legislatures to enact federal policies or state executive officers to administer federal laws. Under the law of nations, sovereigns enjoyed the right not to have their governmental functions interfered with by another sovereign.²²⁵ In addition, a sovereign had the power to hear certain actions of another sovereign, but never a duty to do so.²²⁶

At the Founding, the current “claim” system set out by the Federal Rules of Civil Procedure did not exist.²²⁷ Instead, plaintiffs could bring claims only under an established cause of action.²²⁸ These causes of action were matters of local law, rather than of the law of nations.²²⁹ Citing William Blackstone’s influential *Commentaries on the Laws of England*, Professors Bellia and Clark explain that because causes of action were matters of local law, sovereigns had the power to decide what causes of action their courts would entertain.²³⁰ As established above, under the law of nations, a sovereign could only surrender this power by clear and express language in a binding legal instrument.²³¹ Because no such language exists in the Constitution, States retain their sovereign power to decide what claims their courts have a duty to hear. Importantly, even when a State grants its courts the jurisdiction to hear federal actions, if the jurisdiction imposes a duty to adjudicate such claims upon the state court, the state court owes that duty to its State, not to the federal government.²³² The nation’s history and the Constitution’s structure support this conclusion.

225 See *supra* note 115 and accompanying text.

226 See Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 957 & n.34 (2006) (“The power that the law of nations recognized in one sovereign to enforce actions arising under the laws of another was indeed a power and not a duty, albeit a power that sovereigns generally, but not without exception, exercised in the interests of comity.” *Id.* at 957.); Bellia & Clark, *supra* note 90, at 933 & n.502 (“[I]f the Supremacy Clause is not a clear and express surrender of this aspect of state sovereignty, then the States would retain the same degree of sovereignty over their courts as they do over their legislative and executive functions.” *Id.* at 933 n.502).

227 See FED. R. CIV. P. 3 (“A civil action is commenced by filing a complaint with the court.”); *id.* 7(a) (stating that a complaint is a type of pleading); *id.* 8(a) (requiring “[a] pleading that states a *claim* for relief” state why the court has jurisdiction, why the plaintiff is entitled to relief, and what type of relief the plaintiff seeks (emphasis added)); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 783 (2004).

228 See Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 631 (2015).

229 *Id.* at 630.

230 *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *86–87).

231 See *supra* note 116 and accompanying text.

232 See *infra* notes 252–54 and accompanying text.

A. *The Text*

In *Haywood*, the Court determined that a New York statute stripping its courts of jurisdiction to hear damages claims against corrections officers violated the Supremacy Clause and was thus preempted by it.²³³ In other words, the Court held that the Supremacy Clause requires state courts of general jurisdiction to hear certain federal claims, including some federal claims that the States themselves did not empower their courts to hear.

As explained above, however, the Supremacy Clause simply provides a rule of decision for preemption purposes.²³⁴ As Justice Stevens himself noted in his *Printz* dissent, “[The Judges Clause] commands state judges to ‘apply federal law’ in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore.”²³⁵ In fact, by clearly and expressly stating that state judges would be bound by federal law in deciding cases, the clause satisfies the law-of-nations criteria for divesting States of their sovereign right to determine which law applies in their courts.²³⁶

The Supremacy Clause does not, however, mandate that state courts entertain federal actions, even if they are competent to do so. A reexamination of the text is helpful:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²³⁷

First, the clause provides that the Constitution “shall be the supreme Law of the Land.” Nothing in the text of the Constitution suggests that state courts must entertain federal claims. Next, the clause provides that “the Laws of the United States which shall be made *in Pursuance thereof* . . . shall be the supreme Law of the Land.”²³⁸ Though the Court did not explicitly say that 42 U.S.C. § 1983 preempted the New York statute, that would at least be a more plausible basis for its holding.²³⁹ Yet, nothing in § 1983 expressly requires state courts to hear

233 *Haywood v. Drown*, 556 U.S. 729, 736–37 (2009).

234 *See supra* notes 171–174 and accompanying text.

235 *Printz v. United States*, 521 U.S. 898, 968 (1997) (Stevens, J., dissenting).

236 *See supra* note 116 and accompanying text; Bellia & Clark, *supra* note 90, at 929 n.481.

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

238 *Id.* (emphasis added).

239 *See Haywood v. Drown*, 556 U.S. 729, 764–65 (2009) (Thomas, J., dissenting).

§ 1983 claims.²⁴⁰ Moreover, even if a federal statute did purport to do so, nothing in the Constitution suggests that the States surrendered their sovereign right to determine what cases they want their courts to entertain. Because only federal laws made “in Pursuance” of the Constitution are the Law of the Land, the statute passed would have to be constitutional in order to preempt inferior laws.²⁴¹ Under the law of nations, a clause that clearly does not mandate that state courts hear federal actions is nowhere near clear enough to divest the States of their sovereign right to control the operations of their courts.

Just as the federal statutes attempting to commandeer state governmental functions in *New York* and *Printz* were unconstitutional interferences with residual state sovereignty, a federal statute requiring state courts to adjudicate federal claims would be an equally unconstitutional interference with state sovereignty. Of course, *if* a state court decides to hear an action and adjudicate it on the merits, then it *must* apply federal law to the extent that it conflicts with state law.²⁴² The Supremacy Clause clearly and expressly imposes this duty on state courts.²⁴³ In other words, although the Supremacy Clause clearly mandates state judges to apply federal law when it conflicts with state law, it does not mandate state courts to hear federal cases.²⁴⁴

B. The History

The Founding-era sources and early United States caselaw support the proposition that the federal government cannot compel state courts to hear federal actions. As Professor Bellia has described, during the Founding period and early years of the United States, “public officials analyzed questions of congressional power to assign federal actions to state courts” within the framework of the law of nations, also commonly referred to as the general law.²⁴⁵ Under the law of nations, the power of

240 See *id.* at 765.

241 See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 103–04 (2003); Samuel P. Jordan & Christopher K. Bader, *State Power to Define Jurisdiction*, 47 GA. L. REV. 1161, 1176 (2013).

242 See *Haywood*, 556 U.S. at 754–56 (Thomas, J., dissenting).

243 See Nelson, *supra* note 172, at 260 (“Under the Supremacy Clause . . . the test for preemption is simple: Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law.”).

244 As Justice Thomas noted in *Haywood*, the Full Faith and Credit Clause and the Privileges and Immunities Clause might be clear enough to mandate state courts to hear certain actions. See *Haywood*, 556 U.S. at 755 n.5 (Thomas, J., dissenting). If so, that would be consistent with the law of nations to the extent that those clauses are clear and express surrenders by the States of the right not to have their courts commandeered. Whether they satisfy the criteria or not is beyond the scope of this Note.

245 Bellia, *supra* note 226, at 954; see *id.* at 966–91.

one sovereign to enforce actions arising under the laws of another was “a power[, but] not a duty.”²⁴⁶

1. Early Understandings

For starters, the historical understanding of the Supremacy Clause is that it provided a rule of decision, not a standalone federal power.²⁴⁷ In 1789, during a debate on the First Judiciary Act, Massachusetts Representative Fisher Ames said that “[t]he law of the United States is a rule to [state judges].”²⁴⁸ “It controlled their decisions,” he continued, “but could not enlarge their powers.”²⁴⁹ A decade later, in the debates over the Judiciary Act of 1801, South Carolina Representative Robert Harper—who wanted state courts to have concurrent jurisdiction over certain actions brought by the United States as a plaintiff—conceded that Congress could not require “the State courts, as a matter of duty,” to hear cases pursuant to that concurrent jurisdiction.²⁵⁰ Similarly, Alexander Hamilton assumed that state courts would be *able* to handle most federal actions, but he had his doubts about using state courts to do such work, a proposition that was “liable to question, and ha[d], in fact, been seriously questioned.”²⁵¹ Chancellor Kent, in his influential treatise *Commentaries on American Law*, echoed this sentiment:

The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case. It only *permits* state courts which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; and they do not become inferior courts in the sense of the constitution, because they are not ordained by congress. *The state courts are left to infer their own duty from their own state authority and organization . . .*²⁵²

Kent believed that not only was Congress unable to compel state courts to hear federal actions that exceeded their jurisdiction, but that Congress could not compel state courts to hear actions *even if they were*

²⁴⁶ *Id.* at 957.

²⁴⁷ See Collins, *supra* note 173, at 144, 152–53; Haywood, 556 U.S. at 752–55 (Thomas, J., dissenting).

²⁴⁸ 1 ANNALS OF CONG. 808 (1789) (Joseph Gales ed., 1834).

²⁴⁹ *Id.* For the constitutional legislative history that strongly suggests that the Framers understood the clause to be a mere rule of decision, see Collins, *supra* note 173, at 143–44; Haywood, 556 U.S. at 743–47 (Thomas, J., dissenting).

²⁵⁰ 10 ANNALS OF CONG. 892 (1851).

²⁵¹ See Alexander Hamilton, *The Examination No. 6* (Jan. 2, 1802), in 25 THE PAPERS OF ALEXANDER HAMILTON 484, 488, 486–88 (Harold C. Syrett ed., 1977); cf. THE FEDERALIST NO. 82, *supra* note 16 (Alexander Hamilton).

²⁵² 1 KENT, *supra* note 76, at 377 (emphases added).

perfectly “competent for the purpose.”²⁵³ Kent further clarified that to the extent jurisdiction imposes a duty on state courts, *that duty is owed to “their own state authority and organization.”*²⁵⁴ Applying Kent’s reasoning to *Haywood*, even if, as the majority seemed to suggest, the New York supreme courts were competent to hear § 1983 damages claims against corrections officers, the courts owed no duty to the federal government to do so.²⁵⁵ Kent’s reasoning would also protect state courts more than Justice Thomas’s, as he suggested that state courts of competent jurisdiction were bound to adjudicate federal actions.²⁵⁶

2. Early Court Opinions

The top legal minds of the Union in its early history all agreed that state courts were not required to hear federal actions that the State did not empower them to hear. Unlike *The Federalist Papers* and contemporary political debates, these decisions were binding law on the parties before them. Chief Justice John Marshall,²⁵⁷ Justice Smith Thompson,²⁵⁸ Justice H. Brockholst Livingston,²⁵⁹ and Justice Joseph Story²⁶⁰ all agreed that States may refuse to allow their courts to adjudicate federal actions. In *Osborn v. Bank of the United States*, Chief Justice Marshall noted that state courts are “tribunals over which the government of the Union has no adequate control, *and which may be*

253 *Id.* (emphasis added).

254 *Id.* (emphasis added).

255 *See Haywood v. Drown*, 556 U.S. 729, 739–40, 740 n.6 (2009) (majority opinion).

256 *See id.* at 749, 758–59 (Thomas, J., dissenting) (“As the Court correctly noted, the ‘existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.” *Id.* at 758 (quoting *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 58 (1912))). Justice Thomas did not explicitly say that the state court owes this duty to the federal government. He did, however, agree with the Supreme Court that it had the power to command the state court to hear the case because the state court had proper jurisdiction and was refusing to hear the case for policy reasons, rather than a lack of jurisdiction. *See id.* at 757–58 (remarking that the Court “correctly rejected” the “Connecticut court’s refusal to enforce” the federal cause of action, *id.* at 757). Under the law of nations, a sovereign could choose to exercise its jurisdiction to hear the actions of another sovereign, but it did not have the duty to do so. *See supra* note 226 and accompanying text.

257 *See Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 821 (1824); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 39–40 (1825).

258 *See Stearns v. United States*, 22 F. Cas. 1188, 1191 (C.C.D. Vt. 1827–1840) (No. 13,341) (Thompson, Circuit Justice).

259 *See Livingston v. Van Ingen*, 15 F. Cas. 697, 699–700 (C.C.D.N.Y. 1811) (No. 8,420) (Livingston, Circuit Justice).

260 *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 614 (1842); *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice).

closed to any claim asserted under a law of the United States.”²⁶¹ In *Stearns v. United States*, Justice Thompson wrote:

[I]t seems to be pretty generally admitted that the *state courts are not bound to exercise jurisdiction although given*, but it was *optional* with them to do it or not; and in some instances the state courts have acted in those cases, and in some have declined jurisdiction. . . . *Congress cannot compel a state court to entertain jurisdiction in any case*; they are not inferior courts in the sense of the constitution; they are not ordained by congress. State courts are left to consult *their own duty from their own state authority* and organization.²⁶²

Similarly, in *Livingston v. Van Ingen*, Justice Livingston wrote, “It is not for me to say what the chancellor of this state will think his duty” to hear a statutory patent claim.²⁶³ Justice Livingston went on, saying that though he perceived “no objection” to the state court of equity hearing the claim, the state court could still “think otherwise.”²⁶⁴ Finally, in *Prigg*, Justice Story wrote that “every state is perfectly competent, and has the exclusive right, . . . to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance.”²⁶⁵ He shared a similar belief in *Mitchell v. Great Works Milling & Manufacturing Co.*, writing that “[t]he [S]tates . . . have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure. They may refuse to [entertain] suits . . . ‘arising under the laws of the United States’ for many just reasons”²⁶⁶ He proceeded to give many functional reasons for this, including “the convenience of their own courts,”²⁶⁷ which “might justify [the State] in preferring [state actions] to [federal actions].”²⁶⁸

This Founding-era literature and early United States caselaw severely undermines the claim that the Supremacy Clause clearly and expressly imposed an obligation on state courts to adjudicate federal actions.

261 *Osborn*, 22 U.S. at 821 (emphasis added).

262 *Stearns*, 22 F. Cas. at 1191–92 (emphases added); *but cf.* *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 605 (1858) (Taney, C.J., dissenting) (saying that state-federal court relationships are not those of “separate and independent sovereignties” governed only by “comity of nations” to explain why a state court cannot impede a federal court from handling its business).

263 *Van Ingen*, 15 F. Cas. at 699.

264 *Id.*

265 *Prigg*, 41 U.S. at 614.

266 *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice).

267 *Id.*

268 *Id.* at 500.

C. *The Structure*

The structure created by the Constitution further supports the notion that state courts are under no obligation, and cannot be obligated by Congress, to adjudicate federal causes of action. Article III allows for the creation of inferior federal courts.²⁶⁹ The debate in the early years of the nation, after the Constitution was written, was not whether state courts were obligated to hear Article III claims, but whether they had the power to do so in the first place.²⁷⁰ In 1790, for example, Attorney General Edmund Randolph reported to Congress that he believed that “[t]he nature . . . of some . . . subjects, shuts out the jurisdiction of the State courts.”²⁷¹ Approximately a decade later, Gouverneur Morris, whom James Madison credited for “the finish given to the style and arrangement of the Constitution,”²⁷² argued that “the express words[] of the Constitution,” and the “evident intention” of the Framers both suggested that the Constitution required inferior federal courts.²⁷³ In 1816, in *Martin v. Hunter’s Lessee*, Justice Story remarked that the state courts could not hear the “cases” described in Article III, Section 2, Clause 1 because the “judicial power” is vested in Article III courts, not state courts, and it “shall extend to *all* [of those] cases.”²⁷⁴ In light of this early American evidence suggesting that many of the nation’s most esteemed public lawyers believed that state courts *lacked the authority* to adjudicate a significant share of federal actions, it is difficult to believe that the Madisonian Compromise, codified in Article III, § 1, *mandates* state courts to do just that.²⁷⁵ Moreover, if state courts have the authority to hear federal actions but elect not to, the Madisonian

269 See U.S. CONST. art. III, § 1.

270 See Collins, *supra* note 173, at 72–73 (explaining that “the dominant discourse” in “the early congressional debates” “was couched in terms of constitutionally driven state court incapacity”); *id.* at 61–62, 61 n.52 (explaining that “a level of consensus existed that the Constitution had created exclusive federal enclaves,” *id.* at 61, and a corresponding need for federal courts, and that Maryland was so afraid of this that it proposed a constitutional amendment to explicitly give concurrent jurisdiction to state courts because Article III, in its “present form,” “compelled” Congress “to establish inferior federal courts,” *id.* at 61 n.52 (quoting 2 ELLIOT, *supra* note 21, at 551)).

271 *Id.* at 73 n.78 (emphasis omitted) (quoting Letter from Edmund Randolph, Att’y Gen. to House of Reps. (Dec. 31, 1790) in 1 AMERICAN STATE PAPERS, MISC. NO. 17, at 21, 22 (Wash. Gales & Seaton, 1834)).

272 Gouverneur Morris, LIBR. CONG., <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/gouverneur-morris/> [https://perma.cc/8TBZ-HWWA] (last visited Feb. 21, 2026).

273 See Collins, *supra* note 173, at 63 (quoting 11 ANNALS OF CONG. 79 (1851)).

274 *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334, 333–37 (1816); see also U.S. CONST. art. III, § 2, cl. 1 (distinguishing “Cases” from “Controversies”).

275 See U.S. CONST. art. III, § 1.

Compromise provides a solution: Congress has the power to create inferior federal courts with the duty to hear those federal actions.²⁷⁶

Though the Supremacy Clause alone does not mandate state courts to adjudicate federal claims, other clauses in Article IV might be sufficiently clear and express to divest the States of their sovereign right to control the jurisdiction of their courts. As the Justices on both sides noted in *Haywood*, the Full Faith and Credit Clause and the Privileges and Immunities Clause might both require state courts to hear certain claims that the State could not proscribe from their jurisdiction.²⁷⁷ That is the best reading of those clauses and thus perfectly consistent with the law-of-nations framework described by Professors Bellia and Clark.²⁷⁸

CONCLUSION

At the Founding, under the law of nations, a sovereign could not surrender a sovereign right except by clear and express language. The word “State(s),” means the same thing in the Constitution that it did in the Articles of Confederation before it and in the Declaration of Independence before that. It denotes a sovereign government. To be sure, the States surrendered many aspects of their sovereignty by ratifying the Constitution and thus joining the Union. To the extent they did not clearly and expressly surrender a sovereign prerogative, however, they retain “a residuary and inviolable sovereignty.”²⁷⁹ When deciding whether or not the Constitution allows the federal government to infringe upon the sovereignty of the States, the question is thus whether the Constitution contains clear and express language divesting the States of that sovereign right. The right not to have one’s

276 *Id.* For an argument that the Madisonian Compromise, combined with the Necessary and Proper Clause, mandates state courts to hear federal claims, see Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207 n.84; see also Carlos M. Vázquez & Stephen I. Vladeck, *Testa, Crain, and the Constitutional Right to Collateral Relief*, 72 FLA. L. REV. F. 10, 13 (2021).

277 See *Haywood v. Drown*, 556 U.S. 729, 740 & n.7 (majority opinion) (arguing that those clauses are sufficient evidence that a State cannot “shut the courthouse door to federal claims that it considers at odds with its local policy,” *id.* at 740); *id.* at 755 n.5 (Thomas, J., dissenting) (explaining that those clauses each “include a textual prohibition on discrimination that the Supremacy Clause lacks,” and that the reason for including those provisions “aligns with [the] reasons . . . for abandoning the Articles of Confederation, and the principle of dual sovereignty that the Constitution *preserves*” (emphasis added) (citations omitted)).

278 See Bellia & Clark, *supra* note 90, at 855 (describing the clear and express requirement); *id.* at 933 & n.502 (explaining that if a court found the language to constitute “a clear and express abrogation,” *id.* at 933, of a State’s sovereign right, then it is consistent with the law-of-nations framework that was in place at the Founding).

279 THE FEDERALIST NO. 39, *supra* note 16, at 245 (James Madison).

governmental institutions—including its judiciary—commandeered is a core sovereign right. Because neither the Supremacy Clause nor any other clause in the Constitution clearly and expressly divests the States of this general sovereign right, the States retain it to the extent that it is not expressly surrendered. The nation's history supports this proposition, as Founding-era literature and early American jurisprudence both suggest that Americans still understood the States to be sovereign and that state courts were not obligated to adjudicate federal actions, though they have always been obligated to apply federal law when it conflicts with state law. The structure of government established by the Constitution further supports the idea that the federal government cannot commandeer state governmental institutions or functions, whether those be state executives, state legislatures, or state judiciaries. The Madisonian Compromise, consistent with the law of nations, allowed States to adjudicate certain federal claims, but it did not obligate States to do so. The Court, if presented with a proper case, should correct course and interpret the Constitution according to its proper meaning.

