

ARTICLES

Sovereign Power Constitutionalism

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The text of the U.S. Constitution seems to be missing a host of governmental powers that we take for granted, including powers relating to immigration, Indian affairs, acquisition of territory and resources, and the regulation and protection of U.S. citizens abroad. The Supreme Court suggested an explanation for these and other missing powers in its famous 1936 decision, United States v. Curtiss-Wright Export Corp. Upon becoming a nation, the Court contended, the United States automatically acquired powers “equal to the right and power of the other members of the international family”—powers that inhered in the government “as necessary concomitants of nationality.” Although the Curtiss-Wright decision has been heavily criticized, this Article shows that the “concomitants of nationality” idea reflects an important and long-standing feature of U.S. constitutional law. As will be shown, many areas of constitutional law rest on a presumption that the nation acquired the full complement of sovereign powers allocated to nations under international law, and this has been the case throughout much of U.S. history. This presumption has been manifested at times through broad interpretations of the constitutional text, but on other occasions it has been manifested through invocations of inherent authority that are more structural in character. Importantly, and contrary to what many critics of Curtiss-Wright assume, the sovereign power presumption does not require either a rejection of constitutional constraints or a preference for presidential over congressional authority.

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INTRODUCTION

The text of the U.S. Constitution seems to be missing a host of governmental powers that we take for granted. For example, where does the government get the authority to acquire new territory for the United States, as it has done numerous times? There is no territorial acquisition clause in the Constitution. There is a clause allowing Congress to dispose of and regulate U.S. property, but the clause does not address acquisition.¹ Where does the government get the authority to regulate immigration? There is no immigration clause in the Constitution. There is a Naturalization Clause,² but that seems to address only the issue of how residents can become citizens, not the authority to exclude or deport people. Where does the government get the authority to regulate Indian affairs? There is no general Indian affairs clause in the Constitution. There is an Indian Commerce Clause,³ but many federal regulations address noncommercial matters (such as family law subjects like adoption). Where does the government get the authority to regulate the conduct of its citizens abroad? There is no general citizen regulation clause in the Constitution. There is a Foreign Commerce Clause,⁴ but some laws that apply to citizens abroad concern noncommercial conduct (such as murder and sex with minors). There are many other examples like these, in which it is accepted that the United States has certain powers as a sovereign nation and yet the constitutional text does not provide clear support for them.⁵

The Supreme Court suggested an explanation for these missing powers in its 1936 decision, *United States v. Curtiss-Wright Export Corp.*⁶ The answer, said the Court, comes from nationhood. Justice George Sutherland's opinion for the Court reasoned that when the United States became a nation, it automatically acquired authority "equal to the right and power of the other members of the international family."⁷ Therefore, this authority, said Justice Sutherland, "did not depend upon the affirmative grants

¹ U.S. CONST. art. IV, § 3, cl. 2.

² U.S. CONST. art. I, § 8, cl. 4.

³ U.S. CONST. art. I, § 8, cl. 3.

⁴ *Id.*

⁵ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 15 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS] (noting that there are "missing" foreign affairs powers that "were clearly intended for, and have always been exercised by, the federal government," and asking "where does the Constitution say that it shall be so?").

⁶ 299 U.S. 304 (1936).

⁷ *Id.* at 318.

of the Constitution.”⁸ Indeed, since the individual states never possessed foreign relations powers, they could not, reasoned Justice Sutherland, have been delegating them to the national government in the Constitution.⁹ These powers, rather, came from the “law of nations” (that is, international law) and “exist as inherently inseparable from the conception of nationality.”¹⁰

While providing an answer to the puzzle of missing governmental powers, the analysis in *Curtiss-Wright* has been subjected to what has been described as “withering criticism.”¹¹ Among other things, the decision has been criticized for departing from an enumerated-powers approach to discerning the national government’s authority.¹² Such criticisms have persisted since the 1940s. Meanwhile, a rich scholarly debate has erupted in recent years over whether we do, in fact, have a Constitution of enumerated powers.¹³ This debate over enumeration has focused primarily on Congress’s authority over domestic affairs, and it has operated with little engagement with the literature on sovereignty

⁸ *Id.*

⁹ *Id.* at 316 (“[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.”).

¹⁰ *Id.* When the Constitution was adopted, the term “law of nations” was sometimes used to encompass both what today would be considered public international law—that is, the rights and duties of nations—and also what today would be considered private international law—that is, rules governing private international relationships and disputes, such as conflict of laws principles, rules for the enforcement of foreign judgments, and the law merchant. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989). Modern references to “international law” typically are references to public international law, not private international law. The two principal sources of public international law today are (1) treaties, and (2) “customary international law,” which is the law that results from the practices of nations followed out of a sense of legal obligation. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 102 (AM. L. INST. 1987).

¹¹ HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY 37 (2024) (updating the 1990 version of Koh’s book, which contained a similar description); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659 (1997) (describing *Curtiss-Wright* as the “bête noire of U.S. foreign relations law”); Robert D. Sloane, *The Puzzling Persistence of Curtiss-Wright-Based Theories of Executive Power*, 37 WM. MITCHELL L. REV. 5072, 5073 (2011) (“[W]ith the exception of the case’s formal holding, virtually every aspect of *Curtiss-Wright*—from its history to its constitutional methodology to its political theory—has been subjected to withering criticism.”).

¹² See, e.g., Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379 (2000) [hereinafter Ramsey, *Myth of Extraconstitutional Foreign Affairs Power*] (describing the analysis in *Curtiss-Wright* as “a striking departure from the usual view of constitutional law, which holds that the federal government is one of enumerated powers”).

¹³ See *infra* Part I.D.

and *Curtiss-Wright*. Part of the reason for this scholarly divide is a difference in expertise: most of the participants in the enumeration debate are experts in domestic constitutional law, not foreign affairs law. Moreover, that is not the only example of siloed scholarship that is relevant to this topic. Two significant areas of law that have been influenced by sovereign power reasoning—immigration law and Indian law—are highly specialized, and, as a result, the debates and discussions in those areas have operated largely apart from the debates and discussions in both the domestic constitutional law scholarship and the generalist foreign affairs scholarship.

This Article aims to bring these debates and discussions together. In doing so, it shows that U.S. constitutional law has long reflected a presumption that the federal government acquired full national sovereignty, as understood under the law of nations, with respect to the conduct of foreign affairs. Importantly, unlike some of the other reasoning in *Curtiss-Wright*, this presumption does not require either a rejection of constitutional constraints or a preference for presidential over congressional authority.

In thinking about how to construe the Constitution, it is crucial to keep in mind that it did more than allocate authority. It was also an act of nation building: it helped to establish the United States' status as a nation within the international community. That status would in turn have been governed by international law, under which nations were assumed to have certain powers and capacities. Indeed, the chief function of international law at the Founding was to govern the exercise of nations' sovereignty in relation to other nations.¹⁴ While the Constitution in theory could have denied the new nation some of the usual national powers and capacities, it is unlikely that it was intended to

¹⁴ See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (New York, O. Halsted 1826) (noting that “[w]hen the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law”); Samantha Besson, *Sovereignty*, OXFORD PUB. INT’L L. ¶ 32 (Apr. 2011), <https://perma.cc/T3KB-598C> (“International law was deemed the law that enabled international coexistence between sovereign States; it covered all areas pertaining to the organization of States’ external sovereignty, ranging from border regulation to dispute settlement.”); see also MAX M. EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE US CONSTITUTION 27 (2020) (“Whether they were democratic or monarchical, unitary states or federal republics, they were all *nations* in relation to each other.” (emphasis in original)); 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 12a (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (“The law of nations is the law of sovereigns.”).

do so, at least in most respects. Some of these powers and capacities were mentioned specifically in the constitutional text, but others were left to implication. This does not mean that such powers and capacities need to be thought of as outside the Constitution; the term “extraconstitutional” is often invoked in objections to the sovereign power idea, but that label is misleading.

Here is a fairly uncontroversial example that illustrates how certain powers would have been associated with the creation of a nation: It has always been assumed that the national government has the authority to enter into binding contracts with private parties—to purchase supplies, for example. The Continental Congress did so throughout the revolutionary period, and the federal government has done so regularly since the adoption of the Constitution.¹⁵ Yet while the text of the Constitution gives Congress the power to borrow money, it does not confer a general power on either Congress or the executive branch to make contracts.¹⁶ The Supreme Court eventually ruled in an 1831 decision, more than a century before *Curtiss-Wright*, that no enumeration was necessary for the government to have a contractual power. Rather, said the Court, the capacity to enter into contracts is “incident to the general right of sovereignty.”¹⁷ Some of the federal government’s foreign affairs powers have similarly been thought to follow from national sovereignty. Again, the way in which this idea has been transmitted into constitutional law has varied: sometimes it has

¹⁵ A 1792 statute specified that contracts for supplies were to be “made by or under the direction of the treasury department.” Act of May 8, 1792, ch. 37, § 5, 1 Stat. 279, 280.

¹⁶ The Constitution does state, “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” U.S. CONST. art. VI. But this clause is simply a recognition that the government implicitly had the contractual power prior to the Constitution.

¹⁷ *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831). In general, the Constitution seems to presuppose that the federal government will have various corporate capacities—not only to enter into contracts, but also (for example) the capacity to sue and be sued. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 154 (Boston, Hilliard, Gray & Co. 1833) (“[A]ll the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns.” (emphasis in original)); *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818) (“In all cases of contract with the United States, [the government] must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in [its] own name, unless a different mode of suit be prescribed by law.”); see also Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 55 (2019) [hereinafter Reinstein, *Aggregate and Implied Powers*] (“Governments are corporations and . . . all corporations possessed those rights at common law in the early Republic.” (emphasis omitted)).

been through broad interpretations of the constitutional text (such as the Necessary and Proper Clause¹⁸), and at other times it has been through structural inferences not tied to particular text.

Part I of this Article describes the reasoning in *Curtiss-Wright* and its connection to debates in other areas of public law. Part II discusses an array of examples of federal powers that have been defended (and, in many instances, upheld by the Supreme Court) on grounds of sovereignty. Part III outlines a limited version of the theory in *Curtiss-Wright*, a version that can be called “constitutional sovereignty,” and it responds to potential objections. It also explains why the main competitor to the sovereignty theory—the “Vesting Clause Thesis”—is less plausible as an account of our constitutional law.

Several caveats are in order at the outset. First, this Article is not contending that a presumption of sovereign authority was settled at the Founding. As a number of historians have pointed out, there was likely no settled understanding about the nature of the union, or, relatedly, how to construe the constitutional text. This Article does contend, however, that a presumption of sovereign authority is one plausible way of understanding how the “missing” foreign affairs powers were addressed at the Founding and, more importantly, that this presumption became a significant part of our constitutional law.

Second, in providing various historical examples, this Article is not making a causal claim that sovereign power ideas were the reason that courts and other interpreters adopted expansive understandings of governmental authority. Perhaps interpreters seized on these ideas because they were persuaded by them, but it is also quite possible that they seized on them because the ideas served as useful justifications for what the interpreters thought was needed as a functional matter. For my purposes, it is enough that the ideas were invoked. That said, the fact that certain powers were taken for granted in international relations may well have affected people’s views of what was functionally necessary or desirable.

Third, the words “sovereign” and “sovereignty” are vague and can convey a range of ideas. Most broadly, these terms are sometimes invoked to suggest unconstrained authority.¹⁹ This Article

¹⁸ U.S. CONST. art. I, § 8, cl. 18.

¹⁹ See, e.g., DON HERZOG, SOVEREIGNTY, RIP, at xi (2020) (“The classic theory of sovereignty, the one I’m keen on burying, holds that every political community must have a

uses the terms more narrowly to refer to the proposition that there was a package of powers that nations would have been thought to inherently possess in their international relations. There is nothing in this conception that requires that the authority be unconstrained. Governmental actors in sovereign nations are often constrained by domestic law, and international law also imposes limitations on a nation's exercise of its sovereign authority.²⁰ Nor, as this Article shows, does the idea of sovereignty require a particular conception of executive power.

As I hope will become evident, this topic is rich and underexplored, and I intend to address it in greater depth in an eventual book. The examples in this Article are necessarily selective. Readers will find little discussion of the Civil War, for example, even though the government claimed significant sovereign authority in connection with that war, including the authority to emancipate the Southern slaves.²¹ Moreover, this Article focuses principally on foreign affairs and thus does not consider the extent to which sovereign power reasoning has also informed aspects of domestic affairs.²²

locus of authority that is unlimited, undivided, and unaccountable to any higher authority.”); Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 1 (1999) [hereinafter Henkin, *That “S” Word*] (“The meaning of ‘sovereignty’ is confused and its uses are various, some of them unworthy, some even destructive of human values.”).

²⁰ See, e.g., DANIEL LEE, *THE RIGHT OF SOVEREIGNTY: JEAN BODIN ON THE SOVEREIGN STATE AND THE LAW OF NATIONS* 13, 149 (2021) (noting that sovereigns were historically thought to be bound by both natural law and the customary law of nations); DARYL J. LEVINSON, *LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE* 23 (2024) (“The premise of constitutionalism is that states and governments are constituted by law and constrained to act in accordance with legal rights and rules.”).

²¹ See, e.g., JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 115–26 (2012) (describing the events and debates leading to emancipation); WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 68–69 (Boston, Little, Brown & Co. 1864) (“It is only the law of nations that can decide [the emancipation] question, because the constitution, having given authority to government to make war, has placed no limit whatever to the war powers.”).

²² An important historical example in which sovereign power reasoning was invoked in connection with domestic affairs concerned the government’s authority to issue paper money, an issue of great controversy during and after the Civil War. See Kenneth W. Dam, *The Legal Tender Cases*, 1981 *SUP. CT. REV.* 367, 367 (describing this issue as “one of the leading constitutional controversies in American history”); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555–56 (1870) (Bradley, J., concurring) (contending that the national government is a government “invested with all the attributes of sovereignty” and has those powers which, at the time the Constitution was adopted, “were generally considered to belong to every government as such, and as being essential to the exercise of its functions”).

I. ENUMERATED POWERS AND *CURTISS-WRIGHT*

It is conventional wisdom that we have a government of enumerated powers. That is what Chief Justice John Marshall said in his otherwise expansive national power opinion, *McCulloch v. Maryland*.²³ The Supreme Court's modern decisions have repeated the observation.²⁴ The conventional wisdom seems to follow from the very fact that we have a written constitution, drafted and debated in the 1780s and amended at various times. Indeed, supporters of the Constitution insisted during the Founding that it had this feature.²⁵ That was part of the reason, they maintained, why a Bill of Rights was unnecessary. In case there were any doubt, one of the earliest amendments was the Tenth Amendment, which 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."²⁶ This Amendment seems to confirm that the national government has only the powers delegated to it in the Constitution. To be sure, some powers might reasonably be implied from what is enumerated—and Chief Justice Marshall famously had an expansive conception of implied powers—but the touchstone would still be the enumeration.

²³ 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.").

²⁴ See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."); *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). None of these decisions, it should be noted, concerned foreign affairs.

²⁵ See, e.g., *THE FEDERALIST* NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("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."); see also Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 *YALE L.J.F.* 180, 191–94 (2014) [hereinafter Lash, *Sum of All Delegated Power*] (reciting statements by various Founders indicating that the Constitution was delegating only limited power to the federal government).

²⁶ U.S. CONST. amend. X.

The Supreme Court reasoned in *Curtiss-Wright*, however, that this conventional wisdom about enumerated powers is not true of the government's authority over foreign affairs.

A. *Curtiss-Wright*

The issue in *Curtiss-Wright* was the constitutionality of a statute that made it a crime to provide arms to two countries involved in a conflict in Latin America if the President determined that an arms embargo would “contribute to the reestablishment of peace between those countries.”²⁷ The case was decided at a time when the Court was enforcing a nondelegation doctrine, pursuant to which it would disallow certain broad delegations of authority from Congress to the executive branch.²⁸ In upholding the statute, the Court did not take a position on whether a delegation like this one would be upheld if it concerned a domestic matter.²⁹ Instead, the Court explained that the analysis is different for delegations relating to foreign affairs—and different in particular with respect to the underlying source of authority.³⁰

The proposition that the government is one of enumerated powers, the Court in *Curtiss-Wright* contended, is true only with respect to powers relating to “internal affairs.”³¹ Those internal affairs powers, in the Court's view, were originally held by the individual states and then partially transferred to the national government in the Constitution. By contrast, the Court said that the individual states “never possessed international powers.”³² Such powers, the Court insisted, automatically vested in the national government when the colonies separated from Great Britain by virtue of the fact that the United States was joining the “family of nations.”³³

Under this reasoning, the Court explained, “The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested

²⁷ Joint Resolution of May 28, 1934, ch. 365, 48 Stat. 811. For an account of the factual background and political context of the case, see H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in *PRESIDENTIAL POWER STORIES* 195, 195–213 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

²⁸ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935).

²⁹ *Curtiss-Wright*, 299 U.S. at 321–22.

³⁰ *Id.*

³¹ *Id.* at 315–16.

³² *Id.* at 316.

³³ *Id.* at 318.

in the federal government as necessary concomitants of nationality.”³⁴ Moreover, the Court said that other sovereign powers that are not mentioned in the Constitution similarly must belong to the federal government:

The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.³⁵

One might reasonably ask what any of this has to do with the nondelegation question in the case. After all, there was no question that Congress could regulate the arms shipments under its foreign commerce authority; it did not need any extraconstitutional sovereignty power for that. Perhaps the sovereign power reasoning was all dicta, which is what Justice Robert Jackson later surmised in his concurrence in the *Youngstown Sheet & Tube Co. v. Sawyer*³⁶ steel seizure case.³⁷ The Court in *Curtiss-Wright* did not clearly articulate the linkage. But it appears to have been the idea that, because powers of external sovereignty (whether enumerated in the Constitution or not) do not ultimately derive from the Constitution, they are not subject to the usual structural constraints that apply to powers derived from the Constitution, including the constraint of the nondelegation doctrine.³⁸

In addition to its sovereign power reasoning, the Court in *Curtiss-Wright* emphasized the President’s broad authority over foreign affairs. “In this vast external realm,” said the Court, “the

³⁴ *Curtiss-Wright*, 299 U.S. at 318.

³⁵ *Id.* (citations omitted).

³⁶ 343 U.S. 579 (1952).

³⁷ *See id.* at 635 n.2 (Jackson, J., concurring) (contending that “[m]uch of the Court’s opinion [in *Curtiss-Wright*] is *dictum*” and that the “*ratio decidendi*” of the opinion was functional analysis); *see also, e.g.*, Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 668 (1937) (“It might be arguable whether all these statements [in *Curtiss-Wright*] are *ratio decidendi* or only *obiter dicta*, and whether an analysis of them is of any value.”). *But see* Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973) (contending that “it is incorrect to dismiss major segments of *Curtiss-Wright* as dicta”).

³⁸ *See* Powell, *supra* note 27, at 222–23.

President alone has the power to speak or listen as a representative of the nation.”³⁹ This meant, thought the Court, that it was “dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”⁴⁰ This “sole organ” conception of executive power over foreign affairs has, not surprisingly, been frequently invoked by the executive branch. As Professor Harold Koh has quipped, executive branch lawyers cite the decision for the proposition that “*Curtiss-Wright*, so I’m right.”⁴¹

Curtiss-Wright is one of the most famous decisions in the field of foreign relations law. In addition to being invoked regularly by the executive branch, it is frequently cited by both the Supreme Court and the lower federal courts, and it has been the subject of extensive scholarly commentary, often critical.⁴² It is also a prime example of what has been called “foreign affairs exceptionalism”—that is, the differential constitutional treatment of foreign and domestic affairs.⁴³

B. Sutherland’s Pet Theory?

The opinion in *Curtiss-Wright* was authored by Justice George Sutherland, one of the Court’s “Four Horsemen” who was otherwise supportive of nondelegation constraints on the federal

³⁹ *Curtiss-Wright*, 299 U.S. at 319.

⁴⁰ *Id.* at 319–20. This presidential power reasoning also helps explain why the Court thought that the nondelegation doctrine was less strict in the foreign affairs area, since delegation is less of a concern if the recipient of a delegation already has independent authority to act. See Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1769–70 (2024) (“[W]hen presidents have independent authority to make the determination as part of the exercise of their own powers, [the delegation] concern diminishes.”).

⁴¹ KOH, *supra* note 11, at 38. For additional discussion of the executive power reasoning in *Curtiss-Wright*, see generally Edward A. Purcell Jr., *Understanding Curtiss-Wright*, 31 LAW & HIST. REV. 653 (2013).

⁴² See *supra* note 11.

⁴³ See, e.g., Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1133 (1999) (“[T]he decision in *Curtiss-Wright* forms the cornerstone of modern day foreign affairs exceptionalism.”); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1915 (2015) (contending that *Curtiss-Wright* “provided the foundation for foreign affairs exceptionalism”). The extent to which foreign relations law is or should be treated exceptionally is the subject of ongoing debate. See, e.g., Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism”*, 128 HARV. L. REV. F. 294, 295–97 (2015).

government.⁴⁴ Indeed, Justice Sutherland joined the Court's two 1935 decisions striking down New Deal legislation on nondelegation grounds and authored a 1936 opinion invalidating another New Deal statute.⁴⁵ The sharp distinction that he drew in *Curtiss-Wright* between the constitutional law governing foreign and domestic affairs was not something that had been advocated by the government in its brief.⁴⁶ Rather, it reflected views that Justice Sutherland had himself developed long before he was on the Court. He was, as one commentator put it, "in the happy position of being able to give [his] writings and speeches the status of the law."⁴⁷

In 1909, while serving as a Senator from Utah, Sutherland published a Senate document on "The Internal and External Powers of the National Government," which he reprinted the following year as an essay in the *North American Review*.⁴⁸ In that essay, Sutherland claimed that sovereign power must reside somewhere in the United States and that it was not reasonable to conclude that powers of external sovereignty resided at the state level. Thus, contended Sutherland, "from the necessity of the case

⁴⁴ The Four Horsemen (an allusion to the Four Horsemen of the Apocalypse referred to in the New Testament of the Bible) were Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter. They were opposed by the liberal "Three Musketeers"—Justices Louis Brandeis, Benjamin Cardozo, and Harlan F. Stone. For an argument that the Four Horsemen were not as conservative as they are often portrayed, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560–61 (1997).

⁴⁵ The 1935 decisions were *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The 1936 decision was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In that decision, Justice Sutherland, writing for the Court, insisted that "the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom," but (foreshadowing *Curtiss-Wright*) Justice Sutherland also noted that "[t]he question in respect of the inherent power of that government as to the external affairs of the Nation and in the field of international law is a wholly different matter, which it is not necessary now to consider." *Id.* at 294–95.

⁴⁶ In its brief, the government argued that the delegation was supported by the long-standing practice of broad delegations in foreign relations and that, in any event, the delegation satisfied the Supreme Court's test for permissible delegations because Congress had made the underlying policy decision and had simply left certain factual determinations to the President. See Brief for the United States at 8–11, *Curtiss-Wright*, 299 U.S. 304 (No. 98).

⁴⁷ David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 476 (1946); see also, e.g., Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 13 (1988) ("Sutherland's opinion is a muddled law review article wedged with considerable difficulty between the pages of the United States Reports."); Lofgren, *supra* note 37, at 8 (noting that "Sutherland might have followed the lead of the government on brief and cited long-standing legislative and judicial precedent, but he rejected this simple course").

⁴⁸ See generally SEN. DOC. NO. 61-417 (1909); George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910) [hereinafter Sutherland, *Internal and External Powers*].

all necessary authority must be found in the National government, such authority being expressly conferred or implied from one or more of the express powers, or from all of them combined, or resulting from the very fact of nationality as inherently inseparable therefrom.”⁴⁹ The constitutional Founders, in his view, set up “a fully sovereign nation, possessing and capable of exercising in the *family* of nations every sovereign power which any sovereign government possessed or was capable of exercising under the *law* of nations; unless prohibited or contrary to the fundamental principles upon which the Constitution itself was established.”⁵⁰

Later, after failing to secure a third term in the Senate, Sutherland delivered a series of lectures at Columbia University on “Constitutional Power and World Affairs,” which culminated in the publication of a book that year on the topic.⁵¹ The book, published shortly after the end of World War I, further elaborates Sutherland’s views about the distinction between the national government’s authority over foreign and domestic affairs. Among other things, he insisted that the decision by the Founders to “enumerate and limit the powers of the general government in its dealings with the several states and with the domestic affairs of the people, had little or no application to external or international affairs.”⁵² In external affairs, Sutherland emphasized, “there is no residuary agency; the sole agency capable of acting is the national government.”⁵³ The book proceeds to, among other things, give a broad account of the government’s war and treaty powers.

On first glance, the story here seems to simply be one of a Justice who had a peculiar constitutional theory and managed to slip it into an opinion, in what may largely be dicta. As it turns out, the story is more complicated.

⁴⁹ Sutherland, *Internal and External Powers*, *supra* note 48, at 389.

⁵⁰ *Id.* at 382 (emphasis in original).

⁵¹ See generally GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919) [hereinafter SUTHERLAND, CONSTITUTIONAL POWER].

⁵² *Id.* at 32.

⁵³ *Id.* at 35. Sutherland’s views on this topic may have been influenced by Judge James V. Campbell, who had been one of Sutherland’s professors at the University of Michigan Law School. See HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 42–43 (1994). Sutherland quoted from Campbell in his North American Review article, see Sutherland, *Internal and External Powers*, *supra* note 48, at 386, and in his book he described Campbell as “one of the most scholarly and deeply learned jurists the country has ever known,” SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 51, at 58. For additional discussion of Sutherland’s distinction between domestic and foreign affairs, see G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 47–62 (1999).

C. Complicating the Picture

Consider first that the vote in *Curtiss-Wright* was 7–1, with only Justice James Clark McReynolds dissenting (without opinion). Justice Harlan F. Stone did not participate. If the reasoning was so outlandish, why did six other Justices (including Justices Louis Brandeis and Benjamin Cardozo) sign on to it? Nor did the decision generate an immediate outpouring of academic criticism. Rather, as Professor Mark Tushnet has observed in his study of the Supreme Court during this period, the scholarly reaction was initially “muted.”⁵⁴ Writing eight years after the decision, a commentator expressed surprise that, up to that point, *Curtiss-Wright* “seem[ed] not to have attracted especial notice.”⁵⁵ Moreover, while the idea of sovereignty-based power has since received a lot of criticism, it has also long had its share of academic supporters, including some luminaries like Professor Edward Corwin.⁵⁶

In addition, although it has largely escaped comment in the critical literature, the Supreme Court used similar sovereign

⁵⁴ MARK V. TUSHNET, *THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930–1941*, at 501 (2021); *see also* Powell, *supra* note 27, at 226 (“Commentary in the law reviews was rather muted at first.”); White, *supra* note 53, at 109 (noting that the opinion did not generate sharp reactions in law reviews, at least at first). Writing in 1938, Professor Julius Goebel criticized Justice Sutherland’s historical account as part of a more general essay on constitutional history. *See* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 572 (1938).

⁵⁵ James Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 GEO. L.J. 375, 375 (1944). The Quarles article was highly critical of the idea of extraconstitutional sovereign power, as was another article published the same year (in two parts). *See* C. Perry Patterson, *In re The United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 297 (1944); Quarles, *supra*, at 445.

⁵⁶ *See, e.g.*, CHARLES HENRY BUTLER, 1 *THE TREATY-MAKING POWER OF THE UNITED STATES* 5 (1902) (reasoning that the national government has some powers as “essential attributes of nationality and sovereignty,” including the treaty power); WESTEL WOODBURY WILLOUGHBY, 1 *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 451 (1910) (“[T]he authority of the United States in its dealings with foreign powers includes not only those powers which the Constitution specifically grants it, but all those powers which sovereign States in general possess with regard to matters of international concern.”); EDWARD SAMUEL CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 172 (4th rev. ed. 1957) (“[T]he Constitution, instead of being the *immediate* source of the external powers of the national government, is only their *mediate* source, and confers them simply in consequence of having established a nation truly sovereign in relation to other nations.” (emphasis in original)); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 1 reporters’ n.1 (AM. L. INST. 1987) (“Congress, moreover, has an unexpressed power to legislate in foreign affairs, a legislative component of powers of the United States that inhere in its sovereignty and nationhood.”); RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 403 cmt. a (AM. L. INST. 2018) (“Although the Supreme Court speaks of the limited enumerated powers of the national government, it has recognized that, as a sovereign, the national government also has inherent powers over matters such as the control of borders and the conduct of international relations.”).

power reasoning a year after *Curtiss-Wright* to reject another nondelegation challenge, again in an opinion authored by Justice Sutherland.⁵⁷ That case involved a federal tax on coconut oil processing in the Philippine territory, which Congress authorized to be distributed in bulk to the territory without direction as to how the money should be spent.⁵⁸ In rejecting a nondelegation challenge to this directive, the Court said, as it had in *Curtiss-Wright*, that the nondelegation doctrine did not apply with the same force with respect to matters concerning the exercise of sovereign power:

In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.⁵⁹

This decision was unanimous.

Justice Sutherland also wrote another opinion in 1937 that drew upon the same foreign-versus-domestic distinction that was employed in *Curtiss-Wright*, this time with respect to an issue of federalism rather than the separation of powers. The issue in that case, *United States v. Belmont*,⁶⁰ was whether an executive agreement that President Franklin D. Roosevelt had concluded with the Soviet Union (without any congressional involvement) preempted contrary state law.⁶¹ In holding that it did, even though unilateral executive action cannot normally preempt state law, the Court said that “[p]lainly, the external powers of the United States are to be exercised without regard to state laws or policies.”⁶² Three Justices joined in a separate concurrence, but they did not address this aspect of the Court’s reasoning and instead simply maintained that there was no conflict in the case between federal and state law and thus that the issue of preemption was not squarely presented.⁶³

More significantly, the sovereign power idea outlined by Justice Sutherland in *Curtiss-Wright* had already become a cornerstone

⁵⁷ See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317–18 (1937).

⁵⁸ *Id.* at 310–12.

⁵⁹ *Id.* at 323.

⁶⁰ 301 U.S. 324 (1937).

⁶¹ *Id.* at 327–28.

⁶² *Id.* at 331.

⁶³ *Id.* at 333–35 (Stone, J., concurring in the judgment).

of a number of areas of U.S. constitutional law for decades prior to the decision. As Judge Sarah Cleveland has extensively documented, in the late nineteenth and early twentieth centuries, the Court repeatedly invoked the idea of sovereign powers “to uphold federal authority over Indians, and over immigrants in entry and exclusion proceedings, and to justify the exercise of U.S. power abroad.”⁶⁴ I return to these and other examples (and a couple of counterexamples) in Part II.

D. The “Enumerationism” Debate

As noted earlier, there has been an intense debate in recent years over whether we in fact have a Constitution of enumerated powers. A number of scholars have contended that the conventional wisdom about the enumerated powers structure of the Constitution is wrong, even in domestic affairs.⁶⁵

Some scholars make a descriptive claim: that “enumerationism” is not an accurate account of our constitutional practice. For example, Professor David Schwartz has argued that although we sometimes claim to have a Constitution of enumerated powers, an examination of precedent and practice shows that it “is not our law.”⁶⁶ Similarly, Professor Richard Primus has suggested that

⁶⁴ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002) [hereinafter Cleveland, *Powers Inherent in Sovereignty*]; see also HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 16 (“Faced with lacunae in the constitutional text, the Supreme Court long ago concluded that, in addition to the enumerated powers and their ‘derivatives,’ the federal government enjoys some powers not rooted in the Constitution, but inherent in the nationhood and sovereignty of the United States.”); Edwin Dewitt Dickinson, *The Law of Nations as Part of the National Law of the United States (Part II)*, 101 U. PA. L. REV. 792, 831 (1953) [hereinafter Dickinson, *The Law of Nations (Part II)*] (“Over the years the Supreme Court has affirmed many times a conception of nationhood which enables the national government to do generally the ‘acts and things which Independent States may of right do.’”).

⁶⁵ See, e.g., Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1023–33 (2023); John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARV. J.L. & PUB. POL’Y 57, 66 (2023) [hereinafter Mikhail, *Original Federalist Theory of Implied Powers*]; Richard A. Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 580–81 (2014); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 624 (2017). Other scholars do not explicitly reject enumeration but would construe the Constitution in light of certain broad purposes, with the result that the enumeration would have relatively little constraining effect. See, e.g., NEIL S. SIEGEL, *THE COLLECTIVE-ACTION CONSTITUTION 2* (2024); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6–15 (2010). See generally Reinstein, *Aggregate and Implied Powers*, *supra* note 17.

⁶⁶ Schwartz, *supra* note 65, at 577; see also Coan & Schwartz, *supra* note 65, at 1028.

the enumerated powers principle is a “continuity tender”—that is, “an inherited statement that members of a community repeat in order to affirm their connection to the community’s history, even though they may no longer hold the values or face the circumstances that made the statement sensible for some of their predecessors.”⁶⁷

Other scholars focus more on original understandings, contending that enumerationism was never settled at the Founding. Surveying the scholarly challenges to enumerationism, historian Jonathan Gienapp has contended that “this scholarship has convincingly demonstrated not only that enumerationism was widely rejected by a substantial cross-section of framers who had an outsized role in launching the Constitution, but that crucial features of the Constitution’s own text, and the history behind their inclusion, seem to directly compromise enumerationist logic.”⁶⁸

These anti-enumeration claims are of course contested.⁶⁹ This Article does not take a position on this general debate, which has principally focused on federal power over internal affairs, an area in which federalism arguments in favor of enumeration are stronger than they are with respect to federal power over external affairs. The key point here is simply that if enumerationism is debatable in the domestic arena, it is even more debatable in the foreign relations arena.

E. Siloes of Scholarship

As will become evident in the next Part, there are parallels to the reasoning in *Curtiss-Wright* in other areas of public law,

If enumerationism has long been the official story of U.S. constitutional law, the reality has mostly been that Congress enacts whatever legislation it believes reasonably necessary to address national problems and the Supreme Court, at least in the long run, finds a way to accommodate and justify these expansive exercises of federal power.

⁶⁷ Richard A. Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 5 (2016). See generally RICHARD PRIMUS, *THE OLDEST CONSTITUTIONAL QUESTION* (2025).

⁶⁸ Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. 183, 186 (2020) [hereinafter Gienapp, *Myth of the Constitutional Given*]; see also Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 MINN. L. REV. 699, 701 (2016) (making an originalist argument that “the national government is a sovereign government and that Congress, as a sovereign legislature, possesses the legislative powers that sovereign legislatures possess”).

⁶⁹ See, e.g., Robert G. Natelson, *The False Doctrine of Inherent Sovereign Authority*, 24 FEDERALIST SOC’Y REV. 346, 354–55 (2023). See generally Lash, *Sum of All Delegated Power*, *supra* note 25.

including in immigration law, Indian law, and the law relating to U.S. territorial acquisition and control over resources. General casebooks on foreign relations law do not address these other areas except in very superficial detail, and casebooks in the other areas do not focus on *Curtiss-Wright* or general issues of foreign relations law. The scholarly literature in these areas has also largely developed in isolation. To take one example, there have been debates over constitutional “exceptionalism” in foreign relations law, immigration law, Indian law, and the law governing territorial possessions, but these debates have operated separately.⁷⁰ Seeing this literature together, one might be forgiven for thinking that perhaps all areas of scholarly focus are exceptional.

Siloing can lead to an echo chamber effect that causes experts to miss potentially relevant ideas and approaches in other fields. As an example of what can be missed because of this siloing of scholarship, consider one of the Marshall Court’s Indian law decisions, *Worcester v. Georgia*.⁷¹ The issue there was whether the state of Georgia could prosecute a white missionary for residing on a Cherokee reservation without a state-issued license.⁷² The Court began by referring to the law of nations, pursuant to which “power, war, conquest, give rights, which, after possession, are conceded by the world.”⁷³ Exercising these rights, the Court reasoned, the British Crown in America acquired dominion over the territory on which the Indians lived but chose to treat the tribes as distinct political communities and not to interfere with their internal affairs.⁷⁴ The Court further reasoned that, when the American colonies separated from Great Britain, the Continental Congress, not the states, implicitly acquired authority over foreign affairs, including Indian affairs: “The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.”⁷⁵ The Constitution confirmed this understanding, said the Court, such

⁷⁰ See, e.g., *supra* note 43 and accompanying text (describing foreign relations law exceptionalism); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. L. REV. 583, 635 (2017); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 460–72 (2005); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2482–2512 (2022).

⁷¹ 31 U.S. (6 Pet.) 515 (1832).

⁷² *Id.* at 528–32.

⁷³ *Id.* at 543.

⁷⁴ *Id.* at 547.

⁷⁵ *Id.* at 558.

that “[t]he whole intercourse between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States.”⁷⁶ Much of this reasoning—about how authority under the law of nations vested directly in the Continental Congress rather than the states and was then acquired by the new federal government upon adoption of the Constitution—is similar to the reasoning in *Curtiss-Wright*, decided more than a century later.⁷⁷

Cleveland’s 2002 study of sovereign power is an exception to this siloing in that it considers Indian law, immigration law, and the law of colonial possessions together.⁷⁸ That study is extremely valuable and in some respects quite exhaustive. But it has a number of limitations. Most notably, it mixes together a variety of criticisms, some of which (as I explain in Part III) concern issues that have little to do with the sovereign power idea (such as unduly expansive presidential power, immunity from constitutional constraint, and lack of judicial review).⁷⁹ The study also works too hard to ground the sovereign power idea in one period of U.S. history, contending that the idea’s “origins [] lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power.”⁸⁰ As will become clear in the next Part, that account of the time frame is too narrow. Sovereign power reasoning played an important role in U.S. constitutional reasoning even before the Founding and started appearing in Supreme Court decisions by the early 1800s. Moreover, it has extended well past the late nineteenth century, and, indeed, is an important part of modern constitutional reasoning. Nor do the examples that Cleveland invoked give a full sense of the broad range of sovereign power–inflected authorities, either historically or today.

⁷⁶ *Worcester*, 31 U.S. (6 Pet.) at 561.

⁷⁷ It is not clear to what extent Marshall was suggesting that the federal government’s sovereign power over Indian affairs was extratextual upon adoption of the Constitution. He could be read as saying that the collection of various textual powers in the Constitution added up to complete sovereign control over Indian affairs, perhaps on the theory that these powers convey more authority collectively than might be apparent if they were considered separately. Cf. Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 7 (hypothesizing that the Constitution conveys certain aggregate powers and that for each of these powers the “whole is greater than the sum of its parts”).

⁷⁸ Cleveland, *Powers Inherent in Sovereignty*, *supra* note 64, at 13–15.

⁷⁹ *Id.*

⁸⁰ *Id.* at 14; see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 11–38 (2002) (discussing this historical period).

F. Domestic Federalism Debates

There are also underexplored connections between the idea of inherent sovereign power and issues of domestic federalism. Professors Anthony Bellia and Bradford Clark have claimed, for example, that “[t]he term ‘States’ [in the Constitution] was a term of art drawn from the law of nations and typically signified a sovereign nation with a set of widely recognized sovereign rights.”⁸¹ This reasoning is consistent with the (controversial) approach of the current Supreme Court to state sovereign immunity, an approach that hypothesizes sovereign rights at the state level that are not expressly mentioned in the constitutional text.⁸²

Some of the Supreme Court’s recent limitations on state sovereign immunity have also been connected to the idea of sovereign authority. In particular, the Court has reasoned that Congress can abrogate state immunity from private lawsuits when exercising a power that is “complete in itself”⁸³ because for such a power, the states implicitly consented to suit in the “plan of the Convention.”⁸⁴ In support of this idea, the Court has reasoned that “[w]hen the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation.”⁸⁵ The Framers likely sought to create an even more “cohesive national sovereign” with

⁸¹ Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 838 (2020) [hereinafter Bellia & Clark, *International Law Origins*].

⁸² See, e.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019); *Alden v. Maine*, 527 U.S. 706, 731–35 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57–73 (1996); see also Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1028 (2002) (contending that the Eleventh Amendment “evinces the Framers’ purposive decision to incorporate into the Constitution, in recognition of the sovereign equality of the States, the classical international law rule that only states have rights against other states”); THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” (emphasis omitted)); *Hans v. Louisiana*, 134 U.S. 1, 13–14 (1890) (quoting Alexander Hamilton’s statement in concluding that states have immunity even in federal question cases).

⁸³ *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021) (quotation marks omitted) (quoting *Kohl v. United States*, 91 U.S. 367, 374 (1876)).

⁸⁴ *Id.*

⁸⁵ *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2464 (2022) (quotation marks omitted) (quoting *PennEast Pipeline Co.*, 141 S. Ct. at 2263); see also *id.* at 2460 (“Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military.”); cf. Anthony J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485, 545 (2024) (critiquing this line of reasoning).

respect to foreign affairs.⁸⁶ Even many Anti-Federalists accepted this goal.⁸⁷

The Supreme Court's state sovereign immunity jurisprudence is heavily contested, and it is not my aim here to defend it.⁸⁸ The key point is simply that it is another example of how even purportedly textualist Supreme Court Justices accept that, as Justice Sutherland hypothesized, there are unwritten understandings that affect how the Constitution should be interpreted. Indeed, the Court has long observed in the sovereign immunity context that "[b]ehind the words of the constitutional provisions are postulates which limit and control."⁸⁹ And in a recent decision in this area, the Court emphasized that this is a general feature of our constitutional law.⁹⁰

⁸⁶ See, e.g., THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); see also Letter from Thomas Jefferson to John Blair (Aug. 13, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, 7 AUGUST 1787 TO 31 MARCH 1788, 27–28 (Julian P. Boyd ed., 1955) ("My idea is that we should be made one nation in every case concerning foreign affairs, and separate ones in whatever is merely domestic."); Letter from Thomas Jefferson to James Madison (Feb. 8, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, 1 NOVEMBER 1785 TO 22 JUNE 1786, 264–71 (Julian P. Boyd ed., 1954) ("The politics of Europe render it indispensably necessary that with respect to every thing external we be one nation only, firmly hooped together.").

⁸⁷ See, e.g., FEDERAL FARMER, *Letter III*, in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 203, 224 (John P. Kaminski et al. eds., 2003) ("Those [powers] respecting external objects, as all foreign concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs, can be lodged no where else, with any propriety, but in this [national] government."); see also HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 27 (1981) ("The Anti-Federalists agreed with Publius [i.e., James Madison] that 'if we are to be one nation in any respect, it clearly ought to be in respect to other nations.'"); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 994 (2010) [hereinafter Golove & Hulsebosch, *A Civilized Nation*] ("These aspects of the framers' plan were well understood and, during the Founding, were relatively uncontroversial.").

⁸⁸ As discussed in the next Part, one of the leading proponents of the idea of national sovereign power during the preconstitutional period was James Wilson. After he became a Supreme Court Justice, Wilson concluded (contrary to the current Supreme Court) that the constituent states did not retain this attribute of sovereignty, reasoning that "the people of the United States intended to form themselves into a nation for national purposes." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (Wilson, J.) (emphasis omitted); see also Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 33–35 (2024) (contending that the Bellia and Clark argument rests on a state "compact" approach to the Constitution, which is inconsistent with more nationalistic conceptions of the nature of the Union that rest on social contract theory).

⁸⁹ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

⁹⁰ See *Hyatt*, 139 S. Ct. at 1498–99.

G. State Sovereignty Before the Constitution

As the example of state sovereign immunity illustrates, questions of national sovereignty in our federal system inevitably run up against questions of state sovereignty. At least from an originalist perspective, answers to the latter questions may depend on how one understands state sovereignty in the years leading up to the Constitution. Justice Sutherland, as discussed above, reasoned that the states never possessed sovereignty over external affairs and thus that there is no federalism reason for cabining national government authority in that domain.

Justice Sutherland's historical account is controversial. Some scholars have maintained that, contrary to that account, the states did possess foreign relations authority before the Constitution.⁹¹ Other scholars have agreed with the gist of Justice Sutherland's account.⁹² And others have contended that it is difficult to draw a firm conclusion one way or the other.⁹³ My own sympathies lie with the last group. The key point for purposes of this Article is simply that, as an act of nation building, the Constitution was materially different in nature from what preceded it. Even if the United States' status as a nation-state (as opposed to a confederation of states) was unclear prior to the Constitution, the Constitution was designed to help resolve that question, and state sovereignty was inevitably affected.⁹⁴

⁹¹ See, e.g., Lofgren, *supra* note 37, at 32 (describing Justice Sutherland's historical account as "shockingly inaccurate").

⁹² See, e.g., JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 173 n.* (1979) [hereinafter RAKOVE, *BEGINNINGS OF NATIONAL POLITICS*]; Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds*, 74 COLUM. L. REV. 1056, 1061–62 (1974); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 323 (Max Farrand ed., 1911) (statement of Rufus King) ("The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties.").

⁹³ See, e.g., JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788*, at 178–80 (1986).

⁹⁴ See, e.g., CORWIN, *supra* note 56, at 173 (discussing how, even if the states had external sovereign power prior to the Constitution, it is "perfectly adequate logically" to conclude that their "former sovereignty in this respect must have passed to the national government"); HENKIN, *FOREIGN AFFAIRS*, *supra* note 5, at 19 (similar); see also, e.g., *United States v. Texas*, 339 U.S. 707, 718 (1950) (reasoning that, even if Texas had external sovereignty prior to joining the Union, it implicitly ceded it to the federal government as the "sole and exclusive spokesman for the Nation").

In addition, there was substantial support at the Founding for the idea of *popular* sovereignty—that is, that ultimate sovereignty resided with the people rather than in their governments.⁹⁵ Under that conception, one need not hypothesize that the states had to transfer foreign affairs authority to the national government, assuming that they had any such authority. Instead, the question becomes what type of national government the people themselves established. The idea that they attempted to establish a fully-fledged nation-state in the international community does not depend on resolving the debate about the locus of sovereignty in the preconstitutional period.

As I explain below, viewing the Constitution as helping to establish a sovereign nation in the international community does not mean that federalism is irrelevant to foreign affairs, as Justice Sutherland seemed to suggest. But it does help explain why states' rights considerations have in general carried less weight in the foreign affairs arena than they have in the domestic arena.

II. HISTORICAL EXAMPLES

This Part shows that the idea of governmental authority grounded in national sovereignty has roots that can be traced back to the preconstitutional period. It also describes how this idea came to permeate U.S. constitutional law and is now reflected in numerous judicial decisions, federal statutes, and executive branch actions. This is not to say, of course, that courts and other interpreters have always accepted this style of reasoning, or that it has always been uncontroversial. But these examples do show that, as a positive law matter, sovereign power constitutionalism has long been an important part of our law.

A. Historical Roots

The roots of the sovereign power idea go back significantly further than the late nineteenth century—indeed, they go back at least to the Declaration of Independence, which claimed that, now that the colonies had dissolved themselves from Great Britain, they were “Free and Independent States,” and as such “they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, *and to do all other Acts and Things which Independent*

⁹⁵ See *infra* Part III.C.

*States may of right do.*⁹⁶ This idea of a package of inherent sovereign powers was taken directly from international law, as articulated by prominent European commentators such as the Swiss publicist Emmerich de Vattel.⁹⁷ The idea that the United States was acquiring certain unspecified entitlements is also reflected in the 1783 peace treaty between the United States and Great Britain ending the Revolutionary War, in which Great Britain acknowledged that the United States were “free, sovereign and independent.”⁹⁸ What that status meant was assumed rather than defined.

What were these sovereign powers that were assumed to exist under international law? They would have included the powers to send and receive ambassadors, enter into treaties and other international agreements, control the country’s borders, acquire new territory by treaty or occupation, engage in self-defense, and

⁹⁶ THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776) (emphasis added); *see also* DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 28–29 (2007) (noting that the Declaration was written against a backdrop of assumptions about eighteenth-century international politics, “[t]he most fundamental [of which] was the existence of a group of political bodies . . . that interacted with one another according to certain external rules”). The phrasing in the Declaration is potentially ambiguous about whether each of the states had the sovereign powers or whether they instead held them collectively. *But cf.* Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813, 839 (2023) (“The Declaration could not have coherently announced full sovereign powers for thirteen states separate from the group, because individual states did not actually exercise or claim those powers separate from the group.”).

⁹⁷ *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 10 (2017) (“The phrase ‘Free and Independent States’ referred to the status of sovereign states under the law of nations.”); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 33 (2009) (“The acts the Declaration refers to were the acts of sovereign states, as defined by the international law of the time. In other words, the colonists sought to create a sovereign entity akin to, and equal to, those that existed in eighteenth-century Europe.”); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States (Part I)*, 101 U. PA. L. REV. 26, 35 (1952) (noting that the reference in the Declaration to what independent states may do “came straight from that universal jurisprudence which had been elaborated in the treatises of Grotius, Pufendorf, Burlamaqui, Vattel and others”). Vattel’s treatise, which was published in 1758 and first translated into English in 1760, was especially influential in early U.S. thinking about the law of nations. *See, e.g.*, PETER ONUF & NICOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 11 (1993) (contending that Vattel’s work was “unrivaled among such treatises in its influence on the American Founders”); *cf.* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547, 570 (2012) (“The Founders [] had in their hands a classical legal theory of the law of nations drawn from writers like Grotius and Pufendorf, not solely from Vattel.”).

⁹⁸ Definitive Treaty of Peace art. I, U.K.–U.S., Sept. 3, 1783, 8 Stat. 80, 81. The treaty refers to each of the states by name, again potentially suggesting that they each had sovereignty. But the treaty was concluded by national representatives of the United States, not state representatives.

use the high seas.⁹⁹ The Continental Congress, formally known as the “United States in Congress Assembled,” exercised these and related powers long before being granted them in the 1781 Articles of Confederation, and in fact even before the issuance of the Declaration of Independence.¹⁰⁰ In looking back on that period, Justice William Paterson (one of the signers of the Constitution) observed:

Congress raised armies, fitted out a navy, and prescribed rules for their government: Congress conducted all military operations both by land and sea: Congress emitted bills of credit, received and sent ambassadors, and made treaties: Congress commissioned privateers to cruize against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America.¹⁰¹

Alexander Hamilton had made similar observations in 1780.¹⁰²

⁹⁹ See Bellia & Clark, *International Law Origins*, *supra* note 81, at 847–49 (summarizing the writings of Vattel and others); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 749–52 (2012) [hereinafter Bellia & Clark, *Law of Nations as Constitutional Law*] (same).

¹⁰⁰ See, e.g., Curtis Putnam Nettels, *The Origins of the Union and of the States*, 72 PROC. MASS. HIST. SOC’Y 68, 69–70 (1960) (describing actions taken by the Continental Congress before June 2, 1776, such as maintaining an army).

¹⁰¹ *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 80 (1795) (emphasis omitted) (opinion of Paterson, J.); see also *id.* at 91 (opinion of Iredell, J.) (“[T]hat previously thereto [the national government] did exercise, with the acquiescence of the States, high powers of what I may, perhaps, with propriety for distinction, call *external sovereignty*, is unquestionable.” (emphasis in original)). Justice Paterson appears to have believed that this feature of the preconstitutional period became an implicit part of the U.S. constitutional structure after the Founding. See William Paterson, Draft Opinion (c. 1794), in William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 527 (1986) (“It must be agreed, that the United States, under the existing const[itution], form a complete, sovereign, and independent nation, to which the rights of sovereigns and the law of nations attach.”); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796) (opinion of Chase, J.) (“I entertain this general idea, that the several States retained all internal sovereignty; and that Congress properly possessed the great rights of external sovereignty.” (emphasis omitted)).

¹⁰² See Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON, 1779–1781, 401 (Harold C. Syrett ed., 1961):

[Congress] have done many of the highest acts of sovereignty, which were always cheerfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy, emitting money, making alliances with foreign powers, appointing a dictator &c. &c.—all these implications of a complete sovereignty were never disputed.

Moreover, two years before the drafting of the Constitution, James Wilson—who would become one of the central Framers of the Constitution—reasoned that “the United States are to be considered as one undivided, independent nation; and as possessed of *all the rights, and powers, and properties, by the law of nations incident as such.*”¹⁰³ He made this claim despite the fact that the Articles of Confederation provided that “[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”¹⁰⁴ It is sometimes argued that Wilson expressed a different view during the debates over the Constitution, but it is not clear that this is the case.¹⁰⁵ Not surprisingly, Justice Sutherland drew heavily on Wilson’s views in his pre-judicial writings about sovereign power.¹⁰⁶

Despite the historical backdrop of the Continental Congress having exercised sovereign powers that were not dependent on textual grants of authority, there seemed to be general agreement during the constitutional Founding that the national government’s powers over foreign affairs needed to be *enhanced*. As Alexander Hamilton noted in *The Federalist Papers*,

¹⁰³ JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA (1785), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 66 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis added); *see also* Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1795 (2021) [hereinafter Gienapp, *In Search of Nationhood*] (contending that Wilson offered “the most penetrating account of American nationhood and power advanced in the years prior to the Constitutional Convention”); William Ewald, *James Wilson and the Drafting of the Constitution*, 10 J. CONST. L. 901, 901 (2008) (noting that Wilson “is generally acknowledged to have been one of [the Constitution’s] principal architects, second in importance only to Madison”).

¹⁰⁴ ARTICLES OF CONFEDERATION OF 1781, art. II.

¹⁰⁵ During the constitutional debates, Wilson argued (in disputing the need for a Bill of Rights) that “in delegating federal powers [under the Constitution] . . . the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union.” James Wilson, *Speech in the State House Yard* (Oct. 6, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (John P. Kaminski et al. eds., 1976). But Wilson qualified his insistence on the need for “positive grants” by stating during the Pennsylvania ratification debate that this was true “unless [the authority] results from the nature of the government itself.” Statements by James Wilson in Convention Debates on the Pennsylvania Convention (Dec. 4, 1787), *in* 2 DOCUMENTARY HISTORY, *supra*, at 470. For an argument that Wilson in any event thought that the powers of external sovereignty were being implicitly conveyed to Congress in the Necessary and Proper Clause (which Wilson helped to draft), *see generally* John Harrison, *The International Sovereignty of the United States and the Wilsonian Constitution* (2022) (unpublished discussion paper) (on file with author); *see also* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1123 (2014) [hereinafter Mikhail, *Necessary and Proper Clauses*].

¹⁰⁶ *See* Sutherland, *Internal and External Powers*, *supra* note 48, at 377.

the preconstitutional government was so weak that it had no “respectability in the eyes of foreign powers.”¹⁰⁷ The perceived need for greater national authority over foreign affairs was one of the key driving forces behind calling for a constitutional convention.¹⁰⁸ Before the Constitution, the states often acted as if the “United States” was a mere treaty-like confederation rather than a fully-fledged nation, to the frustration of the Continental Congress.¹⁰⁹

In light of that backdrop, the Founders may have assumed that the new national government would end up with the full complement of powers associated with nationhood, as part of forming what the preamble to the Constitution refers to as a “more perfect Union.”¹¹⁰ Although the Articles of Confederation had purported to reserve to the states those sovereign rights that were not “expressly delegated” to the national government, that language did not make its way into the Constitution.¹¹¹

¹⁰⁷ THE FEDERALIST NO. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁰⁸ See, e.g., RAKOVE, BEGINNINGS OF NATIONAL POLITICS, *supra* note 92, at 351; Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 696 (1987); see also GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 247 (2017) (noting George Washington’s concern that “the Confederation was not a sovereign government”); FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 207–08 (1973) (arguing that “the Constitution was largely intended to strengthen the national position in foreign relations”).

¹⁰⁹ See, e.g., James Madison, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 351 (Robert A. Rutland et al., eds., 1975) (complaining that the Articles were “nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign states”); Clyde H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529, 538–40 (1907) (describing state activities relating to foreign affairs in the preconstitutional period).

¹¹⁰ U.S. CONST. pmbl.; cf. Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 89 (“When [John] Marshall wrote [in *McCulloch*] that ‘all the external relations’ of the United States are entrusted to the national government, he expressed the view of the founding generation.”). Of course, the project of establishing nationhood continued after adoption of the Constitution. See, e.g., ELIGA H. GOULD, AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE 140 (2012) (noting that events during the late eighteenth century “showed that, having overthrown what Vattel would have called the high sovereignty of the British Crown and Parliament, the United States now had a government capable of exercising the most important attributes of that sovereignty”); KEVIN KENNY, THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE 19TH-CENTURY UNITED STATES 219 (2023) (“The transition from a loosely federated state in the antebellum era to a more unified nation-state with overseas imperial ambitions after the Civil War necessarily involved a redefinition of sovereignty. The United States could not assert its international power without defining its powers as a nation-state.”).

¹¹¹ See Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 27 (2005).

The Founding debates are not this Article's focus, but it is worth noting that recent historical work has concluded that what might be called the "Wilsonian" perspective was one of the competing visions at the Founding of how to understand the Constitution. Jonathan Gienapp has outlined, for example, how Wilson's view of nationhood was an important strand of Federalist thinking about the Constitution, even as Wilson and other Federalists tried to downplay some of its implications.¹¹² Similarly, Professor Jud Campbell has described four Founding Era views of the nature of the Union, one of which he labeled "Wilson's 1776 nationalism," pursuant to which "Congress represented a national body politic" and, as such, "had inherent powers that exceeded those mentioned in Article I of the Constitution."¹¹³

In any event, it did not take long after the adoption of the Constitution for sovereign power issues to arise. They did so in 1799, for example, in debates over the constitutionality of the Alien and Sedition Acts¹¹⁴, one of which authorized the President to "order all such aliens as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."¹¹⁵ In addition to nondelegation and First Amendment concerns, there were questions about the national government's authority to take the actions in question.¹¹⁶ In response to these questions, the proponents of the legislation invoked, in addition to specific powers, "the common practice of nations" and the fact that, as a matter of self-preservation, every nation must have the authority "to send away dangerous aliens."¹¹⁷ Alexander Addison, a prominent state court judge in Pennsylvania, similarly contended that the law of nations gave the United States "all sovereign rights with respect to other nations."¹¹⁸ Republican critics

¹¹² See Gienapp, *In Search of Nationhood*, *supra* note 103, at 1793–1804.

¹¹³ Campbell, *supra* note 88, at 30, 32.

¹¹⁴ Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed 1802); Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 USC §§ 21–24); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

¹¹⁵ Alien Act § 1, 1 Stat. at 571 (emphasis omitted).

¹¹⁶ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 258 (1997) [hereinafter CURRIE, *FEDERALIST PERIOD*].

¹¹⁷ Report of a Select Committee Made to the House of Representatives, 9 ANNALS OF CONG. 2986, 2986–87 (1799); see also, e.g., CURRIE, *FEDERALIST PERIOD*, *supra* note 116, at 259 (quoting statements in the legislative debate suggesting that there is inherent sovereign authority over foreign affairs); Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1437–38 (2022) (describing the reliance on Vattel).

¹¹⁸ ALEXANDER ADDISON, *ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY* 21 (Philadelphia, Zachariah Poulson, Jr. 1800) (emphasis omitted).

of the Alien and Sedition Acts accepted that the government had the inherent power to expel enemy aliens, reasoning that such action was permitted by the law of nations, but they resisted the claim that it could expel others.¹¹⁹

To take another example, in its 1812 *Schooner Exchange v. McFaddon*¹²⁰ decision, the Supreme Court reasoned that one element of U.S. sovereignty was deciding whether to continue giving immunity to foreign government vessels entering U.S. territory.¹²¹ Chief Justice Marshall explained that “[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power” and that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”¹²² Although the connection is often forgotten, this decision would be cited near the end of the nineteenth century in support of broad national power over immigration.¹²³

Of more significance, throughout the nineteenth and early twentieth centuries, both judicial and political actors came to rely on sovereign power reasoning in a number of key areas of constitutional law relating to territorial acquisition, control over immigration, the regulation of Indian affairs, and the extraterritorial application of criminal law to U.S. citizens. Moreover, sovereign

¹¹⁹ See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 936–37 (1991) [hereinafter Neuman, *Whose Constitution?*]; David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1637–38 (2018); see also JAMES MADISON, THE REPORT OF 1800 (1800), reprinted in 17 THE PAPERS OF JAMES MADISON 319 (David B. Mattern et al. eds., 1991) (“The general practice of nations, distinguishes between alien friends and alien enemies. The latter it has proceeded against, according to the law of nations, by expelling them as enemies. The former it has considered as under a local and temporary allegiance, and entitled to a correspondent protection.”).

¹²⁰ 11 U.S. (7 Cranch) 116 (1812).

¹²¹ See *id.* at 143–47; see also Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 220–22 (2010) (noting the default nature of this conception of sovereign immunity).

¹²² *Schooner Exch.*, 11 U.S. at 136 (emphasis omitted).

¹²³ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889); see also DANIEL S. MARGOLIES, SPACES OF LAW IN AMERICAN FOREIGN RELATIONS: EXTRADITION AND EXTRATERRITORIALITY IN THE BORDERLANDS AND BEYOND, 1877–1898, at 106 (2011) (describing the *Chinese Exclusion Case* as “a strong reaffirmation” of *Schooner Exchange*). Another doctrinal connection that is often overlooked: in its argument in *McCulloch*, the government cited to *Schooner Exchange* and observed, “If, in favor of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations, for the security of our own national government?” 17 U.S. (4 Wheat.) at 395.

power reasoning continues to underpin these (and other) areas of law today.

B. Territory and Resources

International law at the time the Constitution was adopted would have recognized territorial sovereignty over (1) the territory within the nation's boundaries, (2) its coastal waters, and (3) any additional territory that the nation acquired by either treaty, conquest, or occupation.¹²⁴ The Constitution, however, does not address how the United States is to acquire territorial rights.¹²⁵

The Constitution does give Congress the power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹²⁶ That clause, however, does not address the *acquisition* of territory or property. It was always assumed that the United States could acquire territory or property through either the common law (based on purchases or inheritance from private parties, for example) or through the law of nations.

In 1793, for example, President George Washington's administration informed foreign powers that the United States was setting its territorial sea at three nautical miles from the coast.¹²⁷ At the time, there was no settled international rule on the subject.¹²⁸

¹²⁴ See, e.g., Vattel, *supra* note 14, 84–86, 99–101, 106–10; see also *Jones v. United States*, 137 U.S. 202, 212 (1890) (citing Vattel and other sources for the proposition that “[b]y the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest”).

¹²⁵ See Dickinson, *The Law of Nations (Part II)*, *supra* note 64, at 817 (“There is nothing in the Constitution which provides in terms for the acquisition of additional territory or territorial rights.”).

¹²⁶ U.S. CONST. art. IV, § 3, cl. 2.

¹²⁷ See Letter from Thomas Jefferson to Certain Foreign Ministers in the United States (Nov. 8, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, 1 SEPTEMBER TO 31 DECEMBER 1793, 328–30 (John Catanzariti ed., 1997). In making this announcement, the administration was also exercising the United States' sovereign right to participate in the formation of customary international law, another power that is not mentioned in the Constitution but that has always been assumed to exist. Cf. HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 14, 43 (asking where in the Constitution is the power “to help make new international law” and then noting that the President “acts and speaks the part of the United States in the subtle process by which customary international law is formed”).

¹²⁸ See 1 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 703–06 (1906); see also *United States v. California*, 332 U.S. 19, 32 (1947) (“At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders.”). After the United States announced a three-mile territorial sea, Britain decided to endorse the

The following year, Congress (as part of a neutrality statute) authorized the federal district courts to take cognizance of all captures made within a marine league (that is, three nautical miles) from the coast.¹²⁹

Acquisition issues also arose in 1803 in connection with the Louisiana Purchase treaty, pursuant to which the United States acquired a vast new territory (over 800,000 square miles), thereby effectively doubling the size of the nation. Despite the Constitution's general grant of a treaty power, President Thomas Jefferson initially doubted the constitutionality of acquiring new territory, noting that "[t]he general government has no powers but such as the constitution has given it."¹³⁰ Ultimately, he suppressed his constitutional doubts and moved forward with the purchase. Others argued that the purchase was constitutional on grounds relating to national sovereignty. For example, President Jefferson's Treasury Secretary, Albert Gallatin, reasoned that "the existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties."¹³¹ Several members of Congress made essentially the same claim.¹³²

At various times since then, the United States has acquired additional territory by treaty. For example, it acquired Florida and other southeastern territory through an 1819 treaty with

idea and promoted it as an international law rule. See 1 SAYRE A. SWARTZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS: A BRIEF HISTORY*, at vii (1970).

¹²⁹ See Neutrality Act of 1794, ch. 50, § 6, 1 Stat. 381, 384 (repealed 1818).

¹³⁰ Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 41 *THE PAPERS OF THOMAS JEFFERSON*, 11 JULY TO 15 NOVEMBER 1803, 169–71 (Barbara B. Oberg ed., 2014); see also Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 41 *THE PAPERS OF THOMAS JEFFERSON*, *supra*, at 184–86 ("The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union.").

¹³¹ Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), in 39 *THE PAPERS OF THOMAS JEFFERSON*, 13 NOVEMBER 1802 TO 3 MARCH 1803, 324–27 (Barbara B. Oberg ed., 2012).

¹³² See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 22 (2004); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 95–107 (2001); see also 3 STORY, *supra* note 17, at 160 ("As an incidental power, the constitutional right of the United States to acquire territory would seem so naturally to flow from the sovereignty confided to it, as not to admit of very serious question."); Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 382 (2003) ("When the Louisiana Treaty was concluded, most believed that the United States had the power under the Treaty Clause to acquire foreign territory in order to secure its own borders and preserve access to the Mississippi River. This power arguably flowed from the need of any sovereign nation to defend itself."); cf. Brian Richardson, *The Imperial Treaty Power*, 168 U. PA. L. REV. 931, 937 (2020) (discussing an earlier strain of thought that posited that, "[b]ecause acquiring or ceding territory by treaty would alter the composition of the republic, these exercises of sovereignty were denied to all American governments").

Spain;¹³³ it acquired Oregon through an 1846 treaty with Great Britain that settled a boundary dispute between the two countries;¹³⁴ and it acquired territory in the southwest through treaties with Mexico in the 1840s and 1850s.¹³⁵ But acquisitions of territory have sometimes been accomplished through other means. The United States acquired both Texas (in 1845) and Hawaii (in 1898) through annexation statutes after proposed treaties failed to receive Senate approval.¹³⁶ Even assuming that the treaty power allows for acquisition of territory, as in the Louisiana Purchase, some observers wondered where *Congress* was getting a territorial acquisition power. In the debates, especially over annexing Hawaii, the proponents had an answer: sovereignty.¹³⁷

In addition, in the 1850s Congress started authorizing the acquisition of “guano islands,” such as Navassa Island in the Caribbean, through occupation.¹³⁸ The Supreme Court upheld U.S. regulatory jurisdiction over the islands, reasoning, “By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest This principle affords ample warrant

¹³³ Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Spain—U.S., Feb. 22, 1819, 8 Stat. 252.

¹³⁴ Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, U.K.—U.S., June 15, 1846, 9 Stat. 869.

¹³⁵ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.—U.S., Feb. 2, 1848, 9 Stat. 922; Gadsden Purchase Treaty, Mex.—U.S., Dec. 30, 1853, 10 Stat. 1031.

¹³⁶ H.R.J. Res. 46, 28th Cong. (1845); H.R.J. Res. 259, 55th Cong. (1898).

¹³⁷ See, e.g., 31 CONG. REC. 5839 (June 13, 1898) (statement of Rep. Henry) (reasoning that, because “the right to extend its territory is inherent in any nation,” “it requires no special provision of the Constitution to enable us to annex additional territory”); cf. Daniel Rice, Note, *Territorial Annexation as a “Great” Power*, 64 DUKE L.J. 717, 733–38 (2015) (arguing that the acquisition of territory is a “great power” and, as such, should not be viewed as implicitly authorized by the Necessary and Proper Clause). Because Texas was being brought in as a new state, it was arguable that the annexation fell within Congress’s power to admit new states into the union, but that argument did not apply to Hawaii since it was not being annexed as a state.

¹³⁸ Bird droppings, known as guano, are highly effective as fertilizer. The Guano Islands Act, ch. 164, 11 Stat. 119 (1856), first enacted in 1856 and still on the books, provides that when a U.S. citizen discovers a deposit of guano on an unoccupied island that does not belong to another government, the President can deem the island to be “appertaining to the United States,” *id.* The Act also gave the discoverer “the exclusive right of occupying said island, rocks, or keys, for the purpose of obtaining said guano, and of selling and delivering the same to citizens of the United States,” and it authorized the President to use military force to protect the property. *Id.* For the current version of the Act, see 48 U.S.C. § 1411. See also 18 U.S.C. § 7(4) (treating such guano islands as falling within the “special maritime and territorial jurisdiction of the United States”).

for the legislation of congress concerning guano islands.”¹³⁹ After the Civil War, the Court also upheld broad congressional power to regulate the U.S. territories in North America.¹⁴⁰

More famously, sovereign power was invoked in support of the government’s authority to acquire and regulate colonial possessions, such as the Philippines and Puerto Rico, after the Spanish-American War. In a series of decisions known as the “Insular Cases,” the Supreme Court reasoned that the United States had the same sovereign authority as other nations to acquire and govern new territory. The Court reasoned that “[i]f it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them.”¹⁴¹

Less controversially, the federal government has asserted dominion over what could be called “territorial appurtenances,” such as the coastal seabeds, submerged lands, continental shelves, and airspace. Starting in the 1940s, the Supreme Court invoked “national external sovereignty” in explaining why the federal government rather than state governments had title to such appurtenances.¹⁴² Although now largely forgotten, one of the

¹³⁹ *Jones v. United States*, 137 U.S. 202, 212 (1890). For discussion of U.S. assertions of sovereignty over the guano islands, see DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 46–58 (2020). See generally Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779 (2005). For additional discussion of the legal and historical context of the *Jones* decision, see Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of Territories*, 131 YALE L.J. 2390, 2401–37 (2022).

¹⁴⁰ See, e.g., *Mormon Church v. United States*, 136 U.S. 1, 42 (1890) (“The incidents of these powers [of territorial acquisition] are those of national sovereignty, and belong to all independent governments . . . Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete.”).

¹⁴¹ *Downes v. Bidwell*, 182 U.S. 244, 285 (1901); see also *Dorr v. United States*, 195 U.S. 138, 140 (1904) (“It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations.”); BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* 48 (2016) (“This internationalist reading of the Constitution suggested that the purpose of embracing international law was to make the United States more like other world powers.”); cf. LAWSON & SEIDMAN, *supra* note 132, at 6, 113 (suggesting that the acquisition of the Philippines may have been unconstitutional). In 1934, Congress provided that the Philippines would become an independent country following a ten-year transition period. See Philippine Independence Act (Tydings-McDuffie Act), Pub. L. No. 73-127, 48 Stat. 456 (1934).

¹⁴² See *United States v. Maine*, 420 U.S. 515, 521–22 (1975); *United States v. Louisiana*, 339 U.S. 699, 704 (1950); *United States v. Texas*, 339 U.S. 707, 718 (1950); *United States*

noted scholarly defenses of the historical analysis in *Curtiss-Wright* was focused on the coastal seabeds.¹⁴³ Starting in 1926, Congress began regulating the airspace above the country, declaring that the United States had “complete sovereignty” in its navigable airspace and granting all citizens “a public right of freedom of interstate and foreign air navigation” through the airspace.¹⁴⁴

Not all of these proprietary actions have been accomplished by statute. President Washington’s assertion of a three-mile sea was, as noted above, done through presidential proclamation. This was also true of the famous Truman Proclamation of 1945. There, President Harry Truman proclaimed that “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”¹⁴⁵ Eight years later, Congress enacted the Outer Continental Shelf Lands Act,¹⁴⁶ which extended U.S. laws and jurisdiction over the subsoil and seabed of the outer continental shelf.¹⁴⁷ In 1988, President

v. California, 332 U.S. 19, 34 (1947); *cf. id.* at 45 (Frankfurter, J., dissenting) (“To declare that the Government has ‘national dominion’ is merely a way of saying that vis-à-vis all other nations the Government is the sovereign.”).

¹⁴³ See generally Morris, *supra* note 92. Eventually, in 1953, Congress decided to give states title to the natural resources in submerged lands within a three-mile belt off their coastlines. See Submerged Lands Act, 43 U.S.C. §§ 1301 et seq. The Supreme Court upheld this statute on the ground that Congress has plenary authority under Article IV of the Constitution to dispose of federal property. See *Alabama v. Texas*, 347 U.S. 272, 273–74 (1954) (per curiam).

¹⁴⁴ Air Commerce Act of 1926, Pub. L. No. 69-254, §§ 6(a), 10, 44 Stat. 568, 572, 574. For the current version of the statute, see 49 U.S.C. § 40103(a)(1). *Cf.* *United States v. Causby*, 328 U.S. 256, 261 (1946) (“The air is a public highway, as Congress has declared.”). The United States is now a party to treaties relating to national control over airspace. It is also a party to treaties that disallow certain exercises of sovereignty in outer space. See, e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. II, Oct. 10, 1967, 18 U.S.T. 2410 (“Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”). In 2015, Congress passed a law allowing U.S. citizens to claim asteroid resources. See U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 402, 129 Stat. 704, 721 (2015) (codified at 51 U.S.C. § 51303). In the same statute, however, Congress said that it was not “assert[ing] sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.” *Id.* § 403, 129 Stat. at 722.

¹⁴⁵ Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945).

¹⁴⁶ Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified at 43 U.S.C. §§ 1331 et seq.).

¹⁴⁷ *Id.*

Ronald Reagan issued a proclamation extending the U.S. territorial sea to twelve miles.¹⁴⁸ His proclamation begins by noting, “International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.”¹⁴⁹ In concluding that the President had the authority to issue this proclamation, the Justice Department’s Office of Legal Counsel similarly noted that, under international law “[a] nation is sovereign in its territorial sea.”¹⁵⁰

As this last quotation indicates, claims under international law are working in conjunction with constitutional law in many of these examples. That is, the government contends that the United States has acquired certain territorial rights as a result of international law rules, and then the Constitution operates to direct how the rights are to be exercised. The key point is that the international law rules are not themselves written into the Constitution, even though they affect the scope of authority that can be exercised under it. Nor does the Constitution expressly state that either the President or Congress can make international law claims of acquisition on behalf of the United States; rather, that is simply assumed. And the Constitution does not state that the international law–based territorial rights automatically go to the United States as a collective rather than to the individual states; that is assumed as well.

¹⁴⁸ See Proclamation No. 5928, 103 Stat. 2981 (Dec. 27, 1988). Some years earlier, President Reagan had issued a proclamation announcing a two-hundred-mile “exclusive economic zone” contiguous to the United States’ territorial sea. See Proclamation No. 5030, 97 Stat. 1557 (Mar. 10, 1983). The proclamation notes that international law allows for such a zone and that the United States “will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.” *Id.* While there is a treaty that expressly allows for the assertion of the rights invoked by the Reagan administration—the Law of the Sea Convention—the United States is not a party to that treaty, and thus the administration’s actions were made in reference to norms of customary international law.

¹⁴⁹ Proclamation No. 5928, *supra* note 148.

¹⁵⁰ Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C., 1988 WL 391019, at *240 (Oct. 4, 1988). In 1996, Congress “declare[d] that all the territorial sea of the United States, as defined by [the] Presidential Proclamation [of 1988], for purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty.” Title IX of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 901(a), 110 Stat. 1317, 1317 (1996); see also Convention on the Territorial Sea and the Contiguous Zone art. 1, Apr. 29, 1958, 15 U.S.T. 1606 (“The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.”).

C. Immigration

The Constitution assigns to Congress the authority to “establish an uniform Rule of Naturalization,”¹⁵¹ which is a process by which noncitizens can become citizens.¹⁵² The Constitution contains no general authority to regulate the entrance and deportation of noncitizens. Congress, however, has regulated these issues since the 1870s,¹⁵³ with isolated interventions (such as in the Alien and Sedition Acts) before that time.

Initially, the Supreme Court grounded Congress’s authority to regulate immigration in the Commerce Clause.¹⁵⁴ But the Court subsequently reasoned that, by establishing a nation in international affairs, the Constitution implicitly gave the national government the powers of a sovereign, including most notably the power to control its borders.¹⁵⁵ The Court explained:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and

¹⁵¹ U.S. CONST. art. I, § 8, cl. 4.

¹⁵² What little discussion there was of this clause at the Founding suggests that it was designed to address the problem of conflicting state naturalization rules. See James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 387 (2010) (“This demanding requirement of uniformity was meant to displace the state-to-state variability that had characterized life under the Articles of Confederation.”).

¹⁵³ Before the late nineteenth century, individual states often regulated immigration matters. See ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 21–27 (2020); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993). Congress did not pass a general immigration law until 1875, in the Page Act. See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

¹⁵⁴ See, e.g., *The Head Money Cases*, 112 U.S. 580, 600 (1884). The government in that case invoked the theory of inherent sovereign power. See Brief for the United States at 2–3, *Head Money Cases*, 112 U.S. 580 (No. 772).

¹⁵⁵ See *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. at 603–04. Even the appellant in the initial decision accepted the sovereign power idea. See Brief for Appellant at 3, *The Chinese Exclusion Case*, 130 U.S. 581 (No. 1446) (accepting “the inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state”). But see *Fong Yue Ting*, 149 U.S. at 727 (Brewer, J., dissenting) (“This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?”); *id.* at 757 (Field, J., dissenting) (“The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty.”). For a revisionist interpretation of the *Chinese Exclusion Case* decision, which contends that it merely held that Congress had a sovereign right to abrogate treaties when legislating pursuant to its enumerated powers, see Bowie & Rast, *supra* note 117, at 1467–90.

essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.¹⁵⁶

Importantly, that is *still* the Court's governing account of the immigration power, accepted in both majority and dissenting opinions.¹⁵⁷

The idea of sovereign power to regulate immigration has often been connected to the controversial "plenary power doctrine," pursuant to which the government's immigration regulations are allegedly free from constitutional constraint and judicial review.¹⁵⁸ I explain in the next Part why that doctrine does not follow from the sovereign power concept.

D. Indian Affairs

There is a similar story for Congress's authority to regulate Indian affairs, although this example is also *sui generis* in various respects. Under the Articles of Confederation, the Continental Congress had "the sole and exclusive right and power of . . . regulating the trade and *managing all affairs with the Indians*."¹⁵⁹ But the Constitution does not contain a general Indian affairs clause

¹⁵⁶ *Nishimura Ekiu*, 142 U.S. at 659 (citations omitted).

¹⁵⁷ See *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (noting that the government's authority to regulate immigration "rests, in part, on . . . its inherent power as sovereign to control and conduct relations with foreign nations"); *id.* at 422 (Scalia, J., dissenting) ("I accept [Congress's authority to regulate immigration] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty."). For additional discussion of the constitutional basis for immigration law, see Bowie & Rast, *supra* note 117, at 1482–98. Justice Antonin Scalia contended in the *Arizona* case that the state of Arizona, like the federal government, was a sovereign, and, citing Vattel, he contended that Arizona therefore had the sovereign right to control its borders. *Arizona*, 567 U.S. at 417–19 (Scalia, J., dissenting).

¹⁵⁸ See, e.g., Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 335–46 (2024); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 253, 260–69; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54–62 (1984); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting *Shaughnessy v. Mezei*, 345 U.S. 206 (1953))).

¹⁵⁹ ARTICLES OF CONFEDERATION OF 1781, art. IX (emphasis added).

and instead simply gives Congress the power to “regulate Commerce with . . . Indian Tribes.”¹⁶⁰ Nevertheless, Congress has long regulated a host of noncommercial issues relating to the tribes. This has especially been the case since 1871, when Congress mandated an end to formal treaty-making with the tribes.¹⁶¹ As with immigration, the Supreme Court has reasoned that the national government’s authority to regulate Indian affairs has a sovereignty source that gives it more power than is contained merely in specific textual grants of authority.

As indicated by the discussion above of *Worcester*,¹⁶² the story goes back further for this issue than for immigration law.¹⁶³ But the Supreme Court’s most developed explanation came in the late nineteenth century. In upholding Congress’s power to regulate crimes committed among Indians on a reservation, the Court in *United States v. Kagama*¹⁶⁴ reasoned that the reservation was within U.S. territory and that:

[The] power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.¹⁶⁵

The Court cited *Worcester* and other early Indian law decisions.¹⁶⁶

Again, the sovereign power concept continues to be part of the *modern* explanation for Congress’s authority to regulate Indian affairs. In 2023, in *Haaland v. Brackeen*,¹⁶⁷ the Court upheld the

¹⁶⁰ U.S. CONST. art. I, § 8, cl. 3.

¹⁶¹ See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566. For the current codification of this statute, see 25 U.S.C. § 71. For doubts about the constitutionality of this law, see, for example, David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445, 451 (2007); David H. Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treaty-making*, 97 N.Y.U. L. REV. 137, 160–89 (2022).

¹⁶² See *supra* Part I.E.

¹⁶³ See *supra* text accompanying notes 71–77.

¹⁶⁴ 118 U.S. 375 (1886).

¹⁶⁵ *Id.* at 380.

¹⁶⁶ *Id.* at 382; see also Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 22–25 (2023) (critically noting that, while U.S. constitutional law developed a liberal democratic approach to “internal” matters, it developed a European law of nations approach to “external” matters, with Indian affairs defined as the latter).

¹⁶⁷ 143 S. Ct. 1609 (2023).

constitutionality of the Indian Child Welfare Act,¹⁶⁸ which governs state court adoption and foster care proceedings involving Indian children.¹⁶⁹ In reciting the sources of Congress's authority to regulate Indian affairs, the Court noted that, at the Founding, "Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law."¹⁷⁰ "With this in mind," said the Court, "we have posited that Congress's legislative authority might rest in part on 'the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as "necessary concomitants of nationality."'"¹⁷¹ Leaving no doubt about the connection to more general foreign relations law reasoning, the Court here was quoting from *Curtiss-Wright*. The Court also insisted, however, that Congress's power to regulate Indian affairs is not "unmoored from the Constitution"¹⁷²—a point that I return to in the next Part.¹⁷³

E. Jurisdiction over U.S. Nationals

International law principles relating to what is known as "prescriptive jurisdiction"—that is, the authority to prescribe rules of conduct—have long allowed nations broad authority to

¹⁶⁸ 25 U.S.C. § 1901 et seq.

¹⁶⁹ *Brackeen*, 143 S. Ct. at 1641.

¹⁷⁰ *Id.* at 1628 (quoting *United States v. Lara*, 541 U.S. 193, 201 (2004)).

¹⁷¹ *Id.* (quoting *Lara*, 541 U.S. at 201 (quoting *Curtiss-Wright*, 299 U.S. at 315–22)). For additional discussion of federal power to regulate Indian tribes, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1053–88 (2015). For arguments against the existence of inherent sovereign authority to regulate Indian tribes, see, for example, Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1110–20 (2004). For an argument that the lack of a general Indian affairs clause in the Constitution was initially the result of a scrivener's error by James Wilson but was then made intentional, see generally Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021).

¹⁷² *Brackeen*, 143 S. Ct. at 1627.

¹⁷³ A complication in assessing the federal government's sovereign power to regulate Indian tribes is that the tribes themselves have some claims of sovereignty. See, e.g., *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (noting that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"). But cf. *Montana v. United States*, 450 U.S. 544, 563 (1981) ("[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."). For an account of the complicated and sometimes conflicting ideas about Indian sovereignty in the early post-Founding period, see Ablavsky, *supra* note 171, at 1053–88. See also *id.* at 1083 ("[F]rom the beginning, American policymakers conceived of Native nations as separate, but lesser, sovereigns.").

regulate the conduct of their nationals around the world.¹⁷⁴ There is no general citizen regulation clause, however, in the U.S. Constitution. This can lead to constitutional doubts about the U.S. government's authority to regulate some foreign activities by its nationals, especially noncommercial activities.

In *Blackmer v. United States*¹⁷⁵—decided four years before *Curtiss-Wright*—a U.S. citizen living in Paris had been served with subpoenas to appear in a U.S. court, pursuant to a statute that allows for this, and the issue was whether he could be punished for contempt when he failed to respond.¹⁷⁶ In holding that he could, the Court noted that international law allows nations to regulate their citizens abroad and said, “Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.”¹⁷⁷

In recent years, lower courts have invoked similar reasoning in upholding statutes that regulate U.S. citizens' conduct abroad. Consider, for example, a statute enacted in 1994 that makes it a crime for a U.S. national to murder or attempt to murder another U.S. national in a foreign country.¹⁷⁸ International law allows for this extraterritorial regulation, but where did Congress get the domestic constitutional authority to enact it? A murder abroad does not clearly fall within Congress's authority to “regulate Commerce with foreign Nations.”¹⁷⁹ Nor does a private murder violate

¹⁷⁴ See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 410 (AM. L. INST. 2018) (“International law recognizes a state's jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory.”); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 443 (9th ed. 2019) (“Nationality, as a mark of allegiance and an aspect of sovereignty, is also recognized as a basis for jurisdiction over extraterritorial acts.”); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 110 (Philadelphia, Carey, Lea & Blanchard 1836) (“It is evident that a state cannot punish an offence against its municipal laws committed within the territory of another state, *unless by its own citizens*.”) (emphasis added)); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 22 (Boston, Hilliard, Gray, & Co. 1834) (“[E]very nation has a right to bind its own subjects by its own laws in every other place.”).

¹⁷⁵ 284 U.S. 421 (1932).

¹⁷⁶ *Id.* at 433. The current version of the extraterritorial subpoena statute can be found at 28 U.S.C. § 1783.

¹⁷⁷ *Blackmer*, 284 U.S. at 437.

¹⁷⁸ See 18 U.S.C. § 1119. Prosecutions under this statute require approval from high-level executive officials and may not be conducted unless the suspect is no longer in the country where the murder took place and that country lacks the lawful ability to obtain the suspect's return. *Id.* § 1119(b)(2).

¹⁷⁹ See U.S. CONST. art. I, § 8, cl. 3.

international law, so it does not seem to fall within Congress's power to "define and punish . . . Offences against the Law of Nations."¹⁸⁰ In upholding this statute, U.S. courts have not been troubled by the lack of an obvious textual hook in the Constitution, reasoning that, in any event, the statute is supported by the government's authority as a sovereign.¹⁸¹ Similar issues have arisen in the lower courts with respect to Congress's criminalization of "sex tourism" and other sex with minors by U.S. nationals abroad, although courts in these cases have tended to rely on broad readings of specific constitutional clauses.¹⁸² There is also precedent suggesting that the ability of *individual U.S. states* to regulate

¹⁸⁰ See U.S. CONST. art. I, § 8, cl. 10.

¹⁸¹ See *United States v. Mack*, 2023 WL 3347460, at *3–4 (N.D. Ill. May 10, 2023) (reasoning that Congress can regulate external affairs even in the absence of an enumerated power in Article I of the Constitution); *United States v. Brimager*, 123 F. Supp. 3d 1246, 1249–50 (S.D. Cal. 2015) (agreeing with the government that the statute was supported by "the nation's sovereignty and its power to assert jurisdiction over its own citizens"); *United States v. White*, 51 F. Supp. 2d 1008, 1011 (E.D. Cal. 1997) ("It is pellucid [that] Congress possesses external sovereignty authority to pass criminal laws proscribing its nationals' outlaw conduct against other nationals abroad."). Two of these decisions relied in the alternative on a broad reading of the Foreign Commerce Clause.

¹⁸² See 18 U.S.C. § 2423. Courts have tended to uphold these laws based on either the Treaty Clause or the Foreign Commerce Clause rather than based on inherent sovereign power. See, e.g., *United States v. Clay*, 128 F.4th 163, 172–86 (3d Cir. 2025) (treaty power and commerce); *United States v. Rife*, 33 F.4th 838, 845–48 (6th Cir. 2022) (treaty power); *United States v. Park*, 938 F.3d 354, 362–75 (D.C. Cir. 2019) (treaty power and commerce); *United States v. Durham*, 902 F.3d 1180, 1197–1206 (10th Cir. 2018) (commerce); *United States v. Bollinger*, 798 F.3d 201, 207–21 (4th Cir. 2015) (commerce); *United States v. Pendleton*, 658 F.3d 299, 305–11 (3d Cir. 2011) (commerce). In *Rife*, the court concluded that the Foreign Commerce Clause was insufficient to support criminalizing noncommercial sexual conduct abroad, but it reluctantly concluded that the law could be supported as an implementation of a treaty. *Rife*, 33 F.4th at 845–48; cf. *United States v. Clark*, 435 F.3d 1100, 1109 n.14 (9th Cir. 2006) ("[W]e acknowledge that Congress's plenary authority over foreign affairs may also provide a sufficient basis for [the statute]." (citing *Curtiss-Wright*, 299 U.S. at 315–16)). Congress has also in select instances asserted "passive personality" jurisdiction—that is, it has criminalized certain conduct committed against U.S. citizens abroad in order to protect them. It is not clear from the text of the Constitution where Congress gets this protective authority. Cf. Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 31 (1993) (concluding that "the unenumerated foreign affairs power probably authorizes Congress to establish passive personality jurisdiction"). Some lower courts have relied on sovereign power reasoning in upholding Congress's authority to regulate conduct outside the United States by non-U.S. citizen employees of the U.S. military. See, e.g., *United States v. Brehm*, 2011 WL 1226088, at *4 (E.D. Va. Mar. 30, 2011), *aff'd*, 691 F.3d 547 (4th Cir. 2012) (relying on enumerated powers grounds); *United States v. Williams*, 722 F. Supp. 2d 1313, 1317–18 (M.D. Ga. 2010).

their citizens outside the states' borders (assuming no conflict with federal law) is informed by sovereignty considerations.¹⁸³

F. Other "Concomitants of Nationality"

The Supreme Court has invoked sovereign power reasoning to sustain a number of other congressional actions, including taxing nonresident aliens,¹⁸⁴ determining what acts constitute a relinquishment of citizenship,¹⁸⁵ and compelling citizens to serve in the military.¹⁸⁶ This reasoning might also be needed to explain other "concomitants of nationality" (to use the phrase from *Curtiss-Wright*). One example is the power to terminate U.S. treaty commitments; surely that power must be lodged somewhere in the government, but the text of the Constitution does not address the issue.¹⁸⁷ In addition, where does the national government get the authority to regulate the national flag, which it

¹⁸³ See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941):

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign.

Cf. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (upholding the sovereign power of a state to regulate fishing by citizens and noncitizens within the state's territorial waters, and relying in part on Vattel). The federal government also regulates conduct on the "high seas" and various other locations not under the jurisdiction of foreign nations, even though, again, it is not clear that this is supported by the constitutional text. See, e.g., 18 U.S.C. § 7 (defining what the statute refers to as the "special maritime and territorial jurisdiction of the United States").

¹⁸⁴ See *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.").

¹⁸⁵ See *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) ("As a government, the United States is invested with all the attributes of sovereignty."); see also *Perez v. Brownell*, 356 U.S. 44, 57 (1958) ("The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations."), *overruled on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967).

¹⁸⁶ See *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) ("It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." (citing Vattel's *Law of Nations*)).

¹⁸⁷ In holding that the President had this authority, the D.C. Circuit reasoned (citing *Curtiss-Wright*): "In general, the powers of the federal government arise out of specific grants of authority delegated by the states—hence the enumerated powers of Congress in Article I, Section 8. The foreign affairs powers, however, proceed directly from the sovereignty of the Union." *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir. 1979), *vacated on*

began to do in 1794?¹⁸⁸ Professor David Currie speculated that “Congress must have understood the power to prescribe [a flag] to be inherent in nationhood,”¹⁸⁹ and Justice Byron White suggested the same thing in a modern opinion.¹⁹⁰ Relatedly, sovereignty may be part of the justification for the national government’s authority to regulate passports (which Congress started to do in the mid-nineteenth century).¹⁹¹

Sovereign power reasoning was also evident in the Supreme Court’s much-discussed 1920 decision concerning the scope of the treaty power, *Missouri v. Holland*.¹⁹² In that case, the Court upheld statutory restrictions that governed the hunting and capturing of migratory birds and that were enacted to implement a treaty, reasoning that even if this legislation would have exceeded Congress’s authority if enacted in the absence of the treaty, the existence of the treaty supplied sufficient authority.¹⁹³ In an opinion

other grounds, 444 U.S. 996 (1979). The first time that the United States terminated treaty commitments was in 1798, when Congress, on the eve of an undeclared naval war with France, stated that four treaties with France “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.” Act of July 7, 1798, ch. 67, 1 Stat. 578, 578. For additional discussion of the issue, see CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE 99–118 (2024) [hereinafter BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS].

¹⁸⁸ Ch. 1, 1 Stat. 341 (1794).

¹⁸⁹ See CURRIE, FEDERALIST PERIOD, *supra* note 116, at 204.

¹⁹⁰ See *Smith v. Goguen*, 415 U.S. 566, 586 (1974) (White, J., concurring in the judgment) (reasoning that various congressional powers “and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag”); see also, e.g., *United States v. Ferguson*, 302 F. Supp. 1111, 1114 (N.D. Cal. 1969) (“Among these natural and necessary concomitants of nationality is the selection of a national symbol or flag.”).

¹⁹¹ See *Johnson*, *supra* note 111, at 39–42. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), Justice Clarence Thomas questioned where Congress got the authority to regulate passports, see *id.* at 45 (Thomas, J., concurring in the judgment and dissenting in part) (“The Constitution contains no Passport Clause, nor does it explicitly vest Congress with ‘plenary authority over passports.’”). A majority of the Court assumed that Congress had this authority except to the extent that its exercise invaded the exclusive authority of the President, see *id.* at 32 (noting that the Court “does not question the substantial powers of Congress over foreign affairs in general or passports in particular”), and Justice Scalia defended this congressional authority on the basis of long-standing practice and precedent, see *id.* at 83 (Scalia, J., dissenting).

¹⁹² 252 U.S. 416 (1920).

¹⁹³ *Id.* at 433. Before the conclusion of the treaty, two district courts had held that Congress lacked authority to enact similar legislation. See *United States v. McCullagh*, 221 F. 288, 296 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914). (Another district court had upheld the legislation in an unreported decision.) The Senator who sponsored the legislation argued that it addressed “one of the implied attributes of sovereignty.” 49 CONG. REC. 1493 (1913) (statement of Sen. George McLean). The United States appealed *Shauver* to the Supreme Court, and it was argued twice. The government ultimately withdrew its appeal after Congress passed new legislation implementing the

authored by Justice Oliver Wendell Holmes, Jr., the Court relied in part on the idea of sovereign national power, observing that “it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”¹⁹⁴ That is the same reasoning that had been invoked much earlier in support of the Louisiana Purchase treaty.¹⁹⁵

This reasoning was also evident in the Supreme Court’s decision upholding the United States’ operation of “consular courts” abroad.¹⁹⁶ Pursuant to treaty provisions, the United States operated these courts in various non-Western countries (such as China, Egypt, and Japan) to try U.S. citizens accused there of crimes.¹⁹⁷ In holding that the government had the authority to establish these courts, the Supreme Court reasoned that the U.S. treaty-making power must be equal to that of the governments of Europe and that European governments had long made similar treaties.¹⁹⁸

treaty, so the Court did not issue a decision addressing the earlier legislation. *See* *United States v. Shauver*, 248 U.S. 594, 595 (1919) (mem.).

¹⁹⁴ *Missouri v. Holland*, 252 U.S. at 433 (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

¹⁹⁵ *See supra* text accompanying notes 126–32. Sovereign power reasoning might also support the other major holding in *Missouri v. Holland*, which was that Congress has authority under the Necessary and Proper Clause to implement valid treaties even if the implementation measure would otherwise fall outside of Congress’s authority. It has been assumed in the literature that when Congress implements a treaty, it is carrying into execution the Article II power “to make treaties,” and some scholars and judges have pointed out that legislation *implementing* a treaty does not seem like something that concerns the *making* of the treaty. *See, e.g.,* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1882–89 (2005); *see also* *Bond v. United States*, 572 U.S. 844, 874–76 (2014) (Scalia, J., concurring in the judgment). But legislation implementing a treaty could instead be seen as carrying into execution the sovereign power to ensure treaty compliance. *See* Harrison, *supra* note 105, at 6 (making this point); *cf.* Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 65–81 (2014) (showing that the Necessary and Proper Clause holding in *Holland* was supported by long-standing historical practice).

¹⁹⁶ *See In re Ross*, 140 U.S. 453, 478–80 (1891).

¹⁹⁷ *Id.* at 462–63.

¹⁹⁸ *Id.* The Court also rejected the claim that, in order to prosecute the U.S.-citizen defendants, the government was required by the Constitution to first obtain a grand jury indictment, stating categorically that “[t]he Constitution can have no operation in another country.” *Id.* at 464. But later decisions have retreated from that categorical proposition. *See infra* note 242. It may be that, when exercising sovereign authority, Congress has more ability to establish tribunals staffed by judges who lack the life tenure and salary protections specified in Article III of the Constitution. *See, e.g.,* *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858) (noting that “Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations,” without regard to Article III); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511,

As noted in passing in *Curtiss-Wright*, the sovereign power idea also seems to support at least some national government authority to conclude nontreaty international agreements. The only reference in the Constitution to the national government's conclusion of international agreements is the Treaty Clause, which requires that the President obtain the advice and consent of two-thirds of the Senate.¹⁹⁹ The federal government has always concluded some international agreements outside of that process, however, and in the last hundred years or so, most international agreements have not been concluded pursuant to the Treaty Clause. This practice seems inconsistent with the text (and it might be). But a different section in the Constitution—Article I, § 10—suggests that the Founders understood that not all international agreements are “treaties” for purposes of the Constitution. That section provides that U.S. states may never enter into treaties but may enter into other sorts of international agreements (“Compacts” and “Agreements”) with the “[c]onsent of Congress.”²⁰⁰ From the perspective of national sovereign power, it would be anomalous to conclude that the state governments, but not the national government, could enter into nontreaty international agreements.²⁰¹

546 (1828) (upholding the constitutionality of non-Article III courts in the territory of Florida, explaining that “[t]hey are legislative courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States”). For additional discussion of the history of U.S. consular courts, see Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 601–07 (2022).

¹⁹⁹ See U.S. CONST. art. II, § 2, cl. 2.

²⁰⁰ U.S. CONST. art. I, § 10. In modern practice, state and local governments enter into many international agreements without even obtaining Congress's consent. See Curtis A. Bradley, *State International Agreements: The United States, Canada, and Constitutional Evolution*, 60 CAN. Y.B. INT'L L. 6, 8–17 (2022); Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310, 341–75 (2023).

²⁰¹ See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 207 n.293 (1998) (“It seems clear from the structure of the Constitution that the power to make nontreaty agreements on behalf of the United States would have been understood to be lodged somewhere within the federal government.”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1268 (1995) (“Someone in the United States Government must certainly have authority to enter those types of agreements for the nation as a whole that Article I permits the states to enter for their own purposes with congressional consent.”). It is unlikely that the sovereign power idea is sufficient to support all or even most of the modern practice of executive agreements, a practice that appears to be more defensibly rooted in historical practice. See BRADLEY, HISTORICAL GLOSS AND

G. Counterexamples and Unease

History is almost never neat and tidy, so there are of course counterexamples in which courts have rejected sovereign power arguments. The most significant counterexample during the nineteenth century is the Supreme Court's decision in *Dred Scott v. Sandford*,²⁰² which held that the Missouri Compromise (which banned slavery in certain territories) was unconstitutional.²⁰³ Chief Justice Roger Taney's opinion for the Court reasoned that the "peculiar character of the Government of the United States" was that, "although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation."²⁰⁴ Chief Justice Taney further contended that "no laws or usages of other nations . . . can enlarge the powers of the Government."²⁰⁵ One might call this the Taney strict construction view, although it can draw support from Jefferson as well.²⁰⁶

Dred Scott is not a decision held in high regard. To be sure, other elements of the decision have drawn more criticism than the language quoted above. Nevertheless, as Professor Jamal Greene has noted:

FOREIGN AFFAIRS, *supra* note 187, at 72–98; *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981):

[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.

²⁰² 60 U.S. (19 How.) 393 (1856).

²⁰³ *See id.* at 452.

²⁰⁴ *Id.* at 401.

²⁰⁵ *Id.* at 451. The Taney Court had a stricter view about enumerated powers than has been characteristic of many other periods of the Court's history. *See* Coan & Schwartz, *supra* note 65, at 1030. *But cf.* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622–26 (1842) (holding that the federal government had the exclusive power to enforce the Constitution's Fugitive Slave Clause, with Chief Justice Taney concurring on somewhat narrower grounds). Chief Justice Taney appears to have had a broader view of the government's foreign affairs authority. *See, e.g.,* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (Taney, C.J.) (plurality opinion) (reasoning that "the whole frame of the Constitution" supports the conclusion that international extradition is a national government power and noting that "[a]ll the powers which relate to our foreign intercourse are confided to the general government"); *see also* 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1821–1855*, at 340 (1922) ("The most striking feature [] of Taney's notable opinion [in *Holmes*] was the fact that it sustained the supremacy of the powers of the Federal Government, with a breadth and completeness which had been excelled by no one of Marshall's opinions.").

²⁰⁶ *See supra* text accompanying note 130.

[Chief Justice Taney's] argument that Congress could not prohibit slavery in the territories not only rendered the Missouri Compromise not a compromise at all, but also would have invalidated the Northwest Ordinance, which was passed by the same Continental Congress that authorized the Philadelphia Convention, and which was unanimously reaffirmed by the First Congress.²⁰⁷

Chief Justice Taney wrote a somewhat better-regarded lower court opinion (while riding circuit) at the outset of the Civil War that also rejected a sovereign power approach to interpreting the Constitution. The issue in that case, *Ex parte Merryman*,²⁰⁸ was whether President Abraham Lincoln had the authority to suspend the writ of habeas corpus.²⁰⁹ In holding that he did not, Chief Justice Taney reasoned not only that the Constitution gave Congress rather than the President the suspension power, but also more generally that no argument could be “drawn from the nature of sovereignty” because “[t]he government of the United States is one of delegated and limited powers.”²¹⁰ This observation appears to have been dicta, given that the national government indisputably has the authority to suspend the writ of habeas corpus and that Congress has authorized such suspensions on a number of occasions (and eventually authorized them in the Civil War).²¹¹ Moreover, one could accept both that the federal government has some inherent sovereign power and that the text of the Constitution has assigned the habeas suspension power exclusively to Congress.

These decisions are hardly strong judicial precedent against the existence of sovereign power, especially when compared with

²⁰⁷ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 410 (2011). The Northwest Ordinance was enacted by the Continental Congress in July 1787, while the Constitution was being drafted. Among other things, the Ordinance disallowed slavery in the Northwestern Territory. Congress adopted and continued the operation of the Ordinance, with some modifications, in 1789. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. In the *Federalist Papers*, James Madison suggested that the Continental Congress had lacked authority under the Articles of Confederation to pass the Ordinance. See THE FEDERALIST NO. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961); cf. CURRIE, FEDERALIST PERIOD, *supra* note 116, at 104 (“One lesson of [the Ordinance] may be that necessity is at least as important a determinant of de facto authority as is any written constitution.”).

²⁰⁸ 17 F. Cas. 144 (C.C.D. Md. 1861).

²⁰⁹ *Id.* at 148.

²¹⁰ *Id.* at 149.

²¹¹ See AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 141–244 (2017); cf. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 773 (2013) (“Habeas power means a sovereign judicial officer’s authority to review custody pursuant to some other order of that same sovereign.”). See generally Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014).

the extensive authority that goes the other way. Nevertheless, it is important to acknowledge that reliance on sovereign power reasoning can generate unease, something that was evident in the dissents in the immigration and territorial regulation decisions discussed above. As Professor Louis Henkin noted, the sovereign power idea seems to require “that a panoply of important powers be deduced from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside our constitutional tradition and our particular heritage.”²¹² It would not be surprising, therefore, if modern courts treated this idea as something of a backup argument to be employed only after exhausting arguments connected more directly to the constitutional text. Another, less fraught, way of employing the idea is as an interpretive principle: that when construing the Constitution, there should be a presumption that it confers full sovereign authority to the national government. That was Justice Holmes’s argument in *Missouri v. Holland*: that “it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”²¹³

In any event, despite his cautionary observation, Henkin himself thought that “[s]tudents of the Constitution may have to accept Justice Sutherland’s theory, with its difficulties, or leave constitutional deficiencies unrepaid.”²¹⁴ The next Part describes a version of Justice Sutherland’s theory, which might be called “constitutional sovereignty” and which avoids at least some of the critiques typically made against *Curtiss-Wright*.

III. CONSTITUTIONAL SOVEREIGNTY

As should now be clear, the idea that the government has some authority by virtue of the fact that the United States is a nation in international affairs has informed numerous areas of our constitutional law, as reflected in Supreme Court decisions, federal statutes, and executive branch practice. In my experience, many critics of *Curtiss-Wright* appear to be unaware of the extent

²¹² HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 20. For an early example of this unease, see STATEMENT BY JOHN TAYLOR, DEBATE ON THE VIRGINIA RESOLUTIONS (1798), *reprinted in* THE VIRGINIA REPORT OF 1799–1800, at 115–16 (Richmond, J.W. Randolph 1850) (objecting that the federal government should not be able to “at pleasure dip their hands into the inexhaustible treasuries of the common law and law of nations”).

²¹³ *Missouri v. Holland*, 252 U.S. at 433 (quoting *Andrews*, 188 U.S. at 33).

²¹⁴ HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 20.

to which this has been the case. In any event, a close look at the criticisms directed at *Curtiss-Wright* shows that many of them do not even concern the sovereign power idea.

It is worth recalling that there were several elements to Justice Sutherland's reasoning in *Curtiss-Wright*, including that (1) the national government acquired all of the usual sovereign authority over external affairs; (2) this authority is coming to the government from outside the Constitution; and (3) this authority generally goes to the President because the President is the "sole organ" for the United States in foreign affairs.²¹⁵ There has been a tendency in critiques of *Curtiss-Wright* to group these three elements together, but they need not (and I would argue, should not) travel together.²¹⁶

A. Presidential Power

The most vigorous criticisms of *Curtiss-Wright* have concerned Justice Sutherland's description of the President as "the sole organ of the federal government in the field of international relations."²¹⁷ As critics have pointed out, Congress plays a substantial role in U.S. foreign relations through, for example, approving treaties, deciding on foreign aid, imposing economic sanctions and trade restrictions, and regulating the immunity of foreign governments from suits in U.S. courts. Moreover, even when Presidents can act unilaterally in foreign affairs, they are

²¹⁵ *Curtiss-Wright*, 299 U.S. at 319.

²¹⁶ There are other aspects of the reasoning in *Curtiss-Wright* that have provoked less criticism, including the proposition that courts should give weight to the long-standing historical practice of broad delegations relating to foreign affairs. *See id.* at 327–28; *see also* BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS, *supra* note 187, at 168–90 (discussing the extent to which "historical gloss" supports a more relaxed approach to delegation in foreign affairs).

²¹⁷ *See, e.g.*, KOH, *supra* note 11, at 38–39 (criticizing *Curtiss-Wright* for having "posited that the entire field of foreign affairs fell under the president's inherent authority"); David Cole, *Youngstown v. Curtiss-Wright*, 99 YALE L.J. 2063, 2081 (1990) (book review) (criticizing *Curtiss-Wright* for containing "pages of broad dicta extolling the President's powers—language which Presidents have relied on ever since"); Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 150 (2016) ("Although *Curtiss-Wright* concerned legislative—not presidential—authority, Justice George Sutherland added pages of extraneous material to concoct an array of independent, plenary, exclusive, and inherent powers for the President in external affairs."); Glennon, *supra* note 47, at 14 (criticizing the Court for failing to "explain how powers incident to sovereignty happened to end up exclusively at 1600 Pennsylvania Avenue"); *see also* Morris, *supra* note 92, at 1061 n.36 ("Criticism of *Curtiss-Wright* has centered chiefly on its allocation of power over foreign affairs as between Congress and the Executive.").

often subject to congressional limitations, something not evident by characterizing the President as the “sole organ.”

Justice Sutherland borrowed the “sole organ” description from a speech given in 1800 by John Marshall while he was a member of the House of Representatives, about a year before he was appointed as Chief Justice of the Supreme Court.²¹⁸ Representative Marshall’s speech was a defense of President John Adams’s suggestion to a court that a criminal suspect could be extradited to Great Britain, pursuant to a treaty between the two countries.²¹⁹ Marshall insisted, not unreasonably, that there was nothing improper about a President seeking to carry out the terms of a treaty. Importantly, Marshall accepted that “Congress, unquestionably, may prescribe the mode [of executing a treaty obligation],” but he said that “till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.”²²⁰

Despite this limited historical context, the sole organ reference in *Curtiss-Wright* has been interpreted by the executive branch to support much broader claims of authority, sometimes including authority that is allegedly immune from regulation by Congress.²²¹ Such a conception of executive authority was unnecessary to the decision in *Curtiss-Wright* since the case involved an express delegation of authority from Congress to the President. This was, in other words, a case falling into what

²¹⁸ 10 ANNALS OF CONG. 613 (1800).

²¹⁹ The suspect—Thomas Nash, alias Jonathan Robbins—was alleged to have committed murder during a mutiny on a British ship. The extradition was controversial because some believed that Robbins was a U.S. citizen who had been impressed into naval service by the British. Robbins was extradited on the basis of a treaty, not inherent executive authority, and only after a judge had determined that there was sufficient evidence that he had committed the crime in question. *See generally* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

²²⁰ 10 ANNALS OF CONG. 614 (1800).

²²¹ The executive branch initially took a cautious approach to the executive power reasoning in *Curtiss-Wright*. *See* The President’s Power in the Field of Foreign Relations, 1 Op. O.L.C. 49, 62 (1937) (noting that the reasoning was dicta and that the case did not concern either unilateral presidential action or an effort by Congress to limit presidential action). Eventually, the executive branch adopted a more expansive reading. *See, e.g.*, The President’s Compliance with the “Timely Notification” Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C., 1986 WL 213251, at *164 (Dec. 17, 1986) (“It follows inexorably from the *Curtiss-Wright* analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President’s inherent Article II authority would be unconstitutional.”); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C., 1992 WL 479539, at *21 (Jan. 17, 1992) (“In exercising the ‘federal power over external affairs,’ the President is not subject to the interference of Congress.”).

Justice Jackson would later label the highest category of executive authority, where the President's authority is "at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," such that the President may "be said (for what it may be worth) to personify *the federal sovereignty*."²²²

Interestingly, the pro-executive reasoning in *Curtiss-Wright* is not as evident in Justice Sutherland's prior writings concerning sovereign power. In those writings, Sutherland had not claimed that sovereign authority was necessarily allocated to the executive branch, and in fact he expressed concern in those writings about the growth of executive power.²²³ After examining various historical materials, including the Supreme Court's papers relating to the *Curtiss-Wright* decision, Professor Ed Purcell concluded that the pro-executive reasoning in the decision likely reflected the views of Chief Justice Charles Evans Hughes, not Justice Sutherland.²²⁴

In any event, the key point here is that nothing in the concept of inherent sovereign power requires acceptance of a particular level of presidential authority. Even if foreign affairs powers are derived from or influenced by sovereignty-based sources, that by itself does not tell us which branch of the U.S. government has the authority to exercise those powers or which branch should prevail in the event of a conflict between them. As Judge Augustus Hand observed in a 1921 opinion concerning the authority to regulate the laying of submarine cables off the U.S. coast, even if "the United States [as] a sovereign nation [] must be deemed to have all customary national powers . . . [.] it does not follow that the Executive has the necessary authority."²²⁵ Additional reasoning,

²²² *Youngstown*, 343 U.S. at 635–36 (emphasis added). Although nondelegation concerns are lower when Congress delegates to the President in an area of presidential authority, President Franklin D. Roosevelt presumably did not have the authority to ban the arms sales in *Curtiss-Wright* on his own authority, let alone to make a violation of the ban a criminal offense. See Bradley & Goldsmith, *supra* note 40, at 1784.

²²³ See SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 51, at 75 ("The office of [the] President has grown in potency and influence to an extent never dreamed by those who framed and adopted the Constitution.").

²²⁴ See Purcell, *supra* note 41, at 685. Purcell also suggested that the other Justices may have gone along with this language in order "to provide institutional and moral support for the national executive in an ominous and deeply troubled time." *Id.* at 713.

²²⁵ *United States v. W. Union Tel.*, 272 F. 311, 313 (S.D.N.Y. 1921) (Augustus Hand, J.). In that case, the court concluded that, even if the executive might have the power to regulate the matter in the absence of legislation to the contrary, federal statutes implicitly precluded such executive control. See *id.* at 323. This reasoning is similar to Justice Jackson's much later (and more famous) reasoning in *Youngstown*, which considers executive power in relation to the express and implied intent of Congress. This may not be

such as appeals to constitutional structure and historical gloss, are needed to resolve such internal separation of powers questions.²²⁶ Importantly, most of the examples discussed above in Part II involved exercises of authority by Congress or the treaty-makers.²²⁷

An example of something that the Supreme Court has determined to be an inherent national power that does not flow to the President is the power to extradite criminal suspects to other countries. There is no mention of international extradition in the Constitution.²²⁸ But the Supreme Court reasoned in a decision issued the same year as *Curtiss-Wright* that “[i]t cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government, and not to the states.”²²⁹ Nevertheless, the Court made clear that this power “is not confided to the Executive in the absence of treaty or legislative

coincidental: in Justice Jackson’s files for the *Youngstown* case, there is a note in his handwriting with a citation to the decision and a reminder that it was written by Judge Hand, someone Justice Jackson greatly admired. See H. Jefferson Powell, *The United States as an Idea: Constitutional Reflections*, 49 LOY. U. CHI. L.J. 705, 715 (2018).

²²⁶ See, e.g., LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 108 (6th ed., rev. 2014) (“Even if the power of external sovereignty had somehow passed intact from the Crown to the ‘United States,’ the Constitution divides that power between Congress and the President.”); HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 70–72 (describing various ways that a sovereignty-based foreign affairs power can be exercised by Congress); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 635 (3d ed. 2000) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW] (“[A]scribing the concomitants of nationhood to the federal government says nothing about their allocation among its three coordinate branches.”); Glennon, *supra* note 47, at 13 (“That a nation enjoys certain prerogatives under international law logically says nothing about which branches of its government, under its domestic law, are accorded the power to exercise them.”); *Youngstown*, 343 U.S. at 604 (Frankfurter, J., concurring) (noting that “the fact that power exists in the Government does not vest it in the President”).

²²⁷ In *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), the executive branch invoked the “sole organ” reasoning in *Curtiss-Wright* in support of a claim that the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers,” *id.* at 19. But the Supreme Court “decline[d] to acknowledge that unbounded power.” *Id.* at 20. The Court also insisted that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.” *Id.* at 21.

²²⁸ *Interstate* extradition is addressed in Article IV, § 2. Although there is no specific grant of power in the Constitution to enforce that provision, Congress in 1793 passed a law requiring the governor of each state to deliver up fugitives found in their state upon lawful demand from another state. See Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

²²⁹ *Valentine v. United States*, 299 U.S. 5, 8 (1936); see also, e.g., SAMUEL T. SPEAR, THE LAW OF EXTRADITION: INTERNATIONAL AND INTER-STATE 22–23 (Albany, Weed, Parsons & Co. 1879) (“Every nation, possessing the ordinary attributes of sovereignty, and acting through an established government, must have the power, unless there be some self-imposed restriction upon it in its local constitution, to stipulate for the delivery of fugitive criminals as between itself and other nations.”).

provision.”²³⁰ This conclusion was consistent with long-standing executive branch practice, pursuant to which Presidents had refused to extradite suspects absent a treaty or statute.²³¹

None of this is to suggest, to be clear, that sovereign authority never flows to the President. Sovereign power reasoning has, for example, informed the Supreme Court’s view that the President possesses what Professor Henry Monaghan referred to as a “protective power”—that is, “an executive power to preserve, protect, and defend the personnel, property, and instrumentalities of the national government.”²³² In endorsing this authority, the Court in *In re Neagle*²³³ observed that the national government is “within its sphere sovereign and supreme.”²³⁴ The Court further suggested that the protective power extends to “the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.”²³⁵

²³⁰ *Valentine*, 299 U.S. at 8. The Court based this conclusion in part on historical practice. *See id.* at 9. Extradition by the United States has usually been based on treaties, but in some instances it has been based on statutes. The current extradition statute allows extradition of non-U.S. nationals who have committed crimes of violence abroad against U.S. nationals, even in the absence of an extradition treaty. *See* 18 U.S.C. § 3181(b). Congress has also allowed extradition without a treaty to the international criminal tribunals for the former Yugoslavia and Rwanda, *see id.* § 3181 note (Extradition Treaties Interpretation) and to U.S.-controlled territories, *see id.* § 3185; *cf.* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (plurality opinion) (“All the powers which relate to our foreign intercourse are confided to the general government The power of deciding whether a fugitive from a foreign nation should or should not be surrendered, was, necessarily, a part of the powers thus granted.”).

²³¹ During the Washington administration, Secretary of State Thomas Jefferson concluded that the executive branch could not extradite as a matter of comity and instead needed the support of a treaty. *See* 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 22–23 (Boston, Bos. Book Co. 1891). Most, but not all, administrations adhered to this view, reasoning that unilateral executive action would not be proper given the liberty interests involved. President Lincoln, however, extradited an individual to Spanish-controlled Cuba on his own authority. When queried by Congress where he got the authority to take this action, he invoked “the law of nations and the Constitution of the United States.” *See id.* at 35; *see also* Curtis Bradley, *Historical Gloss and the Extradition Power*, TRANSNAT’L LITIG. BLOG (Dec. 3, 2024), <https://perma.cc/5959-ZPHZ>.

²³² Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61–63 (1993) [hereinafter Monaghan, *Protective Power*].

²³³ 135 U.S. 1 (1890).

²³⁴ *Id.* at 59; *cf.* Monaghan, *Protective Power*, *supra* note 232, at 72 (“When it can be seen as determining the content of the primary legal duties of American citizens, the President’s conduct cannot ordinarily be justified under the protective power.”).

²³⁵ *Neagle*, 135 U.S. at 64. In support of this claim, the Court referred approvingly to an episode in the 1850s, when the United States threatened to use force against an Austrian ship docked in Turkey in order to protect an individual who was in the process of becoming a U.S. citizen. In that episode, the Secretary of State maintained that the

More generally, our constitutional practice from the very beginning has allowed room for the executive to take various actions in foreign affairs—subject, importantly, to congressional regulation. This was evident as early as George Washington’s presidency, with his issuance of a Neutrality Proclamation (followed a year later by congressional regulation) and his territorial sea proclamation (again, followed by a statute).²³⁶ After more than 230 years of practice, our constitutional law accepts that Presidents have significant room to operate in foreign affairs in the absence of congressional restriction, in what Justice Jackson referred to in *Youngstown* as the middle “zone of twilight” category of presidential power.²³⁷ But this does not mean that all of the sovereign authority flows to the President, and certainly it does not mean that it flows exclusively to the President.

B. “Extraconstitutional” Authority

Another aspect of Justice Sutherland’s reasoning that has been heavily criticized is his suggestion that the federal government acquired sovereign authority from outside the Constitution. As Professor Laurence Tribe noted, “Perhaps no other tenet of this controversial opinion [in *Curtiss-Wright*] has been so critically assayed as the proposition that foreign relations powers are, to an extent, extraconstitutional in character.”²³⁸ Commentators

United States has a sovereign right to protect its citizens and that, “from international law . . . [.] Austria could derive no authority to obstruct or interfere with the United States in the exercise of this right.” Letter from William L. Marcy to Chevalier Hulsemann (Sept. 26, 1853), in 8 CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND CHARGE D’AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 27 (Washington, Robert Armstrong 1853). The Court in *Neagle*, with some exaggeration, described this event as “[o]ne of the most remarkable episodes in the history of our foreign relations.” *Neagle*, 135 U.S. at 64.

²³⁶ See George Washington, *Neutrality Proclamation*, 22 April 1793, FOUNDERS ONLINE, <https://perma.cc/UWN6-BKSC>; Act of June 5, 1794, ch. 50, 1 Stat. 381.

²³⁷ See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

²³⁸ TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 226, at 635 n.8; see also, e.g., MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN FOREIGN AFFAIRS 95 (2019) (“[N]othing in the relevant [Founding] sources, let alone in the document itself, supports the contention that the Constitution’s constraints apply any less in foreign affairs than in domestic matters.”); Cleveland, *Powers Inherent in Sovereignty*, *supra* note 64, at 8 (criticizing the idea, which she connected to *Curtiss-Wright*, that “the Constitution imposes few or no constraints, such as the separation of powers or individual rights, on the exercise of sovereign power” (emphasis in original)); Glennon, *supra* note 47, at 13 (expressing concern that extraconstitutional powers would

have been especially concerned that, if sovereign powers are extraconstitutional, they may not be subject to constitutional limitations, including limitations relating to individual rights. The earliest scholarly criticisms of *Curtiss-Wright* were focused on this concern.²³⁹

As an initial matter, it is worth noting that the Court in *Curtiss-Wright* seemed to deny this implication, observing that even when Presidents are exercising sovereign authority as the “sole organ,” their exercises of this authority “must be exercised in subordination to the applicable provisions of the Constitution.”²⁴⁰ This observation is similar to Justice Holmes’s apparent acceptance in *Missouri v. Holland* that treaties must not “contravene any prohibitory words to be found in the Constitution.”²⁴¹ And the Supreme Court has since made clear that international agreements are subject to constitutional constraints.²⁴²

It is also worth noting that Justice Sutherland never quite said that sovereign powers were extraconstitutional, even though that is how his analysis has often been construed. Instead, he merely said that these powers “did not depend upon the affirmative grants of the Constitution,”²⁴³ which could be read to allow for the possibility that they are implied from the Constitution’s provisions and structure rather than reflected in express grants.

“be immune from mere constitutional limits, such as those guaranteeing freedom of the press, prohibiting unreasonable searches and seizures, and outlawing cruel and unusual punishment”); Lofgren, *supra* note 37, at 29 (criticizing heavily the extraconstitutional theory in *Curtiss-Wright*, while also observing that it is “undoubtedly correct” “[t]hat the United States possesses all the powers of a sovereign nation”); Levitan, *supra* note 47, at 497 (contending that the extraconstitutional approach “makes shambles out of the very idea of a constitutionally limited government”); Ramsey, *Myth of Extraconstitutional Foreign Affairs Power*, *supra* note 12, at 381 (contending that, contrary to the reasoning in *Curtiss-Wright*, “the Constitution’s drafters and ratifiers understood the Constitution as the means to give the national government foreign relations power it would otherwise lack”).

²³⁹ See *supra* note 55.

²⁴⁰ *Curtiss-Wright*, 299 U.S. at 320; see also Sutherland, *Internal and External Powers*, *supra* note 48, at 382 (reasoning that the national government had sovereign authority “unless prohibited or contrary to the fundamental principles upon which the Constitution itself was established”).

²⁴¹ *Missouri v. Holland*, 252 U.S. at 433.

²⁴² See *Boos v. Barry*, 485 U.S. 312, 324 (1988) (“[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” (quotation marks omitted) (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957))); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 307 (AM. L. INST. 2018) (“A treaty provision will not be given effect as law in the United States to the extent that giving it this effect would violate any individual constitutional rights.”). Of course, the precise content of those rights, and their geographic applicability, raise additional questions.

²⁴³ *Curtiss-Wright*, 299 U.S. at 318.

In any event, in other decisions invoking sovereign power, the Supreme Court has clearly tied the idea to the Constitution.²⁴⁴ That is, these decisions have reasoned that the federal government is a creature of the Constitution and acquired sovereign authority because the Constitution created a government that was expected to have the full array of sovereign authority. In the *Chinese Exclusion Case*,²⁴⁵ for example, the Court reasoned that the distinction between enumerated powers over internal affairs and inherent authority over external affairs was one “under our Constitution” and that the exercise of sovereign authority was restricted by, among other things, “the Constitution itself.”²⁴⁶ This linkage between sovereign power and the Constitution is also consistent with the Court’s observation in 2023 in *Brackeen* that, although federal power over Indian affairs may derive in part from principles of constitutional structure relating to nationhood, it is not “unmoored from the Constitution.”²⁴⁷

In the immigration area, the idea of sovereign power is sometimes blamed for the much-criticized “plenary power” doctrine, pursuant to which Congress’s immigration decisions are allegedly not subject to constitutional limitations or judicial scrutiny.²⁴⁸ But, again, there is no necessary connection between these ideas.²⁴⁹ As confirmation of this, the plenary power doctrine has

²⁴⁴ See HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 18 (“The earlier cases found powers inherent in sovereignty to be vested in the federal government ‘by the Constitution.’”).

²⁴⁵ 130 U.S. 581 (1889).

²⁴⁶ *Id.* at 604; *cf. Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (“In my opinion, Congress has no existence and can exercise no authority outside of the Constitution.”).

²⁴⁷ *Brackeen*, 143 S. Ct. at 1627; *see also supra* text accompanying note 172. Vattel accepted that governments in sovereign nations were—and should be—subject to constitutional constraints. *See* VATTEL, *supra* note 14, at 19; *see also* CORWIN, *supra* note 56, at 172 (contending that, even though the Constitution is merely the “mediate” rather than “immediate” source of external powers, these powers are “susceptible of limitation by the Constitution when the restrictions that it imposes on all power apply” (emphasis omitted)).

²⁴⁸ *See* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 32–33 (2015) (explaining this claim).

²⁴⁹ *See, e.g.,* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 120–21 (1996) (arguing that sovereignty does not require a rejection of constitutional limits on immigration authority); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) (“The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints.”); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 253, 274 (arguing that, even if the government has inherent sovereign authority to regulate immigration, it does not follow that exercises of this authority should be free from either constitutional constraint or judicial review); Martin, *supra* note 248, at 38 (“[A]s a conceptual matter, there is no reason

receded somewhat over time, even while the Supreme Court has remained committed to a sovereign power foundation for immigration law.²⁵⁰

Relatedly, if sovereign power is linked to the Constitution, the existence of this power does not compel the conclusion that constitutional limitations disappear when the government takes actions outside of U.S. territorial boundaries. This approach thus avoids one of the core critiques of the controversial “Insular Cases,” in which the Supreme Court held that the Constitution did not fully apply to U.S. government actions in the territories it acquired as a result of the Spanish-American War.²⁵¹ In any event, the claim that the Constitution was being turned off in the territories may be something of a myth.²⁵² And, under current

why sovereign powers, at least in a polity like the United States, necessarily escape constitutional constraints.”). For an argument that the plenary power doctrine originated simply as a product of now-outdated due process reasoning (which distinguished heavily between rights and privileges), not as an exceptional treatment of immigration law, see generally Cox, *supra* note 158.

²⁵⁰ See, e.g., *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”). The retreat from the plenary power doctrine has only been partial: the Court has continued to insist that the decision whether to admit foreign citizens into the United States is an exercise of sovereign power that is largely immune from judicial scrutiny. See, e.g., *Dep’t of State v. Munoz*, 144 S. Ct. 1812, 1820 (2024); *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–19 (2018); cf. Martin, *supra* note 248, at 31 (“Significant statute-based challenges to executive action remain available, as do procedural due process challenges, at least to deportation proceedings.”). The key point is simply that there is no necessary connection between the plenary power doctrine and the sovereign power idea.

²⁵¹ See generally BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

²⁵² See, e.g., Ponsa-Kraus, *supra* note 70, at 2452–53 (contending, contrary to the conventional account, that “the *Insular Cases* did not carve out a largely extraconstitutional zone of territory subject to formal, internationally recognized U.S. sovereignty where none of the Constitution applies except for certain fundamental limitations”); Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 801–02 (2005) (contending that “the incorporated/unincorporated distinction did not mirror a distinction between places where the Constitution applied ‘in full’ and places where only its ‘fundamental’ provisions applied”); Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 382 (2018):

[D]uring the period 1900–1917, the residents of Puerto Rico and the Philippines were granted by statute every individual right found in the U.S. Constitution, with the exception of the Second Amendment right to bear arms, the Third Amendment prohibition on quartering soldiers in private homes in peacetime, and, in the Philippines, the rights to a jury trial and grand jury indictment.

doctrine, the extraterritorial application of the Constitution is complicated even without regard to the territories.²⁵³

To be sure, linking sovereign power to the Constitution undermines a doctrinal claim made by the Court in *Curtiss-Wright*: that, if something concerns the exercise of external sovereign authority, it is exempt from otherwise-applicable nondelegation constraints. But this is not a fatal objection to insisting on such linkage. There are good reasons to think that the Supreme Court should not rigorously enforce nondelegation constraints even in domestic affairs.²⁵⁴ But if it is appropriate to apply a more relaxed approach to nondelegation constraints in the foreign affairs area, it is for reasons other than sovereign power, such as the fact that the President has greater independent authority in this domain, and because of the weight of historical practice.²⁵⁵

In sum, although some exercises of sovereign authority are not based on specific constitutional text, this does not mean that they are “extraconstitutional” or free from constitutional constraints.

C. Popular Sovereignty

Another potential objection to the sovereign power idea is that it rests on a conception of *governmental* sovereignty, whereas the U.S. Constitution was founded on a conception of popular sovereignty—that is, sovereignty that rests with the people rather than with their government.²⁵⁶ Consistent with this idea, the Constitution begins with the phrase, “We the people,” and the

²⁵³ In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court held that the Habeas Suspension Clause applied to government detentions at the U.S. naval base in Guantanamo Bay, Cuba. *Id.* at 779. In *United States v. Verdugo-Urquidez*, 493 U.S. 259 (1990), the Court held that the Fourth Amendment did not apply to a U.S. government search of a Mexican citizen’s residence in Mexico. *Id.* at 267. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court held that the Constitution’s jury trial provisions applied to the trial of the spouses of U.S. servicemembers for crimes committed abroad. *Id.* at 40. For additional discussion, see generally J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007); Neuman, *Whose Constitution?*, *supra* note 119.

²⁵⁴ See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–43 (2002); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282–89 (2021).

²⁵⁵ See Bradley & Goldsmith, *supra* note 40, at 1764–66. Lower courts tend to rely on those other reasons in holding that the nondelegation doctrine has less purchase in the foreign affairs area. See, e.g., *United States v. Henry*, 888 F.3d 589, 596 (2d Cir. 2018); *Owens v. Republic of the Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008).

²⁵⁶ See Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 41–56; see also Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1908–11 (2008) [hereinafter Lash, *Original Meaning of an Omission*].

Tenth Amendment also refers to powers being reserved “to the people.”²⁵⁷

Putting aside the many fictional qualities of the idea of popular sovereignty as applied to the constitutional Founding,²⁵⁸ this idea does not tell us what powers the people have conferred on their government. Certainly there is nothing in the concept that requires that the powers be conferred expressly. In fact, in considering the draft of what became the Tenth Amendment, Congress voted against including the word “expressly” in referring to the powers delegated to the federal government,²⁵⁹ thus arguably accepting that some of the national government’s authority is implicit.²⁶⁰

Tellingly, the Founder most associated with the idea of inherent sovereign authority—James Wilson—was also a champion of popular sovereignty. His idea appears to have been that independence from Great Britain created a *national people* and that this community created an entity with the full attributes of nationhood.²⁶¹ Consistent with this conception, the Anti-Federalists were worried that the Preamble’s reference to “We the People of the United States” was implying broad national government power.²⁶²

Ultimately, this popular sovereignty argument boils down to the same question addressed earlier: Are there reasons to think that the people would have reserved to the states or themselves the usual foreign affairs authorities allocated to nations under international law? It is difficult to think of such reasons, and there

²⁵⁷ U.S. CONST. pmbl., amend. X.

²⁵⁸ For example, neither women nor Black people had a voice in adoption of the Constitution, but it nevertheless applied to them. Also, the Constitution is extremely difficult to change, even when “the people” no longer support its provisions.

²⁵⁹ See 1 ANNALS OF CONG. 761, 766–68.

²⁶⁰ Chief Justice Marshall emphasized this point in *McCulloch*, 17 U.S. (4 Wheat.) at 406, as did Joseph Story in his *Commentaries*, see 1 STORY, *supra* note 17, at 418. *But see* Lash, *Original Meaning of an Omission*, *supra* note 256, at 1926–53 (contesting this interpretation).

²⁶¹ See Gienapp, *In Search of Nationhood*, *supra* note 103, at 1796–97; *see also* Gienapp, *Myth of the Constitutional Given*, *supra* note 68, at 203 (describing the idea “of how a national people, rather than the autonomous states, were constituting a national government to act in their name and thus automatically delegating all distinctively national powers to which the individual states had no prior claim”).

²⁶² See Gienapp, *In Search of Nationhood*, *supra* note 103, at 1801–02. There were of course competing views about the nature of the union, especially before the Civil War—for example, the “state compact” theory of the Constitution expressed at times by Jefferson and others. See Campbell, *supra* note 88, at 19–20; *see also* Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 2D 51, 51 (1999) (“Popular sovereignty may express a noble idea, but as an analytical principle, it is vacuous.”).

is no direct evidence of such reservations.²⁶³ It should be of no surprise, therefore, that when courts eventually had to decide whether the federal government had authority over subjects like immigration, Indian affairs, and the territorial seas, they concluded (as we have seen) that the people had not reserved such authority to the individual state governments. None of this is to suggest that the people could not change the arrangement by amending the Constitution through the processes outlined in Article V. Amendments have sometimes been proposed that would do so—for example, a version of the proposed Bricker Amendment in the 1950s would have reduced the scope of the treaty power, but it was not adopted.²⁶⁴

To be sure, there has been resistance at times to the idea of inherent sovereign authority with respect to *internal* affairs—such as the authority to create a national bank—and some of the resistance has been framed in terms of popular sovereignty.²⁶⁵ The key point is that, unlike in the domestic realm, popular sovereignty has not usually been thought to be undermined by governmental exercises of external foreign affairs powers.

It is true, of course, that the United States has sometimes used its sovereign power for ends that are now regarded as highly problematic. But there is nothing in the sovereign power concept that requires such actions, and the United States has also done many positive things in the world with its power.²⁶⁶ It has also done problematic things with its enumerated powers. Moreover,

²⁶³ Because of this point, it is doubtful that the Tenth Amendment establishes a presumption against unenumerated authority over foreign affairs. See SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 51, at 46; cf. MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 20 (2007) [hereinafter RAMSEY, CONSTITUTION'S TEXT IN FOREIGN AFFAIRS] (arguing for such a presumption). If anything, the presumption should run the other way: we should presume that the usual authority that nations had over external affairs was not being reserved away from the national government.

²⁶⁴ See DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 32–48 (1988).

²⁶⁵ See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 80, 87 (1907) (reasoning that, in light of the enumerated powers structure of the Constitution, the federal government does not have a general power “to control the whole system of the reclamation of arid lands” in the country, while also acknowledging that the Constitution “created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world”).

²⁶⁶ Cf. JOEL FRANCIS PASCHAL, MR. SUTHERLAND: A MAN AGAINST THE STATE 231 (1951):

At a time when the peoples of the world are painfully searching for some power extensive enough to impose a semblance of order on the international community, it is a heartening thing to know that the Constitution of the United States does not prohibit this country from making its full contribution.

other nations also have the usual array of sovereign authorities, and that has not meant that they necessarily abuse them. It is also worth recalling that one of the decisions rejecting the sovereign power idea was *Dred Scott*, which is regarded by many observers as a low point in Supreme Court decision-making.

D. Sovereignty and the Text

By jettisoning the presidentialist and extraconstitutional elements of *Curtiss-Wright*, we are left with what might be called a “constitutional sovereignty” approach. Under this approach, exercises of governmental authority—even if they involve external sovereign power—are not exempt from constitutional limitations, and constitutional materials (including, potentially, long-standing historical practice) must be consulted to resolve questions about the internal separation of powers.

Importantly, tying the exercise of sovereign power to the Constitution does not require tying it to specific textual provisions. Structural reasoning is a common mode of constitutional interpretation.²⁶⁷ To take one of many recent examples, it was the central basis for the Supreme Court’s (controversial) presidential immunity decision in 2024, *Trump v. United States*.²⁶⁸ Relatedly, as noted earlier, the Supreme Court has accepted that there are many unwritten “backdrops” that inform the meaning of our Constitution, including (for example) the backdrop concerning state sovereign immunity.²⁶⁹ Taking account of these backdrops may be compatible even with an originalist approach to the Constitution.²⁷⁰ Relatedly, the sovereign power idea may help inform what

²⁶⁷ See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1303–10 (2019) (describing this phenomenon and also noting the tensions between structuralism and originalism). For the classic account of structural reasoning in constitutional law, see generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). For additional discussion, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74–92 (1982).

²⁶⁸ 144 S. Ct. 2312 (2024); see *id.* at 2327 (basing the decision on “our constitutional structure of separated powers” rather than specific text); see also, e.g., *Brackeen*, 143 S. Ct. at 1628 (“We have also noted that principles inherent in the Constitution’s structure empower Congress to act in the field of Indian affairs.”); *Printz v. United States*, 521 U.S. 898, 918 (1997) (“We turn next to consideration of the structure of the Constitution, to see if we can discern among its ‘essential postulate[s],’ a principle that controls the present cases.” (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934))).

²⁶⁹ See *supra* text accompanying notes 89–90.

²⁷⁰ See, e.g., Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (describing constitutional backdrops as “rules of law that aren’t derivable from the Constitution’s text, but instead are left unaltered by the text”); William Baude & Stephen Sachs, *The “Common Good” Manifesto*, 136 HARV. L. REV. 861, 887–88 (2023).

is referred to in the originalism literature as “constitutional construction,” which involves giving legal content to the Constitution’s original meaning.²⁷¹

Because some sovereign powers are listed in the Constitution, the *expressio unius* canon might seem to be a problem for this approach, but it is far from dispositive. According to that canon, when interpreting a text, a list of items suggests that any items not included are being omitted. As Justice Antonin Scalia and Professor Bryan Garner noted in their treatise on interpretation, however, “[v]irtually all the authorities who discuss [this] canon emphasize that it must be applied with great caution, since its application depends so much on context.”²⁷² Whatever the case for the canon in the statutory interpretation context, the case is weaker in the constitutional context, given that the Constitution was not designed like a legislative code and, relatedly, is very difficult to amend. As Chief Justice Marshall emphasized in *McCulloch*, “we must never forget, that it is *a constitution* we are expounding.”²⁷³ In part because of this, almost everyone accepts that the federal government has some implied powers. And, as just noted, it is also accepted that some constitutional principles are supported by structural inferences rather than specific clauses. If implied and structural powers are allowable despite the *expressio unius* canon, then it is hard to see why the canon precludes the possibility of unwritten understandings of authority derived from international law, especially since those understandings can themselves be seen as an implied or structural inference.

In any event, one reason for enumerating some powers but not others would have been to address issues of allocation of authority, something made especially necessary by the fact that

(book review) (reviewing ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022)) (noting that the theory in *Curtiss-Wright* might be consistent with originalism); Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295, 298 (2017) (“Like contracts, both constitutions and statutes are routinely supplemented by a large set of implied terms that are not regarded as problematic by the parties who respect and enforce them.”).

²⁷¹ For discussions of constitutional construction, see generally, for example, KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Lawrence B. Solum, *Originalism and Constitutional Construction*, 83 FORDHAM L. REV. 453 (2013).

²⁷² ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2011); see also, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1250 (2001) (“Law professors consider [the *expressio unius*] canon unreliable or even bogus.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455 (1989) (“The *expressio unius* canon should not be used mechanically.”).

²⁷³ *McCulloch*, 17 U.S. at 407 (emphasis in original).

the Constitution was creating two new branches of government (the executive and the judicial) as well as a dual-chamber legislature.²⁷⁴ The Founders may also have enumerated certain powers simply because those were the powers most prominently on their minds; the mere fact of enumeration does not by itself prove that the enumeration was understood to be exhaustive.²⁷⁵ And even if the Founders thought that the constitutional enumeration had to be complete, they might have relied on general clauses like the Necessary and Proper Clause to round out the list.²⁷⁶ Of course, even in the domestic realm, the Framers almost certainly left some things out that they would have included if they had had more time and foresight. But there is less reason to think that they were even *trying* to write everything down with respect to foreign affairs, in part because international law would have already covered some of those issues.²⁷⁷

²⁷⁴ See HENKIN, FOREIGN AFFAIRS, *supra* note 5, at 17. Even when the allocations are unclear, the text can at least provide a starting point for sorting them out. In instances in which the text has appeared to provide sufficient sovereign authority, discussions and debates about governmental action unsurprisingly have tended to center around the text, although its meaning has been heavily “glossed” by historical practice. See generally BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS, *supra* note 187.

²⁷⁵ See, e.g., Gienapp, *Myth of the Constitutional Given*, *supra* note 68, at 184 (“It is one thing to recognize that national powers are enumerated in the Constitution and quite another to reach the separate, optional conclusion that the powers of the national government are distinctly limited *to* and *by* that enumeration.” (emphasis in original)).

²⁷⁶ Professor John Mikhail contended that the government’s powers of external sovereignty are implicitly encompassed within the Necessary and Proper Clause’s reference to all “other powers” vested by this Constitution in the Government of the United States.” See Mikhail, *Original Federalist Theory of Implied Powers*, *supra* note 65, at 66. See generally Mikhail, *Necessary and Proper Clauses*, *supra* note 105. The counterargument is that this clause is simply referring to obligations imposed on the “United States”—such as in the Republican Form of Government Clause in Article IV. See, e.g., Natelson, *supra* note 69, at 357; cf. Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 92 (taking issue with Mikhail’s textual analysis but still contending that “[w]hen national controls over immigration, recognition, and passports were considered necessary to effectuate the aggregate foreign affairs powers of the United States, Congress could enact legislation that is ‘plainly adapted’ to legitimate constitutional ends pursuant to the ‘all other powers’ provision of the Necessary and Proper Clause”).

²⁷⁷ During the ratification debates, there were certainly statements by some of the Founders suggesting that the federal government was getting only the powers enumerated in the text, but the value of these statements is unclear, especially under a “public meaning” approach to the Constitution. The Anti-Federalists were skeptical of these statements, perhaps appropriately so. See, e.g., MAX EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 106 (2003) (“Antifederalists accused the Federalists of transforming the union from a confederation of sovereign states to a ‘consolidated’ nation-state.”); Gienapp, *Myth of the Constitutional Given*, *supra* note 68, at 205 (“Nor were these Anti-Federalists swayed by Federalist assurances that the Constitution’s delegated powers were clear and circumscribed. Anti-Federalists instead saw these promises for the clever, lawyerly evasions they

In addition to helping resolve the “missing” foreign affairs powers, the backdrop of sovereign power under international law is also likely relevant to the interpretation of specific textual provisions.²⁷⁸ For example, judicial interpretations of Congress’s authority to regulate foreign commerce have long been influenced by sovereignty considerations. In a case concerning the regulation of tea imports, the Court described the Foreign Commerce power as “complete in itself” and said that, whatever federalism limitations there might be with respect to the regulation of domestic commerce, “it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries.”²⁷⁹ The more broadly one interprets textual provisions like these, the less need there is for relying on a mere structural inference.²⁸⁰ Either way, conceptions of nationhood are doing important work.

Moreover, as noted earlier, some scholars contend that the Necessary and Proper Clause gives Congress authority to (among other things) regulate matters of external sovereignty.²⁸¹ Relatedly, the sovereign power idea may be relevant to the debate over

often were.”). Moreover, the public meaning of the Constitution was potentially affected by the international law backdrop of the time, including the backdrop relating to sovereign power, and the Founders’ statements did not specifically address the interaction of that backdrop with the text.

²⁷⁸ Cf. Bellia & Clark, *Law of Nations as Constitutional Law*, *supra* note 99, at 838 (“The constitutional powers to send and receive ambassadors, to declare war, to grant letters of marque and reprisal, and to make rules governing captures on land and water necessarily draw meaning from, and assume the existence of, certain background principles of the law of nations.”); Golove & Hulsebosch, *A Civilized Nation*, *supra* note 87, at 1000 (“[C]ontemporaries realized—as modern readers often cannot—that many clauses referred directly to recognized principles, concepts, and institutions of the law of nations.”). Critiques of the sovereign power reasoning in *Curtiss-Wright* have generally not engaged with the international law backdrop of the Constitution.

²⁷⁹ *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904). In recent years, lower courts have relied on this reasoning about the scope of the Foreign Commerce Clause to, among other things, allow for prosecutions of sex tourism and sexual abuse of minors by U.S. citizens abroad. See, e.g., *United States v. Park*, 938 F.3d 354, 372 (D.C. Cir. 2019).

²⁸⁰ Cf., e.g., Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 654 (2018) (contending, as an alternative to the sovereign power foundation, that “immigration to the United States is and has long been principally economic in its purpose and impact and thus in many cases is properly considered a function of both the Foreign and Interstate Commerce Clauses”); Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PENN. STATE L. REV. 643, 660–64 (2023) (arguing that the Foreign and Indian Commerce Clauses should be seen as broader than the domestic Commerce Clause and that this would eliminate the need for sovereign power justifications).

²⁸¹ See *supra* note 276.

whether the Necessary and Proper Clause should be read to authorize the exercise of so-called great powers.²⁸² Those who contend that it should not be so read argue that if such powers were being granted in the Constitution, they likely would have been granted expressly,²⁸³ but this assumption might not hold for powers of external sovereignty.

Notions of sovereign power may also be relevant to the proper construction of the clause that gives Congress the authority to “define and punish . . . Offences against the Law of Nations.”²⁸⁴ Modern lower courts have tended to assume that, in order for Congress exercise this power, the conduct that it is regulating must itself violate international law.²⁸⁵ That interpretation limits the usefulness of the clause because, except for a few categories of especially egregious activities, private conduct generally does not violate international law.

Unlike these lower court decisions, there is a late nineteenth-century Supreme Court decision that suggests a broader interpretation of the clause. In *United States v. Arjona*,²⁸⁶ the Supreme Court upheld Congress’s authority under the Define and Punish Clause to criminalize the counterfeiting in the United States of foreign government currency, reasoning that the United States had an obligation under the law of nations to “use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace.”²⁸⁷ In federalism reasoning similar to what later appeared in *Curtiss-Wright*, the Court noted that

²⁸² See, e.g., William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013) (“[S]ome powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power.” (emphasis in original)); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559–61 (2012) (opinion of Roberts, C.J.) (concluding that a statutory requirement to buy health insurance involved the exercise of a great substantive and independent power akin to taxing or declaring war and thus was beyond the scope of the Necessary and Proper Clause). But see, e.g., John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 59 n.349 (2014) (“[I]n no case has the Court ever invalidated an act of Congress on the ground that it employed a ‘great substantive and independent power,’ in contravention of the Necessary and Proper Clause.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411)); Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMPLE L. REV. 1, 17 (2016) (similar).

²⁸³ See, e.g., Baude, *supra* note 282, at 1749.

²⁸⁴ U.S. CONST. art. I, § 8, cl. 10.

²⁸⁵ See, e.g., *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1253 (11th Cir. 2012) (dismissing prosecution for drug trafficking outside the United States because the court concluded that drug trafficking is not a violation of international law).

²⁸⁶ 120 U.S. 479 (1887).

²⁸⁷ *Id.* at 484. The Court quoted extensively from Vattel.

the national government *must* have this power since the state governments were under no obligation to address such national responsibilities.²⁸⁸ Otherwise, said the Court, the United States would “be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations.”²⁸⁹ The Court thus appears to have interpreted the Define and Punish Clause—at least when considered in conjunction with the Necessary and Proper Clause—as allowing for congressional regulation not only of conduct that itself violates international law, but also of certain conduct that injures other nations.²⁹⁰

One of the earliest federal statutes, which concerned the protection of ambassadors, reflected this broader conception of the Define and Punish power. At the time of the adoption of the Constitution, nations had an obligation under the law of nations (as they still do today) to protect foreign ambassadors.²⁹¹ One of the episodes during the Articles of Confederation period that seemed to confirm the need for more national control over foreign affairs involved an assault on a French ambassador in Philadelphia—something known as the “Marbois-Longchamps Affair.”²⁹² Because of the lack of any federal courts or any federal law protecting

²⁸⁸ *Id.* at 487.

²⁸⁹ *Id.*

²⁹⁰ *See id.*:

A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively.

The House Judiciary Committee, in commenting on the proposed statute, reasoned that the Define and Punish Clause

vests in Congress power to define and punish as offenses against the law of nations, everything which is done by a citizen of the United States hostile to the peaceful relations between them and foreign nations, or which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb its peace and security.

Rep. John R. Tucker, *Counterfeiting Within the United States*, H.R. REP. NO. 48-1329, at 2 (1884). In support of this interpretation, the Committee relied in part on Vattel. *See id.* at 2–3.

²⁹¹ *See, e.g.*, VATTEL, *supra* note 14, at 371 (“[A]mbassadors and other ministers should be put in a position of perfect safety and inviolability.”).

²⁹² For background on the Affair, see 4 THE SELECTED PAPERS OF JOHN JAY 43–50 (Elizabeth M. Nuxoll ed., 2015).

ambassadors, U.S. compliance with its international responsibilities in a situation like this one depended entirely on state law and state courts.²⁹³ In 1790, a year after the government began operating under the Constitution, Congress used the Define and Punish Clause to criminalize assaults on ambassadors as part of its first general crimes statute.²⁹⁴ This broader understanding of the Clause makes sense when considered in light of the nation's sovereign responsibilities.²⁹⁵ That is, it makes sense to interpret the Constitution as giving the federal government sufficient authority to meet its obligations under international law as a sovereign nation.

E. The Vesting Clause Thesis

There is an alternate theory about the source of the “missing” foreign affairs powers. This theory has been referred to as the “Vesting Clause Thesis” or the “Royal Residuum Thesis.” It could also be described as the Hamiltonian view. The first sentence in Article II of the Constitution, known as the Vesting Clause, states that “[t]he executive Power shall be vested in a President of the United States of America.”²⁹⁶ Some scholars have argued that this clause implicitly conveys to the President all foreign affairs powers not expressly delegated elsewhere in the Constitution, on the theory that such powers would have been regarded at the time of the Founding as traditionally or by their nature “executive.”²⁹⁷ Among other things, these scholars have pointed out that this clause, unlike the Vesting Clause in Article I, does not refer to powers “herein granted,” thus indicating, they contend, that presidential power is not limited to the specific grants of authority in the rest

²⁹³ See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 467 (2011) [hereinafter Bellia & Clark, *Alien Tort Statute*].

²⁹⁴ See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 117–18. It may be that the Alien Tort Statute, 28 U.S.C. § 1350, which dates to 1789 (as part of the First Judiciary Act) was also designed to ensure that the United States met its international responsibilities—in particular, ensuring redress for certain torts committed by U.S. citizens against foreign citizens. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 630–31 (2002); Bellia & Clark, *Alien Tort Statute*, *supra* note 293, at 449–50.

²⁹⁵ See Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 64 (“The consensus view of the founding generation . . . was that the law of nations imposed mutual duties, and corresponding powers to fulfill those duties, upon all members of the community of nations on the principle of equal national sovereignty.”).

²⁹⁶ U.S. CONST. art. II, § 1.

²⁹⁷ See, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 175 (2020); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 275 (2001).

of Article II.²⁹⁸ If one accepts this idea, it is argued, there is no need to accept the sovereign power idea.²⁹⁹

The Vesting Clause Thesis has been extensively criticized, so I provide only a brief summary of the relevant points here.³⁰⁰ Its central weakness, as the critiques have pointed out, is that there is no support for it in the thousands of pages of materials from the Founding debates—not in the records of the drafting convention in Philadelphia, not in public commentary like the *Federalist Papers*, and not in the extensive records of the state ratifying conventions. Moreover, whereas it is possible to imagine that some national powers would have been taken for granted when drafting and debating the Constitution, it is hard to conceive that it would have been uncontroversial to leave to the new office of the presidency a potentially vast store of unspecified authority. To put the point differently, the Framers were eager for the United States to assume an international status equal to that of the European powers,³⁰¹ so it would not be surprising if they took for granted European understandings of what nationhood meant in the international arena, even if they did not take for granted European understandings relating to the internal organization of the nation. Importantly, some Anti-Federalists did perceive that the Constitution might be granting Congress inherent authority,³⁰² but they appear not to have perceived that the Article II Vesting Clause was conveying substantive authority to the President. For this and other reasons, critics of the Vesting Clause Thesis contend that the clause either conveys no authority at all or, at most, conveys authority to superintend the executive branch or execute the laws.

²⁹⁸ See Prakash & Ramsey, *supra* note 297, at 256–57.

²⁹⁹ See, e.g., RAMSEY, CONSTITUTION'S TEXT IN FOREIGN AFFAIRS, *supra* note 263, at 20, 48.

³⁰⁰ For detailed critiques of this thesis, see generally, for example, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Andrew Kent, *Executive Power, the Royal Prerogative, and the Founders' Presidency*, 2 J. AM. CONST. HIST. 403 (2024); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). Cf. Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 138 (2020) (concluding that the Article II Vesting Clause conveys only a power to execute the laws but advancing a thick understanding of that power).

³⁰¹ See, e.g., Golove & Hulsebosch, *A Civilized Nation*, *supra* note 87, at 935–36.

³⁰² See, e.g., Coan & Schwartz, *supra* note 65, at 1006.

In an effort to address this gap in the historical record, supporters of the Thesis primarily emphasize preconstitutional theories about separation of powers, such as from John Locke and Montesquieu, and post-Founding practices and debates. The extent to which the preconstitutional theories made their way into the Constitution is very speculative, however, and the post-Founding practice is far from compelling. While it is true that Alexander Hamilton advanced the Vesting Clause Thesis in a 1793 debate over the constitutionality of President Washington's Neutrality Proclamation,³⁰³ Hamilton was an especially vigorous proponent of executive authority, and his claim was heavily contested by James Madison—who, among other things, complained that Hamilton was improperly trying to transpose the idea of British royal prerogatives to the United States.³⁰⁴ The constitutionality of President Washington's proclamation also likely did not depend on acceptance of the Thesis.³⁰⁵

Importantly, the Supreme Court has never embraced the Vesting Clause Thesis. Justice Jackson pointedly rejected it in his canonical concurrence in *Youngstown*.³⁰⁶ On the modern Supreme Court, only Justice Clarence Thomas has expressed support for the Thesis.³⁰⁷ Contrast this with the sovereign power idea, which, as we have seen, has been endorsed in numerous Supreme Court opinions throughout history. The sovereign power idea, in other words, is part of our positive constitutional law in a way that the Vesting Clause Thesis is not. It is also worth noting that the Thesis probably cannot avoid looking to Vattel and other international law publicists in discerning what foreign affairs powers are missing from the Article I allocations (and thus that allegedly go

³⁰³ See generally Alexander Hamilton, *Letters of Pacificus No. 1* (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON, JUNE 1793 TO JANUARY 1794, at 33 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

³⁰⁴ See generally James Madison, "*Helvidius*" No. 1 (Aug. 24, 1793), reprinted in 15 THE PAPERS OF JAMES MADISON, 24 MARCH 1793 TO 20 APRIL 1795, at 66 (Thomas A. Mason et al. eds., 1985).

³⁰⁵ See Bradley & Flaherty, *supra* note 300, at 681.

³⁰⁶ *Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring).

³⁰⁷ See *Zivotofsky*, 576 U.S. at 33 (Thomas, J., concurring in the judgment in part and dissenting in part). In *Zivotofsky*, both the majority opinion and Justice Scalia's dissent (which was joined by Chief Justice John Roberts and Justice Samuel Alito) appeared to reject the theory. See *id.* at 20 (declining to endorse the proposition, associated with *Curtiss-Wright*, "that the President has broad, undefined powers over foreign affairs"); *id.* at 84 (Scalia, J., dissenting) (referring critically to Justice Thomas's claim of "broad, unenumerated 'residual powers' in the President").

to the President), so the Thesis does not represent an improvement over the sovereign power idea in terms of sources and specificity.

Another problem is that the Vesting Clause Thesis would—like the “sole organ” component of Justice Sutherland’s reasoning—provide what many would regard as an overly expansive reservoir of unspecified executive authority. By contrast, as I have noted, much of the exercise of sovereign power authority has been by Congress and the treaty-makers, not the President. That pattern further undercuts the Vesting Clause Thesis as a positive matter: contrary to the Thesis, courts and other interpreters throughout our history have *not* assumed that all unspecified foreign affairs authority goes to the President. Any carryover of substantive executive power into the Vesting Clause would also have been complicated by the fact that the Constitution was *changing* many of the traditional executive allocations—giving Congress many of the war powers, for example. By contrast, there is no reason to think that the Constitution was substantially changing the usual package of external sovereign authority.

F. External Versus Internal

Another potential objection to the sovereign power idea is that it might rest on an artificial distinction. At least as formulated by Justice Sutherland, the sovereign power idea seems to depend on the ability to draw a meaningful line between external and internal affairs.³⁰⁸ In an age of globalization, however, this line might often be blurry at the margins. Actions taken within the United States, including at the subnational level, often have external effects. Conversely, actions traditionally labeled as external—such as making treaties and policing the borders—often have internal effects. Relations with Indian tribes present their own, *sui generis* complexity, combining elements of national and tribal sovereignty with traditional areas of domestic regulation.

Despite these difficulties, it may be that some sort of external-versus-internal distinction was part of the conceptual backdrop of the Founding. In the pre-Revolutionary period, the American colonies generally managed their own internal affairs, while the British crown (and occasionally Parliament) managed their external

³⁰⁸ See *Curtiss-Wright*, 299 U.S. at 319 (contending that “the federal power over external affairs [is] in origin and essential character different from that over internal affairs”).

affairs.³⁰⁹ The Revolution was in part a response to Parliament's increasing intrusions on the colonies' internal affairs.³¹⁰ Moreover, the state constitutions in the revolutionary period arguably continued this distinction. After reviewing these constitutions, Professor Mark Graber has observed that "Americans, the slender evidence suggests, accepted a rough line of division . . . [whereby the] Continental Congress made external policy and the states made internal policy," although he also noted that this was "under theorized."³¹¹ And in debates over the Constitution, even the Anti-Federalists seemed to accept the distinction.³¹²

In any event, this distinction only matters if one thinks—like Justice Sutherland—that constitutional constraints vary as between external and internal powers. Under the "constitutional sovereignty" approach suggested here, that is not the case. Rather, the focus is on categories of authority allocated to nations under international law that govern their relations with each other, such as control over their borders, not on whether something is properly labeled "external." These categories of authority would in turn be subject to both individual rights and separation of powers limitations.

This means that the main constitutional implication of allowing for unenumerated authority over certain matters relating to sovereignty is for federalism—and, even there, the main takeaway is simply that matters of external sovereignty were not left *exclusively* to the states.³¹³ This should not be a shocking conclusion. From the beginning of the nation, federalism has been understood to be weaker in the foreign affairs realm than in the domestic realm, in part because subnational actions can impose especially harmful externalities on the nation.³¹⁴ As a result, the national

³⁰⁹ See GREENE, *supra* note 93, at 121 (describing a custom prior to the Revolution in which British colonies "had full jurisdiction over their own particular local and internal affairs, while the metropolitan government at the center had authority over all general matters, including the external relations of the several provincial governments").

³¹⁰ See Reinstein, *Aggregate and Implied Powers*, *supra* note 17, at 45.

³¹¹ Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 378, 409 (2016).

³¹² See *supra* note 87.

³¹³ As discussed earlier in this Article, in the absence of preemptive federal legislation or treaties, states have often regulated matters that touch on national sovereignty, including immigration, extradition, and extraterritorial conduct by state residents.

³¹⁴ As Alexander Hamilton noted, "the peace of the WHOLE ought not to be left at the disposal of a PART." THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under international law, federal nations are generally treated as a single entity. See Montevideo Convention on the Rights and Duties of States art. 2, Dec.

government has always been accorded primacy over state governments in foreign affairs. The main issue simply has been the extent to which the national government needs to take affirmative steps, such as enacting legislation, to displace state laws and actions that implicate foreign affairs (and, relatedly, what presumption the courts should apply in discerning whether the national government has done so).³¹⁵

G. Limitations on Sovereign Authority

In the above account, international law is mainly doing the work of empowerment. As we have seen, courts and other interpreters have often invoked international law concepts to conclude that the federal government should have as much power to act in international affairs as other nations. Indeed, these invocations became part of the legal architecture for the United States' rise as a world power. In some respects, conceptions of nationhood have even supported *expansions* of authority over time. For example, the United States' authority to regulate conduct outside its borders has likely grown as international law rules of jurisdiction have become less territorial.³¹⁶ In addition, as previously discussed, the United States acquired authority over a larger portion of its territorial sea as international law changed to allow for such additional authority. The proper subject matter scope of treaty-making has also expanded since the Founding, so, as a practical matter, the U.S. government's treaty-making authority has also expanded.³¹⁷

26, 1933, 49 Stat. 3097 ("The federal state shall constitute a sole person in the eyes of international law.").

³¹⁵ Numerous decisions since *Curtiss-Wright* have emphasized the federal government's primacy over the states in foreign affairs. See, e.g., *Arizona v. United States*, 567 U.S. 387, 394–95 (2012); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–14 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 377 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 n.13 (1979); *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–24 (1964); *United States v. Pink*, 315 U.S. 203, 230–31 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *United States v. Belmont*, 301 U.S. 324, 331–32 (1937); cf. *Bond v. United States*, 572 U.S. 844, 860 (2014) (holding that statutes implementing treaties are presumed not to address purely local crimes). The *Bond* decision may suggest that federalism is a more significant factor when foreign affairs powers are used to address what have traditionally been domestic issues.

³¹⁶ See RAUSTIALA, *supra* note 97, at 238–39.

³¹⁷ Perhaps most dramatically, treaties today sometimes address matters of internal human rights—that is, how nations treat their own citizens. Although the issue is not free from controversy, it has generally been assumed that the U.S. government has the same

But international law, especially today, also imposes *limitations* on government action. Does the U.S. government have constitutional authority to act in contravention of those limitations? This question is different from asking whether the U.S. government can commit to limit its exercises of sovereign authority—through treaties, for example. Surely, it can; indeed, doing so is itself an act of sovereignty. The issue, rather, is whether those limitations are *constitutional* in character.

Regardless of whether it was the understanding in the early years of the nation (a matter of some debate), there has long been an understanding that the federal government—especially when acting through Congress—can breach international law obligations and face whatever international consequences that may entail.³¹⁸ Indeed, the Supreme Court has reasoned that this right of breach is itself an aspect of sovereignty, just like a sovereign individual can decide to breach a contract.³¹⁹ This idea is connected to judicial deference and the political question doctrine: courts do not think that they should be policing the United States' relational obligations with other countries, at least until those obligations have been converted into certain forms of domestic law (namely, statutes and self-executing treaties).³²⁰ Furthermore,

capacity as other nations to enter into such human rights treaties, and it has in fact ratified a number of them. Cf. Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1031–32 (1968) (“It is difficult to believe that any court would find that the Constitution renders the United States impotent to do what all other nations can do—participate in one of the major developments of international life in the last half-century.”).

³¹⁸ See William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531–59 (Pieter H.F. Bekker et al. eds., 2010); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 363 (2005); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 319–21 (2001).

³¹⁹ See *The Chinese Exclusion Case*, 130 U.S. at 600 (noting that “the last expression of the sovereign will must control”); see also *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (reasoning that the power to breach a treaty is a “prerogative, of which no nation can be deprived, without deeply affecting its independence”); N.W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 41 (2018) (“Like the attitudes of individuals towards promise-breaking, different states may allow themselves different latitudes towards the breaching of treaties: some constitutions may make it hard for state institutions to break treaties, other constitutions may make it comparatively easy.”).

³²⁰ Although courts have been willing to adjudicate exercises of sovereign authority that implicate liberty interests or domestic distributions of authority, they have tended not to adjudicate the relational rights of the United States vis-à-vis other nations (or with Indian tribes), at least in the absence of a statutory mandate. See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890) (“Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and

modern customary international law is developed in part through *departures* from its norms; sovereign nations (including the United States) thus participate in its development by sometimes violating it.³²¹

Nevertheless, Congress still needs a source of authority in order to breach international law obligations. It is settled, for example, that Congress can use its foreign commerce authority to legislate protectionist trade restrictions in contravention of a trade treaty.³²² But that is because it has a broad textual grant of authority to rely on. If the only basis that Congress has for enacting a statute is the claim that this is a power that nations have under international law, a clear showing that there is *not* such a power under international law should defeat that claim. So, for example, if Congress's only authority to annex territory comes from sovereign power under international law, that authority is limited to what international law allows. And Congress cannot override that international law because it would lack constitutional authority to enact the override statute. This would mean, for example, that Congress could not today authorize the acquisition of territory by conquest, given that this is clearly disallowed under international law. To put the point differently, there is no inherent sovereign power in the U.S. government to violate

executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.”); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) (“The consequences [of congressional override of a treaty] give rise to questions which must be met by the political department of the government.”); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) (“The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided.”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589 (1823) (“It is not for the Courts of this country to question the validity of this title [by the federal government over Indian land], or to sustain one which is incompatible with it.”). See generally Curtis A. Bradley, *The Political Question Doctrine and International Law*, 91 GEO. WASH. L. REV. 1555 (2023).

³²¹ See Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 38 (Curtis A. Bradley ed., 2016); see also *Sabbatino*, 376 U.S. at 432–33:

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.

³²² See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“Congress may modify such provisions, so far as they bind the United States, or supersede them altogether.”).

international law; there are instead constitutional powers that can sometimes be used to violate international law.³²³

Moreover, even when the government does have authority to override international law, requiring that this normally occur through Congress rather than through unilateral executive action imposes an important process constraint. Another process constraint comes from the long-standing *Charming Betsy* canon of construction, pursuant to which courts will interpret federal statutes, where possible, not to violate international law.³²⁴ Finally, it is worth recalling that under a “constitutional sovereignty” approach, exercises of sovereign power are subject to constitutional limitations relating to individual rights and the separation of powers.

CONCLUSION

We should be skeptical of any claim that a particular structural understanding of the Constitution was settled at the Founding, and this Article makes no such claim.³²⁵ Instead, the claim is simply that one plausible understanding of the Constitution at the Founding was that it created a national government that was

³²³ The authority to override a treaty restriction on what is otherwise a background sovereign right may present a different issue. That may have been what the Supreme Court was getting at in the *Chinese Exclusion Case*: that there was a general sovereign right to exclude noncitizens and that this authority could be invoked by Congress to override a treaty provision that limited that sovereign right. See *The Chinese Exclusion Case*, 130 U.S. at 609:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

But that argument depends on there being a background sovereign right to exclude. The government can draw power from the law of nations only to the extent that the law of nations actually supports its exercise.

³²⁴ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 485 (1997). Congress has also incorporated a wide variety of international law rules into federal statutes. See Ashley Deeks, *Statutory International Law*, 57 VA. J. INT’L L. 263, 270 (2018).

³²⁵ See also Gienapp, *Myth of the Constitutional Given*, *supra* note 68, at 210 (“[W]hen it came to the scope of national power under the Constitution, there were no original certainties, just competing possibilities.”).

presumed to have certain authorities, and that over time this plausible understanding became an important part of our constitutional law, as reflected in both governmental practice and judicial decisions.³²⁶ This development should not be surprising: the United States has one of the oldest and most difficult-to-amend constitutions in the world. Meanwhile, the country has evolved from a small group of ragtag former colonies on the eastern seaboard into a superpower. The idea that the United States during this evolution would have less authority than other nations to act in international affairs was never likely to have much traction. As Justice Holmes put it in *Missouri v. Holland*, such a proposition is “not lightly to be assumed.”³²⁷ Constitutional interpretation in this area has been heavily influenced by functional considerations, and the main point of contestation has simply been whether those considerations should be accommodated through nontextual doctrines (such as appeals to structure or unwritten backdrops) or through broad interpretations of the text, including most notably the Necessary and Proper Clause.

To recap: There are a host of governmental powers relating to foreign affairs that seem necessary and have long been taken for granted by the courts and other actors but that are not obviously conferred by the constitutional text. There are four ways of responding to this phenomenon. First, in what might be called the Taney view (or perhaps the Jeffersonian view), is strict construction, with the result that the United States would have less authority than other nations to act in foreign affairs. For a variety of reasons, that approach has generally been a nonstarter. Second, in what might be called the Hamiltonian view, the unspecified foreign affairs powers all go to the President through the Article II Vesting Clause. That approach seems questionable

³²⁶ Cf. Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007) (“While in the beginning of our constitutional history it was quite possible to claim that Our Federalism invested our national government with less legal authority in the international sphere than that possessed by other nation-states, any such conception has no purchase now.”).

³²⁷ See *supra* text accompanying note 194. Professors Gary Lawson and Guy Seidman have argued that “[t]here may well be some powers that every other government in the world possesses simply by virtue of being a government, but which the federal Constitution denies to the United States government.” LAWSON & SEIDMAN, *supra* note 132, at 100. The fact that this is logically possible, however, does not make it likely. Nevertheless, there might be instances in which the Constitution disallows what would otherwise have been thought to be sovereign prerogatives. For example, even if granting titles of nobility would have been thought to have been a sovereign prerogative at the Founding, the Constitution clearly denies that authority to the U.S. government. See U.S. CONST. art. I, § 9, cl. 8.

from the perspective of the Founding materials and is not consistent with our constitutional history. In addition, it would accord to the President (who is already very powerful in foreign affairs even without the benefit of this approach) what many would regard as too much authority. Third, in what might be called the Marshallian view, the unspecified powers can be implied from a broad construction of various textual provisions. That approach has some support in our constitutional history and may reduce some of the unease associated with invocations of inherent authority. But it is not clear that it can plausibly explain all of the needed authority. In addition, it has the reverse problem of the Hamiltonian view: it seems to give too *little* authority to the President, given that the relevant constitutional text under this approach (including, notably, the Necessary and Proper Clause) is almost all located in Article I, which addresses only Congress's power. Fourth, in what might be called the Wilsonian view, the Constitution should be interpreted as conveying to the federal government the unspecified foreign affairs powers as a matter of national sovereignty, subject to constitutional constraints, including those relating to the separation of powers.³²⁸ The separation of powers questions would then need to be worked out through other analysis, including potentially a consideration of historical practice.

³²⁸ I use these labels only for analytical purposes. In practice, the Marshall Court's views of federal power often resembled those of James Wilson. *See supra* notes 71–77, 121–23, and accompanying text.