

The Constitution and the False Doctrine of Inherent Sovereign Authority

by

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I. INTRODUCTION

This essay examines the hypothesis that the federal government and its departments and officials hold powers unenumerated in the Constitution because those powers are inherent in the federal government's sovereignty. This hypothesis is called the "doctrine of inherent sovereign authority." It should not be confused

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with a similarly-named theory—not at issue here—that applies to states and Indian tribes.²

The federal doctrine's advocates usually begin with the premise that states were never severally sovereign, because upon issuance of the Declaration of Independence (or even before) sovereignty vested in the Continental Congress, representing the Union. From that premise, they argue that sovereignty passed successively to the Confederation Congress and the federal government, unimpaired by the restrictions on central power imposed by the Articles of Confederation or the Constitution.

James Wilson popularized the doctrine of inherent sovereign authority in 1785 in an effort to liberate the Confederation Congress from the restrictions imposed by the Articles. Yet even he did not apply it to the new federal government erected by the Constitution. Moreover, in 1907, the Supreme Court firmly rejected the doctrine, pointing to its clear inconsistency with both the Constitution's enumerated-power scheme and the explicit language of the Tenth Amendment.

Yet the doctrine has displayed remarkable resilience. After its rejection by the Court, it re-surfaced again and again as if the rejection had never occurred. The doctrine of inherent sovereign authority played the lead role in an important Supreme Court decision in 1936, then appeared in supporting roles in cases issued in 2004, 2012, and 2023. Commentators continue to resort to it, and one recently argued that it should be used (under another name) to render the national government virtually omnipotent.

One way to explain this resilience is that the doctrine justifies federal powers the justices or commentators would like to exist, but believe, rightly or wrongly, are unsupported by the Constitution's text.

² See Stephen A. Simon, *Inherent Sovereign Powers: The Influential Yet Curiously Uncontroversial Flip Side of Natural Rights*, 4 ALA. C.R. & C.J. L. REV. 133 (2013) (discussing the state and tribal doctrine).

This essay concludes that the doctrine is based on the logical fallacy of *petitio principii*—begging the question. It also examines the documentary and historical narratives justifying the doctrine, and finds them contradicted by the facts. The essay concludes that the doctrine has no reasonable basis, is inconsistent with both the Constitution's text and the rule of law, and should be abandoned.

II. A SHORT HISTORY OF THE DOCTRINE OF INHERENT SOVEREIGN AUTHORITY

In 1781, the Confederation Congress chartered a central bank, the Bank of North America. Congress's action was controversial, both because of the subject matter and because the Articles of Confederation had granted Congress no express or implied power to charter corporations. The Articles also provided that "Each state retains . . . every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."³ In other words, incorporation was a state, not a confederation, prerogative.

James Wilson of Pennsylvania—who, it must be said, invested personally in the bank and benefitted from its loans⁴—defended the institution's legitimacy in a pamphlet published in 1785. The pamphlet's title was *Considerations on the Bank of North America*.⁵ After conceding the language of the Articles, Wilson enunciated what became known as the inherent sovereign authority doctrine:

³ ARTS. OF CONFED., art. II. Compare the later-adopted Tenth Amendment of the Constitution, *infra* note ____ and accompanying text. The latter omitted the word "expressly" and thus acknowledged federal powers incidental to (implied from) those enumerated, but it rejected any other source of federal authority.

⁴ John K. Alexander, *James Wilson*, AMERICAN NATIONAL BIOGRAPHY, <https://doi.org/10.1093/anb/9780198606697.article.0200340> (2000).

⁵ James Wilson, *Considerations on the Bank of North America* (1785), in 1 COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall & Mark David Hall eds. (2007)).

Though the United States in congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole . . .

To many purposes, 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 to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence [*sic*], and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.⁶

Wilson then supported his contention by referring to the Declaration of Independence:

The act of independence was made before the articles of confederation. This act declares that “*these United Colonies,*” (not

⁶ *Id.* at 65-66. (Italics in original).

enumerating them separately) “are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states may, of right, do.”

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues vested in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.⁷

In other words, Wilson argued that upon adoption of the Declaration of Independence, the Second Continental Congress assumed full sovereignty over all matters in which individual states were not competent. The Confederation Congress inherited this sovereignty from the Second Continental Congress. The states did not reserve authority over such matters when they ratified the Articles, because the states did not have that authority to reserve; it already was vested in Congress.

Once the Constitution had been reported to the states for ratification, however, Wilson sought to defuse any suspicion that he might apply his theory to claim unenumerated powers for the new federal government. In his famous October 6, 1787 State-House Yard speech he said:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve . . . But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from

⁷ Id.at 66.

tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved.⁸

Throughout the debates over the Constitution, its advocates frequently echoed the point Wilson made in his State-House Yard speech: If the Constitution was ratified, the government it erected would be restricted to the powers granted in the document. Illustrative was the comment at the Virginia ratifying convention by a young lawyer named John Marshall:

Has the Government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.— They would declare it void.⁹

It was upon such representations that the Constitution was ratified.¹⁰

To resolve any lingering uncertainty, Congress proposed and the states approved the Tenth Amendment: “The powers not delegated to the United States by

⁸ 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., 1976-2023).

⁹ John Marshall, *Remarks to the Virginia Ratifying Convention*, June 20, 1788, in 10 id. at 1431.

¹⁰ See Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L. J. 469 (2003), and by the same author, *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FED. SOC’Y REV. 60 (2018) and *More News on the Powers Reserved Exclusively to the States*, 20 FED. SOC’Y REV. 92 (2019) (all collecting the numerous Federalist representations to the ratifying public of the limited and enumerated scope of federal powers under the Constitution).

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹ In 1819, John Marshall, now Chief Justice of the United States and writing for a unanimous Court in *McCulloch v. Maryland*, reaffirmed that the federal government was limited to enumerated powers ¹²

Yet in the years following the ratification of the Tenth Amendment, some continued to insist on applying Wilson’s Confederation-era theory to the Constitution.¹³ Then, in 1889 the Supreme Court came close to adopting it by ruling that congressional immigration restrictions were “an incident of sovereignty belonging to the government of the United States.”¹⁴ Although the Court added that this “incident of sovereignty” was “delegated by the constitution,”¹⁵ it failed to identify the specific enumerated power by which the Constitution granted the federal government authority over immigration. Arguably, this was harmless error, because the Constitution’s Define and Punish Clause does grant Congress authority to restrict immigration¹⁶—a fact of which the justices seemingly were unaware.

¹¹ U.S. CONST. amend. X.

¹² *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819):

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

¹³ *E.g.*, ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE VIRGINIA ASSEMBLY 20-21 (1800) (“The declaration of Independence, which raised the United States to the rank of a nation, gave to any government, which the people of the United States should establish with the charge of common defence and foreign intercourse, all the rights which the law of nations gives to every sovereign government”).

¹⁴ *Ping v. United States*, 130 U.S. 581, 609 (1889).

¹⁵ *Id.*

¹⁶ Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution’s Define and Punish Clause*, 11 BRIT. J. AM. LEG. STUDIES 209 (2022). The Define and Punish Clause, states in relevant part, “The Congress shall

Counsel for the federal government promoted the inherent sovereign authority doctrine in the 1907 case of *Kansas v. Colorado*.¹⁷ The Court, relying in part on *McCulloch*,¹⁸ rejected it:

But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments . . . This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment . . . which was seemingly adopted with prescience of just such contention as the present . . .¹⁹

Still, the doctrine continued to surface. In 1936, the Court entirely disregarded its 1907 holding, and employed inherent sovereign authority as the basis for its ruling in *United States v. Curtiss-Wright Export Corp.*²⁰ That case tested the constitutionality of a presidential order, issued pursuant to a congressional resolution, banning the sale of arms into a war zone.

The congressional resolution was clearly justified as a regulation of foreign commerce and the executive order was within the incidental authority granted by the President's enumerated Article II powers.²¹ Yet the Court unnecessarily relied

have Power . . . To define and punish . . . Offenses against the Law of Nations." U.S. CONST., art. I, § 8, cl. 10.

¹⁷ 206 U.S. 46 (1907).

¹⁸ *Id.*, 206 U.S. at 82.

¹⁹ 206 U.S. at 89-90. The Court's reference to *McCulloch* is located *id.*, at 82.

²⁰ 299 U.S. 304 (1936).

²¹ ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 159-61 (3d ed. 2015) (explaining that one intended effect of the President's enumerated powers was to give him wide authority over foreign affairs).

on inherent sovereign authority. Specifically, the Court ruled that the Constitution’s enumeration of powers applied only to domestic matters, not to foreign affairs. Justice George Sutherland wrote the opinion for the Court, and his summary of the doctrine remains its most authoritative description. He began with the Declaration of Independence:

By the Declaration of Independence, “the Representatives of the United States of America” declared the United (not the several) Colonies to be free and independent states, and as such to have “full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.”²²

From this he argued that foreign affairs sovereignty was in the Union from that time—and perhaps from even before:

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies

²² 299 U.S. at 316.

ceased, it immediately passed to the Union That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the ‘United States of America.’ . . .

The Union existed before the Constitution, which was ordained and established among other things to form “a more perfect Union.” Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be “perpetual,” was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.²³

Since 1936, the Supreme Court sometimes has returned to its earlier recognition that the federal government is limited to its enumerated functions,²⁴ but it also has sporadically invoked inherent sovereign authority. The doctrine

²³ *Curtiss-Wright*, 299 U.S. at 316-17.

It has become a frequent claim that the Constitution left the federal government with all foreign affairs powers and the states with none. *See, e.g.*, *Ping v. United States*, 130 U.S. 581, 605 (1889); CALVIN MASSEY AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 248 (2009) (“the [Supreme] Court has consistently declared that only the federal government has the power to conduct foreign affairs”), *citing* *Perez v. Brownell*, 356 U.S. 44 (1958).

Perez seems to have relied on inherent sovereign authority, *id.*, 356 U.S. at 57 (citing *Curtiss-Wright, infra*), but that portion of *Perez* was overruled in *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones”).

However, the claim, in addition to being frequent, is also false. *See, e.g., infra* notes ___ and accompanying text.

²⁴ *E.g.*, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 535 (2012) (relying on *McCulloch*); *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

surfaced in a 1958 case (since overruled),²⁵ and more recently as a possible basis for federal authority over immigration²⁶ (once again overlooking the Define and Punish Clause) and for plenary congressional power over Indian affairs.²⁷

Some commentators have relied on the doctrine to supply what they see (sometimes erroneously) as omissions in the Constitution’s enumeration of federal powers. They have resorted to the doctrine to concede to Congress plenary governance of immigration²⁸ and Indian affairs²⁹—and, in one instance, of almost everything else imaginable.³⁰

²⁵ *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled by* *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

²⁶ *Arizona v. United States*, 567 U.S. 387, 395 (2012) (“inherent power as sovereign to control and conduct relations with foreign nations”).

²⁷ *Haaland v. Brackeen*, ___ U.S. ___ 143 S.Ct. 1609, 1628 (2023) (“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’”); *United States v. Lara*, 541 U.S. 193, 201 (2004) (claiming that “at least during the first century of America’s national existence” Congress’s legislative authority over Indian affairs might rest in part “upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government”).

²⁸ *E.g.*, RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 786 (2007).

²⁹ *E.g.*, FELIX COHEN, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* 397-98 (LexisNexis 2005); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 65-66 (stating that federal Indian law is “derived in large part from the Indian Commerce Clause, treaties with Indian tribes, and a ‘pre-constitutional’ federal authority to deal with Indian tribes”).

³⁰ John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARVARD J. L. & PUB. POL’Y 56, 59 (2023), which states:

Those implied powers include, but are not limited to:

1. All the powers to which any nation would be entitled under the law of nations, such as foreign affairs, Indian affairs, immigration, and other incidents of national sovereignty;

III. WEAKNESSES IN THE DOCTRINE

A. “*Begging the Question*”

The inherent sovereign authority doctrine is based on some logical fallacies. An example from Justice Sutherland's opinion in *Curtiss-Wright* is the claim that “Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.”³¹ This language embodies a *non sequitur*: Even if the premise were true that sovereignty is never held in suspense (and it is demonstrably false; conditions may signal a reversion to a “state of nature”) sovereignty could have passed to the states rather than to the Union.³²

2. All the powers that Blackstone and other writers had explained were tacitly possessed by any legal corporation, including the power to own property, make contracts, sue and be sued, operate under a seal, and enact by-laws, along with other corporate powers, such as the power to remove officers for good cause;

3. The power to legislate on all issues that affect the general interests or harmony of the United States, or that lay beyond the competence of the states

4. Finally, the power to fulfill all the purposes for which the Government of the United States was formed, including, but not limited to, those ends enumerated in the Preamble and General Welfare Clause.

See also John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

³¹ 299 U.S. at 317.

³² In fact, during period leading up to adoption of the Constitution, some writers compared the then-current relationship among American states as a “state of nature.” *E.g.*, Charles Nisbet to the Earl of Buchan, Dec. 25, 1787, 15 DOCUMENTARY HISTORY, *supra* note ___, at 87, 88 (“it is much preferable to a State of Nature, which prevails at present”); “Aristides” (Alexander Contee Hanson), *Remarks on the Proposed Plan of a Federal Government*, Jan. 31 – Mar. 27, 1788, at

However, the central fallacy in the doctrine of inherent sovereign authority is *petitio principii*—that is, begging the question. To beg the question is to rely on one or more premises that take for granted the truth of the conclusion.

The premise of the doctrine's advocates is that when the Founders divided sovereignty between the states and the central government, they necessarily vested authority over all matters of common interest in the central government. This premise contains the conclusion that since foreign affairs (like many other subjects) is a matter of common concern, the Founders granted authority over foreign affairs solely to the federal government. If the Constitution doesn't say so, then the federal government must have received this authority by extra-constitutional means.

It is true that the Virginia Plan would have granted the central government power over all matters of interest to more than one state³³—a scheme modern scholars call "externality federalism." But the Constitution as finally adopted was very different from externality federalism. Unlike the Virginia Plan, it featured a list of enumerated federal powers that left the states with authority over many matters of common interest—presumably because the perceived risks of centralized power were greater than any perceived benefits from central coordination.

Thus, while granting Congress governance of interjurisdictional commerce, the Constitution left other economic matters of common interest (manufacturing, for

id., 517, 544 (asserting that the states ceding certain powers to the new federal government “as just as reasonable as in a state of nature”); David Daggett, *Oration Delivered in New Haven*, Jul. 4, 1787, 13 *id.* at 160, 163 (“and the same principle which induced men, while in a state of nature, to enter into compacts, will soon compel these states to a change of government”).

³³ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1937) (May 29, 1787) (James Madison) (reproducing part of the Virginia Plan as providing, “the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation;”

example) to the states.³⁴ The framers even made the considered decision to allow states (subject to federal preemption) to impose their own embargoes against foreign nations.³⁵ The Constitution also left the states with the power to wage defensive war³⁶ and, with congressional consent, to enter interstate compacts over questions of common interest.³⁷

Merely because one thinks an issue should be resolved centrally, it does not follow that the federal government somehow received power to resolve it.

B. *Textual Problems*

³⁴ Robert G. Natelson, *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 841-45 (2006) (explaining that the Founders left most economic legislation to the states despite acknowledging the interactive nature of the national and international economy); and by the same author, *The Meaning of “Regulate Commerce” to the Constitution’s Ratifiers*, 23 FED. SOC’Y REV. 307 (2022).

³⁵ 2 FARRAND, *supra* note ___, at 440-41 (Aug. 28, 1787) (Madison):

Mr. Madison moved to insert after the word "reprisal" (art. XII) the words "nor lay embargoes". He urged that such acts <by the States> would be unnecessary—impolitic—& unjust—

Mr. Sherman thought the States ought to retain this power in order to prevent suffering & injury to their poor.

Col: Mason thought the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments—He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—

Mr Govr. Morris considered the provision as unnecessary; the power of regulating trade between State & State, already vested in the Genl—Legislature, being sufficient.

³⁶ *Id.* (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War *in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay*”). (Italics added.)

³⁷ U.S. CONST., art. I, § 10, cl. 3.

As the Court in *Kansas v. Colorado* pointed out, the doctrine of inherent sovereign authority is in obvious tension with the Constitution’s structure as a document of enumerated powers. As the Court further pointed out, the doctrine starkly contradicts the explicit language of the Tenth Amendment.³⁸

Professor John Mikhail has made one of the few—perhaps the only—serious effort to reconcile the notion of unenumerated powers with the Constitution’s text. He points out that the Necessary and Proper Clause³⁹ mentions three categories of powers: (1) “the foregoing Powers” (i.e., those granted in Article I, Section 8), (2) those “vested by this Constitution . . . in any Department or Officer” of the United States, and (3) those “vested by this Constitution in the Government of the United States.” He observes that Category (3) “cannot be equated *either* with the enumerated Article I powers of Congress or with the other powers vested by the Constitution in any Department or Officer of the United States.”⁴⁰

However, he finds no enumerated powers encapsulating grants to “the Government of the United States.” He (quite properly) is reluctant to treat the third category as surplusage⁴¹ or as a drafting error. It follows, then, that the third category “necessarily refers to certain implied or unenumerated powers that the Constitution vests in the Government of the United States itself.”⁴² Even if his analysis is not quite the same as the doctrine of inherent sovereign authority, it is closely akin to that doctrine. Moreover, his catalogue of unenumerated federal powers is vast.⁴³

³⁸ U.S. CONST. amend. X.

³⁹ U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁴⁰ Mikhail, *Necessary and Proper*, *supra* note ___, at 1050.

⁴¹ *Id.* at 1058.

⁴² *Id.* at 1050.

⁴³ *Supra*, note ___.

Professor Mikhail's argument is intriguing. But even if one assumes that he is correct that the Constitution conveys no enumerated powers to "the Government of the United States," his solution creates more textual problems than it solves. The scope of his implied unenumerated powers at least equals the scope of those enumerated—which raises the question of why the Constitution's framers bothered to enumerate at all. Further, his interpretation rescues a few words from being consigned as surplus at the cost of treating massive portions of the Constitution—most of the specific enumerations—as surplus.

More importantly, his interpretation is not required to prevent the Necessary and Proper Clause's third category from becoming surplus. This is because he is wrong to assume that the Constitution grants no enumerated powers to "the Government of the United States." Three grants appear in Article IV and one or two (depending on how one counts) in Article VI.

Article IV, Section 4 requires "the United States"—meaning the U.S. government—to (1) guarantee each state a republican form of government, (2) protect states from invasion, and, (3) upon due request, quell domestic violence.⁴⁴ Similarly, Article VI imposes an obligation on "the United States" to (1) pay all "Debts contracted" and (2) honor all "Engagements entered into, before the Adoption of this Constitution."⁴⁵ It is, of course, elementary that the imposition of a mandate includes a grant of power to carry it out, if that power has not been otherwise granted.⁴⁶ If Jill has not previously received authority to supervise her

⁴⁴ U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

⁴⁵ *Id.*, art. VI, cl. 1 ("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.").

⁴⁶ Founding-era legal maxims made a similar point: *Quando aliquid conceditur, conceditur et id sine quo res ipsa uti non potest* (When something is granted, that

company's contracts but her boss tells her to “take care of the Smith contract,” she thereby receives authority to do so. When the Constitution commands the President “take Care that the Laws be faithfully executed,” that command carries with it power to do so.

The Constitution’s imposition of specific obligations on the government may enlist powers enumerated elsewhere, but may also require supplemental authority. For example, the Constitution does not otherwise grant authority to quell garden-variety riots (“domestic Violence”) that do not impede execution of federal laws or rise to the level of invasion or insurrection. The government (and thus its functionaries) receive the necessary supplemental authority from Article IV.⁴⁷

C. *Flaws in the Doctrine’s Historical Narrative*

As outlined by exponents such as Justice Sutherland,⁴⁸ the historical narrative underpinning the doctrine of implied sovereign authority is as follows:

without which the thing cannot be done is also granted) and *Quando lex aliquid alicui omnia incidentia concedit, tacite conceduntur, sine quibus res ipsa esse non potest* (When the law grants something to someone, all the incidents without which the thing cannot exist are tacitly granted.). See 24 CHARLES VINER, AN ABRIDGMENT OF LAW AND EQUITY (index volume, unpaginated) (2d ed., 1794).

⁴⁷ The authority conveyed by other Article IV and Article VI mandates also exceeds that previously granted to specific officers and agencies. For example, Congress received power to incur (and, of course, pay) new debt. U.S. CONST., art. I, § 8, cl. 2, and it received power to tax for the purpose of paying both new debt and Confederation debt. But, properly construed, that clause did not actually authorize *payment* of Confederation debt. *Id.*, art. I, § 8, cl. 1; Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003). That power came from Article VI. Similarly, the Constitution elsewhere granted no general power to enforce “Engagements,” other than, perhaps, the President's authority to enforce formal treaties.

⁴⁸ *Supra* notes ___ and accompanying text.

- From the time Independence was declared—and, indeed, possibly even before—the Continental Congress was sovereign in war and foreign affairs, and perhaps in other areas of public interest;
- upon final ratification of the Articles of Confederation this sovereignty passed seamlessly to the Confederation Congress; and
- upon ratification of the Constitution, it passed seamlessly again to the federal government.⁴⁹

This narrative is flawed in several respects. First, it does not take account of the numerous representations as to the limited scope of federal powers made during the ratification debates and relied upon by the ratifiers. Second, it does not comport with changes made by the Constitution’s framers that actually increased state war powers from what they had been under the Confederation. Third, it is based on misunderstandings and misrepresentations of certain key documents, including the Declaration of Independence, the Articles of Confederation, and the 1783 Treaty of Paris. Finally, it presents a tale of seamless transition from one historical stage to another that is at odds with historical fact.

1. *The Federalist Representations*

As I have documented previously,⁵⁰ during the ratification debates numerous Federalist spokesmen responded to Antifederalist concern about the prospective powers of the new government by emphasizing its limited scope and enumerating in

⁴⁹ *Curtiss-Wright, supra*, 299 U.S. at 317:

The Union existed before the Constitution . . . Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be “perpetual,” was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.

⁵⁰ *Supra* note ____.

detail some of the many areas of governance that would belong exclusively to the states. These representations were authoritative—most were issued by leading lawyers—and supported by the Constitution’s text. The ratifiers had every reason to rely on them.

The belief that statesmen such as James Madison, Edmund Pendleton, John Marshall, James Wilson, and Tench Coxe were all fraudfeasers trying to sneak something past an unsuspecting public is, to put it mildly, not supported by the record. And even if it were true, as a matter of documentary interpretation, the ratifying public would not be bound by the sponsors’ hidden intent but entitled to rely on their representations of meaning.

2. *Changes in State War Powers From the Articles to the Constitution*

If foreign affairs powers were seamlessly transferred from the Confederation Congress to the new federal government, then we would expect that neither the Articles nor the Constitution would recognize any war powers reserved in the states. Alternatively, if some state war powers were reserved under the Articles, then the Constitution would reserve the same or less to the states.

In fact, however, the Articles recognized substantial reserved state war powers and the Constitution, on balance, *increased* them.

In the course of constraining the states, Article VI of the Articles of Confederation, while imposing many restrictions, still recognized some reserved state power to wage defensive naval war and very significant power to wage defensive land war.⁵¹ Under the Constitution the states lost their prerogative to

⁵¹ ARTS. OF CONFED. art. VI provided in part:

* * * *

issue letters of marque or reprisal against an enemy upon whom Congress had declared war.⁵² On the other hand, the Constitution recognized increased state war powers in at least four ways. First, it did not require a congressional declaration of war for states to build ships: It required only war de facto—with no requirement that the war be one waged by the federal government.⁵³ Second, the Constitution deprived Congress of the veto it formerly enjoyed over state naval actions against

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

⁵² U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . grant letters of marque and reprisal . . .”).

⁵³ *Id.*, art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”)

pirates.⁵⁴ Third, it eliminated the Articles' requirement that a state consult with Congress when waging defensive war.⁵⁵ Fourth, the Articles had permitted state preemptive strikes against imminent invasions only by Indians, but the Constitution permitted them against all invasions.⁵⁶

This calculated readjustment in the state-federal balance is inconsistent with the view that the federal government merely inherited plenary external affairs powers from the Confederation Congress.

3. *The Facts about Documents and Times*

The third and fourth flaws in the historical narrative behind the doctrine of inherent sovereign authority consists of misunderstandings and misrepresentations of documents and events. We shall consider these together. Moreover, since Justice Sutherland's account mentions pre-Independence events, we shall begin with the First Continental Congress.

The First Continental Congress was an inter-colonial convention⁵⁷ that met for a few months in 1774. It exercised no power; it merely "recommended" that

⁵⁴ *Id.*

⁵⁵ *Id.* Earlier drafts of the Constitution retained the consultation language, but it was dropped on Sept. 15, 1787, two days before adjournment. The reasons were not specified. 2 FARRAND, *supra* note ___, at 626.

⁵⁶ U.S. CONST. art. I, § 10, cl. 3 ("unless actually invaded, or in such imminent Danger as will not admit of delay").

⁵⁷ Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013) (discussing the First Continental Congress among other conventions of colonies and states held during the Founding era).

colonial congresses and conventions undertake certain actions.⁵⁸ On October 25, 1774, it went out of existence,⁵⁹ and nothing immediately replaced it.

The Second Continental Congress (1775-81) also operated without any formal grant of power, both before and after Independence. Its de facto authority rested solely on the terms of the commissions each state gave to its delegates.⁶⁰ It did what agents of the states told it to do. This reality was reflected in the most important document produced by the Second Continental Congress: the Declaration of Independence. Contrary to Justice Sutherland’s cherry-picked account in the *Curtiss-Wright* case,⁶¹ the Declaration did not purport to derive from a sovereign government. Rather, it sprung from “the *thirteen* united [small “u”] States of America.”⁶² It referred repeatedly to “these states,” and ended with the proclamation that, “these United Colonies are . . . *Free and Independent States* . . . and that as *Free and Independent States*, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which *Independent States* may of right do.”⁶³

The Second Continental Congress expired on March 1, 1781, the first effective day of the Articles of Confederation. By the Articles, the state legislatures created the Confederation Congress and conveyed some powers to it.

⁵⁸ 1 J. CONT. CONG. 75, 80 (Oct. 20, 1774).

⁵⁹ *Id.* at 104 (recording the last day of the Congress).

⁶⁰ *E.g.*, 26 J. CONT. CONG. 15-16 (Jan. 13, 1784) (reciting presentation of Connecticut delegates’ credentials).

⁶¹ *Supra* note ___ and accompanying text.

⁶² DEC. OF INDEP. (Italics added.)

⁶³ *Id.* (Italics added). The Declaration’s assertion that Americans were “one people” was true only in the sense that Koreans or Arabs are one people today or that Germans were one people between 1945 and 1990—that is, a distinct ethnic, cultural, and linguistic group divided into separate sovereignties. Those sovereignties were the ultimate repositories of all foreign affairs powers.

Modern Americans often misunderstood the nature of the Articles of Confederation, often referring to it as “our first constitution” and treating the Confederation Congress as a “central government.”⁶⁴ But that was not how the founding generation understood the Articles. Most contemporaneous dictionaries defined “confederation” as an alliance or league.⁶⁵ For example, Nathan Bailey’s 1783 *Universal Etymological Dictionary* described it as “an alliance between Princes and States, for their defence against a common enemy.”⁶⁶ The Constitution used the word in the same way.⁶⁷ In *Federalist* No. 43, James Madison described the Articles as “A compact between independent sovereigns, founded on ordinary acts of legislative authority [with] no higher validity than a league or treaty between the parties”⁶⁸

⁶⁴ *E.g.*, National Constitution Center, *On this day, the Articles of Confederation are approved*, <https://constitutioncenter.org/blog/on-this-day-our-first-flawed-constitution-went-into-effect> (referring to the Articles as “the first American constitution” and Congress as a “central government”).

⁶⁵ *E.g.*, SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (8th ed. 1786) (unpaginated) (defining “Confederation” as “League; alliance”); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (2^d ed. 1789) (unpaginated) (same definition).

⁶⁶ NATHAN BAILEY, *A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (25th ed. 1783) (unpaginated) (defining “confederation”).

⁶⁷ U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”). As “Treaty” and “Alliance” demonstrate, the three terms were used in an overlapping manner.

⁶⁸ THE FEDERALIST NO. 43 (James Madison) in 15 DOCUMENTARY HISTORY, *supra* note ___, at 439, 445-46. *Accord*: 1 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 362-63 (1787) (stating that the Confederation Congress was “not a legislative assembly, nor a representative assembly, but only a diplomatic assembly”). *See also* David Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STANFORD L. REV. 1697, 1706 (2003).

Rather than a “constitution” in the modern sense, a closer analogue to the Articles would be the North Atlantic Treaty Organization (NATO), with Congress playing a deliberative role comparable to that of the North Atlantic Council. In both arrangements, the member states delegated some sovereign authority to a central assembly. Or one might say that the member states retained complete sovereignty but put some of their powers out on loan. Whichever way it is characterized, the ultimate power remained in the member states, because, like the signatories of any treaty, they could (if they were willing to bear the cost) withdraw at any time.

The Articles themselves were categorical about their limited scope: They explicitly defined the “United States” as a “league.”⁶⁹ They affirmed that “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”⁷⁰ By conveying only powers “expressly delegated” and reserving the remainder in the states, the Articles specifically *negated* any inference that the Confederation Congress inherited authority from the Second Continental Congress.

To be sure, promoters of the implied sovereign authority doctrine sometimes point to the Articles’ statement that they were of perpetual duration.⁷¹ But during

⁶⁹ ARTS. OF CONFED. art. III:

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

⁷⁰ ARTS. OF CONFED. art. II.

⁷¹ *E.g.*, *Curtiss-Wright, supra*, 299 U.S. at 317.

the eighteenth-century, recitals of perpetual duration were common in treaties.⁷² They meant only that there was no fixed expiration date. These recitals impaired neither the ultimate sovereignty of the states nor the prerogative of any state to withdraw at any time if it was willing to bear the cost of doing so.⁷³

The documents by which Britain recognized American independence also reflected the subordinate status of the Confederation to the states.⁷⁴ The provisional peace agreement was denominated “articles of peace and reconciliation between Great Britain and *the American States*.” Although the title of the final treaty stated that the parties were his Britannic Majesty and the United States of America,⁷⁵ the substantive provision acknowledging American Independence enumerated all thirteen states by name and proclaimed them “free, sovereign, and independent states.”⁷⁶ Article V of the treaty engaged merely that Congress would “recommend” certain measures “to the legislatures of the respective states,”⁷⁷ and Article VII anticipated “a firm and perpetual peace between his Britannic Majesty *and the said States*.”⁷⁸

In still other ways, the states and Congress recognized where ultimate sovereignty lay. Between 1776 and 1781, states held several “conventions of states” to coordinate their own responses to issues that overlapped those entrusted to

⁷² See generally A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 528 (George Chalmers ed., 1790) (2 vols.) (showing over 60 appearances in the covered treaties of the term “perpetual” and its variations).

⁷³ See, e.g., *Whitney v. Robertson*, 124 U.S. 190 (1888) (holding that Congress can enact legislation that contradicts a prior treaty).

⁷⁴ 2 *Id.* at 528 (containing the text of the treaty).

⁷⁵ *Curtiss-Wright*, *supra*, 299 U.S. at 317.

⁷⁶ 2 COLLECTION, *supra* note ____, at 529-30.

⁷⁷ *Id.* at 532.

⁷⁸ *Id.*, at 533.

Congress.⁷⁹ In 1788, the Confederation Congress “recommended to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States.”⁸⁰ A Congress with exclusive inherited foreign affairs power could have enacted its own measure on the subject.

The unique histories of several states further buttresses the conclusion that before the Constitution was ratified ultimate sovereignty remained in the member states. When the federal government began operations, North Carolina was not part of the new Union, for she had not ratified the Constitution. Nor was she part of the Confederation, for the Confederation had lapsed. North Carolina was, at least de facto, an independent nation, with power to adopt her own war and foreign policies. It was not until November 21, 1789 that North Carolina ratified the Constitution.

The same analysis applies to Rhode Island, which remained independent even longer—until May 29, 1790.

Several other states also joined the Union only after periods of independence. The “Vermont Republic,” for example, lasted from 1777 until admitted to the Union on March 4, 1791; New York, it is true, claimed Vermont for most of that time, but that did not diminish the fact that Vermont was self-governing.⁸¹ Texas, of course, remained an independent republic for nine years; California for several weeks. Hawaii became a multi-island kingdom in 1795, more than a century before annexation. During their periods of independence, all these states enjoyed the same foreign affairs and war powers any other sovereignty enjoyed. The purported

⁷⁹ See generally, Natelson, *Founding-Era Conventions*, *supra* note ____ (discussing the agendas and activities of Founding-era interstate conventions).

⁸⁰ 34 J. CONT. CONG. 528 (Sept. 16, 1788). See GERALD L. NEUMAN STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 21 (1996) (discussing the background).

⁸¹ *Vermont Republic*, Ballotpedia, https://ballotpedia.org/Vermont_Republic.

transfer of sovereign authority from the Confederation Congress to the federal government could have had no effect on them.

Finally: Even if one assumes the Confederation Congress was in some ways sovereign, a significant temporal gap prevented a seamless transfer of its power to the new federal government. The Confederation Congress mustered its last quorum on October 10, 1788, after which it ceased operations. The federal government did not begin to function until six months later—in April, 1789. In the interim, any congressional sovereignty necessarily relapsed to the member states.

IV. CONCLUSION

The doctrine of inherent sovereign authority violates the rules of logic and is grounded neither in the Constitution's text nor in the facts of history. In its application, it also violates the rule of law, for its lack of grounding leaves its scope and effect to the predilections of courts and commentators.

It should be abandoned.