The Several States within the United States Constitution

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I. Introduction: Structural Framework.

This paper argues that the States, frequently referred to as the "several States" are an explicit and distinct body of power provided for in the United States Constitution.¹ The several States serve as an instrumental body of power within the Constitution, just as the traditionally recognized Legislative, Executive and Judicial bodies of power² are associated with being provided for in Articles I, II, and III.³

The focus of this thesis is based upon examining the plain text of the United States Constitution⁴ ("Constitution") that was ratified by the States in 1788 and was later amended on several occasions.⁵ Understanding the plain text is further enhanced by comparison and analysis with other historical documents that the Framers previously or contemporarily dealt with.

The Constitution was the result of extensive debate and negotiation among delegates from different States with differing interests.⁶ The Constitution followed shortly in time after the

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² “A government is created by the people, having legislative, executive, and judicial powers.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 412 (1819). (emphasis added.) “This government is to possess absolute and uncontrollable power, legislative, executive and judicial,….” THE ANTI-FEDERALIST NO. 17 (Robert Yates).
⁴ U.S. CONST.
⁵ Dates obtained from THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 30 (7th ed. 2001).
Articles of Confederation and did not take effect until it was ratified by a sufficient number of the States themselves. The Constitution only comes to life and grants powers upon compliance with the provisions of Article VII, which provides, “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Article VII provides for Conventions of the States to ratify the Constitution, which first acknowledges “the People” by requiring the people to act in Conventions while at the same time respecting “the States themselves”, as sovereign bodies (“sovereigns”).

This paper will focus on the States as sovereign bodies of power, but there will be a brief description of the overall framework for thinking about the relationships of the different bodies of power within the Constitution. The Constitution itself is the supreme authority within the

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7 ARTICLES OF CONFEDERATION (U.S. 1781).
8 U.S. CONST. art. VII. On June 21, 1788, when New Hampshire became the ninth State to ratify the Constitution, it became effective. THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 30 (7th ed. 2001).
9 The requirement of nine States was also of important for actions via section X of the Articles of Confederation. “The Committee of the States, or any nine of them, shall be authorized to execute, in recess of Congress, such of the powers of Congress as the United States in Congress assembled…” ARTICLES OF CONFEDERATION § X (U.S. 1781).
10 U.S. CONST. art. VII.
11 “From these Conventions the constitution derives its whole authority. The government proceeds directly from the people;…” McCulloch v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). (emphasis added.) “At length a Convention of the states has been assembled, they have formed a constitution which will now, probably, be submitted to the people to ratify or reject, who are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions, or forms of government, at their pleasure.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).
12 “The people of all the States have created the general government, … The people of all the States, and the States themselves, are represented in Congress,…” McCulloch v. MARYLAND, 17 U.S. (4 Wheat.) 316, 435 (1819). (emphasis added.)
13 U.S. CONST. art. VII. “The Ratification of the instrument was to be given by the people in their state conventions, making it a solemn covenant and constitution with an authority wholly different from a mere legislative enactment. This was a double slight of hand: it elevated the general government by making it subordinate to the Constitution, and it incorporated both “the people” and “the states” in the formula that located the ultimate possessors of sovereignty.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 246 (2003).
14 “This Constitution…shall be the supreme Law of the Land…” U.S. CONST. art. VI, § 1, cl. 2. (emphasis added.) “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution…” U.S. CONST. art. VI, § 1, cl. 3. (emphasis added.) “We the people of the United States…do ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl. (emphasis added.) Although the exact definition of “the people” may be difficult to get a handle on, they are very much the same “people” who ratified the Constitution in Conventions. U.S. CONST. art. VII.
United States Constitution, and this body is absent of any individual person or group of people and is therefore much less susceptible, if not nearly immune from corruption. As mentioned above, the people acting in Conventions within their own States act so as to bring the Constitution to life and permit it to become effective. Therefore, two additional bodies of power within the Constitution are the People, and the States. The people may act directly through Conventions. The people may convene to ratify the original Constitution, or to propose amendments to the Constitution or to ratify amendments to the Constitution. Frequently the people act by voting in elections for Representatives, Senators, and the President, and also

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15 “The troubles in Massachusetts demonstrated that Americans were not a new species of men, immune to the corruptions postulated by contemporary theorists.” “Properly constituted, the American union would spread across the continent, a model and inspiration to the whole world. The United States would be exempted from the inevitable cycle of decay and corruption that marked the career of every other state in history.” “In fact, opponents of the Constitution could do little more than revive the old political and social anxieties – the fear of power and of a corrupt officeholding aristocracy – that inspired the revolutionary generation.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 175, 185, 189 (1983). (emphasis added.)

16 “The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’ This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in Convention. …” The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. …The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403-04 (1819). (emphasis added.)

17 U.S. CONST. art. VII. “The Ratification of the instrument was to be given by the people in their state conventions, making it a solemn covenant and constitution with an authority wholly different from a mere legislative enactment. This was a double slight of hand: it elevated the general government by making it subordinate to the Constitution, and it incorporated both “the people” and “the states” in the formula that located the ultimate possessors of sovereignty.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 246 (2003).

18 U.S. CONST. arts. V, VII.

19 “The House of Representatives shall be composed of Members chosen every second Yeat by the People of the several States…” U.S. CONST. art. I, § 2, cl. 1. (emphasis added.)

20 “The Senate of the United States shall be, composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.” U.S. CONST. amend. XVII. (emphasis added.) The Seventeenth Amendment changed the election of Senators from being chosen by the Legislature of each State to a direct election by the people (ratified April 8, 1913). Dates taken from THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 51 (7th ed. 2001). “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.” U.S. CONST. art. I, § 3, cl. 1. (emphasis added.) The original method of electing Senators demonstrated even greater deference and respect for the sovereignty of the States.
by voting as members of juries. The People may also “assemble” peaceably and “petition the Government for redress of grievances.”

The States are recognized as a body of power within the Constitution as described above within the Article VII ratification Conventions, and perhaps the strongest evidence with regard to the States and State sovereignty is the provision for equal voting status in the Senate and the prohibition within Article V, which permits Amendments, but adds, “and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

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21 “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” U.S. CONST. art. II, § 1, cl. 2. (emphasis added.) These “Electors” compose the Electoral College, which is often maligned and by and large misunderstood for several reasons. As originally written and provided for in Article II, the people cannot directly elect the President or the Vice President (who serves as the President of the Senate). As with the original provision for electing Senators (prior to the Seventeenth Amendment), the people must act through their State Legislatures. But these original mechanisms demonstrated Constitutional respect for the need of action and consent of the people as well as demonstrating respect for and the sovereignty of the States. Much of the criticism and confusion may come from the little studied Twelfth Amendment which states, “The Electors...shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President...” U.S. CONST. amend. XII. This amendment had significant impact on the structural Separation of Powers within the Executive branch provided for in the original provisions of Article II of the Constitution. The original Article II provided, “…In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President.” U.S. CONST. art. II, § 1, cl. 3. Upon reviewing the original version, one can see that the strongest non-victorious opponent running for President would end up as the Vice President and therefore as the President of the Senate. Now, it becomes clear that in a closely divided national election, the government would be slowed down from taking any action that would effect the People, where the Vice President would be required to break a tie in the upper house, as would have been the case in the very close 2000 Presidential elections. There would also be less need to police elections when the losing candidate and his constituent’s interests would not be completely left out of political office. This fundamental interference with the Separation of Powers within the Executive branch of the United States took place rather early in United States history with the ratification of the Twelfth Amendment on June 15, 1804. Dates taken from THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 47 (7th ed. 2001).

22 “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where said Crimes shall have been committed;” U.S. CONST. art. III, § 2, cl. 3. (emphasis added.) It is interesting to note the Constitution mandates trial of crimes by jury, which contradicts with the common practice of plea bargaining by prosecutors. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83 (1998). LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 92 (1999).

23 U.S. CONST. amend. I.

24 “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.” U.S. CONST. art. I, § 3, cl. 1. (emphasis added.)

25 This “Consent” requirement provides the same effective veto power by each and every State that existed under the unanimity requirement of the Articles of Confederation. “And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.” ARTICLES OF CONFEDERATION § XIII (U.S. 1781).

26 U.S. CONST. art. V.
Explicit creation of Legislative\(^{27}\), Executive\(^{28}\) and Judicial\(^{29}\) bodies of power within the Constitution are provided for in Articles I, II, and III.\(^{30}\) Traditionally, these are the three bodies of power studied within the United States Constitution. Upon further examination of Article I, it is apparent that certain duties are assigned exclusively to the House of Representatives\(^{31}\), while some other duties are assigned exclusively to the Senate.\(^{32}\) Since there are duties and powers that do not overlap for the lower and upper houses of Congress, there is, within the Legislative branch itself, a Separation of Powers provided for by the Constitution, and the Legislative branch consists of two bodies of power, the House of Representatives, and the Senate.\(^{33}\) The Judicial branch is created in Article III of the Constitution.\(^{34}\) Within Article III, there are provisions for the creation of “inferior Courts as the Congress may from time to time ordain and establish.”\(^{35}\) Moreover, even the Supreme Court of the United States in its appellate role must act under “such Regulations as the Congress shall make.”\(^{36}\) The Congress, and not the Judicial branch, also has

\(^{27}\) “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” U.S. CONST. art. I, § 1.

\(^{28}\) “The executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1.

\(^{29}\) “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

\(^{30}\) U.S. CONST. arts. I, II, III.

\(^{31}\) “The House of Representatives…shall have the sole Power of Impeachment.” U.S. CONST. art. I, § 2, cl. 5. “All Bills for raising Revenue shall originate in the House of Representatives…” U.S. CONST. art. I, § 7, cl. 1. Note also that additional Powers are granted to Congress outside of Article I: “The supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. …“with such exceptions, and under such regulations, as the congress shall make.” UNITED STATES v. MORE, 7 U.S. 159, 173 (1805). “The Congress shall have Power to declare the Punishment of Treason…” U.S. CONST. art. III, § 3, cl. 2.

\(^{32}\) “The Senate shall have the sole Power to try all Impeachments.” U.S. CONST. art. I, § 3, cl. 6. HASTINGS v. UNITED STATES OF AMERICA, 837 F. Supp. 3 (1993). “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;…” U.S. CONST. art. II, § 2, cl. 2. Again, additional powers are granted to the Senate outside of Article I.

\(^{33}\) U.S. CONST. art. I.

\(^{34}\) U.S. CONST. art. III.


\(^{36}\) “The supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. An Act to establish the Judicial Courts of the United States. Act of Sept. 24, 1789, 1 Stat. 73 (1789). UNITED STATES v. MORE, 7 U.S. 159 (1805).
the power to declare the punishment of Treason.\textsuperscript{37} These powers of Congress over the Judicial branch show that the Constitution does not provide for \textit{entirely co-equal} branches of government, and that the politically accountable Legislative branch is superior to that of the Judicial branch, within the Constitutional framework of the United States.

The overall framework for the bodies of power within the United States Constitution includes the Constitution\textsuperscript{38} itself, which as a document and not a person or a body of people is not corruptible in the traditional sense of the word. The Constitution explicitly creates the House of Representatives\textsuperscript{39} (delegates of the people representing the people by enumeration), and the Senate\textsuperscript{40} (delegates of the States representing the States in equity), which make up a Legislative branch that holds within itself a Separation of Powers. The Executive branch, which consists of the President\textsuperscript{41} and the President of the Senate (the Vice President and the runner up for the Presidency), chosen indirectly through the people by State Electors, who themselves may not be officers of the United States. Note here the creation of a Separation of Powers within the Executive branch itself under the original Constitutional provisions of Article II.\textsuperscript{42} The Judicial\textsuperscript{43} branch, which operates in several respects under the authority of Congress.\textsuperscript{44}

In addition to the previously identified five\textsuperscript{45} bodies of power, there exist, (and to a great extent even pre-existed the Constitution) two more bodies of power, the People and, as will be

\textsuperscript{37} “The Congress shall have Power to declare the Punishment of Treason…” U.S. CONST. art. III, § 3, cl. 2.
\textsuperscript{38} U.S. CONST. U.S. CONST. art. VI.
\textsuperscript{39} U.S. CONST. art. I, § 1.
\textsuperscript{40} U.S. CONST. art. I, § 1.
\textsuperscript{41} U.S. CONST. art. II, § 1, cl. 1.
\textsuperscript{42} U.S. CONST. art. II. The original Article II provided, “…In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President.” U.S. CONST. art. II, § 1, cl. 3. Contrast the original structure with the Twelfth Amendment. “The Electors…shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President…” U.S. CONST. amend. XII.
\textsuperscript{43} U.S. CONST. art. III.
\textsuperscript{45} The five bodies of power heretofore identified are the include the Legislative to include both the Senate and the House of Representatives, the Executive, the Judicial, and the Constitution itself. U.S. CONST. arts. I, II, III, VI.
discussed in greater detail below, the States,

This gives us an overall framework of seven bodies of power, of which the States is just one. The instrument of the Constitution itself is “the supreme Law of the Land”, so it is superior to all other bodies of power. And the Constitution could only be brought into effectiveness from the People and the States, so the People and the States would sit in stature below the Constitution and above the politically accountable bodies that they elect into office, specifically the People choose the House of Representatives and the States choose the Senators. Finally, due to Congressional powers held over the Judicial branch, the Judicial branch is in effect subordinate to all other bodies of power within the Constitutional framework, and is of course subordinate to the Constitution itself. [See Appendix diagram.] Within this

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46 “From these Conventions the constitution derives its whole authority. The government proceeds directly from the people;…” … “The people of all the States have created the general government, … The people of all the States, and the States themselves, are represented in Congress;…” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403, 435 (1819). (emphasis added.)


48 In 1819, Chief Justice MARSHALL explicitly named the Constitution, the People, the States, the legislative, the executive and the judicial as bodies of power within the Constitution: “A government is created by the people, having legislative, executive, and judicial powers.” … “From these Conventions the constitution derives its whole authority. The government proceeds directly from the people;…” … “The people of all the States have created the general government, … The people of all the States, and the States themselves, are represented in Congress;…” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403, 412, 435 (1819). (emphasis added.) This paper proposes there are seven bodies of power within the Constitution, rather than the six explicitly mentioned by Chief Justice MARSHALL, since there are two bodies of power within the legislative body, the House of Representatives and the Senate, which represent ‘the people’ and ‘the States themselves’, both of which are implied by Chief Justice MARSHALL as well.

49 U.S. CONST. art. VI, § 1, cl. 2.

50 U.S. CONST.

51 “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States…” U.S. CONST. art. I, § 2, cl. 1. (emphasis added.)

52 “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.” U.S. CONST. art. I, § 3, cl. 1. (emphasis added.) This provision was significantly altered by the Seventeenth Amendment. “The Senate of the United States shall be, composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.” U.S. CONST. amend. XVII. (emphasis added.)


54 U.S. CONST.
framework lies the focus of this paper, which is the States, and the analysis will begin will some fundamental definitions, so that contemporary biases that have developed with respect to the meanings of certain words and institutions may be overcome, so as to clarify and convey the meanings the Framers placed with their carefully chosen terms and uses.

The paper will examine every Article of, many sections of, and many clauses of the Constitution, and each was carefully debated at the Federal Convention of 1787\textsuperscript{55}, and in order to demonstrate respect for the Constitution and the Court, the reader should keep in mind the following statements by the Court concerning the principles for the determination of the true meaning of the Constitution: “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”\textsuperscript{56} “In interpreting the Constitution, real effect should be given to all the words it uses.”\textsuperscript{57} “No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”\textsuperscript{58} “In considering this question, then, we must never forget, that it is a constitution we are expounding.”\textsuperscript{59}

This paper shall examine the States, frequently articulated in the Constitution as “the several States”, as a distinct body of power within the Constitution. As introduced above in

\textsuperscript{56} Chief Justice MARSHALL writing for the Majority. MARBURY v. MADISON, 5 U.S. (1 Cranch) 137, 174 (1803).
\textsuperscript{57} Justice GOLDBERG concurring with the Majority. GRISWOLD v. CONNECTICUT, 381 U.S. 479, 491 (1965). “A writing must be interpreted as a whole and no part should be ignored. All of the writings that form a part of the same transaction should be interpreted together and, if possible, harmonized. If no other intention is established, language is interpreted in accordance with its generally prevailing meaning. This is a watered-down version of the plain meaning rule, but conforms to what is reasonable and logical,” JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.13, at 159 (5th ed. 2003). (emphasis added.)
\textsuperscript{58} Justice STORY writing for the Majority. PRIGG v. PENNSYLVANIA, 41 U.S. (16 Pet.) 539, 612 (1842).
section I, the several States are just one of several bodies of power provided for in the United States Constitution and “the States” are an integral part of a carefully coordinated greater framework of interdependent and interrelating bodies of power, designed as such so as to provide the greatest protection for the people who are governed by these bodies of power. As all papers are required to be limited in scope in order to direct the reader at the thesis to be proved, for purposes of this paper, each area examined is designed to demonstrate the independence and sovereignty of the several States, and although each element could be discussed further on its own merits, the paper, although admittedly broad in content, attempts to prove the extraordinary breadth and depth to which the Constitution recognizes the States as a body of power, despite the heretofore “conventional wisdom” which remains silent with respect to this body of power. In section II of the paper, the meaning of a congress is examined, since even before the Constitution existed and created the United States Congress in Article I, the delegates of the States assembled to act as a congress. Section II describes the perspective of the parties to the agreement that is the Constitution and introduces elements relating to and defining sovereignty that will be discussed throughout the paper. Then Section II suggests a method of Constitutional interest analysis, which utilizes an analysis based upon a historical perspective, and adapts interest analysis for Constitutional purposes. In section III, the examination will focus on proportional allocation of representation and burden sharing (taxation), and as in each section, conducts an analysis through a historical perspective to determine the meaning of the provisions of the Constitution and the underlying principles they represent. In section IV, the analysis will address commerce,

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60 Interest Analysis is adapted for the Constitution from that developed by Professor Brainerd Currie. This adaptation of Interest Analysis will be referred to as Constitutional Interest Analysis, and assists in determining the underlying principles behind the specific provisions of the Constitution. First, historical meanings may be determined from a historical viewpoint, within a historical context, and related provisions may reveal underlying principles that provide direction when applied to current cases, controversies, or to expose conflicts between the underlying principles and present day actual practice. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U.CHIJ.L.REV. 227 (1958). BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963).
navigation, and regulation of trade. In section V, the examination will focus on geographical land claims, territory, and statehood as it impacted the pre-Constitutional United States in anticipation of the future growth of the United States in both land and population. In section VI, the paper will examine the intricate mechanisms of restraint incorporated into the Constitution, which create separation of powers so as to protect the people from those bodies of power that govern them. Section VII provides a brief conclusion and proposed areas for future study as well as a proposed first step for future closer adherence to genuine Constitutional principles designed to protect the people from oppressive behaviors. Following is section II, which begins with the Preamble of the Constitution and examines what a congress actually is, assembly in pre-Constitutional America, sovereignty, and the method of Constitutional interest analysis.

II. The United States in Congress assembled.

Who are the Parties that entered into the Agreement that is the U.S. Constitution? It was simply the States and the People.\(^6^1\) The sovereign States entered into an agreement based upon underlying principles of participatory government and consent of the governed. The discussion below will explain the reasons for the conclusion above. The paper shall begin with what that assembly of delegates really was in 1787.\(^6^2\)

The Constitution\(^6^3\) of the United States was written in 1787\(^6^4\) by “the United States in Congress assembled”\(^6^5\), acting under the then effective Articles of Confederation.\(^6^6\) The opening

\(^6^1\) “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. (emphasis added.) “The 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.” U.S. CONST. amend. X. (emphasis added.) Note that here, the People have rights, and the States have powers.
\(^6^3\) U.S. CONST.
to the Constitution is labeled the “Preamble”, and it states, “We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

i. Definitions.

The phrase “more perfect Union” acknowledges the already existing Union operating under the Articles of Confederation. The Union under the Articles of Confederation was made up of States, and of course the Constitution organized a Union composed of States as well. The definition of “State” is the first important term to examine. “State” is defined as: “A people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war

65 “the United States in Congress assembled” is used many times in the Articles of Confederation. ARTICLES OF CONFEDERATION § II, V, VI, VIII, IX, X, XIII. (U.S. 1781). The Committee of Style at the Federal Convention of 1787 presented in Article I: “Sect. 7. The enacting stile of the laws shall be, ‘Be it enacted by the senators and representatives in Congress assembled.’” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 593 (Max Farrand ed., 1937). “This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States – and where else should they have assembled?” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). (emphasis added.) “At length a Convention of the states has been assembled,…” THE ANTI-FEDERALIST NO. 17 (Robert Yates).
66 ARTICLES OF CONFEDERATION (U.S. 1781).
67 U.S. CONST. pmbl.
68 “Articles of Confederation and perpetual Union” between the States of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.” ARTICLES OF CONFEDERATION pmbl. (U.S. 1781). (emphasis added.) “And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual…” ARTICLES OF CONFEDERATION § XIII. (U.S. 1781). (emphasis added.)
69 ARTICLES OF CONFEDERATION (U.S. 1781).
and peace and of entering into international relations with other communities of the globe.”

The term State indicates “independent sovereignty and control over all persons and things within its boundaries.” This element of sovereignty is critical to understand the undisputed status of the individual States before they entered into the agreement of the Articles of Confederation as well as the Constitution. “Union” is defined as: “A league; a federation; an unincorporated association of persons for a common purpose...A joinder of separate entities.” And “Unite” is defined as: “To join in an act, to concur, to act in concert.” From these definitions, it can be reasoned that the States drafted these agreements in order to better serve their genuinely “common” needs and purposes, which were defined in explicit terms so as to preserve the broadest aspects of their own sovereignty, whether under the Articles of Confederation or the Constitution. The limited and common purpose aspects will be addressed in greater detail later in the paper in Sections III, IV, V, and VI. These agreements both called for

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72 Note that use of the plural word “States” when forming the Union, as in: “The stile of this Government shall be, ‘The United States of America.’” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 565 (Max Farrand ed., 1937).

73 New Hampshire’s Constitution dates to January 5, 1776. N.H. CONST. of 1776. The Vermont Constitution was completed on July 8, 1777. VT. CONST. of 1777. “Vermont was created in July 1777 when representatives of approximately twenty-eight towns in the New Hampshire Grants adopted their own constitution and declared their independence from the state of New York.” ... “The premise of this policy was that Vermont could not be destroyed, a negative de facto recognition of the new state. ... New York had failed to offer Congress any incentives to guarantee its boundaries. Without such guarantees and without the resources to make good its territorial claims, New York was vulnerable to further usurpations. Simply, a state’s claims had to bear some reasonable relation to the jurisdiction it could effectively govern.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 127, 124-25 (1983). Justice STONE issued the opinion for the Court: “This is an original suit, brought by the State of Vermont December 18, 1915, for the determination of the boundary line between that state and the State of New Hampshire. ... We think that the practical construction of the boundary by the acts of the two states and of their inhabitants tends to support our interpretation of the Order-in-Council of 1764, and of the resolutions of Congress and of the Vermont legislature, preceding the admission of Vermont to the Union. We conclude that the true boundary is at the low-water mark on the western side of the Connecticut River...” VERMONT v. NEW HAMPSHIRE, 289 U.S. 593, 595, 619 (1933). (emphasis added.)


75 ARTICLES OF CONFEDERATION (U.S. 1781). U.S. CONST.

76 BLACK’S LAW DICTIONARY 1702 (4th ed. 1951).


78 ARTICLES OF CONFEDERATION (U.S. 1781). U.S. CONST.
a “Congress” to convene, debate, and pass resolutions serving their common purposes. “Congress” is defined as, “An assembly of envoys, commissioners, deputies, etc., from different sovereignties who meet to concert measures for their common good, or to adjust their mutual concerns.”

The independence and sovereignty of the States entering into the Constitution was in the minds of the Framers, to include their own knowledge of recent history involving the “United Netherlands” and the “German Empire.” “Far from saving the country from a consolidated empire, argued the Federalists, the rejection of the Constitution meant the emergence of separate confederacies and the acceptance, with all its fateful consequences, of the European system of the balance of power among contending power blocs.” “Anti-Federalists” charged upon the Constitution the object of a great, consolidated government, supreme over the states, which would, sooner or later, reveal the despotic face that was already implicit in its principle. It would

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80 Chief Justice MARSHALL for the Majority. “The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 402 (1819).
81 James Madison supported a lesser level of State sovereignty, “Without such a check [a compulsive capability of the national government over the State governments] in the whole over the parts our system involves the evil of imperia in imperio (a fragmentation of authority),” “the absence of such a provision had been mortal to the ancient Confederacies – the Acheaean League, the Amphyctionic council – and it had been the ‘disease’ of the modern confederacies, particularly the ‘United Netherlands’ and the ‘German Empire’, the latter example being particularly relevant because it had a ‘federal Diet with ample parchment authority’ and ‘a regular Judiciary establishment.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 247 (2003). “…the United Netherlands, and other similar confederacies.” THE FEDERALIST NO. 54 (Alexander Hamilton).
83 Some of the authors who composed the “Anti-Federalists” are believed to have included the following: possibly Samuel Bryan as “Centinel”; possibly either Melancton Smith or Richard Henry Lee as “Federal Farmer”; Judge Robert Yates as “Brutus”; George Clinton, Governor of New York, as “Cato”; and speeches by Patrick Henry and Melancton Smith. The selection of the pen names was important, and in the choice of “Cato” is noteworthy: “It seems likely that the source of the ideal [republican virtue], in Washington’s case, was Joseph Addison’s play [written in 1713] Cato. That he saw the play a number of times, and it was probably his favorite serious drama, and that he had staged as an inspiration to his troops are well known.” FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 195 (1985). “A Roman soul is bent on higher views:

To civilize the rude unpolish’d world, And lay it under the restraint of laws; To make man mild, and sociable to man; To cultivate the wild licentious savage With wisdom, discipline, and liberal arts; Th’ embellishments of life: virtues like these Make human nature shine, reform the soul, And break our fierce barbarians into men.” Excerpt from the character ‘Juba’, prince of Numidia. JOSEPH ADDISON, CATO, act 1, sc. 4, (1713). (emphasis added.)
be the basis of a monstrous aristocracy and a bloated monarchy that would be intent on reducing all diversities to a common mass.” Federalists, who were supporters of ratification of the Constitution, “denied every charge, patiently explaining that the general government’s powers were limited to a few general objects, that everything else would remain with the states, that the Constitution, and not the general legislature, was to be supreme.”

“[I]f the states were defined by boundaries that were guaranteed by a powerful central government, they would never have to exercise sovereign powers – pre-eminently those of war and peace – to uphold their sovereignty.” In order to prove that this new government would not itself become a danger to the survival of the states, promoters of the Constitution could adopt one of two strategies: they could distinguish the objects of the new central government from those of the states, or they could try to show that the character of the new Constitution to escape the logical impasse presented by traditional definitions of “sovereignty.”

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84 “Antifederalists insisted that the projected distribution of authority would lead to a death struggle for supremacy between the states and the union.” Peter S. Onuf, The Origins of the Federal Republic 198 (1983).
86 The authors who composed the “Federalists” included: Alexander Hamilton, John Jay, and James Madison, who all chose to sign their writings as “PUBLIUS.” It is probably not mere coincidence that ‘Publius’ appears (circa) in 1589 and in the Quarto of 1594, and states: “And therefore do we what we are commanded.” William Shakespeare, Titus Andronicus act 5, sc. 2, (Wordsworth Editions Limited 1996) (1594). (emphasis added.) “Users of modern dictionaries are sometimes surprised when they open Johnson’s: the definitions, the usual business of a dictionary, account for only a small fraction of the book. The bulk of the Dictionary comes from the quotations, about 114,000 of them, that illustrate the words more precisely than any definition could. … The quotations made Johnson’s book not only the largest dictionary of its day, but also one of the most substantial anthologies of English literature ever published. Johnson praised Shakespeare as the best guide to the language of ‘common life’ and quoted from all thirty-six of his plays.” Samuel Johnson, Samuel Johnson’s Dictionary: Selections from the 1755 Work That Defined The English Language 12 (Jack Lynch ed., Levenger Press 2002) (1755). (emphasis retained.)
90 At this point, it is important to take notice that the only time the term “concurrent power” appears in the Constitution is within section 2 of the Eighteenth Amendment, which was repealed. “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. Const. amend. XVIII. The Eighteenth Amendment was ratified on January 16, 1919 and repealed by the Twenty-first Amendment on
governments themselves was fundamentally different.”

“Edmund Pendleton argued that, ‘the two governments are established for different purposes, and act on different objects …They can no more clash than two parallel lines can meet.”

“The union depended on multiple and overlapping balances; there was no single point at which all power would be centered.”

The text of the Constitution itself further emphasizes the international legal meaning of the term “congress” as an assembly of delegates representing sovereigns. Article I, section 1 provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” The phrasing chosen is “a Congress”, which demonstrates this particular body is not necessarily the only Congress that may exist, and other meetings among sovereigns may exist across the globe.

ii. Sovereignty.
The complete definition of sovereignty is somewhat difficult to get a handle on, however there are certain elements that point toward the powers and privileges of sovereigns. Elements that define sovereignty affect a variety of areas and may include various powers, obligations, privileges, or immunities. Regardless of the label placed on a form of government, whether labeled a Monarchy, Oligarchy, Republic, Democracy, Dictatorship, Police State, Communist, Socialist, Nationalist, or Capitalist, there are elements that indicate sovereignty common to each. Admittedly, some of these elements of sovereignty do not fully belong to the States, but moreover, some do not fully belong to the United States. The denial of several specific powers to the States and to the United States will be discussed throughout the paper and also in Section VI, which deals with the Separation of Powers. Throughout the paper’s analysis, one must keep in mind whether sovereignty permits possession of less than all of the elements of sovereignty? And if sovereignty fails merely because one element fails, then neither the United States nor the States are sovereigns, except when acting in concert, when all sovereign powers are possessed by the combination of the United States and the States.

Sovereignty includes the Power: to govern, to create or establish order, to establish standards of behavior, to enforce standards, to collect revenue and redistribute wealth, to act to protect the population; and Sovereignty at its most fundamental level is the Privilege to claim immunity from legal allegations (or to grant consent to acting as a defendant to a claim), if the

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98 There is an extensive description of rights and powers provided in the State Constitutions of Pennsylvania and Maryland of 1776. PA. CONST. of 1776, MD. CONST. of 1776.
99 “No State shall”… U.S. CONST. art. I, § 10, cls. 1, 2, 3. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress…” U.S. CONST. art. I, § 9, cl. 1. And contrary to this provision the Court stated: “The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. As to paupers, it makes no difference by whose aid they are brought to the country.” CHAE CHAN PING v. UNITED STATES, 130 U.S. 581, 608 (1889).
100 PA. CONST. of 1776.
governing power (the sovereign) damages a member of the population (or their property) or to make such claim of immunity even if the sovereign damages the population as a whole.\textsuperscript{101}

The most important aspect to defining sovereignty is that a true sovereign must be able to claim Immunity as an alleged defendant for its own acts upon the governed. This claim of immunity as a sovereign is also frequently respected when the sovereign is the subject of allegations in a forum outside the sovereign’s own realm.\textsuperscript{102}

iii. Constitutional Interest Analysis.

When determining the meaning of provisions in the U.S. Constitution, the proposed approach would be to adapt the Interest Analysis methodology developed by Professor Brainerd Currie for Constitutional analysis.\textsuperscript{103} In general, Interest Analysis when applied to resolve a legal issue should begin with the fundamental question, “What is the underlying purpose behind the rule?” Then it can be determined whether or not the rule at hand is in fact applicable to the issue at hand, and if in fact the underlying principle is advanced, and if not, how may the underlying principle best be served.


\textsuperscript{103} The method proposed to be applied in this paper is not Professor Currie’s Interest Analysis, it is an adaption of the method for Constitutional purposes. Similarly, it seeks to determine the ‘underlying purpose of the rule’, as would be the case under Interest Analysis, but does so in terms of determining the ‘underlying principles behind the Constitutional provisions,’ from a historical perspective. Brainerd Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U.CH.I.L.REV. 227 (1958). BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963).
Interest Analysis for Constitutional purposes should begin by asking the following questions: ‘What are the underlying principles behind the relevant provisions the Framer’s wrote into the Constitution? What are the objectives of the relevant provisions of the Constitution? What are the restraints placed upon powers, if any? And, What are the built-in protections to preserve rights, if any?’ These questions provide direction and areas to keep in mind when examining the document from a historical perspective.

In order to resolve a Constitutional question today, an appropriate analysis demands first a historical analysis that steps into the shoes of the Framers circumstances by examining their experiences and writings in detail. One should begin with a historical inquiry as to the meaning of the Constitution when written in 1787 and in 1789, when amendments were proposed by the First Congress of the United States prior to attempting to determine the meaning at present. This view would provide the clearest lens for determining the underlying principles behind the relevant provisions any particular dispute is referring to.

Conducting an Interest Analysis for the United States Constitution requires a historical analysis from the perspective of the Framers, who were operating on the American continent. This view presumes it would be an improper method to make reference only to U.S. Supreme Court created jurisprudence to craft an opinion and arrive at a decision. Moreover, it would be improper to begin the analysis with reference to jurisprudence. The analysis must begin with a determination of the underlying principles that the Framer’s were confronted with and troubled by, and how those principles resulted in the provisions of the Constitution, which resulted from

104 “THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:” Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.)

105 U.S. CONST. U.S. CONST. amends. I-X.
the debates of 1787. That Constitution, for the most part, is the document the Framers drafted, that modern America is still bound to adhere to today.

This paper is concerned with the role of the States, and how Constitutional Interest Analysis is relevant to determining the role of the several States. The first step is to determine the underlying principles by determining the historical meanings of the relevant provisions, and then determine where the placement of powers (or rights) lies within the Constitutional framework. At times in actual practice, it will be necessary to conduct an interest analysis as to whether there is a conflict between powers granted to both the United States and the States. There must be a determination of the underlying principles behind the provisions and the location of power so as to respect the appropriate loci of power (whether the United States or the States, or another Branch or Body of Power) and so as to least impair any conflicting allocation of powers. The dispute should be resolved so as to select the course of action that most advances the underlying principles, that least impairs the allocation of powers, and that is least intrusive with respect to individual rights. If a State power is impacted or impaired, consideration must be given to the broad effects upon all of the other States, (non-Party States) to the issue at hand as well. This paper will determine the underlying principles with respect to certain salient issues and describe the impact in selected specific areas.

Most Americans have received at least a somewhat clouded view of American history, due to the modern educational issues of political correctness; watered down educational materials, which must meet mass marketing editorial requirements; increasing class size, even in college and graduate schools; and the ever present limits placed on time and money. Even some law school students in America, address the study of Constitutional law from a, “What do I have to learn to pass the state bar exam?” perspective. In doing so, students attempt to conserve time
and energy by limiting themselves to prepackaged shorthand study materials. Regardless of where one studies, rarely does the educational environment permit examination of the content of primary documents and permit students to discover the underlying meanings independently, without the bias of teachers’ opinions, or the editors selections of mass marketing publishers.\(^{106}\) This paper hopes that the Court has access to the resources necessary to make accurate historical determinations of the salient underlying principles that the Framer’s wrote into the Constitution. The only question is do they have the will to advance the underlying principles the Framers provided to America, or are they to preoccupied with preserving the Court’s own power.

The historical analysis requires putting oneself into the proper mindset, one that provides the reader with an understanding of the situation the Framers were actually experiencing. Before engaging in determining the underlying principles behind any provisions in the Constitution, it is important for one to understand that the Framers’ were citizens of England prior to their decision to separate.\(^{107}\) At the time England was one of the wealthiest and most powerful countries in the world, and perhaps in relative terms, the most powerful in all of history. The Framers’ birth right was their citizenship of England, and they chose to cast it away. They were relatively wealthy men who knowingly cast off their birth right for what must have been something more than just a “better idea.” The Framers must have been motivated by some underlying principles, which they deeply believed in, but that were not simply ‘grand ideas’, but were practical\(^{108}\) and at the same

\(^{106}\) This watered down approach may be based on a general fear of the plain text of the Declaration of Arms and of the English Bill of Rights of 1689, especially with respect to reference to violent conflict and the use of arms. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (U.S. 1775). ENGLISH BILL OF RIGHTS (Eng. 1689).

\(^{107}\) “as Free and Independent States…” THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

\(^{108}\) The first acts relating to revenue (Duty, Tonnage Tax, and Collection) were three of the first five statutes passed by the first session of the first Congress. “CHAP. II. - An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States. SEC. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of August next ensuing, the several
time could be realized, notwithstanding the fact that perhaps it was a truly new scheme for government, which had never been successfully entered into before. It is just as important to keep in mind what they gave up, to determine what they were creating.

One fundamental underlying principle motivating the Framers, that they clearly demanded was participatory government, one which derived its powers from the consent of the governed, since only just powers are derived from the consent of the governed.\textsuperscript{109}

Another fundamental principle was the presumption that power, when granted or vested, could eventually be abused.\textsuperscript{110} This was addressed by the creation of limits to powers, and restraints upon the exercise of power. The Framers designed mechanisms to interrupt corruption with the allocation of powers to either the United States or to the States, as well as built-in encumbrances upon powers so as to limit and restrain government action. Some powers often associated with sovereignty were also denied to either the States or the United States, so as to require dependence upon the inter-relationship. Still other powers were dispersed across more than one body of power or simply denied to one body of power to prevent the exercise of power by one branch or body acting alone. Some of these denials were applied to the States, and some to the United States, but all were designed to address abuse of power.

\begin{footnotesize}
duties hereinafter mentioned shall be laid on the following \textit{goods, wares and merchandises} imported into the United States from any foreign port or place, that is to say: An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States. Act of July 4, 1789, 1 Stat., ch. 2 (1789). (\textit{italics retained.}) (\textit{emphasis added.}) An Act imposing Duties on Tonnage. Act of July 20, 1789, 1 Stat., ch. 3 (1789). An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States. Act of July 31, 1789, 1 Stat., ch. 5 (1789).

\textsuperscript{109} “…that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, \textit{without common consent by act of parliament};…”\textsuperscript{\textsuperscript{107}} PETITION OF RIGHT \textsection X (Eng. 1628). (emphasis added.) “That election of members of \textit{Parliament} ought to be free;”… “…matters and things therein contained by the force of law made in due form by authority of \textit{Parliament};”… \textit{ENGLISH BILL OF RIGHTS} \textsection I para. 36 (Eng. 1689). (emphasis added.) “…deriving their just powers from the consent of the governed,…” \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776). “For depriving us, in many cases, of the benefits of Trial by Jury;”… \textit{THE DECLARATION OF INDEPENDENCE} para. 20 (U.S. 1776).

\textsuperscript{110} “But when a long train of \textit{abuses and usurpations}, pursuing invariably the same Object evinces a design to reduce them under absolute \textit{Despotism};…” \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776). (emphasis added.)
\end{footnotesize}
The Framer’s experiences in both life and government were the driving force behind their choice to cast off English citizenship, and form a new nation. Critical documents that affected their lives and assisted them in developing ideas of government included: The Stamp Act, The Quartering Acts, The Townshend Act, The Navigation Acts, and their own documents in response.\(^{111}\) From their experiences, they designed provisions in the Constitution so as to address problems created by these documents and to address problems they encountered or observed.

One early example of a response to the English Acts was The Articles of Association of 1774.\(^ {112}\) Since the Framer’s created the Supreme Court in the Constitution, it is an absolute truth that they had no experience with the Supreme Court’s jurisprudence, and that the Court’s jurisprudence is not an appropriate place to refer to begin the analysis when determining the underlying principles behind the provisions of the Constitution. The historical analysis herein will begin with the legislative history as a starting point for an examination of the Constitution.


The House of Representatives\(^ {113}\), nowadays sometimes called the ‘lower house’, was referred to as the “first branch of the National Legislature”\(^ {114}\) during the debates of the Federal Convention held in Philadelphia\(^ {115}\) during the summer of 1787. The debates were unsuccessfully attempted to be opened on May 14, 1787 and then finally on May 25, 1787 a sufficient number

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\(^{113}\) “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” U.S. Const. art. I, § 1. U.S. Const. art. I, § 2, cl. 1.

\(^{114}\) “Resd. that the members of the first branch of the National Legislature ought to be elected by the people of the several States...” 1 The Records of the Federal Convention of 1787 20 (Max Farrand ed., 1937). JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 30 (1987).

\(^{115}\) 1 The Records of the Federal Convention of 1787 1 (Max Farrand ed., 1937).
of States were present so that the Federal Convention of 1787 could officially begin. Waiting for a sufficient number of States to be present, was in itself recognition of the sovereign status of the States, and the absence of legitimacy of a document produced without them present.

At the outset, the Convention delegates adopted procedural rules so as to facilitate successful debates, and then articulated a series of unsatisfactory defects of the confederation, which existed under the Articles of Confederation. The first resolutions were proposed by Mr. Edmund Randolph of Virginia as follows: “1. Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely. ‘common defence, security of liberty and general welfare.’ 2. Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases. 3. Resd. that the National Legislature ought to consist of two branches. 4. Resd. that the members of the first branch of the National Legislature ought to be elected by the people of the several States…” “…5. Resold. that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures…” Within these few initial resolutions are some of the most thoroughly discussed elements and issues that defined the structure held within the proposed

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Constitution approved by the Convention and sent to the States for ratification. The analysis in Section III will begin with Article I as it relates to revenue, representation and respect for State sovereignty within the Constitution.

III. Representation, Taxation, & Proportion.

What are the underlying principles behind the revenue and representation provisions of the Constitution? No Taxation without Representation, and No shifting of burden sharing onto other collateral States. A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the first powers given to Congress, legislative powers.

Article I begins by providing for a Congress and grants all legislative powers to a Congress.

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122 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (Max Farrand ed., 1937). 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937). U.S. CONST. “The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’ This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in Convention. … From these Conventions the constitution derives its whole authority.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). (emphasis added.) “At length a Convention of the states has been assembled, they have formed a constitution which will now, probably, be submitted to the people to ratify or reject, who are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions, or forms of government, at their pleasure.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).

123 U.S. CONST. art. I.

124 “…that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament….” PETITION OF RIGHT § X (Eng. 1628). (emphasis added.) “That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;”… ENGLISH BILL OF RIGHTS § 1 para. 22 (Eng. 1689). (emphasis added.) “They have undertaken to give an grant our money without our consent,” “…to establish a perpetual auction of taxations where colony should bid against colony, all of them uninformed what ransom would redeem their lives; and thus to extort from us, at the point of the bayonet,”… DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS paras. 3, 6 (U.S. 1775), “…unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.” … “For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.” THE DECLARATION OF INDEPENDENCE paras. 5, 24 (U.S. 1776).

125 U.S. CONST. art. I, § 1.
Senate and a House of Representatives. The next item describes the qualifications necessary for being a “Member” in the House of Representatives (“House”), as well as the method of election, and here in one sentence the Constitution and the Congress it creates show respect for both the People and the States. The House of Representatives are to be chosen “by the People”, which shows respect for the People and the term “chosen” implies the People must vote in an election. The method of choosing Members of the House is not an at large National election, but rather an election “by the People of the several States.”

The Constitution and the Congress are showing respect for “the States”, and the use and definition of the term “several” is quite important here. Several is defined as: “Separate; individual; independent; severable.” Here at the first opportunity to address the States as sovereigns, the Constitution not only chooses the term “States” as defined above, but also reaffirms the independent and sovereign status of the States by prefacing “States” with

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128 “Governments are instituted among Men, deriving their just powers from the consent of the governed,….” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). (emphasis added.) “The civilized procedure of trial by jury is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting, because the judgment of the jury is but another way of obtaining the consent of the governed.” LOUIS NIZER, MY LIFE IN COURT 66 (1961). (emphasis added.)
129 “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 1, cl. 1. (emphasis added.)
133 BLACK’S LAW DICTIONARY 1540 (4th ed. 1951).
“several.” The “several” aspect of the clause is often overlooked since the focus often falls on Member “Qualifications”, and such qualifications were tied directly to the “State Legislature” qualifications and those qualifications were different in every State. The “National Legislature” showing deference to each and every “State Legislature” for the qualifications for its Members is another strong statement about respect for State independence and sovereignty. Article I also provides additional Member qualifications concerning age, United States Citizenship, the minimum term of years as a United States Citizen, and the requirement that the Members actually be an Inhabitant of the State in which chosen when elected. The Constitution and the Congress create an “Inhabitant” requirement that acts to prevent a disingenuous national legislature from arising under the Constitution, which would perhaps represent the People of the several States merely in form and without substance. For if the

136 “V. That each member of the Senate shall have usually resided in the county in which he is chosen for one year immediately preceding his election, and for the same time he shall have possessed, and continue to possess in the county which he represents, not less than three hundred acres of land in fee.” “VI. That each member of the House of Commons shall have usually resided in the county in which he is chosen for one year immediately preceding his election, and for six months shall have possessed, and continue to possess, in the county in which he represents, not less than one hundred acres of land in fee, or for the term of his own life.” N.C. CONST. of 1776, arts. V, VI.

(emphasis added.) Apparently, Ohio has a differing, yet seemingly resolute, view of the issue. “It has been repeatedly held that it is not within the power of state legislatures to superadd anything to the qualifications of members of the congress of the United States. The constitution has fixed the provisions as to the qualifications of such members. … A state law requiring that a representative in congress shall reside in a particular town or county within the district from which he is chosen, is unconstitutional and void.” STATE v. RUSSELL, 10 Ohio Dec. 255, 258 (1900). (emphasis added.) Oklahoma acknowledges the State legislature may have a role: “The general rule is that when the constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive. The legislature, except where expressly authorized to do so, has no authority to require additional or different qualifications for a constitutional office.” OKLAHOMA STATE ELECTION BD., v. COATS, 610 P.2d 776, 778-79 (1980). (emphasis added.)


139 U.S. CONST. art. I, § 2, cl. 1. “delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress…” ARTICLES OF CONFEDERATION § V (U.S. 1781).

140 U.S. CONST. art. I, § 2, cl. 2.
requirement of being an “Inhabitant of that State” did not exist, it is possible the Members would become inhabitants solely of the national seat of government. The direct experience of the Framers, who endured living under the rule of a distant legislature, the British Parliament, is fully addressed with the “Inhabitant of that State” requirement.

i. Apportionment.

Article I, section 2, clause 3, is the result of a most lengthy issue of the debates, and creates a complex balance among various interests of the States and the People. A balance that historians have specifically labeled to mark its significance, to include the “Great Compromise” or the “Franklin Compromise.” As these issues consumed a large number of

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141 A case with regard to the House of Representatives: “when elected, be an inhabitant of the [that] state, in which he shall be chosen.” STATE v. RUSSELL, 10 Ohio Dec. 255, 257 (1900). A case with regard to the Senate: “when elected, be an Inhabitant of that state for which he shall be chosen.” OKLAHOMA STATE ELECTION BD., v. COATS, 610 P.2d 776, 778 (1980).

142 U.S. CONST. art. I, § 2, cl. 2.

143 “Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in heir several provincial legislatures, where their right of representation can alone be preserved.” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 10 (U.S. 1774). “Parliament was influenced to adopt the pernicious project, and assuming a new power over them [the “colonies”] have in the course of eleven years, given such decisive specimens of the spirit and consequences attending this power, as to leave no doubt concerning the effects of acquiescence under it. …for suspending the legislature of one of the colonies…and for altering fundamentally the forms of our Governments: For suspending our Legislatures, and declaring themselves [Parliament] invested with power to legislate for us in all cases whatsoever.” THE DECLARATION OF INDEPENDENCE paras. 23, 24 (U.S. 1776).

144 U.S. CONST. art. I, § 2, cl. 2.

145 “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.” U.S. CONST. art. I, § 2, cl. 3. (emphasis added.)

146 U.S. CONST. art. I, § 2, cl. 3.

147 “Not only, then, did the “great difficulty” lie in “the affair of Representation,” as Madison observed. The “great difficulty” was in fact many difficulties. That between large states and small states had not disappeared by the time of the crucial vote of July 16 [1787] registering the Great Compromise of the convention, but it had gotten deeply entangled in, and almost entirely submerged by, the larger sectional controversy.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 230 (2003). The “Great Compromise” also includes the equality of representation in the Senate provided for in Article I, section 3, clause 1: “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.” U.S. CONST. art. I, § 3, cl. 1.
days during the Federal Convention of 1787 and they also exposed the diverse interests and concerns of the several States.\textsuperscript{149} Article I, section 2, clause 3 links three things together in the first sentence, those being “Representatives”, “Taxes”, and “Numbers.”\textsuperscript{150} The key to linking all three aspects proportionally provides incentives for the decennial census\textsuperscript{151} to be reported by each of the several States accurately.\textsuperscript{152} The greater the “Numbers”, the greater the number of Representatives in the House of Representatives for a State, and the greater that State’s influence within that Branch.\textsuperscript{153} However, the lesser the “Numbers”, the lesser the “taxes” applied to that

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\item[\textsuperscript{148}]“The committee [the Committee of the whole House] reported its compromise proposal, which was Franklin’s brainchild, on July 5 [1787]. …the final vote on Franklin’s compromise was taken on July 16 [1787]…” FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 236-37 (1985). 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 524-27 (Max Farrand ed., 1937).
\item[\textsuperscript{149}]Concerns for continued balanced Representation among the States existed because the States already were aware the Union would grow in population (Numbers), and any States that had claims to vast areas of western geography had the opportunity to add significantly to their own population and representation. Following are some examples of the differing interests and concerns to include: methods of representation and the conflicts among States with land claims & ‘landless’ States. Representation: Samuel Chase of Maryland “proposed a compromise that would reach both contestants articles: in all questions relating to ‘life and liberty,’ the states would have an equal vote; in all questions relating to ‘property,’ the voice of each colony would be proportional to the number of its inhabitants.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 138 (2003). Land claims and landless States: “Virginians were aware of the difficulties in administering the state’s extensive territorial claims.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 82 (1983). “It was generally held [by Virginia] ‘that the unappropriated Lands should all be sold for the benefit of the commonwealth.’” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 83 (1983). “Maryland refused to ratify [the Articles of Confederation] according to its Declaration of December 15, 1778, until ‘an Article or Articles be added …giving full power to the United States in Congress Assembled to ascertain and fix the western limits’ of the states.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 88 (1983). “Virginia’s apparent willingness to cede [territory, to include western territory which became Kentucky], under conditions determined by herself, was not enough for the delegates from the landless states [including Maryland]. ‘No colony has a Right to go to the South Sea,’ claimed [Samuel] Chase. ‘They never had- they can’t have. It would not be safe to the rest. It would be destructive to her Sisters, and to herself.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 140 (2003).
\item[\textsuperscript{150}]U.S. CONST. art. I, § 2, cl. 3.
\item[\textsuperscript{151}]U.S. CONST. art. I, § 2, cl. 3.
\item[\textsuperscript{152}]“In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.” THE FEDERALIST NO. 54 (Alexander Hamilton).
\item[\textsuperscript{153}]“Representatives and direct Taxes shall be apportioned among the several States…” U.S. CONST. art. I, § 2, cl. 3. (emphasis added.)
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State, and the lesser the burden of taxation upon that State. By this apportionment mechanism, each State has contradicting reasons for wanting both greater “Numbers” and yet, at the same time, lesser “Numbers.” Here, the balance is placed directly and simultaneously upon the allocations of representation and the allocations of burden sharing by the States. This is a self-regulating mechanism that respects each and every State’s sovereignty by strongly discouraging any one State from taking advantage of the other States in the Union by acquiring an excessive amount of representation and thereby obtaining undue influence within the Union. In the event a State does claim it is entitled to greater representation than it should have, it must incur an equally proportional increase in burden sharing (taxation), and is therefore much less likely to do so. This structural arrangement demonstrates Constitutional respect for the States and the People, by representation in Numbers, as well as ensuring continuing respect “among the several States” for each other.

The apportionment clause has a somewhat complex formula with respect to the actual computation of the “Numbers” used. The easiest part of the computation is quite telling of the

154 “Representatives and direct Taxes shall be apportioned among the several States…” U.S. CONST. art. I, § 2, cl. 3. (emphasis added.)
155 Proportional allocation of burden sharing was also provided for in the Articles of Confederation. “All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed by the United States in Congress assembled.” ARTICLES OF CONFEDERATION § VIII (U.S. 1781). (emphasis added.)
156 THE FEDERALIST No. 54 (Alexander Hamilton).
157 “In the waning years of the twentieth century, we Americans and our friends abroad were befuddled by the diffuse locations and sharings of sovereignty that came increasingly to characterize the contemporary world system; we struggled to discover the key to that delicate balance between representation and burden sharing that is an elixir to states-unions that find it, and a poison to those that do not;…” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 260 (2003). (emphasis added.)
158 U.S. CONST. art. I, § 2, cl. 3. THE FEDERALIST No. 54 (Alexander Hamilton).
159 The term “among” was carefully chosen by the Framers. Among is defined as: “Mingled with or in the same group or class. Among is sometimes held to be equivalent to between. But ‘among’ implies more than two objects as differentiated with ‘between.’” BLACK’S LAW DICTIONARY 108 (4th ed. 1951). U.S. CONST. art. I, § 2, cl. 3.
160 U.S. CONST. art. I, § 2, cl. 3.
sovereign condition of the States, that part being, “and excluding Indians not taxed.”\textsuperscript{161} This is an explicit statement by the Constitution that sovereigns, the “Indians”\textsuperscript{162}, do exist and will be Constitutionally recognized \textit{within} the geographical territory and jurisdiction of the United States, which re-enforces the Constitution’s recognition of the “several States” within the same clause and the same Constitution, and the same “United States.”\textsuperscript{163} The complex portion of the formula used to compute the actual “Numbers” used for representation is determined by “adding to the whole Number of free Persons, \textit{including} those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.”\textsuperscript{164} Here, Article I, section 2, clause 3 provides for three different types of Persons all within one sentence, within one clause, and within one critical “Numbers” computation used for representation.\textsuperscript{165}

In order to better understand this determination of “Numbers,” it is helpful to introduce other portions of the Constitution which relate directly to this clause.\textsuperscript{166} The first related clause provides: “All Bills for Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments\textsuperscript{167} as on other Bills.”\textsuperscript{168} This requirement that the branch, which is represented proportionately by Numbers controls the origination of all revenue Bills, conforms with the original resolution proposed by Mr. Randolph on May 29, 1787 at the

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\item\textsuperscript{161} U.S. CONST. art. I, § 2, cl. 3.
\item\textsuperscript{162} The States operating under the Articles of Confederation had already begun to act as a Union for international purposes, and had also begun to treat the Indians, (the Senecas, Mohawks, Onondagas and Cayugas), as sovereigns by entering into Treaties with the “Six Nations.” Treaty with Six Nations, Oct. 22, 1784, U.S.- Six Nations.
\item\textsuperscript{163} U.S. CONST. art. I, § 2, cl. 3.
\item\textsuperscript{164} U.S. CONST. art. I, § 2, cl. 3.
\item\textsuperscript{165} U.S. CONST. art. I, § 2, cl. 3.
\item\textsuperscript{166} U.S. CONST. art. I, § 2, cl. 3.
\item\textsuperscript{167} Contrary to this final version, the Committee of Detail, VI provided, “All Bills for raising and appropriating Money and for fixing the Salaries of the Officers of Government shall originate in the House of Representatives, and shall not be altered or amended by the State.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 154 (Max Farrand ed., 1937).
\item\textsuperscript{168} U.S. CONST. art. I, § 7, cl. 1.
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Federal Convention.\textsuperscript{169} This requirement also reflects the linkage of all three of the elements in the Constitution’s apportionment clause, (and which Mr. Randolph proposed), those of representation (\textquotedblleft rights of suffrage\textquotedblright{}), taxes (\textquotedblleft quotas of contribution\textquotedblright{}), and \textquotedblleft Numbers\textquotedblright{} (similar to \textquotedblleft the number of free inhabitants\textquotedblright{}) and is even stronger than Mr. Randolph’s proposal as the requirement binds all three together in Article I, section 2, clause 3, and the significance of representation by Numbers is re-emphasized by only permitting the House to originate Revenue Bills.\textsuperscript{170} Another closely related clause in Article I provides: \textquoteright{No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration\textsuperscript{171} herein before directed to be taken.}\textsuperscript{172} There is some of the strongest language linking\textsuperscript{173} the allocation of burden sharing

\textsuperscript{169} \textit{2. Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.} 1 \textsc{The records of the federal convention of 1787} 20 \textsc{(Max Farrand ed., 1937).} (emphasis added.)


\textsuperscript{171} Pursuant to this constitutional authority to direct the manner in which the \textquoteleft{actual enumeration\textquoteright} of the population shall be made, Congress enacted the Census Act (hereinafter Census Act or Act), 13 U.S.C. § 1 et seq., delegating to the Secretary of Commerce (Secretary) authority to conduct the decennial census. § 4. . . . It further requires that \textquoteleft{the tabulation of total population by States…as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.} § 141(b). Using this information, the President must then \textquoteleft{transmit to the Congress a statement showing the whole number of persons in each State…and the number of Representatives to which each State would be entitled.} 2 U.S.C. § 2(a).\textsuperscript{172} DEP’T. OF COMMERCE v. UNITED STATES HOUSE OF REPRESENTATIVES, 525 U.S. 316, 321-22 (1999). Census Act. “Bureau of the Census. The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.” Act of March 6, 1902, ch. 139, § 1, 32 Stat. 51. Act of Aug. 31, 1954, ch. 1158, § 1, 68 Stat. 1012 (codified as amended 13 U.S.C. § 2). Act of Aug. 31, 1954, ch. 1158, § 1, 68 Stat. 1013 (codified as amended 13 U.S.C. § 5). Act of Aug. 31, 1954, ch. 1158, § 1, 68 Stat. 1019. Act of Oct. 17, 1976, Pub. L. No. 94-521, § 7(a), 90 Stat. 2461 (codified as amended 13 U.S.C. § 141). U.S. Const. art. I, § 9, cl. 4.

\textsuperscript{172} VII. That all freemen, of the age of twenty-one years, who have been inhabitants of any one county within the State twelve months immediately preceding the day of any election and possessed of a freehold within the same county of fifty acres of land for six months next before, and at the day of election, shall be entitled to vote for a member of the Senate.” “VIII. That all freemen of the age of twenty-one years, who have been inhabitants of any one county within this State twelve months immediately preceding the day of any election, and shall have paid public taxes shall be entitled to vote for members of the House of Commons for the county in which he resides.” N.C. Const. of 1776, arts. VII, VIII. Note the linkage to taxpayer, or even stricter status, that of a freeholder, to the right to participate in elections. “ART. IX. All male white inhabitants, of the age of twenty-one years, and possessed in his own right of ten pounds value, \textit{and liable to pay tax in this State}, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections for representatives, or any other officers, herein agreed to be chosen by the people at large; and every person having a right to vote at any election shall vote by ballot personally.” GA. CONST. of 1777, art. IX. (emphasis added.) The express qualification of \textit{taxpayer} for voting eligibility existed in the New Hampshire Constitution of 1784, the Pennsylvania Constitution of 1776, the North Carolina Constitution of 1776, and the Georgia Constitution of 1777. Qualifications for \textit{electors}, voters that is, for all thirteen original states vary and are listed in Willi Paul Adams’ Appendix: \textquoteleft{Property
(taxation) proportionately with the “Numbers” (computed populations) of the several States. 174

Before examining the legislative history of these sections and clauses, there is one more Article that directly re-enforces the apportionment clause. Article V provides: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution,…shall be valid…when ratified by the Legislatures of three fourths of the several States,…; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first175 and fourth Clauses in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”176 Article V provides for procedures that require super majority177


174 U.S. CONST. art. I, § 9, cl. 4.
175 U.S. CONST. art. I, § 9, cl. 1. Justice BARBOUR for the Majority: “…we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.” … “If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the states. … It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, &c. of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable paupers.” … “We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends;… That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive,” … “It is the duty of the state to protect its citizens…” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 132-33, 139, 141 (1837). (emphasis added.) “The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. As to paupers, it makes no difference by whose aid they are brought to the country.” CHAE CHAN PING v. UNITED STATES, 130 U.S. 581, 608 (1889).

176 U.S. CONST. art. V. Note the actual phrasing used: “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight…” U.S. CONST. art. V. (emphasis added.) The following phrasing was NOT chosen (absent the word “which”): “Provided that no Amendment may be made prior to the Year One thousand eight hundred and eight…” in such case, some additional phrasing could create broad application of the “1808” limitation. In addition, the following most clearly understood method of phrasing was NOT chosen either: “Provided that no Amendment shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article prior to the Year One thousand eight hundred and eight…” And finally, note the use of the word “may”
approval and ratification so as to permit changes (Amendments) to the Constitution. However, within Article V are explicit strict prohibitions placed upon certain areas that cannot be amended. It is worth noting that it is highly probable there are other elements of the Constitution that cannot be changed by amendment, even though they are not explicitly listed among the prohibitions of Article V.

The explicit prohibitions in Article V impact upon population, which is reflected in representation, and protect representation directly by way of the “equal Suffrage in the
Senate”\textsuperscript{184} requirement\textsuperscript{185}, and impact taxation\textsuperscript{186}, by way of protecting and preserving the apportionment clause.\textsuperscript{187} The existing relationships among various Articles, sections and clauses within the Constitution should now be clearer, and a proper examination of the Constitution as \textit{a whole document} is required to determine the genuine underlying structure it provides.\textsuperscript{188}

ii. Legislative History.

In an effort to better understand these relationships, and specifically the issues discussed above regarding representation, taxation, proportion and Article V, the analysis shall turn to an examination of the legislative history of the Federal Convention of 1787.\textsuperscript{189} First an examination and understanding of the legislative history of Article V is required before attempting to understand that historically most troubling phrase of Article V, “which may be made prior to the Year One thousand eight hundred and eight.”\textsuperscript{190} The origins of Article V clearly stem from the inflexibility of the Articles of Confederation, which required unanimity to accomplish any

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\item\textsuperscript{184} U.S. CONST. art. V.
\item\textsuperscript{185} “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and \textit{each Senator shall have one vote}.” U.S. CONST. art. I, § 3, cl. 1. (emphasis added.) The representation within the Senate maintains the State representation in equity.
\item\textsuperscript{186} “Representatives and direct Taxes shall be \textit{apportioned among the several States} which may be included within this Union, according to their respective \textit{Numbers}, which shall be determined by adding to the whole \textit{Number of free Persons}, including those bound to Service for a Term of Years, and excluding Indians not taxed, \textit{three-fifths of all other Persons.”} U.S. CONST. art. I, § 2, cl. 3. (emphasis added.)
\item\textsuperscript{187} “No Capitation, or other direct, Tax shall be laid, \textit{unless in Proportion to the Census or Enumeration} herein before directed to be taken.” U.S. CONST. art. I, § 9, cl. 4. (emphasis added.)
\item\textsuperscript{188} As for examining the Constitution as a whole document, Akhil Reed Amar wrote that there are, “questions \textit{obscured} by the clausebound approach that now dominates constitutional discourse.” AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xv (1998). (emphasis added.) U.S. CONST.
\item\textsuperscript{190} U.S. CONST. art. V.
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change at all.\footnote{And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; \textit{nor shall any alteration at any time hereafter be made in any of them}; unless such alteration be agreed to in a Congress of the United States, and be afterwards \textit{confirmed by the legislatures of every State}.} The proposed resolutions presented by Mr. Randolph as early as May 29, 1787 included provision for amendments, “13. Resd. that provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary, and that the assent of the National Legislature ought \textit{not} to be required thereto.”\footnote{1 The Records of the Federal Convention of 1787 22 (Max Farrand ed., 1937). (emphasis added.)} Mr. Randolph’s proposal respects the States’ independence and sovereignty to such an extent it permits amendment without the consent of the “National Legislature.”\footnote{1 The Records of the Federal Convention of 1787 33 (1987). (emphasis added.)} The Committee of Detail, \footnote{1 The Records of the Federal Convention of 1787 22 (Max Farrand ed., 1937).} presented, “Resolved That Provision ought to be made for the Amendment of the Articles of Union, whenever it shall seem necessary.”\footnote{The Committee of Detail proceedings ran from June 19, until July 23, 1787. 2 The Records of the Federal Convention of 1787 129 (Max Farrand ed., 1937).} The Committee of Detail, IV presented, “(An alteration may be effected in the articles of union, on the application of two thirds \textit{nine \{2/3d\} of the state legislatures \{by a Convn.\}) \{on appln. of 2/3ds of the State Legislatures to the Natl. Leg. they call a Convn. to revise or alter ye Articles of Union\}.”\footnote{2 The Records of the Federal Convention of 1787 148 (Max Farrand ed., 1937). (emphasis retained.)} Already restrictions on the amendment provision are appearing in Committee of Detail IV that were non existent in Committee of Detail I.\footnote{2 The Records of the Federal Convention of 1787 133 (Max Farrand ed., 1937).} This reflects the need to place restraints on changes to a compact of not insubstantial significance to independent and sovereign States. Committee of Detail, V simply placed the amendment issue within a brief list labeled “to be added” and provided only, “3. Qu. whether any Thing should be said as to the \textit{Amendment by the States}”.\footnote{2 The Records of the Federal Convention of 1787 152 (Max Farrand ed., 1937). (emphasis retained.)} However, Committee of detail, IX provided, “This Constitution ought to be amended whenever such amendment shall become necessary; and on the Application of (two thirds) the Legislatures of two thirds of the States of
the Union, the Legislature of the United States shall call a Convention for that purpose.”

Committee of Detail, IX requires super majority approval for amendment to the Constitution by the States, which demonstrates respect for State sovereignty and independence, and moreover respects the People by further requiring a Convention. Although Committee of Detail, IX appears to provide no explicit prohibitions or restrictions upon specific areas for amendment, within Committee of Detail, IX there is a provision mandating and linking proportionality:

“(Representation shall)

(Direct Taxation shall always be in Proportion to Representation in the House of Representatives.)”

“The proportions of direct Taxation shall be regulated by the whole Number of white and other free Citizens and Inhabitants, of every Age, Sex, and Condition, including those bound to Servitude for a Term of Years, and three fifths of all other Persons not comprehended in the foregoing Description;…” The Committee of Detail drafts demonstrate points of interest to the Framers as they were actually debating and drafting the Constitution, and later during the Federal Convention of 1787, more refined drafts were made under the Committee of Style, which concluded its business on September 10, 1787.

The Committee of Style presented a much more refined and detailed version of the Amendment provision for the Constitution. The Committee of Style presented an Article “XIX. The Legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall

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propose amendments to this Constitution which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States: Provided that no amendments which may be made prior to the year 1808. shall in any manner affect the 4th and 5th Sections of article the 7th."\(^{205}\) The Committee of Style of the Federal Convention provides the greatest clarity by examination of its Article XIX, for the determination of how and what the “1808” specifically relates to.\(^{206}\) The Committee of Style provides the following in “the 4th and 5th Sections of article the 7th.”\(^{207}\) Committee of Style, Article VII:

“Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State. The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 - but a tax or duty may be imposed on such importation not exceeding ten dollars for each person. Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige Vessels bound to or from any State to enter, clear, or pay duties in another.

And all duties, imposts, and excises, laid by the Legislature, shall be uniform throughout the United States.

\(^{205}\) 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 578 (Max Farrand ed., 1937). Notice the uncanny similarity to the final version of Article V of the Constitution. Phrases in italics replicate the substance of the Article XIX from the Committee of Style. “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V. (emphasis added.)


Sect. 5. No Capitation tax shall be laid, unless in proportion to the census herein before directed to be taken.”

Section 4 of “article the 7th” explicitly provides four distinct sentences that each create an independent and several restriction on legislation or regulation, and only one of those sentences, that pertaining to Migration or Importation is related to the period of time articulated by the phrase “prior to the year 1808.” Moreover, here is the only time, either in the Committee of Style draft or in the actual ratified Constitution, that a reference is made specifically to “the several States now existing” or “the States now existing” which much more likely than not, further limits this particular clause to States in existence on September 17, 1787 and are members of the Union defined by the Articles of Confederation. The provisions of the “Migration or Importation” clause are explicitly limited in time and geography until the year 1808 and to the States operating under the Articles of Confederation. Upon examination of the Committee of Style draft it is clear the three other sentences within Section 4 and Section 5 remain independent and thoroughly insulated from the phrase “prior to the year 1808.”

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208 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 571-72 (Max Farrand ed., 1937). Article I, section 9, clauses 1 and 4 provide: Retained phrases are in italics: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. CONST. art. I, § 9, cl. 1. (emphasis added.) Retained phrases are in italics: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 9, cl. 4. (emphasis added.)
211 U.S. CONST. art. I, § 9, cl. 1.
213 ARTICLES OF CONFEDERATION (U.S. 1781).
215 ARTICLES OF CONFEDERATION (U.S. 1781).
and Sections so as to obtain a document with seven Articles for the final Constitution.217 The Committee of Style’s final report provided for Amendments in its Article “V. The Congress, whenever two-thirds of both houses shall deem necessary, or on application of two-thirds of the legislatures of the several States, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article .”218 Take note that in the Committee of Style’s final report version, its Article V retained all of the language, (except for altering the plural “amendments” to “amendment”) and blanks were left, where numbers had been in the previous Article XIX version, so as to accommodate the new numbering system.219 All of the provisions provided for in Sections 4 and 5 of Article 7, as referred to in the “Article XIX” Amendment version, were placed within Sections 8 and 9 of Article I, of the final report “Article V” Amendment version.220 The Federal Convention closed on Monday, September 17, 1787221, but nonetheless, not until Saturday, September 15, 1787 do the references to “…{1 & 4 clauses in the 9.} section of article I ” appear to fill in the blanks left in the Committee of Style’s final report Article V.222 Discussion, motions, and limited debate with respect to Article V continued on September 15, and eventually “Mr. Govr Morris [of Pennsylvania] moved as to annex a further proviso – ‘that no State, without its Consent shall be deprived of its equal Suffrage in the Senate’ That

motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question saying no.” And at this point the elements of the final version of Article V, which provides for the possibility of Amendments to the Constitution, were all finally in place. The preservation of “equal Suffrage in the Senate” by explicitly prohibiting it from ever being amended is strong evidence for the Congress’ and the Constitution’s respect for the independence and sovereignty of the several States. As for the matter of prohibiting amendment of the fourth Clause “in the Ninth Section of the first Article” it is now clear from examination of the process in the Committee of Detail and the legislative progress through the Committee of Style that the phrase “prior to the Year One thousand one hundred and eight” is strictly clause specific and does not impact the prohibition to amend the fourth clause “in the Ninth Section of the first Article” in any time related manner or in any manner at all. The analysis reveals that there is a strict prohibition on altering the proportional relationship that must exist between representation in the House of Representatives, the allocation of burden sharing (taxation), and the determination of “Numbers” from the census or enumeration of the population.

iii. The De Jure De Facto Gap: Amendment XVI.

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225 U.S. CONST. art. I, § 3, cl. 1. U.S. CONST. art. V.
226 U.S. CONST. art. I, § 9, cl. 4. U.S. CONST. art. V.
228 U.S. CONST. art. I, § 2, cl. 3. U.S. CONST. art. I, § 9, cl. 4. U.S. CONST. art. V. “An Act to lay and collect a direct tax within the United States. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a direct tax of two millions of dollars shall be, and hereby is laid upon the United States, and apportioned to the states respectively, in the manner following: - To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills. To the state of Massachusetts, two hundred and sixty thousand four hundred and thirty-five dollars, thirty-one cents and two mills. To the state of Rhode Island,…” An Act to lay and collect a direct tax within the United States. Act of July 14, 1798, 2 Stat., ch. 75 (1798). (italics retained.) (emphasis added.)
The existence of and the text of the Sixteenth Amendment contradict what the legislative history of the Constitution in the Federal Convention reveals.\(^\text{229}\) The Sixteenth Amendment provides: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”\(^\text{230}\) After having engaged in the preceding analysis, it is apparent the amendment\(^\text{231}\) does affect: 1) the underlying structure linking representation, taxation\(^\text{232}\), and population\(^\text{233}\); 2) the fourth clause\(^\text{234}\) “in the Ninth Section of the first Article”\(^\text{235}\), and 3) the self


\(^{230}\) U.S. Const., amend. XVI.

\(^{231}\) U.S. Const., amend. XVI. One conclusion of this paper is that the “Sixteenth Amendment” cannot exist as written and in fact cannot even be sent to the States for ratification under the Constitution, since it contravenes fundamental structural elements of the Constitution, as well as several explicit prohibitions to taxation without apportionment among the several States, and the explicit prohibition that exists in Article V. Simply put, the Sixteenth Amendment is Unconstitutional. U.S. Const. art. I, § 2, cl. 3. U.S. Const. art. I, § 9, cl. 4. U.S. Const. art. V. U.S. Const. amend. XVI.

\(^{232}\) Note the themes in early jurisprudence on taxation from Chief Justice MARSHALL: “That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is concurrently exercised by the two governments: are truths which have never been denied.” … “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another,… But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. … To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.” McCulloch v. MARYLAND, 17 U.S. (4 Wheat.) 316, 425, 431 (1819). (emphasis added.) (CAPITALS retained.) These issues were predicted in 1787: “A free republic will never keep a standing army to execute its laws. It must depend on the support of its citizens. But when a government is to receive its support from the aid of the citizens, it must be so constructed as to have the confidence, respect, and affection of the people. … The body of the people being attached, the government will always be sufficient to support and execute its laws, and to operate upon the fears of any faction which may be opposed to it, not only to prevent an opposition to the execution of the laws themselves, but also to compel the most of them to aid the magistrate; but the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States, as necessary for these purposes.” The Anti-Federalist No. 17 (Robert Yates). (emphasis added.)


\(^{234}\) An example of one of the earliest Supreme Court tax cases and the Court’s jurisprudence regarding the: Revenue Act of Sept. 8, 1916, ch. 463, § 2(a), 39 Stat. 756. “The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. … A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.” Eisner v. MACOMBER, 252 U.S. 189, 205-06, (1920). (emphasis added.) “To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative
regulating mechanism that prevents a State from claiming a greater population so as to achieve greater influence within the House of Representatives without incurring the requisite allocation of burden sharing (taxation). Since the “Amendment” violates the plain text of the Constitution, offends the fundamental structure of the “National Legislature”, and conflicts with the true meaning derived from the legislative history, it cannot exist under this Constitution and is simply unconstitutional.

Alternative methods for the proportional allocation of burden sharing, (taxation), and representation that were actually adopted or considered included: property, wealth,

process and to frustrate the announced will of the people.” A. H. PHILLIPS, INC. v. WALLING, 324 U.S. 490, 493 (1945). (emphasis added.) “It is quite true…that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.” HELVERING v. GREGORY, 69 F.2d 809, 810-11, (1934). “To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.” GREGORY v. HELVERING, 293 U.S. 465, 470, (1935).

U.S. CONST. art. I, § 9, cl. 4. U.S. CONST. art. V.
236 THE FEDERALIST No. 54 (Alexander Hamilton).
237 U.S. CONST. art. V. U.S. CONST. art. I, § 9, cl. 4. U.S. CONST. art. I, § 2, cl. 3. THE FEDERALIST No. 54 (Alexander Hamilton). 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 565-80, 590-603 (Max Farrand ed., 1937). It is important to note that “Sixteenth Amendment” need not be “repealed” since it cannot exist as an “unconstitutional creation” under this Constitution. It is noteworthy that since many people actually make a living off of the complexity of the tax laws in the United States, this proposition will not be well received by those calling themselves experts. Tax Reform Act of 1986. I.R.C. However, if each of the States must return to its proper role as a revenue agent, then there will be not only greater local control of the revenue system by the People, but also up to fifty revenue agencies and fifty State revenue codes for those professionals to service, not to mention competition.

“…in the prescient language of the New York Supreme Court, it meant that ‘the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry.’” Palmer v. Mulligan, 3 Cai. R. 307, 314 (N.Y. Sup. Ct. 1805). MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 43, 279 (1977). Taxes will still exist, and taxes will not simply go away, they will simply become Constitutional when the “Sixteenth Amendment” is finally abandoned and the revenue will be paid to the appropriate Party, that being the several States, who will forward funds to the National fisc in the appropriate apportioned amounts. The directly damaged parties here are the States, the State Legislatures, and the people of the States, rather than individual taxpayers, who nonetheless will have to pay taxes to their States, rather than directly to the National Treasury.

“...All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed by the United States in Congress assembled.” ARTICLES OF CONFEDERATION § VIII (U.S. 1781). (emphasis added.)
numbers\textsuperscript{240}, and equity\textsuperscript{241}. The debates of the Federal Convention of 1787 considered the proportional allocation of representation and taxation\textsuperscript{242} over an extended period of time, and although both population\textsuperscript{243} and equity\textsuperscript{244} were selected from among the four methods and agreed upon for representation methods, and only population\textsuperscript{245} was to control for allocation of burden sharing, \textit{no where} in the debates did anyone ever propose, move, or argue that allocation of burden sharing should be “without regard”\textsuperscript{246} to any measure whatsoever.\textsuperscript{247} Even if one were to argue that a change in the allocation of burden sharing as related to representation could be made under this Constitution, there were only four alternative measure types ever considered by the Colonists and the Framers, and “none of the above” was never a valid consideration. It is simply not plausible for the “Sixteenth Amendment” to be a Constitutional element.\textsuperscript{248}

The respect shown for State independence and sovereignty by the structural and proportional mechanisms linking population, representation and taxation, as well as the

\textsuperscript{239} "The 1754 Albany Plan of Union had called for the establishment, by act of Parliament, of ‘one general Government’ for the colonies… …the initial allocation of seats in this forty-eight-member body gives an indication of the population and wealth then prevailing… Subsequent allocations were to be based on the moneys that each colony contributed, via taxation by the Grand Council, to the general treasury.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 80 (2003). “That after the first three years, when the proportion of money arising out of each Colony to the general treasury can be known, the number of members to be chosen for each Colony shall, from time to time, in all ensuing elections, be regulated by that proportion, yet so as that the number to be chosen by any one Province be not more than seven, nor less than two.” THE ALBANY PLAN OF UNION § V (U.S. 1754). (emphasis added.) “3. A repn. according to Numbers or Wealth” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 265 (Max Farrand ed., 1937).


\textsuperscript{244} U.S. CONST. art. I, § 3, cl. 3. U.S. CONST. art. V.


\textsuperscript{246} U.S. CONST. amend. XVI.


protective measures to ensure these mechanisms shall not be modified in the future, demonstrate respect for each and every State among the several States, as well as by the Congress and the Constitution itself. Implications of the established relationships between representation and revenue will be addressed in the Constitutional Interest Analysis which follows.

iv. Present Impact of Constitutional Interest Analysis.

Representation and Revenue clearly point to the underlying principles of: No Taxation without Representation and No shifting of burden sharing onto other States, which demonstrates the need for respect among the States for each other. The States as sovereigns have both powers and obligations within the Constitution’s revenue framework, and the States are accountable to contribute revenue for the representation that each State has in Congress. Accountability is a key aspect to sovereignty in the national revenue structure. Sovereignty does not only convey power, but it also incurs obligations, or the sovereign is not sustainable.

It is critical for the States to accept the accountability aspect of sovereignty within the Constitutional framework, so that they establish revenue systems that generate enough revenue for their own State government operations and services, a well as enough to contribute to the United States Treasury to conform with their level of population, and representation in Congress. States do have the power to issue Debt (bonds) as an alternative method of raising

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249 U.S. CONST.
251 “That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is concurrently exercised by the two governments: are truths which have never been denied.” … “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another,… But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. … To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 425, 431 (1819). (emphasis added.) (CAPITALS retained.)
252 U.S. CONST. art. I, § 2, cl. 3. “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;”… U.S. CONST. art. I, § 9, cl. 7. (emphasis added.)
funds, but over time debt must eventually be paid down with revenue collected, or paid down through the power of continuous inflation, whereas the real value of debt actually decreases in terms of the adjustments to nominal value over time. This latter inflation based method of public debt repayment was experienced in England and the Framers viewed it as undesirable. Excess inflation is the most regressive tax a sovereign can place on its citizens and inhabitants, for excess inflation indirectly, but harshly taxes money that is held in savings, and hopefully available for investment by others. The mechanism of placing the power to issue currency in the national government, and completely separating it from the States’ powers of revenue collection and public debt issue, is a mechanism the Framers established so as to prevent the

253 "By 1719 the public debt was more than 50 million [British pounds]. That meant a perpetual tax burden for interest payments, but it also meant that 50 million [British pounds] in absolutely liquid property had been brought into existence." FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 118 (1985). The Legal Tender Cases included: KNOX v. LEE, 79 U.S. (12 Wall.) 457 (1871). JULLIARD v. GREENMAN, 110 U.S. 421 (1884). The ‘Gold Clause Cases’ included: UNITED STATES v. BANKERS TRUST CO., 294 U.S. 240 (1935). NORTZ v. UNITED STATES, 294 U.S. 317 (1935). PERRY v. UNITED STATES, 294 U.S. 330 (1935). It is critical to note the requirement for gold as stated by the First Congress from the Collection Act of 1789: “Sect. 30. And be it further enacted, That the duties and fees to be collected by virtue of this act, shall be received in gold and silver coin only, at the following rates, that is to say, the gold coins of France, England, Spain and Portugal, and all other gold coin of equal fineness, at eighty-nine cents for every penny weight. The Mexican dollar at one hundred cents; the crown of France at one dollar and eleven cents; the crown of England at one dollar and eleven cents; and all silver coins of equal fineness at one dollar and eleven cents per ounce.” “Sect. 18. And be it further enacted, That all foreign coins and currency shall be estimated according to the following rates: each pound sterling of Great Britain, at four dollars forty-four cents; each livre tournois of France, at eighteen cents and a half; each florin or guilder of the United Netherlands, at thirty-nine cents; each mark banco of Hamburgh, at thirty-three cents and one third; each rix dollar of Denmark, at one hundred cents; each rix dollar of Sweden, at one hundred cents; each rouble of Russia, at one hundred cents; each real plate of Spain, at ten cents; each milree of Portugal, at one dollar and twenty-four cents; each pound sterling of Ireland, at four dollars ten cents; each tale of China, at one dollar forty-eight cents; each rupee of Bengal, at fifty-five cents and a half; and all other denominations of money in value as near as may be to the said rates; and the invoices of all importations shall be made out in the currency of the place or country from whence the importation shall be made, and not otherwise.” An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States. Act of July 31, 1789, 1 Stat., ch. 5 (1789). (emphasis added.) (emphasis retained.)

254 "Advanced as his ideas were in many respects, however, [Adam] Smith lacked [Sir James] Steuart’s grasp of the principles of public finance. Accordingly, Smith thought capital could be accumulated only by frugality and failed to comprehend that by far the most potent source of capital formation was the public debt. The oversight, to be sure, is understandable. He had seen the public debt grow to outsized proportions (it had reached 129 million [British pounds] by 1775) and had seen taxes grow correspondingly. He was convinced that the public debt would ultimately bankrupt the nation if drastic means were not soon adopted to reduce it, or at least to check its expansion. Too, he had observed that many of the great holders of the public funds dissipated their earnings in gambling, corrupt political activity, and luxurious consumption.” FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 127 (1985).

255 U.S. CONST. art. I, § 8, cls. 5, 6.
States from simply printing currency and thereby devaluing money, which hinders economic stability. The federal government would hold the power of monetary policy entirely, and the States are denied that power, but were given the power of fiscal policy, and are accountable to maintain a revenue system that meets the needs of State expenditures as well as the need for contribution to the national fisc.

Once States abdicate their accountability for their own revenue obligations, they in effect become beggars, who are overly dependent upon the national Treasury. This excess dependency on continuous funding from the national Treasury interferes with the interrelationships which are necessary for a proper functioning of the revenue and financial system designed and built-into the Constitutional framework. Dependency by the States upon the national Treasury on a continuous basis also causes burden shifting onto other States, which is contrary to an underlying principle of the Revenue and Representation provisions of the Constitution.

The power to tax, whether with respect to the States or the United States, has limits with respect to geography and limits with respect to population (excluding Indians). Tax may be levied upon the geographical limits of the State and upon the citizens and inhabitants of the

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256 U.S. CONST. art. I, § 8, cls. 1, 2, 5, 6.
258 U.S. CONST. art. I, § 2, cl. 3.
263 U.S. CONST. art. I, § 2, cl. 3.
State, even though an individual may not continuously reside within the State. The underlying principle of No Taxation without Representation, may also place temporal limits upon the power to tax. It is a quite plausible argument that excessive reliance upon long-term debt to raise funds for continuous expenditures places taxes upon future populations, which are presently legal infants\textsuperscript{264} or possibly not yet conceived and are not being represented by the Congress at present, which is taxing them in the future by not raising sufficient funds through current taxation upon current represented populations. Based upon the underlying principles of No Taxation without Representation and No burden shifting, it would appear that No \textit{temporal} taxation without representation would be permitted either, and the practice of excess continuous deficits leading to a continuous and growing debt would be forbidden.\textsuperscript{265} This is simply temporal burden shifting. Based upon the terms served by representatives, senators, and the executive, a debt that could be repaid within two years might be justified, and a debt that could be repaid within one Presidential term, or four years, might be defendable, but any cumulative debt which would not be repaid in full beyond the term of all sitting Legislators, which is the six year term for Senators, could be entirely improper and clearly a violation of the underlying principle.\textsuperscript{266} The underlying principle prohibits continuous deficit spending, and prohibits a cumulative debt that exceeds a six-year repayment term. This temporal burden shifting would be a violation of the underlying principle of No Taxation without Representation, and could make either continuous deficits or excess cumulative debt that exceed a certain repayment term of years entirely unconstitutional.


The power to raise revenue is a critical power for a sovereign to possess in order to sustain itself.267 And, a State could choose a revenue system that did not even require payments

267 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425, 431 (1819). The Power of taxation is extensive and absolute to the sovereign, and yet, notwithstanding this vast power, it yields to the individual’s rights, to include the right to keep and bear arms, which is explicitly stated in the Direct Tax Act of 1798 (see the Statute excerpts and select Amendments following the Opinion excerpts.) Chief Justice MARSHALL on taxation: “Although, among the enumerated powers of government, we do not find the word ‘bank’ or ‘incorporation,’ we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended [408] that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-08 (1819). (emphasis added.) “The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819). (emphasis added.) “That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819). (emphasis added.) “That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819). (emphasis added.) “It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819). (emphasis added.) “The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard then against its abuse. *** Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, [429] for the benefit of all -- and upon theory, should be subjected to that government only which belongs to all. … It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819). (emphasis added.) “All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819). (emphasis added.) “We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819). (emphasis added.) “That the power to tax involves the power to destroy; that the power to destroy may
from individual citizens for needed funds, if for instance, the State had natural resources, such as gold or oil, and retained or took possession of the assets as a sovereign power. The State could simply sell the assets in the marketplace for the needed funds. However, just having the power to defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government,” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 431 (1819). (emphasis added.) “The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 432 (1819). (emphasis added.) Note that the tax Act is laid upon and apportioned to the States, there existence of the collectors of the internal revenues of the United States, and especially what property the tax collector is prohibited from taking away from delinquent tax payers as provided in the Direct Tax Act of 1798, STATUTE excerpts: “An Act to lay and collect a direct tax within the United States. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a direct tax of two millions of dollars shall be, and hereby is laid upon the United States, and apportioned to the states respectively, in the manner following: - To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills. To the state of Massachusetts, two hundred and sixty thousand four hundred and thirty-five dollars, thirty-one cents and two mills. To the state of Rhode Island,....” ... “SEC. 2. And be it further enacted, That the said tax shall be collected by the supervisors, inspectors and collectors of the internal revenues of the United States, under the direction of the Secretary of the Treasury, and pursuant to such regulations as he shall establish; and shall be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act, intituled [sic] ‘An Act to provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States,’ and in the following manner:” ... “SEC. 9. And be it further enacted, That each of the said collectors shall, immediately after receiving his collection list, advertise, by notifications, to be posted up in at least four public places in each collection district, that the said tax has become due and payable and the times and places at which he will attend to receive the same; and, in respect to persons who shall not attend, according to such notifications, it shall be the duty of each collector to apply once at their respective dwellings, within such district, and there demand the taxes payable by such persons; and if the said taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for such collector to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent as aforesaid, with a commission of eight per centum upon the said taxes, to and for the use of such collector: Provided, that it shall not be lawful to make distress of the tools or implements of a trade or profession, beasts of the plough necessary for the cultivation of improved lands, arms, or the household utensils, or apparel necessary for a family.” An Act to lay and collect a direct tax within the United States. Act of July 14, 1798, 2 Stat., ch. 75 (1798). (italics retained.) (emphasis added.) See also DISTRICT OF COLUMBIA v. HELLER, 128 S. Ct. 2783 (2008). Comment: Take note that tools of the trade, beasts of burden, arms, household utensils, and clothing are all placed together in one clause of necessary personal property that even the United States tax collector is prohibited from using to satisfy overdue and delinquent taxes. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Here, in the Direct Tax Act of 1798 is an explicit example that the term “the people” clearly confers individual rights in addition to any rights retained by the people as a community. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. In the Act, Congress has made clear that the right to keep and bear arms is explicitly provided for as an individual right, (in addition to the right of the people as a community, acting as a Militia), within the Direct Tax Act of 1798, and shall not be infringed to the extent that even the absolute Power to Tax must yield to the individual’s rights. The Direct Tax Act is an explicit expression enacted by the Congress which demonstrates that Rights supersede Powers, and that Rights (of individuals and the people as a community) are to be construed broadly, while Powers (granted to the government) are to be construed narrowly, and that even great Sovereign Powers, such as Taxation, must yield to an Individual’s Rights.
extract revenue does actually belong to some organizations, which are not sovereigns. These
organizations conduct extortion operations, and although they may appear to operate for years
with impunity, they do not possess a claim to right of immunity for their actions, and they are not
sovereigns. Power to tax is essential to sovereignty, but it does not make one a sovereign on its
own. Both the United States, and the States are vested with the power to tax.268

The method of raising revenue for several of the largest federal programs is the Federal
Income Tax, which is based upon the Sixteenth Amendment.269 This revenue raising provision is
contrary to the underlying principle of No Taxation without Representation. Specific examples
of the product of this revenue system have been the creation and overgrowth of large expenditure
programs such as Medicaid, Medicare, and Social Security.270 All of these programs and services
are large and place all of their risk in one large national pool. The health care and social service
risks could be diversified and dispersed among fifty different State risk pools, if the revenue
system in practice actually respected the underlying principle of No Taxation without
Representation. The individual State risk pools could be more closely designed and aligned with
the economic and population characteristics of the individual States to serve their industries and
populations best. It is quite possible these smaller risk pools could go under-funded or unfunded
at times, but the system would only risk failure of at most one State at a time and effective steps
to protect that one State in the event of failure could be taken. Alternatively, the revenue system
as originally designed would provide greater financial stability and reduced risk through

268 “That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by
the grant of a similar power to the government of the Union; that it is concurrently exercised by the two
governments: are truths which have never been denied.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 425 (1819). (emphasis added.)
901).
diversification into fifty (or more) State revenue and corresponding expenditure programs. Having one national risk pool increases the risk of total failure, and that could be catastrophic to the entire nation.\textsuperscript{271} There would be added strength in separating the revenue and expenditure budgeting functions, which would be controlled by the States, from the currency and monetary policy functions\textsuperscript{272}, which are controlled by the National government. Respecting State sovereignty and the underlying revenue principles of No Taxation without Representation, and No burden shifting upon another State, provided distinct advantages that have recently been abandoned.\textsuperscript{273} The States have been denied some powers, just as the United States has been denied some powers, but there are advantages that exist by design in denying certain powers associated with sovereignty to the States, and in the allocation and denial of some powers to the Federal and some to the State governments. The underlying principles of No Taxation without Representation, and No burden shifting, as well as the particular revenue provisions within the Constitution point to strong respect for State sovereignty. Both the United States and the several States retain the power to tax, and both are sovereigns within the system. State sovereignty is

\textsuperscript{271} The size of a republic getting too large was of great concern during the period the Framers drafted the Constitution. “If respect is to be paid to the opinion of the greatest and wisest men who have ever thought or wrote on the science of government, we shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States. Among the many illustrious authorities which might be produced to this point, I shall content myself with quoting only two. The one is the baron de l’\textit{MONTESQUIEU, SPIRIT OF LAWS}, ch. xvi, vol. I [bk. VIII] (1752). ‘It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.’” \textit{THE ANTI-FEDERALIST NO. 17} (Robert Yates).

\textsuperscript{272} \textit{U.S. CONST.} art. I, § 8, cls. 1, 2, 5, 6.

also strongly expressed within the “Commerce Clause” and the examination and analysis that follows in Section IV will focus on that aspect of Article I.274

IV. Commerce, Navigation & Regulation.

What are the underlying principles behind the commerce and navigation provisions of the Constitution? No Protectionism within the Union, Free and open channels of Commerce, and a De-Regulation of Commerce.275 A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the complete text of what is commonly known as the Commerce Clause.276

i. Powers and Definitions.

The Constitution grants authority and powers to Congress in several Articles277, and some of the salient powers are provided for in Article I, section 8, and the analysis will begin with the first few clauses of section 8.278 Article I, section 8, clause 3 provides: “The Congress shall have Power”279 “To regulate commerce280 with foreign nations281, and among the several States, and with the Indian tribes.”282 The simple structure of the sentences in section 8 utilizes the

276 U.S. CONST. art. I, § 8, cl. 3.
279 U.S. CONST. art. I, § 8, cl. 1.
282 U.S. CONST. art. I, § 8, cl. 3.
introductory phrase found in clause 1 for clause 3, as well as all clauses in the section. Full understanding of clause 3, will be enhanced by first introducing section 8, clause 1, which provides: “The Congress shall have Power\textsuperscript{284} To lay and collect Taxes\textsuperscript{285}, Duties\textsuperscript{286}, Imposts and Excises, to pay the Debts and provide for the Common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”\textsuperscript{287} In section III of this paper, above, was a discussion of the allocation method of taxes, here in section 8, clause 1 there are more details on the devices that may be employed for obtaining Revenue.\textsuperscript{288} The definitions of Duties, Imposts and Excises are of assistance and as follows: “Duties. In its most usual signification this word is the synonym of impost or customs;”\textsuperscript{289} “Imposts. Taxes, duties, or impositions levied for divers reasons. ‘Impost is a tax received by the prince for such merchandises as are brought into any haven within his dominions from foreign nations. It may in some sort be distinguished from customs, because customs are rather that profit the prince maketh of wares shipped out; yet they are frequently confounded;”\textsuperscript{290} “Excise. An inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale. ‘An excise has been defined as meaning tribute, custom, tax, tollage, or assessment, a fixed absolute and direct charge laid on merchandise, products, or commodities without any regard to amount of property belonging to those on whom

\textsuperscript{284} “Power. The right, ability, or faculty of doing something.” BLACK’S LAW DICTIONARY 1332 (4th ed. 1951).
\textsuperscript{287} U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{288} U.S. CONST. art. I, § 8, cl. 1. “Tax. To impose a tax; to enact or declare that a pecuniary contribution shall be made by the persons liable, for the support of the government.” BLACK’S LAW DICTIONARY 1628 (4th ed. 1951).
\textsuperscript{289} BLACK’S LAW DICTIONARY 595 (4th ed. 1951).
\textsuperscript{290} BLACK’S LAW DICTIONARY 889 (4th ed. 1951).
it may fall…”291 The definitions are all clearly inter-related, as ‘Duties’ includes “imposts or customs”, and ‘Imposts’ includes “Taxes, duties, or impositions” (and is “distinguished from customs” because customs is based on “wares shipped out”), and Excises includes “imposition,” “custom,” and “tax.”292 The definitions of these terms may seem somewhat circular, but they all involve the aspects of collecting revenue from the flow of “merchandise, products, and commodities293” in the course of trade294 between sovereigns295, or as commonly expressed, “international trade.” These powers granted to Congress in section 8, clause 1, are pertinent to the Union acting as a whole and interacting with other sovereigns engaging in the intercourse of


293 Terms used for ‘goods’ in trade and commerce appear in historical Acts: “no goods…of Europe…brought into this Commonwealth…except only such foreign vessels as do truly and properly belong to the people of that place, of which the said goods are the growth, production or manufacture,….” THE NAVIGATION ACT para. 2 (Eng. 1651). (emphasis added.) “that no goods…of foreign growth, production or manufacture…are to be brought into this Commonwealth…but only from those of their said growth, production, or manufacture…” THE NAVIGATION ACT para. 3 (Eng. 1651). (emphasis added.) “that no goods or commodities whatsoever, of the growth, production or manufacture of Africa, Asia, or America, or any part thereof,…be imported into England,… but….” THE NAVIGATION ACT § III (Eng. 1660). (emphasis added.) “…commodities… commodities in specie…” QUALIFICATION OF THE NAVIGATION Act (Eng. 1660). (emphasis added.) “no commodity of the growth, production, or manufacture of…” THE NAVIGATION ACT § IV (Eng. 1663). (emphasis added.) “no goods or merchandises whatsoever shall be imported into, or exported out of,…” THE NAVIGATION ACT § II (Eng. 1696). (emphasis added.) “That from and after the first day of December next [1774], we will not import, into British America, from Great-Britain or Ireland, any goods, wares, or merchandise whatsoever, or from any other place, any such goods, wares, or merchandise, as shall have been exported from Great-Britain or Ireland…” THE ARTICLES OF ASSOCIATION § II (U.S. 1774). (emphasis added.) Here, the Court addresses both ‘goods’ and ‘commerce’: “Now it is difficult to perceive what analogy there can be between a case where the right of the state was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not;…”…They [persons] are not the subject of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods.” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 136-37, (1837). (emphasis added.)


295 “Sovereign. A person, body, or state in which independent and supreme authority is vested;…” BLACK’S LAW DICTIONARY 1568 (4th ed. 1951). (emphasis added.)
international commerce. Aspects of trade and commerce among sovereigns are also provided for in section 8, clause 3, “Congress shall have Power” to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” “Commerce with ‘foreign nations’” is clearly commerce between the Union and other sovereigns, and as such, is by definition commercial intercourse between two sovereigns. “Commerce with the Indian tribes” is clearly commerce between the Union and the Indians, a body politic that had already been recognized as a sovereign residing within the geographical area of the Union, described as the Six Nations, and as such is distinctly commercial intercourse between sovereigns. Since all three phrases, “with foreign nations,” “among the several States,” and “with the Indian tribes,” are all within the same clause, it is proper to respect and retain the ‘trade among sovereigns’ aspect with regard to the other two phrases of the clause. The phrase uses the word “States”.

296 “That the Acts of Trade and Navigation imposed burdens, even onerous burdens, on the colonies was admitted by both government and opposition in the parliamentary debate over the American question. … The reforms reflected in the extension of Vice-Admiralty jurisdiction in 1764 and the creation of an American Board of Customs Commissioners in 1767 proceeded from that recognition. The opposition, too, shared the view that the colony trade was responsible for British wealth and power…” “The perception had formed even before the crisis brought on by the Stamp Act; the repeal of that measure simply confirmed the lesson in their eyes. ‘Elevated with the advantage they had gained,’ wrote the first distinguished historian of the Revolution, David Ramsey, ‘from that day forward, instead of feeling themselves dependent on Great Britain, they conceived that, in respect to commerce, she was dependent on them. It inspired them with such ideas of the importance of their trade, that they considered the Mother Country to be brought under greater obligations to them, for purchasing her manufactures, than they were to her for protection and the administration of civil government.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 75, 76 (2003). (emphasis added.) THE NAVIGATION ACT para. 1 (Eng. 1651). THE NAVIGATION ACT (Eng. 1660). “and for offences committed against any other act or acts of parliament relating to the trade or revenues of the said colonies or plantations; shall and may be prosecuted, sued for, and recovered, or in any court of admiralty, in the respective colony or plantation where the offence shall be committed, or in any court of vice admiralty appointed…” THE STAMP ACT § LVII (Eng. 1765). (emphasis added.) THE TOWNSHEND ACT (Eng. 1767). NEW ENGLAND RESTRAINING ACT (Eng. 1775). THE AMERICAN PROHIBITORY ACT (Eng. 1775).

297 U.S. CONST. art. I, § 8, cl. 1.
298 U.S. CONST. art. I, § 8, cl. 3.
299 U.S. CONST. art. I, § 8, cl. 3.
300 Regulating trade with the Indians was addressed and proposed by Benjamin Franklin in 1754. “11. That they make such laws as they judge necessary for regulating all Indian trade.” THE ALBANY PLAN OF UNION § XI (U.S. 1754).
301 “The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:” Treaty with Six Nations, Oct. 22, 1784, U.S.- Six Nations. U.S. CONST. art. I, § 8, cl. 3.
302 U.S. CONST. art. I, § 8, cl. 3. Although some opinions have been utilized to support a broad view of Congress powers under the “Commerce Clause”, there are also opinions that support a narrower view. Contrary to the
and the word “several”, which were both discussed and defined in the preceding analysis of Sections II and III.\footnote{BLACK’S LAW DICTIONARY 1540, 1578 (4th ed. 1951).} The word “among” is defined as analogous to ‘between’ when the numbers involved are greater than two.\footnote{BLACK’S LAW DICTIONARY 108 (4th ed. 1951).} From the Constitutional text itself, it is not incongruous to respect the ‘trade and commerce among sovereigns’ aspect of the “Commerce Clause” with regards to all three phrases.\footnote{“The Congress shall have Power” “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;” U.S. CONST. art. I, § 8, cl. 1. U.S. CONST. art. I, § 8, cl. 3. (emphasis added.)} The Framers concern for the regulation of commerce as is currently understood to be “international trade and commerce” is explicitly articulated in The

proposition of this thesis, the “Commerce Clause” has been interpreted by the Court in extremely broad and far reaching terms: “…the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon…” GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824). NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Recently some limits have been placed on the “Commerce Clause.” United States v. Lopez, 514 U.S. 549 (1995). United States v. Morrison, 529 U.S. 598 (2000). The Court has held a broad view of Congressional powers emanating from the “Commerce Clause” and has shown deference with respect to Congressional legislation. GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1 (1824). NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316 (1819). The tautology from the Court in 1819, in support of deference to the Congress is decidedly in conflict with opinions both before and after 1819: “That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 413 (1819). Opinions from the Court with a narrower view of Congressional powers are numerous: “The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it…” MARBURY v. MADISON, 5 U.S. (1 Cranch) 137, 176-77, (1803). (emphasis added.) “This government is acknowledged by all to be one of enumerated powers.” … “If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action.” … “The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any State to the contrary notwithstanding.'” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 405-06 (1819). (emphasis added.) “We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States.” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 139 (1837). (emphasis added.) In an 1805 opinion where the Court found it did NOT have appellate jurisdiction over one of the justices of the peace for the county of Washington (district of Columbia), the Court also held a narrow view of powers. “But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.” UNITED STATES v. MORE, 7 U.S. (3 Cranch) 159, 173 (1805).
Articles of Association of October 20, 1774 as well as in the Federal Convention of 1787 and follows next.

ii. Legislative History.

The Articles of Association established an effective trade embargo against Great-Britain, in response to the effects of the Navigation Acts of 1651 and 1660. The Articles of Association declare, “We, his majesty’s most loyal subjects, the delegates of the several colonies of… To obtain redress of these grievances, which threaten destruction to the lives liberty, and property of his majesty’s subjects, in North-America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceful measure…” The first section of the Articles indicates the primary target of the Colonists embargo and provides: “1. That from and after the first day of December next, we will not import, into British America, from Great-Britain or Ireland, any goods, wares, or merchandise whatsoever, or from any other place, any such goods, wares, or merchandise, as shall have been exported from Great-Britain or Ireland; nor will we, after that day, import any East-India tea from any part of the world; nor any molasses, syrups, paneles, coffee, or pimento, from the British plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign indigo.”

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306 THE ARTICLES OF ASSOCIATION (U.S. 1774).
308 THE ARTICLES OF ASSOCIATION (U.S. 1774).
310 THE ARTICLES OF ASSOCIATION pmbl. (U.S. 1774).
311 “no goods…of Europe…brought into this Commonwealth…except only such foreign vessels as do truly and properly belong to the people of that place, of which the said goods are the growth, production or manufacture….” THE NAVIGATION ACT para. 2 (Eng. 1651). (emphasis added.)
312 THE ARTICLES OF ASSOCIATION § I (U.S. 1774). It is important to note the Articles continue on for fourteen sections, and that section 2 declared an end to Colonial slave trade, and provides: “2. We will neither import nor purchase, any slave imported after the first day of December next; after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.” THE ARTICLES OF ASSOCIATION § II (U.S. 1774). Note that twelve colonies, to include Maryland, Virginia, North Carolina, and South Carolina were parties to the Articles of
Commerce and the Navigation Acts are linked within the Committee of Detail, IV of the Federal Convention of 1787, which enumerated “the legislative powers”313 to include:

“5. To regulate commerce {both foreign & domestic}

2. {no State to lay a duty on imports - }
Exceptions
1. no Duty on exports.
2. no prohibition on (such) {ye} Importations of {such} inhabitants {or People as the sevl. States think proper to admit}
3. no duties by way of such prohibition.

Restrictions
1. A navigation act shall not be passed, but with the consent of (eleven states) {2/3d. of the Members present of} the senate and (10 in) {the like No. of} the house of representatives.
(2. Nor shall any other regulation – and this rule shall prevail, whersoever the subject shall occur in any act.)
(3. the lawful territory To make treaties of commerce (qu: as to senate) Under the foregoing restrictions)”314

From the Committee of Detail, IV the proximity of the actual inclusion in the commerce clause “Exceptions” and “Restrictions” of “Duty,” “imports,” “exports,” “Importations of inhabitants,” and “navigation act,” it is clear the commerce clause relates directly to the

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313 Selected legislative powers taken from the Committee of Detail, IV: “The following are I the legislative powers: with certain exceptions; and under certain restrictions (2 with certain exceptions and) (3 under certain restrictions) agrd. I. To raise money by taxation, unlimited as to sum, for the (future) past (or) <&> future debts and necessities of the union and to establish rules for collection

Exception(s) agrd. No Taxes on exports. – Restrictions I. direct taxation proportioned to representation 2. No (headpost) capitation-tax which does not apply to all inhabitants under the above limitation (& to be levied uniform) 3. no (other) indirect tax which is not common to all 4. (Delinquencies shall be distress – [illegible words]) 5. To regulate commerce <both foreign and domestic> 2. No State to lay a duty on imports - >

Exceptions I. no Duty on exports. 2. no prohibition on (such) <ye> Importations of <such> inhabitants <or People as the several States think to admit> 3. no duties by way of such prohibition. Restrictions I. A navigation act shall not be passed, but with the consent of (eleven states in) <2/3d. of the Members present of> the senate and (10 in) <the like No. of> the house of representatives. (2. Nor shall any other regulation – and this rule shall prevail, whersoever the subject shall occur in any act.) (3. the lawful territory To make treaties of commerce (qu: as to senate) Under the foregoing restrictions) 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 142-43 (Max Farrand ed., 1937). (emphasis retained.)(.) (emphasis added.)

interaction of trade and intercourse between sovereigns.\textsuperscript{315} This conforms with the commerce clause addressing “foreign nations” and “Indian tribes” as well.\textsuperscript{316} The Committee of Detail, IV does use the phrase “{both foreign & domestic}”\textsuperscript{317} and the reference to “domestic” here can be

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\textsuperscript{315} 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 143 (Max Farrand ed., 1937).
\textsuperscript{316} U.S. CONST. art. I, § 8, cl. 3. It is worth noting the level of distinct sovereignty provided the Indian Tribes within the Constitution, to the extent that Article III jurisdiction of the courts of the United States does not include jurisdiction over the Indian Tribes for reasons of Constitutional want of jurisdiction, as opined by Chief Justice MARSHALL in \textit{THE CHEROKEE NATION v. GEORGIA} in 1831. “The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.” \textit{THE CHEROKEE NATION v. GEORGIA}, 30 US 1, 20 (1831). (emphasis added.) Since Cherokee Nation was held on Constitutional grounds, it requires an amendment to the Constitution and cannot be reversed so as to create jurisdiction by courts of the United States. In contrast, the Court fails to cite its Constitutional lack of jurisdiction over Indian Tribes or Nations whenever convenient, and even cites mere Congressional power to alter this conundrum. “We believe that the question of ownership, both past and present, was decided in favor of the Indians by the Supreme Court and may not now be relitigated. … The problem is the jurisdiction of the federal courts to determine a boundary dispute between Indian tribes without congressional action waiving immunity and consenting to suit.” \textit{THE CHEROKEE NATION v. OKLAHOMA}, 461 F.2d 674, 678, 680 (1972). Again returning to Chief Justice MARSHALL in 1831, “The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes -- foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption. The counsel for the plaintiffs contend that the words "Indian [19] tribes" were introduced into the article, empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated: Had the Indian tribes been foreign nations, in the view of the convention; this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly. It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. Foreign nations is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations;" not we presume because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that [20] construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.” \textit{THE CHEROKEE NATION v. GEORGIA}, 30 US 1, 18-20 (1831). (emphasis added.)
\textsuperscript{317} 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 143 (Max Farrand ed., 1937).
seen in the phrase “among the several States” which better reflects and indicates the international trade and commercial intercourse provided for at the Federal Convention.

The objective of Congress having power to regulate commerce was simply to lift off the restrictions placed upon trade by the Navigations Acts, and to prevent trade wars being conducted by the several States. The Framers desired a Union of States that removed the restraints on trade and effectively promoted an American “Free Trade Area” in modern terminology. The commerce clause was truly about deregulation, and especially directed at the oppressive constraints of the Navigation Acts. The Navigation Act of 1651 provided for strict enforcement by way of “the penalty of the forfeiture and loss of all the goods that shall be imported contrary to this act; as also of the ship (with all her tackle, guns and apparel) in which

318 U.S. CONST. art. I, § 8, cl. 3.
320 “Adams amplified on these conceptions in letters written in 1780, and subsequently published in Great Britain. The great point he contended for in these essays was that the ‘true interest’ of both America and Europe was that ‘America should have a free trade with all of them, and that she should be neutral in all their wars.’ …that the blessings of her commerce may be open to all.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 166 (2003). “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of Congress.” U.S. CONST. art. I, § 10, cl. 2. (emphasis added.)
321 “The sweets of a free commerce with every part of the earth,’ wrote the congress in a May 1778 address to the inhabitants of the United States, ‘will soon reimburse you for all the losses you have sustained. The full tide of wealth will flow in upon your shores, free from the arbitrary impositions of those, whose interest and whose declared policy it was to check your growth.’ It did indeed require but a ‘moment’s reflection,’ wrote David Ramsay in the same year, to demonstrate ‘that as we now have a free trade with all the world, we shall obtain a more generous price for our produce, and foreign goods on easier terms, than we ever could, while we were subject to a British monopoly.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 164 (2003).
324 The Fourth Amendment responds to “reasonable suspicion”, which appeared in the Navigation Act of 1696, with the higher standard of “probable cause.” “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. (emphasis added.) “Therefore it is further enacted that when governors or customs officers in the colonies have reasonable suspicion that certificates of having given security in England are false, they shall require sufficient security for discharge in England or Wales.” THE NAVIGATION ACT para. 10 (Eng. 1696). (emphasis added.)
the said goods or commodities shall be so brought in and imported; the one moiety to the use of the Commonwealth\textsuperscript{325}, and the other moiety to the use and behoof of any person or persons who shall seize the goods or commodities, and shall prosecute the same in any court of record within this Commonwealth.\textsuperscript{326} The prohibitions provided, “no goods or commodities whatsoever the growth, production or manufacture of Asia, Africa, or America, or of any part thereof; or of any islands belonging to them, or which are described or laid down in the usual maps or cards of those places, as well of the English plantations as others, shall be imported or brought into this Commonwealth of England, or into Ireland, or any other lands, islands, plantations, or territories to this Commonwealth belonging, or in their possession, in any other ship or ships, vessel or vessels whatsoever, but only in such as do truly and without fraud belong only to the people of this Commonwealth…and whereof the master and mariners are also for the most part of them of the people of this Commonwealth, under the penalty of forfeiture.”\textsuperscript{327} The Navigation Act continues in its strict measures to include restrictions that require \textit{direct} shipments (and on country of origin vessels only) from the country of origin for all Europe\textsuperscript{328}, and that only direct shipments may be made to the “Commonwealth” (England) for all other places, and that trans-shipments (lading and unlading at a third country between the country of departure and England) are not permitted\textsuperscript{329}. The total result mandated nearly every thing involved in international trade,

\textsuperscript{325} \textit{commonweal, commonwealth … 1. A polity; an established form of civil life. … 2. The publick; the general body of the people. … 3. A government in which the supreme power is lodged in the people; a republick.”}
\textit{“republick … Commonwealth; state in which the power is lodged in more than one.” “republican … One who thinks a commonwealth without monarchy the best government.” Compare with: “democracy … One of the three forms of government; that in which the sovereign power is neither lodged in one man, nor in the nobles, but in the collective body of the people.”} \textsc{samuel johnson, samuel johnson’s dictionary: selections from the 1755 work that defined the english language} 114, 133, 433 (Jack Lynch ed., levenger press 2002) (1755).

\textsuperscript{326} \textsc{the navigation act} para. 1 (Eng. 1651).

\textsuperscript{327} \textsc{the navigation act} para. 1 (Eng. 1651).

\textsuperscript{328} “no goods…of Europe…brought into this Commonwealth…except only such foreign vessels as do truly and properly \textit{belong to the people of that place}, of which the said goods are the growth, production or manufacture….” \textsc{the navigation act} para. 2 (Eng. 1651). (emphasis added.)

\textsuperscript{329} “that no goods…of foreign growth, production or manufacture…are to be brought into this Commonwealth…but only from those of their said growth, production, or manufacture…” \textsc{the navigation act} para. 3 (Eng. 1651).
exported from anywhere, was required to proceed directly to England so that the “Commonwealth” completely controlled the central commercial market. The Navigation Act of 1651 was reaffirmed in its severe penalties and trade restrictions with the Navigation Act of September 13, 1660, the Qualification of the Navigation Act of 1660, the Navigation Act of July 27, 1663, and the Navigation Act of April 10, 1696. The Navigation Act of 1696 made additional specific provisions for dealings with the American colonies. An enforcement section provides, “V. Whereas by the Navigation Act of 1663 colonial governors were empowered to appoint an officer to carry out provisions of the Act, which officer ‘is there commonly known by the name of the naval officer’ and whereas through connivance or

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330 THE NAVIGATION ACT (Eng. 1651). “‘Universal Monarchy at land is impracticable; but universal Monarchy at sea has been well nigh established, and would before this moment have been perfected, if Great Britain and America had continued united.’ Were Britain and America to be ‘again united under one domination, there would be an end of the liberty of all other nations upon the seas. All commerce and navigation of the world would be swallowed up in one frightful despotism. The Princes of Europe, therefore, are now unanimously determined that America shall never again come under the English government.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 166-67 (2003).


332 “VIII. And whereas in some of his Majesty’s American plantations, a doubt or misconstruction has arisen upon the before mentioned act,...” THE NAVIGATION ACT para. 8 (Eng. 1696). (emphasis added.) “XIV. Ships carrying American produce have been unloaded in Scotland and Ireland, contrary to existing law, under the pretence they were driven there by weather, lack of provisions, or other cause. After December 1, 1696, it shall be unlawful under any pretext to unload in Scotland or Ireland any goods or merchandise the growth or product of the American plantations unless they have first been landed in England or Wales and the proper duties paid. Penalty to be forfeiture of the ship and goods, with three-fourths to the crown and the other fourth to him or them bringing the action.” THE NAVIGATION ACT para. 14 (Eng. 1696). (emphasis added.) The Fifth Amendment addresses taking property and taking property for public use. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. (emphasis added.) “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” KELO v. CITY OF NEW LONDON, 125 S. Ct. 2655, 2662 (2005). The Court found no jurisdiction in 1833: “We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. ... This court, therefore, has no jurisdiction of the cause, and it is dismissed.” BARRON v. BALTIMORE, 32 U.S. (7 Pet.) 243, 250-51 (1833). (emphasis added.)

333 THE NAVIGATION ACT (Eng. 1696).
negligence, frauds and abuses have been committed, all such officers must give security\textsuperscript{334} to the Commissioner of Customs in England for the faithful performance of their duty. Colonial governors are to be answerable for ‘offenses, neglects, or misdemeanors’ of persons appointed by them.\textsuperscript{335} The extent of the liability placed upon the governors and officers, and the requirement to give security, demonstrate the strict adherence to the Navigation Acts that was expected, and the level of enforcement\textsuperscript{336} applied.\textsuperscript{337} Here, there is also an explicit expression of the involvement of the Commissioner of Customs\textsuperscript{338} in England with respect to this “British-American” commerce, which is clearly being treated as international trade, despite the colonial status of America under the Navigation Acts.\textsuperscript{339} This over-regulated trade was the type of intra-American \textit{trade war} the Framers feared might develop “among the several States”\textsuperscript{340} over time, because of the independence and sovereignty of the States that made up the Union.\textsuperscript{341}

\textsuperscript{335} \textit{The Navigation Act} para. 5 (Eng. 1696).
\textsuperscript{336} “X. Ships taken at sea and condemned as prizes in the High Court of Admiralty to be specially registered, with proper oaths and proof of entire English ownership, before being allowed the privileges of an English built ship.” \textit{The Navigation Act} para. 19 (Eng. 1696). (emphasis added.) The international relations aspects of property condemned as “prizes” at sea as well as “Admiralty” are addressed in the Constitution in Article I, section 8, clause 10 and in Article III, section 2, clause 1. U.S. \textit{Constitution} art. I, § 8, cl. 10. U.S. \textit{Const.} art. III, § 2, cl. 1.
\textsuperscript{338} The enforcement level in the Navigation Act of 1696 explicitly states the “Customs standard” of “reasonable suspicion.” “X. Great frauds have been committed by Scotchmen and others by counterfeiting certificates of security to bring plantation goods to England or Wales;…Therefore it is further enacted that when governors or customs officers in the colonies have reasonable suspicion that certificates of having given security in England are false…” \textit{The Navigation Act} § X (Eng. 1696). (emphasis added.)
\textsuperscript{339} \textit{The Navigation Act} § V (Eng. 1696).
\textsuperscript{340} U.S. \textit{Const.} art. I, § 8, cl. 3.
\textsuperscript{341} The Committee of Style of the Federal Convention of 1787 provided: “VII. Sect. 1. The Legislature shall have power to…To regulate commerce with foreign nations, and among the several States; and with the Indian tribes.” “Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State. The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 - but a tax or duty may be imposed on such importation not exceeding ten dollars for each person. \textit{Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige Vessels bound to or from any State to enter, clear, or pay duties in another. And all duties, imposts, and excises, laid by the Legislature, shall be uniform throughout the United States.} Sect. 5. No Capitation tax shall be laid, unless in proportion to the census herein before directed to be taken.” 2 \textit{The Records of the Federal Convention of 1787} 571-72 (Max Farrand ed., 1937). (emphasis added.) Note the italicized prohibitions that relate directly to “international trade” measures and measures actually imposed by the Navigation
The Committee of Style in Article VII, Section 4, placed strict prohibitions on taxes and duties imposed by the several States, and prohibited mandatory port calls for Vessels, and prohibited port preferences for any State over another, as well as prohibitions on State created entry, clearance and duty requirements.\textsuperscript{342} The significance of the Framers experience and concerns with the Navigation Acts is evidenced by motions at the Federal Convention up until Saturday, September 15, 1787, the second to last day of the Convention.\textsuperscript{343} Debate covered tonnage tax and prohibitions placed upon Amendments is recorded as, “Moved to amend it viz. No State without the consent of Congress shall lay a duty of tonnage.”\textsuperscript{344} Carried in the affirmative 6 ays 4 Noes, I divided. …Added to the V article amended ‘No State without its consent shall be deprived of its equal suffrage in the Senate. Mr. Mason [George Mason of Virginia] moved in substance that no navigation act be passed without the concurrence of 2/3 of the members present in each house,” (as an additional explicit prohibition to be included within Article V.)\textsuperscript{345} Understanding the impact of the Navigation Acts and the treatment of trade within Great Britain, between England and its colonies and plantations, and islands, makes understanding what otherwise might be viewed as technical or obscure provisions of the Constitution readily understandable by simply examining the plain text of the Constitution from the perspective that it has literally responded to other historical documents.\textsuperscript{346} Article I, section 8, \textsuperscript{\textsuperscript{342}}2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 571 (Max Farrand ed., 1937).
\textsuperscript{343}2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 634 (Max Farrand ed., 1937).
\textsuperscript{344}“Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (Max Farrand ed., 1937).
\textsuperscript{345}2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 634 (Max Farrand ed., 1937). Sunday was an off day, and on Monday, September 17, 1787, the proposed Constitution was approved and the Convention closed. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 650 (Max Farrand ed., 1937).
clauses 1 and 3 have already been examined above. Also appearing in Article I, within section 8, are clauses 10 and 11, which provide, “The Congress shall have Power”\textsuperscript{347}: “To define and punish\textsuperscript{348} Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations\textsuperscript{349};” and “To declare War\textsuperscript{350}, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.\textsuperscript{351}” In Section 8, clause 10 there is plain reference to the “High Seas” and the “Law of Nations” which have an obvious sovereign to sovereign context, as well as the common link of involving courts of admiralty\textsuperscript{352}, which were the judicial instruments of enforcement utilized by Great Britain and the Navigation Acts.\textsuperscript{353} Section 8, clause 11, addresses “Captures on Land and Water” which not only relates to courts of admiralty and sovereign to sovereign entanglements, but is at times interconnected with the first phrase pertaining to declarations of “War”, which for the most part requires the involvement of at least one sovereign, even in a civil war.\textsuperscript{354} Article I, section 9, clauses 1, 5 and 6 are all nearly exactly the same in text, and the same in substance as the provisions in the Committee of Style, Article

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\item \textsf{U.S. Const. art. I, § 8, cl. 1.}
\item \textsf{The grant of the power to Punish will be addressed in Section VI of this paper, which is of significant importance to recognition and respect shown by the Constitution and the Congress for State independence and sovereignty, since the power to punish is rather limited within the Constitution. U.S. Const. art. I, § 8, cl. 6, 10. U.S. Const. art. III, § 3, cl. 2. U.S. Const. amend. V, VIII.}
\item \textsf{U.S. Const. art. I, § 8, cl. 10.}
\item \textsf{“war … 1. War may be defined as the exercise of violence under sovereign command against withstanders; force, authority, and resistance being the essential parts thereof. … 5. Hostility; state of opposition; act of opposition.” SAMUEL JOHNSON, SAMUEL JOHNSON’S DICTIONARY: SELECTIONS FROM THE 1755 WORK THAT DEFINED THE ENGLISH LANGUAGE 542-43 (Jack Lynch ed., Levenger Press 2002) (1755).}
\item \textsf{U.S. Const. art. I, § 8, cl. 11.}
\item \textsf{THE NAVIGATION ACT (Eng. 1651). THE NAVIGATION ACT (Eng. 1660). QUALIFICATION OF THE NAVIGATION ACT (Eng. 1660). THE NAVIGATION ACT (Eng. 1663). THE NAVIGATION ACT (Eng. 1696). THE STAMP ACT (Eng. 1765). THE TOWNSHEND ACT (Eng. 1767). NEW ENGLAND RESTRAINING ACT (Eng. 1775). THE AMERICAN PROHIBITORY ACT (Eng. 1775). “They have undertaken to give and grant our money without our consent, though we have ever exercised an exclusive right to dispose of our own property; statutes have been passed for extending the jurisdiction of courts of admirality and vice-admiralty beyond their ancient limits:…” DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (U.S. 1775). “XVII. That the jurisdiction of the court of admiralty be confined to maritime causes.” S.C. Const. of 1776, art. 17. (emphasis added.)}
\item \textsf{U.S. Const. art. I, § 8, cl. 10. “XIX. Ships taken at sea and condemned as prizes in the High Court of Admiralty to be specially registered, with proper oaths and proof of entire English ownership, before being allowed the privileges of an English built ship.” THE NAVIGATION ACT § XIX (Eng. 1696). (emphasis added.)}
\item \textsf{U.S. Const. art. I, § 8, cl. 11. THE NAVIGATION ACT § XIX (Eng. 1696).}
\end{enumerate}
\end{footnotesize}
VII, Section 4, which was examined thoroughly above and are built in protections to prevent an intra-American trade war environment. 355 Article I, section 10, clauses 2 and 3, provide: “No State shall, without the Consent of the Congress, lay any Imposts or Duties356 on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.” 357 “No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” 358 The plain text of Section 10, clause 2, places strict prohibitions upon the States with respect to “Imports or Exports”, which itself is recognition by the Constitution and the Congress for the independence and sovereignty of the several States to act on such matters, without such a prohibition. 359 The clause does provide an exception, but nonetheless, even the exception directs any revenue thereby obtained is “for the Use of the Treasury”360 of the Union, and that Congress may revise such inspection Laws permitted under the exception, so as to prevent any one particular State from taking advantage of

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355 U.S. CONST. art. I, § 9, cls. 1, 5, 6. “Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State. The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 - but a tax or duty may be imposed on such importation not exceeding ten dollars for each person. Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige Vessels bound to or from any State to enter, clear, or pay duties in another. And all duties, imposts, and excises, laid by the Legislature, shall be uniform throughout the United States.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 571 (Max Farrand ed., 1937). (emphasis added.)
357 U.S. CONST. art. I, § 10, cl. 2.
358 U.S. CONST. art. I, § 10, cl. 3.
359 U.S. CONST. art. I, § 10, cl. 2.
360 U.S. CONST. art. I, § 10, cl. 2.
the others with respect to commercial intercourse “among the several States.”361 Clause 3 places strict prohibitions on the States from laying any “Duty of Tonnage”362, which is clearly related to international trade and commerce. Clause 3 continues to provide prohibitions to States from keeping “Troops, or Ships of War in time of Peace,” or forming an “Agreement” or “Compact” or the equivalent of a treaty with another State or to engage in “War.”363 All of these affairs, maintaining a military force, forming treaties, and conducting warfare, are the international activities of sovereigns, and here there is a prohibition as to the States for these limited activities, so that the Union, may act under the Constitutionally enumerated powers, for the limited purposes provided for in the Constitution of sovereign to sovereign relations.364 Although there are specific prohibitions placed upon the States, the existence of these prohibitions demonstrates

361 U.S. CONST. art. I, § 10, cl. 2. U.S. CONST. art. I, § 8, cl. 3. “Freedom of commerce, for example, was an objective sought both among the American states and with foreign countries. The principles of balance of power and nonintervention (in the domestic affairs of other states) were also applicable to both spheres, as were associated doctrines of comity, good faith, and the peaceful settlement of disputes.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 272 (2003).


363 U.S. CONST. art. I, § 10, cl. 3.

364 U.S. CONST. art. I, § 10, cl. 3. “The powers of the general government were separated, but also sometimes mixed, but in either event they were so arranged and balanced as to ensure that it would not pass beyond its authoritative jurisdiction. Its objects were largely external, concerned with war, peace, negotiation, and foreign commerce; everything else was to remain with the states.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 12 (2003). “This government is acknowledged by all to be one of enumerated powers.” … “If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action.”…“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any State to the contrary notwithstanding.’” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 405-06 (1819). (emphasis added.) “The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it;…” MARBURY v. MADISON, 5 U.S. (1 Cranch) 137, 176-77, (1803). (emphasis added.) “We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation,; where that jurisdiction is not surrendered or restrained by the constitution of the United States.” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 139 (1837). (emphasis added.)
recognition by the Constitution that they are sovereigns entitled to exercise the powers of sovereigns.\footnote{U.S. CONST. art. I, § 10, cls. 2, 3. U.S. CONST.}{365}


iii. Present Impact of Constitutional Interest Analysis.

The restraints placed upon trade by The Navigation Acts of 1651, 1660, 1663, and 1696 were in the minds of the Framers when drafting the Constitution and one of their earliest responses was The Articles of Association of 1774.\footnote{THE NAVIGATION ACT (Eng. 1651). QUALIFICATION OF THE NAVIGATION ACT (Eng. 1660). THE NAVIGATION ACT (Eng. 1663). THE NAVIGATION ACT (Eng. 1696). THE STAMP ACT (Eng. 1765). THE QUARTERING ACT (Eng. 1765). THE TOWNSHEND ACT (Eng. 1767). THE QUARTERING ACT (Eng. 1774). NEW ENGLAND RESTRAINING ACT (Eng. 1775). THE AMERICAN PROHIBITORY ACT (Eng. 1775). THE ARTICLES OF ASSOCIATION (U.S. 1774).}{367} The underlying principles behind the commerce provisions in the Constitution prohibit protectionism or discriminatory measures with respect to Trade among the States within the Union.\footnote{Port of Entry (and delivery) and Clearance were designated by the United States and not the States. This act for collection of revenue and designating Ports of Entry was the fifth act passed by the first session of the First Congress. “SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the due collection of the duties imposed by law on the tonnage of ships and vessels, and on goods, wares and merchandises imported into the United States, there shall be established and appointed, districts, ports, and officers, in manner following, to wit: The States of New Hampshire shall be one district, to include the town of Portsmouth as the sole port of entry; and the towns of Newcastle, Dover and Exeter, as ports of delivery only; but all ships or vessels bound to or from either of the said ports of delivery, shall first come to, enter and clear at Portsmouth;...” An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States. Act of July 31, 1789, 1 Stat., ch. 5 (1789). (italics retained.) (emphasis added.)}{368} However, protectionism between the United States and foreign countries is permitted.\footnote{Tariff Act of 1930. Act of June 17, 1930, ch. 497, 46 Stat. 763 (codified as amended 19 U.S.C.) Customs Duties.}{369} And, in the event protective measures are
adopted by a State, it must treat all States within the Union uniformly and in the same manner as it treats itself.  

The Framers objectives included free and open Commerce, and the motivations behind the commerce clause were driven by a desire for de-regulation and unrestrained economic activity, growth, and prosperity. Here, the States were denied the power of commercial protectionism, and were prohibited from infringement upon the commerce of other States in favor of themselves, but each State may have independent and several public safety policies, as long as they treat all other States uniformly. Another underlying principle was that there be no hegemony with respect to commerce, as was experienced under the Navigation Acts and the Crown of England.

A Constitutional Interest Analysis of the commerce provisions requires beginning with a historical view of commerce, which reveals a narrow construction of commerce as compared with today, one that was motivated by a desire for free trade, deregulation, and free and open channels of commerce. Commerce would originally be limited to "goods" or in other terms,

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371 "Adams amplified on these conceptions in letters written in 1780, and subsequently published in Great Britain. The great point he contended for in these essays was that the 'true interest' of both America and Europe was that 'America should have a free trade with all of them, and that she should be neutral in all their wars.' ...that the blessings of her commerce may be open to all." DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 166 (2003).
376 The revenue act for Duty of 1789, articulates the items of commerce that were subject to federal taxation. This was the second statute passed by the first session of the First Congress, (and citizenship of the United States is critical to determining the duties to be paid):

"CHAP. II. - An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States. SEC. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported: Be it enacted by the Senate and House of Representatives of the United States of America in Congress
assembled. That from and after the first day of August next ensuing, the several duties hereinafter mentioned shall be laid on the following goods, wares and merchandises imported into the United States from any foreign port or place, that is to say: On all distilled spirits of Jamaica proof, imported from any kingdom or country whatsoever, per gallon, ten cents. On all other distilled spirits, per gallon, eight cents. On molasses, per gallon, two and a half cents. On Madeira wine, per gallon, eighteen cents. On all other wines, per gallon, ten cents. On every gallon of beer, ale or porter in casks, five cents. On all cider, beer, ale or porter in bottles, per dozen, twenty cents. On malt, per bushel, ten cents. On brown sugars, per pound, one cent. On loaf sugars, per pound, per pound, three cents. On all other sugars, per pound, one and a half cents. On coffee, per pound, two and a half cents. On cocoa, per pound, one cent. On all candles of tallow, per pound, two cents. On all candles of wax or spermaceti, per pound, six cents. On cheese, per pound, four cents. On soap, per pound, two cents. On boots, per pair, fifty cents. On shoes, slippers or goloshes made of leather, per pair, seven cents. On all shoes or slippers made of silk or stuff, per pair, ten cents. On cables, for every one hundred and twelve pounds, seventy-five cents. On tarred cordage, for every one hundred and twelve pounds, ninety cents. On twine or packthread, for every one hundred and twelve pounds, two hundred cents. On steel unwrought, for every one hundred and twelve pounds, seventy-five cents. On untailed yarn, for every one hundred and twelve pounds, seventy-five cents. On all nails and spikes, per pound, one cent. On salt, per bushel, six cents. On manufactured tobacco, per pound, six cents. On snuff, per pound, ten cents. On all other green teas, per pound, sixteen cents. On wool and cotton cards, per dozen, fifty-cents. On coal, per bushel, two cents. On pickled fish, per barrel, seventy-five cents. On all other green teas, per pound, twelve cents. On all other teas imported from China or India, in ships built in the United States, and belonging to a citizen or citizens thereof, or in ships or vessels built in foreign countries, and on the sixteenth day of May last wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation, as follows: On bohea tea, per pound, six cents. On all souchong, or other black teas, per pound, ten cents. On all hyson teas, per pound, twenty cents. On all other green teas, per pound, twelve cents.

On all teas imported from Europe in ships or vessels built in the United States, and belonging wholly to a citizen or citizens thereof, or in ships or vessels built in foreign countries, and on the sixteenth day of May last wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation, as follows: On bohea tea, per pound, eight cents. On all souchong, or other black teas, per pound, thirteen cents. On all hyson teas, per pound, twenty-six cents. On all other green teas, per pound, sixteen cents.

On all teas imported, in any other manner than as above mentioned, as follows: On all teas imported, in any other manner than as above mentioned, as follows: On bohea tea, per pound, fifteen cents. On all souchong, or other black teas, per pound, twenty-two cents. On all hyson teas, per pound, forty-five cents. On all other green teas, per pound, twenty-seven cents.

On all goods, wares and merchandises, other than teas, imported from China or India, in ships not built in the United States, and not wholly the property of a citizen or citizens thereof, nor in vessels built in foreign countries, and on the sixteenth day of May last wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation, twelve and a half per centum ad valorem. On all looking-glasses, window and other glass (except black quart bottles), On all China, stone and earthen ware, On gunpowder, On all paints ground in oil, On shoe and knee buckles, On gold and silver lace, and On gold and silver leaf. } Ten per centum ad valorem. On all blank books, On all writing, printing or wrapping paper, paper-hangings and pasteboard, On all cabinet wares, On all buttons, On all saddles, On all gloves of leather, On all hats of beaver, fur, wool, or mixture of either, On all millinery ready made, On all castings of iron, and upon slit and rolled iron, On all leather tanned or tawed, and all manufacture of leather, except such as shall be otherwise rated, On canes, walking sticks and whips, On clothing ready made, On all brushes, On gold, silver, and plated ware, and on jewelry and paste work, On anchors, and on all wrought, tin, and pewter ware. } Seven and a half per centum ad valorem.

On playing cards, per pack, ten cents.

On every coach, chariot or other four wheel carriage, and on every chaise, solo, or other two wheel carriage, or parts thereof. } fifteen per centum ad valorem.

On all goods, wares and merchandise, five per centum on the value thereof at the time and place of importation, except as follows: salt peter, tin in pigs, tin plates, lead, old pewter, brass, iron and brass wire, copper in plates, wool, cotton, dyeing woods and dyeing drugs, raw hides, beaver, and all other furs, and deer skins. SEC. 2. And be it further enacted by the authority aforesaid, That from and after the first day of December, which shall be in the year one thousand seven hundred and ninety, there shall be laid a duty on every one hundred and twelve pounds, weight of hemp imported as aforesaid, of sixty cents; and on cotton per pound, three cents. SEC. 3. And be it [further] enacted by the authority aforesaid, That all the duties paid, or secured to be paid upon any of the goods, wares and merchandises as aforesaid, except on distilled spirits, other than brandy and Geneva,
The States forming the Union wanted to ensure uniform access to transportation (which at the time were primarily waterways) without port preferences, and without restraining trade with any other State or foreign country. This reveals an underlying principle of free and open channels of commerce. Here the United States has been granted Admiralty jurisdiction over navigable waters, and the States have been denied

shall be returned or discharged upon such of the said goods, wares, or merchandises, as shall within twelve months after payment made, or security given, be exported to any country without the limits of the United States, as settled by the late treaty of peace; except one per centum on the amount of the said duties, in consideration of the expense which shall have accrued by the entry and safe-keeping thereof.

SEC. 4. And be it [further] enacted by the authority aforesaid, That there shall be allowed and paid on every quintal of dried, and on every barrel of pickled fish, of the fisheries of the United States, and on every barrel of salted provision of the United States, exported to any country without the limits thereof, in lieu of a drawback of the duties imposed on the importation of the salt employed and expended therein, viz: On every quintal of dried fish, five cents. On every barrel of pickled fish, five cents. On every barrel of salted provision, five cents.

SEC. 5. And be it further enacted by the authority aforesaid, That a discount of ten per cent. on all the duties imposed by this act, shall be allowed on such goods, wares and merchandises, as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen or citizens thereof, or in vessels built in foreign countries, and on the sixteenth day of May last, wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation.

SEC. 6. And be it further enacted by the authority aforesaid, That this act shall continue and be in force until the first day of June, which shall be in the year of our Lord one thousand seven hundred and ninety-six, and from thence until the end of the next succeeding session of Congress which shall be held thereafter, and no longer. APPROVED, July 4, 1789. An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States. Act of July 4, 1789. 1 Stat., ch. 2 (1789). (italics retained.) (emphasis added.)


378 The revenue act that relates to Tonnage tax (upon ships and vessels) of 1789, the third statute passed by the first Congress: “SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following duties shall be, and are hereby imposed on all ships or vessels entered in the United States, that is to say: On all ships or vessels built within the said States, and belonging wholly to a citizen or citizens thereof; or not built within the said States, but on the twenty-ninth day of May next, wholly the property of a citizen or citizens of the United States, in any other manner than by sea,...” An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States. Act of July 31, 1789. 1 Stat., ch. 5 (1789). (italics retained.) (emphasis added.)

the power of controlling navigable waters, which are the channels of commerce. Each State forfeits this power but gains the benefit of free and open access to all the Union’s waterways and ports so as to facilitate trade. The States sacrifice a power that may rightfully belong to a sovereign, but with the understanding of that the same sacrifice is made by all States for the benefit of all States.

The impact of the underlying principles of de-regulation and free and open trade would narrow the construction of the commerce clause and not permit utilizing “a substantial economic effect on interstate commerce” as a basis to validate Congress’ power as was held by the Court in 1942. Under a narrower construction, activities conducted within one State, would not fall within the underlying principle of free and open trade, which is limited to commerce among the several States.

An example of a conflict in the original historical narrower meaning and the modern broad construction is most pronounced and may be seen in the area of corporations and corporate securities. Corporations are formed under State powers, and are regulated by State statutes, and may raise funds in public securities markets. States clearly have power in this area, and

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380 U.S. CONST. art. III, § 2, cl. 1.
381 "'The sweets of a free commerce with every part of the earth,' wrote the congress in a May 1778 address to the inhabitants of the United States, 'will soon reimburse you for all the losses you have sustained. The full tide of wealth will flow in upon your shores, free from the arbitrary impositions of those, whose interest and whose declared policy it was to check your growth.' It did indeed require but a 'moment's reflection,' wrote David Ramsay in the same year, to demonstrate 'that as we now have a free trade with all the world, we shall obtain a more generous price for our produce, and foreign goods on easier terms, than we ever could, while we were subject to a British monopoly.'" DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 164 (2003).
382 Under this extremely broad construction of the power of Congress under the Commerce Clause, it is hard to imagine Congress needing any other powers under the Constitution, which is to read all of the other clauses with greatly reduced or no effect. “But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” WICKARD v. FILBURN, 317 U.S. 111, 125 (1942). (emphasis added.)
383 N.Y. BUS. CORP. LAW (Consol. 2005).
securities are not goods, wares and merchandises. However, in order to read a construction that gives both the commerce clause meaning as well as the “Power To provide for the Punishment of counterfeiting the Securities and current Coin of the United States” meaning, it is clear that the only securities the United States has the Power to act upon are United States securities, which is contrary to the Securities Act of 1933 and the Securities Exchange Act of 1934, which regulate securities of corporations and exempt securities of the United States from the regulation scheme. Here, Congressional overreaching managed to get it exactly backwards, the securities Congress has power to regulate, Securities of the United States, are exempt. The United States has been denied the power to regulate securities other than securities of the United States, and the States have the power to regulate corporate securities. If greater regulation is needed, the States are the appropriate source of power and they have the power. The States may act independently to pass statutes to encourage responsible corporate behavior and protect investors. If necessary, States may even pass statutes that permit piercing the corporate veil, so as to promote standards of conduct or to deter reckless or negligent behaviors. Here, most of the powers are denied to the United States, and other limited powers are denied to the States. These limitations on specific powers do not remove sovereignty from either the States or the United States, there is simply an allocation of power, that acts to facilitate underlying principles of no

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385 U.S. CONST. art. I, § 8, cl. 6.


protectionism, free and open commerce, free and open channels of commerce, and further promotes participatory government by requiring action by State legislatures.

In the area of commerce with respect to securities regulation, in contrast to the underlying principles behind Revenue and Representation which may not be modified, not even by amendment, the Constitution could be amended by use of Article V to grant Congress Power in the area of securities regulation. A Constitutional amendment is not a quick process, and the process demands the genuine will of the People or the States in order to be successful. Action to amend would require action by either the States or the People, in addition to the Congress, and action of the People is critical element to a government system built upon the underlying principles of participatory government and consent of the governed.

This paper proposes that the commerce clause should be read as limited to actual trade in hard goods, commodities, products, manufactures, and wares, and should not be broadly construed so as to include anything that may possibly occur in one State and merely influence another State, as the broad construction violates the underlying principles. The underlying principle of deregulation would also be violated when goods are viewed as fungible to create the

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legal fiction of ‘interstate commerce’, when none in fact occurs, to serve as a basis for
Congressional commerce clause power. If commerce is to be construed broadly, it could be
perfectly appropriate to apply the limited liability of Admiralty\textsuperscript{393}, to highways and aviation (jet
routes), which are the modern channels of commerce. The traditional notion behind the limited
liability of Admiralty permits recovery only to the extent of the value of the vessel (and perhaps
the vehicle or aircraft) after the collision, even if it is completely destroyed. The underlying
principle behind Admiralty limited liability is to encourage investment in the hazardous
adventure that benefits all from overseas commerce. Since Congress created the Federal Aviation
Administration and the Air Traffic Control\textsuperscript{394} system to control jet routes, it would seem
perfectly analogous to apply such limited liability to something as hazardous as aviation.
Vehicles upon highways, especially the interstate system of federal highways, are modern
channels of commerce, and equivalently modern channels of navigation, and the trucks and
aircraft are the vessels\textsuperscript{395} in navigation upon navigable waters which are so important to
admiralty and the transportation of commerce.\textsuperscript{396} Admittedly, encouragement of investment in
the hazardous adventure of shipping on the high seas was an underlying reason for the admiralty
limited liability rule, and contrary to the business environment at present, insurance was
generally not available when admiralty courts developed the rule. Since the underlying reason
with respect to insurance no longer applies, it is quite possible the rules of admiralty should
change to account for the level of insurance that is available.

Appx. § 183). PLACE v. NORWICH & NEW YORK TRANSP. CO., 118 U.S. 468 (1886). OCEAN STEAM
NAVIGATION CO. v. MELLOR (The Titanic), 233 U.S. 718 (1914).
\textsuperscript{394} Federal Aviation Administration: “The Federal Aviation Administration is an administration in the Department of
106 (2003)).
\textsuperscript{395} An Act imposing Duties on Tonnage. Act of July 20, 1789, 1 Stat., ch. 3 (1789).
\textsuperscript{396} EXECUTIVE JET AVIATION, INC. v. CLEVELAND, 409 U.S. 249 (1972). “Extension of admiralty and
Today, modern implications of the underlying principle of free and open channels of commerce might even point to fuels (energy sources), which are commodities. If one considers that waterways were the primary channels of commerce, and power for transportation depended upon wind and water, then fuel may be a fundamental channel of commerce today. It could be a violation of the principle for individual States to prescribe different chemical formulas for fuel refined and sold in their state. The underlying principles of free commerce, no protectionism, and a desire for de-regulation would make such individual State restrictions upon commerce a violation. Although this would be a denial of power to States, it is designed to serve the greater good of every State and permit every State access to every other States’ marketplace.

The Framers’ concerns for navigation and the Navigation Acts continued with respect to the prospects for the future growth of the Union, from specific interests such as fishing rights to broad sweeping interests such as land claims and new territory. In the next section of this paper, the examination will focus on Land claims, Territory and future growth of the Union.

V. Land Claims, Territory, and Statehood.

What are the underlying principles behind the provisions in the Constitution that relate to the geographical growth of the Union in terms of land acquisitions? The underlying principles

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397 "...the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices." WICKARD v. FILBURN, 317 U.S. 111, 128 (1942).
399 "Sec. 2. Provided always, and be it enacted, That no ship or vessel built within the aforesaid States, and belonging to a citizen or citizens thereof, shall, whilst employed in the coasting trade, or in the fisheries, pay tonnage more than once in any year. ... Approved, July 20, 1789." An Act imposing Duties on Tonnage. Act of July 20, 1789, 1 Stat., ch. 3 (1789). (italics retained.) (emphasis added.)
are to preserve the status of the States entering into the agreement\textsuperscript{401}, enforced by the principle that there shall be No national Territory controlled by a National Legislature. This principle is advanced by providing a mechanism for the creation of new States, and providing for a strictly limited “ten miles square” “Seat of the Government of the United States.”\textsuperscript{402} A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the treatment of the geographical growth of the Union.

This section shall examine the anticipated expansion of the Union, and issues related to anticipated economic growth and anticipated population growth because of the existing and expected territorial expansion of the Union, due to the occupation and settlements\textsuperscript{403} in areas of contiguous geography, some of which, were Lands, already claimed, in the original State Charters.\textsuperscript{404} The analysis will specifically examine the relationships of land and its role in defining sovereignty, and the necessity of free and open waters for transportation and commerce, and how these elements acted to protect and serve those persons that were the members of the communities that composed collective bodies of power that eventually became new member states within the Union. Creating new states involves establishing firm boundaries and delineating limits to jurisdiction, which requires mutual recognition between adjacent states as well as among all of the member states, and although the agreement among states of the exact location of surveyed boundaries may seem technical compared to other Constitutional structural

\textsuperscript{401} \textsc{Articles of Confederation} (U.S. 1781).
\textsuperscript{402} U.S. Const. art. IV, § 3, cls. 1,2. U.S. Const. art. I, § 8, cl. 17.
\textsuperscript{403} “Madison considered cessions inappropriate for regions like Virginia’s Kentucky District, with relatively large and growing populations. Jefferson’s version of ten new states presupposed cessions that were in fact long delayed or simply not forthcoming; he overlooked the differences between hypothetical new states in unsettled areas and new states in areas that were already settled and politically active. Virginians at home were beginning to negotiate terms of separation with the Kentucky people…” \textsc{Peter S. Onuf, The Origins of the Federal Republic} 162 (1983).
issues, it directly impacts and demonstrates recognition of each State’s sovereignty, and by each State for each of the other States within the Union.\textsuperscript{405}

i. Lands.

Article IV, section 3, clauses 1 and 2, provide for “New States” and “Territory or other Property belonging to the United States.”\textsuperscript{406} As early as May 29\textsuperscript{th}, 1787, Mr. Randolph introduced the following proposed resolution at the Federal Convention, “10. Resolvd. That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory or otherwise, with the consent of a whole number of voices in the National Legislature less than the whole.”\textsuperscript{407} The solution proposed by Randolph is made clearer upon examination of the pertinent sections the Framers were currently operating under, which provided: “Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”\textsuperscript{408} The Articles of Confederation specifically provide for the admission of Canada upon Canada’s official request to join the Union, however, a vote by the States is required, and further requires a supermajority, for the admission of any

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\textsuperscript{405} “The state’s western policy was subsequently directed toward defending its interests in the Kentucky District while working toward a constitutional separation and the creation of a new state there. When this was finally achieved, Virginia was finally secured in permanent, manageable boundaries – one of the major goals of its revolution.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 102 (1983). “Vermont was created in July 1777 when representatives of approximately twenty-eight towns in the New Hampshire Grants adopted their own constitution and declared their independence from the state of New York.”…“The premise of this policy was that Vermont could not be destroyed, a negative de facto recognition of the new state. … New York had failed to offer Congress any incentives to guarantee its boundaries. Without such guarantees and without the resources to make good its territorial claims, New York was vulnerable to further usurpations. Simply, a state’s claims had to bear some reasonable relation to the jurisdiction it could effectively govern.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 127, 124-25 (1983). The Vermont Constitution was completed on July 8, 1777. VT. CONST. of 1777.

\textsuperscript{406} U.S. CONST. art. IV, § 3, cls. 1, 2.

\textsuperscript{407} 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., 1937).

\textsuperscript{408} ARTICLES OF CONFEDERATION § XI (U.S. 1781).
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other “colony.” In the event, the Union was admitting unsettled, unclaimed lands, it is quite possible that would not be considered a “colony” under section XI, and that it would place a proposed admission under the unanimity requirements for “any alteration,” within section XIII. Fortunately, in 1784, a provision addressing this stated, “That whenever any of the sd [sic] states shall have, free inhabitants as many as shall then be in any one the least numerous of the thirteen original states, such state shall be admitted by it’s delegates into the Congress of the United States, on an equal footing with the said original states: After which the assent of two thirds of the United States in Congress assembled shall be requisite in all those cases, wherein by the Confederation the assent of nine States is now required.” The unanimity provision of section XIII was a difficult requirement for the Union to deal with and Mr. Randolph addressed it right at the outset of the Convention. The resulting provision in Article IV, section 3, clause 1 of the Constitution provides, “New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of

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409 ARTICLES OF CONFEDERATION § XI (U.S. 1781).
410 ARTICLES OF CONFEDERATION § XI, XIII (U.S. 1781). “Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.” ARTICLES OF CONFEDERATION § XIII (U.S. 1781). (emphasis added.)
411 REPORT ON GOVERNMENT FOR WESTERN TERRITORY art. V (U.S. 1784). This “1784 Ordinance” is dated as prepared on March 1, 1784, and as effective on April 23, 1784. This “Northwest Ordinance of 1784” was established under the Articles of Confederation.
413 “Vermont was created in July 1777 when representatives of approximately twenty-eight towns in the New Hampshire Grants adopted their own constitution and declared their independence from the state of New York.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 127 (1983). “The British government was supposed to have set up a new colony in the Grants just before the American Revolution began, with Philip Skene commissioned as its first governor.”…”The Vermonters’ reliance on the Skene charter was a tribute to the enormous prestige of charters in defining rights during the revolutionary era. Even when making the most radical claims to self-government, Vermonters spoke of our ‘charter of liberty from Heaven.’ … With the invention of a charter, Vermont’s claims became congruent with those of other American states.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 134 (1983).
the Legislatures of the States concerned as well as of the Congress.”34

The clause provides for recognition of existing States and existing State boundaries, as a new State or States may not be created by more than one existing State, and may not be formed within an existing State, without the “Consent of the Legislature of the States.”35

The forming of a new State within a State had been experienced by New York with the formation of Vermont in the counties of what was originally northeastern New York.36

Virginia had also ceded territory from within its existing charter claims,37 but this was eventually consented to by Virginia, unlike New York’s experience with Vermont, which the “Consent” provision was directed at preventing from

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34 U.S. CONST. art. IV, § 3, cl. 1.
35 U.S. CONST. art. IV, § 3, cl. 1.
36 “In the first years of the war [the American Revolution], Vermont participated actively in the American effort, capturing Ticonderoga (May 1775) and playing an important role in thwarting Burgoyne’s attack from Canada (August-October 1777). In recognition of these contributions, the new state’s leaders expected to be welcomed into the American union. But New York insisted that the Grants [of Land] remained a part of the state, and Congress could not afford to alienate one of its most important members.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 128 (1983). “The British government was supposed to have set up a new colony in the Grants just before the American Revolution began, with Philip Skene commissioned as its first governor. (In fact, Skene was to command a garrison at Lake Champlain.) … The Vermonters’ reliance on the Skene charter was a tribute to the enormous prestige of charters in defining rights during the revolutionary era. … With the invention of a charter, Vermont’s claims became congruent with those of other American states.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 134 (1983).
37 A case from the Court on Kentucky’s property laws and State sovereignty as a result of its origins as part of Virginia. “It is now argued that, by the seventh article of the compact with Virginia, Kentucky was precluded from passing such a law.” … “The article reads thus: ‘All private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.’” … “We have an analogous case in the thirty-fourth section of the Judiciary Act of the United States; in which it is enacted that the laws of the several states shall be rules of decision in the courts of the United States; and which has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined.” “It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage.” HAWKINS v. BARNEY’S LESSEE, 30 U.S. 457, 464, 466-67 (1831). (emphasis added.) An Act to establish the Judicial Courts of the United States. Act of Sept. 24, 1789, 1 Stat. 73 (1789). A 1799 boundary case between New York and Connecticut, which demonstrates the high value placed on real property rights described as a “right of soil”, Chief Justice ELLSWORTH, “In this respect New York is, perhaps, distinguished from her sister states, whose claims of territory are, generally, founded upon positive grant; while her [New York] claim of soil is a mere incident of the sovereignty and jurisdiction, with which the revolution invested in her. … …in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced.” NEW YORK v. CONNECTICUT, 4 U.S. 1, 4-5 (1799).
occuring again in the future. The Consent provision is explicit respect shown by the Constitution and the Congress, as approval by both the Legislatures of the States and the Congress are required in this situation, for the independence and sovereignty of the several States. The Constitution provides that the admission of new States may be done, from areas that do not consist of the territory or jurisdiction of other States, by Congress alone, and does not require the approval of the States, which is in distinct contrast to the supermajority approval by “nine States” for a “colony” in section XI of the Articles of Confederation. However, simply providing the ability to add new States was not the desired end of the several States, as the States wanted protection from future areas that were to be under the control of Congress from occupying significant amounts of territory within the United States, and thereby adding unduly to Congressional power, and undermining the role of the States within the Union. The States

418 U.S. CONST. art. IV, § 3, cl. 1. “Virginians were aware of the difficulties in administering the state’s extensive territorial claims. … The boundary question was inextricably tied with recognition of private titles within those boundaries, and so it too was inseparable from the state’s sovereignty.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 82 (1983). (emphasis added.) “The Virginians insisted on a political settlement; a negotiated agreement was an acknowledgment of their state’s sovereign rights. … Congress had no choice but to deal with Virginia. Recognition of this political necessity was itself a recognition that Virginia could determine its own boundaries, that the claims were ‘good’ because they were enforceable. Virginians were convinced that their claims were valid, and they were prepared to litigate them with any other claiming state before a special court, set up according to Article IX [of the Articles of Confederation].” ARTICLES OF CONFEDERATION § IX (U.S. 1781). PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 101 (1983). (emphasis added.) “But when John Montgomery of Pennsylvania changed his vote from no to yes, so changing his state’s vote, the necessary seven state votes were assembled and the cession was completed. Virginia’s land cession enabled Congress to begin implementing its plans for sale of public lands and the establishment of new states in the West.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 100 (1983). (emphasis added.) “The completion of the Virginia cession closed the debate on the state’s charter claims across the Ohio [River].” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 101 (1983). (emphasis added.)

419 Nonetheless, the United States has challenged States, in fact initiated litigation, over which government has control over an area on numerous occasions. UNITED STATES v. CALIFORNIA, 332 U.S. 19 (1947). UNITED STATES v. MAINE, 420 U.S. 515 (1975). These cases will be quoted in detail in a footnote to follow.

420 U.S. CONST. art. IV, § 3, cl. 1.

421 U.S. CONST. art. IV, § 3, cl. 1. ARTICLES OF CONFEDERATION § XI (U.S. 1781).

422 “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” U.S. CONST. art. IV, § 3, cl. 2. (emphasis added.)

423 U.S. CONST. art. IV, § 3, cl. 1. “A Remonstrance drafted by George Mason and adopted by the Virginia assembly in December 1779 stated: ‘Should Congress assume jurisdiction, and arrogate to themselves a right of adjudication, not only unwarranted by, but expressly contrary to the fundamental principles of the confederation;
insisted that States would be formed, and “Statehood automatically followed, once a population of 60,000 was attained, and the enlarged new states were likely to reach that figure at an early date.” This automatic mechanism of Statehood for new states, protected State

superseding or controlling the internal policy, civil regulations, and municipal laws of this or any other State, it would be a violation of public faith, introduce a most dangerous precedent which might hereafter be urged to deprive of territory or subvert the sovereignty and government of any one or more of the United States, and establish in Congress a power which in process of time must degenerate into intolerable despotism.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 90 (1983). (emphasis added.) An excerpt from the first Essay by Brutus dated October 17, 1787, and believed written by Judge Robert Yates of New York: “it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. … In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).

424 The controversy over the navigation of the Mississippi brought these fears [“pressure to increase minimum population requirements for statehood”] to a head; the ‘occlusion’ of that river would retard emigration to the West, Monroe told Patrick Henry, and ‘effectually … exclude any new State.’ The self-interested policy of the eastern (northern) states would throw westerners ‘into the hands of Britain.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 168 (1983). “Westerners demanded free navigation of the Mississippi.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 159 (1983). As for the coastal Americans, Navigation rights were also protected on the high seas with respect to American fisherman and fishing rights in Article 3, of The Paris Peace Treaty of 1783. “Article 3. It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland, also in the Gulf of St. Lawrence and at all other places in the sea,…” The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 3, U.S. – Great Britain.

425 PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 171 (1983). “And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.” NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14 art. 5 (U.S. 1787). (emphasis added.) (emphasis retained.) This “Northwest Ordinance of 1787” is dated July 13, 1787. The exact dates are very important since the United States is still operating under the Articles of Confederation, and the Constitution has not been ratified, let alone completely written as of this Agreement. This matter of dates will be specifically addressed later in this paper in Section VI.

426 This paper proposes that the existence a Territory such as Puerto Rico, which has not become a State within the United States, was not contemplated as a possibility and was to be entirely prevented from occurring as a possible result under the Constitution. Moreover, this paper proposes that in the cases such as Puerto Rico, since so much time has passed, Puerto Rico must be given the status of an independent country, that is completely and entirely sovereign in all respects. The conundrum may be seen in words from the United States District Court for the District of Puerto Rico: “In sum, after 1952, Puerto Rico’s status changed from that of a mere territory to the unique status of a Commonwealth. The federal government’s relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bound by both the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the right of the people of Puerto Rico as United States citizens.” … “Thereafter, the authority exercised by the federal government emanates from the compact entered into between the people of Puerto Rico and the Congress of the United States.” … “The First Circuit has held that a Puerto Rican resident, although an American citizen, has no
sovereignty, by preventing the Congress from acquiring power over extended areas, and extensive growing populations.  

Article IV, section 3, clause 2 provides, “The Congress shall have Power to dispose of…the Territory or other Property belonging to the United States…” which was directed at providing Congress a legitimate method for generating revenue from the sale of land. “Throughout 1783, a coherent western policy emerged out of its [Congress] various committees – on public credit, demobilization, and Indian affairs –dealing with adjustment to peace. The implementation of this policy depended on the creation of a national domain. Some beginning had to be made in satisfying public creditors through land sales.” The clause continues and provides, “…; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any Particular State.”

constitutional right to vote for President and Vice President,…as the Constitution…specifically provides that the electors for those offices be chosen by ‘each State…in such manner as the Legislature thereof may direct,’ and Puerto Rico is not a State. Under the same rationale, Plaintiff does not have a constitutional right to be represented in Congress…” RIVERA v. CONGRESS OF THE UNITED STATES, 338 F.Supp. 2d 272, 276, 279 (2004). The rights of Puerto Rican residents have been addressed by the Court, and provides further ambiguity. “We do not suggest, however, that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens.” EXAMINING BD. OF ENGRS. v. OTERO, 426 U.S. 572, 604-05 (1976).

“It is as possible that one state shall aim at an undue influence over others, as that any individual should aspire after the aggrandisement of himself. The danger of evil in both cases will be lessened by the increase of obstacles: and therefore our security as citizens of America will be promoted not only by the increase of number as individuals, but also by the increase of states which form the general union…Your memorialists conceive that an increase of states in the federal union will conduce to the strength and dignity of that union, just as our increase of individual citizens will increase the strength and dignity of a state.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 155 (1983). (emphasis added.)


U.S. CONST. art. IV, § 3, cl. 2.


"Virginia’s land cession enabled Congress to begin implementing its plans for the sale of public lands and the establishment of new states in the West.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 100 (1983). (emphasis added.)


U.S. CONST. art. IV, § 3, cl. 2.
geographical territory and areas of jurisdiction, which is a reflection of the dispute resolution provision in Article IX of the Articles of Confederation. The method created by Article IX was rather complex, and as a result the only proceeding brought under Article IX was that of *Connecticut v. Pennsylvania*, but a State’s claim of right was still preserved within Article IV, section 3, clause 2 of the Constitution. Article IV of the Constitution protects and respects the independence and sovereignty of each State, whether “now existing” or to be made with respect to its territory, or jurisdiction, or “any Claims…of any particular State.”

ii. Waters.

The matter of Navigation was also bound to the issue of land claims and territory, and is found in Article 8, of The Paris Peace Treaty of 1783, which provides, “The navigation of the

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434 “By the ‘peaceable and conclusive settlement of a dispute between two such powerful sovereign States, concerning a large and valuable territory,’ the United States had displayed – at least to the Pennsylvania Council – ‘a very singular and truly dignified example of a people who have wisdom and virtue enough not to waste in civil convulsions, the happiness and glory acquired by a successful opposition to their foreign enemies.’” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 58 (1983).
435 “The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any causes whatever;…” ARTICLES OF CONFEDERATION § IX (U.S. 1781).
437 “…Pennsylvania initiated proceedings under Article IX to resolve its differences with Connecticut over the Wyoming Valley.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 58 (1983). The issue was finally resolved in 1782, and was the only dispute resolved by the resolution proceedings under the Articles of Confederation.
438 “This is an original suit, brought by the State of Vermont December 18, 1915, for the determination of the boundary line between that state and the State of New Hampshire.” … “We think that the practical construction of the boundary line between that state and the State of New Hampshire: … “We think that the practical construction of the boundary by the *acts of the two states and of their inhabitants* tends to support our interpretation of the Order-in-Council of 1764, and of the resolutions of Congress and of the Vermont legislature, preceding the admission of Vermont to the Union. We conclude that the true boundary is at the low-water mark on the western side of the Connecticut River,…” VERMONT v. NEW HAMPSHIRE, 289 U.S. 593, 595, 619 (1933). (emphasis added.) “Of course, the defendant States were not parties to United States v. California or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases.” UNITED STATES v. MAINE, 420 U.S. 515, 527 (1975). (emphasis retained.) (emphasis added.) UNITED STATES v. CALIFORNIA, 332 U.S. 19 (1947).
439 U.S. CONST. art. IV, § 3, cl. 2. Correspondingly, “The judicial Power shall extend to all Cases, …; - to Controversies between two or more States;…” U.S. CONST. art. III, § 2, cl. 1.
440 “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, …” U.S. CONST. art. I, § 9, cl. 1. (emphasis added.)
441 U.S. CONST. art. IV, § 3, cl. 2.
river Mississippi, from its source to the ocean\textsuperscript{442}, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States.\textsuperscript{443} The “Northwest Ordinance of 1787” provided, “The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation,…”\textsuperscript{444}, and the Articles of Confederation provided, “No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.\textsuperscript{445} No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already

\textsuperscript{442} The Court has ruled on coastal boundaries between the United States and the States, and apparently with no recollection of the Confederation existing under the Articles of Confederation. “United States v. California…involved an original action brought in this Court by the United States seeking a decree declaring its paramount rights, to the exclusion of California, to the seabed underlying the Pacific Ocean and extending three miles from the coastline and from the seaward limits of the State’s inland waters. California answered, claiming ownership of the disputed seabed. The basis of its claim, as the Court described it, was that the three-mile belt lay within the historic boundary of the State; ‘that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an ‘equal footing’ with the original states, California at that time became vested with title to all such lands.’ … The Court rejected California’s claim. The original Colonies had not ‘separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it.’” UNITED STATES v. MAINE, 420 U.S. 515, 519-520 (1975). (emphasis added.) ARTICLES OF CONFEDERATION (U.S. 1781). The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 8, U.S. – Great Britain. U.S. CONST. art. VI, § 1, cl. 1. The Court did recognize State sovereignty to some extent and, just as importantly, referred to the limited purposes relating to dealings between sovereigns of the National government established in the Constitution. “Of course, the defendant States were not parties to United States v. California or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases.” … “California, like the original thirteen colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. …The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with powers, war and peace focus there. National rights must therefore be paramount in that area.” UNITED STATES v. MAINE, 420 U.S. 515, 521, 527 (1975). (emphasis added.) UNITED STATES v. CALIFORNIA, 332 U.S. 19 (1947).

\textsuperscript{443} The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 8, U.S. – Great Britain.

\textsuperscript{444} NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14 art. 4 (U.S. 1787).

\textsuperscript{445} ARTICLES OF CONFEDERATION § VI (U.S. 1781). This clause corresponds to: U.S. CONST. art. I, § 10, cl. 1.
proposed by Congress, to the courts of France and Spain. 446 And now it is important to emphasize, Article VI, section 1, clause 1, binds all pre-existing agreements to the Union under the Constitution as well. Section 1, clause 1, provides, “All Debts contracted and Engagements 447 entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” 448 Here the linkage of continuing obligations 449 exists, and is articulated so as to maintain pre-existing commitments to the world

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446 ARTICLES OF CONFEDERATION § VI (U.S. 1781). This latter clause corresponds to: U.S. CONST. art. I, § 10, cl. 2.

447 “Engagement. In French law. A contract. The obligation arising from a quasi contract. The terms ‘obligation’ and ‘engagement’ are said to be synonymous, but the Code seems specially to apply the term ‘engagement’ to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee.” BLACK’S LAW DICTIONARY 622 (4th ed. 1951). Justice WILSON on “Engagements” in 1793, “Is the foregoing description of a State a true description? It will not be questioned but it is. Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; it is upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper it purely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorized by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice. Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a SOVEREIGN State? Surely not.” CHISHOLM v. GEORGIA, 2 U.S. 419, 456 (1793). (emphasis added.) Chief Justice MARSHALL’s use of “Engagements” in 1831, “They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.” THE CHEROKEE NATION v. GEORGIA, 30 U.S. 1, 16 (1831). (emphasis added.) Note also the use of “Engagements” from the syllabus of The Cherokee Nation v. Georgia, “They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state, and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States.” THE CHEROKEE NATION v. GEORGIA, 30 U.S. 1 (1831). (emphasis added.)

448 Article VI, section 1, clause 1, is a provision that looks to the future of the Union and at the same time incorporates by reference obligations of the past. “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, § 1, cl. 1. (emphasis added.) This corresponds to: “Article 4. It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.” The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 4, U.S. – Great Britain. For a case concerning a debt in dispute see also CHISHOLM v. GEORGIA, 2 U.S. 419 (1793).

449 “No State shall…pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,…” U.S. CONST. art. I, § 10, cl. 1.
outside the Union, as well as recognizing and retaining respect for the independence and sovereignty of the several States, which were the parties who actually entered into treaties, contracts, debts, and engagements as well as the Articles of Confederation.

The “Northwest Ordinance of 1787” reaffirmed navigation rights in section 14, article 4, and provided, “The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefore.” Located in this one clause of the “Northwest Ordinance of 1787”, which was agreed to before the Constitution was ratified, by the States operating under the Articles of Confederation, and which remains binding via Article VI of the Constitution, links the matters of Land Claims, Territory and Statehood; Commerce, Navigation & Regulation; and it even addresses Taxation as well as

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450 Justice BARBOUR for the Majority on State sovereignty and powers: “We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation.; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends:… That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.” … “It is the duty of the state to protect its citizens…” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 139, 141 (1837). (emphasis added.) Obligations were only valid against the United States, rather than States themselves: “Article XII. All bills of credit, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.” ARTICLES OF CONFEDERATION § XII (U.S. 1781). (emphasis added.)

451 “At the end of the Revolution moreover, the Paris Treaty of 1783 listed each American state separately, giving international recognition to the exclusive claims of the thirteen states over all the territory in the ‘United States.’” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 130 (1983). (emphasis added.) Article 1: His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free sovereign and independent states, that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof.” The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 1, U.S. – Great Britain.

452 ARTICLES OF CONFEDERATION (U.S. 1781). U.S. CONST. art. VI, § 1, cl. 1.

453 NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14 art. 4 (U.S. 1787). (emphasis added.)
With each step in the examination of the Constitution, the interrelationships of the various Articles and sections of the Constitution become clearer, and all the more apparent that the Constitution must be viewed as a whole document in order to understand it fully, rather than creating obstacles and stumbling over “questions obscured by the clausebound approach that now dominates constitutional discourse.” Those free and open navigable waters served as the avenues of commerce, or ‘common highways’, that ran along the shores of the sovereign lands, and served the inhabitants (persons) who lived there, and now the analysis will turn to those diverse and varied persons.

iii. Persons and People.

The “Northwest Ordinance of 1787” links issues of Land Claims, Navigation, and Taxation; and, as already discussed above, Taxation is inextricably bound with Representation and Proportion in Numbers. The analysis will examine “Persons” with respect to Representation; and “Persons” as compared with “Property” in the Ordinances of 1784, 1787, the Articles of Confederation and the Constitution. The Articles of Association of October 20, 1774, were effectively a trade embargo to combat the Navigation Acts, which provided for termination of the importation of slaves, and a commitment to discontinue the slave trade as of

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December 1, 1774, and the term “slave” was used. This established the beginning of explicit articulation of a desire to terminate slavery in America, and it provided an actual date to take effect. The rather vast Territory governed by the “Ordinance of 1784” was guaranteed “5, That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty.” Once again, a deadline is created to terminate the existence of slavery or involuntary servitude. Later, in the “Northwest Ordinance of 1787”, Article 6 provided, “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.” The prohibition is similar, but is effective upon enactment, and provides for a limited claim right only to “the original States.” The fugitive flight phrase corresponds to the Articles of Confederation, which provided, “If any person guilty of, or charged with, treason, felony, or

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459 "2. We will neither import nor purchase, any slave imported after the first day of December next; after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.” THE ARTICLES OF ASSOCIATION § II (U.S. 1774). (emphasis added.)
460 REPORT ON GOVERNMENT FOR WESTERN TERRITORY art. IV (U.S. 1784).
461 REPORT ON GOVERNMENT FOR WESTERN TERRITORY art. IV (U.S. 1784).
462 The “Northwest Ordinance of 1787” superseded the “Ordinance of 1784,” “Be it ordained by the authority aforesaid, That the resolutions of the 23rd of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void.” NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14 (U.S. 1787).
463 NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14, art. 6 (U.S. 1787).
464 NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14, art. 6 (U.S. 1787). “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. CONST. art. I, § 9, cl. 1. (emphasis added.) The term “now existing” does not appear anywhere else in the Constitution, and reflects the meaning of “the original States” in the Northwest Ordinance of 1787.
other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense." In Article IV of the Constitution, which also deals with "New States," "Territory or other Property," section 2, clauses 2 and 3 provide, "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." And, "No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon a Claim of the Party to whom such Service or Labour may be due." Both clauses include the act of one being "delivered up" under certain limited circumstances, and the first requires "A Person charged…with…Crime, and "Demand of the executive Authority," while the second requires a "Person held…escaping" and the “Claim of the Party to whom …Service or Labour may be due.” In both clauses, a “Person” is involved, moreover, the Ordinance of 1784 refers to “personally guilty,” the Northwest Ordinance of 1787 refers to “person”, the Articles of Confederation refer to “person,” and the Constitution explicitly refers to “Person” with respect to

466 ARTICLES OF CONFEDERATION § IV (U.S. 1781).  
467 U.S. CONST. art. IV, § 3, cl. 1.  
468 U.S. CONST. art. IV, § 3, cl. 2.  
469 U.S. CONST. art. IV, § 2, cl. 2.  
470 The meaning of this clause may in fact specifically not include slavery. “On motion of Mr. Randolph the word “servitude” was struck out, and “service” {unanimously} inserted, the former being thought to express the condition of slaves, & the latter the obligations of free persons.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 607 (Max Farrand ed., 1937). (emphasis added.)  
471 U.S. CONST. art. IV, § 2, cl. 3.  
472 U.S. CONST. art. IV, § 2, cl. 2, 3.  
473 U.S. CONST. art. IV, § 2, cl. 2.  
474 U.S. CONST. art. IV, § 2, cl. 3.
these matters. The Constitution always speaks of “person” and “property” as distinctly different entities, concepts, and ideas. This is most pleasing to the ear when expressed in the Fifth Amendment phrase, “No person shall be…nor be deprived of life, liberty, or property, without due process of law.” The “Members” of the House of Representatives are ‘persons’ as defined in Article I. One of the most important elements of Article I is the determination of Representation for each State, whether already existing, or to be newly created, which is based on “their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.” Note that “those bound to Service for a Term of Years” are included and counted as whole Numbers. Even those counted for Article I, section 2, clause 3 purposes as “three-fifths” are distinctly referred to as “Persons.” Representation and Taxation of new States and old are proportional to their Numbers, and only “Persons” are counted within

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476 With respect to Representation: Samuel Chase of Maryland “proposed a compromise that would reach both contested articles: in all questions relating to ‘life and liberty,’ the states would have an equal vote; in all questions relating to ‘property,’ the voice of each colony would be proportional to the number of its inhabitants.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 138 (2003).


478 U.S. CONST. amend. V. The Court found no jurisdiction in 1833: “We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. … This court, therefore, has no jurisdiction of the cause, and it is dismissed.” BARRON v. BALTIMORE, 32 U.S. (7 Pet.) 243, 250-51 (1833). (emphasis added.) Nonetheless, take note of the Court’s clear articulation that there are limitations to federal powers. The Constitution and the Amendments are both ratified by the People of the States in Conventions, and it appears that contrary to the reasoning of Chief Justice MARSHALL in 1833 (with respect to the Amendments of 1789) was an opinion by Chief Justice MARSHALL in 1819 (with respect to the Constitution of 1787): “The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. …The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 404 (1819).

479 U.S. CONST. art. I, § 2, cls. 1, 2.

480 U.S. CONST. art. I, § 2, cl. 3.


482 U.S. CONST. art. I, § 2, cl. 3.
“Numbers.”483 If the “other Persons” referred to in the apportionment clause, were not “Persons,” then the “slave States” would lose all Representation whatsoever for their slave populations.484

483 U.S. Const. art. I, § 2, cl. 3. Contrary to the view presented in this paper, Justice TANEY opined: “It [the Constitution] has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.” DRED SCOTT v. SANDFORD, 60 U.S. (19 How.) 393, 451 (1857). (emphasis added.) It is interesting to examine the contrasts in an earlier slave-case brought by a petitioner-slave in an opinion by Chief Justice TANEY in 1842, “The case … came upon a petition for freedom. ‘Provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life,’ … Now a bequest of freedom to the slave upon the same principles with a bequest over to a third person. … there can be no reason for applying a different rule where the bequest over is freedom to the slave. … freedom to the petitioner, … affirmed.” WILLIAMS v. ASH, 42 U.S. 1, 12-14 (1842.). The Constitution addresses property explicitly in: U.S. Const. amends. III, IV, V. As has been previously discussed (See 55 n.302), inconsistent holdings have never impeded the Court from arriving at its desired ends, and contrary to the narrow view of government power in 1857, there was a vastly broader view in 1819. “It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.” … “That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 408-09, 413 (1819). (emphasis added.) Here “ample means” is interpreted to grant broad powers by the Court. Previously, in 1837, the Court had clearly distinguished persons and property: “Now it is difficult to perceive what analogy there can be between a case where the right of the state was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not:…” “They [persons] are not the subject of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods.” “…we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.” “… ‘If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the states. … It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, &c. of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable paupers.” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 132-33, 136-37, (1837). (emphasis added.)

484 U.S. Const. art. I, § 2, cl. 3. A denial of Representation for the “other Persons” was part of Mr. Randolph’s proposal: “2. Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants; as the one or the other rule may seem best in different cases.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (Max Farrand ed., 1937). (emphasis added.) “If population were to be the rule [of Representation], however, all the northerners would have preferred a rule making representational proportional to the number of free inhabitants.” “South Carolina, wanted all her slaves counted fully. North Carolina and Virginia repudiated Carolina’s extremism but considered the three-fifths ratio a sine qua non.” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 226 (2003). “Mr Butler [of South Carolina] contended again that Representation sd. be according to the full number of inhabitants, including all the blacks; admitting the justice of Mr. Govr. Morris’s motion.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 592 (Max Farrand ed., 1937).
The “Persons” provided for in all of these clauses regarding slavery or “involuntary servitude,” are “persons” within the meaning of the Constitution, and the negotiations among the Delegates over slavery, or the termination of slavery, or the possibility of slavery in “new States,” when drafting these documents and the Constitution, include both time restrictions and geographical limitations.\textsuperscript{485} A result of the negotiations was included in Article V of the Constitution, which provides explicit Prohibitions to Amendment of certain items, and states, “Provided that no Amendment…shall in any manner affect the first …Clause\textsuperscript{486}…in the Ninth Section of the first Article.”\textsuperscript{487} As examined above, this appeared in the Committee of Style, Article VII, section 4, and finally in Article I, section 9, of the Constitution, which provides, “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight,…”\textsuperscript{488} The prohibition to Amendment in Article V, and the prohibition in Article I, section 9 both have expiration dates, just as there were explicit expiration dates within

\textsuperscript{485} U.S. CONST. art. V. U.S. CONST. art. I, § 9, cl. 1.
\textsuperscript{486} The Court’s treatment of Congressional Power and State police Power with respect to Naturalization and Immigration are seen in the following cases: “That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.” … “This government could never give up the right of excluding foreigners whose presence it might deem a source of danger to the United States.” … “The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them.” … “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 judgement of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.” CHAE CHAN PING v. UNITED STATES, 130 U.S. 581, 603, 607-09 (1889). (emphasis added.) “That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation;” … “If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the states. … It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, &c. of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable paupers.” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 132-33, 139 (1837). (emphasis added.)
\textsuperscript{487} U.S. CONST. art. V.
the Articles of Association of 1774, and the “Ordinance of 1784.” Additionally, there is a geographical limitation to the clause, which limits it only to “States now existing,” as opposed to “New States,” and this would further limit its “protections” to the thirteen States in existence at the Federal Convention of 1787. This “prohibition” to Amendment was actually a postponement of Amendment provision, as opposed to the strict adherence demanded of the “fourth Clause…in the Ninth Section of the first Article” which is an unchangeable fundamental underlying principle of the Constitution. Since Article I, section 9, clause 1, is a postponement provision, that permits Amendment at some time in the future, it is clearly apparent the Framers where negotiating in time and geography, such being the year 1808, “Territory or other Property” and “States now existing” as compared with “New States.”

Unsettled Territory, without “Persons” or without a sufficient number of “Persons” do not only not qualify for “Statehood,” they simply do not even need Representation under both the “Northwest Ordinance of 1787” and the “Constitution” and here it is made clear, that, although the States wanted firm boundaries, it is “the People of the States” that settle, reside, inhabit, and organize as a community within their “State”, that genuinely compose that body of power

491 U.S. CONST. art. V. U.S. CONST. art. I, § 9, cls. 1, 4.
493 “The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’ This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in Convention.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). (emphasis added.) “At length a Convention of the states has been assembled, they have formed a constitution which will now, probably, be submitted to the people to ratify or reject, who are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions, or forms of government, at their pleasure.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).
that are “the several States.”494 The Framers utilized mechanisms that accommodated changes over time, changes in population, and changes in geographical settlement, as well as “automatic” mechanisms for creating and admitting “New States,” and thereby ensured that the Constitution would demonstrate respect for the independence and sovereignty of each and every State within the several States, as well as their inhabitants and Persons, all of them.495

iv. Present Impact of Constitutional Interest Analysis.

The Framers represented States, which were already independent496, and knew the nation would grow in territory, especially westward. The sovereignty of States could be undermined if the geographical growth of the Union permitted a vast national territory that would fall under control of the National Legislature, and thereby undermine the position of the States. Without a mechanism for creating new States497, large geographical territory498, large populations, or both could fall under control of the Congress499, which would impair the sovereignty of the States and the establishment of an equitable relationship among the States and any future territory.

The underlying principle revealed from a historical examination of the Framers perspective, clearly points to a principle prohibiting a national territory under control of a

497 U.S. CONST. art. IV, § 3, cl. 1.
499 "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;…” U.S. CONST. art. IV, § 3, cl. 2. (emphasis added.) “To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may,…become the Seat of the Government of the United States,...” U.S. CONST. art. I, § 8, cl. 17. (emphasis added.) Note there is a distinction between Legislation and Rules and Regulations within the Constitution, and exclusive Legislation is limited to “not exceeding ten Miles square.
national legislature.\textsuperscript{500} Moreover, it reinforces the position by a provision in the Constitution, which demands equal suffrage in the Senate for each State.\textsuperscript{501} This equal suffrage provision is so strong, that it is not permitted to be amended. The provision appears in Article V and provides for a State’s own consent, with respect to denying the equal suffrage, so that a State has control of its own right of suffrage, not the national government.

Contrary to the Article V prohibition, if one looks at the land areas that consist of the federal territory today, there are geographical areas and populations being denied their equal suffrage in the Senate without their own consent. It is a very plausible argument that Puerto Rico\textsuperscript{502}, the U.S. Virgin Islands, Guam, and other lands claimed as territory\textsuperscript{503} of the United States having been held for extended periods of time\textsuperscript{504}, and not having been fully recognized as States within the Union are operating in contravention of the Article V provision of the Constitution. It is also appropriate to recall the underlying principle of participatory government and consent of the governed when examining the extent to which these federal territories have

\textsuperscript{500} “A Remonstrance drafted by George Mason and adopted by the Virginia assembly in December 1779 stated: ‘Should Congress assume jurisdiction, and arrogate to themselves a right of adjudication, not only unwarranted by, but expressly contrary to the fundamental principles of the confederation; superseding or controlling the internal policy, civil regulations, and municipal laws of this or any other State, it would be a violation of public faith, introduce a most dangerous precedent which might hereafter be urged to deprive of territory or subvert the sovereignty and government of any one or more of the United States, and establish in Congress a power which in process of time must degenerate into intolerable despotism.’” Peter S. Onuf, The Origins of the Federal Republic 90 (1983). (emphasis added.)

\textsuperscript{501} U.S. Const. art. V.


been denied representation within the federal republic. Admittedly, a territory will have a period of time between acquisition and Statehood, but after an extended period of time passes, the underlying principles of the provisions in the Constitution are being violated. The appropriate resolution is to create new States, or to liberate the territories and grant these areas complete separation and independence from the Union.

The Framers were well studied in the problems of an extended republic, in terms of attempting to govern a vast and expansive territory. They understood that some of the States themselves had geographical reach beyond which could be governed effectively, such as Virginia before 1784. The purpose new States would serve would promote manageable republics in addition to prohibiting the creation of a national territory controlled by a distant national legislature, which was one of the very arguments they made against the Crown of England.


507 The size of a republic getting too large was of great concern during the period the Framers drafted the Constitution. “If respect is to be paid to the opinion of the greatest and wisest men who have ever thought or wrote on the science of government, we shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States. Among the many illustrious authorities which might be produced to this point, I shall content myself with quoting only two. The one is the baron de 1 MONTESQUIEU, SPIRIT OF LAWS, ch. xvi, vol. I [bk. VIII] (1752). ‘It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.’” THE ANTI-FEDERALIST NO. 17 (Robert Yates).

508 “Resolved, N.C.D. 1. That they are entitled to life, liberty, and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.” ... “Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented,...” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS § 7, 10 (U.S. 1774). (emphasis added.)
Geographic growth of the republic, and the accompanying growth in population were planned for carefully by the Framers, and the underlying principles of participatory government, consent of the governed, and adding new States all act to protect the sovereignty of existing States, and provide for the continuation of republican forms of government\(^{509}\) by keeping them from becoming too large or from falling under control of a national legislature. The parties who entered into the agreement that is the Constitution were independent and sovereign States\(^{510}\), and they acted to preserve their own status, with a mechanism for creating new States.\(^{511}\) The preservation of the status of the several States was one device in the scheme of the Separation of Powers, and the analysis will next examine a few of the salient features in that area.

**VI. Separation of Powers.**

What are the underlying principles behind the provisions in the Constitution, which disperse and distribute powers in different bodies of power or “branches of government?” The underlying principle behind the separation of powers is that when power is granted, power will eventually be abused, and encumbrances must exist to restrain government actions.\(^{512}\) A historical analysis from the viewpoint of the Framers shall provide insight and reveal the strength

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\(^{509}\) “…Republican Form of Government…” U.S. CONST. art. IV, § 4.


\(^{511}\) U.S. CONST. art. IV, § 3, cl. 1.

\(^{512}\) “But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism,…” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). (emphasis added.) “In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” THE ANTI-FEDERALIST NO. 17 (Robert Yates). (emphasis added.) “THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:” Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.) “…To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 431 (1819). (emphasis added.)
of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the dispersal and distribution of powers.

“Separation of Powers” is an extremely complex principle that was infused into the Constitution by the Framers, and is much more far reaching, than the basic concepts of a Legislative, an Executive, and a Judicial\(^513\) “branch” within the National government as provided for in Articles I, II, and III.\(^514\) As a brief example of the “Separation of Powers” provided for within the Constitution of 1787, there are the three “Branches\(^515\)” of government, the Legislative\(^516\), the Executive\(^517\), and the Judicial\(^518\); however, within the Legislative, there are a House of Representatives (delegates of “the People” represented by “Enumeration”)\(^519\), and a Senate (delegates of “the several States” represented in Equity).\(^520\) The Executive, provides, “The Person having the greatest Number of Votes [of the Electors] shall be the President”\(^521\), and “In every Case, after the choice of the President, the Person having the greatest Number of Votes

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\(^513\) U.S. CONST. arts. I, II, III. “A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412 (1819). “This government is to possess absolute and uncontrollable power, legislative, executive and judicial,…” THE ANTI-FEDERALIST NO. 17 (Robert Yates).

\(^514\) U.S. CONST. arts. I, II, III.

\(^515\) The original usage of the term “branch” was used to describe separation within the “Legislative Branch” as well. “3. Resd. that the National Legislature ought to consist of two branches.” I THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (Max Farrand ed., 1937).

\(^516\) U.S. CONST. art. I.

\(^517\) U.S. CONST. art. II.

\(^518\) U.S. CONST. art. III.


\(^520\) U.S. CONST. art. I, § 1. U.S. CONST. art. I, § 3, cl. 1, 2, 3, 4. “The people of all the States have created the general government,…” The people of all the States, and the States themselves, are represented in Congress,…” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819). Note that the Seventeenth Amendment altered the original provisions of Article I, section 3, clause 1. U.S. CONST. amend. XVII. This modification altered the election method so as to circumvent the Senators of each State from being chosen by the State Legislature of each State. The Seventeenth Amendment was ratified on May 13, 1913. Dates obtained from: THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 51 (7th ed. 2001).

of the Electors shall be the Vice President" [President of the Senate]. The Judicial separates powers into several distinct realms, to include the Courts, the People, the States, Powers granted to Congress over the Judicial branch, and control by the Constitution itself over the Courts.

Article III provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," “the supreme Court shall have appellate Jurisdiction…under such Regulations as the Congress shall make”, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been

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522 U.S. CONST. art. II, § 1, cl. 3. This provision, which ensured that the strongest opponent to the person elected President would serve as Vice President, and thereby as President of the Senate, was a significant Separation of Powers built into the Executive branch that is an important structural mechanism in a closely divided Nation and National Legislature, and was changed by the Twelfth Amendment. U.S. CONST. amend. XII. Arguably, it is quite possible, if there were to be a change in the method of Election of the Vice President, it should have either a) involved Election of the Vice President by the State Legislatures, or b) involved a direct election by the People for the position of Vice President, as distinguished from the Elector system provided in Article II for the President. It seems incongruous with the rest of the Constitution, for political parties to have acquired the ability to elect both the President, and the Vice President, President of the Senate, from within the same indirect Elector system, at the same time, and from the same election process. In fact, at the Federal Convention of 1787, an early version from the Committee of Style provided in Article “V. Sect. 4. The Senate shall chuse its own President and other officers.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 567 (Max Farrand ed., 1937). (italics retained.) Debates of September 7, 1787 record, “{Section 3.} {see Sepr. 4} “The vice President shall be ex officio President of the Senate.” Mr. Gerry opposed this regulation. We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper. … Mr. Randolph concurred in the opposition to the clause.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 536-37 (Max Farrand ed., 1937). The final report of the Committee of Style provided in “ARTICLE I. … Sect. 3. … [c]” The Vice-President of the United States shall be, ex officio, President of the senate, but shall have no vote, unless they be equally divided.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 590-92 (Max Farrand ed., 1937).

523 U.S. CONST. art. I, § 3, cl. 4. Note that Power is granted to the Executive branch, the Vice President, within Article I and clearly outside of Article II.


525 U.S. CONST. art. III, § 1. The Constitution only provides for the supreme Court, the “inferior Court” system must be provided by Congress, which separates the supreme Court from the inferior Courts, and further allocates a significant amount of Congressional control over the judicial branch.

526 U.S. CONST. art. III, § 2, cl. 2. The Constitution provides that the appellate Jurisdiction of even the supreme Court shall be under Congressional Regulation. Here, the judicial branch is again subordinate to the Legislative branch.

committed.” Article III, speaks to the Courts in the voice of the Constitution, the document, as the “supreme Law of the Land”, and provides, “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” Additionally, Article III grants Congress the Power to declare the Punishment of Treason, and even places certain limitations upon Congress, thereby further restraining the Courts, and containing Congressional action. The Separation of Powers provided by the Constitution exists within branches that the Constitution creates, and further separations are provided for, under mechanisms that require affirmative action be taken by more than one body of power, so as to limit and restrain government action.

 colonial judges exercised circumscribed powers; they presided to ensure order and fairness, but juries decided all matters of law as well as fact.” LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 73 (1999). PALKO v. CONNECTICUT, 302 U.S. 319 (1937). DUNCAN v. LOUISIANA, 391 U.S. 145 (1968). U.S. CONST. art. III, § 2, cl. 3. The trial of ALL crimes is Constitutionally mandated to be held by jury and Such Trial must be held in the State where committed. This provision not only demonstrates respect for the local People by providing a local Jury, but also shows respect for the State itself. State police powers will be addressed later in this paper, within Section VI, which will help clarify the extent of the respect shown for States in this clause.

U.S. CONST. art. VI, § 1, cl. 2.

U.S. CONST. art. III, § 3, cl. 1. This Constitutional directive to all, including the Courts, prevents the Courts and Judges from defining Treason in America as defined in England, and prevents the inclusion of Misprision of Treason within Treason (which could be as simple as contempt of court), as was practiced under British rule in America. Definitions: “Treason. … In England, treason is an offense particularly directed against the person of the sovereign, and consists (1) in compassing or imagining the death of the king or queen, or their eldest son and heir; (2) in violating the king’s companion, or the king’s eldest daughter unmarried, or the wife of the king’s eldest son and heir; (3) in levying war against the king in his realm; (4) in adhering to the king’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and (5) slaying the chancellor, treasurer, or the king’s justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. 4 WILLIAM BLACKSTONE, COMMENTARIES 76-84 (1795).” BLACK’S LAW DICTIONARY 1672 (4th ed. 1951). "Misprision. …more particularly and properly, the term denotes (1) a contemp against the sovereign, the government, or the courts of justice, including not only contempts of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty;….” BLACK’S LAW DICTIONARY 1151 (4th ed. 1951). (emphasis added.) Misprision of Treason is defined as, “The bare knowledge and concealment of an act of treason or treasonable plot, that is, without any assent or participation therein, for if the latter elements be present the party becomes a principal. 4 WILLIAM BLACKSTONE, COMMENTARIES 120 (1795).” BLACK’S LAW DICTIONARY 1152 (4th ed. 1951). (emphasis added.)

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.” U.S. CONST. art. III, § 3, cl. 2. (emphasis added.)

For example, this fundamental principle is explicitly provided for with respect to military power and military action, whereby only Congress has the Power “To declare War” (and “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions”), and simultaneously provides that “The
Besides co-operative and co-ordinate action provisions, there are also bodies of power, that pre-existed the Constitution, the States and the People, and that the Constitution continues to recognize and respect that are not explicitly created by the Constitution, but nonetheless exist.533

i. Two-Body Requirements.

As just mentioned, there are several Constitutional provisions that require action by more than one body of power created by the Constitution, and the examination will begin with a brief description and enumeration of some of these mechanisms.534 Article I, section 7, clause 2, provides the principle of Bicameralism and Presentment535, and states, “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States….”536 But, underlying this principle, are the institutions involved, and the people who compose those institutions. The House of Representatives shall be composed of Members chosen by the People of the several States, and the Electors in each State, shall have the Qualifications for the most numerous Branch of the State Legislature, and must be an Inhabitant of that State.537 The Representatives are not elected at large from within the entire United States, they represent distinct constituencies within specific

536 U.S. CONST. art. I, § 7, cl. 2.
537 U.S. CONST. art. I, § 2, cl. 1, 2.
States, and are elected by the People of the States. The Qualifications are State controlled, which respects local rule, and Inhabitant status is required to insure local representation. Even with the House, which provides representation of the People by Numbers, there is Constitutional respect for the independence and sovereignty of the States, and of course the People, who must elect their representatives. The Senate shall be composed of two Senators from each State, chosen by the Legislature thereof… The equal status afforded to each State in the Senate demonstrates Constitutional respect for the independence and sovereignty of the several States, and the selection of Senators by the State Legislatures demonstrates respect for local rule and the sovereignty of these governmental bodies of power. Senators must also be Inhabitants of the State each Senator represents, further insuring local representation. Requirements for co-operative acts between bodies of power are numerous and include, “the Advice and Consent of

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538 U.S. CONST. art. I, § 2, cls. 1. “The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’ This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in Convention.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). (emphasis added.) “At length a Convention of the states has been assembled, they have formed a constitution which will now, probably, be submitted to the people to ratify or reject, who are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions, or forms of government, at their pleasure.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).


540 U.S. CONST. art. I, § 2, cls. 1, 2, 3.

541 U.S. CONST. art. I, § 3, cl. 1.

542 “SECTION II. The supreme legislative power shall be vested in a House of Representatives of the Freemen or Commonwealth or State of Vermont.” VT. CONST. § 2 of 1777. (emphasis retained.)

543 U.S. CONST. art. I, § 3, cl. 1.

544 U.S. CONST. art. I, § 3, cl. 3.
the Senate\textsuperscript{545}, the conduct of War\textsuperscript{546}, Trial by Jury\textsuperscript{547}, the agreement of both Houses and ratification by Convention\textsuperscript{548} or through the State Legislature to amend the Constitution\textsuperscript{549}, among others.\textsuperscript{550}

ii. Jurisdiction.

What are the underlying principles behind the judicial provisions of the Constitution? The historical analysis points to the principles of trial by jury\textsuperscript{551}, which provides consent of the governed\textsuperscript{552} and is a restraint upon government action by separating power from the government and placing it with the people, and to due process.\textsuperscript{553} A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The analysis will start with the sovereign aspects of state jurisdiction and then trial by jury.\textsuperscript{554}

a. State Jurisdiction.

\textsuperscript{545} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{546} U.S. CONST. art. I, § 8, cls. 11, 15. U.S. CONST. art. II, § 2, cl. 1.
\textsuperscript{547} U.S. CONST. art. III, § 2, cl. 3.
\textsuperscript{548} McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 403 (1819). THE ANTI-FEDERALIST NO. 17 (Robert Yates). “In almost every convention by which the constitution was adopted…” BARRON v. BALTIMORE, 32 U.S. (7 Pet.) 243, 250 (1833). (emphasis added.)
\textsuperscript{549} U.S. CONST. art. V.
\textsuperscript{550} U.S. CONST. art. I, § 7, cl. 3.
\textsuperscript{551} “Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 11 (U.S. 1774). U.S. CONST. art. III, § 2, cl. 3. U.S. CONST. amend. V, VI, VII.
\textsuperscript{552} “The civilized procedure of trial by jury is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting, because the judgment of the jury is but another way of obtaining the consent of the governed.” LOUIS NIZER, MY LIFE IN COURT 66 (1961). (emphasis added.)
\textsuperscript{553} “And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law.” PETITION OF RIGHT § IV (Eng. 1628). (emphasis added.) U.S. CONST. art. VI, § 1, cls. 1, 2. U.S. CONST. amend. V.
\textsuperscript{554} When considering courts and State jurisdiction, recall that the judicial power of the United States was also granted Admiralty and maritime jurisdiction so as to keep all waterways, navigable waters, or the channels of commerce free and open from the interference of State courts, and hopefully to provide a uniform treatment of these channels of commerce, which would prevent local protectionism or preferential regulatory behavior. U.S. CONST. art. III, § 2, cl. 1. NORTHWEST ORDINANCE, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE OHIO RIVER § 14 art. 4 (U.S. 1787). U.S. CONST. art. I, § 9, cls. 5, 6. U.S. CONST. art. I, § 10, cls. 1, 2, 3.
The several States are granted distinct powers within the Constitution, besides the explicitly stated references to the State Legislatures, or to the People of the States voting in elections, or to ratification by Convention or in the State Legislatures of Amendments to the Constitution or “Ratification of the Conventions of nine States.” Article III provides for Trial by Jury in the State where the said Crimes shall have been committed. Article IV provides, “A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.” “No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon a Claim of the Party to whom such Service or Labour may be due.” There is an explicit statement of “the State having Jurisdiction

555 U.S. CONST. arts. I, II, V, VII.
556 “The civilized procedure of trial by jury is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting, because the judgment of the jury is but another way of obtaining the consent of the governed.” LOUIS NIZER, MY LIFE IN COURT 66 (1961). (emphasis added.)
558 “That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends;… That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.” … “It is the duty of the state to protect its citizens…” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 139, 141 (1837). (emphasis added.)
559 U.S. CONST. art. III, § 2, cl. 3.
560 U.S. CONST. art. IV, § 2, cl. 2.
561 Although the discussion above in the Land Claims, Territory and Statehood (Section V) of this paper made its arguments even under the “conventional wisdom” usage that Article IV, section 2, clause 3, refers to slavery, the debates of September 13, 1787 of the Federal Convention indicate otherwise. U.S. CONST. art. IV, § 2, cl. 3. “On motion of Mr. Randolph the word “servitude” was struck out, and “service” {unanimously} inserted, the former being thought to express the condition of slaves, & the latter the obligations of free persons.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 607 (Max Farrand ed., 1937). (emphasis added.)
562 U.S. CONST. art. IV, § 2, cl. 3. (emphasis added.) In 1842 the Court failed to make the distinction with respect to the word “service” that was made in 1787 by Mr. Randolph (of Virginia) at the Federal Debates. Justice STORY for the Majority; “It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made,…” … Justice McLEAN dissenting; “The act of 1793 seems to cover the whole constitutional ground. The third section provides, ‘That when a person held to labour in any state or territory of the United States, under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labour or
of the Crime" and that a Person may be charged in a State with Treason. The States involvement in allegations of Treason is explicitly spelled out and in fact provides for the "demand of the executive Authority of the State." By this plain text of Article IV, prosecution of Treason by the States is addressed explicitly in the Constitution. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Here the Constitution describes being charged in a State, and being delivered up on demand of the executive Authority of the State, not on demand of any federal authority. Moreover, "Treason" is named alone, by itself, so as to include any charges brought on by the States, and the phrase "Treason against the United States" is not used, as in Article III. Possessing criminal Jurisdiction alone, is an expression of sovereignty, but herein, the Constitution explicitly addresses Treason against the several States, and this clearly indicates respect for independence and sovereignty of the several States. Treason will be discussed further later in the paper, and next discussion will focus on impacts of trial by jury.

b. Trial by Jury.

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563 U.S. CONST. art. IV, § 2, cl. 2.  
564 From a case involving the charge of High Treason in the Commonwealth of Pennsylvania, heard in the Supreme Court of Pennsylvania, and where the defendant was exonerated since the laws of the commonwealth were suspended for a period of time. "Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them." RESPUBLICA v. CHAPMAN, 1 U.S. (1 Dall.) 53, 57 (1781). An indictment of treason against the State of New York. THE PEOPLE v LYNCH, 11 Johns. 549 (1814).

565 U.S. CONST. art. IV, § 2, cl. 2.  
566 U.S. CONST. art. IV, § 2, cl. 2.  
568 U.S. CONST. art. IV, § 2, cl. 2.  
570 U.S. CONST. art. IV, § 2, cls. 2, 3.
Historically, the Framers were provided motivation to demand trial by jury from their experiences with Admiralty Courts and Vice Admiralty Courts, which operated without juries, and to some extent reflected the notorious Star Chamber.\(^{571}\) The Courts of Admiralty applied to the Colonies under The Stamp Act and The Townshend Act.\(^{572}\) The Framers designed a judicial power with the Star Chamber and the Inquisitorial System in mind, which they wanted to prevent from existing in America.\(^{573}\) As former Englishmen the Framers were familiar with general principles regarding individual rights and a fair justice system from the Petition of Right of 1628 and the English Bill of Rights of 1689.\(^{574}\)

An explicit requirement of trial by jury was placed in Article III of the Constitution, and later expanded in the proposed Bill of Rights in 1789.\(^{575}\) Many State constitutions provided their own Declaration of Rights, or had the privilege of trial by jury\(^{576}\) in practice and implied by their State constitutions through use of the phrase due process.\(^{577}\) The underlying principles of

\(^{571}\) The Stamp Act (Eng. 1765). The Townshend Act (Eng. 1767). “Yet the use of torture, which continued until approximately 1650, was always restricted to the Privy Council and its judicial arm, the Star Chamber.” … “Juries in criminal cases, though never subject to the attaint, could be threatened with punishment by the Star Chamber for false verdict.” … Leonard W. Levy, The Palladium of Justice: Origins of Trial by Jury 43-44, 47 (1999).

\(^{572}\) The Stamp Act (Eng. 1765). The Townshend Act (Eng. 1767).

\(^{573}\) “In this ecclesiastical inquest, the bishop, who was the ecclesiastical judge, on visiting a parish within his jurisdiction, would convene a synod or gathering of the faithful. He selected some and swore them to denounce all persons guilty of offenses requiring investigation; then he closely interrogated the denouncers, or synodal witnesses, to uncover malefactors and test the reliability of their testimony. It was but a short step for the ecclesiastical judge to conduct the prosecution against the accused and to decide on his guilt or innocence. [Pope] Innocent III took that step, which the Fourth Lateran Council confirmed.” Leonard W. Levy, The Palladium of Justice: Origins of Trial by Jury 27 (1999).

\(^{574}\) Petition of Right (Eng. 1628). English Bill of Rights (Eng. 1689).

\(^{575}\) U.S. Const. art. III, § 2, cl. 3. U.S. Const. amends. V, VI, VII.

\(^{576}\) Nine of the States explicitly mentioned the right of trial by jury in the State constitution, either within a forward section enumerating a declaration of rights, or within the body of the articles. At least six of these expressly state both civil and criminal jury rights, and the balance are general in terms and may be constructed to encompass both civil and criminal jury rights. The former six: Ga. Const. of 1777. Md. Const. of 1776. N.C. Const. of 1776. Pa. Const. of 1776. Vt. Const. of 1786. Va. Const. of 1776. The latter three: N.J. Const. of 1776. N.Y. Const. of 1777. S.C. Const. of 1778.

\(^{577}\) At least nine States proclaimed rights for the people, but each in a different manner. There were five State constitutions with an explicit declaration of rights that preceded the framework of powers section of the State constitutions. Md. Const. of 1776. N.C. Const. of 1776. Pa. Const. of 1776. Vt. Const. of 1777. Vt. Const. of 1786. Va. Const. of 1776. Two additional State constitutions included a list of specifically enumerated rights that followed the framework of government. S.C. Const. of 1778. Ga. Const. of 1777. And two other States simply
participatory government, and consent of the governed are also fundamental underpinnings of Trial by Jury. The explicit provisions in the Bill of Rights mention due process and provide mechanisms, and describe rights and privileges, which ensure certain protections are afforded an alleged defendant within the justice system, as well as protections for a member of the general public from government interference and action.

The importance of the underlying principles of due process and trial by jury provide for a mechanism for dispute resolution that is government operated, but that is constrained by a Jury system that demands public involvement in government. The People must accept their obligation within the structural Framework provided by the Constitution for the inter-dependent system to function properly. Each body of power must not abdicate its role within the system, since the Constitution, and all other bodies of power depend upon the other forces operating upon them from all of the fundamental elements. When the People refuse to vote or refuse to vote in the jury box, they abdicate their power and their Constitutional role in government and...
the entire system is weakened. The States must accept, and not abdicate, the obligations that go along with their role and their sovereignty, and the People must accept their obligations. As mentioned above, the revenue system of the States has been permitted to grow excessively dependent upon an unconstitutional national revenue system, and here the People continually avoid their obligation to participate and serve on juries. The People not taking an interest in their own government was simply not an assumption built into the Constitutional framework.

The Constitutional mandate for trial by jury for all crimes is in Article III. Previously, this was held so strongly, that it could not be waived. The Supreme Court of Illinois held that even if a defendant waived a jury trial for a bench trial, and such defendant plead not guilty and received a bench trial, such defendant was required to have a new trial, a trial by jury. The court held the defendant could not convey the jurisdiction to the court to hold a bench trial. Ultimately, when the issue was not even in controversy, this requirement was changed by the Court in Patton v. U.S., in direct contravention of the plain meaning of Article III of the Constitution and the underlying principles.

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If the People refuse to accept their role within the Constitutional framework to ensure due process and trial by jury for their fellow citizens, then they will find a difficult time on relying upon those same principles to protect them from government action or interference or when they themselves are named as defendants. Not serving when called for jury duty is a violation of the underlying principle, whether in federal or state courts, and undermines the functioning of the system. The Constitution depends upon all bodies of power playing their role, and is built upon the principle of participatory government, since the Framers expected that the People would always have a vested interest in their own government. Although courts are denied some power due to the principle of trial by jury, courts are still mechanisms with significant authority within the Constitutional framework, and State courts are especially important with respect to crime and punishment.

iii. Punishment and Treason.

What are the underlying principles behind the provisions granting the power to punish of the Constitution? The separation of the power to punish from the national government to the greatest extent possible, and the separation from the national government of the corresponding police powers, which are to be as local as possible.

a. Punishment.

\[\text{the direction of the Constitution, when that issue was not even before the Court. In the case, the defendant consented to trial by jury of eleven jurors, not twelve, due to severe illness of one juror.}
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\[\text{PATTON v. UNITED STATES, 281 U.S. 276 (1930). U.S. CONST. art. III, § 2, cl. 3.}
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\[\text{U.S. CONST. amends. I, II, III, IV, VIII, IX.}
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\[\text{U.S. CONST. art. III, § 2, cl. 3. U.S. CONST. amends. V, VI, VII.}
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\[\text{U.S. CONST. art. I, § 8, cls. 6, 10. U.S. CONST. art. III, § 3, cl. 2. MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102 (1837).}
\]
Directly related to crime, is punishment, and it is critical to examine the usage of “punish” and “punishment” within the Constitution. The Congress are the only body of power created by the Constitution that is expressly granted powers related to punishment. The Constitution provides, “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two thirds, expel a Member.” In this clause, it is clear that expulsion is more severe than this particular use of “punish,” as expulsion requires a “two thirds” majority. Powers granted to Congress that have an impact outside of their own body are limited to: Power “To provide for the Punishment of counterfeiting the Securities and current Coin of the United States”; “To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations”; and “to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” This is a rather short and specific list, which provides for the power to punish in areas clearly associated with international dealings and encounters between sovereigns. Usage of the term “punish” was specifically discussed at the debates of the Federal Convention, and it indicates a rather narrow grant of power. Counterfeiting of currency is a power that should be controlled by the body of power

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595 U.S. CONST. art. I, § 3, cl. 7. Note that within the Constitution, the term “Penalties” is distinct from “Punish” or “Punishment.” U.S. CONST. art. I, § 5, cls. 1, 2. U.S. CONST. art. I, § 8, cls. 6, 10. U.S. CONST. art. III, § 3, cl. 2. U.S. CONST. amend. VIII.
597 U.S. CONST. art. I, § 5, cl. 2.
598 U.S. CONST. art. I, § 5, cl. 2.
599 U.S. CONST. art. I, § 8, cl. 6.
600 U.S. CONST. art. I, § 8, cl. 10.
601 U.S. CONST. art. III, § 3, cl. 2.
603 To define & punish piracies and felonies on the high seas, and ‘punish’ offences against the law of nations. Mr. Govr. Morris moved to strike out ‘punish’ before the words ‘offences agst. the law of nations.’ So as to let these be definable as well as punishable, by virtue of the preceding member of the sentence. Mr. Wilson hoped the alteration would by no means be made. To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. That would make us ridiculous. Mr. Govr The word define is proper when applied to offences in this case; the law of {nations} being often too vague and deficient
operating under authority to coin and print the currency, and acts upon the “High Seas” as well as Offenses to the “Law of Nations” are clearly within the sovereign realm.604 And, lastly, Treason, as addressed above, is a crime against a sovereign, and indicates sovereign dealings by definition.605 The Constitution clearly respects the independence and sovereignty of the several States with respect to issues surrounding jurisdiction, crime and punishment.606 The
to be a rule. On the question to strike out the word ‘punish’ {it passed in the affirmative}“ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 614-15 (Max Farrand ed., 1937). (emphasis retained.) With respect to agreement on appropriate terminology, the debates were highly selective: “The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery was taken up. Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach any great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined- As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. To add after ‘bribery’ ‘or maladministration’. Mr. Gerry seconded him- Mr. Madison So vague a term will be equivalent to a tenure during pleasure of the Senate. Mr. Govr Morris, it will not be put in force & can do no harm - An election of every four years will prevent maladministration. Col. Mason withdrew ‘maladministration’ & substitutes ‘other high crimes & misdemeanors’ {agst. the State} On the question thus altered. … [Ayes – 8; noes – 3.]” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550 (Max Farrand ed., 1937).


606 U.S. CONST. arts. I, III, IV. The Court has respected State powers even in the most unbalanced of circumstances. Justice ROBERTS for the Majority. “[I]n the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the state, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.” … “[While] want of counsel in a particular case may result in a conviction lacking [in] such fundamental fairness, we cannot say that the [Fourteenth Amendment] embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.” BETTS v. BRADY, 316 U.S. 455, 471-73 (1942). (emphasis added.) Eventually, the Court overruled itself and recognized individual rights over State powers in the area of right to appointed counsel. The 1942 decision was overruled in 1963. “Twenty-two States, as friends of the Court, argue that Betts was ‘an anachronism when handed down’ and that it should now be overruled. We agree.” GIDEON v. WAINWRIGHT, 372 U.S. 335, 345 (1963). (emphasis added.) Comment: The Death penalty was provided for by the Punishment for Crimes Act of 1790 enacted by the First Congress, yet maiming was prohibited, here Congress provides explicit statements as to the constraints placed upon government action upon the individual, which helps further articulate the Eighth Amendment. U.S. CONST. amend. VIII. The Punishment for Crimes Act of 1790 was principally for crimes in locations upon the high seas and in areas under the sole and exclusive jurisdiction of the United States. Select excepts from the Statute: “ An Act for the Punishment of certain Crimes against the United States. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.” … “Sec. 3. And be it [further] enacted, That if any person or persons shall, within any fort, arsenal, dock-yard,
Constitution’s treatment of punishment powers\(^607\) in such a limited fashion corresponds to
criminal trials being held in the State where the crime was committed, and indicates nearly all of
the police powers\(^608\) shall remain with the States.\(^609\) The discussion will return next to Treason
and then proceed with the matter of police powers.

b. Treason.

nearly all criminal jurisdiction does not Constitutionally lie
inside the several States, and that
nearly all of 18 U.S.C. and its related criminal statutes, (besides those enumerated explicitly within the Constitution)
are unconstitutional and simply a result of broad overreaching. U.S. CONST. Crimes and Criminal Procedure. 18 U.S.C. “We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends;… That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.” … “It is the duty of the state to protect its citizens…” MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102, 139, 141 (1837). (italics retained) (emphasis added.)
An example of the type of punishment that was feared most in Colonial times was that
given for Treason. In New York in 1691, even after the 1689 English Bill of Rights, Jacob
Leisler and his son-in-law were charged with treason and convicted. The punishment imposed
upon them was recorded as, "They were hanged, cut down when still alive, their sex organs were
cut off, they were disemboweled, the excised body parts were burned before their eyes, they
were beheaded and cut into quarters, and their heads displayed upon spikes." From the
documentation of these punishments, we may infer the Colonists had good reason to be
concerned about the punishments for treason and punishments in general. For the Colonists, who
were exposed to this type of punishment, it is quite plausible, if not logical, that they had every
reason to set limits on punishment powers granted within the U.S. Constitution, so as to prohibit
this type behavior by any level of government.

Article III, section 3, clause 1 explicitly addresses Treason by defining what it is, and
providing strict limiting requirements for a conviction of the charge of Treason. Additional
punishment limitations restricting Congress are spelled out in clause 2. Fortunately, the
Colonists documented their extensive experience with the charge of Treason. The Colonial Bill
of Rights of 1774 provides, "colonists may be transported to England, and tried there upon
accusations for treason and misprisions…" The Declaration of Arms of 1775, denounced the
"12th of June" proclamation with hostility, which proceeds to "declare them all, either by name
or description, to be rebels and traitors, to supercede the course of the common law, and instead
thereof to publish and order the use and exercise of the law martial." The Declaration of

612 U.S. CONST. art. III, § 3, cl. 1.
613 U.S. CONST. art. III, § 3, cl. 2.
615 DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 9 (U.S. 1775). (emphasis added.)
Independence of July 4, 1776, charges the English with false prosecutions, "For transporting us beyond Seas to be tried for pretended offences." 616

Prosecution for Treason by the States was actually contemplated by the writers of the Constitution. Treason is primarily associated with "the offense of attempting by overt acts to overthrow the government of the state to which the offender owes allegiance; or of betraying the state into the hands of a foreign power." 617 However, from Black's Law Dictionary, "in England, treason is an offense particularly directed against the person of the sovereign, and consists (1) in compassing or imagining the death of the king or queen, or their eldest son and heir; (2) in violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; (3) in levying war against the king in his realm; (4) in adhering to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and (5) slaying the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. 4 WILLIAM BLACKSTONE, COMMENTARIES 76-84 (1795)." 618 The Colonial Bill of Rights mentions "treasons and misprisions" among its charges, which includes both misprision and misprision of treason. 619 Black's defined Misprision as, "more particularly and properly, the term denotes (1) a contempt against the sovereign, the government, or the courts of justice, including not only contempts of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty;…" and misprision of treason is defined as, "The bare knowledge and concealment of an act of treason or treasonable plot, that is, without any assent or participation therein, for if the latter elements be present the party becomes a principal. 4

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616 THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).
618 BLACK'S LAW DICTIONARY 1672 (4th ed. 1951). (emphasis added.)
619 DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (U.S. 1774).
The English experience of the Colonists indicates that Judges are highlighted in both treason and misprision of treason, and in Colonial times the punishment was of the highest order for Treason.

In order to prevent any abuse of the term Treason within the United States, the Constitution specifically addresses Treason in several areas. So, "Treason against the United States" is Constitutionally defined, and the requirements for conviction are stated. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." 

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620 BLACK'S LAW DICTIONARY 1151-52 (4th ed. 1951). (emphasis added.)
621 U.S. CONST. art. III, § 3, cl. 1. (emphasis added.)
622 U.S. CONST. art. III, § 3, cl. 1. It is important to note the direct relationships articulated by explicit textual connections and functional protections among the Constitutional provisions (in Article III and Amendment V) and in the Punishment for Crimes Act of 1790. “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

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The States involvement in allegations of Treason is explicitly spelled out and in fact provides for the "demand of the executive Authority of the State." By this plain text of Article IV, prosecution of Treason by the States is addressed explicitly in the Constitution. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Here, the Constitution describes being charged in a State, and being delivered up on demand of the

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623 Treason, Treason against the United States, and Treason against a State: An Act for the Punishment of certain Crimes against the United States. Act of April 30, 1790, 2 Stat., ch. 9, (1790). From a case involving the charge of High Treason in the Commonwealth of Pennsylvania, heard in the Supreme Court of Pennsylvania, and where the defendant was exonerated since the laws of the commonwealth were suspended for a period of time. "Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them." RESPUBLICA v. CHAPMAN, 1 U.S. (1 Dall.) 53, 57 (1781). An indictment of treason against the State of New York. THE PEOPLE v LYNCH, 11 Johns. 549 (1814). Of special importance are the cases ("the Dorr cases") that rule on or refer to the conviction of Thomas Wilson Dorr for Treason against the state of Rhode Island. Thomas Wilson Dorr served as the Governor of Rhode Island. Justice McLEAN for the Court: "Thomas W. Dorr was convicted before the Supreme Court of Rhode Island, at March term, 1844, of treason against the state of Rhode Island, and sentenced to the state’s prison for life."… “Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness.” EX PARTE DORR, 44 U.S. (3 How.) 103, 104, 105 (1844). (emphasis added.) In the case of Thomas Wilson Dorr, it is worth noting the following Act by the State of Rhode Island in 1854: An Act to reverse and annul the Judgment of the Supreme Court of Rhode Island for Treason, rendered against Thomas W. Dorr, June 25, A. D. 1844. The Act was passed in the January session of 1854 by the Rhode Island General Assembly. For a contemporaneous history of the political life of Thomas W. Dorr, see the following book, DAN KING, THE LIFE AND TIMES OF THOMAS WILSON DORR, WITH OUTLINES OF THE POLITICAL HISTORY OF RHODE ISLAND (1859). The cases which rule on or refer to “Dorr” include EX PARTE DORR, 44 U.S. (3 How.) 103 (1844). LUTHER v. BORDEN, 48 U.S. (7 How.) 1 (1849). ATTORNEY GENERAL ex rel. BASHFORD v. BARSTOW, 4 Wis. 567 (1855). TAYLOR v. PLACE, 4 R.I. 324 (1856). A New York State Treason ejectment action related to John Jacob Astor of New York. From the syllabus of Carver v. Jackson, “On the 22d of October 1779, the legislature of the state of New York, by ‘an act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the state, &c.’ declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy; and all their estate, real and personal, severally and respectively, in possession, reversion, or remainder, was forfeited and vested in the people of the state.” From the opinion of Justice STORY, [80] “The action is ejectment, brought upon several demises; and among others, upon the demise of John Jacob Astor. … [90] “consequently, the remainder to the children was a contingent remainder during the life of their parents; and as such it was destroyed by the proceedings and sale under the act of attainer and banishment of 1779. The circuit court was of a different opinion; and held, that the remainder to the children was contingent until the birth of a child, and then vested in such child, and opened to let in after born children; and that there being a vested remainder in the children at the time of the act of 1779, it stands unaffected by that act.” CARVER v. JACKSON, 29 US 1, 80, 90 (1830).

624 U.S. CONST. art. IV, § 2, cl. 2.
625 U.S. CONST. art. IV, § 2, cl. 2.
626 U.S. CONST. art. IV, § 2, cl. 2. (emphasis added.)
executive Authority of the State, not on demand of any federal authority.\textsuperscript{627} And "Treason" is named by itself, so as to include any charges brought on by the States, and note that it is not called "Treason against the United States" as in Article III.\textsuperscript{628} Provisions linked to Treason begin with the criminal proceedings in Article III\textsuperscript{629}, that are connected with additional explicit provisions regarding Treason in Article I, Article II, Article III, and Article IV.\textsuperscript{630} The States (and the federal government) are restricted in their dealings with Treason. Article III continues, "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."\textsuperscript{631} Congress reserves control over the remedy for punishing Treason, and the punishment is explicitly limited by the Constitution.\textsuperscript{632} Here, an "Attainder of Treason" is explicitly mentioned, and earlier in the Constitution an explicit prohibition of Bills of Attainder is placed upon the States.\textsuperscript{633} All types of Bills of Attainder are prohibited to the States, and this of course would prevent any "Attainder of Treason" from being passed by a State, so that too is forbidden to the States.\textsuperscript{634} This prohibition of Article I, section 10 provides, "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or any Law impairing the Obligation of Contracts, or grant any Title of Nobility."\textsuperscript{635} States were in fact contemplated as forums for Treason proceedings, and State Judges were highlighted within the traditional English elements of

\textsuperscript{627} U.S. CONST. art. IV, § 2, cl. 2.  
\textsuperscript{628} U.S. CONST. art. IV, § 2, cl. 2. U.S. CONST. art. III, § 3, cl. 1.  
\textsuperscript{631} U.S. CONST. art. III, § 3, cl. 2.  
\textsuperscript{632} U.S. CONST. art. III, § 3, cl. 2.  
\textsuperscript{634} U.S. CONST. art. I, § 10, cl. 1.  
\textsuperscript{635} U.S. CONST. art. I, § 10, cl. 1. (emphasis added.)
Treason (for treason based upon contempt of court\textsuperscript{636}), and the punishments for Treason were of the highest order during the Colonial period. Specific cases prosecuting charges of Treason against the State actually took place in States\textsuperscript{637}, and are further documented by actions for ejectment in real property cases due to the “Corruption of Blood” and “Forfeiture”\textsuperscript{638} that accompanied execution of the convicted under an Act of Attainder.\textsuperscript{639} Treason under the Constitution is not a crime that is committed only against the United States\textsuperscript{640}, but it may also be charged and prosecuted against the States\textsuperscript{641}, and this demonstrates a substantial element of

\textsuperscript{636}BLACK'S LAW DICTIONARY 1151-52 (4th ed. 1951).

\textsuperscript{637}In Pennsylvania: RESPUBLICA v. CARLISLE, 1 U.S. (1 Dall.) 35 (1778). (Defendant convicted and executed.) RESPUBLICA v. ROBERTS, 1 U.S. (1 Dall.) 39 (1778). (Defendant convicted and executed.) In Virginia: Commonwealth v. Caton, 8 Va. 5 (1782). (Defendant appealed conviction on grounds of pardon, but appeal held pardon invalid as granted by only one house of the legislature and not both, held defendant ought to be executed.) Pennsylvania case citing U.S. Constitution and the State Constitution, Judge YEATES, “The 10th section of the 1st article of the constitution of the United States provides, among other things, that ‘no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts;’ and the 17th section of the 9th article of the state constitution expressly directs, that ‘no ex post facto law, nor any law impairing contracts shall be made;’ and the 18th section asserts that ‘no person shall be attainted of treason or felony by the legislature.’ Put a strong case, which for the honor of human nature we can scarcely suppose the possibility of: that the legislature should, under very peculiar circumstances, (as in the case of sir John Fenwicke in England) pass an act of attainder against an obnoxious citizen for treason, and the attorney general should demand of the court to award execution.” EMERICK against HARRIS, 1 Binn. 416, 420 (1808). (emphasis added.) (emphasis retained.)


\textsuperscript{639}Several cases based on one New York: Act of Attainder, October 22, 1779. JACKSON v. CAITLIN, 2 Johns. 248 (1807). JACKSON v. STOKES & THOMPSON, 3 Johns. 151 (1808). JACKSON v. MUNSON, 3 Cai. R. 137 (1805). ROBINSON v. MUNSON, 1 Johns. 277 (1806).

\textsuperscript{640}UNITED STATES v. BURR, 25 F. Cas. 201. (1807). (A case against Aaron Burr for treason.) In re BURR, 8 U.S. (4 Cranch) 470 (1807). (Held that no evidence could be admitted.)

\textsuperscript{641}From the Supreme Court of Pennsylvania: RESPUBLICA v. WEIDLE, 2 U.S. (2 Dall.) 88 (1781). The Act of Assembly is cited within the Syllabus of Weidle as: “The indictment was founded on the 4th Sect. of the Act of Assembly (1 Vol. Dall. Edit. 728) and charged all the misprisons of treason three enumerated. The words are ‘That if any person or persons within this State shall attempt to convey intelligence to the enemies of this State, or the United States of America, or by publicly and deliberately speaking or writing against our public defence; or shall maliciously and advisedly endeavour to excite the people to resist the Government of this Commonwealth, or persuade them to return to a dependence upon the Crown of Great Britain; or shall maliciously and advisedly terrify, or discourage, the people from enlisting into the service of the Commonwealth; or shall stir up, excite or raise tumults, disorders, or insurrections in the State, or dispose them to favor the enemy; or oppose and endeavour to prevent the measures carrying out in support of the freedom and independence of the said United States; every such person, being thereof legally convicted by the evidence of two or more credible witnesses, shall be adjudged guilty of misprison of treason, &c.’” The Opinion from Justice M’KEAN: “A mere loose and idle conversation, without any wickedness of heart, may be indiscreet and reprehensible, but ought not to be construed into misprison of treason. On the other hand, drunkenness is no justification, or excuse, for committing the offence; to allow it as
sovereignty and independence that belongs to the several States within the Constitutional framework. The Constitutional limits placed upon the punishment of Treason\textsuperscript{642} and the testimony required for Treason\textsuperscript{643} proceedings demonstrate adherence to the underlying principles of trial by jury and due process, as well as a desire to preserve and not disrupt property rights, as such state confiscation could be abused and become an arbitrary source of revenue.


What are the underlying principles with respect to the separation of police powers in the Constitution? The fundamental principles are that police power should be local and be denied to the greatest extent possible to the national government.\textsuperscript{644} This is reinforced by the Constitutional mandate for local trial by jury.\textsuperscript{645} A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the Amendments that relate to Prohibition, which granted State police powers to the United States.\textsuperscript{646}

a. Granting and Repealing Power by Amendment.

The Eighteenth and Twenty-First Amendments present a pair of interesting explicit expressions within the Constitution, that have a definite relationship to respect for the States, and might provide some significant insight into the Separation of Powers between the National government and the several States.\textsuperscript{647} Amendment XVIII, section 2, provides, “The Congress and the several States shall have concurrent power to enforce this article by appropriate

\begin{itemize}
  \item U.S. CONST. art. III, § 3, cl. 2.
  \item U.S. CONST. art. III, § 3, cl. 1.
  \item MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102 (1837).
  \item U.S. CONST. art. III, § 2, cl. 3. U.S. CONST. amends. V, VI, VII.
  \item “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. CONST. amend. XVIII § 2. (emphasis added.) U.S. CONST. amend. XXI.
  \item U.S. CONST. amends. XVIII, XXI.
\end{itemize}
The phrase concurrent power, with respect to the National government and the State governments, does not appear anywhere else in the Constitution. Moreover, as this is the only place it appears, and Amendment XXI, section 1, provides, “The eighteenth article of amendment to the Constitution of the United States is hereby repealed”; which indicates a rather strong statement by the Constitution and the States, who must ratify all Amendments by a three-fourths supermajority, about the Constitutionality of concurrent powers, and of course U.S. CONST. amend. XVIII, § 2.

Concurrent powers with respect to taxation have been treated by the Court as a distinctly different type of power: “That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.” … “It is admitted that the power of taxing the people and their property is essential to the very existence of government.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425, 428 (1819). (emphasis added.) “The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states;… But the two grants are not, it is conceived, similar in their terms or their nature.” Gibbons v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824). (emphasis added.) “…the only mean therefore left, for any state to support its government and discharge its debts, is by direct taxation; and the United States have also power to lay and collect taxes. …when the federal government begins to exercise the right of taxation in all its parts, the legislatures of the several states will find it impossible to raise monies to support their governments.” The Anti-Federalist No. 17 (Robert Yates). (emphasis added.)

A recent decision from the Court on the issue of the Twenty-First Amendment and the Commerce Clause was closely divided (5-4). Justice KENNEDY for the Majority: “The States’ position is inconsistent with our precedents and with the Twenty-first Amendment’s history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.” … “Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The ‘burden is on the State to show that the discrimination is demonstrably justified.’ The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete evidence, that a State’s nondiscriminatory alternatives will prove unworkable.” … States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” Justice THOMAS for the Dissent: “In sum, the Webb-Kenyon Act authorizes the discriminatory state laws before the Court today.” … “The Court begins its opinion by detailing the evils of state laws that restrict the direct shipment of wine. It stresses, for example, the Federal Trade Commission’s opinion that allowing the direct shipment of wine would enhance consumer welfare. … The Court’s focus on these effects suggests that it believes that its decision serves this Nation well. I am sure that the judges who repeatedly invalidated state liquor legislation, even in the face of clear congressional direction to the contrary, thought the same. The Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and the Acts of Congress. The Twenty-first Amendment and the Webb-Kenyon Act displaced the negative Commerce Clause as applied to regulation of liquor imports into a State. They require sustaining the constitutionality of Michigan’s and New York’s direct-shipment laws.” GRANHOLM v. HEALD, 125 S. Ct. 1885 1897, 1917, 1919, 1927 (2005). (emphasis added.) U.S. CONST. amend. XXI. U.S. CONST. art. I, § 8, cl. 3. Webb-Kenyon Act, 37 Stat. 699 (1913), (codified as 27 U.S.C. § 122 (1913)).

U.S. CONST. amend. XXI. § 1. U.S. CONST. amend. XVIII.

U.S. CONST. art. V.
about the strength of the independence and sovereignty of the States. However, statutes were passed that impacted police powers of both the States and the Federal government.\textsuperscript{655}


The general belief is that a \textit{sovereign} should possess police powers, and under the Constitution the States do possess nearly all police powers so that they may act to protect their citizens and inhabitants\textsuperscript{656}, and the United States is denied nearly all police powers by the Constitution not granting the power to punish, which was discussed above.\textsuperscript{657} The Constitution uses the power to punish sparingly and the federal police power is to be limited to those specific uses explicitly mentioned.\textsuperscript{658} Although the United States is denied police powers, it nonetheless retains its status as a sovereign.

In the police powers\textsuperscript{659} area, the States and the People, through the amendment mechanism of Article V, amended the Constitution so as to \textit{grant the national government} police powers under section 2 of Amendment XVIII, with respect to enforcing the prohibition of

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\textsuperscript{654}\text{“…the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon…” GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824).}

\textsuperscript{655}“All fermented, distilled, or other \textit{intoxicating liquors} or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the \textit{exercise of its police powers,…”} Wilson Act. Original Packages Act. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified as amended 27 U.S.C. § 121). (emphasis added.) Transportation of oleomargarine, imitation butter or cheese were under similar such police powers in 1902. Act of May 9, 1902, ch. 784, § 1, 32 Stat. 193 (codified as amended 21 U.S.C. § 25). Liquor and oleomargarine must have surprising similarities in their socio-economic influence.

\textsuperscript{656}MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102 (1837).


\textsuperscript{658}BETTS v. BRADY, 316 U.S. 455


\textsuperscript{659}In 1908, the Bureau of Investigation was created, and its mission was expanded by the creation of a federal legislative solution to a moral problem, which sounds a lot like Prohibition in itself, with passage of the White-Slave Traffic Act. It is highly questionable whether “transporting any woman or girl…for…prostitution or debauchery, or for any other immoral purpose,…” may even be effectively enforced by anyone other than local officials. Bureau of Investigation: Act of May 22, 1908, ch. 186, § 1, 35 Stat. 236 (codified as amended 28 U.S.C. § 531 (2000)). White-Slave Traffic Act. Act of June 25, 1910, Pub. L. No. 61-277, § 2, ch. 395, 36 Stat. 825 (codified as amended 18 U.S.C. 2421 (1998)).
intoxicating liquors. This provision, although later repealed by Amendment XXI, forever changed the exercise of police powers by the United States. With passage of the Eighteenth Amendment, a national police power developed, which grew despite the fact the Twenty-first Amendment was passed by the States, to repeal this grant of power to the United States. Here again, the States abdicated a portion of their role, police powers, and weakened the overall system by permitting an encroachment upon their allocated powers and their sovereignty. Every body of power must accept the obligations that accompany the powers they possess, and any refusal to participate within a government based upon the underlying principles of participatory government and consent of the governed, undermines the structural framework by violating the underlying principles.

The Police powers provided for in the Constitution permit a limited national police power with respect to enforcement of the specific referrals to punishment. These areas should be represented by the United States Coast Guard, the U.S. State Department, and the U.S.

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663 U.S. Const. art. I, § 8, cls. 6, 10. U.S. Const. art. III, § 3, cl. 2.
665 The fourth statute passed by the first session of the first Congress: “SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes,...” An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs. Act of July 27, 1789, 1 Stat., ch. 4 (1789). (italics retained.) (emphasis added.) “There shall be at the seat of government an executive
Secret Service\textsuperscript{666}, for enforcement of piracy, felonies on the high seas, offenses to the law of nations, and counterfeiting of securities of the United States. For the most part, private parties, foreign countries, and the States would serve the informing, reporting and police functions. The United States could establish other federal police bureaus to enforce these Constitutional provisions, but the agencies of the United States are intended to be limited to narrow areas where they may exercise police power, as this power was intended to be primarily allocated to the States. Nonetheless, although there is no punishment authority granted within the ‘Commerce Clause,’\textsuperscript{667} most federal statutes, including the White-Slave Traffic Act of 1910\textsuperscript{668} are based upon an extremely broad construction of commerce powers.\textsuperscript{669} The U.S. Marshals\textsuperscript{670} are admittedly a police power, but their mission is to enforce the authority of the Court system, and they do not actually work for the Executive branch, but for the Judicial power under control of the Justices and the Judges of the United States provided under Article III.\textsuperscript{671}

A specific problem with the Amendments surrounding Prohibition is revealed in the regulation of commerce, and especially with respect to intoxicating liquors.\textsuperscript{672} The power to regulate commerce belongs to Congress. And, a concurrent power to regulate commerce, which

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\textsuperscript{667}U.S. CONST. art. I, § 8, cl. 3.


\textsuperscript{671}U.S. CONST. art. III.

\textsuperscript{672}U.S. CONST. amends. XVIII, XXI. U.S. CONST. art. I, § 8, cl. 3.
prohibits protectionism and preferential treatment, belongs to the States.\(^{673}\) For purposes of discussion, it is assumed commerce is defined narrowly to include only commodities, products, wares and manufactures, (to include intoxicating liquors).\(^{674}\) For intoxicating liquors, the analysis requires considering the provisions relating to commerce and navigation, as well as the two amendments addressing these specific products (intoxicating liquors).\(^{675}\) All three carry special weight since, there was a ratification process for the commerce and navigation provisions of the Constitution itself, and later again for the Eighteenth Amendment, and finally the Twenty-first Amendment.\(^{676}\) Here, the People and the States did participate in government and take action to amend the Constitution, but at first to transfer power to the United States, and then later to repeal that transfer of power, although in name only, as the Federal Bureau of Investigation remained in force.\(^{677}\) The States further complicated the issue by not only repealing the Eighteenth Amendment, but also taking control of commerce in intoxicating liquors, nearly to the exclusion of Congress.\(^{678}\) All the while, the States could have exercised police powers on their own, and certainly did not need a grant of power, by the Wilson Act of 1890 to do so.\(^{679}\) For it is an Amendment\(^{680}\) that is intended to be required for the States to grant police power to the national

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\(^{673}\) MAYOR OF NEW YORK v. MILN, 36 U.S. (11 Pet.) 102 (1837).


\(^{675}\) U.S. CONST. art. I, § 8, cl. 3. U.S. CONST. amends. XVIII, XXI.


\(^{680}\) U.S. CONST. amend. XVIII.
government, and not a mere Congressional statute\textsuperscript{681} that may grant police powers, that already exists in the States, to the States.

The Framers feared abuse of power and drafted the Constitution with the idea in mind that police power could be used to undermine the States by abusing or misusing police powers in support of a national takeover by the national legislature. It is interesting to note that at present through the modern tools of instant communication, increased hazards of centralized control may more readily develop, which may promote and encourage a national law enforcement movement with a national agenda, resulting in the very oppression, despotism, and tyranny the Framers feared most. Separating the police power from the national government was a mechanism that denied some powers to the United States and was intended to preserve the sovereignty and independence of the States. Although there have been violations of the underlying principles and federal encroachment in recent practice, the United States and the several States are both sovereigns within this system.\textsuperscript{682}

v. Military Power.

What are the underlying principles for the separation of military powers within the Constitution? The Framers underlying principles with respect to military powers are: Standing armies are “dangerous to liberty”\textsuperscript{683}, and the national government has an international defense


\textsuperscript{682} “State police power not abridged. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: Provided, however, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.” Taylor Grazing Act. Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified as amended 43 U.S.C. § 315 et seq.). (emphasis added.)

\textsuperscript{683} VA. CONST. of 1776, § 13. VT. CONST. of 1777, chap. 1, § 15. “the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their control over the militia, tend, not only to a consolidation of the government, but the destruction of liberty.” THE ANTI-FEDERALIST NO. 17 (Robert Yates). (emphasis added.) The exact phrase “standing armies…are dangerous to liberty” is also found in the State Constitutions of Maryland, North Carolina, and Pennsylvania. MD. CONST. of 1776. N.C. CONST. of 1776. PA.
role to play (and were granted naval power\textsuperscript{684}) and land forces shall belong to the States.\textsuperscript{685} A historical analysis from the viewpoint of the Framers should provide insight and reveal the strength of the underlying principles within the Constitutional provisions that remain with us today. The historical analysis will begin with the danger of standing armies.

a. Legislative History.

Military force and military powers are closely associated with sovereignty and their existence is a clear indicator of that a body of power has the status of an independent and sovereign State.\textsuperscript{686} The Virginia Constitution of June 29, 1776 was preceded by a “Declaration of

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\textsuperscript{685} U.S. CONST. art. I, § 8, cls. 10, 11, 12, 13.

\textsuperscript{686} The Constitution of Vermont and court cases provide examples that indicate that States could have their own military within the State government, as well as their own militia, and that the militia was treated as a special entity, which could require strictly military jurisdiction or could require civil jurisdiction. “SECTION XLII. All field and staff officers, and commissioned officers of the army, and all general officers of the militia, shall be chosen by the General Assembly.” “SECTION XXXVI. Every officer, whether judicial, executive or military, in authority under this State, shall take the following oath or affirmation of allegiance, and general oath of office, before he enter on the execution of his office.” “SECTION XVIII. …They [all officers] are to correspond with other States, and transact business with officers of government, civil and military; and to prepare such business as may appear to them necessary to lay before the General Assembly.” VT. CONST. of 1777, chap. 2, § 18, 36, 42. “XV. That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.” VT. CONST. of 1777, chap. 1, § 15. “and all military questions and matters, by the officers and courts established from among the militia.” LOOMIS v. SIMONS 2 Root 454, 456 (1796). “The question is altogether of military cognizance, viz. to which of said companies the plaintiff belonged; and in which, by law, he ought to do duty; this is determinable by the officers of the militia.” LOOMIS v. SIMONS 2 Root 454, 456 (1796). The State courts disclaim jurisdiction of the Militia in military matters, (Circuit Court of CONNECTICUT). LOOMIS v. SIMONS 2 Root 454 (1796). A case of trespass by the militia upon lands of a private citizen, who is not a member of the militia. Brigham v. Edmands 73 Mass. 359 (1856). “Since the first organization of the militia of this commonwealth under the Constitution…” Brigham v. Edmands 73 Mass. 359, 362 (1856). Here the Militia is viewed as a State Constitutional entity. “But it is claim to an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage. Such a right cannot be exercised except under the authority of the legislature, expressed in clear distinct terms, or by necessary implication, and with suitable provisions for compensation to the persons whose property may be so appropriated or injured.” Brigham v. Edmands 73 Mass. 359, 363 (1856). The State claims jurisdiction of Militia
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Rights” of June 12, 1776, which provides in section 13, “That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.”

Standing armies are viewed negatively in this section, and this negative belief was also expressed in documents produced by the Framers, such as in 1774 within The Declaration and Resolves of the First Continental Congress, which provides, “That keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in activities that impose (trespass) on the public, and also acknowledges that Militia use of land is property taken for public use.

This civil control corresponds to, “The President shall be Commander in Chief of the Army and Navy of the United States,....” U.S. CONST. art. II, § 2, cl. 1.

VA. CONST. of 1776, § 13. Note the similarity to the Second Amendment, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. See also DISTRICT OF COLUMBIA v. HELLER, 128 S. Ct. 2783 (2008).

“‘It might be shewn, that the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their controul over the militia, tend, not only to a consolidation of the government, but the destruction of liberty.” ... “A free republic will never keep a standing army to execute its laws.” ... “Hence the government will be nerveless and inefficient, and no way will be left to render it otherwise, but by establishing an armed force to execute the laws at the point of the bayonet – a government of all others the most to be dreaded.”’

THE ANTI-FEDERALIST No. 17 (Robert Yates). (emphasis added.) On this subject, nothing speaks more clearly than the words of combat veterans: “In his letter of reply [January 1, 1777] to the members of Congress, [George] Washington wrote: ‘Instead of thinking myself freed from all civil obligations by this mark of their confidence, I shall constantly bear in mind that as the sword was the last resort for the preservation of our liberties, so it ought to be the first thing laid aside when those liberties are firmly established.’” DAVID MCCULLOUGH, 1776 286 (2005). “Dr. Benjamin Rush, who had arrived with Cadwalader’s brigades to help establish a field hospital, wrote later of this his first direct encounter of war. Indeed, Rush was one of the very few signers of the Declaration of Independence yet to see the reality of the war firsthand. ‘The American army retired and left the British in possession of Trenton. The scene which accompanied and followed this combat was new to me. The first wounded man that came off the field was a New England soldier. His right hand hung a little above his wrist by nothing but a piece of skin. It had been broken by a cannon ball. I took charge of him and directed him to a house on the river which had been appropriated for a hospital. In the evening all the wounded, about 20 in number, were brought to this hospital and dressed by Dr. [John] Cochran, myself, and several young surgeons who acted under our direction. We all lay down on some straw in the same room with our wounded patients. It was now for the first time war appeared to me in its awful plenitude of horrors. I want words to describe the anguish of my soul, excited by the cries and groans and convulsions of the men who lay by my side.’” DAVID MCCULLOUGH, 1776 287 (2005). “Some say the American soldier is the same clean-cut young man who left his home; others say morale is sky-high at the front because everybody’s face is shining for the great Cause. They are wrong. The combat man isn’t the same clean-cut lad because you don’t fight a kraut by Marquis of Queensbury rules. You shoot him in the back, you blow him apart with mines, you kill him or maim him the quickest and most effective way you can with the least danger to yourself. He does the same to you. He tricks you and cheats you, and if you don’t beat him at his own game you don’t live to appreciate your own nobleness. But you don’t become a killer. No normal man who has smelled and associated with death ever wants to see any more of it. In fact, the only men who are even going to want to bloody noses in a fist fight after this war will be those who want people to think they were tough combat men, when they weren’t. The surest way to become a pacifist is to join the infantry.” BILL MAULDIN, UP FRONT 12-14 (W.W. Norton & Co. 2000) (1945).
which such army is kept, is against the law."\textsuperscript{690} A year later, The Declaration of the Causes and Necessity of Taking Up Arms, provided, “we should regard these oppressive measures as freemen ought to do, sent over fleets and armies to enforce them\textsuperscript{691};” and again in 1776 in The Declaration of Independence, which alleged, “all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. … He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.”\textsuperscript{692} This policy continued and was expressed in the Articles of Confederation, in section 6, which provides, “No vessel of war shall be kept up in time of peace by any State\textsuperscript{693}, 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 equipment.”\textsuperscript{694}

The Constitution grants powers to Congress with respect to military force, which include the following, “The Congress shall have Power\textsuperscript{695}…To raise and support Armies, but no Appropriation of Money to that Use shall be for longer Term than two years.\textsuperscript{696} …To provide

\textsuperscript{690} Declaration and Resolves of the First Continental Congress para. 15 (U.S. 1774).
\textsuperscript{691} Declaration of the Causes and Necessity of Taking Up Arms para. 4 (U.S. 1775).
\textsuperscript{692} The Declaration of Independence para. 13 (U.S. 1776).
\textsuperscript{693} This corresponds to, “No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in Time of Peace, …” U.S. Const. art. I, § 10, cl. 3. (emphasis added.)
\textsuperscript{694} Articles of Confederation § VI (U.S. 1781).
\textsuperscript{695} U.S. Const. art. I, § 8, cl. 1.
\textsuperscript{696} U.S. Const. art. I, § 8, cl. 12.
and maintain a Navy.\textsuperscript{697} …To make Rules for the Government and Regulation of the land and naval Forces.\textsuperscript{698} …To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.\textsuperscript{699} …To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to discipline prescribed by Congress.”\textsuperscript{700} The language chosen in granting Congressional Powers is significant, and reflects the continuing theme that there are to be no “Standing Armies” in Time of Peace. The distinction is best seen when the phrases, “To raise\textsuperscript{701} and support”\textsuperscript{702} and “To provide\textsuperscript{703} and maintain”\textsuperscript{704} are compared side by side, and note the former is directed at Armies, and the latter is directed at a Navy. A Navy is necessary to protect a common exposed coastline, as well as trade and fishing rights, which were addressed in the discussion concerning the Navigation Acts and Commerce above in section IV of this paper. Meanwhile, an Army is “dangerous to liberty,”\textsuperscript{705} as was discussed at the debates of the Federal Convention. “To the (2) clause Mr. Gerry objected that it admitted of appropriations to an army, for two years instead of one, for which he could not conceive a reason…

\[697\text{ U.S. Const. art. I, § 8, cl. 13.}\]
\[698\text{ U.S. Const. art. I, § 8, cl. 14.}\]
\[699\text{ U.S. Const. art. I, § 8, cl. 15.}\]
\[700\text{ U.S. Const. art. I, § 8, cl. 16.}\]
\[701\text{ “Raise. To create; to infer; to create or bring to light by construction or interpretation. To cause or procure to be produced, bred or propagated. To bring together; to get together or obtain for use or service; to gather; to collect; to levy; as to raise money to raise an army.” BLACK’S LAW DICTIONARY 1425 (4th ed. 1951).}\]
\[702\text{ U.S. Const. art. I, § 8, cl. 12.}\]
\[703\text{ “Provide. To make, procure, or furnish for future use, prepare.” BLACK’S LAW DICTIONARY 1388 (4th ed. 1951).}\]
\[704\text{ U.S. Const. art. I, § 8, cl. 13.}\]
\[705\text{ VA. Const. of 1776, § 13. VT. Const. of 1777, chap. 1, § 15. “the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their controul over the militia, tend, not only to a consolidation of the government, but the destruction of liberty.” THE ANTI-FEDERALIST NO. 17 (Robert Yates). (emphasis added.) The exact phrase “standing armies…are dangerous to liberty” is also found in the State Constitutions of Maryland, North Carolina, and Pennsylvania. MD. Const. of 1776. N.C. Const. of 1776. PA. Const. of 1776. Delaware had a provision to protect elections. “ART. 28 To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day;…” DEL. Const. of 1776, art. 28.}\]
– that it implied there was a standing army which he inveighed against as dangerous to liberty, as
unnecessary even for so great an extent of Country as this. and if necessary, some restriction on
the number & duration ought to be provided: Nor was this a proper time for such innovation. The
people would not bear it.

Mr. Sherman remarked that the appropriations were permitted only, not required to be for
two years. As the Legislature is to be biennially elected, it would be inconvenient to require
appropriations to be for one year, as there might be no Session within time necessary to renew
them. He should himself he said like a reasonable restriction on the number and continuance of
an army in time of peace.”

“Col: Mason, being sensible that an absolute prohibition of standing armies in time of
peace might be unsafe, and wishing at the same time to insert something pointing out and
guarding against the danger of them, moved to preface the clause (Art I sect. 8) ‘To provide for
organizing, arming and disciplining the Militia &c’ with the words ‘And that the liberties of the
people may be better secured against the danger of standing armies in time of peace’ Mr.
Randolph 2ded. the motion.

Mr. Madison was in favor of it. It did not restrain Congress from establishing a military
force in time of peace if found necessary; and as armies in time of peace are allowed on all hands
to be an evil, it is well to discontinuance them by the Constitution, as far as will consist with the
essential power of the Govt. on that head.

Mr. Govr. Morris opposed the motion as setting a dishonorable mark of distinction on the
military class of Citizens

Mr. Pinkney & Mr. Bedford concurred in the opposition.

706 The debates on Wednesday, September 5th, 1787. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 509
(Max Farrand ed., 1937).
On the question\textsuperscript{707} … [Ayes – 2; noes – 9]\textsuperscript{708}

The policy against “Standing Armies” is continuous and resolute throughout the Framers documents.\textsuperscript{709} It is clearly expressed by use of the phrase “to raise” as compared with “to provide”, and it demonstrates the Framers’ intent to not maintain a national army of the United States.\textsuperscript{710} Moreover, the references to the Militia and State authority over the Militia, further demonstrate the independent and sovereign status of the several States as the only bodies that continuously maintain and control land forces.\textsuperscript{711}

b. Present Impact of Constitutional Interest Analysis.

The Framers experiences and writings clearly indicate their was a concrete belief that government abuse of power was inevitable and placed at an even heightened risk when armies where available to enforce the government’s will upon the People.\textsuperscript{712} The Constitutional provisions allocate some powers to the States and some powers to the United States, and provide a mechanism to expand the power of the United States by calling forth the States’ land forces into the service of the United States.\textsuperscript{713} For the most part, naval powers are denied to the States\textsuperscript{714}, and land forces remain with and are vested in the States.\textsuperscript{715} The naval power is granted to the United States\textsuperscript{716}, and land forces are not to continually exist under control of the United

\textsuperscript{707} JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 639 (1987).
\textsuperscript{708} The debates on Friday, September 14\textsuperscript{th}, 1787. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 612-13 (Max Farrand ed., 1937).
\textsuperscript{710} U.S. CONST. art. I, § 8, cls. 12, 13. DEL. CONST. of 1776. MD. CONST. of 1776. N.C. CONST. of 1776.
\textsuperscript{711} PA. CONST. of 1776. VT. CONST. of 1777. VA. CONST. of 1776.
\textsuperscript{713} THE STAMP ACT (Eng. 1765). THE QUARTERING ACT (Eng. 1765).
\textsuperscript{714} U.S. CONST. art. I, § 8, cl. 15.
\textsuperscript{715} U.S. CONST. art. I, § 10, cl. 3.
\textsuperscript{717} U.S. CONST. art. I, § 8, cl. 13.
States. The land forces are to be assembled by the United States only when actually needed. The naval power granted to the United States conforms with and supports the underlying principle of free and open channels of commerce as it protects trade routes, and conforms with the jurisdiction of the United States provided under the judicial power to include admiralty jurisdiction. The actual conduct of war by the United States is further divided and requires both the Congress to declare war and the Executive to act as Commander-In-Chief.
The underlying principle that standing armies are dangerous to liberty pushed the Framers to avoid them, and especially to avoid them under the control of a national government. They also designed the added encumbrance requiring action by both the Congress and the Executive to make it more difficult to get involved in war. Abdication of powers was discussed above as it related to the States in the areas of revenue and police powers, and as it related to the People in the areas of voting and jury duty. Within the separation of military powers, the Congress has abdicated its power, by not having enacted the power to declare war since 1942, for declaration of war is the power that is granted in the Constitution and not any lesser alternative descriptions that may have been drafted by the Congress. The interdependencies designed into the system are there to protect the People from government’s abuse of power, but the system requires each body of power to not only exercise its powers when necessary.

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725 V.A. Const. of 1776, § 13. Vt. Const. of 1777, chap. 1, § 15. “the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their controol over the militia, tend, not only to a consolidation of the government, but the destruction of liberty.” THE ANTI-FEDERALIST NO. 17 (Robert Yates).

726 Gulf of Tonkin Resolution. J. Res. Aug. 10, 1964, Pub. L. No. 88-408, §§ 1-3, 78 Stat. 384 (50 U.S.C. Appx.) In hindsight, it is hard to believe that this was passed in an election year.


it wants to, but to also accept the obligations that accompany the powers. The overall structural framework demands all take part in government\textsuperscript{728}, the Constitution is weakened when the Congress, or the States, or the People do not live up to their part of the Agreement.

When considering sovereignty, military power is an element to weigh heavily, but is possessing military power a defining power of sovereignty and are full military powers required for sovereignty? Although the conduct of war is historically linked to the creation and formation of a sovereign\textsuperscript{729}, it has been a power exercised not infrequently by non-sovereign organizations. One instance of importance to America is the period during the Presidency of Abraham Lincoln.\textsuperscript{730} Was the Confederacy recognized as a sovereign in the eyes of the Union? Did the North treat the South as a sovereign, or were the South’s actions simply a non-sovereign exercise of the conduct of war? Here, there exists a problem for the North in attempting to “preserve the Union” if it actually treated the Confederacy as a sovereign and even if it exercises its power to declare war. For if Congress declares war, is it to declare war \textit{against the United States}, or should it simply authorize the securing of a particular region of the United States and the enforcement of the laws of the United States. There is always a problem during periods of civil war, since conducting a legally declared war might convey sovereignty to the alleged rebels, who of course view themselves as revolutionaries, and only the passage of time will convey or deny sovereignty to them. And, if the result had been different, if Grant had surrendered to Lee at Appomatox, would the Confederacy have been a sovereign all along? And since Lee did surrender, did all of those participants become subject to charges of Treason, and if so how is the

\textsuperscript{728} “…deriving their just powers from the \textit{consent of the governed},…” \textit{THE DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776). (emphasis added.) “For depriving us, in many cases, of the benefits of \textit{Trial by Jury};”… \textit{THE DECLARATION OF INDEPENDENCE} para. 20 (U.S. 1776). (emphasis added.)

\textsuperscript{729} The American Revolution permitted international recognition of the States comprising the United States as sovereign and independent States. The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 4, U.S. – Great Britain.

\textsuperscript{730} \textit{PRIZE CASES}, 67 U.S. (2 Black) 635 (1863).
North to make economic use of the South after the conflict? Civil war raises many issues, but merely the ability to conduct war is likely insufficient to convey sovereignty, at least until a legal peace treaty is signed forming a new country.

The twentieth century has seen alternative regimes which have sprung up and raise questions about the use of military power and sovereignty. When the Irish Republican Army (IRA) was engaged in paramilitary activities, was it conducting a non-sovereign war? Since actual negotiations took place with the IRA, was some form of legal legitimacy conveyed upon it. Additionally, there have been violent actions that may be linked to a controlling organization that has no recognized geographical territory, but rather occupies an ideological territory upon the political landscape, such as the Taliban or Al Qaeda. Are the operations sponsored and conducted by Al Qaeda, and similar organizations, the conduct of non-sovereign war, or does merely the power to conduct war convey sovereignty, it probably does not at present, but the future result may convey sovereignty of some kind, just as the proposed Palestinian State may be the result of actions taken by organizations led by Arafat and the PLO (Palestine Liberation Organization). The conclusion is that military power alone, or even the power to conduct war alone, is insufficient to make one a sovereign, as an additional act or event must formally take place that conveys some legal status. In sum, possessing military power alone does not make one a sovereign.

Under the Constitution, some military power is denied to the States, and some is denied to the United States, but both are sovereigns. A sovereign could exist even though it is absent any genuine military power at all, particularly for geographically smaller States, especially city-

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states, such as the Vatican\textsuperscript{732}, which nonetheless occupies a large territory on the political landscape.

Since the Constitution explicitly addresses the Militia\textsuperscript{733} in several areas, the absence of a Militia may quite possibly be unconstitutional and is a problem for present day America, as it clearly violates the underlying principle that standing armies are dangerous to liberty and impairs separating land forces from national control. The Constitution does not provide for a National Guard, and the National Guard is not the Militia. It is possible that the State governor could utilize the National Guard as the full time leaders and the lead instrument in calling forth all of the able bodied citizens, of such designated ages as the State Legislature proscribes, at regular and recurring intervals, and that could be used to re-establish the Militia\textsuperscript{734} within the States. In

\textsuperscript{732} The State of the Vatican City: “Until the United States shall have consular officer resident in the State of the Vatican City, a copy of any document of record or on file in a public office of said State of the Vatican City, certified by the lawful custodian of such document, may be authenticated, as provided in section 6 of this Act, by a consular officer of the United States resident in the city of Rome, Kingdom of Italy, and such document or record shall, when so certified and authenticated, be admissible in evidence in any court of the United States.” Act of June 20, 1936, ch 640, § 6A, as added June 25, 1938, ch 682, 52 Stat. 1163 (codified as 22 U.S.C. § 4222).

\textsuperscript{733} U.S. CONST. art. I, § 8, cls. 15, 16. U.S. CONST. amends II, V.

\textsuperscript{734} The Constitution of Vermont and court cases provide examples that indicate that States could have their own military within the State government, as well as their own militia, and that the militia was treated as a special entity, which could require strictly military jurisdiction or could require civil jurisdiction. “SECTION XLII. All field and staff officers, and commissioned officers of the army, and all general officers of the militia, shall be chosen by the General Assembly.” “SECTION XXXVI. Every officer, whether judicial, executive or military, in authority under this State, shall take the following oath or affirmation of allegiance, and general oath of office, before he enter on the execution of his office.” “SECTION XVIII. …They [all officers] are to correspond with other States, and transact business with officers of government, civil and military; and to prepare such business as may appear to them necessary to lay before the General Assembly.” VT. CONST. of 1777, chap. 2, § 18, 36, 42. “XV. That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.” VT. CONST. of 1777, chap. 1, § 15. “and all military questions and matters, by the officers and courts established from among the militia.” LOOMIS v. SIMONS 2 Root 454, 456 (1796). “The question is altogether of military cognizance, viz. to which of said companies the plaintiff belonged; and in which, by law, he ought to do duty; this is determinable by the officers of the militia.” LOOMIS v. SIMONS 2 Root 454, 456 (1796). The State courts disclaim jurisdiction of the Militia in military matters, (Circuit Court of CONNECTICUT). LOOMIS v. SIMONS 2 Root 454 (1796). A case of trespass by the militia upon lands of a private citizen, who is not a member of the militia. The State claims jurisdiction of the Militia. Brigham v. Edmands 73 Mass. 359 (1856). "Since the first organization of the militia of this commonwealth under the Constitution..." Brigham v. Edmands 73 Mass. 359, 362 (1856). Here the Militia is viewed as a State Constitutional entity. "But it is claim to an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage. Such a right cannot be exercised except under the authority of the legislature, expressed in clear distinct terms, or by
modern America, by the absence of a Militia, there is an abdication by the People of yet another
of their obligations, just as with jury duty. This military service within the Militia is a form of
burden sharing, as burden sharing truly includes taxation and conscription\(^{735}\), or “blood and
treasure.”\(^{736}\) The assembly of a few volunteers in the name of the National Guard, is not a
commitment of the People to preserving their own freedom, to include freedom from government
interference, and freedom has never been free.

vi. Article VI and Incorporation By Reference.

Article VI of the Constitution is known for the phrase, “the supreme Law of the Land,”\(^{737}\) and although this phrase is important, and no doubt, is still not completely understood by even
Constitutional scholars, the entire Article is of significance to the Constitution’s recognition of
necessary implication, and with suitable provisions for compensation to the persons whose property may be so
appropriated or injured.” Brigham v. Edmands 73 Mass. 359, 363 (1856).

\(^{735}\) Duty to Serve. “…it shall be the duty of every male citizen of the United States, and every other male person
residing in the United States, who, on the day or days fixed for the or any subsequent registration, is between the
ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times,….” Act of
1129 (codified as amended 50 U.S.C. Appx. § 453 (1981)). “…every person required to register…shall be liable for
amended 50 U.S.C. Appx. § 454 (2002)).

\(^{736}\) Burden Sharing: “…blood and treasure…” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS
para. 23 (U.S. 1774). “At the expense of their blood, at the hazard of their fortunes…” DECLARATION OF THE
CAUSES AND NECESSITY OF TAKING UP ARMS para. 2 (U.S. 1775). “we mutually pledge to each other our Lives, our
Fortunes and our sacred Honor.” THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). “That a well-regulated
militia is the proper and natural defence of a free government.” MD. CONST. of 1776, Declaration of Rights § XXV.
“That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe
defence of a free State;…” VA. CONST. of 1776, Bill of Rights § XIII. “The freemen of this commonwealth and their
sons shall be trained and armed for its defence…” PA. CONST. of 1776 § V. “…but every State shall always keep up
a well-regulated and disciplined militia, sufficiently armed and accoutered,…” ARTICLES OF CONFEDERATION art. VI
(U.S. 1781).

\(^{737}\) U.S. CONST. art. VI, § 1, cl. 2. “Per Legem Terrae. By the law of the land; by due process of law.” BLACK'S LAW
DICTIONARY 1293 (4th ed. 1951). “Coke says, the words, ‘per legem terrae’ in magna carta, and the words ‘due
process of law’…in the statute of…mean the same thing… And we have no doubt that the phrase by the law of the
land in our constitution [New Hampshire], means the same thing as by due process of law.” MAYO v. WILSON 1
N.H. 53, 55 (1817). (emphasis retained.) In 1787, the year the Constitution was being drafted, in a case in Maryland,
Counsel for the appellee argued, "Irish Nell was an English subject, and as such entitled to all the privileges of an
English subject in an equal degree with any other English subject, however possessed with wealth, and exalted in
station or rank. If she committed the crime of marrying a negro slave, she would by law be subject to no punishment
before conviction, in some mode, and she was entitled to the common law mode of trial by Jury, as no other mode
was prescribed by law. By magna charta,…nullus liber homo disseisietur de libertatibus, nisi per legem terrae.
Libertatibus signifies the laws of the realm. Nisi per legem terrae, without due process of law." Butler v. Craig 2 H.
& McH. 214, 231 (1787). (emphasis added.)
the independence and sovereignty of the several States. The Article begins, “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.”

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738 U.S. CONST. art. VI, § 1, cl. 1, 2, 3.
739 Engagement. In French law. A contract. The obligation arising from a quasi contract. The terms ‘obligation’ and ‘engagement’ are said to be synonymous, but the Code seems specially to apply the term ‘engagement’ to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee.” BLACK’S LAW DICTIONARY 622 (4th ed. 1951). (emphasis added.)
740 U.S. CONST. art. VI, § 1, cl. 1. Consequently, by the Constitutional directive of Article VI, the United States should have been substituted as the proper party defendant (as the Article VI directed substitute for the State of Georgia) in the case of Chisholm v. Georgia in 1793. The soon following public dissatisfaction and revolt that lead to the Eleventh Amendment might have been avoided, had the Court observed its oath to support and adhere to the Constitution. Following are excerpts from Chisholm v. Georgia with opinions of the Majority from Justice WILSON, Justice BLAIR, and Chief Justice JAY. First in the sequence is the opinion by Justice WILSON, the only person in American history to have signed the Declaration of Independence and the Constitution and served as a Justice on the Supreme Court of the United States of America. Chisholm v. Georgia had opinions written by Justice BLAIR and Justice WILSON who both signed the Constitution as well as by Chief Justice JOHN JAY, one of three authors of the Federalist Papers (which included Jay John, James Madison and Alexander Hamilton). It is also worth noting that Mr. Edmund Randolph, of the Virginia delegation of the 1787 Constitutional Convention, served as Attorney General for the United States and represented the plaintiff in Chisholm. At [453] “WILSON, Justice. This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be Sovereign…. [454] To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration. Having thus avowed by disapprobation of the purposes, for which the terms, State and Sovereign, are frequently used, and of the object, to which the application of the last of them is almost universally made; it is now proper that I should disclose the meaning, which I assign to both, and the application, [455] which I make of the latter. In doing this, I shall have occasion incidently to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilised, and, at last oppressed their master and maker. MAN, fearfully and wonderfully made, is the workmanship of his all perfect CREATOR: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance. When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is divine: Of all human contrivances, it is certainly most transcendentally excellent. It is concerning this contrivance that Cicero says so sublimely, "Nothing, which is exhibited upon our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated STATES." Let a State be considered as subordinate to the PEOPLE: But let every thing else be subordinate to the State. The latter part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the Second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the Sovereigns of the State. This Second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent, even in the several States, of which our union is composed. By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that if its members: It may incur debts to be discharged out of the public flock, not out of the private
fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this [456] feigned and artificial person, we should never forget, that, is truth and nature, those, who think and speak, and act, are men. … [465] Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for Such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When [466] so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court. … [466] But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. "The judicial power of the United States shall extend, to controversies between two States." Two States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the United States shall extend to controversies, between a State and citizens of another State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind. I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and Kingdoms; and by the Constitution of the United States. From all, the combined inference is; that the action lies." CHISHOLM v. GEORGIA, 2 U.S. 419 at 453-66 (1793). (emph\asmaller{asis added}) (see U.S. Const. amend. XI.) “[451] From the opinion of Justice BLAIR, which predicts the limits of judicial power announced in an altogether different manner in Marbury v. Madison. Justice BLAIR. [451]…if, at the end of the business, notwithstanding the powers given us in the 14th section [452] of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers; to which, however, there may be no necessity to have recourse: Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to their own ideas of justice? At [450] What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not answer be in the affirmative? A dispute between A. and B. assurely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, [451] in respect to the dignity of a State. But that very dignity seems to have been thought a sufficient reason for confining the fence to the case where a State is plaintiff. It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another bunch of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant: this is unequivocally asserted when the judicial power of the United States is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant." CHISHOLM v. GEORGIA, 2 U.S. 419 at 450-52 (1793). (emphasis added.) From the opinion of Chief Justice JAY. At 470. “It is remarkable [471] that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this "Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. … [472] It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued,
clause corresponds to Article 4, of The Paris Peace Treaty of 1783, which provides, “It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.” Besides the “debts heretofore contracted” described in Article 4 of the Treaty, The Paris Peace Treaty in its entirety, is one of the “Engagements” mentioned in the Article VI clause, “All Debts contracted and Engagements entered into,” and the parties to the Treaty were twelve of the States, (the original thirteen less Delaware), and “His Brittanic Majesty” as Great Britain. The Articles of though not personally, sued. In this city [Philadelphia] there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of Delaware, as on the Mayor or other Officers of the Corporation of Philadelphia? Will it be said, that the fifty odd thousand citizens in Delaware being associated under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former? -- In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in [473] another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice. If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the Union may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain then, that a State may be sued, and hence it plainly follows, that suitability and State sovereignty are not incompatible. As one State may sue another State in this Court, it is plain that no degradation to a State is thought to accompany her appearance in this Court. It is not therefore to an appearance in this Court that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number of an inferior light. But if any reliance be made on this inferiority as an objection, at least one half of its force is done away by this fact, viz. that it is conceded that a State may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina. The only remnant of objection therefore that remains is, that the State is not bound to appear and answer as a Defendant at the suit of an individual: but why it is unreasonable that she should be so bound, is hard to conjecture: That rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them.” CHISHOLM v. GEORGIA, 2 U.S. 419 at 470-73 (1793). (emphasis added.)


742 “His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free sovereign and independent states, that he treats with them as such,
Confederation grant the Congress the power to enter into treaties on behalf of the States, and provide that, “The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article – of sending and receiving ambassadors – entering into treaties and alliances…” Moreover, the Articles of Confederation pledge the public faith of the United States for debts contracted and provide, “All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.” The Paris Peace Treaty of 1783, was entered into under the authority of the Articles of Confederation, and Article VI, section 1, clause 1 of the Constitution binds the United States to the Engagements entered into under the Articles of Confederation. The clause imposes Constitutional authority that binds the United States to such Treaty, and the Treaty was entered into to officially grant international recognition, among sovereigns, of the end of the War. This Treaty, by mutual recognition, is international recognition of the sovereignty of the parties to the Treaty, which are Great Britain and twelve of the several States, and the Constitution recognizes this “Engagement”, and here, the sovereignties of all of the several States and the United States

and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof.” The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 1, 4, U.S. – Great Britain.

\footnote{ARTICLES OF CONFEDERATION § IX (U.S. 1781).}

\footnote{ARTICLES OF CONFEDERATION § XII (U.S. 1781). As a further reaffirmation of this provision and its ‘incorporation by reference via Article VI,’ was broader protection of the Eleventh Amendment, which \textit{forbids a State from being a defendant} to such a controversy, and other type controversies as well, within the jurisdiction or the courts, of the United States, and yet, has no effect on the jurisdiction of the State courts, which is left up to the States themselves. \textit{The Judicial power of the United States} shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. (emphasis added.) The Eleventh amendment was proposed on March 4, 1794 and ratified on February 7, 1795. Dates taken from \textit{The U.S. Constitution and Fascinating Facts About It} 47 (7th ed. 2001).}

\footnote{The Paris Peace Treaty of 1783, Sep. 3, 1783, U.S. – Great Britain. U.S. CONST. art. VI, § 1, cl. 1.}

\footnote{The Paris Peace Treaty of 1783, Sep. 3, 1783, U.S. – Great Britain. U.S. CONST. art. VI, § 1, cl. 1.}
are simultaneously Constitutionally affirmed and recognized in one clause.\textsuperscript{747} The sovereign recognition aspects of the Treaty are clearly seen in Article 2, which defines the geographical boundaries of the United States, to include the critical western boundary line in the middle of the Mississippi river.\textsuperscript{748} Geographical boundaries were also provided for in the Treaty With the Six Nations of 1784, which was also an agreement made under the Articles of Confederation, and an agreement among sovereigns, which were the United States, the Senecas, Mohawks, Onondagas, and Cayugas, (the Oneidas and Tuscaroras were additional signatories.)\textsuperscript{749}

The clause was discussed at the debates of the Federal Convention:

“The Report of the Committee of Eleven delivered in & entered on the Journal of the 21st. inst. was then taken up. and the first clause containing the words ‘The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress’ being under consideration,

Mr. Elsworth argued that they were unnecessary. The U- S- heretofore entered into Engagements by Congs who were their Agents. They will hereafter be bound to fulfil them by their new agents.

Mr Randolph thought such a provision necessary; for though the U. States will be bound, the new Govt will have no authority in the case unless it be given to them.

Mr. Madison thought it necessary to give the authority in order to prevent misconstruction. He mentioned the attempts made by the Debtors to British subjects to shew that contracts made under the old Government, were dissolved by the Revolution which destroyed the political identity of the Society.

\textsuperscript{748} “‘And that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their boundaries,...” The Paris Peace Treaty of 1783, Sep. 3, 1783, art. 2, U.S. – Great Britain.
Mr Gerry thought it essential that some explicit provision should be made on this subject, so that no pretext might remain for getting rid of the public engagements.

Mr. Govr. Morris moved by way of amendment to substitute – ‘The Legislature shall discharge the debts & fulfil the engagements {of the U. States}’.

It was moved to vary the amendment by striking out ‘discharge the debts’ & to insert ‘liquidate the claims’, which being negatived.

The amendment moved by Mr. Govr. Morris was agreed to all the States being in the affirmative.”

The phrasing finally adopted in the Constitution did not make use of the term “Legislature” and simply holds Constitutionally valid “All the Debts contracted and Engagements entered into.” This reflects the idea that “this Constitution” … “shall be the supreme Law of the Land,” and not a body of power composed of Members, or of a Person, or People, or Judges; but simply the document itself, the Constitution alone, which, since it is not made up of people, and is therefore not corruptible, is supreme. This supreme authority

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751 U.S. CONST. art. VI, § 1, cl. 1.
752 The version in the Committee of Detail, IX referred to the Legislature itself and provided, “The Acts of the Legislature of the United States made in Pursuance of this Constitution, and all Treaties made under the Authority of the United States shall be the supreme Law of the several States, and of their Citizens and Inhabitants; and the Judges in the several States shall be bound thereby in their Decisions, any Thing in Constitutions or Laws of the several States to the Contrary notwithstanding.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 169 (Max Farrand ed., 1937). (emphasis added.)
753 The Committee of Style provided a Preamble as follows, “We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 565 (Max Farrand ed., 1937). (emphasis added.) The phrase “the Government” was removed and the final proposed, approved, and ratified Preamble to the Constitution provides, “…do ordain and establish this Constitution…” U.S. CONST. pmbl. (emphasis added.) Within this element, and later in Article VI, the supreme law is placed in “this Constitution”, as a document, and not any body of people acting as a government; there is a great distinction here, which was designed to be a significant built in protection of the people. On this very point, Chief Justice MARSHALL interpreted this completely to the contrary, acting in the self interest (to include his own) of the people composing the National Government when he opined, “The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of
corresponds to the need to have a dispute resolution mechanism, which was also found in Article IX of the Articles of Confederation, and was found to be impracticable by way of its complexity. Peaceful resolution of differences being far less expensive than armed conflict was a great motivator for the States in sacrificing this particular element of sovereignty, in order to obtain mutual recognition of sovereignty among the several States by each State.

vii. Pledge of Allegiance.

As early as May 29th, 1787, Mr. Randolph also proposed a resolution providing for an Oath to the Constitution, as follows, “14. Resd. that Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.” The Committee of Detail, IX version added the “United States” to the several States and provided,

the land, “any thing in the constitution or laws of any State to the contrary notwithstanding.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 406 (1819). (emphasis added.)

“Properly constituted, the American Union would spread across the continent, a model and inspiration to the whole world. The United States would be exempted from the inevitable cycle of decay and corruption that marked the career of every other state in history.” … “…the old political and social anxieties – the fear of power and of a corrupt officeholding aristocracy – that had inspired the revolutionary generation.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 185, 189 (1983). “…it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. … In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” THE ANTI-FEDERALIST No. 17 (Robert Yates). (emphasis added.)

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, § 1, cl. 2. (emphasis added.)


“The democratic character of the American states, together with the umbilical cords of commerce that connected them, made for peace, not war.” (argument by Anti-Federalists) “Federalists countered with the argument that democratic governments were as likely to make war as despots, and they reviewed the ample sources of contention…” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 253 (2003). “…Vermont was the only true American republic, for it alone had truly created itself.” PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 145 (1983). Referring to Vermont’s declaring independence, (or from New York’s perspective, Vermont’s secession from New York).

“The Members of the Legislatures, and the executive and judicial Officers of the United States, and of the several States, shall be bound by Oath to support this Constitution.” And finally, “senators and representatives” were added to the clause by the Committee of Style, resulting in Article VI, section 1, clause 3, of the Constitution providing, “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;…” Corresponding to the document, the Constitution, being the supreme Law of the Land, there is required to be taken an Oath by the persons who comprise the bodies of power within the national government as well as the persons who make up the bodies of power within the governments of the several States, and here the Constitution recognizes that the United States and all of the several States have their own sovereignty, and the Constitution demands allegiance to itself as the supreme body, since it is a theoretically pure and un-corruptible body of power that reigns supreme to protect both the people of the United States, and of the several States, from overreaching and oppressive government behaviors. The Oath to support the Constitution, was held to be important enough to be the first statute passed by the first session of the first Congress in 1789, and that points to the weight that should be accorded to it by that Congress, which included many of the Framers. In Article VI, the Constitution recognizes the sovereignty of the States, and

761 U.S. CONST. art. VI, § 1, cl. 3.
762 U.S. CONST. art. VI, § 1, cl. 2.
763 U.S. CONST. art. VI, § 1, cl. 3.
764 U.S. CONST. art. VI, § 1, cls. 2, 3.
765 SEC. 1. Be it enacted by the Senate and [House of] Representatives of the United States of America in Congress assembled, That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: “I, A. B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.” The said oath or affirmation shall be administered within three
establishes a Separation of Powers, which is not simply a separation between the United States and the several States, but there is a separation between persons who are susceptible to temptation and corruption\textsuperscript{766}, and a pure un-corruptible document that stands supreme to all other bodies of power.


The Framers created mechanisms to address the underlying principles, one in particular being that power will eventually be abused, and the meaning of the express provisions in the Constitution, as well as the underlying principles, may only be derived from their experiences and the writings they where confronted with or created. Within the Constitutional framework, some powers are allocated to the States only, and some are allocated to the United States. Some powers are denied to the United States, and some are denied to the States, and there is some overlap as some powers run concurrently\textsuperscript{767}, and yet some are modified by consent provisions. The separations were designed to provide a benefit greater than the powers denied and are not a sign that one is not a sovereign, but these allocations and separations are a feature that indicate even greater respect for the governed, that is the People of the United States, and the People of the States, as well as recognizing the sovereign role of the several States, which are located more closely with the People and better understand their situations and may better provide services for their particular needs, than the United States possibly could.

\textit{days after the passing of this act…}” An Act to regulate the Time and Manner of administering certain Oaths. Act of June 1, 1789, 1 Stat., ch. 1 (1789). (italics retained.) (emphasis added.)\textsuperscript{766} “it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. … In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” THE ANTI-FEDERALIST NO. 17 (Robert Yates). (emphasis added.)\textsuperscript{767} “That the \textit{power of taxation is one of vital importance}; that it is \textit{retained by the States}; that it is not abridged by the grant of a similar power to the government of the Union; that it is \textit{concurrently exercised} by the two governments: are truths which have never been denied.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 425 (1819). (emphasis added.)
If the definition of sovereignty *demands* possession of all the possible powers of sovereignty, then does the denial of one such power indicate a lack of sovereignty, and if so, then both the United States and the States lack the requisite elements of sovereignty, and may only be considered a true sovereign when viewed in concert. For only when considered together, do we find all the elements of sovereignty. This is probably a less than desirable, if not unacceptable approach. This narrow view does not conform with the discussion above that emphasizes no single element of sovereignty defines sovereignty fully, as has been mentioned with respect to the power to raise (or extort) revenue, and the power to conduct acts of war.

For example, the power to print currency is granted to the United States and not the States. This power, like military power is associated with sovereignty, but Lichtenstein is treated as a sovereign and it relies upon Swiss Francs for its currency needs, so although a power may be possessed, it may be neither feasible nor required to be exercised in some circumstances. Although any one particular power should not be used to declare and define one as being or not being a sovereign, it may require at a minimum, perhaps a plain and simple irrefutable right to claim immunity from dispute resolution mechanisms and remedies (court proceedings in the States and the United States) for acts upon the governed that may happen to cause damage to persons or property. This short statement about immunity cannot be the complete definition of sovereignty, but it is a critical element to finding sovereignty within a body of power.  

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768 U.S. CONST. art. I, § 8, cl. 5.
United States and the States have the right to claim immunity from a cause of action, or to grant
consent to be a defendant, and this right of claim cannot be separated out from either.

VII. Conclusion.

i. Application of Constitutional Interest Analysis.

The Constitutional Interest Analysis, which has been adapted from Brainerd Currie’s
method of Interest Analysis\textsuperscript{770}, is an attempt to step into the shoes of the Framers and view the
Constitutional provisions to determine their historical meaning. The provisions were written in
response to writings and events that had meaning to the Framers. When reading the Constitution,
or interpreting it, one must bear in mind, the Framers had as a birth right, the citizenship of
England within their own possession, and England was quite possibly the wealthiest and most
powerful country in the world, and possibly in history when viewed in relative terms. The
Framers must have had something pragmatic in mind and not just a grand ideology, since they
could have chosen to avoid war and remain British subjects.

The pragmatic approach to drafting the Constitution left us with provisions that expose
the underlying principles the Framers decided were necessary for sound government. Through
historical analysis, the principles this paper has revealed include: participatory government,
consent of the governed; no taxation without representation, no burden shifting; no
protectionism, deregulation of commerce, and free and open channels of commerce; no national
territory controlled by a national legislature, and preservation of the status of existing States.
Additionally, the paper has revealed the underlying principles to include that: power will be
abused and must be restrained by some mechanism, and sometimes that mechanism is dividing
the powers, such is the case with trial by jury and due process (protecting the individual from

\textsuperscript{770} The Constitutional Interest Analysis applied herein is \textit{adapted} for the Constitution from that developed by
government action); separation of the power to punish from the national government and separation of police power from the national government; standing armies are dangerous to liberty and separation of land forces from the national government; and that the pre-existing status of obligations and of the several States are to be respected. It is interesting to note the overall principle of fear of government action upon individuals, upon the People, and upon the several States, exists within most of the underlying principles mentioned. The Constitution was written to grant power, but also to protect the governed from power, and that must be one’s perspective when engaging in the analysis and examining sovereignty.

The paper suggests Constitutional Interest Analysis as the appropriate method for deriving the underlying principles of the Constitution by first determining what the Framers meant when the provisions were written. It relies on the understanding that protections and restraints were built into the Constitution. It requires an understanding that there are limited and enumerated powers granted in the Constitution, and that there are admittedly a denial of powers to both the United States and to the States throughout the Constitution, but nonetheless, within the framework, the several States are sovereigns, and at the same time the United States is a sovereign. This may be a lot to ask, but we have asked a lot of the Constitution, and may have stretched it to its limits so as to suit our needs-of-the-day, and this methodology may permit the Constitution to serve America longer than stretching it to a breaking point.

When one is to resolve a dispute that has Constitutional implications, one method of applying Constitutional Interest Analysis would be as follows: If and when one is pointing to clauses in the U.S. Constitution, then at the outset the analysis requires an analysis to determine the principles underlying the clauses in the Constitution, and this in turn demands a historical analysis of primary documents relating to statutes of the period and documents recording
The Constitution is the Supreme Law of the Land. And, in the rare instances of direct head to head conflict, where allocation of power appears to be placed in both, and there are no apparent restraints provided for, reference to the Supreme Law of the Land will permit resolution in favor of the Constitution over an individual State, where the underlying principles behind the Constitutional provisions so demand, or the plain text of the Constitution particularly directs.

ii. Constitutional Interest Analysis reveals current relevance of the Underlying Principles and the integral role of the several States.

The analysis has examined various bodies of power, definitions of terms chosen for use within the Constitution, taxation and representation, commerce and navigation, lands and statehood, and the numerous mechanisms that provide separation of powers. The quantity of instances and the nature of the powers provided by the Constitution, that create the forces and influences of ‘the several States’ within the Constitutional framework, indicate clearly that ‘the several States’ as a body of power should not simply be dismissed since it does not have its own distinct Article within the Constitution, but rather ‘the several States’ should be respected as a specifically provided for body of power that permeates the entire Constitution. One last point so as to avoid any possible confusion with common vernacular expressions, the thesis of this paper is not in support of the freely used term of “States’ rights”, but rather the paper accepts that the
People have rights, and States have powers, and specifically only the powers granted to them within their own state constitutions, and the paper accepts that States also do have liberties.\textsuperscript{771}

The States and the several States, when examined as they appear within the “Constitution for the United States of America”\textsuperscript{772}, whether analyzed within individual clauses, or preferably, viewed within the Constitution as a whole document\textsuperscript{773}, indicate by both the numerous affirmations and the breadth of affirmations of the independence and sovereignty of the several States, that “the States” exist as a distinct body of power within the structural framework of the Constitution. Historical documents written before and contemporaneously with the writing of the Constitution provide expressions of various bodies of power that influenced the Framers and reflect the issues the Framers encountered and that the Framers addressed when fashioning mechanisms to restrain government authority and protect the people from overreaching, corrupt and oppressive behaviors. The Framers created the judicial power of the United States and therefore, wrote the Constitution without ever having been exposed to the supreme Court of the United States, or any decision of the supreme Court of the United States of America.\textsuperscript{774} In order to determine the meaning of the Constitution today, one must first determine the meaning of the Constitution in 1787, when it was written, and the Framers’ meaning certainly cannot be

\textsuperscript{771} “The order they were looking to constitute, however, was an ‘imperial’ order, one that would unfold over an ‘amazing extent of country,’ embracing within it an extraordinary variety of interests, peoples, and ways of life; the liberty they wished to preserve was not simply individual liberty, though that was recognized by nearly all as a fundamental political value, but the ‘liberty of states.’” DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 35 (2003). “Our liberties we prize and our rights we will maintain” Iowa state flag and motto.

\textsuperscript{772} U.S. CONST. pmbl.

\textsuperscript{773} “A writing must be interpreted as a whole and no part should be ignored. All of the writings that form a part of the same transaction should be interpreted together and, if possible, harmonized. If no other intention is established, language is interpreted in accordance with its generally prevailing meaning. This is a watered-down version of the plain meaning rule, but conforms to what is reasonable and logical.” JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.13, at 159 (5th ed. 2003). (emphasis added.)

determined from jurisprudence that they never read or experienced. Only writings that they wrote, or had access to can help one determine the genuine original meaning of the Constitution.

Literature the Framers had access to, and no doubt had familiarity with, included writings specifically directed at the common man with aspirations of mass marketing, to include plays by Shakespeare. One of Shakespeare’s earliest works, Titus Andronicus, addressed tyranny and the suffering of the people:

Tell him, it is for justice and for aid,
And that it comes from old Andronicus,
Shaken with sorrows in ungrateful Rome.
Ah, Rome! Well, well; I made thee miserable
What time I threw the people’s suffrages
On him that thus doth tyrannize o’er me.
Go, get you gone, and pray be careful all,
And leave you not a man of war unsearched:
This wicked emperor may have shipped her hence,
And, kinsmen, then we may go pipe for justice.

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777 “Users of modern dictionaries are sometimes surprised when they open Johnson’s: the definitions, the usual business of a dictionary, account for only a small fraction of the book. The bulk of the Dictionary comes from the quotations, about 114,000 of them, that illustrate the words more precisely than any definition could. … The quotations made Johnson’s book not only the largest dictionary of its day, but also one of the most substantial anthologies of English literature ever published. Johnson praised Shakespeare as the best guide to the language of ‘common life’ and quoted from all thirty-six of his plays.” SAMUEL JOHNSON, SAMUEL JOHNSON’S DICTIONARY: SELECTIONS FROM THE 1755 WORK THAT DEFINED THE ENGLISH LANGUAGE 12 (Jack Lynch ed., Levenger Press 2002) (1755). (emphasis retained.) (emphasis added.)
778 Stated by Titus Andronicus, a noble Roman, to his brother Marcus (tribune of the people), and Publius, (Marcus’ son). WILLIAM SHAKESPEARE, TITUS ANDRONICUS act 4, sc. 3, (Wordsworth Editions Limited 1996) (1594).
Government, power, the law and their impact on the common man, were specifically addressed by Shakespeare as well. From the most common of characters, a Fisherman:

Why, as men do a-land: the great ones
eat up the little ones. I can compare our rich misers to
nothing so fitly as to a whale; a’ plays and tumbles,
driving the poor fry before him, and at last devours
them all at a mouthful: such whales have I heard on
a’th’land, who never leave gaping till they ha’ swal-
lowed the whole parish, church, steeple, bells and all.779

Pericles comments in response to the Fisherman:

How from the finny subject of the sea
These fishers tell the infirmities of men;
And from their wat’ry empire collect
All that may men approve or men detect!
Peace be at your labor, honest fishermen.780

Fisherman 1, goes on to comment on peace and government:

Why, I’ll tell you: this is called Penta-
polis, and our king the good Simonides. …
Ay, sir, and he deserves so to be called
for his peaceable reign and good government.781

Before the Fishermen depart, one cries out:

Help, master, help! here’s a fish hangs
in the net, like a poor man’s right in the law; ‘twill
hardly come out. Ha! Bots on’t, ‘tis come at last, and
‘tis turned to a rusty armour.782

779 Stated by Fisherman 1 to Fisherman 2 and 3. WILLIAM SHAKESPEARE, PERICLES act 2, sc. 1, (Wordsworth Editions Limited 1995) (1613).
780 Comment stated by Pericles, Prince of Tyre, in response to Fisherman 1, 2, and 3. WILLIAM SHAKESPEARE, PERICLES act 2, sc. 1, (Wordsworth Editions Limited 1995) (1613).
781 Stated by Fisherman 1 to Pericles, Prince of Tyre. WILLIAM SHAKESPEARE, PERICLES act 2, sc. 1, (Wordsworth Editions Limited 1995) (1613).
Here one may see the even the commonest of men understand what may be good and bad in government and the justice system, and the Framers were certainly devising the Constitution with such basic concepts in mind. Shakespeare returned to the positive aspects of the Roman republic, (republican virtue), and the importance of commerce.

The dearest friend to me, the kindest man,
The best-condition’d and unwearied spirit
In doing courtesies, and one in whom
The ancient Roman honour more appears
Than any that draws breath in Italy.  

The duke cannot deny the course of law:
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state,
Since that the trade and profit of the city
Consisteth of all nations.

Later, in 1713, Joseph Addison wrote a tragedy about Rome and republican virtue, that recalled both the negatives of tyranny, oppression, and slavery, as well as the glory of freedom, liberty, and republican government.

How does the luster of our father’s actions,
Through the dark cloud of ills that cover him,
Break out, and burn with more triumphant brightness?
His sufferings shine, and spread a glory round him
Greatly unfortunate, he fights the cause
Of honour, virtue, liberty, and Rome.

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783 Stated by Bassanio (about Antonio, a merchant of Venice) to Portia. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 2, (Oxford University Press 1979) (1596).
785 “It seems likely that the source of the ideal [republican virtue], in Washington’s case, was Joseph Addison’s play [written in 1713] Cato. That he saw the play a number of times, and it was probably his favorite serious drama, and that he had it staged as an inspiration to his troops are well known.” FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 195 (1985).
786 “Which of the two to choose, slavery or death!” Stated by Sempronius to Cato. JOSEPH ADDISON, CATO, act 2, sc. 1, (1713).
787 “Rome still survives in this assembled senate!” Stated by Sempronius to Lucius, a senator, and the Senate. JOSEPH ADDISON, CATO, act 2, sc. 1, (1713).
His sword ne’er fell but on the guilty head;  
Oppression, tyranny, and power usurp’d;  
Draw all the vengeance of his arm upon them.\textsuperscript{788}

From Cato himself:

Why should Rome fall a moment ere her time!  
No, let us draw her term of freedom out  
In its full length, and spin it to the last,  
So shall we gain still one day’s liberty;  
And let me perish, but in Cato’s judgment,  
A day, an hour, of virtuous liberty,  
Is worth a whole eternity in bondage.\textsuperscript{789}

-Bid him disband his legions,  
Restore the commonwealth to liberty,  
Submit his actions to the public censure,  
And stand the judgment of a Roman senate.  
Bid him do this, and Cato is his friend.\textsuperscript{790}

From these historical writings the Framers had access to, it is apparent even the common man of their period was, or should have been, familiar with abuse of power and corruption. Benjamin Franklin, who was one of the Framers, and a founder of what is now the University of Pennsylvania\textsuperscript{791}, left us a university, which has a coat of arms that bears the slogan, ‘LEGES

\textsuperscript{788} Stated by Portius, son of Cato, to Marcus, who is Portius’ brother. JOSEPH ADDISON, CATO, act 1, sc. 1, (1713).  
\textsuperscript{789} Stated by Cato to Sempronius. JOSEPH ADDISON, CATO, act 2, sc. 1, (1713).  
\textsuperscript{790} Stated by Cato to Decius. JOSEPH ADDISON, CATO, act 2, sc. 2, (1713).  
\textsuperscript{791} Congressional acknowledgement of the University of Pennsylvania. JOINT RESOLUTION. Authorizing the recognition of the two-hundredth anniversary of the founding of the University of Pennsylvania by Benjamin Franklin and the beginning of university education in the United States, and providing for the representation of the Government and people of the United States in the observance of the anniversary. Whereas there are to be held at Philadelphia, Pennsylvania, and at other places during the year 1940 celebrations commemorating the two-hundredth anniversary of the founding of the University of Pennsylvania by Benjamin Franklin and the beginning of university education in the United States, and providing for the representation of the Government and people of the United States in the observance of the anniversary. Whereas there are to be held at Philadelphia, Pennsylvania, and at other places during the year 1940 celebrations commemorating the two-hundredth anniversary of the founding of the University of Pennsylvania by Benjamin Franklin and the beginning of university education in the United States, and providing for the representation of the Government and people of the United States in the observance of the anniversary. Whereas there are to be held at Philadelphia, Pennsylvania, and at other places during the year 1940 celebrations commemorating the two-hundredth anniversary of the founding of the University of Pennsylvania by Benjamin Franklin and the beginning of university education in the United States, and providing for the representation of the Government and people of the United States in the observance of the anniversary. Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Government and people of the United States unite with the University of Pennsylvania in a fitting and appropriate observance of the two-hundredth anniversary of its founding, which marked the formal beginning of university education in the United States (Harvard, William and Mary, and Yale were founded before the University of Pennsylvania, but they were not universities until after the University of Pennsylvania became a university). JOINT RESOLUTION Authorizing the recognition of the two-hundredth anniversary of the founding of the University of Pennsylvania by Benjamin Franklin and the beginning of university education in the United States. Joint Resolution of June 20, 1940. (emphasis added)(emphasis retained.)
SINE MORIBUS VANAE,’ or in English, laws without morals are in vain. The Framers understood this, and it seems logical that they would not have created a simple form of government that mankind, with all its weaknesses, could get a handle on easily so as to manipulate it to his own ends. It seems plausible that they would have created a complexity of relationships that is difficult to grab hold of, and provided the restraints and tensions that exist among the Constitutional bodies of power by design. This aspect of built in restraints and tensions placed on powers granted would act to build confidence in the government, by the people, and the several States. An absence of confidence is dangerous to any government and subverts its authority, as stated by Justice STEVENS, dissenting for the Court, “What must underlie petitioners’ entire federal assault… is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. …the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

792 On Confidence: “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another,… But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. … To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 431 (1819). (emphasis added.) (CAPITALS retained.) These issues were predicted in 1787: “A free republic will never keep a standing army to execute its laws. It must depend on the support of its citizens. But when a government is to receive its support from the aid of the citizens, it must be so constructed as to have the confidence, respect, and affection of the people. …The body of the people being attached, the government will always be sufficient to support and execute its laws, and to operate upon the fears of any faction which may be opposed to it, not only to prevent an opposition to the execution of the laws themselves, but also to compel the most of them to aid the magistrate; but the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States, as necessary for these purposes.” THE ANTI-FEDERALIST NO. 17 (Robert Yates). (emphasis added.)

793 The importance of confidence is addressed in the dissent from Justice STEVENS. BUSH v. GORE, 531 U.S. 98 (2000).
The concept of a general lack of confidence in the American political and judicial system was well described in 1946 by Robert Penn Warren, from his character Willie Stark:

“I’m not a lawyer. I know some law. In fact, I know a lot of law. And I made me some money out of law. But I’m not a lawyer. That’s why I can see what the law is like. It’s like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain’t ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia. Hell, the law is like the pants you bought last year for a growing boy, but it is always this year and the seams popped and the shankbone’s to the breeze. The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different. Do you think half the things I’ve done were clear, distinct, and simple in the constitution of this state?”

“The Supreme Court has ruled −,” Hugh Miller began.

“Yeah, and they ruled because I put ‘em there to rule it, and they saw what had to be done. Half the things weren’t in the constitution but they are now, by God. And how did they get there? Simply because somebody did ‘em.”

Any lack of confidence held by the American people is certainly reinforced by a lack of consistency on the part of the judicial system, and specifically the lack of consistency by the United States Supreme Court with respect to its own jurisdiction and powers, and the powers of Congress. It would seem to contradict common sense to permit a broad interpretation of Congress’ Constitutional powers, when explicit powers and responsibilities vested in and granted to Congress, such as the Post Office, Customs, and Naturalization formerly had there own

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797 Cases where the Court has cited itself for substantive law, when in fact the Court held it did not have jurisdiction. BARRON v. BALTIMORE, 32 U.S. (7 Pet.) 243 (1833). DRED SCOTT v. SANDFORD, 60 U.S. (19 How.) 393 (1857).
799 U.S. CONST., art. I, § 8, cls. 1, 4, 7. An Act to establish an uniform Rule of Naturalization. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the
department and agencies, respectively, and have since been outsourced or absorbed by departments with superseding missions. The Constitution should be interpreted with the understanding that powers are granted to the national government, and yet the several States retain the status of sovereigns and at a minimum, the balance of the powers that are not granted to bodies within the Constitution, keeping in mind there are some concurrent powers to be exercised by both the national government and the several States.

The future implications of the conclusion of this paper may provide a new direction for research and discussion about Constitutional origins and “strict construction” based upon the meaning of the Constitution on September 17, 1787 and June 21, 1788. If one claims to know the true Constitutional meaning, one must look beyond jurisprudence of the supreme Court or other courts, (which nonetheless many courts seem to limit themselves to in spite of claiming to be strict constructionists), and determine the motives for placing the particular powers, United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: Provided also, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed. An Act to establish an uniform Rule of Naturalization. Act of March 26, 1790. 1 Stat. 103, sess. II, ch. 3. (1790).
coordinate approvals, and mechanisms of restraint within an overall framework designed to protect liberty and ensure perpetual peace.\textsuperscript{802}

If one does assume for a moment that in the near future, the several States are universally accepted as a body of power as provided for within the Constitution, then one may ask, what is the best course of action to return to a true Constitutional arrangement within the United States. This paper believes all of the mechanisms cannot be changed at once without excessive disruption of society within the United States and the several States. However, the one mechanism that will place responsibility with the States and that will permit a gradual transfer of functions and activities to their appropriate Constitutional loci, would be returning to a linked proportional allocation of representation and burden sharing (taxation), which of course was protected from being amended in the first place, and was the one element of the Constitution that occupied more time during the debates of the Federal Convention of 1787 than any other element of the Constitution.\textsuperscript{803} Adherence to the Constitution is the duty of every legislator, executive, and judicial officer at every echelon of government, and it is a breach by each one of them of their oaths\textsuperscript{804} to support the Constitution if each is not assisting and insisting upon a return to an arrangement that conforms with the Constitution. As it would reduce the power of each\textsuperscript{805}, it is

\textsuperscript{802} Articles of Confederation § III, IV, XIII (U.S. 1781). “As they continually counterpoised the state of peace with the state of war, and made a bid for the former against the perceived threat of the latter, it seems fair to denominate the federal Constitution as a peace pact, the most unusual specimen of this kind yet known to history.” David C. Hendrickson, Peace Pact: The Lost World of the American Founding 7 (2003).


\textsuperscript{804} An Act to regulate the Time and Manner of administering certain Oaths. Act of June 1, 1789, 1 Stat., ch. 1 (1789).

\textsuperscript{805} In 1819, Chief Justice MARSHALL explicitly identified the Constitution, the People, the States, the legislative, the executive and the judicial as bodies of power within the Constitution. [In the following, “Conventions” refers to conventions of the people, but conventions of the State legislatures are also provided for within the Constitution.] “A government is created by the people, having legislative, executive, and judicial powers.” … “From these Conventions the constitution derives its whole authority. The government proceeds directly from the people;…” … “The people of all the States have created the general government, … The people of all the States, and the States themselves, are represented in Congress,…” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403, 412,
likely they will resist\footnote{806}, and that only continuous demands and active voting by the people of the United States and of the several States will actually affect change, and when the people act, the change will eventually come.

As much recent concern has developed around the issue of the health of the fisc of the United States of America, it might well help resolve the problem if the powers of direct taxing and fundamental budgeting are placed primarily with the States, and not with the United States. This change would eliminate a significant conflict of interest within the United States, if there is permitted such a return to a structure that re-establishes a \textit{separation of powers} between the bodies that primarily tax and budget from the body that has the responsibility for printing paper currency, and hence, the power to devalue that currency by doing so when revenue is insufficient.\footnote{807}

The several States might be viewed as independent and sovereign States that have agreed to enter into a peaceful free trade area and a pact of limited and enumerated Powers\footnote{808}, that is the United States, and otherwise have retained their sovereignty, and such view is entirely not only compatible but re-enforced by the entire Constitution of the United States. And as there is strength in diversity, Americans should permit America to experience that strength, by

\footnotetext[806]{806}{\textquote{it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. … In so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them."\textbf{THE ANTI-FEDERALIST No. 17} (Robert Yates). (emphasis added.)}}

\footnotetext[807]{807}{U.S. CONST. art. I, § 8, cls. 5, 6.}

\footnotetext[808]{808}{\textquote{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 it enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted." McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 405 (1819). (emphasis added.)}}
recognizing the sovereignty and independence of each and every one of the several States within the Constitutional framework of bodies of power. 

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810 U.S. CONST. arts. I, II, III, IV, V, VI, VII.