

MINIMAL SOVEREIGNTY AND AMERICAN FEDERALISM

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ABSTRACT

The government established by the United States Constitution is often described as one of dual sovereignty. The Supreme Court has used that term to describe the system of federal and state shared governmental responsibility and has relied on it to decide cases affecting the limits of state and federal power. Hence, sovereignty affects the relationship of the state to the federal government and has proven to be a crucial determinant of the power of states to act independently of federal mandates. In discussing American federalism, the notion of dual sovereignty is critical. Traditionally, sovereignty has been understood to involve the sovereign's authority to exercise absolute power over matters within its jurisdiction. But, when the states ratified the Constitution of the United States, sovereignty was understood to reside in the people, who then assign the authority to act to government at the state and federal levels.

In the first part of this Article, I explain how the notion that sovereignty resides in the people is in tension with the understanding that the sovereign exercises absolute authority over the coercive power of government. I contend that this tension can best be resolved by reducing the understanding of sovereignty to a core notion of minimal sovereignty. The next part of the Article addresses the theoretical attraction of the recognition of minimal sovereignty as a means of resolving questions of United States constitutional law about the bounds on relations of the federal and state governments. The final parts of this Article consider how applying minimal sovereignty to the description of the American government as one of dual state and federal sovereignty bears on a select set of particular constitutional questions about the bounds of the powers of the federal and state governments and sovereign immunity.

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INTRODUCTION

The government established by the United States Constitution is often described as one of dual sovereignty.¹ The Supreme Court, for instance, has relied on that term to decide cases regarding the limits of state and federal power.² Hence, sovereignty affects the relationship of the state to the federal government and has proven to be a crucial determinant of the power of states to act independently of federal mandates. In discussing American federalism, the notion of dual sovereignty is critical.

Of course, one cannot understand the possible structures of government that comport with the Constitution’s notion of dual sovereignty without understanding what sovereignty entails. It turns out, however, that sovereignty as a concept has not retained a consistent meaning since it was first used in thirteenth century Europe. The meaning

1. See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1612-14 (2002); THE FEDERALIST NO. 39, at 187, 192-93 (James Madison) (Lawrence Goldman ed., 2008).

2. *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457-60 (1991); Printz v. United States, 521 U.S. 898, 918-22 (1997); Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 751-53 (2002); Murphy v. Nat’l Collegiate Athletic Ass’n, 584 U.S. 453, 470 (2018).

of the term has changed to describe and justify various forms of government over the centuries.³ Even today, its precise meaning is not universally agreed upon.⁴

In this paper, I discuss the development of the notion of sovereignty and then relate it to American federalism. I do so, however, not to discover some definite correct meaning of sovereignty. Rather, I do so to describe a core notion of sovereignty, or at least the embodiment of the sovereign into a legal entity that can exercise sovereign powers. I have labelled this notion “minimal sovereignty” to suggest that it describes the most basic attributes a government must exhibit for it to be considered sovereign. I then describe how, in light of changes in the nature of the world since the creation of the United States—the fact that the world is much more interconnected in real time—minimal sovereignty provides an explanation of the best understanding of the various constitutionally specified powers of the federal government, and how they may affect the powers of state government.

This Article begins by reviewing the development of the concept of sovereignty. In doing so, I pay special attention to the ways that the understanding of the term had to change to justify the American Revolution, as well as to how the ratification of the United States Constitution required a change in the understanding of sovereignty to allow the United States to exist as a sovereign nation. From this review, I argue that prevailing theories of sovereignty cannot justify a federal system that respects the role of states without unduly curtailing the power of the federal government. Therefore, I derive minimal requirements for a state to be sovereign that allow a beneficial role for states while not unduly curtailing federal power. The notion of “minimal sovereignty” requires only that a sovereign must be recognized as legitimately exercising the coercive powers of the state—the power to make law, and to enforce it by imposing penalties for its violation—within some jurisdiction without depending on the delegation of those powers from a superior entity.

The next part of this Article addresses the theoretical attraction of the recognition of minimal sovereignty as a means of resolving questions of United States constitutional law about the relationship between the federal and state governments. I use the term “theoretical” loosely to mean considerations that include but go beyond the arguments about whether the use of minimal sovereignty leads to good

3. DIETER GRIMM, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL LEGAL CONCEPT* 3-5 (Belinda Cooper trans., 2015); F.H. HINSLEY, *SOVEREIGNTY* 76-78 (Cambridge Univ. Press 2d ed. 1986); DANIEL LEE, *THE RIGHT OF SOVEREIGNTY: JEAN BODIN ON THE SOVEREIGN STATE AND THE LAW OF NATIONS* 2 (Oxford Univ. Press 1st ed. 2021).

4. See, e.g., LEE, *supra* note 3, at 3 (“[D]espite its currency even in contemporary politics, sovereignty has become now possibly the most misunderstood and abused concept of modern political thought.”); Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 230 n.3 (2005) (citing various academic works attempting to define and apply the concept of sovereignty, though admitting the “concept remains somewhat elusive”).

policy regarding the use of particular powers. More specifically, I consider how the use of minimal sovereignty generally to resolve such constitutional law questions would empower voters to have a meaningful choice regarding the coordination of state and federal governments in our constitutional system and comports to a great extent with how voters today consider voting for candidates that support an active federal government versus those that oppose big government.

The third part of this Article considers how applying minimal sovereignty to the description of the American government bears on a select set of particular constitutional questions about the bounds of the powers of the federal and state governments. It also addresses the extent to which the notion of minimal sovereignty grants a state authority to exercise its powers of sovereignty on matters within the enumerated powers of the federal government. Part four of the Article addresses how minimal sovereignty bears on state sovereign immunity from suit in federal court and, conversely, immunity of the federal government from suit in state court. In considering how the notion of minimal sovereignty can help define the bounds of various state and federal exercises of power, I also suggest why the boundaries dictated by minimal sovereignty in each context are better than those justified by the courts' current understanding of sovereignty.

I. HISTORICAL DEVELOPMENTS OF SOVEREIGNTY

A. *The Development of the Concept of Sovereignty*

The term "sovereignty," as linked to political rule, can be traced back to the thirteenth century, where it was used to describe the powers of various landowners in European feudal systems.⁵ Any lord in those systems was seen as having ultimate power over the implementation of law and the dispensing of justice within his estate.⁶ The term reflected that the sovereign wielded power to make decisions that could not be overridden even by lords who were hierarchically superior to him.⁷ Sovereignty thus reflected some understanding of the various powers of the lords that had to be respected even by superior lords. For

5. See KATHLEEN DAVIS, PERIODIZATION AND SOVEREIGNTY: HOW IDEAS OF FEUDALISM AND SECULARIZATION GOVERN THE POLITICS OF TIME 38-42 (Ruth Mazo Karras & Edward Peters eds., 2008).

6. "It is evident in theory that a baron, being a sovereign, could not be subjected to any will but his own, and that therefore such common arrangements as had to be made in medieval society had to be effected on the same lines as modern international conventions." Paul Vinogradoff, *Feudalism*, in 3 THE CAMBRIDGE MEDIEVAL HISTORY 458, 470-71 (Cambridge Univ. Press reprint, 1936).

7. For example, in the thirteenth century, jurist Azo noted the growing recognition of sovereignty of territorial kings and rulers in Europe over that of even the Emperor's power. See KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 35 (Univ. of Cal. Press 1993); Walter Ullmann, *Arthur's Homage to King John*, 94 ENG. HIST. REV. 356, 361-63 (1979).

example, barons were considered sovereign even though they were responsible to the monarch to provide men to help defend the kingdom and tithes to support it.⁸ The king may have had more sovereign powers in that he dispensed justice among the lesser lords in accord with the natural law understanding of the obligation of those lords to the king.⁹ But, with respect to the internal operation of a lord's estate, the lord was sovereign.¹⁰

One crucial aspect of the medieval notion of sovereignty was its connection to the executive power of government. No lord or king was understood to create law.¹¹ Rather, the law was seen as dictated by natural and religious sources.¹² The sovereign was merely the person who had the ultimate power to dispense justice and carry out predetermined law within his estate.¹³

The Reformation and the philosophical questioning of natural law and the Catholic canon in the sixteenth century portended uncertainty about law and, therefore, great threats of physical insecurity and social unrest from differing understandings of the law.¹⁴ The reaction to this disturbance of the social order was the development of the idea that monarchs were responsible to make law within the entire domains of their kingdoms.¹⁵

In the mid-sixteenth century, Jean Bodin wrote several instrumental works that altered the notion of sovereignty to validate this role for

8. "[E]ach baron is sovereign in his barony." PHILIPPE DE BEAUMANOIR, *THE COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR* 368 §1043, (Edward Peters ed., F.R.P. Akehurst trans., 1992); *see also* CLIFFORD R. BACKMAN, *THE WORLDS OF MEDIEVAL EUROPE*, 220-24 (Oxford Univ. Press 2003).

9. For example, in monarchies in the Middle Ages, it was generally understood that the king could enforce laws but could not "legally overstep the customary limits of his office," and if he had done so, the "community's ancient right to resist an illegal king" would allow the king's subjects to force him to abide by customary law. HINSLEY, *supra* note 3, at 93; *see also id.* at 97.

10. This concept was expressed notably by legal understandings in the Touraine-Anjou region during medieval times: "The baron has all manner of justice in his territory, and the king cannot proclaim his command in the land of the baron without the latter's consent . . ." Vinogradoff, *supra* note 6, at 471 (quoting *Coutume de Touraine-Anjou* at 17 (received in the *Etablissement de St Louis*, I, p. 26)); *see also* Helmut Walser Smith, *The Long Shadow of Jean Bodin*, 55 *CENT. EURO. HIST.* 109, 110 (2022).

11. "Functionally, sovereignty did not include the right to autonomous lawmaking. The social order was established by God-given or natural law, but, in any case, not by man-made law." GRIMM, *supra* note 3, at 17; *see also* HINSLEY, *supra* note 3, at 67-68.

12. *See* Gordon Hall Gerould, *Medieval Conceptions of Natural Law*, in 2 *NATURAL LAW INSTITUTE PROCEEDINGS* 73, 74 (Alfred L. Scanlan ed., 1949); JOHN OF SALISBURY, *POLICRATICUS* 191 (Cary J. Nederman ed. & trans., 2007).

13. *See* GRIMM, *supra* note 3, at 17.

14. *See* HAROLD J. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS* 15-17 (1921); Joseph Lortz, *Why Did the Reformation Happen?*, in *THE REFORMATION: MATERIAL OR SPIRITUAL* 56, 58-60 (Lewis W. Spitz, ed., 1962); *see generally* HAROLD J. GRIMM, *THE REFORMATION* (Am. Hist. Ass'n 1972) (discussing the widespread political and religious fragmentation and unrest across Europe that led to the Reformation).

15. *See* GRIMM, *supra* note 3, at 24-25.

the monarch.¹⁶ Essentially, the king was seen as the one ultimate decisionmaker both with absolute power to make the laws within the kingdom and to execute those laws.¹⁷ Of course, the king could, and by necessity would, delegate to others the execution of the law at a local level.¹⁸ But those responsible for execution of the law were no longer themselves considered sovereign because their decisions could be countermanded by the king, and in fact, their very positions of responsibility to execute the law were seen as a delegation from the ultimate power—the monarch.¹⁹ With the ultimate authority to make law and execute it now understood to be the province of the king, the term sovereignty provided a justification for the nation state.²⁰

Although the Reformation led to Bodin's reformulation of sovereignty that justified the monarchal nation state, it also spawned secular political philosophy, which in time demanded further evolution of the notion of sovereignty.²¹ The earliest such philosophy, such as that of Thomas Hobbes, postulated that the monarchal nation state created social stability and personal security that more than compensated for the deprivation of liberty under sovereign rule compared to the state of nature.²² But later philosophers like Jean Jacques Rousseau questioned the legitimacy of monarchal power over the "people."²³ For Rousseau, the people represented an abstract entity whose acquiescence, if not consent, was necessary to legitimate government exercise of

16. Bodin authored the "Six Books of the Commonwealth": "The Final End of the Well-ordered Commonwealth," "Of the Different Kinds of Commonwealth," "The Council," "The Rise and Fall of Commonwealths," "The Order to be Observed in Adapting the Form of the Commonwealth to Diverse Conditions of Men and the Means of Determining Their Dispositions," and "The Census and the Censorship," discussing various foundations of sovereignty and political science. See JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley trans., 2009).

17. "[T]he distinguishing mark of the sovereign [is] that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law." *Id.* at 28; see also *id.* at 35.

18. See *e.g.*, *id.* at 27 (giving examples of how the sovereign power could be delegated or "gifted" to another actor without the sovereign releasing his innate sovereign authority).

19. "[The sovereign] can give absolute power to a person or group of persons for a period of time However much [authority] he gives there always remains a reserve of right in his own person, whereby he may command, or intervene by way of prevention, confirmation, evocation, or any other way he thinks fit, in all matters delegated to a subject, whether in virtue of an office or a commission. Any authority exercised in virtue of an office or a commission can be revoked, or made tenable for as long or short a period as the sovereign wills." *Id.* at 25.

20. Bodin himself used the term "state" in his Six Books of the Commonwealth to describe various forms of commonwealths, such as in describing a popular state or an aristocratic state. *Id.* at 69, 72-73; see also 2 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 351-54 (Cambridge Univ. Press 1978).

21. See, *e.g.*, SKINNER, *supra* note 20, at 354-58.

22. THOMAS HOBBS, LEVIATHAN 87, 89-96 (J.M. Dent & Sons LTD 1914).

23. LASKI, *supra* note 14, at 23-26.

coercive powers of the state.²⁴ Given that sovereignty referred to the entity in which the ultimate power to govern resided, Rousseau's philosophy therefore placed sovereignty in the people.²⁵

The recognition that sovereignty lies in the people directly influenced the American colonists' issuance of the Declaration of Independence from Britain. The colonists objected to being taxed by Parliament, because they did not have any democratic representation in that body.²⁶ This flew in the face of the English understanding that Parliament, as the sovereign in which England claimed the colonists were virtually represented, had absolute and ultimate power over the colonists.²⁷ In declaring independence from England in response to this assertion, the colonists relied on sovereignty residing in the people and the fact that they had not consented to be governed by Parliament to legitimate their declaration of independence from Britain.²⁸

Recognition that sovereignty resides in the people, however, forced more changes in the conception of sovereignty beyond theoretical transfer of the ultimate power to the people.²⁹ Prior to this recognition, sovereignty had always been vested in individuals.³⁰ That left no question about how sovereign powers were to be exercised: the sovereign simply issues an order and his assistants, who as subjects of the

24. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 56-58 (Christopher Betts trans., 1999). Rousseau is credited with creating the modern formulation of democracy as "popular sovereignty."

25. Under Rousseau's concept of sovereignty, the people did not merely enthrone the sovereign, but were themselves sovereign. See GRIMM, *supra* note 3, at 31.

26. See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 *YALE L.J.* 1652, 1669 (2021); RANDOLPH G. ADAMS, *POLITICAL IDEAS OF THE AMERICAN REVOLUTION* 69 (Trinity Coll. Press 1922); see also Edmund S. Morgan, *Colonial Ideas of Parliamentary Power 1764-1766*, 5 *WM. & MARY Q.* 311, 320-23 (1948).

27. "The compromises [on taxation] proposed by the colonists . . . seemed to the English to lead to a division of sovereignty that would contradict the concept itself. The taxation debate thus turned into a question of preserving sovereignty that allowed for no compromise." GRIMM, *supra* note 3, at 34-35; see also David Ammerman, *The British Constitution and the American Revolution: A Failure of Precedent*, 17 *WM. & MARY L. REV.* 473, 473 n.2 (1976).

28. The Declaration of Independence specifically relies on popular sovereignty when it states that governments derive "their just powers from the consent of the governed." *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

29. The idea of "popular sovereignty," meaning recognition that the interests of the people influence the legitimacy of government, dates back to before the work of Bodin. See DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* 25-50 (Oxford Univ. Press 2016). But these early concepts of "popular sovereignty" did not posit that the people were themselves *the sovereign*, exercising directly the "constituent power that brings government into being and defines its fundamental purposes, authorities, and limitations." Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 *HASTINGS L.J.* 371, 399 (2022).

30. In *Leviathan*, Thomas Hobbes foresaw sovereignty as a "great Authority being Indivisible" and existing in one individual, though sovereignty was seen as implicitly given to the sovereign by the people's assent. HOBBS, *supra* note 22, at 95. Similarly, Bodin's concept of sovereignty envisions sovereign authority as existing in one individual; though authority was able to be delegated, the delegation does not result in a division of the sovereign authority itself. See BODIN, *supra* note 16, at 25.

monarch are beholden to his absolute power, carry out his order. Once the “people,” as an abstract notion, were recognized as sovereign, there was no clearly accepted way for the sovereign entity to exercise its power.³¹

The conundrum of how to carry out sovereign power once it no longer resided in a single individual, was actually raised by the British system of government, at least as far back as the Glorious Revolution of 1688.³² By that time, the powers of the monarch were clearly shared with the House of Commons, which was recognized as having the power to legislate, and the House of Lords, which acted as the supreme judicial body.³³ The prevailing view that the sovereign had to have supreme power was challenged by the notion that the King shared his power with the Peers and the Commons.³⁴ The English elided resolution of that conundrum by positing that Parliament was sovereign, but Parliament represented the three estates of England—the House of Commons, the Peers or House of Lords, and the King.³⁵ The question of how this institution of “mixed government” was to exercise sovereign power was answered by an understanding of how each of these three parts of Parliament interacted with each other to govern.³⁶ Significantly, by recognizing Parliament—a governing body—as sovereign, the sovereign in theory remained capable of exercising the coercive powers of government. Moreover, although the Crown did not enjoy absolute power, the understanding that sovereignty required some entity to exercise such power did not fundamentally change in response to the British system of “mixed government.”³⁷

When the American colonies defeated the British in the Revolutionary War, however, the question of how the people could exercise absolute and sovereign power reared its head. The American answer was

31. Those who “crown ‘the people’ ” as sovereign, “hand-waiv[e] away the possibility that there may not be any assortment of institutions and norms that would enable the multitude to govern as if it were a single person.” Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1, 8 (2023); see also Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2653 (2014) (describing popular sovereignty as a “constitutive fiction”).

32. See 2 CHRIS BRYANT, *PARLIAMENT: THE BIOGRAPHY* 266-69 (Doubleday 2014).

33. “In the Glorious Revolution of 1688, . . . Parliament was able . . . to expand its political rights. England became a ‘mixed government,’ consisting of the king, the House of Lords, and the House of Commons.” GRIMM, *supra* note 3, at 25.

34. As a mixed government, Parliament “could not be considered sovereign, according to Bodin’s concept of sovereignty.” GRIMM, *supra* note 3, at 25.

35. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 346-47 (Univ. of N.C. Press 1998); see also HINSLEY, *supra* note 3, at 117-19.

36. This still left questions about how of the power of the Crown related to the power of Parliament’s representative bodies to enable it to effectively govern the realm. WOOD, *supra* note 35, at 33.

37. Mixed government refers to government in which the exercise of sovereign power is divided. See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 220 n.214 (2001).

that the people, as sovereign assigned the various sovereign powers to institutions that could directly exercise them via a constitution.³⁸ The institutions of government—the new state legislatures, governors, and courts—were not themselves sovereign because they held their power at the behest of the people, as reflected in constitutions that the people of each state adopted.³⁹ In advocating the ratification of the United States Constitution, the Federalists expressed the view that sovereignty resided with the people, who were responsible for ratifying the Constitution, which in turn specified how the sovereign powers were to be exercised by the various branches of the government or left to state governments.⁴⁰ The sovereign nation was thus something different from the federal government or state governments. It was the nation of the United States understood as a system in which the sovereign people had determined the internal workings and powers of both levels of government, as well as how governmental powers were to be exercised at each level.⁴¹

The use of a constitution to allocate power to various institutions of government, subject to specified limits, represented a major change in the notion of sovereignty. Under the constitutional system, the entity that holds sovereign power—the people—is not capable of exercising that power directly. Rather, the exercise of the sovereign powers is delegated to various institutions, which legitimately exercise them only when they act consistently with specifications in the Constitution.⁴² Thus, the initial essence of sovereignty—that the sovereign is the entity that exercises absolute and ultimate power to execute the law—was turned on its head. The sovereign people cannot exercise power themselves, but nonetheless hold ultimate power to specify the mechanisms by which, and the limits on the extent to which, the institutions that are to exercise the power may do so.⁴³

38. “Defining ‘the people’ became one of the central issues in the development of the American experience, but soon after declaring independence, American revolutionaries came to agree that popular sovereignty underlay America’s republican governments. . . . [T]he problem of how to locate popular sovereignty was solved relatively quickly by the institutional device of the constitutional convention.” Christian G. Fritz, *Constitutional Conventions*, in 1 *ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM* 37 (Joel H. Sibley ed., 1994); see also GRIMM, *supra* note 3, at 37.

39. See GRIMM, *supra* note 3, at 38. Moreover, the Constitutions of all of the thirteen original states “emphasized popular sovereignty as the foundation of government.” Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *MICH. L. REV.* 859, 882 (2021).

40. See THE FEDERALIST NO. 49, at 250 (James Madison) (Lawrence Goldman ed., 2008). Interestingly, Madison described the Constitution’s structure of governmental authority as “power surrendered by the people.” THE FEDERALIST NO. 51, at 258 (James Madison) (Lawrence Goldman ed. 2008).

41. See GRIMM, *supra* note 3, at 38.

42. See GRIMM, *supra* note 3, at 70-71.

43. Steve Gey, recognizing the theoretical conundrum that the sovereign people have no means directly to exercise their sovereignty, labelled the powers assigned by the United

From a theoretical perspective, constitutional specification of how sovereign powers are to be exercised does not alleviate tensions that arise from the inability of the people directly to exercise those powers. Recall that sovereignty is supposed to reside in the entity with absolute and ultimate governmental power that is not derived by delegation from some superior governmental entity.⁴⁴ The existence of such a superior entity implies the power of that entity to review and overrule an exercise of governmental power. But review and reversal by the constitutionally specified process of amendment is not the action of the people as an abstract entity. Rather, it is exercise of delegated authority by some subset of the people acting in a manner specified by the constitution that authorizes the overruling of the decisions of the normal institutions of government.⁴⁵ As such, the amendment process is a delegation of authority from the “people,” understood as the abstract entity with ultimate governmental authority, to some other entities that must act using the prescribed amendment procedures.⁴⁶

Thus, to say that sovereignty resides in the people implies that the people can override the constitutional itself. Under traditional conceptions of sovereignty, enactment of a constitutional amendment to override a particular law enacted by constitutional processes is not an exercise of ultimate sovereign authority, but rather an exercise of delegated authority. Hence, the ultimate power of the people as sovereign must derive from an ability to displace government by extra-constitutional means. For example, exercise of truly sovereign power would occur if, in response to a failure to ratify a proposed constitutional amendment, a sufficient groundswell of support for the amendment successfully forced the courts to consider the Constitution amended (or simply replaced the judges with ones that would implement this “order” from the people). To deal with this seeming contradiction between constitutional specification of exercise of sovereign powers and the true sovereignty of the people, sovereignty theorists constructed the

States Constitution to the federal and state governments as “immediate sovereignty” to distinguish it from the ultimate sovereignty of the people. Gey, *supra* note 1, at 1626-28.

44. Monarchs were thought to derive their sovereignty by divine right—that is from God. Although in theory this meant that monarchs were assigned their powers by another entity, that entity did not enjoy any substantiation that allowed it to control the monarch’s exercise of sovereign power. “Kingly Power is by the Law of God, so it hath no inferiour Law to limit it.” ROBERT FILMER, *PATRIARCHA: OR THE NATURAL POWER OF KINGS* 78 (London 1680).

45. To be truly an act of the sovereign people, the exercise must be external to the constitution. GRIMM, *supra* note 3, at 69-73.

46. Amending the United States Constitution requires either a proposal adopted by two thirds of both houses of Congress and ratified by the legislatures of three fourths of the states or proposed by a constitutional convention called by Congress upon application of two thirds of legislatures of the states and ratified either by three fourth of the legislatures of the states or by three fourths of the members of the convention. U.S. CONST., art. V. All of these actions are taken by representatives of the people, not by the people themselves. Thus, an amendment preferred by a majority (or even a significant supermajority) of the people may be defeated.

notion of “latent sovereignty.” The people enjoy latent sovereignty to the extent that they have the authority and the actual power or ability to overrule actions taken by the constitutionally specified branches of government without following the amendment procedures in the constitution.⁴⁷

This attribute of latent sovereignty, however, illustrates that any exercise of government power is justified by sovereignty if it takes effect. But then latency robs the conception of sovereignty of any practical import. If the notion of sovereignty is to survive and have any influence over what exercises of power are considered legitimate, for example, if courts are to rely on sovereignty to determine the legitimacy of government action, then I contend that the term is best limited to the fundamental notion of legitimate authority to exercise governmental power.⁴⁸ I label that notion “minimal sovereignty.”

B. *The Concept of Minimal Sovereignty*

A minimal sovereign is one whom the relevant political community accepts as having the power *to exercise the coercive powers* of government without being delegated that power by another entity.⁴⁹ Sovereignty can exist within two communities: the internal community comprised of those subject to the jurisdiction of the sovereign, and the external community of other nation-states that interact with the sovereign via international agreements such as treaties.⁵⁰ Thus, a

47. That sovereignty is latent in a constitutional state “has made the sovereign invisible.” GRIMM, *supra* note 3, at 71.

48. Essentially, I argue that judicial invocation of the notion of sovereignty that extends beyond minimal sovereignty is based on an inherently incoherent concept, and hence reflects simple unsupported assertions by the courts of the powers of the various institutions of government vis-à-vis competing institutions. Cf. Sanford Levinson, *The Confusing Language of McCulloch v. Maryland: Did Marshall Really Know What He Was Doing (or Meant)?*, 72 ARK. L. REV. 7, 8-9 (2019) (questioning whether judicial invocation of sovereignty is helpful); David S. Schwartz, *McCulloch v. Maryland and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL’Y 25, 61 (2021) (opining that although “Levinson may be right that ‘sovereignty talk’ in constitutional law is too confused to be helpful. Nevertheless, the term is banded about too frequently to avoid some effort to make sense of it”).

49. According to Hans Kelsen, a state comes into being “if an independent government has established itself by issuing a coercive order for a certain territory and if the government is effective, i.e., if the government is able to obtain permanent obedience to its order on the part of the individuals living in its territory.” HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 219 (Anders Wedberg trans., 1945).

50. Acceptance by the internal and external relevant communities relates to traditional notions of internal and external sovereignty. Internal sovereignty describes the powers of a government to exercise the coercive powers of the state within its domestic jurisdiction. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1862 (2009). A government has such power so long as its citizens acquiesce in the coercive action. External sovereignty describes “the power of a State to determine its responsibilities, ‘means, and structures independently from any foreign State or organization, subject only to international law.’” Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT’L L.J. 301, 313 n.66 (1995) (quoting Luzius Wildhaber, *Sovereignty and International Law*, in *THE STRUCTURE AND PROCESS OF*

government is sovereign with respect to the community of those subject to its power to the extent that it does not overstep the bounds that will result in its displacement by those subjects. Essentially, by declining to displace the government, the people accept the government's authority to exercise coercive powers over them. And it is sovereign externally to the extent that other nations acquiesce in its exercise of coercive powers over its people. That is, sovereign powers of a nation are limited by the constraint that it does not invoke sufficient wrath of other nations to incite those nations to conquer it. That minimal sovereignty depends on acquiescence by these relevant communities implies that minimal sovereignty is contingent and based ultimately on the pragmatics of what is an acceptable exercise of coercive powers by the government of a nation. Given that minimal sovereignty is not absolute, it also may be limited to the extent that contravention of accepted limits will result in action to displace the government, whether by election, alteration of judges on the court that accepted the contravention, constitutional amendment, or ultimately, if necessary, revolution.

Minimal sovereignty retains the core essence of the sovereign as having ultimate authority to wield the power of the state.⁵¹ Because the sovereign power derives from recognition by the relevant community, the exercise of that government power is not subject to review and reversal. Thus, no other entity can dictate how the sovereign is to exercise such power. Minimal sovereignty, however, need not be absolute because it allows multiple sovereigns to reign over the same geographical and subject-based jurisdictions and allows for limitations on the bounds of exercises of sovereign power. Two sovereigns can exercise such power over the same individuals, in the same territory, and about the same substantive matters. Obviously, for such a system to be workable there must be an understanding about which of the two sovereign's actions prevail in case they conflict. This understanding may be based on some principle accepted by those subject to the dual sovereigns, such as the supremacy clause provided in the United States Constitution. Moreover, to hold the minimal sovereign to accepted limits on exercise of its powers requires an accepted arbiter of whether such limits have been transcended. The acceptance of that arbiter, however, does not negate the sovereignty of the entity whose actions must give way because that "lesser" sovereign, if you will, still has the power to make and enforce laws. That power is not overruled; rather, its effect is negated if and only if the superior sovereign

INTERNATIONAL LAW 436-37 (R. St. J. Macdonald & Douglas Johnston eds., 1983)). A government has such power so long as other states cannot force it to do otherwise.

51. Despite varying conceptions of sovereignty which have evolved to render the concept useful in describing government at various times in history, "[w]hat was always unique to [the concept] . . . was its quality as highest and ultimate authority . . . to make decisions and give orders that are binding on others." GRIMM, *supra* note 3, at 103-04.

exercises its coercive powers over the same individuals on the same matter in a way that is contrary to the action of the lesser sovereign.

I would note that minimal sovereignty for a constitutional system is fundamentally non-originalist.⁵² Constitutional provisions retain significance only to the extent that a particular understanding of those provisions is accepted by the relevant political community. For purposes of analyzing United States federalism, that political community is the internal political community of the nation—that is, the citizens of the United States. Consensus of that community is signaled by acquiescence in the outcomes resulting from relevant decisions by the institutions constitutionally authorized to exercise the sovereign powers. The Constitution is relevant to the extent the people feel a commitment to follow its delegation of such powers, but to the extent the people support changes in the understanding of such delegation, those changes must be incorporated into the system of government if the people are to be truly sovereign.⁵³ For example, from 1936 until 2018, it was safe to assert that the Constitution authorized Congress to grant broad rulemaking authority to executive branch agencies as long as the statute authorizing such rulemaking limits the subject matter over which the agency can regulate and provides at least minimal guidance about how the agency is to exercise that rulemaking authority.⁵⁴ But recently that understanding was rejected by at least three justices of the current Supreme Court, and another justice indicated

52. Minimal sovereignty can be consistent with originalist approaches to constitutional interpretation if the relevant community—the citizens of the nation—believe that originalism is the legitimate method of reading the Constitution at least to the extent that they do not revolt or otherwise successfully demand appointment of judges who use non-originalist approaches to interpretation. But the acquiescence of the political community in originalism would be required to make it legitimate.

53. In this sense, minimal sovereignty is consistent with the views of scholars who contend that the Constitution can legitimately be amended by means other than the formal amendment process set out in Article V. See, e.g., David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2320 (2021); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462-94 (1994). Minimal sovereignty does not render the Constitution's text nor the Supreme Court interpretation of that text irrelevant because most times in American history, the citizenry has accepted Supreme Court holdings regarding the meaning of the Constitution. But minimal sovereignty would deem changes in the understanding of the Constitution derived from a popular movement legitimate, which may occur when the Court's understanding of the Constitution so frustrates popular will that the people engage in constitutional rather than ordinary politics. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-33 (Harv. Univ. Press 1991); but cf. generally MICHAEL KLARMAN, *THE FRAMERS COUP* (Oxford Univ. Press 2016) (suggesting that the drafting and ratification of the Constitution reflected ordinary interest group politics rather than some extraordinary deliberation by the people of the United States).

54. The Supreme Court has held only two statutes to be violations of the non-delegation doctrine, and both holdings occurred in reaction to Franklin Delano Roosevelt's New Deal. Prior to 2018, even Justice Scalia, among the most formalist of modern jurists, held that the courts could not appropriately police the bounds of even extremely broad statutory delegations of rulemaking authority to administrative agencies. See Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL. (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/> [https://perma.cc/GEP2-8XGL].

that he would support reconsidering the approach if it was explicitly raised in the case.⁵⁵ Whether it survives depends on the reaction of the various institutions of government: who future Presidents nominate and the Senate confirm to the Court; whether Congress and state legislatures will try to amend the Constitution.⁵⁶ In short, minimal sovereignty permits greater uncertainty about the legitimacy of particular government action, because the public reaction to any government action may take years to mobilize and generate a stable response.

One might object that to the extent that sovereignty is contingent on acquiescence by relevant communities, it is an unnecessary concept. One could directly argue about what actions would be best for the nation under a particular set of circumstances and contend that that is how the government should act. But, in a world with transaction costs and imperfect information, in which the people in the abstract sense cannot operate directly, the conceptualization of sovereignty matters because those who have been granted the authority to exercise governmental power rely on that concept when they act as government officials. Legislatures have relied on sovereignty in deciding what laws to pass and what to leave to a different level of government.⁵⁷ Courts have relied on sovereignty to resolve fundamental disputes about the constitutional powers of both federal and state governments.⁵⁸ Thus, as I will discuss in Part III of this article, there are important doctrines of constitutional law that depend on judges' understanding of sovereignty. Perhaps even more fundamentally, the kind of governance to which relevant communities will acquiesce are influenced by the understandings of who is sovereign and what power sovereignty bestows on them.⁵⁹

In addition to practical significance, later in this Article, I argue that there is normative value to adopting a minimal notion of

55. Justice Gorsuch's dissent in *Gundy v. United States*, explicitly called for reinvigoration of the non-delegation doctrine. 588 U.S. 128, 155-57 (2019). That dissent was joined by Chief Justice Roberts and Justice Thomas. *See id.* at 149. Justice Alito concurred in the judgment but wrote that were a majority of the Court willing to reconsider the approach the Court had taken toward that doctrine for the past 84 years, he would support doing so. *Id.*

56. It appears unlikely that the long-standing approach to the nondelegation issue will survive. Justices Kavanaugh and Barrett, who joined the Court after *Gundy* was decided, have indicated an interest in strengthening limitations on Congress's ability to delegate legislative type functions to the executive branch. *See Joseph Postell & Randolph J. May, The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 264-65 (2022).

57. "[Congress] sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and federal officials in administering an act" Conn. Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 530 (1945).

58. *See Gey, supra* note 1, at 1603.

59. For example, President George W. Bush stated that although he opposed use of medical marijuana, he believed that states should have the authority to regulate such use. Susan Feeney, *Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control*, DALLAS MORNING NEWS, Oct. 20, 1999, at 6A (quoting President George W. Bush).

sovereignty because it fosters political competition between the federal and state governments to regulate many matters.⁶⁰ A minimal notion of sovereignty may give voters a more meaningful choice of the level of government regulation they might prefer by providing two institutions of government who may compete for people's affections with regard to outlooks toward regulation. Minimal sovereignty, compared to abandonment of the principle entirely, provides for a more robust debate about trade-offs between satisfying a diversity of values between various states' citizens, and the instrumental benefits that come from coordination of activities throughout the nation, without hamstringing the federal government's ability to provide such central coordination.⁶¹

One might also object that minimal sovereignty is conceptually inconsistent because there must be some referee to decide what the law is in particular cases of disagreement between the levels of government or even among the institutions within each level. For example, in the United States, certainly the federal Supreme Court will have an important role in deciding such matters.⁶² One might therefore conclude that state government is not even minimally sovereign because it is subject to review by the Supreme Court. Ultimately, however, the Supreme Court is not the final decision maker. In fact, there is no institution of government at either level that decides this issue. Rather, in a dispute about the powers of state and federal legislatures, which level of government "reigns" depends on public acceptance of the outcome of that dispute—an acceptance that itself will be framed by the actions of the various institutions of government at each level. The acquiescence of the people essentially will depend on the polity's acceptance of the legitimacy of those various actions, which in turn may depend on the text and structure of the Constitution as well as norms about the appropriate roles of the institutions of government.

For example, in the United States, federal courts are the arbiters of whether a provision of federal law that would preempt state law falls within Congress's power, and the Supreme Court would be the ultimate source of law on this question.⁶³ The Court might decide the

60. See *infra* Part II.

61. Cf. Joseph Raz, *The Future of State Sovereignty* (King's Coll. London Dickson Poon Sch. of Law Legal Studies Research Paper No. 2017-42), <https://ssrn.com/abstract=3073749> [<https://perma.cc/53T6-LJP5>] (arguing that supranational institutions of government (e.g. federal governments) are unlikely to protect diversity of states' values, and that maintaining state sovereignty might be the best means of protecting such values within supranational organizations).

62. In fact, the Supreme Court has developed a detailed preemption jurisprudence to address such issues, although that jurisprudence does not seem to have rendered preemption decisions very predictable or coherent. See Richard A. Epstein & Michael S. Greve, *Introduction*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 1, 1-3 (Richard A. Epstein & Michael S. Greve eds., 2007).

63. The issue might remain unresolved at the national level for some time if the Supreme Court does not grant certiorari on the issue and the federal courts of appeals do not all agree on its resolution.

question based on its understanding of the Constitution, which invariably will take into account evolution of the judicial acceptability of the bounds of Congress's power. But a Supreme Court decision does not necessarily ultimately resolve the matter. If the Court's decision is controversial, those supporting the opposite outcome might seek to change the resolution dictated by the Court. And there are various ways to do so. They can seek to have Congress provide an explicit preemption or savings clause in the federal legislation, re-raise the issue in subsequent cases and hope to get the Court to change its mind, or in a particular case perhaps even get a jury to refuse to follow the law set out by the Supreme Court. They can try to use the political process to change the make-up of the Court to be receptive to their view. They can try to get the political institutions to amend the Constitution. And ultimately, they are free to revolt against the government if it insists on enforcing the holding of the Court, and the matter is of sufficient import to enough people. In some sense, in the history of the United States, all of these means of refusing to acquiesce and hence in asserting sovereignty have at least been threatened, and many have been attempted.⁶⁴ Hence, the referee of the system is not one institution like the Supreme Court but will reflect the action of various institutions of state and federal government with respect to the controversy. And, in taking such actions, accepted understanding of the constitutional legitimacy of the exercise of sovereign powers by the various institutions of government will matter in determining the outcomes in which the people ultimately will acquiesce.

64. See, e.g., *Statement by Frank E. Gannett, of Gannett Newspapers Regarding President Franklin D. Roosevelt's Attempt to Pack the Supreme Court*, NAT'L ARCHIVES (Feb. 23, 1937), <https://www.docsteach.org/documents/document/statement-by-frank-gannett> [<https://perma.cc/2GWV-PUZZ>] (addressing President Roosevelt's court packing plan in response to Supreme Court rulings against his agenda); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overturning prior Supreme Court cases regarding abortion and precedent regarding a constitutionally recognized right to privacy); Naomi Gilens, *It's Perfectly Constitutional to Talk about Jury Nullification*, ACLU: NEWS AND COMMENT. (Jan. 22, 2019), <https://www.aclu.org/news/free-speech/its-perfectly-constitutional-talk-about-jury-nullification> [<https://perma.cc/UX38-XNZH>] (discussing activists efforts to educate jurors about their ability to disregard an unjust law and the rationale and history behind jury nullification); *United States v. Payne*, No. 2:16-CR-00046-GMN-PAL, 2016 WL 7380744, at *2-3 (D. Nev. Dec. 20, 2016) (describing events regarding Cliven Bundy grazing his cattle on federal land without a permit, violating various district court orders enjoining him from doing so, and threatening to "do battle" with the government to protect his property as well as events involving Bundy's sons occupying federal land in the Malheur Wildlife Refuge of Oregon to protest Bundy's followers' convictions); see also *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

II. THE CASE FOR MINIMAL SOVEREIGNTY AS THE BASIS FOR AMERICAN FEDERALISM

A. Avoiding Judicial Arbitrariness in Determining the Divide between Federal and State Powers

As I have previously mentioned, the United States Constitution reflected a concept that separated ultimate authority to govern from the actual exercise of coercive powers of government.⁶⁵ This modification comported with the understanding that the sovereignty of the United States ultimately resided in the people and that the Constitution reflected an authorization by the people of the federal government's use of sovereign power.⁶⁶ For the most radical of the Federalists, that the Constitution could limit state sovereignty at all implied that the states were no longer sovereign, but rather that their authority to exercise sovereign powers was implicitly delegated by, and only to the extent allowed by, the people via the Constitution.⁶⁷ By contrast, many opposed to a strong national government argued that the sovereignty of the individual states predated the ratification of the Constitution, and that states retained their sovereign power except to the extent that the plan of the Convention expressly limited it.⁶⁸

Under either view, however, the Constitution clearly envisioned a division of the authority to exercise sovereign powers between the state and federal governments. And the division made by the Constitution implemented a pragmatic notion of dual sovereignty: both the federal and state governments would exercise sovereign powers over the same people in the geographical territory in which they resided. This was problematic because traditionally a sovereign is imbued with absolute and ultimate power over matters within its jurisdiction. The

65. See *supra* notes 43-44 and accompanying text.

66. The understanding was presented by the Federalists to appeal to populists, which appeal may have been necessary to secure states' ratification of the Constitution. See also 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 555-56 (Merrill Jensen ed., 1976) (statement of James Wilson on Dec. 11, 1787). Gordon Wood argues that the Federalist assertion that the Constitution reflects an exercise of popular sovereignty may have been disingenuous, but he also notes that given populist sentiments at the time, it may have been the only basis on which the Constitution could be ratified. WOOD, *supra* note 35, at 561-63. The theory of popular sovereignty came to shape "the way Americans viewed themselves as a people. They firmly believed that on their own authority they could form themselves into a community, create or replace a government to order their community, select and replace those who hold government office, determine which values bind them as a community and thus which values should guide those in government." DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 10 (La. State Univ. Press 1988).

67. Thus, Justice Wilson advocated that any notion of sovereignty as a justification for government authority was contrary to the idea that the people are sovereign. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (Wilson, J., concurring).

68. This understanding is most famously expressed in Justice Iredell's dissent in *Chisholm v. Georgia*, 2 U.S. at 435. It is also the prevailing understanding of the Court today. See e.g., *Printz v. United States*, 521 U.S. 898, 918-19 (1997).

Constitution negotiated the tension between the claims to such absolute power by dividing the jurisdiction to govern the people within the United States (and hence within the various states) between the states and federal governments according to the ends at which the governing decision was aimed. The federal government authority was specified in an enumeration of powers which sought to grant Congress power over those matters aimed at national interests;⁶⁹ state governments were to have residual authority over all other matters other than select matters explicitly forbidden them by the Constitution, which left them with authority to regulate all matters that did not relate to the common national interest.⁷⁰ The Constitution, along with the Bill of Rights and later the Fourteenth Amendment's due process and equal protection clauses, also imposed independent limits on the federal and state governments' exercise of sovereign powers within their allotted jurisdictions.⁷¹

Division between the powers of state and federal government essentially hinged on purposes for which each government invokes regulatory power. In one sense, states garner the lion's share of governmental power because they retain the power to pursue all aims generally recognized as appropriate for a sovereign government except for those granted to the federal government or explicitly denied to the state governments by the Constitution.⁷² Thus, states could regulate matters of morality, health, and the general welfare under their residual sovereign powers. In contrast, the federal government was granted authority only to pursue those aims assigned by the Constitution to the federal government. Notably, however, the powers of Congress included the necessary and proper clause, which allowed the federal

69. The original Virginia Plan for the Constitution would have granted Congress power "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual [i.e. particular state] legislation." KLARMAN, *supra* note 53, at 139. Those opposed to a strong federal government (initially small states fearing unequal representation in Congress) argued that the "objects of the union were few . . . and they ought to be specifically defined." *Id.* at 146. The nationalists among the delegates to the Constitutional Convention complained that it would be impossible to enumerate the powers that the federal government should have. *Id.* After it was agreed that representation in the Senate was to be two Senators per state, even those in favor of a strong national government agreed to an enumeration of power. *See id.* at 146-47. The enumeration, however, included the potentially capacious necessary and proper clause, essentially granting Congress implied powers to enable the execution of the explicitly provided powers of the United States. This was essential to ensure the federal government could adequately regulate matters of national concern. The Convention approved this inclusion without discussion. *Id.* at 152.

70. *See* U.S. CONST. art. I, § 10. By specifying exceptions to states residual authority, the structure of the Constitution implies that states retained their pre-Constitution sovereign powers. Any doubts about states retaining sovereign powers were dispelled by ratification of the Tenth Amendment, just two years after ratification of the Constitution. U.S. CONST. amend. X.

71. By independent limits, I mean explicit textually specified limits that are unrelated to the jurisdictional lines between state and federal sovereign powers.

72. *See* *Munn v. Illinois*, 94 U.S. 113, 124 (1876).

government wide latitude to choose the means by which it would exercise its enumerated powers.⁷³

Although states seemed to retain broader powers than the federal government, the framers gave a countervailing advantage to the federal government vis-à-vis states. The supremacy clause of the Constitution explicitly addresses the potential for conflicts between state and federal regulation that may arise even if each level of government stays within its allotted arena of legitimate aims. This may occur, for example, if a state regulated the sale of a certain product that it believes threatens the health or safety of its residents unless it meets state guidelines, but federal regulators have set an incompatible standard, and the statute clearly manifests a desire for national uniformity for that product to encourage its manufacture within the nation.⁷⁴ Thus, the state standard would be too strict to permit the federal desire for national uniformity of the product. Under the supremacy clause of the Constitution, the state regulation yields to the federal one.⁷⁵

The division of powers between the federal and state governments reflected the experience of the Framers. Under the Articles of Confederation, the Continental Congress was unable to constrain the states to act in “concert in matters where common interest requires it.”⁷⁶ Madison thus wished to ensure that the federal government would have sufficient powers to further the common national interest and avoid the states interfering with the effectiveness of the federal government.⁷⁷ At the same time, those more aligned with maintaining the power of the states were concerned that the federal government not have vaguely specified authority to pursue the common federal welfare, fearing that the federal government could then usurp the states’ prerogative to regulate everyday matters that did not uniquely involve the common interests of the new nation. The enumeration of powers was viewed as specifying those powers that were the legitimate “object[] of the union.”⁷⁸ So long as Congress exercised its enumerated

73. As Chief Justice Marshall famously wrote for the Court: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

74. Of late, “[p]reemption is the fiercest battle in products liability litigation.” Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450-52 (2008).

75. “National uniformity . . . stands as one of the objectives of the Supremacy Clause and preemption analysis in general.” Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1339 (2022); see also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 256-57 (2000).

76. KLARMAN, *supra* note , at 129, 739 n.12 (quoting Madison’s letter to John Page).

77. KLARMAN, *supra* note 53, at 133.

78. KLARMAN, *supra* note 53, at 146.

powers, state law had to give way to federal law. The enumeration, however, was seen as an important check to keep the federal government from interfering with state regulation and individual liberty. In short, the Constitution's federalist structure represented a compromise between those who favored greater congressional authority "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted,"⁷⁹ and those who feared federal encroachment on states' regulatory prerogatives. But the ultimate structure of the enumerated powers, including the necessary and proper and supremacy clauses, were understood both to enable a robust federal government to address legitimate matters of national interest, and state sovereignty to address all other matters of concern.⁸⁰

Interestingly, consistent with the flexibility of the understanding of sovereignty to justify various developments in the history of government, early in our nation's history the Supreme Court recognized that the Indian tribes remained sovereign on the land that they traditionally controlled, but that their sovereignty was not absolute. Chief Justice Marshall's opinion ruled that the Cherokee tribe continued to have the legitimate authority to exercise the coercive powers of the state over its people within its territory.⁸¹ Simultaneously, the United States was sovereign over Indian territory by succeeding Britain, which had previously conquered the Cherokee and entered into treaties that essentially limited some aspects of Cherokee sovereignty.⁸² But, except to the extent the United States did so, the Cherokee could assert their sovereign powers against all others, including the states.⁸³ This realization was crucial for the federal government to retain power to regulate the relationship between its citizens and those of the Native American tribes. Thus, early in the history of the United States, the Supreme Court abandoned the requirement that a sovereign exercises absolute power, essentially adopting the notion of minimal sovereignty when pragmatics so required.

I contend that any constitutional line between absolute federal and state powers rests on a weak foundation. The world today is more extensively and quickly connected than it was at the time of the Constitution's framing. Communications, and hence legally significant interactions, occur globally virtually instantaneously. Today there are few

79. KLARMAN, *supra* note 53, at 139 (citing the Virginia Plan).

80. According to David Schwartz, the "ideology of 'enumerationism'" allowed for the potential of both "an effectual national government with implied powers" and a meaningful "concept of reserved state powers." Schwartz, *supra* note 48, at 27. See also David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 937.

81. *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832).

82. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 583-84 (1823).

83. *Worcester*, 31 U.S. at 561; see also *Haaland v. Brackeen*, No. 21-376, slip op. at 13-23 (June 15, 2023) (Gorsuch, J., concurring).

matters of local character that do not have some influence in the aggregate of the nation as a whole. Because circumstances at the time of the founding of the United States could simultaneously tolerate both a states' rights view of the Constitution and one that applied the enumerated powers liberally enough to allow the federal government to address any matters that substantially affect the national economy, the Constitution itself provides little guidance today about how to balance the need for adequate empowerment of the federal government and the expectation that states retain absolute power over a sufficient set of local regulatory matters.⁸⁴ Without such guidance, judicial use of sovereignty to assign powers to one level of government versus the other is normatively problematic.

Traditional sovereignty requires that courts assign both levels of government areas within which their regulation is absolute.⁸⁵ States are to be left free to regulate matters of local concern that do not come within the courts' interpretation of the powers enumerated in Article I Section 8 of the Constitution. And courts must draw the line between what is of sufficient national concern to be within Congress's power and what is local in nature and therefore within the province of state power. Such line drawing is an inappropriate role for the courts, and to the extent they have assumed that role, the lines they have attempted to draw historically have created unacceptable restrictions on the power of the federal government to regulate matters of national concern or on the power of state government to regulate free from federal interference.⁸⁶

First, in drawing the line between federal and state authority, the nature of law leads the court to categorize activity into general classes. Such categorization is problematic for several reasons. By the nature of absolute power, any category that falls under federal authority essentially denies to the states' power to regulate in that category, and vice-versa. But categories like health and safety, welfare, and crime-fighting encompass various activities which may most appropriately fall on different sides of the federal-state power line.⁸⁷ In addition, the appropriate realm within which to place even specific actions often will depend on the precise context of the problem regulation means to address, which in turn may vary over time as society becomes more

84. "No provision of the Constitution speaks directly to the allocation of power between the national and state governments." Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 534 (1995).

85. See *supra* notes 15-17 and accompanying text.

86. Cf. SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* 30 (2013).

87. This is reflected in the fact that it is generally accepted that licensing of health care professionals and setting standards of medical care is a matter for states. See Bill Marino, Roshen Prasad & Amar Gupta, *A Case for Federal Regulation of Telemedicine in the Wake of the Affordable Care Act*, 16 COLUM. SCI. & TECH. L. REV. 274, 297-98 (2015). But the safety and efficacy of drugs is a matter for the federal government. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 24-26 (2005).

interconnected. Thus, categorization, like any rule, will be both over- and under-inclusive.⁸⁸ For example, in *United States v. Lopez*, the Court opined that regulation of education is the province of the states.⁸⁹ But virtually all teachers get paid and hence are involved in commercial transactions for their services. It is not clear to me, for instance, that licensing of teachers to ensure they are qualified as necessary to prepare children for the jobs of the future is not regulation of a commercial transaction that affects the national economy.

Even in the context of determining whether a particular exercise of power by the federal or a state government was within that government's sovereign power involves choices that are matters of policy best left to the political process. The evaluation of how much power states should have as opposed to the federal government reflects value judgments, such as how much the polity trusts government at one level versus another. Not surprisingly, the courts, as the most apolitical branch of government have struggled in assigning various categories to the levels of government, sometimes with potentially disastrous consequences. For example, for many years, the *Lochner* era Supreme Court cordoned off from federal regulation extraction of resources and production of goods, finding that these activities preceded commerce, thus undermining Congress's ability to ensure well-functioning national markets.⁹⁰ More recently, in evaluating the constitutionality of the Affordable Care Act, the Court held that Congress did not have authority under the commerce clause to require individuals to purchase health insurance.⁹¹ The Court never questioned that the ACA's mandate to purchase insurance would significantly affect the market for health care,⁹² which made up about 17.5% of the nation's GDP at the time.⁹³ The Court reasoned instead that requiring a person to purchase insurance is not regulation of commerce because no prior commercial transaction existed that is being regulated.⁹⁴ Essentially the Court's reasoning suggests that mandating conduct is not regulation, even though mandates have historically been a means of regulating since time immemorial. To a great extent, the Court's reasoning reflected its concern that allowing Congress to order individuals to engage in commercial transactions would grant Congress authority over

88. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73-75 (1983) (describing the over- and under-inclusiveness of rules).

89. 514 U.S. 549, 580 (1995) (“[I]t is well established that education is a traditional concern of the States.”).

90. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

91. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 551-52 (2012) (Roberts, C.J.).

92. See *id.* at 550; see also *id.* at 603 (Ginsburg, J., dissenting in part).

93. See Andrea M. Sisko et al., *National Health Spending Projections: The Estimated Impact of Reform Through 2019*, 29 HEALTH AFFS. 1933, 1934 (2010).

94. See *NFIB*, 567 U.S. at 550, 552.

too great a regulatory domain.⁹⁵ But to address these concerns, the Court had to invent illogical commerce clause doctrine that could have prevented Congress from addressing a huge problem with enormous significance to the national economy.⁹⁶

B. Minimal Sovereignty Provides the People with Greater Protection from Government Tyranny than Traditional Sovereignty

The normative case for adopting any conception of sovereignty underlying American federalism hinges on that conception allowing each level of government to provide an effective and appropriate check on the other. The idea that the dual sovereignty underlying American federalism might provide a check on government dates back to the debates regarding ratification of the Constitution. The Federalists strongly advocated the potential for the different levels of government to provide a safeguard against the despotism of either. They argued:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.⁹⁷

Jurists and scholars since have also alluded to the idea that the federal government would provide a check on state governments, and vice versa.⁹⁸

Checks on government have traditionally been thought of as means for preventing the government from acting in a manner that is considered illegitimate. For example, a check on government might be salutary if it prevents government from acting tyrannically.⁹⁹ In a democratic republic, like the United States, a check might also prevent the government from acting contrary to the preferences or values held by

95. See *id.* at 552.

96. The Court affirmed Congress's power to enact the ACA under its taxing power. *Id.* at 575, 588. But had Congress not tied the penalty for violating the Act's individual mandate requirement to the tax liability of the violator and authorized the IRS to implement the mandate, *NFIB* would have had the effect of stymying Congress from addressing this important matter that it had been trying to address for decades. See ALAN DERICKSON, HEALTH SECURITY FOR ALL: DREAMS OF UNIVERSAL HEALTH CARE IN AMERICA 42 (2005) (noting that Senator Edward Kennedy had proposed the Health Security Act in 1970); see also generally *id.* (chronicling unsuccessful efforts to provide universal health care in America that date back to the late nineteenth century).

97. THE FEDERALIST NO. 28, at 137 (Alexander Hamilton) (Lawrence Goldman ed., 2008); see also THE FEDERALIST NO. 51, *supra* note 40, at 258.

98. See, e.g., *NFIB*, 567 U.S. at 536 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O'Connor, J.); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080-81 (2014).

99. See generally David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187 (2020).

its citizens.¹⁰⁰ But, there is another sense in which a federal system may provide a check on its different levels of government that to my knowledge has been underappreciated. If the citizens lose faith in one of the levels of government, without a federal system, they must change their system of government. In a federal system, by contrast, one level of government may act as a backstop if the public loses trust in the other level. In other words, federalism can check a level of government by expanding the political alternatives to having that level actively carry out its sovereign functions. The people have the option to deny a level of government the political support necessary to enact statutes or execute its laws. Governed by the other, trusted, level of government, life can go on without the fear of anarchy or the need for revolution.

Were the courts to remain true to their belief in traditional sovereignty, granting exclusive power to the federal government to regulate matters that clearly involve interstate or international activities might leave the people with insufficient alternative means to register their choice of regulatory policy. For example, climate change would seem to be a matter of national concern. Scientists predict that global emissions of greenhouse gasses must be cut drastically, beginning now, to have any chance of avoiding catastrophic climate change.¹⁰¹ Yet for years there seems to be insufficient consensus to generate a congressional response to the threats climate change poses.¹⁰² During the George W. Bush Administration, the EPA refused to recognize the emission of greenhouse gasses as the cause of climate change.¹⁰³ Despite the Supreme Court rejecting the Bush EPA's conclusion that climate change did not result from anthropogenic activity,¹⁰⁴ the Bush administration went to great lengths to avoid regulating such emissions.¹⁰⁵ The Obama administration did begin to regulate greenhouse

100. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360 (2001).

101. See Press Release, Intergovernmental Panel on Climate Change (April 4, 2022), https://www.ipcc.ch/site/assets/uploads/2022/04/IPCC_AR6_WGIII_PressRelease_English.pdf [<https://perma.cc/LF84-WLBB>].

102. Congress recently enacted The Inflation Reduction Act of 2022—the first statute expressly aimed to limit climate change. But even that statute addresses the problem by creating tax credits and other economic incentives for reduction in carbon emissions, rather than authorizing regulations that allow the government to order such emissions from existing sources. See Francesca Paris et. al., *A Detailed Picture of What's in the Democrats' Climate and Health Bill*, NY TIMES, <https://www.nytimes.com/interactive/2022/08/13/upshot/whats-in-the-democrats-climate-health-bill.html> [<https://perma.cc/2KF3-LCHG>] (August 16, 2022).

103. See *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

104. *Id.* at 528-29, 532-35.

105. In response to the Supreme Court decision instructing the EPA to regulate greenhouse gasses as pollutants under the Clean Air Act, “President Bush’s OIRA suppressed greenhouse gas rulemaking, simply by refusing to receive the extensive scientific analysis and regulatory proposals the Environmental Protection Agency (EPA) had developed in the

gas emissions under the Clean Air Act, but the Court has limited that regulation because the volume and ubiquity of such emissions did not fit well with that Act's structure of pollution regulation.¹⁰⁶

Absent Congress amending the CAA to address greenhouse gasses, the federal government has limited ability to mount a response to the problem, especially the authority to require substitution of power generated by renewable energy resources for coal-fired power. Congress, however, has not found the energy to overcome inertia on regulation of climate change despite the White House and a majority of both houses of Congress being controlled by the Democrats during Obama's first term. When Republicans gained increased control over the political branches of the federal government, the federal response only retreated more, with the Trump Administration making efforts to overturn rules adopted by the Obama EPA to address the problem.¹⁰⁷

Under faithful adherence to the nationalist view of dual sovereignty, it is difficult to justify allowing states to pursue climate change policies. Greenhouse gases affect the world at large no matter where they are emitted. They do not have local effects that differ in nature from those that occur globally.¹⁰⁸ Moreover, state regulation of greenhouse gases, especially by states as large as California, affect electric power energy supplies throughout various regions of the country and may be administered in ways that would violate the dormant commerce clause.¹⁰⁹ They also could affect the propensity of other nations to limit their greenhouse gases, which raises issues of foreign policy that traditionally have been recognized solely as the province of the federal government. Hence, under traditional conceptions of sovereignty, states have no business regulating climate change because

wake of the Supreme Court's decision in *Massachusetts v. EPA*." Peter L. Strauss, *The President and the Constitution*, 65 CASE W. RES. L. REV. 1151, 1153 (2015).

106. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321-22 (2014); *West Virginia v. EPA*, 597 U.S. 697 (2022).

107. In particular, Trump's EPA replaced Obama's Clean Energy Plan with the Affordable Clean Energy Rule. That rule, however, was vacated by the D.C. Circuit. The circuit did not explicitly reinstate the Clean Power Plan. Therefore, the EPA treated neither rule as being in force. See Environmental Protection Agency, Office of Air and Radiation, *Memorandum: Status of Affordable Clean Energy Rule and Clean Power Plan* (February 12, 2021), https://www.epa.gov/sites/default/files/2021-02/documents/ace_letter_021121.doc_signed.pdf [<https://perma.cc/HHD4-2GSB>].

108. "Because GHGs are ubiquitous and climate change effects are rooted in worldwide GHG levels, critics of state climate regulation argue that more stringent or additional state actions could end up merely imposing costs locally and benefitting others. A crackdown on GHG emitters by any governmental jurisdiction short of an all-encompassing international regime could cause a 'leakage' problem, leading production to shift to less regulated environments, creating little or no net climate benefit." William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1070 (2017).

109. For general discussion of how state renewable portfolio standards could run afoul of traditional dormant commerce doctrine, see generally Anthony Sacco, *Renewable Portfolio Standard Outcomes and the Dormant Commerce Clause*, 51 ENV'T L. REP. 10947 (2021); Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243 (1999).

doing so encroaches on a matter that one would think would exclusively be the responsibility of the federal government. Given Congress's inability to reach sufficient consensus to address climate change, however, popular concern has manifested itself by having the states take the lead in creating programs to encourage and, to some extent, require use of solar and wind power to replace coal for the generation of electric power, and to cut carbon emissions from motor vehicles.¹¹⁰

I maintain that it would be preferable for the courts to recognize that the level of government that has the authority to address any particular regulatory matter should be subject to the people's preferences as expressed via the political process writ large. Minimal sovereignty seems more in line with the understanding of the polity about how the federal and state governments interact. The American polity does care about which level of government regulates particular matters. But voters do not base their preferences on which level of government should regulate in the inherent local or national nature of a political matter.¹¹¹ Rather, their preferences reflect which level of government is likely to decide a matter in line with their policy preferences and which level of government they generally trust more.¹¹² Minimal sovereignty encourages state and federal governments to compete for trust of the people, who can decide which level of government to empower via the ballot box.

Minimal sovereignty avoids the problems of both states' rights and nationalist conceptions because of two attributes. First, minimal sovereign power, being dependent on recognition of the authority to exercise coercive powers of government by the relevant community, cannot be controlled by another entity. In other words, even if there are two sovereign entities that preside over the same matters within the same geographic boundaries, neither one can command the other how to exercise its sovereign power. Second, by not requiring a sovereign's power to be absolute within the domain of its jurisdiction, minimal sovereignty does not limit the jurisdiction of dual sovereigns when each is recognized as legitimately exercising coercive government power. Thus, the fact that the federal government has sovereign power over a matter says nothing about whether the state governments also have sovereign power over the same matter. To be clear, I do not mean to imply that the Constitution cannot impose limits on the exercise of sovereign power. But if those limits exist, it is not because of any

110. See Michael Arnone, *Diagonal Federalism: How States Should Respond to Inconsistent Federal Climate Change Mitigation Policy*, 46 WM. & MARY ENV'T L. & POL'Y REV. 569, 574 (2022).

111. See Nicholas Jacobs, *An Experimental Test of How Americans Think about Federalism*, 47 PUBLIUS: J. FEDERALISM 572, 591 (2017).

112. See Cindy D. Cam & Robert A. Mikos, *Do Citizens Care about Federalism? An Experimental Test*, 4. J. EMPIRICAL LEGAL STUD., 589, 623 (2007).

notion that sovereign powers cannot overlap, but rather because the citizens of the United States accept the Constitution's limitations on such power.

These attributes of minimal sovereignty prevent state governments from emasculating the federal government's ability to regulate to further the national interest. So long as the federal government exercises its own legitimate regulatory powers, the supremacy clause ensures that states cannot prevent that exercise from having controlling force by adopting regulations that conflict with or undermine federal regulation. To the extent the federal government does not have the means to implement its policies without state cooperation, states can withhold such cooperation and thereby thwart federal policy.¹¹³ Moreover, there is no limitation on the basis for states adopting policies that conflict with those of the federal government, even if the states do so because of disagreement over what is best for the national interest. In other words, at least in the abstract, minimal sovereignty allows the states and federal government to compete for the trust of the people to determine what ultimate policy is implemented.

Despite the inadequacy of other conceptions of sovereignty to enable checks on state and federal regulation, one might question why the concept of sovereignty is needed at all to enable such checks and, even if it is needed, whether minimal sovereignty in practice does enable them. Ideally, the electoral system is already structured to provide checks against unresponsive government; one might argue that it provides all the checks that are needed against each level of government implementing policies that are inconsistent with the preferences of the polity. If the electorate does not like the policy implemented by either state or federal legislatures or officials, it can "vote the bums out."¹¹⁴

The electoral system in the United States, however, is highly imperfect. With exception perhaps of single-issue voters who vote for candidates based on their proposed policy on specific salient issues, voters do not know enough about policy matters to keep members of Congress or the President directly accountable for the policies they adopt.¹¹⁵ Most voters are unaware even of significant issues of potential government policy.¹¹⁶ Those who are aware of policy issues nonetheless are

113. See Landau et. al., *supra* note 99, at 1225-28, 1233-35, 1251; James A. Gardner, *The Theory and Practice of Contestatory Federalism*, 60 WM. & MARY L. REV. 507, 508 (2018).

114. The ability of the electorate to "vote the bums out"—in other words of electoral accountability to check tyranny, however, depends on "a free, functioning, and accessible electoral system." Amanda-Hollis Brusky, *Impeachment as a "Madisonian Device" Reconsidered*, 95 CHI. KENT L. REV. 497, 511-12 (2020).

115. See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304-06 (2004).

116. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 79-82 (1996); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1254 (2006).

often unaware of the policy positions of candidates for office.¹¹⁷ Even voters who are aware of those positions are unable to predict the likely outcomes that will result from adoption of the policies they purport to prefer—that is, they cannot appreciate what policies are likely to solve the problems about which they are concerned, let alone other ramifications that might occur from adopting specific policies.¹¹⁸ In addition, policy issues that arise during a legislator's or official's tenure in office are not static. As real-world events develop, the policy issues of the day change, sometimes quite quickly. For example, when George W. Bush was elected to his second term as President in 2004, it would have taken a remarkably prescient person to have foreseen the great recession triggered by the collapse of securitized backed subprime mortgages almost four years later.¹¹⁹ And I would venture that, although public health and national security experts were aware of the threat of a viral pandemic,¹²⁰ neither they nor the public appreciated the risk of a pandemic like covid-19 when Donald Trump was elected President in 2016, or even at the time of the 2018 midterm congressional elections, just a year before the pandemic began.

Therefore, perhaps it is unsurprising that voters generally do not cast their ballots based on policy positions of candidates. Instead, they rely on proxies such as party affiliation, or signals from interest groups. Those signals, however, are not sufficiently precise to allow a voter to determine which candidate best supports the positions the voter prefers.¹²¹ Voters may also choose for whom they vote based on their perceptions of a candidates' personality or outlook on the world.¹²² But those criteria too are not likely proxies for candidates' policy positions. Rather, people seem to vote based on which candidate they believe they can trust to make the decisions that will be best for them, whatever the policy matter that may present itself and whatever

117. See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378-81 (2010).

118. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010); cf. Craig M. Burnett, Elizabeth Garrett & Matthew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 320 (2010).

119. See generally *Why Economists Failed to Predict the Financial Crisis*, KNOWLEDGE AT WHARTON (May 13, 2009), <https://knowledge.wharton.upenn.edu/article/why-economists-failed-to-predict-the-financial-crisis/> [<https://perma.cc/ZLB4-GRFS>] (discussing why economists failed to predict the 2008 recession caused by the bursting housing bubble).

120. "The US intelligence community, public health experts and officials in Trump's own administration had warned for years that the country was at risk from a pandemic." Daniel Dale, *Analysis: Trump says the pandemic crisis was 'unforeseen' – but lots of people foresaw it*, CNN POL., <https://www.cnn.com/2020/03/15/politics/fact-check-trump-coronavirus-nobody-predicted/index.html> [<https://perma.cc/FL5V-GTQX>] (Mar. 15, 2020).

121. See Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1420-21 (2013).

122. See Francis Rourke, *Presidentializing the Bureaucracy: From Kennedy to Reagan*, in *THE MANAGERIAL PRESIDENCY* 123, 126 (James P. Pfiffner ed., 1991).

those positions may entail.¹²³ This would explain how Donald Trump was able essentially to take control of the Republican Party, and in the process change many of the policy positions for which it stood.

Given the imperfections in the electoral system for keeping officials accountable to people's policy preferences, to the extent that federalism provides an effective check on runaway government at either level, it could play a valuable role in checking both federal and state government. That raises the question, however, whether competition between the federal and state levels of government that minimal sovereignty enables provides an effective means for voters to constrain government run amok.

One might be skeptical that voters pay any attention to the distribution of powers between state and the federal government. Except during what Bruce Ackerman has called "constitutional moments,"¹²⁴ such as reconstruction, the New Deal, and perhaps President Johnson's Great Society program to eliminate poverty and racial injustice, American voters have rarely explicitly communicated a desire to change the understood constitutional division of power between the federal government and those of the states.¹²⁵ Nonetheless, there are indications that citizens do care about which level of government should be responsible for particular government policies. In particular, they seem to prefer granting greater authority to the level of government in which they have greater trust.¹²⁶ Research regarding how citizens factor their views about the appropriate level of government to address a particular matter into how they vote or otherwise influence public officials is not extensive. But evidence suggests that "individuals attribute solution responsibility to the order of government they believe to be functionally responsible when they think it is doing a good job, and they attribute solution responsibility away from the government they deem functionally responsible if they think it is doing a poor job."¹²⁷

This attribution of authority to the level of government in which voters trust may not be apparent because of the way elections make

123. See Seidenfeld, *supra* note 121, at 1413-14.

124. Such constitutional moments are "characterized by Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms." Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

125. The rarity with which the people explicitly force a shift of power between the federal and state governments may reflect that under traditional notions of sovereignty, such shifts require changing understandings of the structure of the Constitution, which can only occur after long sustained preferences inconsistent with the prior understanding of the allocation of power between institutions of government.

126. See Cam & Mikos, *supra* note 112, at 592; see also Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1701-02 (2007).

127. Kevin Arceneaux, *Does Federalism Weaken Democratic Representation in the United States?*, 35 PUBLIUS 297, 308 (2005).

this attribution. Generally, state and local government provide basic government services such as police protection from crime and facilitation of property rights and development.¹²⁸ They also tend to provide infrastructure that aids the growth of local economies, albeit sometimes using substantial federal funding.¹²⁹ The federal government, in contrast, tends to focus more on regulation of national markets and wealth redistribution, which are not universally seen as fundamental to the operation of society.¹³⁰ Thus, competition between trust in the federal versus state governments often plays out in terms of objections to “big government,” which almost exclusively focus on the operation of the federal government. According to this understanding of the public preference for state versus federal regulatory responsibility, when trust in the federal government is relatively high, such as when there is a perceived need for national security, significant regulation of markets, or wealth redistribution, federal officials have more political leeway to maintain active regulatory agendas. When trust in the federal government is relatively low, the electorate calls for an end to big government, which invariably refers to efforts to cut back on federal regulatory programs.¹³¹ Thus, without focusing explicitly on regulatory competition between the state and federal governments, voters actually choose to rebalance the relative regulatory responsibilities between the two levels of government. I do not mean to overstate the extent to which competition for trust of the people translates into politically based checks on either federal or state government. But minimal sovereignty is the only notion that can potentially provide meaningful politically based checks.

III. MINIMAL SOVEREIGNTY’S IMPLICATIONS FOR THE EXTENT OF STATE AND FEDERAL REGULATORY AUTHORITY

Virtually all would agree that the United States Constitution guarantees states a meaningful role in the governance of our nation. Precisely what that role is, however, has never been resolved. One question that has repeatedly arisen, both in judicial cases and academic discourse, is whether the Constitution imposes internal limits on the exercise of federal power beyond its explicit proscriptions via the enumeration of powers in Article I, Section 8. To clarify this question,

128. See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 58-59 (2018).

129. *Id.* at 58.

130. See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 34-35 (2d ed. 2009).

131. See Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1761 (2013). Thus, it was no coincidence that Ronald Reagan’s political rhetoric and Newt Gingrich’s “Contract with America” advocated “cutting big government, turning power and responsibility back to the states, and deregulating in the areas important to American industry.” Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 798 n.90 (2015).

suppose that under current commerce clause doctrine, Congress attempts to regulate conduct that clearly affects interstate markets. Further suppose that the means by which Congress attempts to regulate do not appear to violate any individual “right” or other proscription on federal action that the Constitution provides. The question that has not been fully resolved is what, if any limits, can one infer from our Constitutional structure, especially the enumeration of legislative powers and the Tenth Amendment to the Constitution, on whether and how Congress may regulate such conduct. This is the kind of question that courts and scholars have often answered by invoking concepts of sovereignty, and therefore, for which the notion of minimal sovereignty is most pertinent.

A. Minimal Sovereignty and the Bounds of Congress’s Power

1. Congress’s power under the commerce clause.

The bounds of Congress’s powers has potential bearing on many distinct legal inquiries. For example, in *United States v. Lopez* the Supreme Court considered whether Congress had the power to prohibit possession of a gun in a school zone.¹³² The Court found that possessing a gun in a school was not an activity that is commercial in nature, and that it fell within the kind of activity traditionally regulated by the states.¹³³ Therefore, rather than defer to Congress’s implicit determination that the activity substantially affects interstate commerce, the Court took it upon itself to independently evaluate the activity’s effect, and found that it did not.¹³⁴ Justice Breyer, in dissent, provided a detailed explanation for how guns in schools likely would affect the quality of education schools provide, which would affect such matters as the qualifications of Americans for the jobs of the future, which in turn would affect interstate commerce.¹³⁵ The Lopez majority simply dismissed Breyer’s argument by noting that were the argument to be accepted there would be no regulatory space within which states could exercise their sovereign power.¹³⁶ The Court rejected Breyer’s reasoning not because guns would fail to affect interstate commerce sufficiently, but rather because the Court concluded that if that explanation sufficed then there would be nothing that Congress could not regulate and therefore nothing left within the ambit of state regulatory power. Subsequently, in *United States v. Morrison*, the Court declined to defer to explicit findings of the effect of the prohibited conduct on interstate commerce that Congress included in the Violence Against

132. 514 U.S. 549, 551 (1995).

133. *Id.* at 561.

134. *Id.* at 567.

135. *Id.* at 619-24 (Breyer, J., dissenting).

136. *Id.* at 565-67.

Women Act,¹³⁷ even though in *Lopez* the Court had suggested that such findings would be a factor in granting such deference.¹³⁸ Again, it did not question Congress's conclusion that the activity would substantially affect interstate commerce, but merely noted that the findings were of the same nature as the findings Breyer had given in his *Lopez* dissent and that the Court had rejected.¹³⁹ In both of these cases, the Court relied on the traditional notion of sovereignty and found Congress exceeded its power because holding that Congress would have power to enact the Violence Against Women Act would preclude states having any power over such matters.

One might contend that the Court was not relying on the notion of sovereignty, but instead merely reading the enumeration of the commerce clause power to implicitly exclude some regulation by Congress—that “enumeration presupposes something not enumerated.”¹⁴⁰ This statement hinges on the logical notion that the Constitution would not include particular enumerated powers if it meant to grant Congress unlimited police powers. But as Richard Primus convincingly argued, that logic does not preclude enumeration from implying that Congress can regulate without limit within the particular context of the case.¹⁴¹ The logic only requires that there be some state of the world in which the enumeration of the commerce clause precludes Congress from regulating some matters. For instance, it may be that the commerce clause was meant to permit Congress to address any activity that substantially affected the national economy. In 1789, few activities other than direct regulation of interstate sales or transport would even arguably have had such a substantial effect. Hence, at the time, the enumeration did not grant Congress broad power over all activity that affects commerce. But, if the world has changed such that any activity of sufficient significance to prompt government regulation substantially affects interstate commerce, then the enumeration of the commerce clause might allow Congress to regulate virtually any activity today.

To determine whether an enumerated power, in my example the commerce clause, prohibits Congress from regulating a particular activity, one must evaluate whether the federalist structure of our Constitution envisions such a limit in the particular context. Thus, in response to Richard Primus's argument Kurt Lash acknowledges that as

137. 529 U.S. 598, 615-17 (2000).

138. *Lopez*, 514 U.S. at 563.

139. *Morrison*, 529 U.S. at 615-17.

140. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

141. The Constitution “might, or it might not, [confer the equivalent of plenary powers on Congress] depending on the best constructions of many different powers and the relationship between those powers and the social world at any given time.” Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 583 (2014).

a logical matter Primus is correct,¹⁴² but that the context for the enumeration of powers in the Constitution was an understanding that the Constitution's enumeration of power reflected a system of dual sovereignty, which necessarily envisions such a limit.¹⁴³

Lash's reliance on the original understanding of sovereignty, however, cannot resolve the question whether the Constitution authorizes a particular exercise of power by Congress. Even assuming Lash's originalist approach to reading the Constitution, the fact that the framers' understanding or the original public meaning of the Constitution recognized that the states must have some sphere of action within which their sovereign power is absolute, does not indicate the bounds of that sphere. As Marshall's opinion in *McCulloch* makes clear, it is also reasonable to read the enumerated powers to ensure a sphere of absolute federal sovereignty sufficient to allow the federal government the necessary power effectively to address matters of national concern.¹⁴⁴ That is, the framers and ratifiers of the Constitution may have agreed to an enumeration of those powers desiring that the federal government have no more power than that enumerated because they believed those powers were adequate for the effective operation of the federal government. The Constitution, however, does not indicate how the need for the federal government to have such necessary power is to be balanced against the understanding that states retain sovereign powers.¹⁴⁵ In particular, the framers almost certainly never envisioned the extent to which such necessary powers would extend two hundred plus years later. As already noted, while drawing this line in early days of the Republic certainly generated controversy, there was almost no doubt that reading the Constitution to grant this necessary power to the federal government in 1789 would not infringe on states' authority to regulate almost all day-to-day conduct within their borders.¹⁴⁶

There is also a more fundamental objection to Lash's invocation of an originalist understanding of sovereignty. As I noted earlier, if sovereignty really belongs to the people, then strictly speaking, it cannot be originalist.¹⁴⁷ The question is what the people today prefer. Invoking originalist understandings of how to determine the bounds of delegation from the people to their federal and state agents would be

142. Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 *YALE L.J.F.* 180, 180, 182 (2014).

143. *Id.* at 185.

144. See Schwartz, *supra* note 80, at 27.

145. Enumeration of Congress's powers "does not tell us how to balance the Constitution's commitment to internal limits with its equally apparent commitment to effective national government." Andrew Coan, *Implementing Enumeration*, 57 *WM. & MARY L. REV.* 1985, 1990 (2016).

146. See *supra* notes 77-82 and accompanying text.

147. See *supra* note 52 and accompanying text.

consistent with retention of sovereignty by the people only if the polity today agrees that that is the correct basis for drawing such lines. That is a question originalists do not address.

Minimal sovereignty relieves the tension that exists in today's interconnected world between giving Congress jurisdiction to address matters of substantial national interest and leaving states with an arena within which they may exercise their sovereign powers. It does so by rejecting the separation of state and federal spheres of sovereign power into non-intersecting sets. If the federal government has the need to exercise a power to address matters of national concern, the enumerated powers should be construed broadly to allow it to do so. But that construction should not deprive states of also addressing that matter, even if it is a matter that seems not to be one of particularly local concern. There is probably little of regulatory interest today that the federal government could not regulate if the limits of its commerce clause powers are based on whether the activity it regulates has a substantial effect on interstate commerce. But the fact that Congress could regulate almost every activity that states regulate, and via the supremacy clause could reverse the effect of state regulation that sets a standard different from that set by federal law, does not deprive the states of their minimal sovereignty. They remain free to regulate as they see fit, and the federal government cannot review and overrule that regulation. Most significantly, the people retain the political power to choose the level of government that they trust to address the matter.

The power to choose which level of government should regulate provides a meaningful check on the federal government. Pragmatically, it is nigh impossible for the federal government to regulate most areas governed by state law. Historically there has been no political will for them to do so.¹⁴⁸ And if there were such political will—even if the people trusted the federal government to take over the functions of state and local government—the information the federal government would have to obtain, and the regulatory infrastructure it would have to establish would impose virtually insurmountable barriers to it cutting state government out of the regulatory process. This explains why even when the federal government does regulate a matter comprehensively, it often relies on cooperation of state government to ensure that federal regulation operates smoothly and in a beneficial manner.¹⁴⁹

148. Historical experience supports the framers' belief that "any attempt by federal officials to usurp [state] powers, if not blocked at the polls or through the operation of ordinary checks and balances, could and would be thwarted by popular political appeals organized under the leadership of state officials." Larry D. Kramer, *The Supreme Court 2000 Term Forward: We the Court*, 115 HARV. L. REV. 4, 124-25 (2001).

149. "Realistically speaking, Congress can neither abandon [federal programs that rely on state implementation] nor 'fire' the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and

2. Tenth Amendment limits on federal power and the spending clause.

Another specific legal question is what limits, if any, the Tenth Amendment imposes on Congress's power. The Tenth Amendment reads: "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."¹⁵⁰ A casual reading might suggest that the Tenth Amendment implies some powers that are not delegated to the United States. A more careful consideration reveals that the text is merely a tautology: the United States has the powers granted to it by the Constitution—no more but no less. If there are no powers that are not delegated, a literal reading of the text suggests that there are no limits imposed by the amendment. Yet some have read the history of the adoption of the Tenth Amendment to suggest that it was included precisely to ensure that the powers of the federal government are not all encompassing.¹⁵¹ As for my previous discussion of enumeration and bounds of the commerce clause power, this debate does not reveal anything about the extent to which the Tenth Amendment limits Congress's powers. Resolving that question requires invoking some other source of those limits, such as the conception of sovereignty.

For much of the history of the United States, the Supreme Court relied on the Tenth Amendment to justify a broad reading of states' powers.¹⁵² The Supreme Court did not, however, read the Tenth Amendment as an external affirmative limitation on Congress's power until 1976, when it relied on the Tenth Amendment to forbid Congress from exercising regulatory power "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."¹⁵³ The Court held: "Insofar as the 1974 amendments operate directly to displace the States' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they

this mutual dependency guarantees state officials a voice in the process." Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994). This reliance on state government to help implement federal programs gives states significant power to resist federal imposition of policies to which the states object. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1266-67 (2009).

150. U.S. CONST. amend. X.

151. "[T]he Tenth Amendment was prompted [primarily] by Antifederalist fears about the imperfect enumeration of powers in the Constitution—particularly the vagueness of the "necessary and proper" clause The Amendment was intended to provide a rule of construction against additional federal powers being inferred from the absence of limitations." David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 352, 362-78 (1996).

152. See *id.* at 362-78.

153. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976).

are not within the authority granted Congress by the Commerce Clause.”¹⁵⁴

The traditional state functions limitation was problematic at least in part because it was not tied to the sovereign powers of the state. The functions with which the Court found that federal regulation laws might interfere are all functions that can be provided by private entities as well as state and local governments. This created a problem regarding the breadth of the Tenth Amendment, and its potential to interfere with federal regulation of matters of national interest.¹⁵⁵ Thus, perhaps it was not surprising that only nine years after announcing the special exemption of state traditional functions from generally valid federal regulation the Court abandoned that doctrine, questioning whether “courts ultimately can identify principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.”¹⁵⁶ The Court instead adopted an understanding of American federalism that seemed to suggest political rather than judicial means of implementing the Tenth Amendment, concluding that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹⁵⁷

That Court’s seeming endorsement of a political understanding of the Tenth Amendment’s federalism guaranty, however, is problematic because it would allow the federal government to direct the states’ use of their coercive sovereign powers to implement federal policy. Concerns about state sovereignty thus led the Court again to read the Tenth Amendment as imposing an external limit on Congress’s enumerated powers,¹⁵⁸ holding that Congress could not require states either to provide for disposal of low-level nuclear waste generated in the state or alternatively take title to such waste, which would then require the state to become liable for the damages of the generators of the waste.¹⁵⁹ The Court announced the principle that “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory

154. *Id.* at 833.

155. In three of the four cases following *National League of Cities*, in which the Court addressed tenth amendment challenges to application of statutory provisions to the states, the Court held that Congress had not violated the tenth amendment because the regulated functions were not ones that were traditionally governmental. *See Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 685 (1982); *EEOC v. Wyoming*, 460 U.S. 226, 238-39 (1983).

156. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985). The *Garcia* Court explicitly found the traditional governmental functions test unworkable. *Id.* at 561 (Powell, J., dissenting).

157. *Id.* at 550.

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

159. *Id.* at 175.

program.”¹⁶⁰ Justice O’Connor, writing for the Court, reasoned that permitting the federal government to direct the states to implement federal policy will engender voter confusion about which level of government to hold responsible for the policy.¹⁶¹ The Court has since extended the non-commandeering principle to preclude Congress from requiring state executive officials from enforcing a federal regulatory program.¹⁶²

Possibilities of confusion aside, the Tenth Amendment anti-commandeering principle essentially implements an important component of minimal sovereignty. From the perspective of traditional sovereignty, there is no need for an external limit on federal commandeering of state government. The federal government simply has no business addressing matters over which the states have authority. But, from the perspective of minimal sovereignty, the external limit is not only appropriate, it is crucial. At a theoretical level, each sovereign must be responsible for exercising its governmental powers free from oversight and reversal by another entity. Otherwise, competition between the federal and state levels of government would be short-circuited, which would undermine the political benefits of minimal sovereignty. At a more pragmatic level, allowing the federal government to commandeer state organs to implement coercive powers would greatly reduce the cost of the federal government implementing its policies which in turn would undermine opposition to federal policy by those who distrust big government. Again, the effect would be to dilute states ability to provide a counterweight to federal policy.¹⁶³

Judicial doctrine regarding the spending clause, in the abstract, is also consistent with minimal sovereignty. Unlike the other enumerated powers, the spending clause explicitly authorizes Congress to spend to promote the general welfare.¹⁶⁴ This likely reflects that spending is not an exercise of the coercive powers of the state: The federal government can only spend to purchase what someone is willing to sell.¹⁶⁵ Hence the scope of spending power does not depend on

160. *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288).

161. *Id.* at 182-83.

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

163. To be clear, minimal sovereignty does not condemn cooperative federalism—that is regulatory structures that involve both federal and state government voluntarily working together to better achieve regulatory ends. See Ani B. Satz, *The Federalism Challenges of Protecting Medical Privacy in Workers’ Compensation*, 94 IND. L.J. 1555, 1604 (2019). If a state finds it in its interests to cooperate in implementing a federal program, then minimal sovereignty does not constrain its authority to do so. Cooperative federal-state programs do raise a question about the line between federal inducement of state cooperation versus federal coercion. See discussion of Congress’s spending power *infra* notes 168-172 and accompanying text. But there is no way to avoid this question if states are to provide a true alternative to federal governance on all issues.

164. See U.S. CONST. art. I, § 8, cl. 1.

165. See Mark Seidenfeld, *The Bounds of Congress’s Spending Power*, 61 ARIZ. L. REV. 1, 4 (2019).

sovereignty or its limits unless that power is somehow used to coerce conduct. Supreme Court spending power doctrine recognizes this by explicitly requiring that the spending not be coercive.¹⁶⁶

The specific test the Court uses for whether spending is coercive, however, potentially can limit Congress's spending power in ways that interfere with the federal government's legitimate exercise of its sovereign power. The Court has held that spending is coercive if Congress threatens to withhold funding it had previously supplied to states if the amount of money is great enough that the states essentially would never accept the loss of funding.¹⁶⁷ That test for coercion, however, is not consistent with minimal sovereignty because it can interfere with the federal government conditioning funds in a manner that ensures it gets what it bargained for when offering funding to the states.¹⁶⁸ Given the voluntary nature of spending transactions, a better way of understanding how spending can be coercive would borrow from private contract law doctrine.¹⁶⁹ To avoid unduly limiting the federal government's spending to serve the national interest, the Court would do better to define coercive spending as involving a threat by the federal government to withdraw funding when that withdrawal would not serve the interests of the United States but rather is used strategically to coerce states into using their sovereign powers on behalf of the federal government.¹⁷⁰ Again, according to conceptions of minimal sovereignty, coercing states exercise of their sovereign powers would be outside the sovereign powers of the federal government.

B. Minimal Sovereignty and the Bounds of State Power

1. The Dormant Commerce Clause.

Minimal sovereignty also has implications for the limits on states' power. Perhaps the most significant potential implication involves the dormant commerce clause doctrine. Although there is no text in the Constitution that specifies limits on states' power over commerce, courts have read the affirmative interstate commerce clause to imply

166. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 580-81 (2012); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

167. *NFIB*, 567 U.S. at 581-82.

168. For example, with respect to the spending power at issue in *NFIB*, the federal government might have threatened to withdraw basic Medicaid funding if states did not expand Medicaid because failure to implement this expansion would have increased the money the federal government would have to spend under the pre-existing basic program. See Seidenfeld, *supra* note 165, at 21-22.

169. See Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 503-09 (2016).

170. See Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. 391, 428 (2004).

a limitation on such state power.¹⁷¹ Dormant commerce clause doctrine has two prongs: the first prohibits a state discriminating against goods and services from other states;¹⁷² the second prohibits states from unduly burdening interstate commerce even though state regulation serves legitimate interests of the state.¹⁷³

The dormant commerce clause, however, provides only a default rule: Congress is free to authorize states to regulate in a manner that would otherwise violate the doctrine.¹⁷⁴ Thus, it really raises the question of whether when states regulate in a manner that would violate the doctrine the burden should be on Congress to preempt such regulation if Congress finds it undermines the national interest, or instead the burden should be on Congress to authorize such regulation if Congress determines it is in the national interest. Justice Jackson justified the doctrine and expressed opposition to relying on Congress to override state-imposed regulation of interstate commerce as follows:

It is . . . tempting . . . to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry. . . .

The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits. Because that is so, I am reluctant to see any new local systems for restraining our national commerce get the prestige and power of established institutions.¹⁷⁵

The lack of direct textual grounds for the dormant commerce clause raises the question: how can the Court justify the doctrine? One possibility is that given the explicit grant of sovereign authority to the federal government to regulate interstate commerce, traditional sovereignty necessarily being absolute precludes states from exercising that same authority. If one understands the enumeration of powers in

171. “To begin, there is no dormant Commerce Clause. The dormant Commerce Clause doctrine is a judicially created construct” Trayce Hockstad, *On the Road to Supreme Court Review: The Constitutionality of Truck-Only Tolls*, 28 WIDENER L. REV. 1, 18 (2022).

172. See *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 99 (1994).

173. See *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 173 (2018).

174. “[T]he Court repeatedly has declared that Congress may authorize the states to engage in conduct that would otherwise violate the Dormant Commerce Clause.” Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 155 (2005).

175. *Duckworth v. Arkansas*, 314 U.S. 390, 400-01 (1941) (Jackson, J., concurring).

terms of the ends that the federal government may pursue,¹⁷⁶ this justification would preclude states from adopting provisions intended to discriminate against other states. Minimal sovereignty, however, does not accept the absolute nature of sovereignty. Hence, were the Court to adopt that notion of sovereignty, it would either have to justify the dormant commerce clause on other grounds or abandon the doctrine.

Adopting the concept of minimal sovereignty, however, might not be as detrimental as Justice Jackson suggests because it would not require the Court to abandon much of what comprises dormant commerce clause doctrine. The commerce clause allowed Congress to provide a coordinated response to discrimination by the British against American goods carried and cargo on American ships. But the need for the national government to coordinate the response reflected the unwillingness of the states to cooperate with respect to imposts on foreign trade.¹⁷⁷ This lack of cooperation led many of the states with the best ports to enact legislation that not only attempted to force other states to protect them against British discrimination but also to leverage the volume of imports at their ports to obtain revenues that ultimately were paid by the people in neighboring states.¹⁷⁸ This in turn led neighboring states to enact provisions that protected the goods they produced and sent to other states from economic discrimination.¹⁷⁹ There is strong evidence that the commerce clause was seen as a means of limiting state power to enact protectionist regulation of interstate commerce.¹⁸⁰ The Constitution addressed these problems not only by granting Congress the power to regulate interstate commerce, but also by prohibiting states taxing of imports and exports that came through their harbors¹⁸¹ and guaranteeing “[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States.”¹⁸²

176. See BARBER, *supra* note 86, at 55.

177. See KLARMAN, *supra* note 53, at 21-23 (describing how the lack of coordination between states allowed Britain to discriminate against American trade).

178. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 47 (2005).

179. See Denning, *supra* note 178, at 48.

180. See Denning, *supra* note 178, at 81-85. As Madison later recalled, the commerce clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of [government].” Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 15 (J.B. Lippincott & Co. 1865).

181. U.S. CONST. art. I, § 10. “[I]mport and export could refer either to interstate or foreign commerce.” Denning, *supra* note 178, at 86.

182. U.S. CONST. art. IV, § 2, cl. 1. Historically, there existed explicit recognition of privileges and immunities of trade and commerce. Arguably, the framers did not feel the need to include such a provision in the Constitution because Congress was given the power to regulate interstate commerce, which was understood to preclude states from discrimination against the commerce of other states. See DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 18 (2003).

Together these provisions provide good reason to read the affirmative commerce clause to prohibit states from discriminating against the goods and services of other states.¹⁸³

The prong of the dormant commerce clause that allows courts to declare state regulations that are adopted for a legitimate state purpose to be unconstitutional if they unduly burden interstate commerce, however, is another matter. Among the Framers there was disagreement about the extent to which the grant of federal power over interstate commerce was exclusive. Madison expressed the opinion that the power over commerce was “indivisible and ought to be wholly under one authority.”¹⁸⁴ To the contrary, Roger Sherman advocated: any danger from states interfering with interstate commerce could be addressed by Congress, whose power to regulate commerce was supreme.¹⁸⁵ The Constitutional Convention did not resolve this question.¹⁸⁶ But even Chief Justice Marshall, an avowed nationalist, recognized that the Constitution afforded states authority to exercise their police powers even when such exercise affected interstate commerce.¹⁸⁷ The question was how much interference with commerce did the Constitution allow.¹⁸⁸ In terms of the exclusivity required by traditional sovereignty, that translates into whether the power to enact a particular regulation that affects commerce belonged to the federal government or instead to the states.

This line is clearly not dictated by the Constitution and courts have no legally principled way to draw it.¹⁸⁹ The question comes down to whether the legitimate interests of the state outweigh the cost imposed on interstate commerce.¹⁹⁰ This is quintessentially a question of policy not law. It is best answered by the branches constrained by political processes. Minimal sovereignty allows the courts to escape this conundrum by abandoning sovereignty-based limits on state power. Unless the Constitution itself precludes states from exercising a power, they should be free to do so. If Congress believes that the states, while legitimately exercising their police powers, have enacted laws that unduly interfere with interstate commerce, it is free to enact its own regulations preempting the offending laws.

183. Denning, *supra* note 178, at 88-89.

184. KLARMAN, *supra* note 53, at 152.

185. *Id.*

186. *Id.*

187. See FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 15-22 (1937).

188. *See id.*

189. “While it has become standard practice . . . to consider, in addition to these factors, whether the burden on commerce imposed by a state statute ‘is clearly excessive in relation to the putative local benefits,’ such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part) (internal citations omitted).

190. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

It deserves noting that reading minimal sovereignty to eliminate the second prong of current dormant commerce clause doctrine would have marginal effects on the balance between state and federal power. Perhaps wary of declaring state statutes that were duly adopted by legislatures pursuing legitimate state ends to be unconstitutional, cases in which courts have struck down statutes under this prong are few and far between.¹⁹¹

2. Federal Preemption of State Law.

Minimal sovereignty might also affect the permissible bounds of federal preemption of state law. Given that minimal sovereignty would prohibit the federal government from commandeering states to use their coercive powers to further federal policy, it also stands to reason that it would also prohibit the federal government from telling states not to use those powers to further such policy.¹⁹² Thus, it is imperative to discuss how minimal sovereignty would permit the federal government to react to states implementing policies that Congress does not support. It deserves noting that this imperative already exists given the Court's current Tenth Amendment jurisprudence. The Court has avoided addressing it only because it has not maintained a consistent conception of sovereignty. As already recognized, its Tenth Amendment doctrine reflects an acceptance of minimal sovereignty's non-overlapping spheres of federal and state powers, while its doctrine with respect to the bounds of federal power has flipped back and forth between states' rights and nationalist conceptions, both of which accept the division of sovereign powers into exclusive federal and state spheres.¹⁹³

Current law divides preemption into four types: express preemption and three types of implied preemption—conflict preemption, obstacle

191. "Of late, this balancing test has been used to invalidate very few statutes in the Supreme Court and does not have much bite in the lower courts either." Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623, 624 (2007).

192. See Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 863-64 (2016) (arguing that a state's sovereign interest in adopting and enforcing its laws justifies state standing to sue the United States). At times, the Supreme Court has eluded the potential conflict between federal preemption and state sovereignty by characterizing the state interest as "quasi-sovereign." *Id.* at 866.

193. In cases presenting the issue of how the non-commandeering doctrine of the Tenth Amendment squares with preemption doctrine, the Court has simply ignored the issue. For example, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court found that Congress intended federal immigration law to occupy the field and hence preempted Arizona law making violation of some federal immigration laws a state crime. Justice Scalia, at the outset of his dissent, noted that the Court's decision deprived Arizona of "the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there." *Id.* at 417. But neither the majority nor the dissent addressed the non-commandeering doctrine. The majority simply stated: "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.* at 399.

preemption, and preemption by occupying the entire field of regulation over a matter.¹⁹⁴ Conflict preemption occurs when “it is impossible for a private party to comply with both state and federal law.”¹⁹⁵ Obstacle preemption is related in that it occurs when “under the circumstances of [the] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”¹⁹⁶ even if it is technically possible for a person to comply with both state and federal law. Field preemption occurs when “[t]he scheme of federal regulation” is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”¹⁹⁷

Conflict and obstacle preemption are not in any tension with state sovereignty. Recall that minimal sovereignty precludes the federal government from telling the states how to exercise their sovereign authority, but it does not deny that the supremacy clause elevates federal law over state law when the two conflict.¹⁹⁸ In other words, as long as preemption can be viewed as a means of deciding whether state law applies to a particular factual circumstance, and not as telling the state what laws it can and cannot adopt and enforce, it is entirely consistent with minimum sovereignty. Conflict preemption arises when federal law tells private persons how they must act or must not act. An actual conflict of law occurs when state law tells private persons that they must act in a manner prohibited by federal law, or that they must not act in a manner required by federal law. In either case, federal law controls the action of the person, not the state, and therefore does not run afoul of the Tenth Amendment or the notion of minimal sovereignty. In that situation, courts will deem the federal law as controlling with respect to the private conduct. Similarly, obstacle preemption does not tell the state how to regulate, and therefore it too is consistent with minimal sovereignty.

Express preemption and field preemption, however, are trickier because they directly preclude the states from regulating matters that Congress has taken it upon itself to address. One might recharacterize these types of preemption as operating on private entities. For example, one might argue that express and field preemption simply reflect Congress expressing an intent that private conduct be regulated by the substance of federal law and nothing more. For example, if Congress wanted all conduct related to some field, say the manufacture and distribution of drugs, to be subject to federal regulation and beyond that

194. See Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. ECON & POL'Y 217, 240-41 (2022).

195. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

196. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871-75 (2000); *Felder v. Casey*, 487 U.S. 131, 153 (1988).

197. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

198. See *supra* notes 51-51 and accompanying text.

for the free market to work unfettered, it could achieve that by specifying that federal regulation of such manufacturing and distribution occupies the field and hence preempts any additional state law. That seems to specify the standards to which private conduct is subject, and hence would not run afoul of the Tenth Amendment non-commandeering principle.

It is not clear that recharacterization relieves the tension between these types of preemption and the non-commandeering principle when statutes imbue federal officials with discretion to interpret and execute federal law. In such instances, the statute is not defining standards of private conduct but rather is assigning that task to federal officials to the exclusion of states. Such preclusion of state sovereign law-making authority runs afoul of the non-exclusivity of such powers under minimal sovereignty. Thus, application of express and field preemption when Congress has left the federal standards to executive discretion would violate the precepts of minimal sovereignty. The supremacy clause, however, would still allow federal standards actually adopted to preempt any state laws that conflicted or undermined the obstacles of federal regulation.

IV. MINIMAL SOVEREIGNTY AND SOVEREIGN IMMUNITY

Sovereign immunity is yet another matter for which the concept of sovereignty greatly influences current legal doctrine, and hence would also be affected by minimal sovereignty. For a minimal sovereign to exercise the coercive power of the state, it must be able to structure its government as it sees fit to exercise such power. Hence, a sovereign can exempt itself from particular provisions of its own laws. In addition, establishing the relations between the courts and the executive and legislative branches of the government certainly falls within the powers of minimal sovereignty. It follows that a sovereign government has the inherent power to limit suits against itself in its own courts.

A. Immunity of States from Suit in Federal Court and the Eleventh Amendment.

The question arises, however, whether the nature of sovereignty demands that a sovereign state not be subject to suit in any court except upon its agreement to such suit. One can argue that this was the assumption that prevailed at the time the Constitution was ratified.¹⁹⁹

199. Alexander Hamilton wrote: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal." See THE FEDERALIST NO. 81, at 399 (Alexander Hamilton) (Lawrence Goldman ed., 2008); see also Steven Menashi, *Article III as a*

And the citation of the history of state immunity from suit in federal courts is often cited to support this assumption.²⁰⁰ Shortly after the Constitution was ratified, the Supreme Court, in *Chisholm v. Georgia*, held that citizens of one state could assert federal diversity jurisdiction to sue a different state in federal district court to seek repayment of revolutionary war debts incurred by the debtor state.²⁰¹ The majority in *Chisholm* reasoned that Article III of the Constitution explicitly withdrew states' immunity to suit in federal courts.²⁰² The holding in *Chisholm* was reversed by the Eleventh Amendment to the Constitution soon after the case was decided.²⁰³ And subsequent cases construing the Eleventh Amendment read it as expressing agreement with the dissent in *Chisholm*, which was predicated on a theory of inherent sovereign immunity that posited that being subject to suit in any court was antithetical to the status of being sovereign.²⁰⁴

The thesis of minimal sovereignty, however, asserts that sovereignty should only recognize those privileges necessary to the exercise of coercive authority over those subject to the state's jurisdiction. There is nothing inherent in the exercise of coercive powers that mandates that one sovereign government not be subject to suit in the courts of another. Therefore, the notion of minimal sovereignty does not justify immunity of states from suit in federal court, or the immunity of the federal government from suit in state courts. As such, minimal sovereignty is in tension with the historical understanding of the Eleventh Amendment as ratifying a broad proscription of subjecting states to suit in federal courts. If such immunity for states is to inhere, it must have a source other than the abstract concept of sovereignty.

Of course, in exercising minimal sovereign power, a state may voluntarily abandon its authority to sue another sovereign in its courts. Thus, one potential source of sovereign immunity between nations could be an agreement between the nations, whether express or implied. With respect to the federal system of the United States, the Constitution provides the overarching agreement of how the federal government interacts with the governments of the states. Therefore, any limitation on the jurisdiction of the federal courts over cases brought against states, or of the state courts over suits brought against the federal government may be found in the Constitution itself. But if it cannot be squarely located in the Constitution, then it should be rejected as inconsistent with the concept of minimal sovereignty.

Constitutional Compromise: Modern Textualism and State Sovereign Immunity, 84 NOTRE DAME L. REV. 1135, 1150, 1156-8, 1165-1171 (2009).

200. *E.g.*, *Hans v. Louisiana*, 134 U.S. 1, 5-6, 12, 15-19 (1890); *see also Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

201. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

202. *Id.* at 452, 468, 470-72.

203. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 454 (Wolters Kluwer 8th ed. 2021).

204. *See, e.g., Hans*, 134 U.S. at 3, 12-13; *Alden*, 527 U.S. at 715.

As initially ratified, the Constitution said nothing about either immunity of suits against states in federal courts or suits against the federal government in state courts.²⁰⁵ As just discussed, however, the Eleventh Amendment does address the jurisdiction of federal courts over state government. Therefore, one might reasonably construe that amendment as an explicit bar to suits against states in federal court. But the language of the Eleventh Amendment provides a much narrower bar to federal courts entertaining suits against states. It reads: "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."²⁰⁶ The language of the amendment technically deprives federal courts of authority to entertain suits against states only when the suits are brought under federal diversity jurisdiction.²⁰⁷ In diversity cases, the substantive law that applies is state law, and under minimum sovereignty a state could provide that it not be subject to suit under its own laws. Thus, this narrower interpretation of the Eleventh Amendment would be consistent with minimal sovereignty if it is understood as guaranteeing that federal courts may not apply a state's own law against the state unless the state has consented. Avoiding judicial prescriptions that depend on a broader but theoretically problematic understanding of sovereignty thus counsels for accepting the narrower textually specific interpretation of the Eleventh Amendment.

B. Implications of Minimal Sovereignty for State Immunity from Suit in Federal Court

Allowing federal courts to entertain suits against states for violations of federal law would hardly work as an avulsion in the law. The need to hold states accountable for complying with federal law has long been recognized.²⁰⁸ In *Ex Parte Young*, the Supreme Court avoided the implications of state sovereign immunity by holding that the actions of an officer of the state are not protected by state sovereign immunity when the officer acts beyond their legal authority, such as by violating

205. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 104-05 (1996) (Souter, J., dissenting).

206. U.S. CONST. amend. XI.

207. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033-36, 1060-63 (1983).

208. "[E]nforcement [of federal law against a state] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . [I]n exercising her rights, a State cannot . . . deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." *Ex parte Virginia*, 100 U.S. 339, 346 (1880).

federal statutory or constitutional law.²⁰⁹ By this legal construction, the federal government is able to keep states from ignoring federal constitutional and statutory rights, for example, by allowing “section 1983 suits” against state officials who, acting under color of state law, violate federal law.²¹⁰ The fictional nature of the *Ex Parte Young* doctrine is made obvious by the tension created by recognizing that an official named in such a suit is said to act under color of state law but at the same time in their personal capacity.²¹¹

In fact, eliminating the need for the *Ex Parte Young* doctrine provides significant benefits. One complication stemming from that doctrine is that state agencies often are considered representatives of the state, and hence immune from suit despite alleged federal law violations.²¹² The line between the entities that enjoy immunity and those that do not is not always pellucid, leading to cases being dismissed because they are sloppily styled.²¹³

More significantly, replacing the fiction of *Ex Parte Young* may be essential to prevent states from undermining rights provided by federal law. Recently, Texas tried to circumvent the requirement that states respect a woman’s right to an abortion that had been found in the United States Constitution. In 2021, Texas enacted a statute—SB 8 2021—that banned any person from providing an abortion of a fetus in which a heartbeat could be detected or aiding and abetting the provision of such an abortion.²¹⁴ The statute relied on private civil suits for enforcement by creating a cause of action for any person other than a state actor to collect damages from any violator of the SB 8 ban and setting minimum statutory damages of \$10,000.²¹⁵ The statute also prohibited state actors from enforcing the fetal heart beat abortion

209. A state official acting unconstitutionally cannot use the State’s name to “enforce a legislative enactment” because “the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.” *Ex Parte Young*, 209 U.S. 123, 159-160 (1908).

210. 42 U.S.C. § 1983.

211. See *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254-55 (2011); *Idaho v. Couer d’Alene Tribe*, 521 U.S. 261, 269-70 (1997).

212. See, e.g., *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

213. See, e.g., *Lynn v. Colorado Dep’t of Insts. Div. of Youth Servs.*, 15 F. App’x 636, 637 (10th Cir. 2001) (dismissing plaintiff’s claim, even assuming that the relief he sought would otherwise be available, because he sued the state but did not sue a state official in any capacity).

214. See TEX. HEALTH & SAFETY CODE § 171.204 (2021). Because generally a fetal heart-beat can be detected during the sixth week of pregnancy, the SB 8 provision is also known as the six-week ban. See Kaitlin Sullivan, ‘Heartbeat bills’: Is there a fetal heartbeat at six weeks of pregnancy?, NBC NEWS: WOMEN’S HEALTH (May 3, 2022), <https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-pregnancy-rena24435> [<https://perma.cc/3GYK-MQ9H>].

215. See TEX. HEALTH & SAFETY CODE § 171.208 (2021).

ban.²¹⁶ By authorizing only private civil suits to enforce the ban, SB 8 2021 essentially threatened all abortion providers with monumental civil liability.²¹⁷ This threat dramatically affected the availability of abortion services in Texas when it took effect even though prior to its enactment a pregnant woman had the right to an abortion of any non-viable fetus.²¹⁸ The abortion providers could not protect themselves from application of the statute, which clearly was unconstitutional when enacted, because the state was immune from suit and there was no official they could name who implemented the statute.²¹⁹ Presumably any state can use the same scheme to force individuals to refrain from exercising any federal constitutional or statutory right and entirely undermine the federal courts' ability to protect such rights. Under minimal sovereignty, the State of Texas could have been named in a suit in federal court alleging that enactment of SB 8 violated a woman's right to an abortion. Thus, the implications of minimal sovereignty would prevent states from using this civil liability scheme to undercut individual rights guaranteed by federal law.

One potential concern is that eliminating state immunity will subject states to suits for monetary fines and damages, which in turn will impact state sovereign powers. That concern, however, seems more significant at first blush than its likely impact because, at least currently, there are few avenues that would impose damage awards against states. Outside of narrow areas of law, such as admiralty, there is little federal common law that can be used to impose liability on states.²²⁰ Federal statutory law sometimes imposes damages and fines for violations, but statutes that impose such monetary relief

216. See TEX. HEALTH & SAFETY CODE §§ 171.207, 171.208 (2021); see Mary Ziegler, *The Deviousness of Texas's New Abortion Law*, THE ATLANTIC (Sept. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/deviousness-texas-new-abortion-law/619945/> [<https://perma.cc/VTJ8-V35A>].

217. See TEX. HEALTH & SAFETY CODE § 171.208 (2021).

218. See generally Whitney Arey, Ph.D. et. al., *A Preview of the Dangerous Future of Abortion Bans — Texas Senate Bill 8*, 387 NEW. ENG. J. MED. 388 (2022) (describing how S.B. 8 threatened availability of abortion services in Texas). The Supreme Court established a woman's right to an abortion in *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (establishing viability as the criteria and using trimesters of pregnancy as a proxy for viability); see also *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 874, 876-79 (1992). After SB 8 took effect, the Supreme Court overruled *Roe* and *Casey*, thus eliminating a woman's right to abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 230 (2022). But until *Dobbs* was handed down, SB 8 effectively allowed Texas to prevent many women from exercising their right to an abortion in Texas.

219. See, *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 573-74 (Tex. 2022).

220. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), famously holds: "There is no federal general common law." In diversity jurisdiction cases, state law applies. *Id.* at 78-79. "[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' These instances are 'few and restricted' and fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947)).

generally apply to the public.²²¹ Thus, by their nature they do not address liability for state exercises of sovereign power. Statutes for violations of civil rights are an exception that do impose liability for acts that states might take in their sovereign capacity. Currently these apply only to *persons* who have deprived an individual of their civil rights, rather than on the states themselves,²²² although by adopting minimal sovereignty, the Court would enable Congress to amend such statutes to provide for damage suits directly against states if there is political will for Congress to do so.²²³ Pragmatically, however, actions requiring states to prevent future violations of federal rights can impose costs on the states of equal or greater amount than those that would be imposed by damage awards.²²⁴ Hence, the threat of significant unwarranted state liability under federal law likely would not influence state use of its sovereign powers significantly more than does current law. In addition, the Tenth Amendment's non-commandeering principle precludes the federal government from directly controlling state exercises of their coercive (i.e. sovereign) powers except to the extent that the Constitution explicitly grants Congress power to enforce constitutionally specified limits on such exercises.²²⁵ Therefore, the Tenth Amendment precludes federal statutes that impose liability simply to influence states' exercise of their sovereign powers.

There is a possibility that minimal sovereignty could widen the scope of damage suits against state officials under statutes that authorize such suits for a denial of an individual's civil rights. But such suits are currently not protected by absolute privilege if in fact the official acted contrary to federal law. Under the reasoning of *Ex Parte*

221. See, e.g., Fair Labor Standards Act of 1934, 29 U.S.C. §§ 201-262; Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

222. For example, the statute most often used to protect against state government incursions on federal rights—42 U.S.C. § 1983—provides “[e]very *person* who, under color of [state law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity.” (emphasis added). See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976).

223. Such amendments, however, would be limited by the Tenth Amendment's non-commandeering principle. See *supra* notes 201-205 and accompanying text.

224. CHEMERINSKY, *supra* note 203, at 480. “So long as federal jurisdiction is exercised to compel future compliance with federal law, particularly the federal Constitution, then that compliance can, apparently, cost a State any amount of money, despite sovereign immunity.” Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 53 VAND. L. REV. 407, 465 (1999); cf. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 110 (2013).

225. Those Amendments to the Constitution that explicitly create rights that cannot be abridged by any state and include the provision: “Congress shall have power to enforce this article by appropriate legislation,” see U.S. CONST. amends. XIII, XIV, XV, XIX, XXIV & XXVI, specify limits on states' exercise of their sovereign powers that are independent of (i.e. external to) any conception of state sovereignty. And the provision granting Congress power to enforce these amendments merely allows Congress to ensure that states do not violate these independent constitutional mandates. See *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997).

Young, by so acting, the official is deemed to have acted beyond their rightful authority and hence in their personal capacity.²²⁶ Current law does grant officials qualified immunity from civil rights suits against them in their personal capacity, but that immunity reflects a doctrine the courts created to shield officials from the possibility of being accused of wrongdoing for failing to carry out their official responsibilities with sufficient zealotry and for carrying them out overzealously.²²⁷ Thus, qualified immunity is a constraint on damages against government officials that operates independently of conceptions of state and federal sovereignty.²²⁸

One other potential concern, addressed in *Ex Parte Young* itself, is that opening states to suits in federal court will allow plaintiffs who harbor an ideological dislike of a state statute to simply name the governor or the state legislator as defendants in suits seeking to have the statute declared unconstitutional as soon as it is adopted.²²⁹ Today, however, standing would prevent such suits unless the plaintiff could show a reasonably high probability that they would suffer a concrete injury from the challenged statute or regulation.²³⁰ Thus, eliminating the need to name an official who is authorized to enforce a challenged statute or regulation is unlikely to lead to a cavalcade of lawsuits to challenge state laws before they are applied.

C. Implications of Minimal Sovereignty on Federal Officials Immunity from Suit in State Courts

Subjecting the federal government to suit in state courts would seem to have a greater impact than the converse. State law, such as ordinary tort law, could impose liability on the federal government or a federal official for the official's action implementing federal law. For example, a state court might entertain a tort suit against a federal law enforcement agent for excessive use of force.

Federal preemption of state law under the supremacy clause of the Constitution, however, would still provide a limit on such suits. Under "obstacle preemption," state law would be preempted to the extent that

226. 209 U.S. 123, 159-160 (1908).

227. Qualified or "good faith" immunity was first recognized in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), which justified the doctrine by arguing that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does [so without probable cause]." The Court has since refined the doctrine to hold that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

228. See Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1704-07 (2022).

229. *Young*, 209 U.S. at 157.

230. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

it interfered with implementation of federal law.²³¹ That could be read to preempt liability of a federal official for any act that is explicitly authorized or that comes within discretion that the official is granted under federal law, even if that discretion is applied in a negligent manner. So read, preemption would lead to potential federal liability under state law only when a suit is already available in federal court for the same conduct under the Federal Tort Claims Act.²³² The only difference (which may have some significance) is if courts were to recognize minimal sovereignty, then the state courts (subject to potential Supreme Court review) would determine the bounds of discretion granted to officials by federal statute if the plaintiff sued under state tort law, while currently federal judges make that determination under the Federal Tort Claim Act.

CONCLUSION

Over the history of the United States, the Supreme Court has relied on various understandings of sovereignty to decide questions about the constitutional bounds of federal and state power. At various times the Court has applied either a nationalist or state rights conceptions of dual sovereignty. Both conceptions, however, recognize that sovereignty requires a sphere within which the sovereign actor retains absolute power. And neither conception provides much promise for each level of government to effectively check the other. In this Article, I propose a conception of minimal sovereignty that abandons the requirement that a sovereign must enjoy absolute power over matters it is authorized to regulate. The Article explains how minimal sovereignty provides a more promising likelihood of each level of government checking the other. It then goes on to describe how minimal sovereignty would affect judicial doctrines about the bounds of federal and state power, doctrines of sovereign immunity of state government from suit in federal court, and the inverse immunity of the federal government from suit in state court. It concludes that such changes, while unlikely to be momentous, could provide significant benefits in the structure of the law governing state and federal government interactions.

231. See *supra* notes 197-200 and accompanying text.

232. The Federal Tort Claims Act provides for tort liability of a federal official except to the extent that liability is predicated on an authorized discretionary act by that official. Federal Tort Claim Act, 28 U.S.C. §§ 1346, 2680(a), 2674; see also *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991).

