FIELD OFFICE FEDERALISM

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State governments are neither regional offices nor administrative agencies of the Federal Government.

—Justice Sandra Day O'Connor

[The federal government] must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. . . . It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States.

—Alexander Hamilton

INTRODUCTION

IMAGINE, for a moment, a world where the federal government chose not to create massive executive and judicial bureaucracies. Instead of establishing the Environmental Protection Agency, Congress instructed state environmental agencies to enforce federal environmental law. Rather than creating federal bankruptcy courts, Congress obliged state courts to adjudicate bankruptcy cases. Instead of regulating commerce, raising taxes, and enacting patent laws itself, it commanded state legislatures to enact laws in these areas, pursuant to federal instructions. Could the federal government usher in such a

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3 A world in which Congress instructs state legislatures to legislate even though Congress could enact laws itself may strike some as odd. Yet there are instances in which Congress might choose to instruct rather than to legislate directly. For instance, in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(A) (1988), Congress ordered states to negotiate in

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Brave New Federalism? In other words, may the federal government commandeer a state’s legislative, executive, and judicial resources for federal purposes, effectively transforming states into the “field offices” of the federal government?4

In New York v. United States,5 the Supreme Court took a small step forward in resolving these questions by holding that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”6 New York involved whether the federal government could force a state to take title to low-level radioactive waste if the state refused to regulate such waste pursuant to congressional instructions.7 The Court divined that obliging states to take title to radioactive waste “would ‘commandeer’ state governments into the service of federal regulatory purposes” and would thus “be inconsistent with the Constitution’s division of authority between federal and state governments.”8 Nor could Congress compel state governments to enact waste disposal legislation as Congress lacked the authority to “instruct” state legislatures.9 The Court held that Congress’ offer of an empty “choice” between these two options was unconstitutional, since “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.”10

Justice Sandra Day O’Connor, writing for the majority, documented an originalist case against the constitutionality of federal commandeering of state legislative and executive branches.11 Relying

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4 Justice O’Connor argued in FERC v. Mississippi, 456 U.S. 742 (1982), that the answer was no: “State legislative and administrative bodies are not field offices of the national bureaucracy.” Id. at 777 (O’Connor, J., concurring in part and dissenting in part).
6 Id. at 2435.
7 Id. at 2427-28.
8 Id. at 2428.
9 Id.
10 Id.
11 Justice O’Connor identified the Court’s task as “understanding and applying the framework set forth in the Constitution” rather than “devising our preferred system of government.” Id. at 2418. Her attempt to “understand[ ]” and “apply[ ]” the Constitution
upon *The Federalist Papers* and the records of the Philadelphia Convention, she asserted that the Framers "opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."\(^{12}\) State ratifying conventions likewise rejected the principle of legislation upon states.\(^{13}\) She concluded that the Constitution "confers upon Congress the power to regulate individuals, not States."\(^{14}\)

Writing in dissent, Justice John Paul Stevens disagreed with Justice O'Connor's historical interpretation of federal power over states.\(^{15}\) Justice Stevens acknowledged that the Framers of our Constitution chose to permit Congress to legislate directly upon individuals,\(^{16}\) but he denied that this additional power over individuals was substituted for the Continental Congress' power over states. Rather, Stevens insisted that the Framers "enhanced" the power of the Federal Government by *adding* the ability to legislate over individuals.\(^{17}\) "Nothing in th[e] history [of the Framing] suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles."\(^{18}\)

A detailed review of Philadelphia Convention debates, *The Federalist Papers*, the Anti-Federalist papers, and the state ratification debates reveals that both Justice O'Connor and Justice Stevens are partially correct. Justice O'Connor properly declares that the Founding Generation abandoned federal commandeering of a state's legisla-

includes an analysis of the original understanding of the federal-state relationship. See id. at 2421-23.

\(^{12}\) Id. at 2422.

\(^{13}\) Id. at 2422-23.

\(^{14}\) Id. at 2423. Justice O'Connor also cited several Court cases to support her proposition that the federal government could not commandeer state authorities. Id. (citing, e.g., FERC v. Mississippi, 456 U.S. 742, 762-66 (1982) and Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

\(^{15}\) *New York*, 112 S. Ct. at 2446 (Stevens, J., concurring in part and dissenting in part).

\(^{16}\) Id. at 2446 (Stevens, J., concurring in part and dissenting in part).

\(^{17}\) Id. (Stevens, J., concurring in part and dissenting in part).

\(^{18}\) Id. (Stevens, J., concurring in part and dissenting in part).

Justice Stevens also could have cited *The Federalist Papers* and a few Court cases to support his assertion that the Constitution permits Congress to legislate directly upon states. See Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1477 n.211 (1987) (citing *The Federalist Papers* and Court cases that suggest that Congress can legislate upon states).
The Framers and Ratifiers regarded commandeering state legislatures as so futile, unjust, and potentially explosive that they repudiated the concept altogether. Adopting an originalist mode of interpretation, such as the one Justice O'Connor adopted in *New York*, suggests that the Congress may not compel state legislatures to enact statutes raising revenue, regulating commerce, or regulating nuclear waste disposal.

But Justice O'Connor is mistaken in asserting that Congress may not use states as the "regional offices" or "administrative agencies" of the federal government. Justice Stevens has the better historical argument in insisting that the federal government may compel states to enforce federal law. Though the Founding Generation did not wish to permit coercion of states in their sovereign, legislative capacities, many individuals envisioned federal commandeering of state executive officers. Apparently, they saw no inconsistency in abandoning federal commandeering of state legislatures while at the same time permitting federal commandeering of state executives. Indeed, many of the same individuals who abandoned the idea of commandeering state legislatures affirmed that the federal government could require state officers to enforce federal law. Thus, under an originalist analysis, state officers may be transformed into the "bureaucratic puppets" of the federal government.

To round out the discussion, this Article addresses the original understanding on federal commandeering of state courts. Justice O'Connor viewed this question as wholly distinct from the question of commandeering state legislatures. "[F]ederal 'direction' of state judges is mandated by the text of the Supremacy Clause. No compa-

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19 *New York*, 112 S. Ct. at 2421-23. While originalist interpretation is by no means universally accepted, such an analysis may still prove useful or at the very least provides an interesting history lesson. In any case, searching for the original understanding of the constitutionality of federal commandeering is the best method for judging Justice O'Connor's opinion on her own terms, since originalism is the interpretive mode she adopts. See id.

Before turning to originalist evidence, however, this Article first examines the Constitution's text and structure in an attempt to discern whether the text itself addresses the "commandeering" question.

20 Id. at 2434.

21 "I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes." Id. at 2446-47 (Stevens, J., concurring in part and dissenting in part).

rable constitutional provision authorizes Congress to command state legislatures to legislate.\(^\text{23}\) Justice O'Connor's interpretation was shared by many in the Founding Generation who argued that the last clause in the Supremacy Clause required state judges to hear federal claims.\(^\text{24}\) Others, however, believed that the Supremacy Clause might not be the only method by which the federal government may commandeer state courts because they thought that the power to constitute inferior tribunals permitted Congress to constitute state courts as inferior tribunals.\(^\text{25}\) Put simply, many in the Founding Generation recognized a federal right to commandeer state courts; they merely disagreed as to the sources of such power.

The Founding Generation, then, distinguished commandeering state legislatures from commandeering the magistracy (executives and judicial officers).\(^\text{26}\) Hamilton's statement that the federal government "must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions"\(^\text{27}\) is illustrative of this principle.

This distinction between the legislature and magistracy may reflect four structural features of the Framers' era. First, the locus of state sovereignty was in state legislatures. They embodied whatever sovereignty a state possessed, whereas state executives and judges were not sovereign at all. Second, state legislatures exercised legislative will. They chose whether to enact laws, whereas state executives and courts were viewed as officers of general jurisdiction who enforced all appli-

\(^{23}\) *New York*, 112 S. Ct. at 2430. Justice O'Connor might have added, "nor is there any comparable constitutional provision that authorizes Congress to command state executives to execute."

\(^{24}\) The Supremacy Clause provides:

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

U.S. Const. art. VI, cl. 2.

\(^{25}\) U.S. Const. art. I, § 8, cl. 9 (declaring that "Congress shall have power to constitute Tribunals inferior to the supreme Court").

\(^{26}\) The "Magistracy" was used to encompass both executive and judicial officers. Compare The Federalist No. 47, at 337-38 (James Madison) (discussing the executive magistracy) with No. 78, at 490 (Alexander Hamilton) (discussing the judicial magistracy). Note also that Madison asserted that the executive and judicial magistracies are related; judges "are shoots from the executive stock." The Federalist No. 47, at 338 (James Madison).

\(^{27}\) The Federalist No. 16, at 116 (Alexander Hamilton).
cable laws of the land. Third, state legislatures were multimember institutions, making sanctions for noncompliance extremely difficult. State executive and judicial officers, because they acted as individuals, could be sanctioned individually in a manner not possible for state legislatures. Finally, and perhaps most importantly, commandeering state legislatures had failed spectacularly under the Articles of Confederation. Commandeering of state executive and judicial officers, on the other hand, was not viewed as similarly futile.

Part I of this Article discusses commandeering of state legislatures, executives, and courts under the Articles of Confederation, since a rudimentary understanding of the system in place prior to the adoption of our Constitution will prove useful. Part II examines the Founding Generation’s views on federal attempts to compel states to legislate. Part III considers the Founding Generation’s beliefs on conscripting state executives to enforce federal law. Part IV addresses whether the federal government may force state courts to administer federal law. Ultimately, I conclude that where Congress has legislative authority, it may commandeer state executives and state courts, but not state legislatures, to help implement its constitutional powers. In this sense, states can be the federal government’s field offices.

I. FEDERAL COMMANDEERING OF STATE LEGISLATURES, EXECUTIVES, AND COURTS UNDER THE ARTICLES OF CONFEDERATION

While much is known about the Philadelphia Convention and the ratification history of the Constitution, the period of the Articles of Confederation remains largely unexplored. An understanding of the Articles will prove instructive, however, since many of our Constitution’s provisions were not generated in Philadelphia, but rather descended from the Articles’ provisions. After all, the Articles’ history is a part of the Constitution’s history. It is appropriate, then, to

28 This Article does not discuss what impact the Reconstruction Amendments may have on federal authority to commandeer state legislatures. In the interest of tractability, this Article will leave such an examination for another day. Rather, it discusses all questions of commandeering from the vantage point of the original Constitution. Therefore, Justice White’s criticisms concerning the majority’s failure to discuss the Reconstruction Amendments apply with equal force here. See New York, 112 S. Ct. at 2444 n.3 (White, J., concurring in part and dissenting in part) (arguing that the amendments enacted after the Civil War expanded the scope of congressional power).
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begin with a brief outline of the federal-state relationship during the Articles.

A radically different relationship existed at the time of the Articles. States were dominant and almost independent, while the federal “government” was frail and largely dependent upon the states. Even where the Articles appeared to bestow on the federal government a “right” or an “authority,” those rights and authorities were exercised at the sufferance of the states. In other words, though the Articles strived to form a “confederation,” the putative members of the confederation constantly challenged its authority. States would often simply ignore the Continental Congress, even when it acted pursuant to one of its Articles powers. To speak of “legal” or “binding” federal commandeering of the states in this context may be anachronistic.

A. The Continental Congress: Requisitioning State Legislatures

The Articles of Confederation created a loose association of the thirteen American states. The people of the several states were not asked for their approval of the confederation. Rather, the Articles’ authority derived from the approval of the thirteen state legislatures. As a result, the Articles more closely resembled an “international treaty or covenant” among separate nations than a constitution.

Article II set the tone for the loose confederation: “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” Despite the fact that the Articles granted the Continental Congress authority over

29 Articles of Confederation art. III (“The said States hereby severally enter into a firm league of friendship with each other . . . .”).


At the Philadelphia Convention, George Mason noted that “at present the representation in congress are [sic] not representatives of the people, but of the States.” 1 The Records of the Federal Convention of 1787, at 142 (Max Farrand ed., 1911) [hereinafter Federal Convention]. All future citations to the Federal Convention reflect modern spellings and expanded abbreviations.

31 See Robert W. Hoffert, A Politics of Tensions 206 (1992) (reprinting the terms under which the Articles of Confederation would be ratified).

32 Anderson, supra note 30, at 56; see also Allan Nevins, The American States During and After the Revolution 1775-1789, at 660 (Augustus M. Kelley ed., 1969) (1924) (describing how the members of the Continental Congress resembled ambassadors and Congress a diplomatic assembly); Amar, supra note 18, at 1446-48 (same).

33 Articles of Confederation art. II.
foreign affairs\textsuperscript{34} and the war power,\textsuperscript{35} the states were to retain considerable independence and remain essentially "sovereign."\textsuperscript{36}

Indeed, for the most part, Congress could not pass laws binding on individuals.\textsuperscript{37} In particular, Congress lacked the authority to tax individuals\textsuperscript{38} or to raise armies directly. Congress, however, could make binding requisitions from state legislatures for money\textsuperscript{39} or men only;\textsuperscript{40} it lacked the authority to commandeer state legislatures wholesale. Recall that Article II of the Articles of Confederation limited congressional authority to those powers "expressly delegated" to the Congress.\textsuperscript{41} Hence, Congress could not tell state legislatures to pass laws regulating waste disposal because such a power was not in the Articles. Nor could Congress prescribe how states would raise the funds and soldiers needed to satisfy federal requisitions.\textsuperscript{42}

Though Congress possessed the \textit{de jure} authority to require states to provide funds and men to the national government, \textit{de facto}, Congress could not pass laws binding on individuals. See, e.g., Articles of Confederation art. IX (granting the Continental Congress the power to set rules of capture and piracy, to establish post offices throughout the states, to regulate coinage, weights, and measures, and to regulate the affairs of Indians not members of any state); see also The Federalist No. 40, at 289 (James Madison) (stating that the Continental Congress had the authority to regulate individuals); 1 Federal Convention, supra note 30, at 314 (Madison claiming that "in some instances as in piracies, captures etc. the existing Confederacy . . . must operate immediately on individuals."); 1 id. at 283 (Hamilton stating that the Articles of Confederation exercised legislative powers over individuals insofar as it regulated piracies on the high seas).

Madison, however, insisted that the Continental Congress possessed the ability to "tax" individuals in two instances: Congress could charge postage for mail services and had the implied authority to levy a tribute on coinage. The Federalist No. 40, at 289 (James Madison).

Articles of Confederation art. VIII (giving Continental Congress the authority to requisition funds from the states).

Articles of Confederation art. IX (giving Continental Congress the authority to make "binding" soldier requisitions from each state in proportion to white inhabitants).

Articles of Confederation art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

Articles of Confederation art. VIII (declaring that states may determine method of gathering funds to satisfy requisition). State legislatures were required to arm and clothe the soldiers they supplied, but at the national government's expense. Articles of Confederation art. IX.
gress was often reduced to ineffectual requests.43 Federalist John Jay noted that the Continental Congress could only advise the state governments to fulfill federal requisitions.44 Even the eminent Anti-Federalist George Mason understood that the Articles of Confederation were "deficient in not providing for coercion and punishment against delinquent States."45 Congress’ inability to secure a robust, reliable stream of funds left it in an enfeebled position. Alexander Hamilton proclaimed that "[t]he measures of the Union have not been executed; the delinquencies of the State have . . . arrested all the wheels of the national government, and brought them to an awful stand."46

In part, the Founding Generation convened the Philadelphia Convention to remedy this defect. They recognized that Congress could not rely on the whim of the states to comply voluntarily with "binding” requisitions.47 A more binding method of procuring money and

43 At the Philadelphia Convention, Madison “observed that the violations of the federal articles had been numerous and notorious. Among the most notorious was an Act of New Jersey herself; by which she expressly refused to comply with a constitutional requisition of Congress . . .” 1 Federal Convention, supra note 30, at 315. Connecticut delegate Roger Sherman similarly noted that “[t]he unwillingness of the states to comply with the requisitions of congress, has embarrassed us greatly.” 1 id. at 347.

44 Jay stated:

It is a pity that the expectations which actuated the authors of the existing confederation, neither have nor can be realized: . . . those gentlemen were led to flatter themselves that the people of America only required to know what ought to be done, to do it. This amiable mistake induced them to institute a national government [that] though very fit to give advice, was yet destitute of power . . . . They seem not to have been sensible that mere advice is a sad substitute for laws; nor to have recollected that the advice even of the allwise and best of Beings, has been always disregarded by a great majority of all the men that ever lived.


45 1 Federal Convention, supra note 30, at 34.

46 The Federalist No. 15, at 161 (Alexander Hamilton).

47 Anti-Federalist William Symmes discerningly noted that the delegates to the Philadelphia Convention sought to augment congressional authority because many of them, having served in the Continental Congress, understood the Continental Congress’ lack of authority.

At present, Congress have [sic] no power to lay taxes, &c. nor even to compel a compliance with their requisitions. May we not suppose, that the members of the great Convention, had severely felt the impotency of Congress, while they were in it, and therefore were rather too keenly set for an effectual increase of power?

men was necessary if the thirteen colonies were not to go their separate ways.

B. The Continental Congress' Powers over State Executives

The Articles of Confederation did not expressly empower the Continental Congress to commandeer state executives. Because the Articles limited congressional powers to those expressly delegated to Congress, one might presume that the Continental Congress could not commandeer state executives.\footnote{The Articles of Confederation commandeered state executives in one instance. State executives had to “deliver up” those who were fleeing from justice in another state. Articles of Confederation art. IV (“If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.”).} A closer look at the historical evidence suggests that this initial impression is incorrect.

In many instances, Congress appears to have relied on its own set of federal officials to enforce federal law. Under Article IX, Congress had the authority “to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under [congressional] direction.”\footnote{Articles of Confederation art. IX.} After an attempt to supervise execution of federal law through committees,\footnote{Richard B. Morris, The Forging of the Union 1781-1789, at 95-110 (1987). Initially, Congress relied upon committees composed of members of Congress to superintend execution. Id. at 95.} Congress established Secretaries of Finance, War, and Foreign Affairs.\footnote{Jennings B. Sanders, Evolution of Executive Departments of the Continental Congress 1774-1789, at 96 (1935).} These officers appear to have executed federal law largely without the assistance of state officers. Similarly, the national Post Office appeared to have hired its own post-riders.\footnote{See id. at 161.}

Yet the Continental Congress may have had the legal authority to “requisition” the assistance of state executives. The Continental Congress would on occasion command state executives to perform a task. For instance, when appointing federal piracy courts from the ranks of state courts,\footnote{Under the Articles, Congress could “appoint[ ] courts for the trial of piracies and felonies committed on the high seas.” Articles of Confederation art. IX.} Congress decreed that if there were more than one state admiralty judge in a particular state, the “supreme executive power of
such State may and shall commissionate one of them exclusively to join" the piracy court. In other words, rather than hiring its own set of officials and dispersing them throughout the states, Congress would merely require state officers to carry out Articles duties. Here, Congress commandeered the chief executive of each state and forced them to make a choice among admiralty judges. The federal duty was hardly burdensome; nonetheless it was a federal duty prescribed by Congress.

Congress appears to have commandeered state officials only when the Articles granted it some legislative authority. For instance, when Congress wanted to impose an excise tax upon imports, it merely "recommended to the several states" that the states "invest" in the Congress a "power to levy" such taxes. Since Congress could not enact an excise tax, it obviously could not commandeere state officials to collect it.

Summarizing, where Congress had authority under the Articles to legislate, it appears to have acted as though it could employ state executives to execute those powers.

C. The Continental Congress’ Authority over State Courts

The Articles authorized Congress to establish three types of courts: appellate “capture” courts, piracy courts, and a “congressional” court. Appellate capture courts heard capture appeals from state courts. Piracy trial courts heard cases involving piracies and felonies committed on the high seas. The congressional court settled land disputes between individuals of different states and disputes between states more generally.

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54 Ordinance of April 5, 1781, in 19 Journals of the Continental Congress 1774-1789, at 355 (Gaillard Hunt ed., 1912) [hereinafter Journals].
55 24 id. at 188-89 (1922).
56 "The United States in Congress assembled, shall have the sole and exclusive right and power of... establishing courts for receiving and determining finally appeals in all cases of captures..." Articles of Confederation art. IX.
57 Id.
58 "The United States in Congress assembled shall also be the last resort on appeal in all disputes... that... arise between two or more States concerning boundary, jurisdiction or any other cause whatever... [and]... all controversies concerning the private right of soil claimed under different grants of two or more States..." Id.
59 "Capture" referred to the congressionally sanctioned practice of capturing enemy ships and their cargoes as "prizes." The Articles of Confederation granted Congress the power of "establishing rules for deciding, in all cases, what captures on land or water shall be legal." Id.
In April 1781, as part of its authority to appoint piracy courts, Congress ordered state courts to hear piracy cases. "[T]he justices of the supreme or superior courts of judicature, and judge of the Court of Admiralty of the several and respective states, or any two or more of them, are hereby constituted and appointed judges for hearing and trying such offenders." The Continental Congress apparently interpreted its authority to appoint piracy courts as permitting the appointment of state judges as federal piracy judges.

The 1781 ordinance required state courts to hear piracy cases; it was not merely hortatory. Prior to the adoption of the Articles, the Continental Congress' authority was hortatory since it lacked the legal authority to compel state courts to hear federal cases. For instance, a 1775 resolution "recommended to the several legislatures in the United Colonies . . . [that they] erect courts of Justice, or give jurisdiction to the courts now in being for the purpose of determining" capture cases. Similarly, a 1780 resolution "recommended" that States "make laws authorizing and directing the Courts of Admi-

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60 Ordinance of April 5, 1781, in 19 Journals, supra note 54, at 355.
Erwin Surrency also appears to have viewed the statute as requiring state judges to hear capture claims. See Erwin C. Surrency, History of the Federal Courts 7 (1987).

61 The ordinance was supposedly enacted pursuant to Congress' "sole and exclusive right and power (inter alia) of appointing courts for the trial of piracies and felonies committed on the high seas." 19 Journals, supra note 54, at 354.

Julius Goebel notes that when the Continental Congress legislated pursuant to its enumerated Articles' powers it enacted ordinances. Where Congress lacked a legal basis for legislating, it "used the resolve, usually in the idiom of recommendation" to the states. 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 201-02 (1971).

62 Goebel attempts to cast doubt on this interpretation when he claims that the ordinance merely "relegat[ed] this jurisdiction to courts to be erected by the states." 1 Goebel, supra note 61, at 173.

Goebel, however, does provide some evidence of state reaction to the ordinance. He claims that South Carolina "does not appear to have legislated until Feb. 27, 1788," a number of years after the ordinance was enacted. 1 id. at 174 n.129. Massachusetts, however, enacted its statute in February of 1783. Id.

63 Resolution of November 25, 1775, in 3 Journals, supra note 54, at 373 (1905).

At the same time it recommended that states establish capture trial courts, Congress established itself as the Court of Appeals for capture cases. 3 id. at 374; see Henry J. Bourguignon, The First Federal Court: The Federal Appellate Prize Court of the American Revolution 1775-1878, at 45-46 (1977). Bourguignon documents how different states reacted to Congress' recommendation. 1d. at 57-75.
ralty . . . to carry into full and speedy execution the final decrees of the Court of Appeals" for capture cases.  

With the adoption of the Articles in March of 1781, however, Congress secured a solid legal basis for creating courts. With that authority, Congress gained the power to tell state courts to hear piracy claims. At the same time, Congress recognized limitations on its authority. For instance, in November 1781, Congress again merely recommended that states establish courts to handle cases concerning the laws of nations. Since the Articles had not granted Congress the authority to create courts with such jurisdiction, Congress could not force state courts to handle such cases.

While Congress had the explicit power to set up piracy courts and appellate capture courts, it lacked the ability to institute capture courts with original jurisdiction. The Articles' drafters apparently relied upon the understanding that state courts would continue to hear capture cases based on the Continental Congress' 1775 recommendation and subsequent state acceptance of the recommendation. If states could have refrained from establishing capture courts, federal authority to regulate captures and to establish an appellate capture court would have been rendered inconsequential. Because of the strong presumption that state capture courts would continue to exist, disbanding the existing state capture courts without providing an

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64 Ordinance creating court of appeals, January 15, 1780, in 16 Journals, supra note 54, at 61 (1910). The 1780 ordinance ended use of a congressional committee as a tribunal for hearing capture claims. The ordinance instead authorized a separate capture court to handle appealed capture cases. Congress established the court in anticipation of the Articles' ratification, which would formally grant Congress the authority to set up an appellate capture court. Bourguignon, supra note 63, at 112-16.

65 The Secretary of Foreign Affairs also understood that the power of appointing piracy courts included the authority to order state judges to hear piracy claims. 29 Journals, supra note 54, at 797 (1933); see also 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 536 (Jonathan Elliot ed., 2d ed. 1968) [hereinafter Debates] (Madison noting that Continental Congress used authority to institute piracy courts by investing the jurisdiction in state courts); 3 The Documentary History of the Ratification of the Constitution 527 (Merrill Jensen ed., 1978) (Roger Sherman contending that Continental Congress had authorized state courts to hear piracy claims).

66 Resolution of November 23, 1781, in 21 Journals, supra note 54, at 1137 (1912) (recommending that States enact laws to punish violators of international law and to establish courts with cognizance of such cases).

67 Articles of Confederation art. IX. Congress may have had the authority to use state courts or particular state judges to staff the appellate court of captures just as it apparently had the authority to use state courts as federal piracy courts.
alternative means of hearing capture cases might have been a violation of the Articles. In other words, though Congress lacked the authority to create capture courts, it may have had an implicit right to demand that states continue to maintain them.

An analogous (and equally implicit) Confederation-imposed duty might have been the understanding that all states would continue to have state legislatures. For instance, Article V of the Articles of Confederation mandated that “delegates shall be annually appointed in such manner as the legislature of each State shall direct.” Any state that eliminated its legislature would be unable to fulfill its responsibilities. Similarly, Article IV assumed that there would continue to be state governors or executives to “deliver[ ] up and remove[ ]” other states’ fugitives. Any state which decided to do away with government altogether would probably have violated the Articles, even though the Articles did not expressly require the continuation of state governments, legislatures, or executives.

Finally, because there were so few federal courts and because their jurisdiction was so limited in scope, state courts were most often the final arbiters of the Articles, federal law, and treaties. There was no textual provision in the Articles giving state courts jurisdiction over these cases. Nonetheless, state courts resolved disputes about post

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68 To be sure, Article II of the Articles of Confederation would militate against accepting this interpretation: “Each State retains . . . every power, jurisdiction and right which is not by this confederation expressly delegated to the United States, in Congress assembled.” Articles of Confederation art. II. Because there was no express federal right to capture courts of original jurisdiction, one could argue that Congress lacked such a right. Yet, the express right to create appellate capture courts and the authority to fashion federal capture rules probably encompassed a right to the continued availability of state capture courts to hear capture claims.

69 Of course a legal right to the continuing service of state capture courts is empty if the states do not comply and the federal government has no means of forcing compliance. Recall that under the Articles, states chose whether or not to comply with federal commands, regardless of the legal basis of those demands. Nevertheless, members of the Continental Congress probably would have viewed the disestablishment of state capture courts as a violation of an implicit federal right, regardless of the federal government’s ability to vindicate that right.

70 Articles of Confederation art. V.

71 Articles of Confederation art. IV.

72 See generally Letters from The Federal Farmer, reprinted in 2 Anti-Federalist, supra note 47, at 315 (“The state courts in all other cases [nonpiracy, non-land grant cases, etc.] possess the judicial powers, in all questions arising on the laws of nations, of the union, and the states individually—nor does congress appear to have any controul over state courts, judges or officers.”) (letter dated Jan. 18, 1788).
office law,73 heard cases involving individuals accused of defrauding the United States,74 and interpreted international treaties.75

The Confederation period teaches three lessons about federal authority to commandeer state courts. First, the Continental Congress' authority to appoint courts included the authority to command state judges to hear certain federal cases. Second, the Articles may have created an implicit federal right to the continued existence of state capture courts. Third, state courts were the main expositors of the limits of federal law—they were the most important "federal" courts of the Confederation period. Recognizing the limitations on the Continental Congress' authority informs our understanding of the Constitution as it relates to commandeering state courts.

II. COMMANDEERING STATE LEGISLATURES UNDER THE CONSTITUTION

A. Constitutional Text and Structure

The Constitution does not speak of requisitions for soldiers or money. Instead, Congress itself may levy taxes76 and raise armies.77

73 See 1 Hampton L. Carson, The History of the Supreme Court of the United States 84 (1902).
74 1 id. at 82-83.
75 The Federalist No. 22, at 197-98 (Alexander Hamilton) (lamenting the Articles system in which each state judiciary interpreted international treaties, resulting in contradictory interpretations).
76 U.S. Const. art. I, § 8, cl. 1. It is perhaps by design that the congressional power to lay taxes appears first among section eight powers.
77 U.S. Const. art. I, § 8, cl. 12.

Justice Stevens contends that "in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops." New York, 112 S. Ct. at 2446 (Stevens, J., concurring in part and dissenting in part). If he had compared the Continental Congress' power under the Articles to our Congress' authority, he would have noticed significant differences. As noted, under the Articles, Congress had the explicit authority to make requisitions for soldiers. Under our Constitution, such congressional authority is nowhere to be found. Instead, Congress has the authority to raise armies itself.

Professor Akhil Amar persuasively contends that though Congress can raise armies, it cannot draft individuals into the armed forces. Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1168-73 (1991). Instead, the congressional authority to raise armies may be used only to form a "volunteer" army such as the one we have today. Id. In other words, Congress may not involuntarily draft individuals into the federal army.

Though Congress cannot compel state legislatures to turn over soldiers to the federal government, Congress can force state executives to cede control of state militias to the federal executive. U.S. Const. art. I, § 8, cl. 15. Yet the power to requisition state militias in extraordinary circumstances (i.e., to ensure execution of federal law, suppress insurrections,
Such language is the first hint that Congress lacks the authority to requisition from state legislatures, for while the Articles of Confederation explicitly granted such power to the Continental Congress, our Congress lacks similar express authority.\textsuperscript{78}

Where the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it. The Continental Congress had the power to borrow and coin money, set weight and measure standards, establish post offices, punish piracies, and declare war.\textsuperscript{79} The Constitution also grants Congress these powers.\textsuperscript{80} Conspicuously, the Constitution does not mention requisition authority, even though this authority was crucial to the Continental Congress' power.\textsuperscript{81} The lack of clear requisitioning authority strongly suggests that the Constitution does not permit federal requisitioning from state legislatures.\textsuperscript{82}

\textsuperscript{78} Under the original Constitution, the only legislative "commandeering" authority that our federal government explicitly possessed was similar to a power the Articles of Confederation Congress enjoyed. Our Constitution, pre-Seventeenth Amendment, required state legislatures to choose their U.S. Senators. U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . . ."), amended by U.S. Const. amend. XVII, cl. 1.

Similarly, under the Articles, state legislatures chose delegates to Congress. "[D]elegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress . . . ." Articles of Confederation art. V.

\textsuperscript{79} Articles of Confederation art. IX.

\textsuperscript{80} U.S. Const. art. I, § 8, cl. 2, 5, 7, 10, 11.

\textsuperscript{81} The authority to requisition funds was the Continental Congress' most important power, because without funds, it could not carry on its business, namely legislating, executing, and judging.

\textsuperscript{82} Nor does the Constitution require states to comply with requisitions. Article I, Section 10, Clause 1 places numerous unconditional prohibitions on state legislative authority. U.S. Const. art. I, § 10, cl. 1 (stating that, e.g., no state shall enter into treaty, coin money, pass a Bill of Attainder, or impair the obligations of contracts). Clauses 2 and 3 of that same section limit state power as well, but permit Congress to remove such restrictions. U.S. Const. art. I, § 10, cl. 2, 3 (prohibiting states, without the consent of Congress, from laying imposts or duties or entering into interstate compacts). Had Congress retained the ability to requisition money and men, the Constitution might have contained a provision providing that "no state
Nonetheless, one might argue that the Constitution *implicitly* grants Congress the authority vested in the Continental Congress in addition to its enumerated powers. Yet Article I does not even mention the Articles of Confederation, let alone explicitly incorporate Articles powers. Indeed, Article I, Section 1 of the Constitution rejects claims of "implicit" federal legislative power by limiting legislative authority to those powers "herein granted." Requisitioning authority is not included among the powers "herein granted," creating a strong presumption that it does not exist.

Finally, if the Framers and Ratifiers had wanted to create *plenary* federal authority to coerce state legislatures, a power that the Continental Congress itself did not possess, they undoubtedly would have been more explicit. Recall that the Continental Congress only had the authority to commandeer state legislatures in two instances: for soldiers and for money. Would the Constitution create implied, plenary congressional authority to commandeer state legislatures? It seems unlikely that the Framers and Ratifiers would have vested Congress with expansive, tacit authority that the Continental Congress itself did not possess.

A proponent of commandeering state legislatures might rejoin that there is a textual provision which permits commandeering state legislatures: the Necessary and Proper Clause. Congress has the power to commandeer state legislatures where such commandeering is necessary and proper to carry into execution the federal government's enumerated powers. Perhaps Congress cannot effectively carry into execution its Commerce Clause authority unless it can command the New York legislature to legislate.

shall fail to fulfill congressional requisitions." Given the grave difficulties the Continental Congress experienced with requisitions, it is unlikely that the Constitution would have retained the requisitioning system without also taking steps to ensure its future success. See supra Part I.A. Of course, language alone could not have thwarted states bent on ignoring federal requisitions, yet it would have at least made clear that states were *supposed* to comply.

83 U.S. Const. art. I, § 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

84 See supra Part I.A.

85 U.S. Const. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").
Yet resorting to the Necessary and Proper Clause fails to resolve
the constitutional question: the clause alters the style but not the sub-
stance of the inquiry. It transforms the debate into whether the action
is "proper," without answering the underlying question.86 An oppo-
nent of commandeering state legislatures might call commandeering
"improper," thus eliminating the Necessary and Proper Clause as a
textual hook.87 The Necessary and Proper Clause results in an ana-
lytical dead-end, for we are left with the question of whether com-
mandeering state legislatures is proper.

Based on the lack of any explicit authority suggesting that Congress
may commandeering state legislatures and the unlikelihood of any such
implicit authority, textual and structural analysis suggests that Con-
gress may not commandeering state legislatures.

B. The Original Understanding of Commandeering State
Legislatures

Some may find the textual and structural arguments unconvincing.
Conceivably, the Framers and the Ratifiers could have thought that
Congress would retain its requisition authority even though the Con-
stitution makes no mention of requisitions. To determine whether the
Framers meant to grant Congress the implied power of com-
mandeering state legislatures, we could examine the original understand-
ing of each Section 8 power and determine whether commandeering
state legislatures fit into the original understanding of each clause—a

86 Note that the Necessary and Proper Clause contains two distinct tests. First, any law
enacted pursuant to the clause must be "necessary and proper." The "proper" prong of the
clause most likely acts as a test to determine if the law is consistent with the Constitution's
text, structure, and implicit premises.

Second, any law enacted pursuant to the clause must help "carry[ ] into execution" one of
Congress' own enumerated powers or those of the Executive or Judicial Branch. For instance,
the clause cannot be used to withdraw the Supreme Court's original jurisdiction. Such a law
would not only be improper (it would violate Article III), it would also not help "carry[ ] into
execution" the Supreme Court's powers. See Saikrishna B. Prakash, Note, Hail to the Chief
Administrator: The Framers and the President's Administrative Powers, 102 Yale L.J. 991,

87 In The Federalist Papers, Hamilton questioned the clause's ability to expand
congressional authority. He noted that Congress lacked the explicit authority to regulate laws
of inheritance and that the Necessary and Proper Clause did not change this reality. The
Federalist No. 33, at 201-05 (Alexander Hamilton); see Prakash, supra note 86, at 1009-10 &
n.124. Similarly, an opponent of commandeering could argue that commandeering state
legislatures is inconsistent with the Constitution's text, structure, and implicit notions of state
sovereignty.
daunting task to be sure. Fortunately, the Founding Generation directly addressed the matter and confirmed our first intuition. Both opponents and supporters of the Constitution completely repudiated the notion that Congress should be able to oblige states to take legislative action. Requisitioning state legislatures had proved futile, unjust, and potentially explosive and for these reasons the Founding Generation renounced the concept.

1. The Philadelphia Convention’s Response to the Articles

Justice O'Connor's New York opinion describes the two primary plans laid before the Convention. The Virginia Plan granted Congress legislative authority over individuals, eliminating the need for state legislative action. At the same time, Congress would retain its "Legislative Rights vested... by the Confederation." Gouverneur Morris, prominent Pennsylvania delegate, thought such a government would be a "national, supreme, Government... having a complete and compulsive operation." George Mason agreed "that such a Government was necessary as could directly operate on individuals."

The New Jersey Plan also vested Congress with limited authority to legislate upon individuals, including the power to tax imports. Yet, instead of permitting broad federal taxation or authorizing Congress to create a federal army, the New Jersey Plan sought to strengthen the Articles’ requisition system. When the federal government required

88 112 S. Ct. at 2422.
89 1 Federal Convention, supra note 30, at 21 ("[T]he National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation ... .").
90 Id.
91 Id. at 34.
92 Id.
93 Justice O'Connor's opinion erroneously contends that under the New Jersey Plan, "Congress would continue to require the approval of the States before legislating." New York, 112 S. Ct. at 2422. Yet the Plan would have permitted Congress to levy duties on all foreign goods. 1 Federal Convention, supra note 30, at 243 (proposing granting Congress the "author[ity] to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture"). James Madison also recognized that the New Jersey Plan would "in many instances... operate immediately on individuals." 1 id. at 314.
94 The New Jersey Plan stated that:
soldiers or funds, Congress would have to turn first to the states. If a state did not meet its quota, Congress could then pass acts “directing and authorizing” the collection of the funds or soldiers within the delinquent state.  

Even before William Patterson had offered the New Jersey Plan, it was clear that it would fail: too many delegates recognized the futility of requisitions. George Mason repeated his desire that the new central government enact laws directly applicable to citizens. “Under the existing Confederacy, Congress represent the States not the people of the States: their acts operate on the States not on the individuals. The case will be changed in the new plan of Government.” George Reed would have gone even further and eliminated states altogether. “Too much attachment is betrayed to the State Governments. We must look beyond their continuance. A national Government must soon of necessity swallow all of them up.”  

Governor Edmund Randolph, the principle proponent of the Virginia Plan, attacked the portion of the New Jersey Plan that sought to coerce states into satisfying congressional requisitions. According to Madison’s Convention notes, Randolph condemned coercion as “impracticable, expensive, cruel to individuals. It tended also to habituate the instruments of it to shed the blood and riot in the spoils of their fellow Citizens . . . . We must resort therefore to a national

whenever requisitions shall be necessary . . . the United States in Congress be authorized to make such requisitions[,] . . . that if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non complying States and for that purpose to devise and pass acts directing and authorizing the same.

1 Federal Convention, supra note 30, at 243.

Charles Pinckney similarly wanted to keep the requisition system intact. He sought a more effective method of coercing the states to meet requisitions, however.

[T]here ought to be a power to oblige the parties to furnish their respective quotas without the possibility of neglect or evasion . . . . No Government has more severely felt the want of a coercive Power than the United States . . . . Unless this power of coercion is infused, and exercised when necessary, the States will most assuredly neglect their duties.

3 id. at 119 (Appendix A).

95 1 id. at 243.
96 1 id. at 133.
97 1 id. at 136.
98 The New Jersey proposal provided that “if any State . . . shall oppose or prevent the carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth the power of the Confederated States, . . . to enforce and compel an obedience to such Acts . . . .” 1 id. at 245.
Legislation over individuals . . .”

James Madison also rejected the notion of legislating upon states. “The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”

Ultimately, the Convention spurned the New Jersey Plan and its discredited attempt to permit Congress to continue requisitioning. Significantly, the Convention also abandoned the portion of the Virginia Plan that stated that Congress would retain its Articles legislative authority, authority which included the power to requisition states. States were improper subjects of legislation because state legislators could merely ignore federal instructions. Short of a civil war, Congress could not force its will upon obstinate states. Hence, the Convention did not merely supplement requisitions with legislative authority over individuals, rather, it completely substituted legislation upon individuals for legislation upon states.

2. The Federalist Papers and Coercion of State Legislatures

Though The Federalist Papers are primarily considered political tracts written to support ratification, they also serve to illuminate the defects of the Constitution’s predecessor, the Articles of Confederation. Hamilton and Madison were well-served in discussing not only the Constitution’s potential benefits but also the Articles’ many perceived flaws.

Numerous Papers address the futility and injustice of legislating upon states in their political capacities. In Federalist No. 15, Hamilton claimed that “[t]he great and radical vice in the construction of

99 1 id. at 256. Randolph’s complaints about the New Jersey Plan were unfair on two counts. First, the New Jersey Plan did not solely rely upon coercion of states as a means of pursuing federal governmental ends. See supra text accompanying note 95. Second, Randolph’s original plan also relied upon coercion when a state failed to fulfill a requisition. 1 Federal Convention, supra note 30, at 21 (investing the national legislature with the authority to call forth the Union’s forces should a state fail to meet a requisition). By the time Randolph criticized the New Jersey Plan, however, he had abandoned the idea of coercing states.

100 2 Federal Convention, supra note 30, at 9.

101 1 id. at 322.

102 1 id. at 54 (Madison observing that “[t]he use of force against a State, would look more like a declaration of war, than an infliction of punishment”); see infra text accompanying notes 104-07.

103 The Convention modified the Virginia Plan and eventually abandoned those portions of the plan that contemplated coercion of the states. Our Constitution does not mention requisitions; nor does it sanction use of force against recalcitrant states.
the existing Confederation is in the principle of LEGISLATION for
STATES or GOVERNMENTS, in their CORPORATE or COL-
LECTIVE CAPACITIES, and as contradistinguished from the
INDIVIDUALS of which they consist.”\textsuperscript{104} Requisitioning states was
a “radical vice” because Congress lacked the ability to compel obedi-
ence to congressional requisitions. Moreover, Congress also lacked
the power to punish laggard states. As Hamilton noted, “[i]f there be
no penalty annexed to disobedience, the resolutions or commands
which pretend to be laws will, in fact, amount to nothing more than
advice or recommendation.”\textsuperscript{105} Penalties, the \textit{sine qua non} of a sys-
tem of laws, could be applied in but two manners: “by the agency of
the courts and ministers of justice, or by military force.”\textsuperscript{106} Courts
could only coerce individuals, not states. As a result, “[i]n an associa-
tion where the general authority is confined to the collective bodies of
the communities [state legislatures] that compose it, every breach of
the laws must involve a state of war.”\textsuperscript{107} In other words, when states
failed to satisfy federal requisitions, the federal government’s only
recourse would be military force.

Comparing the states to planets and the federal government to the
sun, Hamilton asserted that there is an “eccentric tendency in the
subordinate or inferior orbs, by the operation of which there will be a
perpetual effort in each to fly off from the common centre.”\textsuperscript{108} This
tendency springs from the “love of power” which animates the infer-
ior orbs and impels them to resist the force that “abridge[\textit{s}]” and
“control[\textit{s}]” their authority.\textsuperscript{109} Because of this “eccentric tendency,”
congressional decrees will go unexecuted if they must rely upon the
state legislatures.\textsuperscript{110} Attempting to coerce states to abandon these
“eccentric tendenc\textit{i}es” and “delinquencies,” which were the Confed-
eracy’s “natural and necessary offspring,” would trigger a civil war.\textsuperscript{111}

\textsuperscript{104} The Federalist No. 15, at 158 (Alexander Hamilton).
\textsuperscript{105} Id. at 159.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 159-60.
\textsuperscript{108} Id. at 160.
\textsuperscript{109} Id. at 160-61.
\textsuperscript{110} Id. at 161 (“If, therefore, the measures of the Confederacy cannot be executed without
the intervention of the particular administrations, there will be little prospect of their being
executed at all.”).
\textsuperscript{111} Id. at 163 (“It has been seen that delinquencies in the members of the Union are its
natural and necessary offspring; and that whenever they happen, the only constitutional
remedy is force, and the immediate effect of the use of it, civil war.”).
If the central government was to exercise its authority effectively, it must operate without reliance on the inferior orbs. Legislating upon the citizens of the states would achieve federal ends, permit the "COERCION of the magistracy,"112 and circumvent obstructionist states. "[I]f we still will adhere to the design of a national government . . . we must extend the authority of the Union to the persons of the citizens—the only proper objects of government."113 Congressional power operating directly on the citizens of the states would eliminate the "middlemen" that had heretofore stood in the way of the union’s proper functioning.114

While it is clear that the union must operate directly upon individuals, did the authors of The Federalist Papers also expect Congress to retain its power to instruct state legislatures? For instance, was Congress still constitutionally permitted to make monetary requisitions?

There are several hints in The Federalist Papers that Hamilton and Madison may have believed that the Constitution vested the national government with new authority to legislate upon individuals in addition to its existing power to legislate upon states. First, recall that Hamilton insisted that "we must extend the authority of the Union to the persons of the citizens."115 Similarly, Madison warranted "that the great principles of the Constitution proposed by the Convention may be considered less as absolutely new, than as the expansion of principles which are found in the [A]rticles of Confederation."116

Second, Hamilton once appeared to suggest that Congress could revert to the Articles system of requisitions if direct taxation proved

112 Id. at 159.
113 Id.; see also The Federalist No. 16, at 165 (Alexander Hamilton) ("[The union] must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.").
114 Hamilton conceded that states may still resist the national power even with a Congress that legislates directly on individuals. The Federalist No. 16, at 166 (Alexander Hamilton) ("But if the execution of the laws of the national government should not require the intervention of the State legislatures, . . . the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power."). Any attempt to obstruct national laws, however, would be both less likely and more dangerous to those who would attempt such an interposition. Id.
115 The Federalist No. 15, at 159 (Alexander Hamilton) (emphasis added).
116 The Federalist No. 40, at 290 (James Madison) (emphasis added); see also No. 45, at 329 (James Madison) ("If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of its ORIGINAL POWERS.").
inadequate. Hamilton argued that if the national government possessed the authority to tax individuals directly, the states would more likely heed congressional requisitions. "When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part." Hamilton may have expected requisitions and legislation upon individuals to co-exist in the congressional quiver.

Finally, in a discussion concerning the propriety of the Philadelphia Convention's construction of a new Constitution, Madison took great pains to suggest that the Constitution had elements similar to the Articles of Confederation and was thus a mere revision or alteration. Madison asserted that like the Articles of Confederation, "[i]n some instances . . . the powers of the new government will act on the States in their collective characters." Perhaps one of these powers (albeit an implicit one) permits the national government to attempt to coerce states to legislate on behalf of the federal government.

A careful review of The Federalist Papers, however, leaves little doubt that the authors regarded the new federal government's powers over individuals as a substitute for the Articles' requisitioning powers. Rather than merely extending congressional authority, the Constitution actually transformed the nature of congressional power. Hamilton and Madison, if they argued to the contrary, were merely attempting to downplay the Constitution's radical elements.

Note that when Hamilton talked of "extend[ing]" the authority of the union in one breath, in the next he stated that individuals are "the

117 The Federalist No. 36, at 262 (Alexander Hamilton) ("It has been very properly observed by different speakers and writers on the side of the Constitution, that if the exercise of the power of internal taxation by the Union should be discovered on experiment to be really inconvenient, the federal government may then forbear the use of it, and have recourse to requisitions in its stead."). (emphasis added).
118 Id.
119 The Federalist No. 40 (James Madison).
120 Id. at 289.
121 Though the Articles granted Congress some powers over individuals, those powers were limited to a handful of areas. See supra note 37. The new Constitution greatly expanded those areas. U.S. Const. art. I, § 8. More importantly, the new Constitution permitted Congress to tax individuals and to raise armies directly. Although this could be construed as a mere "expansion" of the Continental Congress' powers, such an interpretation is strained because the Continental Congress lacked the authority to directly tax or raise armies; instead it had to act through the states.
only proper objects of governments.” Thus he implied that states are improper objects of legislation. Hamilton also recognized that the Constitution represents a change insofar as it does away with requisitions: “What remedy can there be for this situation [failure to comply with requisitions], but in a change of the system which has produced it—in a change of the fallacious and delusive system of quotas and requisitions?” Continuing, Hamilton insisted that the only “substitute” that can be imagined for the “ignis fatuus in finance” is permitting the national government to tax just as any “well-ordered” government could, i.e., to tax individuals directly.

Though Hamilton appears to have contemplated the continued use of requisitions in *Federalist* No. 36, more often, he decried their feasibility and denounced their injustices. As noted above, he thought the system of quotas and requisitions to be “fallacious and delusive.” In *Federalist* No. 21, Hamilton identified the principle of “regulating the contributions of the States to the common treasury by QUOTAS” as a “fundamental error in the Confederation.” Requisitioning states was futile because state legislatures could safely ignore the federal government’s requisitions. Commandeering state legislatures could also be dangerous: If the federal government insisted upon satisfaction of requisitions, war could break out.

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122 The Federalist No. 15, at 159 (Alexander Hamilton) (emphasis added).
123 The Federalist No. 30, at 233 (Alexander Hamilton) (emphasis added).
124 Id. (emphasis added).
125 The Federalist No. 36, at 262 (Alexander Hamilton).
126 The Federalist No. 30, at 233 (Alexander Hamilton).
127 The Federalist No. 21, at 188 (Alexander Hamilton).
128 “To say that deficiencies may be provided for by requisitions upon the States is on the one hand to acknowledge that this system cannot be depended upon, and on the other hand to depend upon it for every thing beyond a certain limit.” The Federalist No. 30, at 234 (Alexander Hamilton).
129 The Federalist No. 15, at 159-60 (Alexander Hamilton).
Even if states could somehow be coerced into satisfying congressional requisitions, Hamilton still rejected requisitioning as unjust. In Federalist No. 21, Hamilton argued that since the country lacks a commonly accepted measure of wealth, there can be no generally acceptable rule for determining a state's ability to provide funds.\textsuperscript{130} "The attempt, therefore to regulate the contributions of the members of a confederacy by any such rule, cannot fail to be productive of glaring inequality and extreme oppression."\textsuperscript{131} A seeming inequality alone would be sufficient "to work the eventual destruction of the Union" as aggrieved states would abandon the union.\textsuperscript{132} This flaw was "an evil inseparable from the principle of quotas and requisitions."\textsuperscript{133} On the whole, then, Hamilton viewed direct legislation upon individuals as a substitute for commandeering state legislatures. After all, why would the Constitution perpetuate the Articles' "great and radical vice"?\textsuperscript{134}

Finally, when Madison declared that "[i]n some instances ... the powers of the new government will act on the States in their collective characters,"\textsuperscript{135} he was not referring to a congressional ability to requisition from states. Rather, he merely highlighted the Constitution's truly "federal" as opposed to national features.\textsuperscript{136} "In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only."\textsuperscript{137} Hence, with respect to court proceedings, our federal government continues to act upon states in their collective capacities.\textsuperscript{138} Madison might have added Article I, Section

\textsuperscript{130} The Federalist No. 21, at 188 (Alexander Hamilton).
\textsuperscript{131} Id. at 189.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} The Federalist No. 15, at 158 (Alexander Hamilton).
\textsuperscript{135} The Federalist No. 40, at 289 (James Madison).
\textsuperscript{136} The Federalist No. 39, at 284 (James Madison). Madison uses the term "federal" when referring to a government that acts upon political bodies, like states. Id. ("The difference between a federal and national government, as it relates to the operation of the government, is . . . that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities.").
\textsuperscript{137} Id. Madison is referring to Article III's jurisdictional list. U.S. Const. art. III, § 2.
\textsuperscript{138} Of course, enforcing a judicial ruling against a state could be just as troublesome potentially as enforcing a requisition.
10, Clauses 1, 2, and 3,139 much of Article IV,140 and the Supremacy Clause141 to his list of federal powers that act upon states in their collective capacities. For the most part, however, the Constitution is “national” in that it permits Congress to legislate upon individuals rather than upon states.142

*The Federalist Papers* bespeak an abandonment of congressional commandeering of state legislatures.143 Requisitioning was largely

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139 U.S. Const. art. I, § 10, cl. 1 (categorically prohibiting certain state actions); cl. 2 (requiring congressional consent for laying imposts or duties); cl. 3 (requiring congressional consent for numerous military and foreign policy actions). All these restrictions operate on states in their corporate, legislative capacities.

140 U.S. Const. art. IV, § 1 (allowing Congress to prescribe general laws for the manner in which each State's public Acts, Records, and Judicial Proceedings will receive the faith and credit of sister states); § 2 (guaranteeing equal privileges and immunities in the several states and requiring states to deliver fugitives and runaway slaves); § 4 (guaranteeing a republican form of government to all states).

141 U.S. Const. art. VI, cl. 2 (establishing that federal law trumps state law in cases of concurrent legislative jurisdiction).

142 In private letters written after the Philadelphia Convention, Madison repeatedly stated that the Constitution is meant only to act upon individuals. Writing to Thomas Jefferson immediately after the Philadelphia Convention, Madison stated that:

> It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. A voluntary observance of the federal law by all the members could never be hoped for. A compulsive one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent and the guilty, the necessity of a military force both obnoxious and dangerous, and in general a scene resembling much more a civil war than the administration of a regular Government.

> Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them

3 Federal Convention, supra note 30, at 131-32 (third emphasis added); see also 3 id. at 474-75 (letter from Madison to Thomas Cooper stating new government would operate not on states but on individuals); 3 id. at 517 (letter from Madison to N.P. Trist stating that under the Constitution, government would operate “directly on the people”).

143 Professor H. Jefferson Powell contends that *The Federalist Papers* advance the notion that Congress may commander state legislatures, even beyond those areas in which the Continental Congress possessed commandeering authority. H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 659-64 (1993). Specifically, he points to *Federalist* No. 27 for the proposition that Hamilton thought that state legislatures could be commandeered into the service of the federal government. Id. at 663 (quoting *The Federalist* No. 27 (Alexander Hamilton)).

At the same time, Professor Powell acknowledges that there is some evidence in *The Federalist Papers* supporting the view that the Constitution abandoned commandeering state legislatures. For instance, in *Federalist* No. 84, Hamilton insists that Congress “will do all the business of the United States” in contrast to the Confederation period, in which state legislatures undertook the “business of the United States.” Powell, supra, at 664 n.147
futile as states repeatedly ignored requisitions. Moreover, if the federal government attempted to force states to meet requisitions, civil war might break out. Finally, determining requisition amounts would often lead to perceived injustices. States would invariably feel that they were being forced to supply an undue portion of the nation’s finances.

3. Views on Requisitions from Anti-Federalists and the State Ratification Delegates

Anti-Federalists echoed the Federalist belief in the need to legislate upon individuals and not upon state legislatures. Though Governor Edmund Randolph of Virginia chose not to support the Constitution, he nonetheless understood the difficulties associated with requisitions: “[T]he operations of peace and war will be clogged without regular advances of money, and . . . these will be slow indeed, if dependent upon supplication alone. For what better name do requisitions deserve, which may be evaded or opposed, without the fear of coercion?”144 In Randolph’s view, states could be coerced only by blockade or by waging a war, two modes of coercion the national government should avoid.145 “Let us rather substitute the same process, by which individuals are compelled to contribute to the government of their own states.”146 The federal government ought to directly tax citizens “[i]nstead of making requisitions to the legislatures.”147 Randolph unquestionably viewed the federal government’s ability to tax individuals as a substitute for Articles requisitions.

The Federal Farmer also recognized that under the proposed Constitution, Congress would procure funds and troops by legislating

(quoting The Federalist No. 84 (Alexander Hamilton)). Powell belittles this evidence by labelling it “modest support.” See id. Unfortunately, he neglects other Papers that unequivocally disparage commandeering state legislative processes. For instance, he overlooks the abundant comments disparaging requisitioning state legislatures for money and soldiers. See The Federalist No. 15, at 158 (Alexander Hamilton); No. 21, at 188 (Alexander Hamilton); No. 30, at 234-35 (Alexander Hamilton).

As will become even more clear in Part I.B.3, infra, Federalists and Anti-Federalists recognized that the Constitution had abandoned the “fallacious and delusive” principle of instructing state legislatures.

145 Id.
146 Id. (emphasis added).
147 Id. (emphasis added).
upon individuals rather than coercing states. Unlike Randolph, however, he lamented the demise of requisitions. Under the Articles, he observed, "the union makes a requisition, and assigns to each state its quota of men or monies wanted; each state, by its own laws and officers . . . furnishes its quota." The state legislatures properly stood between the union and individuals. Unfortunately, the new Constitution would "operate immediately on the body of the people, on persons and property." A national government that bypasses states "makes the existence of . . . state government of no consequence."

The Federal Farmer questioned the supposed superiority of direct federal taxation; in his view, taxes laid on individuals would often remain uncollected just as requisitions had been. Opponents of the Confederation, he believed, had exaggerated its defects and then had asked for "a total change of the principles, as well as forms of government." The Federal Farmer's comments reveal that he regarded direct taxation a substitute for requisitions since he disparaged the Constitution's "total change of . . . principles" and was reluctant to "totally condemn requisitions."

Luther Martin also decried the system of direct taxation that the Constitution sought to establish. He complained that Congress would tax liquor, clothes, even hearths. Since the states were "better judges of the circumstances of their citizens," they could better determine how to levy taxes. Naturally, he thought that the Articles system of requisitions ought to be used in the first instance. If a state failed to comply with a requisition, national taxes could then be

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149 2 id. at 331-32.
150 2 id. at 332.
151 Id.
152 See id.
153 2 id. at 333 ("[W]e ought to consider what immense bounties the states gave, and what prodigious exertions they made . . . in order to comply with the requisitions . . . .").
154 2 id. at 334.
155 2 id. at 333-34.
157 Id. (emphasis omitted).
applied directly upon individuals. Unfortunately to his mind, the Philadelphia Convention had repudiated requisitioning and had adopted direct taxation of individuals.

The debates in the state ratification conventions also reflect the understanding that the Constitution substituted the principle of legislation upon individuals for the discredited idea of commandeering state legislatures. Speaking at the Connecticut Convention, future Supreme Court Justice Oliver Ellsworth denounced the failings of the Confederation, and spoke in favor of a coercion by law instead of a coercion by arms:

Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. No coercion is applicable to such bodies, but that of an armed force.

Similarly, Rufus King, before the Massachusetts Convention, recited at length the difficulties in requisitioning funds from the states: "What method, then, can be devised to compel the delinquent states to pay their quotas? Sir, I know of none. Laws, to be effective, therefore, must not be laid on states, but upon individuals."

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158 2 id. at 56.
159 Martin had proposed such a scheme at the Philadelphia Convention but it was not enacted. 2 Federal Convention, supra note 30, at 359.
One Anti-Federalist, Old Whig, was under the impression that requisitions might still be used. At the end of a essay in which he railed against direct taxation at length, he remarked that Connecticut delegates to the Philadelphia Convention claimed that the “power of direct taxation as an authority . . . need not be exercised if each state will ‘furnish the quota.’” Essays of an Old Whig (1787-88), reprinted in 3 Anti-Federalist, supra note 47, at 41. Old Whig was probably referring to a letter to Governor Huntington of Connecticut from Convention delegates Roger Sherman and Oliver Ellsworth. In the letter, Sherman and Ellsworth wrote that under the Constitution, “although Congress may raise the money by their own authority,” Congress need not exercise that authority “if each state will furnish its quota.” Letter from the Hon. Roger Sherman and the Hon. Oliver Ellsworth, Esquires, to the Governor of Connecticut (Sept. 26, 1787), in 1 Debates, supra note 65, at 492.

Neither Old Whig nor Sherman and Ellsworth claimed that the national government has the constitutional right to demand a quota, i.e., to requisition. Rather, they appear to suggest that Congress and states may mutually agree to gather revenue by quota rather than through direct taxation. If either the state or Congress should refuse to accept “voluntary” requisitions, Congress could resort to directly taxing individuals.

160 2 Debates, supra note 65, at 197 (emphasis added).
161 2 id. at 56 (emphasis added).
At the New York Convention, Alexander Hamilton insisted that a system of laws acting upon states would require an army or militia to enforce, and would thus be "one of the maddest projects that was ever devised." For him, the cure for this evil was "to enable the national laws to operate on individuals, in the same manner as those of the states do."

Philadelphia Convention delegate Charles Pinckney, speaking at the South Carolina Convention, asserted that the Philadelphia Convention felt it necessary to establish "a government upon different principles, which, instead of requiring the intervention of thirteen different legislatures between the demand and the compliance, should operate" immediately upon the people. He claimed that every delegation at Philadelphia conceived "the necessity of having a government which should at once operate upon the people, and not upon the states."

Finally, at the North Carolina Convention, Samuel Spencer asserted that there ought to be a bill of rights to protect citizens from the forthcoming federal legislation that would regulate citizens rather than states: "Heretofore . . . all the laws of the Confederation were binding on the states in their political capacities . . . but now the [Constitution] is entirely different. The laws of Congress will be binding on individuals . . . ." Echoing Hamilton's comments, William R. Davie similarly denounced that "radical vice" of the Confederation, namely "that its powers could not be executed but . . . by military force, and not by the intervention of the civil magistrate." Davie explained that the Philadelphia Convention delegates recognized that the national government would remain ineffectual "unless its laws operated on individuals." The delegates' experience with the Articles led them "to depart from that solecism in politics—the principle of

162 2 id. at 232.
163 Id. (emphasis added).
164 2 id. at 233.
165 4 id. at 256 (emphasis added).
166 Id.
167 4 id. at 153 (emphasis added).
168 4 id. at 22-22.
169 4 id. at 22. Davie was not a delegate to Philadelphia, but his comments are instructive. His insights into the intent of the Philadelphia delegates suggest that the principles which motivated them to reject legislation upon states were well-known at the time of the Founding.
Numerous speakers at state conventions voiced their understanding that the Constitution had replaced the Articles system of legislation upon state legislatures with a system of legislation upon individuals.\textsuperscript{171}

C. Commandeering State Legislatures Today

Federalists were entirely willing to surrender the Continental Congress' authority to requisition as this authority was thought to be illusory, unjust, and potentially dangerous. In return for relinquishing feeble requisitions, Congress secured the ability to directly regulate individuals, a far more potent and practical power.

What may have been viewed as a good bargain over 200 years ago might not be so viewed today. States are altogether willing to heed congressional dictates, be they legislative or administrative commands. Occasionally, a state will claim that Congress has exceeded its Article I, Section 8 powers. But after a court renders an opinion affirming plenary congressional authority, the state acquiesces. The magistrates now coerce the states; civil war is no longer necessary. What a sea-change in 200 years! \textit{New York v. United States} is fascinating precisely because New York would have complied with congressional commands to regulate waste had the Court ordered New York to do so. Two hundred years ago, New York may not even have bothered challenging a federal waste law—New York would have ignored the waste disposal law altogether.

Nonetheless, the compact struck in Philadelphia and ratified at the state conventions was not conditioned on the continued futility of requisitions. The Constitution wisely relinquished the ineffectual, noncoercive requisitions. Requisitions were futile; states would not comply. Requisitions were unjust; states asserted that Congress treated them unfairly. Requisitions were potentially explosive; a Congress bent on collecting funds might use troops against recalcitrant

\textsuperscript{170} Id. (emphasis added).
\textsuperscript{171} Professor Powell recognizes that Justice O'Connor presents a "lengthy historical justification" for what he appropriately calls her "autonomy of process principle" (i.e., leaving state legislatures and administrative processes free from federal coercion). See Powell, supra note 143, at 641-42. Yet Powell never attempts to refute any of Justice O'Connor's evidence from the state ratification conventions or from the Philadelphia Convention itself. Instead, he limits his discussion of the original understanding of commandeering to \textit{The Federalist Papers}. Powell's argument regarding the relationship between Congress and state legislatures suffers as a result.
states. Today, under an originalist analysis, such as the one Justice O'Connor adopts, the federal government may not reclaim that discarded instrument now that it might prove more efficacious. Congress cannot require states to legislate or refrain from legislating nor can Congress instruct state legislatures in any way.\footnote{172}

If, however, one were to ignore the wealth of evidence and accept the theory that our Congress retains its Articles of Confederation authority,\footnote{173} Congress nonetheless lacks the power to instruct states to regulate nuclear waste. Recall that under the Articles of Confederation, Congress was allowed only to requisition soldiers and money.\footnote{174} The Continental Congress lacked the authority to command state legislatures indiscriminately. Hence, even if the Constitution grants Congress the powers of the Confederation, Congress still lacks the constitutional authority to commandeer state legislatures completely. At most, Congress may only commandeer state legislatures for two items: funds and soldiers. Commandeering state legislatures to regulate low level radioactive waste would still be unconstitutional.\footnote{175}

When Justice O'Connor asserts that Congress may not compel state legislatures to enact waste disposal laws,\footnote{176} she is unequivocally correct.

\footnote{172} Returning to the question of whether it is "proper" for Congress to commandeer state legislatures, a review of the statements of the Constitution's proponents and opponents makes it clear that Congress may not commandeer state legislatures. Virtually everyone regarded such authority as improper.

\footnote{173} See, e.g., New York v. United States, 112 S. Ct. 2408, 2446 (1992) (Stevens, J., concurring in part and dissenting in part) (arguing that the Constitution added to the powers Congress had under the Articles).

\footnote{174} See supra Part I.A.

\footnote{175} Of course, Congress might still have the authority to "coerce" states into regulating low-level radioactive waste by dangling carrots and brandishing sticks. Old Whig and Sherman and Ellsworth appear to suggest that Congress can threaten direct taxation to coerce states to meet their "voluntary" quotas (requisitions). See supra note 159. Madison also thought that voluntary requisitions could be used in lieu of direct taxation; if states did not fulfill these voluntary quotas, Congress could use direct taxation. See The Federalist No. 45, at 328 (James Madison). These passages suggest (but do not establish) that Congress may use carrots and sticks to convince states to legislate in a manner conducive to federal ends.

\footnote{176} See New York, 112 S. Ct. at 2428.
III. Commandeering State Executives under Our Constitution

A. Constitutional Text and Structure

Article II, Section 1, Clause 1 vests federal executive power not in state governors or other state executives but with the President: "The executive Power shall be vested in a President of the United States of America." Moreover, Article II, Section 3 grants the President the authority to "take Care that the Laws be faithfully executed." These grants of executive authority suggest that the President must assume the premier role in enforcing federal law. The President possesses the constitutional authority to superintend the execution of federal law and remains accountable to the people for its administration.

What Article II role are the states to play? States are only mentioned in their capacity as participants in the presidential selection process. They are not explicitly granted any of the federal government's executive power, nor are they responsible for faithfully executing federal law. This might indicate that the Constitution limits the states' Article II function to selection of the Chief Executive and excludes them from any role in executing federal law.

Such an extreme *expressio unius* argument also would suggest that only the President may administer federal law; after all, the President is the only person explicitly given any executive authority. Yet we know better. Even though the executive power and the authority to faithfully execute federal law rest with the President, he may delegate his executive tasks to others. In fact, the Constitution contemplates delegation to superior department heads and inferior executive officers. If the President may assign executive authority to congres-

177 U.S. Const. art. II, § 1, cl. 1.
178 U.S. Const. art. II, § 3.
179 See generally Prakash, supra note 86, at 991 (arguing that the Framers intended the President to be accountable for the execution of federal law and to control its administration).
180 U.S. Const. art. II, § 1, cls. 2, 3.
181 Departments are mentioned in three places in the Constitution. The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2, cl. 1. With respect to appointments, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Finally, Congress has power to make laws "necessary and proper for carrying into Execution the foregoing Powers, and all other
sionally authorized federal officers, could he not also delegate to congressionally deputized state officers? If the Secretary of the Treasury may exercise federal executive power, why not the Governor of Massachusetts, or the Atlanta police? There is no explicit constitutional bar against using state executives as auxiliaries in enforcing federal law.¹⁸²

Yet the debate between Justices O’Connor and Stevens is not about whether state executives may enforce federal law. On this question, both agree: State executives may enforce federal law.¹⁸³ Rather, their disagreement concerns whether the federal government may compel state executives to enforce federal law.¹⁸⁴ As noted above, the Conti-

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¹⁸² Note that the only group constitutionally barred from serving in the federal executive branch are members of Congress: “[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. Const. art. I, § 6, cl. 2.

¹⁸³ Justice O’Connor is not opposed to voluntary state administration of federal law; rather she opposes federal commandeering of state executives, i.e., forced state administration of federal laws. See New York, 112 S. Ct. at 2423-24 (discussing how federal government may provide benefits to states that legislate or regulate in federally approved manners).

Because Justice Stevens finds nothing constitutionally troubling about compelling state executives to enforce federal law, a fortiori, he finds nothing unconstitutional about state enforcement of federal law in general, be it forced or voluntary. See id. at 2446-47 (Stevens, J., concurring in part and dissenting in part).

¹⁸⁴ Would state officers commandeered into administering federal law be “Officers of the United States”? If so, they might have to be appointed by the President and confirmed by the Senate, unless they were considered “inferior officers” for constitutional purposes, in which case Congress could delegate the power to appoint to the President, heads of departments, or judges. See U.S. Const. art. II, § 2, cl. 2.

On the other hand, state officers commandeered into federal service might not be subject to the appointments clause at all. Perhaps state officials who are commandeered into federal service simply do not fit into the category of “Officers of the United States.” Note that state executives who enforce federal law (e.g., under the Constitution’s Fugitive Clause, U.S. Const. art. IV, § 2, cl. 2) are not considered U.S. officers. All agree that state judges must enforce federal law when state and federal law clash, see U.S. Const. art. VI, cl. 2, yet no one argues that state judges must be subject to the Appointments Clause. Similarly, state executives commandeered into enforcing federal law are also probably not be subject to the Appointments Clause.
nental Congress may have thought it had such authority with respect to its explicit Articles powers.\(^{185}\)

An opponent of commandeering state executives might consider Article IV, Section 2, Clauses 2 and 3,\(^{186}\) and Article I, Section 8, Clauses 15 and 16\(^{187}\) as indications that Congress lacks the broad authority to transform states into “federal administrative agencies.” Article IV, Section 2, Clauses 2 and 3 explicitly commandeer state executives to deliver up fugitives from justice and fugitives of injustice, i.e., slaves, to other states. Article I, Section 8, Clause 16 similarly commandeers state executives to administer federal training and disciplinary rules for their respective state militias.\(^{188}\) Article I, Section 8, Clause 15 allows Congress to call forth the militia to help execute federal law.\(^{189}\) Perhaps these are the only circumstances in which our Constitution sanctions employing state executives to administer federal law.

Article VI might also indicate that state executives need not execute federal law. Although state judges are bound to the “Constitu-

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\(^{185}\) See supra Part I.B. Note that the *expressio unius* argument made in Part II.A. cannot be made here. The Continental Congress lacked the explicit authority to commandeer state executives, so the failure to include explicit authority in our Constitution was less likely a conscious choice on the part of the Framers. In other words, the lack of explicit congressional authority to employ state executives cannot be so easily interpreted as an intent to reject federal commandeering of state officers.

\(^{186}\) U.S. Const. art. IV, § 2, cl. 2 (“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”); cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

\(^{187}\) Congress may “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art. I, § 8, cl. 15. And Congress may “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” U.S. Const. art. I, § 8, cl. 16 (emphasis added).

\(^{188}\) I am indebted to Professor Amar for this observation.

\(^{189}\) Note the interesting differences between the Articles of Confederation and our Constitution. Under the Articles, Congress could call upon state legislatures to provide soldiers. Under the Constitution, however, Congress may instruct state executives how the militia ought to be trained and may call forth the militia to execute federal law. This is illustrative of the central theme of this Article: The Constitution repudiates commandeering the state legislatures, but sanctions commandeering the magistracy.
tion, and the Laws of the United States," state executives are only bound by oath to support the Constitution, and not federal law. Arguably, the only state branches that the federal government can commandeer to administer federal law are the state courts, for only they are bound to federal law.

Finally, an opponent of commandeering might also insist that the Constitution's Republican Guarantee Clause prohibits Congress from statutorily imposing federal duties on state officers. A republican form of government presupposes that only the citizens of that particular government may tell their officials what laws to pass and what laws to enforce. Hence, the federal government may not tell the states to enforce federal law without violating the Republican Guarantee Clause.

Ready responses exist to all three arguments. First, though the Constitution does specify certain responsibilities of state executives (such as the fugitive and the militia training clauses), it does not explicitly reject broad federal commandeering of state officers. Perhaps the Constitution sets minimum federal duties for state officers. Congress, by statute, may add to those minimums.

Similarly, although the Constitution itself commandeers state judges into enforcing federal law, nothing prevents the federal government from compelling state executives to administer federal law under the Supremacy Clause. The Constitution, once again, just establishes a minimum.

The Republican Guarantee Clause argument can also be overcome. Congressional legislation that demands the assistance of state officers does not imperil a state's republican form of government. A republican form of government only requires that the people ultimately control that government, whatever its authority. A guarantee of republican government does not require completely sovereign states. Indeed, if absolute sovereignty were the test of republican govern-

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190 U.S. Const. art. VI, cl. 2 (“Judges in every State shall be bound” to the Constitution and federal laws).
191 U.S. Const. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath ... to support this Constitution.”).
192 U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”).
ment, no state would have a truly republican government. The Constitution places numerous explicit limitations on state governments. States may not pass ex post facto laws or confer titles of nobility.\textsuperscript{194} They need the permission of Congress to tax imports.\textsuperscript{195} And, of course, the Supremacy Clause restricts a state's sovereignty by assuring that federal law trumps state law. Simply put, the Republican Guarantee Clause cannot serve as a bar to federal commandeering of state executives because federal commandeering of state executives is not inconsistent with republican government.

If textual authority to commandeer state officers exists, it might stem from Congress' necessary and proper authority.\textsuperscript{196} Congress might claim that "commandeering" state executives is "necessary and proper for carrying into Execution" the President's take care responsibilities.\textsuperscript{197} Without state help, the President would be unable to faithfully execute portions of federal law.

A foe of commandeering might respond that Congress could make no law directing state executives to enforce federal law because such a law would be "improper" and thus unconstitutional; it would violate implicit constitutional guarantees of state autonomy and implicit limits on congressional authority.\textsuperscript{198} Once again, resort to the Necessary and Proper Clause as a textual hook to sanction federal commandeering of state officers does not really resolve the dispute: The underlying question remains whether Congress has the authority to commandeer state executives. Employing the Necessary and Proper Clause merely reformulates the question into whether commandeering is necessary and proper (read: constitutional) to carry into execution one of the federal government's powers.

\textsuperscript{194} U.S. Const. art. I, § 10, cl. 1.
\textsuperscript{195} U.S. Const. art. I, § 10, cl. 2.
\textsuperscript{196} U.S. Const. art. I, § 8, cl. 18.
\textsuperscript{197} Such a claim would not differ much from a claim that the President needs the assistance of inferior federal officers to carry out his executive duties. The same authority that permits Congress to create executive departments and federal officers might also allow Congress to commandeer state executives.
\textsuperscript{198} A more readily acceptable example of an unconstitutional use of the Necessary and Proper Clause authority would be a law which sought to reduce the salaries of sitting Article III judges. Such a law would be improper because it seeks to lower the salary of federal judges, something the Constitution explicitly forbids. See U.S. Const. art. III, § 1 ("The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").
Resolving this debate about the propriety of commandeering state officers will require moving beyond the Constitution's text to the implicit premises underlying the Constitution. Justice O'Connor claims that the Founding Generation created a federal-state relationship based on independence and autonomy. In contrast, Justice Stevens articulates a different vision, one in which the Founders created a system of superior and subordinate authorities. Though there is much to be said on behalf of Justice O'Connor's general conceptions of the federal-state relationship, on this particular question, Justice Stevens appears to have the better historical interpretation.

B. The Original Understanding and Commandeering State Executives

1. The Philadelphia Convention

The Philadelphia Convention invested the President with the responsibility for executing federal law. This authority was generally agreed upon and therefore little debated. As noted earlier, however, though the President has the constitutional authority to enforce federal law, the President may delegate such power to congressionally designated officers. The question then becomes, may Congress transform purely state officers into hybrid federal-state officers?

Justice O’Conner’s New York opinion noted that the preliminary New Jersey Plan would have commandeered state officers into the employ of federal purposes: “[T]he laws of the United States ought, as far as may be consistent with the common interests of the Union, to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required.” She stated that the plan did not progress very far, since delegates did not debate the plan. Justice O’Connor inferred that because the dele-

199 New York, 112 S. Ct. at 2422-23.
200 Id. at 2446-47 (Stevens, J., concurring in part and dissenting in part).
201 U.S. Const. art. II, § 3.
202 See Prakash, supra note 86, at 1000-03 (arguing that the history of the Take Care Clause supports the idea that the President should be held responsible for the execution of federal law).
203 112 S. Ct. at 2422 (quoting 3 Federal Convention, supra note 30, at 616) (alteration in original).
204 Id.
gates did not debate the plan, they disapproved of its general thrust: state officers being commandeered into enforcing federal law.

Max Farrand contends that what Justice O'Connor refers to as the "New Jersey Plan" probably represented the Connecticut delegations' ideas in forming the New Jersey Plan. Therefore, Justice O'Connor cannot safely conclude that the Convention rejected the principle of state administration of federal law because the Convention never actually saw this "version" of the New Jersey Plan. A mere failure to propose or even discuss a plan for state enforcement of federal law cannot indicate, by itself, that the Framers (and by implication the Constitution) rejected the general principle of state administration of federal law. A proponent of the constitutionality of federal commandeering (such as Justice Stevens) could claim that the delegates did not debate the proposal because it was implicit in the mind of all Convention delegates. All counted on state execution of federal law.

Though Justice O'Connor has difficulty supporting the position that the Convention rejected the notion of state officers enforcing federal law, a supporter of federal commandeering has an equally tough time making a originalist case based on the Philadelphia Convention. There simply was very little discussion of employing state officers to enforce federal law at the Convention. Nor was there much of a debate on the requirements for being a federal executive officer. When it came to the execution of laws, the Convention understandably focused on the President.

2. The Federalist Papers and Commandeering State Executives

In contrast to the Philadelphia Convention, The Federalist Papers contain substantial discussions about whether state officers may be forced to administer federal law. Both Hamilton and Madison envisioned federal use of state executives to administer the new federal

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205 3 Federal Convention, supra note 30, at 615 (Appendix E).
206 What Convention evidence I have found only marginally supports the understanding that state officers might enforce federal law. South Carolina delegate Charles Pinckney, during debate on the composition of the Senate, asserted that:

No position appears to me more true than this; that the General Government can not effectually exist without reserving to the States the possession of their local rights.—They are the instruments upon which the Union must frequently depend for the support and execution of their powers, however immediately operating upon the people, and not upon the States.

1 id. at 404 (emphasis added).
laws that were to be applied to individuals. Most often their discussions concerned collecting taxes owed to the federal government. In *Federalist* No. 45, Madison attempted to calm those who feared the specter of a large federal bureaucracy. Madison wrote that if the national government uses its powers of direct taxation the revenue’s “eventual collection . . . will generally be made by the officers, and according to the rules, appointed by the several States.”\(^{207}\) Indeed, Madison claimed “it is extremely probable, that . . . [state officers] will be clothed with the correspondent authority of the Union.”\(^{208}\) State administration would eliminate the need for a gargantuan federal government.

While trying to reassure those who feared new federal tax collectors with little familiarity with local customs and idiosyncrasies, Hamilton similarly maintained that existing state tax collection schemes could handle federal tax collection as well: “The national legislature can make use of the *system of each State within that State*. The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government.”\(^{209}\)

Hamilton believed that state collection of revenues owed the federal government would decrease federal expenses. The national government could “make use of the State officers and State regulations” for collecting revenue because this scheme would not only “avoid any occasion of disgust to the State governments and to the people” but also would “save expense in the collection.”\(^{210}\)

In *Federalist* No. 27, Hamilton indicated that federal commandeering of state officials is not limited to tax collecting. Rather he viewed the entire state executive officer pool as a source from which to draw: The Constitution “will enable the government to employ the ordinary magistracy of each [of the states], in the execution of its laws.”\(^{211}\) Elsewhere, he repeated this understanding when he contended that “[t]he magistracy, being equally the ministers of the law

\(^{207}\) The Federalist No. 45, at 328 (James Madison).

\(^{208}\) Id.

\(^{209}\) The Federalist No. 36, at 261 (Alexander Hamilton).

\(^{210}\) Id. at 263 (Alexander Hamilton). Hamilton subsequently asserts that state officers can become “attached” to the federal government through “emoluments.” Id. It is unclear whether Hamilton thought the federal government must pay state officers to enforce federal law, or whether paying them a little extra would just be prudent.

\(^{211}\) The Federalist No. 27, at 221 (Alexander Hamilton).
of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness."\footnote{212}{The Federalist No. 16, at 166 (Alexander Hamilton); see also id. at 165 ("[The Constitution] must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be \textit{empowered to employ the arm of the ordinary magistrate} to execute its own resolutions.") (emphasis added).}

Hamilton recognized that citizens might be confused about the source of a law if state officers administered federal and state law, but he viewed such confusion as a beneficial product of state administration. Permitting the national government to employ state officers "will tend to destroy, in the common apprehension, all distinction[s]" between the two sources of authority.\footnote{213}{The Federalist No. 27, at 221 (Alexander Hamilton).} This confusion "will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State."\footnote{214}{Id.} In other words, the citizenry is more likely to comply with a federal law if they consider it a state law administered by state officers.\footnote{215}{Id.}

Some might interpret these passages as merely indicating that state governments may agree voluntarily to enforce federal law rather than creating a federal commandeering right. Justice O'Connor acknowledges that "[a]fter the Convention, several thinkers suggested that the National Government might rely upon state officers to perform some of its tasks."\footnote{216}{Id. at 796 n.35 (O'Connor, J., concurring in part and dissenting in part).} She notes that, for instance, Madison "thought that Congress might rely upon state officials to collect national revenue."\footnote{217}{Id. (O'Connor, J., concurring in part and dissenting in part) (citing The Federalist No. 45 (James Madison)).} At the same time, she insists that these suggestions did not "propose congressional control of state legislative power."\footnote{218}{Id. (O'Connor, J., concurring in part and dissenting in part).} Rather, these musings "seemed to assume that the States would consent to national use of their officials."\footnote{219}{Id. (O'Connor, J., concurring in part and dissenting in part).}
In fact, many of the benefits of employing state officers to administer federal law accrue to states. Perhaps if states wished to avoid the costs of state enforcement of federal law (as well as forgo the benefits), they could instruct state officers to refuse to enforce federal law. In other words, Hamilton and Madison might have been mollifying those concerned about states rights, rather than asserting that the federal government possesses a right to commandeer state executives.

The better reading of these passages, however, recognizes that the benefits of state administration also accrue to the federal government. Without federal authority to commandeer state executives, the federal government cannot reap these benefits. For instance, the federal government cannot reduce its expenses if states refuse to allow state officers to administer federal law. Similarly, the federal government loses beneficial confusion that would otherwise ensue if states refused to enforce federal law. When Madison and Hamilton discussed federal benefits of state commandeering, they contemplated a system in which the federal government has a "right" to compel state officers to enforce federal law.

If there was any remaining doubt about Hamilton's view of commandeering state officials, he laid such doubts to rest when he declared:

that the laws of the Confederacy . . . will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.\(^{220}\)

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\(^{220}\) The Federalist No. 27, at 221-22 (Alexander Hamilton). In a footnote to this passage, Hamilton contends that "[t]he sophistry which has been employed, to show that this will tend to the destruction of the State governments, will, in its proper place, be fully detected." Id. at 222 n.4.

Hamilton's emphatic statement might seem to reopen the question of whether state legislatures can be commandeered by the federal government. After all, he claims that each state branch "will be rendered auxiliary to the enforcement of [federal] laws." Id. at 222. However, Hamilton is primarily discussing the "magistracy" rather than state legislatures. That is why he discusses enforcement of law, a function of the magistracy, not of legislatures.

Moreover, Hamilton's statement is reconcilable with his earlier utterances. State legislatures are to be "incorporated" into the federal government as far as the federal government's constitutional authority extends. Id. at 221-22. If the federal government's authority does not
Thus, Hamilton viewed state executives as auxiliaries for the enforcement of federal laws.\textsuperscript{221} In the above passages, Madison and Hamilton noted that though the federal government will use state officers, the federal government may not interfere with the hiring and regulation of state executive officers. Madison insisted that the federal government would have no direct influence on the selection of state officers.\textsuperscript{222} Hamilton claimed that the federal government would “make use of the system of each State.”\textsuperscript{223} Indeed, any attempt to regulate the local police “would be as troublesome as it is nugatory.”\textsuperscript{224} Although the federal government can utilize state officers, the federal government may not interfere with the personnel practices of state agencies.\textsuperscript{225}

Neither Hamilton nor Madison considered compelled state execution of federal law inconsistent with their conclusion that laws ought to coerce individuals, not states. Most likely, Hamilton and Madison did not regard federal law that state officials must enforce as legislation upon the states “in their CORPORATE or COLLECTIVE CAPACITIES.”\textsuperscript{226} A law on the states “in their CORPORATE or COLLECTIVE CAPACITIES” was a law directed at state legislatures. A law directed at individuals, to be enforced by state officers, was not a law attempting to coerce states. Properly speaking, federal extend to commandeering state legislatures, as so many of the Framers indicated, then the federal government may not commandeer state legislatures.

There are some examples in which the Constitution “commandeers” state legislatures. Before the Seventeenth Amendment, Article I, Section 3 required state legislatures to choose Senators. U.S. Const. art. I, § 3, cl. 1. Perhaps this is what Hamilton refers to when he asserts that legislatures will be “incorporated” into the national government.

\textsuperscript{221} Elsewhere, Hamilton writes that the magistrate may use the posse comitatus as an auxiliary in the enforcement of the laws. The Federalist No. 29, at 227-28 (Alexander Hamilton). Consistent with Hamilton’s view of strong federal executive power, he argues that the executive may call upon state executives or indeed the whole populace to help the executive enforce federal law.

\textsuperscript{222} The Federalist No. 45, at 327 (James Madison).

\textsuperscript{223} The Federalist No. 36, at 261 (Alexander Hamilton) (regarding collection of internal taxes).

\textsuperscript{224} The Federalist No. 17, at 168 (Alexander Hamilton); see also Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, \textit{in} 8 The Papers of Alexander Hamilton 63, 100 (Harold C. Syrett & Jacob E. Cooke eds., 1965) (asserting that under the Constitution, Congress is “not authorised to \textit{regulate} the police of [Philadelphia]”).

\textsuperscript{225} Of course, this is a matter of original understanding. The Fourteenth Amendment has changed all this by allowing Congress to examine state hiring practices for evidence of discrimination in violation of the Equal Protection Clause. U.S. Const. amend. XIV.

\textsuperscript{226} The Federalist No. 15, at 158 (Alexander Hamilton).
law never "commandeers" state officers. Rather, state executives merely fulfill their duties, namely enforcing the laws of the land regardless of the "source [from which these laws] might emanate." \(^{227}\)

Indeed, in *Federalist* No. 16, Hamilton specifically rejects requisitioning state legislatures and embraces commandeering of state executives. The federal government "must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions." \(^{228}\) In effect, the federal government bypasses the state legislature and secures the assistance of the "ordinary magistrate" to enforce federal law applicable to individuals.

3. **The Anti-Federalists and State Ratification Delegates' Views on Commandeering State Executives**

Many Anti-Federalists understood that the federal government might use state officials to enforce federal law. The Anti-Federalist Agrippa (James Winthrop), for example, provided constitutional grounds for state administration of federal law. He noted that "[a]ll the state officers are also bound by oath to support this constitution." \(^{229}\) This oath binds the state judges and officers "to execute the continental laws in their own proper departments within the state." \(^{230}\) Though Agrippa's reading of the Constitution's Oath Section was strained, \(^{231}\) he nevertheless contemplated state executives administering federal law. \(^{232}\)

\(^{227}\) The Federalist No. 16, at 166 (Alexander Hamilton).

\(^{228}\) Id. at 165.

\(^{229}\) Agrippa, Letter to the People (Dec. 11, 1787), *reprinted in* 4 Anti-Federalist, supra note 47, at 78 (discussing U.S. Const. art. VI, cl. 2).

\(^{230}\) Id.

\(^{231}\) Agrippa's conclusion that state officers must enforce federal law because the Constitution requires them to take an oath supporting the Constitution appears incorrect. The Constitution binds state judges to the Constitution and to federal law. U.S. Const. art. VI, cl. 2. However, state executives and legislatures are only bound to the Constitution and not federal law. U.S. Const. art. VI, cl. 3. Thus, the Constitution itself does not bind state executives to execute federal law. Nevertheless, as noted earlier, though the Constitution may not require state officers to enforce federal law, Congress might still have the legislative authority to so burden state officers. See supra Part III.A.

\(^{232}\) Not all Anti-Federalists recognized (or perhaps accepted) that the federal government would employ state officers to execute federal law. Luther Martin stated that "all the officers for collecting these taxes . . . are to be appointed by the general government, under its directions, not accountable to the States." Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the
As in *The Federalist Papers*, the issue of tax collection was also prominent at the state conventions. Many delegates opposed to the Constitution conjured up frightening images of two sets of tax collectors. The Constitution's supporters responded that the federal government could call on state executives to enforce federal law, eliminating the need for two tax men. At the Virginia Ratifying Convention, Patrick Henry initially assumed that there would be two sets of tax collectors: "In this scheme of energetic Government, the people will find two sets of tax-gatherers—the State and the Federal Sheriffs."\(^{233}\) The Federal Sheriff "may . . . ruin you with impunity: For how are you to tie his hands? Have you any sufficient decided means of preventing him from sucking your blood by speculations, commissions and fees?"\(^{234}\)

Later, however, Henry acknowledged that supporters of the Constitution claimed that "one collector may collect the Federal and State taxes."\(^{235}\) Henry recognized that federal use of state executives is not dependent upon state acquiescence; rather the federal government may commander state officers and the states will suffer a revenue loss as a result.\(^{236}\)

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\(^{233}\) General Convention Lately Held at Philadelphia (1788), *reprinted in* 2 Anti-Federalist, supra note 47, at 55. He also lamented the fact that tax collectors might not be residents of the states in which they collect taxes. Id. Martin seemed to contemplate two distinct sets of officers: one set appointed by and accountable to the state and one set appointed by and accountable to the federal government.

Similarly, the Anti-Federalist John DeWitt also concluded that there would be a new set of federal officers. "A new set of Continental pensioned Assessors will be introduced into your towns, whose interest will be distinct from yours.—They will be joined by another set of Continental Collectors . . . ." John DeWitt, To the Free Citizens of the Commonwealth of Massachusetts (1787), *reprinted in* 4 Anti-Federalist, supra note 47, at 33.

\(^{234}\) Patrick Henry, Speech in the Virginia State Ratifying Convention (June 5, 1788), *in* 5 Anti-Federalist, supra note 47, at 223.

\(^{235}\) Id. at 223-24. Henry declared that Virginia had ample problems contending with those "unfeeling blood-suckers," the state sheriffs. 5 id. at 224 ("Our State Sheriffs, those unfeeling blood-suckers, have . . . committed the most horrid and barbarous ravages on our people: It has required the most constant vigilance of the Legislature to keep them from totally ruining the people . . . ."). He asserted that it would be much more difficult to fend off federal collectors. 5 id. at 223-24.

\(^{236}\) Id. at 235. Nonetheless, he still found such an arrangement troublesome since "collections [would then] go to Congress." Id. Because the national government is paramount to the state legislatures, "if the Sheriff is to collect for both; his right hand for the Congress, his left for the State; his right hand [will be] paramount over the left." Id.

Later in the Convention, Henry repeats his concern that if the state and federal tax collectors are one and the same, state tax revenues and the liberties of the people will suffer.
Like Patrick Henry, Melancton Smith assumed that there would be two sets of tax collectors. "Here are to be two lists of all kinds of officers—supervisors, assessors, constables, etc., employed in this business. . . . On one day, the continental collector calls for the tax; he seizes a horse: the next, the state collector comes, procures a replevin, and retakes the horse, to satisfy the state tax." Reacting to Smith's concerns, Robert Livingston demurred. "We have state taxes, county taxes, and corporation taxes. How do these operate together? It is true that in some places they are collected by the same man; and probably also the federal and state taxes will be." Livingston admitted, however, that "a single collector, acting in different capacities, [may have to] go through the same ceremony of seizure, replevin, etc., which the gentleman [Smith] has so humorously described."

William McClaine, speaking at the North Carolina Ratifying Convention, similarly dismissed anxieties about two sets of tax collectors by denying that the new Constitution required two collectors. "The laws can, in general, be executed by the officers of the states. State courts and state officers will, for the most part, probably answer the purpose of Congress as well as any other." McClaine believed state

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237 2 Debates, supra note 65, at 167-68.

At one point during the debate, Henry also claimed that the lowly constable "is the only man who is not obliged to swear paramount allegiance to this beloved Congress." 3 id. at 323. One might interpret this statement as an indication that though Henry recognized that state constables might enforce federal law, he also understood that the Constitution did not require that local constables enforce federal law. Nevertheless, though the Constitution may not require state officials to enforce federal law, nothing in the Constitution and nothing in his discussion indicates that Congress may not pass a law requiring state officers to enforce federal law. In other words, Henry's comment about oaths may reflect only what is constitutionally required and may not express any opinion on the limits of congressional authority to require an oath or to compel an official to enforce federal law. See supra Part II.A.

238 2 id. at 346.

239 Id.

240 4 id. at 140.
officers could be used not only to quell state fears but also "to lessen the expense" of tax collecting.  

Echoing their *Federalist Papers* writings, Madison and Hamilton recognized a federal commandeering option. Responding to concerns about two sets of revenue officers, Madison questioned: "Is it not in the power of the general government to employ the state officers? Is nothing to be left to future legislation, or must every thing be immutably fixed in the Constitution?" At the New York Ratifying Convention, Hamilton sought to calm the fears of those who thought that the national government would swallow up the states. "I insist that it never can be the interest or desire of the national legislature to destroy the state governments. It can derive no advantage from such an event; but, on the contrary, would lose an indispensable support, a necessary aid in executing the laws." 

The ratification history indicates that both the Constitution's supporters and detractors understood that state officers could be called into federal service. In other words, delegates who voted for or against the Constitution may have been aware that the federal government possessed the authority to commandeer state officers. Given that the Constitution was offered to the state conventions with the understanding that the federal government could employ state officers to enforce federal law, the Constitution permits federal commandeering of state officers.

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241 Id. Though McClaine argued that the federal government would save money if it employed state officers, he did not indicate how the federal government would save money.

242 3 id. at 306.

243 2 id. at 353 (second emphasis added). Note the similarities between Hamilton's statement and the Necessary and Proper Clause. Congress may order state executives to execute federal laws as they are "necessary" to carry into execution the President's Take Care Clause responsibilities.

244 The state ratification debates reflect little discussion of the *posse comitatus*. What little there is suggests that the executive may "deputize" any individual to assist the executive in the administration of federal law.

With respect to the federal government calling the *posse comitatus*, Henry Clay lamented the possibility that federal sheriffs might use the militia or "raise the *posse comitatus* to execute the laws." 3 id. at 384. Madison responded that the power to call forth the militia or to rely upon the *posse comitatus* "existed in all countries," and that such "public force must be used when resistance to the laws required it, otherwise society itself must be destroyed." Id. Recall that in *The Federalist Papers*, Hamilton also states that the federal government has the authority to call out the *posse comitatus*. See supra note 221.

The federal government's ability to call upon the *posse* suggests that the federal government should also be able to call upon state executives to enforce federal law. The *posse* consists of
C. Commandeering State Executives Today

Why did the "commandeering" issue arise in debates regarding the federal Constitution? Perhaps state administration of federal law was initially raised as a defense of the Constitution. Opponents of the Constitution conjured up (understandably) horrifying visions of two sets of tax collectors. They denounced the prospect of federal officials executing federal law without any familiarity with the customs and idiosyncracies of the state in which they were to enforce federal law. Finally, opponents railed against a federal behemoth whose horde of bureaucrats would overwhelm states and their officers.

Supporters of the Constitution rejoined that these problems would not arise if state officers enforced federal law. Employing state officers ensured that states had significant control over the individuals who would enforce federal law. Moreover, states could ensure that individuals clothed with federal power were at least from the state in which they would enforce federal law; such officers would be more sensitive to local concerns. Finally, those who feared that a gargantuan federal bureaucracy would overpower the states were reassured that existing state officers could carry out federal tasks.

The supreme irony of the commandeering debate is that the Federalists appear to have initially suggested state administration as a means of mollifying those who feared a decline in the states' authority. Federalists sought to reassure those who wished to retain states as viable, thriving political entities that the federal government would not become too bloated and intrude into every aspect of state life. Where possible, they argued, state officers could handle federal tasks.

States, however, were not the sole beneficiaries of state administration of federal law. Benefits would also flow to the federal government. State administration would help keep federal expenses low. State administration would induce the citizenry to heed federal law as citizens might confuse federal law with their own state's laws. Finally, state administration would secure to the union the advan-

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every person over the age of fifteen, all of whom may be bound to assist officers of the law. See Williams v. State, 490 S.W.2d 117, 120 (Ark. 1973). If the President can call upon the ordinary citizen people to assist in the enforcement of federal law, it might follow that the President may deputize state executives. State officers are merely a subset of the larger group containing all the people.
tages of having those well-versed in local matters enforcing federal law in the country's numerous localities.

Though the Constitution's proponents may have initially conceived of state enforcement of federal law as a means of winning over the opposition, eventually Federalists also recognized and emphasized that commandeering garnered benefits for the federal government as well. When the federal government was perceived as a beneficiary of state administration of federal law, state enforcement could no longer be understood as merely benefitting states. Instead, commandeering became a federal right that the federal government would employ to save money, garner the obedience of the populace, and secure better administration.

What is the mechanism for federal commandeering of state executives? State executives are officers of general jurisdiction; they are "equally the ministers of the law of the land, from whatever source it might emanate." The Constitution does not need a provision declaring that state executives must enforce federal law; state executive officers must enforce federal law because of the very nature of their office. When the federal government was given the power to legislate upon individuals, it also was "empowered to employ the arm of the ordinary magistrate to execute its own resolutions."

Today, ardent defenders of state autonomy, such as Justice O'Connor, reject federal commandeering of state officers because such authority transforms them into bureaucratic puppets of the federal government. Yet Justice O'Connor cannot rely upon part of the Philadelphia bargain (no federal commandeering of state legislatures) without acknowledging the other part of the bargain (federal commandeering of state executives). On a purely historical level, Justice O'Connor's New York opinion fails to draw the critical distinction

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245 The Federalist No. 16, at 166 (Alexander Hamilton).
246 Earlier, we left open the question of whether the Necessary and Proper Clause permits Congress to commandeer state executives. See supra note 198 and accompanying text. We can now answer this question: Congress need not even enact a law requiring state executives to enforce federal law.
247 The Federalist No. 16, at 165 (Alexander Hamilton). Given today's complex laws, it would make little sense for the federal government to insist on commandeering all state executives to administer all federal laws. Instead, state tax collectors could be drafted into the service of the Internal Revenue Service. Local police could enforce federal criminal and civil law. State environmental officials could enforce federal environmental laws.
between commandeering state legislatures and commandeering state executives.

IV. COMMANDEERING STATE COURTS UNDER OUR CONSTITUTION

As noted earlier, under the Articles, the Continental Congress appeared to have acted as though it could commandeer the assistance of state judges in two different ways. First, the Continental Congress commanded state judges to hear piracy claims arising under federal law. Second, the Articles may have established an implicit federal entitlement to the continued existence of state capture courts which would adjudicate capture cases under federal law.

Today, all agree that state courts of general jurisdiction must be open to hear federal claims, i.e., they must help administer federal law. In *New York v. United States*, Justice O'Connor correctly noted that state judges must administer federal law because of the Supremacy Clause.

The next Section examines the question anew. Though the conclusions are fairly familiar, I will argue that the Founding Generation envisioned commandeering of state courts in two different manners. First, many thought that the Supremacy Clause required state judges to hear federal claims. Second, some Framers thought that Congress could constitute state courts as inferior federal courts.

A. Constitutional Text and Structure

Just like the Articles of Confederation, the Constitution does not declare that the federal government may commandeer state courts. Article I, Section 8, Clause 9 merely grants Congress the authority “[t]o constitute Tribunals inferior to the supreme Court.” How Congress may exercise that power is unclear. Must these inferior tribunals be exclusively “federal” or can they be a hybrid of state and federal authority? Recall that the Continental Congress’ ability to “appoint” courts was thought to include the authority to force state judges and courts to hear piracy cases. Perhaps the ability to “con-

250 U.S. Const. art. I, § 8, cl. 9.
251 See supra Part I.C.
stitute" inferior tribunals also embraces the authority to commandeer state courts, just as the word "appoint" granted commandeering power under the Articles.\textsuperscript{252} Put simply, why cannot Congress constitute state courts as inferior tribunals?

To be sure, constituting state courts as inferior federal courts would pose some difficulties. Would not state judges, whose courts were made into inferior tribunals, have life tenure as federal judges? Would not such state judges also be protected by the undiminished compensation requirement? Article III makes clear that \textit{all} judges of the inferior courts must have life tenure and an undiminished salary.\textsuperscript{253} These requirements apply regardless of whether these judges are commandeered from state courts or whether Congress creates separate inferior tribunals.

Yet perhaps these difficulties are more conceptual than real. Nothing prevents state judges from also sitting as inferior federal judges. We merely find it hard to envision a state judge without life tenure sitting as a federal judge with life tenure. To be sure, some of the advantages of having state court judges sit as federal judges might be lost. Given that state judges could lose an election (and thus their seat), a state court judge could lose her state judgeship and yet remain

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\item Note that Congress' power to create lower federal courts is referred to as the authority "[t]o constitute Tribunals," U.S. Const. art. I, § 8, cl. 9, and as the authority to "ordain and establish" inferior courts. U.S. Const. art. III, § 1. The power to "constitute" is equivalent, undoubtedly, to the power to "ordain and establish." Note also that the Articles of Confederation authorized the Continental Congress to "appoint" courts for the trial of piracies and "establish" courts for hearing capture appeals. See supra notes 56-57 and accompanying text.

I suggest that the Articles powers of "appointing courts" for piracies and "establishing courts" for hearing capture appeals are akin to the current Congress' powers of "constitut[ing]" and "ordain[ing] and establish[ing]" inferior federal courts.

Julius Goebel, however, insists that the Continental Congress viewed the power to "establish[ ] courts" for hearing capture appeals differently from the authority to "appoint[ ] courts" for piracy cases. This difference is reflected in the fact that the ordinance commanding states to set up state courts for piracy cases "remained the basis for subsequent state legislation." 1 Goebel, supra note 61, at 173-74 & n.129.

Perhaps Goebel meant that "appointing" piracy courts necessarily involved appointing a pre-existing court, whereas "establishing" appellate capture courts involved creating an entirely new court.

\item "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.
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a federal judge. If this occurred, economies of scope might be lost.\footnote{Assuming uncrowded state court dockets, it might have been possible to save money by granting the same judge cognizance of federal and state claims, rather than employing two separate judges, each with salary and support costs.} Nonetheless, this is merely an argument against the utility of constituting state courts as inferior tribunals; it does not demonstrate that state courts cannot be constituted as inferior tribunals.

Constituting state courts as inferior tribunals would also generate some appointment complications. Recall that under the Articles of Confederation, Congress could not only create federal piracy courts, it could make appointments to those courts as well.\footnote{The Continental Congress had the power of “appointing courts” for trying piracy cases. Articles of Confederation art. IX.} Under the Constitution, however, appointments are a much more complicated matter. If Congress attempted to constitute state judges as inferior federal judges, these judges would probably have to be nominated by the President first, since they would appear to fall under the rubric “Officers of the United States.”\footnote{In other words, would such a state court judge whose court was commandeered be an “Officer[ ] of the United States” or an “inferior Officer”? The Constitution provides: [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2, cl. 2.} No one suggests that individuals (without any state tenure) appointed as inferior Article III judges are not “Officers of the United States.” Similarly, state court judges constituted as federal judges are also subject to the Appointments Clause. All Article III judges, it would appear, must be nominated by the President and confirmed by the Senate before sitting as judges.\footnote{If, however, state judges, whose courts are constituted as inferior tribunals, are not “Officers of the United States,” no problem exists. State judges commandeered into federal service may not need to be appointed by the President or confirmed by the Senate. Only non-inferior “Officers of the United States,” i.e., Supreme Court Justices, Ambassadors, etc., must go through the nomination and confirmation process. Surely, state governors are not U.S. officers, even though they must enforce the fugitive from justice and fugitive from slavery clauses of the Constitution. See U.S. Const. art. IV, § 2, cl. 2, 3. Similarly, state legislators were not U.S. officers merely because they were to act as instruments of federal law when choosing U.S. Senators. Id. art. I, § 3, cl. 1, amended by U.S. Const. amend. XVII, cl. 1. Conceivably, Congress might directly appoint state courts as inferior federal courts without triggering the Appointments Clause.}
The Appointments Clause, though complicating matters, does not absolutely bar state court judges from sitting as federal judges. Instead, it merely sets up procedural hoops for prospective federal judges to jump through, namely presidential nomination and Senate confirmation. Conceivably, if a President and Congress were bent on conserving federal resources and trusted state judges to enforce federal law in the first instance, they could constitute state judges as federal judges of the inferior federal courts.258

Examining Article III, Section 1 does not shed any additional light on the matter.259 Section 1 recognizes that Congress may "ordain and establish" inferior courts, but does not indicate whether Congress may "ordain and establish" state courts as inferior courts. At the same time, the introductory section seems to foreclose non-Article III courts from exercising the "judicial Power of the United States." After all, only the "one supreme Court" and "such inferior Courts as the Congress may" create are empowered to exercise "[t]he judicial Power of the United States."260 If state courts could be constituted as inferior tribunals, they could then exercise federal judicial power. But if state courts cannot be transformed into inferior Article III courts, perhaps they cannot exercise federal judicial power at all. Nevertheless, even under this interpretation, state courts might also hear federal cases, provided that they do not exercise federal judicial power.261

Ultimately neither Article III's introductory section nor Article I, Section 8, Clause 9 clearly indicates whether state courts may be commandeered into enforcing federal law as Article III courts. Looking elsewhere in the Constitution, however, proves more fruitful. Another provision commandeers state courts in another way: The

258 To be sure, this is an extraordinary hypothetical; but I ask you to suspend your skepticism.
259 U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
260 Id.
261 Whatever the scope and meaning of the "judicial Power of the United States," Article III, Section 1 appears to limit it to the Supreme Court and inferior federal courts. Neither Congress, nor the President, nor purely state judges may exercise federal judicial power.
The Supremacy Clause usually is invoked to confirm that a state's constitution and laws must yield to the federal Constitution and to federal laws and treaties made pursuant to it. The tail end of the section (call it the State Judges Clause) focuses on a different subject: state judges. The State Judges Clause tells us that state judges “shall be bound” to the federal Constitution, laws, and treaties; moreover, they must ignore their respective state constitution and laws when they conflict with federal law.

What does it mean to say that state judges are “bound” to the Supreme Law of the Land? At a minimum it suggests that federal law and the Constitution have become part of the law of the state. Moreover, because federal laws and the Constitution are supreme, where there is a conflict between state and federal law, state judges must administer (are bound to) federal law. In effect the Supremacy Clause and State Judges Clause tell state judges, “these new federal laws are the laws of your state; enforce them as you would any other, making sure that federal law is always vindicated when a conflict with state law arises.”

Though federal laws have become the law of the state, does a judge have to enforce any and all federal laws, even if he has no state jurisdiction over similar state cases? It would be absurd to suggest that the State Judges Clause binds all state judges to hear all federal cases. The Clause should not be interpreted as requiring a state small claims court to hear federal constitutional cases which involve million dollar claims.

Perhaps the Supremacy and State Judges Clauses ought to be read as instructing state courts to enforce federal laws analogous to the types of laws they currently enforce. The small claims court should be open to federal cases similar to the cases it currently adjudicates. In effect, the Clause may embody a nondiscrimination principle: Do

262 The Supremacy Clause provides:
  This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. Const. art. VI, cl. 2.
not discriminate against federal law or federal cases. If you discriminate against federal cases, you are not treating federal law as though it were the law of your state. You are treating it as an alien law, one that you would rather not have your courts enforce. Hence legislatures may not enact jurisdictional statutes which purposely disfavor federal claims; the Supremacy and State Judges Clauses transform these "federal" claims into state claims which cannot be discriminated against.263

Where state courts have general jurisdiction, they will naturally be open to all federal cases. Their general jurisdiction makes them available to hear cases regarding state, federal, and even international laws. Given that state courts, at the time of the Founding, were ordinarily courts of general jurisdiction, they could be called upon to administer all federal law.264

Article VI, Section 2, therefore, creates a constitutional duty for state judges: they must enforce (are "bound" to) the federal Constitution and laws. To be bound by the federal Constitution and laws makes state judges the instruments of the federal government in some manner. Similarly, state legislatures were "bound" to choose Senators;265 state executive authorities remain "bound" to "deliver[ ] up" individuals fleeing from justice in other states.266 All three branches of state governments are thus, in a sense, instruments of the federal government. A state could no more forbid its courts from hearing

263 See Testa v. Katt, 330 U.S. 386 (1947) (holding that state courts cannot refuse to enforce federal claims); Mondou v. New York, New Haven & Hartford R.R., 223 U.S. 1, 55-59 (1912) (holding that a state court cannot refuse to enforce a federal remedy on the ground of inconvenience or confusion). For instance, if a state jurisdictional statute limited a state court’s jurisdiction to state constitutional claims, federal constitutional claims could also be heard in such a court. The federal Constitution has become part of the state constitution, and any jurisdiction granted over state constitutional cases automatically grants jurisdiction over federal constitutional cases as well.

Note also that if federal law conflicts with a state constitution, a court charged with hearing state constitutional cases might also have to hear questions concerning the interpretation and administration of federal law.

264 One might think that the Oaths Section, U.S. Const. art. VI, cl. 3, binds state courts to administer federal law. A closer examination, however, reveals that the Oaths Section has nothing to do with administering federal law. Instead, the section only requires state officers to pledge their allegiance to the Constitution.

265 U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . "), amended by U.S. Const. amend. XVII, cl. 1.

266 U.S. Const. art. IV, § 2, cl. 2.
federal claims (or do away with its courts) than it could tell its state executives to ignore the Fugitive Clause (or do away with its state executives).

This discussion of the constitutional text clarifies the questions raised earlier. The Supremacy and State Judges Clauses strongly suggest that state courts are required to hear cases arising under federal law. At the same time, Article I, Section 8, Clause 9 can be read to permit Congress to constitute state courts as inferior tribunals, although not without creating some incongruities in light of Article III. The following Sections further address these questions.

B. The Original Understanding and Commandeering State Courts

1. The Philadelphia Convention

a. What Kind of Inferior Tribunals?

The Virginia Plan sought to establish a “National Judiciary . . . to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.” The inferior tribunals were to “hear and determine [cases] in the first instance” while the supreme tribunal would hear cases “in the dernier resort.” State courts had no significant, national role—they were only required to take an oath supporting the “articles of [the] Union.” On June 4, it was moved and unanimously accepted that the judiciary was “to consist of One supreme tribunal, and of one or more inferior tribunals.”

The next day, John Rutledge reopened the issue of establishing inferior tribunals. He motioned to strike out the language permitting Congress to establish inferior federal courts. He opposed “establishing any national tribunal except a single supreme one.” He thought the state courts “most proper” for deciding “all cases in the first instance.” Creating separate inferior federal courts would constitute an “unnecessary encroachment on the jurisdiction [of the States]” and would create “unnecessary obstacles to their adoption of

267 1 Federal Convention, supra note 30, at 21.
268 1 id. at 22.
269 Id.
270 1 id. at 95.
271 1 id. at 119.
272 Id.
the new system [the Constitution]."\textsuperscript{273} The ability to appeal to the "supreme national tribunal [was] sufficient to secure the national rights and uniformity of Judgments."\textsuperscript{274} Roger Sherman seconded the Rutledge motion. Sherman expressed apprehension regarding the "expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose."\textsuperscript{275} Rutledge and Sherman were implicitly warranting that state courts would hear cases that would otherwise have gone to inferior federal courts.

James Madison opposed the idea of employing state courts as courts of original jurisdiction. State courts, he argued, could not be trusted with adjudication of federal claims. Under the Articles, state courts either were uncertain about what to do when conflicts between state and federal law arose, or decided these cases "in favor of the State authority."\textsuperscript{276} Madison asserted that "unless inferior tribunals were dispersed throughout the Republic with final jurisdiction . . . appeals would be multiplied to a most oppressive degree."\textsuperscript{277} Moreover, he thought that "an appeal would not in many cases be a remedy."\textsuperscript{278} Pennsylvanian James Wilson also opposed the Rutledge motion. He declared that the "admiralty jurisdiction ought to be given wholly to the national Government, as it relate[s] to cases not within the jurisdiction of particular states."\textsuperscript{279} Rutledge, however, prevailed. With five states voting to strike, four voting to retain, and two split, the delegations struck the language that would have required the creation of one or more inferior tribunals.\textsuperscript{280} The Convention rejected mandatory erection of inferior courts.

Yet Wilson and Madison remained unbowed. Immediately after Rutledge’s victory, they moved to add language which "empowered [Congress] to appoint inferior Tribunals."\textsuperscript{281} They drew a distinction between requiring the establishment of inferior tribunals "and giving

\begin{thebibliography}{9}
\bibitem{273} Id. at 124.
\bibitem{274} Id.
\bibitem{275} id. at 125.
\bibitem{276} id. at 122.
\bibitem{277} id. at 124.
\bibitem{278} Id.
\bibitem{279} Id.
\bibitem{280} Id. at 125.
\bibitem{281} Id. at 118. There seems to be some disagreement over language of the Wilson-Madison proposal. Madison claimed that the proposal empowered Congress to “institute inferior
Pierce Butler objected to the joint motion, insisting that “[t]he people will not bear such innovations. The States will revolt at such encroachments.” Rufus King, however, echoed Madison’s concerns about appeals and at the same time, attempted to meet Sherman’s apprehensions about costs. He thought the “comparative expense” associated with “the establishment of inferior tribunals” would “cost infinitely less than the appeals that would be prevented by them.” The Madison-Wilson motion passed on a vote of eight states for, two against, and one state divided. As noted above, the language enabled Congress to “appoint inferior Tribunals,” thus inviting comparisons with the Articles power of “appointing” piracy courts.

Yet the hard-core resistance to separate inferior courts remained dogged in their opposition. The introduction of the New Jersey Plan on June 15 quietly reopened the debate over the need for inferior tribunals. The Plan did not expressly provide for the creation of inferior tribunals, but instead required that all cases except impeachment would be first heard in state courts.

[All] punishments, fines, forfeitures and penalties . . . shall be adjudged by the Common law Judiciarys of the State in which any tribunals.” 1 id. at 125. The Journal and Robert Yates report that the proposal empowered Congress to “appoint” inferior tribunals. 1 id. at 118, 127.

1 id. at 125. Alexander Hamilton’s similar proposal provided for the creation of a Supreme Court with original jurisdiction in capture cases. Congress would also have the power to “institute Courts in each State for the determination of all matters of general concern,” with Supreme Court appellate jurisdiction in all such cases. 1 id. at 292.

1 id. at 125.
1 Id.
1 Id.

Goebel calls the movement from Rutledge’s victory to the Wilson-Madison victory a “swift change of mind.” 1 Goebel, supra note 61, at 212. He argues that the “swift change” may have come about because of the ambiguous “appoint.” Delegates may have interpreted “appoint” in the same manner as it was interpreted during the Confederation. Id. In other words, those who did not want to establish separate inferior federal courts may have viewed the Wilson-Madison compromise as a method of allowing state courts to be those inferior tribunals.

Rutledge et al. probably recognized that the authority to “appoint” inferior tribunals might not be used to appoint state courts as the inferior tribunals. The power could also be used to establish a separate system of courts in which state courts possessed little or no authority in administering federal law.

1 id. at 244.
offence contrary to the true intent and meaning of such Acts rules and regulations shall have been committed . . . with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law and fact in rendering judgment, to an appeal to the Judiciary of the United States.\textsuperscript{289}

The New Jersey Plan made explicit what was implicit in the original Rutledge motion; it sought to use state judiciaries as the courts of original jurisdiction for federal law.\textsuperscript{290}

On July 18, the Convention once again debated the question of whether Congress ought to "be empowered to appoint inferior tribunals."\textsuperscript{291} Pierce Butler renewed his opposition on the grounds that he "could see no necessity for such tribunals."\textsuperscript{292} In his opinion, state courts could handle federal business.\textsuperscript{293} Luther Martin concurred with Butler and further claimed that inferior courts would "create jealousies and oppositions in the State tribunals, with the jurisdiction of which they will interfere."\textsuperscript{294}

Nathaniel Gorham responded to Martin's concerns by noting that federal courts were already in the states "with jurisdiction for trial of piracies etc. committed on the Seas."\textsuperscript{295} He claimed that neither state courts nor the states themselves had complained.\textsuperscript{296} Furthermore, inferior federal courts were "essential to render the authority of the National Legislature effectual."\textsuperscript{297}

Edmund Randolph echoed Madison's earlier concerns. He "observed that the Courts of the States can not be trusted with the administration of the National laws."\textsuperscript{298} George Mason "thought many circumstances might arise not now to be foreseen, which might

\begin{thebibliography}{99}
\bibitem{} 1 id. at 243.
\bibitem{} A plan attributed to George Mason also would have relied upon state courts to hear cases in original jurisdiction. \textit{"Superior State Courts shall have original jurisdiction"} in all cases where the Supreme Court does not have original jurisdiction. 2 id. at 433.
\bibitem{} 2 id at 45.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} 2 id. at 45-46.
\bibitem{} 2 id. at 46. As noted earlier, these federal piracy courts were composed of state judges. See supra Part I.C.
\bibitem{} 2 Federal Convention, supra note 30, at 46.
\bibitem{} Id.
\bibitem{} Id.
\end{thebibliography}
render such a power absolutely necessary.” 299 Roger Sherman, who had initially opposed creation of federal courts on grounds of expense, acquiesced to their creation. Sherman “was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done. with safety to the general interest.” 300 With the Sherman capitulation, the state delegations unanimously agreed to the motion empowering Congress to “appoint inferior tribunals.” 301

This language was sent to the Committee of Detail, 302 which promptly altered it to today’s present form. 303 Congress no longer had the authority to “appoint,” but instead had the authority to “constitute [inferior] tribunals.” 304 On August 17, the Convention unanimously and apparently without any debate, agreed to accept the Committee of Detail’s change. 305

Yet, Rutledge’s philosophy would not die an easy death. On August 27, when discussing the jurisdiction of the federal courts, a delegate submitted an amendment that would have given state courts original jurisdiction in all cases in which the Supreme Court lacked it. 306 This motion was quickly withdrawn and language similar to the Constitution’s was proposed. 307 This language pointedly left open the question of which courts could exercise original jurisdiction. As in the Constitution, original federal jurisdiction was not explicitly

299 Id. 300 Id. 301 Id. 302 2 id. at 133. 303 2 id. at 168. 304 2 id. 305 2 id. at 315. The Committee of Detail also made another crucial alteration. Before the Committee convened, only Supreme Court judges had life tenure and undiminished compensation. 2 id. at 132. The Committee reported language which required that all federal judges have tenure “during good behavior” and receive undiminished compensation. 2 id. at 186. 306 2 id. at 424 (“In all the other cases beforementioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make.”). 307 In cases of impeachment, cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, this [Supreme Court] jurisdiction shall be original. In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make. Id.
granted to inferior tribunals or to state courts. This second motion passed.\textsuperscript{308}

What are we to make of these numerous discussions? At a minimum, the delegates clearly thought that they were creating a system in which state courts might enforce federal law. Many of the Philadelphia delegates wanted state courts to be the exclusive courts of original jurisdiction. They eventually compromised by permitting, but not requiring, the creation of inferior federal courts. The compromise reflected the understanding that, for some, original jurisdiction in the hands of state courts was still preferable. Federal courts were an option to be used in still unclear, exceptional circumstances.\textsuperscript{309}

Moreover, when Rutledge, Sherman, et al., opposed the creation of inferior courts, they were implicitly pledging that state courts would always be open to enforce federal law. In other words, they were tacitly giving assurances that state courts would handle the job of judicially administering federal law.\textsuperscript{310} When their opposition was brushed aside, i.e., when Congress was given the power to create inferior courts, did the federal government lose the ability to require state courts to be open to federal claims? Given that the compromise did not require the creation of inferior federal courts, delegates may have assumed that if Congress decided not to create inferior tribunals, federal claims would still be heard in state court.\textsuperscript{311}

Beyond these points, the debates indicate that some of the delegates contemplated using the authority to institute inferior tribunals as a means of commandeering state courts. Recall that originally the Madison-Wilson compromise granted Congress the power to “appoint inferior tribunals.”\textsuperscript{312} When Roger Sherman, one of the opponents of inferior tribunals, agreed to accept this language, he expressed his hope that Congress would “make use of the State Tribunals whenever it could be done. with safety to the general interest.”\textsuperscript{313}

\textsuperscript{308} Id.

\textsuperscript{309} See, e.g., supra text accompanying note 300 (Sherman agreeing to allow Congress to create inferior courts but hoping it would not make liberal use of that power).

\textsuperscript{310} It is unlikely that these delegates opposed the creation of inferior tribunals without providing a satisfactory alternative.

\textsuperscript{311} In other words, Rutledge’s assurances that state courts would hear federal cases likely influenced those who voted to grant Congress the authority to appoint inferior tribunals.

\textsuperscript{312} 1 Federal Convention, supra note 30, at 118.

\textsuperscript{313} 2 id. at 46.
appoint ("make use of") state courts whenever possible. Later, the Committee of Detail altered "appoint" to "constitute." If the earlier language had made its way into the Constitution, one would have a nearly impervious argument that "appointing" inferior tribunals under the Constitution had the same connotation as "appointing" did under the Articles.

But the power to "appoint" tribunals did not become part of the Constitution. According to one explanation, delegates did not grant the authority to "appoint" because they did not want Congress to possess the authority it had under the Articles to "appoint" state courts as piracy courts. This explanation, however, cannot adequately explain the manner in which the change was made. The Committee of Detail made the change and laid the language before the Convention, which unanimously agreed to it. There apparently was no debate on the floor about whether the Congress ought to have the "appointing" powers of the Confederacy.

Another, more plausible interpretation, is that the terms "appoint" and "constitute" were seen as largely interchangeable. The Committee of Detail substituted "constitute" for "appoint" not because it wished to convey a different meaning, but because it would avoid confusion relating to the President's authority to make appointments under the Appointments Clause. Given the Appointments Clause, granting Congress the authority to "appoint" inferior federal courts might cause confusion. The Committee of Detail judiciously avoided this problem by employing "constitute" instead. When the language came before the Convention, the Convention unanimously ratified the alteration, perhaps not realizing that there had been any relevant change in wording. It is quite probable that the Convention thought it was granting Congress the power to "constitute" separate inferior courts and also granting Congress the authority to "constitute" state courts as inferior federal courts.

To sum up, the Constitution allows Congress to decide whether or not to create inferior federal courts. If Congress does not create them, Rutledge's implicit pledge may require state courts to hear federal cases. If, however, Congress chooses to create inferior federal courts,

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314 2 id. at 168.
315 U.S. Const. art. II, § 2, cl. 2.
it may create a wholly separate set of inferior federal courts or (perhaps) constitute state courts as inferior federal courts.

b. What are State Judges "Bound" to Do?

The New Jersey Plan, discussed above, not only vested state courts with exclusive original jurisdiction in federal cases, it also contained the seeds of the Supremacy and State Judges Clauses. "[A]ll Acts of . . . Congress made by virtue and in pursuance of the powers hereby . . . vested in them . . . shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens . . . ." The Plan further required that "the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding." Because the Plan did not provide for the creation of an inferior federal judiciary, all federal cases would originate in state courts. The New Jersey Plan, then, required state courts to hear federal cases since federal cases were to be "adjudged by the Common law Judiciaries of the State." After the Convention rejected a congressional power to "negative" state laws that were inconsistent with federal law, Luther Martin moved that the Convention accept the Supremacy and State Judges Clauses. His motion was unanimously approved and later sent to the Committee of Detail. The Committee of Detail left it unchanged, except for two modifications. The Committee altered the phrase "Judicatures of the several States" to "judges in the several

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316 1 Federal Convention, supra note 30, at 245.
317 1 id. at 243. I am assuming that because all federal cases (except impeachment) were assigned to state courts and because there was no separate federal judiciary, the New Jersey Plan forced state courts to hear federal cases. It is possible that the New Jersey Plan merely held out the possibility of state court administration of federal law. Note, however, that the New Jersey Plan was never enacted in its entirety.
319 [T]hat the Legislative acts of the U.S. made by virtue and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.
320 2 id. at 28-29.
321 2 id. at 29.
322 2 id. at 132.
States” and provided that federal law would preempt state constitutions as well as state laws in state courts. Finally, on August 23, the Convention unanimously agreed to make the Constitution, as well as federal law, the supreme law of the land.

As noted, the New Jersey Plan required state courts to operate as courts of original jurisdiction in federal cases. There were to be no lower federal courts. Either the granting of jurisdiction in the New Jersey Plan (questions of federal law “shall be adjudged” by state courts) or the plan’s Supremacy and State Judges Clauses, or a combination of both, operated to force state courts to hear federal cases.

Whatever one’s theory of how the New Jersey Plan bound state judges into exercising original jurisdiction over nearly all federal cases, the Constitution requires state judges to enforce federal law. State courts cannot refuse to exercise the jurisdiction that the Constitution itself presume they will exercise.

A review of the Philadelphia debates enables us to draw several tentative conclusions. First, the Philadelphia delegates expected that state courts would hear cases involving federal law. Second, the Rutledge alternative to inferior courts implicitly guaranteed that state courts would always be open for federal claims; this understanding might not have been disturbed by the compromise that permitted, but did not require, the creation of inferior courts. Third, the power to “constitute” inferior tribunals may have been viewed both as a method of commandeering state courts to hear federal claims and as the authority to establish wholly separate federal courts. Fourth, an examination of the New Jersey Plan reveals that granting state courts jurisdiction requires them to exercise that jurisdiction. The New Jersey Plan sought to require state courts to hear all federal cases in

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323 2 id. at 183.
Goebel claims that this change “had the effect of making personal the injunction, and laying it as well upon . . . national judges functioning within any state.” 1 Goebel, supra note 61, at 236. The problem with Goebel’s interpretation is that it would not apply to judges not sitting in any state, namely our current Supreme Court. In addition, if the Committee of Detail intended the change to cover all judges, federal and state, they could have conveyed their intent more directly.

As an alternative explanation, I suggest that the Committee of Detail changed the wording because the word “Judge” was used elsewhere in the Constitution. Recall that the use of the word “Judiciary” was first introduced by the original New Jersey Plan. 1 Federal Convention, supra note 30, at 245.
324 2 Federal Convention, supra note 30, at 183.
325 2 id. at 389.
original jurisdiction. Our Constitution, since it presumes federal jurisdiction for state courts, itself commandeers state courts. The Constitution’s grant of jurisdiction transforms state courts into instruments of federal law.

2. The Federalist Papers and Commandeering State Courts

Hamilton composed The Federalist Papers examining the federal government’s relationship to state courts. Noting that the Constitution was silent as to federal jurisdiction for state courts, Hamilton nonetheless concluded that state courts could hear federal cases.\(^2\)\(^6\) At least one time, however, he maintained that the power to “constitute” inferior federal courts might be a necessary part of the plan as it empowered the national legislature to commit to [state courts] the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much “to constitute tribunals” as to create new courts with the like power.\(^3\)\(^2\)\(^7\)

In other words, Congress could confer jurisdiction to state courts and thus, in some sense, constitute state courts as inferior tribunals.

Hamilton regarded state court administration of federal law not merely as a state privilege, but also as a federal prerogative: “[T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter [states] will of course be natural auxiliaries to the execution of the laws of the Union . . . .”\(^3\)\(^2\)\(^8\) Hamilton was not making a claim limited to the courts of the United States. Rather, “[t]he judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction.”\(^3\)\(^2\)\(^9\) Indeed, as noted earlier, Hamilton maintained that the “legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority

\(^2\) The Federalist No. 82, at 515-16 (Alexander Hamilton).
\(^6\) The Federalist No. 81, at 509 (Alexander Hamilton).
\(^7\) The Federalist No. 82, at 517 (Alexander Hamilton).
\(^8\) The Federalist No. 82, at 517 (Alexander Hamilton).
\(^9\) Id. at 516. Hamilton apparently views courts as institutions with general jurisdiction. State courts thus stand ready to lay “hold of all subjects of litigation between parties.”
Field Office Federalism

extends; and will be rendered auxiliary to the enforcement of its laws."\(^{330}\)

As noted in the discussion of Federalist commentary on commandeering state executives, Hamilton insisted that the federal government would be able to call upon the state magistracy to administer federal laws. Because the magistracy denotes both executive and judicial officers,\(^{331}\) his comments about the magistracy apply with equal force in a discussion regarding commandeering state courts. The federal government “must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.”\(^{332}\) Indeed, “[t]he magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness.”\(^{333}\) The magistracy, unlike the legislature, exercise little will; they merely enforce applicable laws.

Hamilton declared that if a state court has jurisdiction, it must decide (lay hold of) any case properly brought before it. Significantly, he did not draw a distinction between jurisdiction derived from state law and jurisdiction derived from federal law. Regardless of the jurisdictional source, as long as a court has jurisdiction, it “lays hold of” the case.\(^{334}\) If state courts are presumed to have concurrent federal jurisdiction, these courts, as the federal government’s “natural auxiliaries,”\(^{335}\) must exercise such jurisdiction. It is in this sense that the national and state governments are properly regarded as “ONE WHOLE.”\(^{336}\)

Why were state courts not endowed with original and exclusive federal jurisdiction, with appeals to the Supreme Court? The authority to constitute inferior federal courts was thought necessary because “the prevalency of a local spirit may be found to disqualify the local

\(^{330}\) The Federalist No. 27, at 221-22 (Alexander Hamilton).

\(^{331}\) See supra note 26 and accompanying text.

\(^{332}\) The Federalist No. 16, at 165 (Alexander Hamilton); see No. 27, at 221 (Alexander Hamilton) (“The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws.”).

\(^{333}\) The Federalist No. 16, at 166 (Alexander Hamilton).

\(^{334}\) The Federalist No. 82, at 516 (Alexander Hamilton).

\(^{335}\) Id. at 517.

\(^{336}\) Id. at 516-17.
tribunals for the jurisdiction of national causes."\textsuperscript{337} State judges who held their offices during pleasure or on a yearly basis might "be too little independent to be relied upon for an inflexible execution of the national laws."\textsuperscript{338} Yet the Constitution itself did not decree that state judges were inferior to their more independent federal brethren. A future Congress was left to decide whether to establish separate inferior tribunals or to rely upon state courts as the exclusive or concurrent courts of original jurisdiction in federal cases. If the "prevalency of a local spirit" did not disqualify state tribunals, inferior federal courts might not be necessary and state courts would administer federal law subject to Supreme Court appellate review.

3. \textit{The Anti-Federalists and the State Conventions}

Anti-Federalists recognized that state courts would be used as instruments of federal law under the new Constitution. One Anti-Federalist (A Federal Republican) dreaded that the new Constitution created "one large system of lordly government."\textsuperscript{339} The Supremacy Clause and the State Judges Clause particularly alarmed him.\textsuperscript{340}

But what judges are to be bound by [federal laws] in all cases whatever, notwithstanding any laws to the contrary, that may have been promulgated by any particular state? The judges not only of those inferior \textit{federal} courts which Congress may from time to time establish in any or all the states; but also the judges of the courts immediately dependent on the states themselves. They are to be overruled by the \textit{laws} of Congress in "every state," and the laws of every state must be prejudiced in their favor.\textsuperscript{341}

Agrippa also understood that state judges must enforce federal law. For him, the Constitution amounted to "a complete consolidation of all the states into one" since "by article 6, the judges in every state are to be bound by the laws of Congress."\textsuperscript{342} The Supremacy and State Judges Clauses must be understood "as binding state judges and other officers, to execute the continental laws in their own proper depart-

\textsuperscript{337} The Federalist No. 81, at 510 (Alexander Hamilton).
\textsuperscript{338} Id.
\textsuperscript{339} A Review of the Constitution Proposed by the Late Convention by A Federal Republican (Oct. 28, 1787), \textit{reprinted in} 3 Anti-Federalist, supra note 47, at 80.
\textsuperscript{340} Id.
\textsuperscript{341} State judges "are to be bound by [federal law] in all cases whatever." Id.
\textsuperscript{342} Letters of Agrippa (1787-88), \textit{reprinted in} 4 id. at 88.
ments within the state." Later, Agrippa reiterated the consequences of the clauses: "If this is not binding the judges of the separate states in their own office, by continental rules, it is perfect nonsense." Agrippa underscored the profound implications the Supremacy and the State Judge Clauses have for state courts. State courts are to be the instruments of federal law where they have jurisdiction. They are bound "by continental rules" and must thus "execute the continental laws in their own" states.

Brutus also understood that the Clauses bound state judges to enforce federal law and the Constitution. Brutus' discussion of the judiciary began by defending the manner in which state courts had handled federal claims under the Articles. According to him, state courts had done a fine job under the Articles. State courts could continue to perform that function as the new Constitution made state judges enforce the Constitution and federal laws; hence, there was no need for inferior federal judges. The Supremacy and State Judges Clauses ensured that state courts would continue to faithfully administer federal law.

Luther Martin similarly viewed the Supremacy and State Judges Clauses as binding state judges to enforce federal law. "[T]here, was no occasion for inferior courts of the general government to be appointed in the different States . . . ." Instead, "State judiciaries in the respective States would be competent to, and sufficient for, the cognizance in the first instance of all cases." Why would state judi-

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343 4 id. at 78.
344 4 id. at 97.
345 Essays of Brutus (1788), reprinted in 2 id. at 436.
346 Id.

These prohibitions [Article I, § 10] give the most perfect security against those attacks upon property . . . . For "this constitution will be the supreme law of the land, and the judges in every state will be bound thereby; any thing in the constitution and laws of any state to the contrary notwithstanding."

The courts of the respective states might therefore have been securely trusted, with deciding all cases between man and man . . . and indeed for ought I see every case that can arise under the constitution or laws of the United States, ought in the first instance to be tried in the court of the state . . . . The state courts would be under sufficient control . . . .

2 id. at 436-37.
348 Id.
ciaries enforce federal law and the Constitution? Because the Constitution itself required that they treat federal law and the Constitution as supreme. The federal government's laws were "made the supreme law of the States, [and thus] would be binding on the different State judiciaries." The Supremacy and the State Judges Clauses, then, directed state court judges to apply federal law in their respective states.

Luther Martin, as the originator of the Clauses, might have special insights as to their original understanding. After Oliver Ellsworth (writing as The Landholder) accused Luther Martin of proposing the Supremacy Clause, Martin acknowledged his authorship of this portion of the New Jersey Plan. Martin, however, underscored the sharply different context in which he had offered the Clauses. Martin insisted that he had introduced the provision before it was finally established that the federal government could create "inferior continental courts" for cognizance of cases arising under federal law. Under his plan, state courts, rather than Congress, would adjudge whether federal law had been violated. In other words, "every question . . . would have been determined in the first instance in the courts of the respective states." Had the original understanding of the role of state courts survived, "the propriety and the necessity that treaties duly made and ratified, and the laws of the general government, should be binding on the state judiciaries which were to decide upon them, must be evident to every capacity." In Martin's view, then, the Supremacy and State Judges Clause were originally meant to ensure that federal laws and treaties were binding on state judges who were to have the initial role in interpreting them.

Even though state courts will not always have original jurisdiction in federal cases, the fact that they might have original jurisdiction makes the "propriety" and "necessity" of the Supremacy and the State Judges Clauses equally evident today. For while Luther Martin did not succeed in preventing the creation of lower federal courts, his fight was not completely in vain. Congress may, but need not, insti-
Field Office Federalism

Field Office Federalism

Constitute inferior and separate federal courts with sole jurisdiction over federal cases. Where Congress chooses not to establish these courts, state courts are to play the exclusive role as initial vindicators of federal law and the Constitution.

The Anti-Federalist literature indicates that many recognized that the Supremacy and State Judges Clauses required state courts to administer federal law. The Clauses commandeer state judges into the service of the federal government. An interpretation of the clause that allowed state courts to "opt out" of enforcing federal law through jurisdiction-limiting statutes (passed by state legislatures) would mean that Martin proposed a clause that would have held out the promise of state court enforcement while granting states the privilege of withdrawing those fora.355

Apart from the commandeering effects of the Supremacy and State Judges Clauses, some members of the Founding Generation thought that state courts could be transformed into inferior federal courts. At the Virginia Ratification Convention, numerous delegates insisted that state courts would enforce federal law. Edmund Pendleton, member of Virginia's highest court,356 thought "it highly probable that [Congress would] appoint the state courts to have the inferior federal jurisdiction."357 Such a system would provide "general satisfaction" and would also be economical "since a small additional salary may in that case suffice, instead of competent provision for the judges."358 Pendleton thought appointing state courts with federal

355 The Philadelphia Convention's rejection of state courts as the exclusive courts of original jurisdiction led Martin to claim erroneously that only federal courts would administer federal law. At the Maryland ratification convention, Martin correctly understood that rejection of exclusive reliance on state courts was based on a perception that state courts were not sufficiently independent. 3 id. at 156. Yet he mistakenly concluded that federal courts were to be the exclusive administrators of federal law. 3 id. at 220. Similarly, George Mason, apparently believed that state judges could not hear any federal cases. Mason claimed that all revenue cases "may and must be brought . . . to the federal courts; in the first instance, to the inferior federal court, and afterwards to the superior court." 3 Debates, supra note 65, at 525-26. Likewise, actions against federal officers for brutality would have to be brought before federal judges partial to federal officers would have to be brought before federal judges partial to federal officers. 3 id. at 524.

356 Carson, supra note 73, at 113.

357 Id. at 113. Note Pendleton's interchangeable use of "appoint" for the Constitution's "constitute."

358 Id. At the same time, Pendleton recognized that circumstances might change and a "power to make such changes [such as creating separate inferior federal courts] ought to rest with Congress." Id.
jurisdiction was an example of "constituting tribunals inferior to the Supreme Court." 359

Madison held similar views. Congress, under the Articles, could vest the power to hear capture cases "in the state courts, both inferior and superior." 360 Similarly, Congress, under the Constitution, would exercise its power to constitute inferior tribunals just as it had under the Confederation. "By the Confederation, Congress" could "establish courts for trying piracies and felonies committed on the high seas." 361 The Continental Congress did not abuse this power and create numerous piracy courts. Instead, it "invested the admiralty courts of each state with this jurisdiction." 362 Under the new Constitution, if the state courts were trusted, Congress would still employ them as inferior tribunals. Madison and Pendleton, then, regarded the power of constituting inferior tribunals as the authority under which the federal government could compel state courts to hear federal cases. By referring back to the Articles piracy courts, Madison shows his familiarity with the Continental Congress' powers and their implications for interpreting our Constitution.

Recognizing that mixed loyalties might arise from state judges serving as federal judges, some Virginian opponents of the Constitution voiced their fears about this possibility. Patrick Henry decried the prospect of state judges sitting as federal judges as well. "If we are to be deprived of that class of men [state judges], and if they are to combine against us with the [federal] government, we are gone." 363 Henry colorfully asserted that state judges "cannot serve two masters." 364 Because federal laws are "paramount to those of the states, . . . whenever they come in competition, the judges must decide in favor of the former." 365

359 Pendleton repeats this understanding when he notes that "[f]or the sake of economy, the appointment of these [inferior] courts might be in the state courts. . . . There is no inconsistency, impropriety, or danger, in giving the state judges the federal cognizance." 3 id. at 548.
360 3 id. at 536.
361 Id.
362 Id.
363 3 id. at 539.
364 Id.
365 Id.
William Grayson also denounced the possibility of state judges having divided loyalties. State judges are the best check we have. They secure us from encroachments on our privileges. They are the principal defence of the states. How improper would it be to deprive the state of its only defensive armor! I hope the states will never part with it. There is something extremely disgraceful in the idea. How will it apply in the practice? The independent judges of Virginia are to be subordinate to the federal judiciary. Our judges in chancery are to be judges in the inferior federal tribunals. 366

Grayson, like Henry, recognized that state courts could be constituted as inferior tribunals and seized upon this possibility as a reason for rejecting the Constitution. By speaking of the federal government depriving states of the loyalties of state judges, he implicitly acknowledged that states have no adequate defense against such federal encroachments.

Delegates at the North Carolina Convention also understood that state courts would be called into federal service. As noted earlier, William McClaine attested that “[t]he laws can, in general, be executed by the officers of the states. State courts and state officers will, for the most part, probably answer the purpose of Congress as well as any other.” 367 North Carolina Governor Johnston also viewed state courts as auxiliaries for the enforcement of federal law. State courts were to have concurrent jurisdiction even if federal courts were created. 368 Indeed, it was not altogether clear whether and how Congress would create inferior courts. “I do not know how inferior courts will be regulated. Some suppose the state courts will have this business.” 369

366 3 id. at 563.
367 4 id. at 140.

Later, however, McClaine asserted that state judges were unfit to hear federal cases because they were so partial to their own states laws. 4 id. at 172.

Still later, McClaine defends the Supremacy and State Judges Clauses as absolutely necessary. “To permit the local laws of any state to control the laws of the Union, would be to give the general government no powers at all. If the judges are not to be bound by it, the powers of Congress will be nugatory.” 4 id. at 181.

368 4 id. at 141. “The opinion which I have always entertained is, that they will, in these cases, as well as in several others, have concurrent jurisdiction with the state courts, and not exclusive jurisdiction.” Id.
369 4 id. at 142.
The state convention debates reveal that many delegates were aware that Congress might employ its authority to "constitute tribunals" to commandeer state courts. Undoubtedly, the Constitution's opponents raised the specter of numerous federal judges, each unfamiliar with local habits and practices. The Constitution's supporters then rejoined that Congress could constitute state courts as inferior tribunals.\textsuperscript{370} Having had their first argument defeated, the opposition regrouped and decried the notion that state judges would serve as federal judges thus depriving states of the judges' undivided loyalties.

C. Commandeering State Courts Today

Before the Articles of Confederation, the Continental Congress counted on state courts to recognize and enforce any legal authority that the Congress may have wielded. During the Confederation period, the Congress once again relied on state courts for vindication of most federal rights; federal courts only had jurisdiction over a few cases. After the ratification of our Constitution, Congress may continue to rely upon state courts to hear federal cases. An implicit federal prerogative common to all these periods was that state courts might be called on to enforce federal law.

\textsuperscript{370} After the Constitution was ratified, several individuals who supported a strong central government rejected the notion that Congress could institute state courts as inferior tribunals. For instance, after the ratification of the Constitution, Ellsworth rejected his earlier interpretation.

To annex to State Courts, jurisdictions which they had not before, as of admiralty cases, and, perhaps, of offences against the United States, would be constituting the judges of them, \textit{pro tanta}, federal judges, and of course they would continue such during good behavior, and on fixed salaries, which in many cases, would illy comport with their present tenures of office.


Note that Ellsworth's assertion has several problems. First, as a factual matter, state courts already had cognizance of admiralty cases. See supra Part I.C. Second, granting state courts jurisdiction over cases that they did not have cognizance over before does not necessarily transform them into inferior judges with lifetime tenure and nondiminishment of salary. No one else claims that "annexing" or granting jurisdiction alone requires life tenure and nondiminished compensation. Finally, Ellsworth's only objection is not that granting state courts' federal jurisdiction is unconstitutional; rather that it merely "illy comport[es]" with their status as state judges.

His post-ratification musings do not refute his earlier declaration that "nothing hinders \ldots that all cases may in the first instance be had in the state courts \ldots." 3 The Documentary History of the Ratification of the Constitution 490 (Merrill Jensen ed., 1978).
Finding the specific textual support for this proposition has proven difficult. First, the Confederation period suggests that the power to constitute inferior tribunals might grant Congress the authority to constitute state courts as inferior tribunals. Indeed, there is some evidence for this in *The Federalist Papers*, the Philadelphia Convention records, and the state ratification records. Hamilton, Madison, Edmund Pendleton, and others thought that Congress could constitute state courts as federal courts.

At the same time, these individuals appeared to have been unaware of the complications that accompanied their proposals. They all appear to have supposed that Congress can appoint state courts as it did under the Articles. They did not mention that these state judges transformed into federal judges would have life tenure and undiminished salary. They also did not relate that, under the Appointments Clause, the President must nominate all Article III judges.

There is a simple reason for their not mentioning the appointment, tenure, and salary complications of constituting state courts as inferior federal courts. These gentlemen simply failed to recognize that these provisions applied to all inferior judges. Recall that the Committee of Detail granted all inferior judges tenure during good behavior and precluded diminishment of their compensation. The Convention ratified these changes after the fact and may have been unaware of the significant changes the Committee of Detail had wrought. The authority to appoint Supreme Court judges was not granted to the President until September 7, 1787, late in the Convention. Until that time, it was not clear who would appoint Supreme Court and inferior judges.

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371 Compare 2 Federal Convention, supra note 30, at 132 with 2 id. at 186.
372 2 id. at 423.
373 Note that the Virginia Plan provided that both Supreme Court Judges and Inferior Court judges would receive tenure during good behavior and nondiminished compensation. 1 id. at 21-22. Because the Convention rejected the mandatory creation of inferior federal courts, the tenure and salary provisions obviously no longer applied to inferior judges. When the Convention bestowed upon Congress the discretionary power to create inferior courts, the tenure and salary restrictions still were not made to apply to inferior judges. 1 id. at 125. The Committee of Detail undoubtedly went back to the original Virginia Plan and resurrected the idea that all federal judges ought to have tenure and nondiminished compensation.
374 2 id. at 533. Until that time, the President had the authority to appoint officers of the United States. 2 id. at 185.
Nonetheless, even if these gentleman did not realize that the Constitution requires that all judges of the inferior courts receive tenure during good behavior and nondiminished compensation, nothing in the Constitution precludes Hamilton’s, Madison’s, and Pendleton’s utterances from coming true. Congress must merely observe more limitations on its authority than it did under the Articles of Confederation. Under the Articles, state judges commandeered into serving as federal piracy judges did not need life tenure, undiminished salary, or presidential appointment and Senate confirmation. Under our Constitution, all these specifications must be met before someone can be recognized as an inferior Article III judge. If these criteria are met, then the federal government can indeed commandeer state courts as inferior federal courts.

A second manner in which the federal government might have a “right” to commandeer state courts is through the Supremacy and State Judges Clauses. Their history suggests that they transformed state courts into instruments of federal law. The clauses declared that henceforth, federal law was part of the states’ laws as well. All courts with jurisdiction are required to apply federal law over state law where the two conflict. Moreover, the Supremacy Clause prevents state legislatures from enacting jurisdictional laws which discriminate against federal cases. A discriminatory jurisdictional statute (such as “a state court may only hear state law cases”) fails to heed the instruction of the Supremacy Clause: Federal law is really the law of your state—do not treat it any differently than you would your own laws.

Regardless of the theory one adopts, it becomes clear that the Constitution’s proponents and at least some of its detractors recognized that the federal government would have the authority to commandeer state courts. Historical practice under the Articles, the Convention histories of the authority to constitute inferior tribunals and the Supremacy and State Judges Clauses, The Federalist Papers, several prominent Anti-Federalists, and the state ratification debates all suggest that state courts could be commandeered into federal service. As a matter of original understanding, the Founding Generation understood that state courts could be commandeered to enforce federal law.
V. CONCLUSION

What is the practical result of this? In essence, the Constitution abandoned the idea of instructing legislatures on how to legislate. Instead, the Constitution empowers the federal government to "requisition" directly the assistance of state executives and courts. As Hamilton put it, the federal government "must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations."375 The federal government "must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions."376

From the states' point of view, the difference appears rather trivial. Yet from the federal government's perspective, there is a world of difference. State legislatures, unlike state executives and judiciaries, were the direct representatives of the people. Because of the source of their power, state legislatures might feel more emboldened and more apt to defy federal authority. Under the Articles, this is exactly what happened.

Why the distinction between the state magistracy and state legislatures? Ellsworth's views on the question are illustrative. "I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity."377 First, as Ellsworth notes, state legislatures ("sovereign bodies") wielded whatever sovereignty the state government possessed. The legislatures represented the people of the state and acted according to their interests. Outsiders who tried to force these institutions to obey (like the Continental Congress) were simply not going to be heeded.

Second, state legislatures exercised legislative will and discretion. They determined what laws should be passed and which legislation was better left unenacted. Because they exercised will, they could not be made to comply mechanically with federal requisitions. State legislatures, then, embodied the states "in their political capacity."

Third, the multimember character of state legislatures made coercion of legislatures difficult. Who would be held accountable for failure to satisfy a requisition, the whole legislative body or only those

375 The Federalist No. 16, at 165 (Alexander Hamilton).
376 Id.
377 2 Debates, supra note 65, at 197.
who had opposed fulfilling the congressional requisition? Where the national government's authority was "confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war." Hence, the Constitution abandoned coercion of multimember "sovereign bodies."

Finally, the Founding Generation relinquished requisitioning state legislatures because in practice the system simply had failed to deliver. State legislatures repeatedly ignored Articles requisitions. In such a system, requisitions were really only supplications, as even opponents of the Constitution understood. Short of a civil war, state legislatures could not be forced to comply. As Ellsworth insisted, "[n]o coercion is applicable to such [legislative] bodies, but that of an armed force." Better to abandon the phantom authority altogether.

The magistracy, however, were perceived differently. They did not exercise state sovereignty; they were not "sovereign bodies." Rather they were the servants of the legislature; the servants of the laws of the land. Nor did they exercise legislative will; they were not the embodiment of a state's "political capacity" that Ellsworth discussed. Instead they mechanically enforced the laws of the land. For these reasons they could not pick and choose which laws to enforce and, thus, could not discriminate against federal law. Moreover, coercion could more easily be applied against the magistracy. Execution and adjudication normally took place through the agency of a single person. Delinquent individual executive or judicial officers could be held accountable for maladministration of the laws in a manner that state legislators could not be held responsible for failure to heed congressional attempts at commandeering. Finally, the Founding Gener-

378 The Federalist No. 15, at 160 (Alexander Hamilton).
379 Edmund Randolph, A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), reprinted in 2 Anti-Federalist, supra note 47, at 90 ("[T]he operations of peace and war will be clogged without regular advances of money, and that these will be slow indeed, if dependent on supplication alone. For what better name do requisitions deserve, which may be evaded or opposed, without the fear of coercion?").
380 2 Debates, supra note 65, at 197.
381 The Federalist No. 16, at 166 (Alexander Hamilton) ("The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness.").
382 Id.
ation considered commandeering state executives and judges more efficacious under the Articles than the misguided attempts to commandeer state legislatures. State executives and courts could not defy federal authority as easily as state legislatures had.

Whatever the reasons for distinguishing the commandeering of state legislatures from commandeering state magistrates (executives and courts), the Constitution contains such a distinction. Though the scope of that ability may justly be questioned, its constitutional legitimacy can hardly be doubted given the wealth of evidence indicating that both proponents and opponents of the Constitution envisioned federal commandeering of state executives and state courts.

When Hamilton asserted that "if we still will adhere to the design of a national government . . . we must extend the authority of the Union to the persons of the citizens,—the only proper objects of government," he said nothing to the contrary. Federal law, administered by state executives and courts, does not constitute a law "for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES," nor are these state institutions "objects of government." Instead, federal law, administered by state executives and courts, helps "extend the authority of the Union" to individuals.

Returning to the questions confronting the Court in New York, recall that Congress gave states a choice: either regulate nuclear waste pursuant to our instructions or take title to the waste. Our review of the Founding Generation's views on commandeering bolsters Justice O'Connor's holding as it relates to state legislatures. Congress simply cannot command a state legislature to legislate. Nor can Congress threaten a state with ownership of nuclear waste should the state refuse to regulate as Congress wishes. Congress simply lacks the

383 Questions remain about the scope of the commandeering power. Several discussions of the power suggest that Congress cannot become involved in selecting state officers or in regulating a state's bureaucratic system. See supra notes 222-25 and accompanying text. Another unresolved issue is whether the federal government must reimburse state governments for time spent carrying out federal duties. Given the administrative discretion granted to police officers and other state executive officials, a small supplemental federal salary might prove useful in encouraging them to administer federal law. Without such a supplement, state executives are likely to serve diligently the master who pays them (the state) rather than the master who does not (the federal government).

384 The Federalist No. 15, at 159 (Alexander Hamilton).

385 Id. at 158.
authority to impose such a liability on states that refuse to bend to congressional commands.\textsuperscript{386}

If, however, Congress had merely told state officials to enforce federal waste disposal laws, state executives would have to administer the waste law. Numerous members of the Founding Generation explicitly stated the state executives could be used for federal ends.

Yet, Congress cannot use state executives for any federal purpose. Suppose Congress instructed state environmental officials to administer federal wetlands laws and to compensate those individuals who were the subject of regulatory takings. Here, Congress would be attempting to commandeering not only state executives, but also attempting to requisition state treasuries.\textsuperscript{387} Such an attempt to circumvent the Founding Generation's decision to renounce requisitions would be constitutionally infirm. Congress may only use state executives to administer federal law; the Constitution (implicitly) prohibits Congress from tapping into state treasuries. Hence, Congress may not use state executives to siphon off state funds. Congress can get state executives to enforce wetlands policy, but the funds for takings compensation must come from the federal fisc.

In essence, this Article has argued that \textit{New York}’s "commandeering" dividing line ought to be shifted. Justice O’Connor admits that the federal government may commandeering state courts.\textsuperscript{388} This Article seeks to show that state executives are really more like state judges than state legislators. State executives and judges must administer the laws of the land, even if those laws emanate from Congress. Similarly, Justice Stevens is quite correct in noting that the federal government may commandeering state executives and courts.\textsuperscript{389} He

\textsuperscript{386}\textit{New York v. United States}, 112 S. Ct. 2408, 2429 (1992) (holding that requiring states to take title to nuclear waste either lies “outside Congress' enumerated powers” or infringes upon state sovereignty protected by the Tenth Amendment).

\textsuperscript{387} Of course, the congressional ability to commandeering state executives does help Congress to tap into state treasuries as well. To the extent that state officers are burdened with federal duties, they neglect state responsibilities, thus necessitating the state legislatures to hire more executives. This indirect commandeering of state funds is a far cry from the ability to requisition state legislatures.

\textsuperscript{388} 112 S. Ct. at 2430.

\textsuperscript{389} Id. at 2446 (Stevens, J., concurring in part and dissenting in part).
merely falters in not recognizing the peculiar nature of state legislatures and the failed commandeering attempts under the Articles. Whether or not we perceive state legislatures as fundamentally different from the state magistracy, the Constitution so views them.

Justice O'Connor's desire to resurrect our Constitution's Federalism is laudable; however, her opinion does not reflect the Federalism the Framers and Ratifiers constructed. The Framers granted the federal government a limited set of enumerated powers. As Madison states in Federalist No. 45, "[t]he powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Justice O'Connor made all the right "limited federal powers" murmurs but failed to deliver the Federalism the Constitution actually embodies. The Constitution would be better served if she attempted to recover the original understanding of the limits of these "few and defined" federal powers. She ought to accept, however, the principle that where the federal government has the constitutional authority to act, it may command the assistance of state executives and courts. As a matter of original understanding state executives and courts may indeed be the "bureaucratic puppets" and "field offices" of the federal government.

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390 The Federalist No. 45, at 328 (James Madison).