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The Paradox of Omnipotence: Courts, Constitutions, and Commitments

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THE PARADOX OF OMNIPOTENCE: COURTS, CONSTITUTIONS, AND COMMITMENTS

*David S. Law**

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INTRODUCTION: THE PARADOX OF OMNIPOTENCE

Can God make a stone that He cannot lift? That is, does infinite power include the power to limit itself? The question has long been a subject of philosophical debate.¹ It has also, on occasion, troubled legal theorists and social scientists. The paradox of omnipotence can easily be recast in lawmaking terms:

In law the paradox is of parliamentary, legislative, or sovereign omnipotence: the power to make any law at any time ... If an entity has the power to make any law or do any act at any time, then can it limit its own power to act or make law? If it can, then it can't,

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¹ See, e.g., George I. Mavrodes, *Some Puzzles Concerning Omnipotence*, 72 PHIL. REV. 221 *passim* (1963); C. Wade Savage, *The Paradox of the Stone*, 76 PHIL. REV. 74 *passim* (1967).

and if it can't, then it can. If it can do any act at any time, then it can limit or destroy itself, because that is an act; but it cannot do so, because doing it means it cannot and could not do any act at any time. In the legal version we can say that either there is a law that the sovereign cannot make or a law that it cannot repeal.²

It has been the insight of social scientists that sovereign omnipotence, of the type that cannot impair itself, can be a source of considerable practical difficulty for sovereigns themselves. In an influential article, Douglass North and Barry Weingast tell the story of the English and French monarchies in the seventeenth and eighteenth centuries.³ Each regime confronted a practical challenge created by the paradox of its own omnipotence. One flourished, because it developed limits upon its own power; the other stagnated, because it remained too powerful for its own good.

North and Weingast frame their account with a pair of closely related observations. First, it is often in a sovereign's best interest to make a credible commitment not to perform certain acts. For example, a sovereign with absolute power can alter property rights for his or her own benefit. Yet people are less likely to engage in productive economic activity or to invest in a particular country if they fear that its ruler will confiscate the fruits of their labor.⁴ Similarly, creditors will not voluntarily lend generous amounts at favorable terms to an absolute monarch who can renege upon debts at will.⁵ The second observation that North and Weingast make, however, is that sovereigns have historically succumbed to the temptation to break their commitments for short-term gain.⁶ Even the prospect that citizens and lenders will refuse to cooperate

² PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LAW, LOGIC, OMNIPOTENCE, AND CHANGE* 12 (1990); *see also, e.g.*, JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 147-49 (2000) (identifying and giving political examples of the "paradox of omnipotence"); H.L.A. HART, *THE CONCEPT OF LAW* 149-52 (2d ed. 1994) (attempting to unravel the paradox by distinguishing between "self-embracing" and "continuing" forms of legislative omnipotence).

³ *See* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, in *THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN WORLD* 16-47 (Paul W. Drake & Mathew D. McCubbins eds., 1998). This essay first appeared in 1989 in the *Journal of Economic History*.

⁴ *See id.* at 16.

⁵ *See id.* at 17 (describing the English monarch's resort to "forced loans").

⁶ *See id.* at 16 (noting that "responsible behavior" on the part of monarchs has been a historical rarity, "in good part because the pressures and continual strain of fiscal necessity eventually led

again in the future – that is, the threat of retaliation over repeat play – is not always adequate to prevent renegeing, particularly when the very survival of a regime is at stake.⁷

In the competitive struggle to expand and sustain their respective empires, the English and French monarchies required vast amounts of capital. At the outset of the seventeenth century, however, neither regime could commit itself credibly to repay debts or to honor property rights. The absence of limitations upon the legal power of kings meant that there was no law a king could make that he could not also unmake or disregard. Consequently, English and French kings alike earned a reputation for expropriating wealth, repudiating debts, and renegeing upon commitments, by means ranging from currency manipulation to outright force.⁸ Not surprisingly, creditors took such behavior into account and demanded higher interest rates from kings than from their wealthy subjects.⁹ In England, the constitutional settlement imposed by the Glorious Revolution of 1688 brought a halt to such faithless conduct. Henceforth, only Parliament could authorize taxes or provide for the financial needs of the Crown. Parliament, in turn, represented commercial interests that would not tolerate governmental disregard for property rights.¹⁰ Meanwhile, English judges became assured of continued tenure during good behavior, and their newfound independence enabled them to vindicate property rights against King and Parliament alike.¹¹ The Crown's newfound inability to dishonor its commitments to wealth holders translated into a newfound ability to borrow: public borrowing increased vastly, even as interest rates fell dramatically,

rulers to 'irresponsible behavior'"); *id.* at 20-21; see also Kenneth A. Shepsle, *Discretion, Institutions, and the Problem of Government Commitment*, in *SOCIAL THEORY FOR A CHANGING SOCIETY* 245, 247 (Pierre Bourdieu & James Coleman eds., 1991); Hilton L. Root, *Tying the King's Hands: Credible Commitments and Royal Fiscal Policy During the Old Regime*, 1 *RATIONALITY & SOC'Y* 240, 240-41 (1989).

⁷ See *id.* at 20-21; Douglass C. North & Barry R. Weingast, *Limited Government and Liberal Markets: An Introduction to "Constitutions and Commitment,"* in *THE ORIGINS OF LIBERTY*, *supra* note 4, at 13-14.

⁸ See North & Weingast, *supra* note 3, at 22-25 (describing, inter alia, the English crown's seizure of bullion that merchants had placed in the Tower of London for safekeeping; Root, *supra* note 6, at 246-47 (describing, inter alia, the French crown's use of currency reform to decrease the value of its debts); Shepsle, *supra* note 6, at 250.

⁹ See Root, *supra* note 6, at 253; Shepsle, *supra* note 6, at 250.

¹⁰ See North & Weingast, *supra* note 3, at 32.

¹¹ See *id.* at 27, 30, 32-33.

because lenders concluded that the Crown would honor its debts.¹² It was the accidental genius of the Glorious Revolution, argue North and Weingast, that the imposition of constitutional restrictions upon the ability of the Crown to obtain capital by coercive means, at the expense of creditors and citizens, enabled it to obtain even greater amounts of capital at favorable terms. The French regime, by comparison, underwent no comparable institutional transformation. Unable to raise war financing on the same scale as its English counterpart, it met ultimately with bankruptcy – and the guillotine.¹³

Thanks to North, Weingast, and others writing in the same vein,¹⁴ it is now fairly conventional to observe that constitutions can and do benefit sovereigns by imposing limits upon their power. This school of thought is well summarized by John Ferejohn and Larry Sager:

Economists, social scientists, and legal theorists sometimes argue that constitutional practices can usefully be understood as commitment devices. By enshrining various aspects of procedure or substance in a written document that announces itself as the supreme source of law, and by making that document difficult to change, a people can achieve a future better than any they could otherwise attain. The usual examples center on using a constitution to commit to protecting private property, to accord political and legal recognition to unpopular minorities, and more generally to respect and further the rule of law and democracy.

...

On this view, a constitutionally-bound government acquires capacity it would not otherwise have by effectively restraining itself[.] A government which is effectively bound to pay back its loans and honor its contracts is thereby made better able to borrow money and enter into contracts. And a government that is

¹² See *id.* at 35-39.

¹³ See *id.* at 45-46.

¹⁴ See, e.g., ELSTER, *supra* note 2, at 88-174; JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 87-96 (rev. ed. 1984); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134-77 (1995); Russell Hardin, *Why a Constitution?*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100 *passim* (Bernard Grofman & Donald Wittman eds., 1989); Shepsle, *supra* note 6, at 250-51; Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 348-55 (1990) (justifying judicial review as a form of “precommitment among free and equal sovereign citizens” to the ideals underlying “democratic sovereignty”); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 635-42 (1991).

constitutionally barred from expropriating property is thereby better able to attract capital.¹⁵

It is not always the case, however, that constitutions enhance the ability of governments to make commitments. What the literature on constitutions and commitments has neglected is the extent to which constitutions can have precisely the opposite effect. Insofar as they confer inalienable powers and immunities upon governments, constitutions instead *entrench barriers to commitment*. Consider again the example of the United Kingdom. The constitutional settlement imposed by the Glorious Revolution did not solve the paradox of omnipotence so much as it relocated the problem from one organ of government to another: whereas it was once the Crown that lacked the power to bind itself, it is now Parliament that lacks this power. The doctrine of parliamentary sovereignty is a pillar of England's unwritten constitution, and it provides, in effect, that Parliament lacks legal power over the extent of its own legal power.¹⁶ In Dicey's authoritative formulation, "Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, ... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."¹⁷ Such legislative

¹⁵ John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929 (2003); see also, e.g., JEREMY WALDRON, LAW AND DISAGREEMENT 257-60 (describing, then critiquing, "the 'precommitment' view of constitutional constraints").

¹⁶ See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23-32, 39-70 (10th ed. 1959) (defining the English "constitution," and identifying parliamentary sovereignty as one of its components); JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 1 (1999); George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined*, 92 L.Q. REV. 591, 612 (1976) (noting that there is "simply no judicial support whatever" for the view that Parliament can "impose limitations on the content or ambit of future legislation").

¹⁷ DICEY, *supra* note 16, at 39-40. The influential English legal theorist H.L.A. Hart acknowledged that parliamentary sovereignty posed a paradox of omnipotence, and sought to resolve the paradox by drawing a distinction between continuing and self-embracing omnipotence: self-embracing omnipotence includes the power to limit one's own omnipotence, whereas continuing omnipotence is, as its name suggests, omnipotence that cannot permanently impair itself. See HART, *supra* note 2, at 149-52. In practice, British courts have interpreted parliamentary sovereignty as a form of continuing omnipotence, albeit one that arguably permits Parliament to impose heightened procedural requirements upon itself. See Winterton, *supra* note 16, at 596-613 (acknowledging Parliament's inability to "impose limitations on the content or ambit of future legislation," but also describing disagreement among scholars over the extent of Parliament's ability to alter the "manner" or "form" by which it exercises legislative power). Thus, for example, if Parliament specifies in legislation that it can only withdraw from the E.U. or repudiate E.U. law upon an unmistakably clear statement of its intent to do so, the courts will honor and enforce that requirement against Parliament. However, if Parliament were to enact

omnipotence renders the United Kingdom theoretically incapable, for example, of forever relinquishing its control over Canada or Australia,¹⁸ or of making a binding membership commitment to the European Union.¹⁹

This article advances several claims about the nature of the commitment problems that governments face, and the role of constitutions and courts in addressing them. Part I elaborates the argument that constitutions do not necessarily solve commitment problems but can instead aggravate them, by entrenching inalienable governmental powers and immunities. Part II argues that sovereigns make different types of commitments that engender more than one variety of commitment problem. I distinguish in particular between *effective* and *persuasive* commitments, on the one hand, and the problems of *undercommitment* and *overcommitment*, on the other. Others have dwelt mainly upon what I term the problem of undercommitment – namely, the inability of sovereigns to make persuasive commitments in the absence of adequate limitations upon their own power. The potential for overcommitment, by comparison, has not been identified by scholars as a problem for governments but ought to be of concern, for any categorical solution to the problem of undercommitment runs the risk of hobbling the government permanently while exceeding what is necessary to ensure the government's ability to make persuasive commitments. Part III explores how courts can navigate a course between these perils and optimize the extent of the sovereign's commitments, even in the face of constitutionally entrenched barriers to commitment. I also

legislation that withdraws the United Kingdom from the European Union, there is little question – for now, at least – that British courts would honor the withdrawal. See GOLDSWORTHY, *supra* note 16, at 15, 244-45 (observing that parliamentary sovereignty might fall victim to the passage of time “if it ever comes to be generally accepted by British legal officials that Parliament has lost its authority to withdraw Britain from the European Community”).

¹⁸ See, e.g., HART, *supra* note 2, at 120-22; PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 3.5(d), at 3-11 to 3-13 (3d ed. 2003) (discussing section 2 of the Canada Act, 1982 and its questionable legality as a matter of British constitutional law); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 664-65 n.37 (2005); Winterton, *supra* note 16, *passim*.

¹⁹ See, e.g., GOLDSWORTHY, *supra* note 16, at 244 (observing that “if Parliament were tomorrow to legislate to terminate Britain's membership ... British courts would almost certainly acquiesce”); Law, *supra* note 18, at 664-65 n.37; O. Hood Phillips, Q.C., *Self-Limitation by the United Kingdom Parliament*, 2 HASTINGS CONST. L.Q. 443, 467 (1975) (deeming it the “strictly constitutional position” that Parliament can “repeal or unilaterally amend” the domestic statute by which the United Kingdom joined the European Union); see also, e.g., Peter Mirfield, *Can the House of Lords Lawfully Be Abolished?*, 95 L.Q. REV. 36 *passim* (1979) (questioning the legal ability of Parliament to abolish the House of Lords).

suggest, however, that in performing these functions, courts risk damage to the basis of their own power – namely, their reputation for rendering fair and efficacious judgments. I will draw mainly upon Supreme Court decisions to illustrate each of these claims.

I. THE CONSTITUTIONAL ENTRENCHMENT OF SOVEREIGN OMNIPOTENCE

It is tempting to dismiss the British doctrine of parliamentary sovereignty as the conceptual legacy of governance by monarchs who claimed absolute power as a matter of divine right – a legacy from which Americans freed themselves centuries ago. One might suppose, in particular, that parliamentary sovereignty rests upon a conception of unlimited sovereign power made obsolete in this country by the adoption of written state and federal constitutions that explicitly limit governmental power. But written constitutions do not only limit power; they also *confer* power, and that power may be inalienable. Constitutions set forth both minima *and* maxima of governmental power, and the minima that they define can be as inflexible as the maxima that they impose. That is, constitutions often implement what Stephen Holmes calls the “self-destruction taboo”²⁰: they can and do render governments incapable of disabling themselves. To render a sovereign incapable of disabling itself, however, is also to ensure that the sovereign can always undo previous acts and unmake prior commitments.

In this country, an assortment of constitutional doctrines guarantees the continuing ability of the state and federal governments to avoid judicial enforcement of their commitments, should they so choose. The doctrines discussed below confer powers that cannot be alienated and immunities from judicial process that cannot be irrevocably waived.

A. Inalienable Attributes of Sovereignty

The Supreme Court’s decision in *United States Trust Company of New York*

²⁰ HOLMES, *supra* note 14, at 114.

*v. New Jersey*²¹ illustrates the constitutionalization of the self-destruction taboo. *United States Trust* concerned a deliberate legislative effort to impair the debt obligations of the Port Authority of New York and New Jersey, a public body created by a bi-state compact between New York and New Jersey. The Port Authority finances its operations in part by issuing bonds secured by a "general reserve fund" into which all of its surplus revenues are pooled.²² In order to promote investor confidence in the Port Authority and thereby reduce its borrowing costs, New York and New Jersey jointly enacted a "statutory covenant" that limited the uses to which the Port Authority's reserves could be applied without bondholder consent. In particular, the 1962 covenant provided that the reserves would not be used without bondholder consent to fund commuter rail operations, except to the extent that specified reserve amounts were met and operating deficits remained within specified limits.²³ By the mid-1970s, however, New York and New Jersey wanted so badly to expand the Port Authority's commuter rail operations that they retroactively repealed the 1962 covenant.²⁴ Port Authority bondholders brought suit in state court challenging the repeal of the covenant as a violation of the Contract Clause, which forbids any state from passing a "Law impairing the Obligation of Contracts."²⁵ The New Jersey courts rejected the claim.²⁶

The Supreme Court looked more favorably upon the argument and struck down the repeal of the covenant. For the dissenters, the majority's use of the Contract Clause to invalidate state legislation reeked unacceptably of the *Lochner* era.²⁷ Both sides agreed, however, that as a matter of federal constitutional law, there are certain powers that states cannot alienate and, therefore, certain contractual commitments that states cannot be forced to observe.²⁸ In the

²¹ 431 U.S. 1 (1977).

²² See *United States Trust*, 431 U.S. at 7.

²³ See *id.* at 10-11.

²⁴ See *id.* at 13-14.

²⁵ U.S. CONST. art. I, § 10.

²⁶ See *United States Trust*, 431 U.S. at 3-4.

²⁷ See *id.* at 60-61 (Brennan, J., dissenting) (protesting that "this is the first case in some 40 years in which this Court has seen fit to invalidate purely economic and social legislation on the strength of the Contract Clause," and accusing the majority of a return to *Lochner*-era "economic due process" and "substantive constitutional review" of state policy).

²⁸ See *Glidden*, 431 U.S. at 23-24; *id.* at 46-49 (Brennan, J., dissenting).

majority's formulation, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."²⁹ The Court's task, therefore, was "to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens."³⁰ On the one hand, the Court deemed it beyond question that states possess "the power to enter into effective financial contracts"³¹: states reserve no "sovereign right to withhold payment" when they "borrow money and contract to repay it."³² On the other hand, Justice Blackmun's opinion for the majority stressed that the police power and the power of eminent domain could not be "contracted away."³³ Deliberate impairment of a contractual obligation remains constitutional "if it is reasonable and necessary to serve an important public purpose"³⁴: a state cannot, for example, be forced to honor a financial commitment that would prevent it from acting for "health or safety reasons."³⁵ The Court warned, however, that "complete deference" to a state's judgment as to the "reasonableness and necessity" of a contractual impairment is not appropriate when "the State's self-interest is at stake."³⁶

The notion that there are constitutional limits upon the ability of a sovereign to contract away certain powers has come to be known in American jurisprudence as the "reserved powers" doctrine,³⁷ but the concept is hardly unique to this country. As Gillian Hadfield has observed, the doctrine of parliamentary sovereignty also imposes analogous limits upon the capacity of

²⁹ *Id.* at 15 (Blackmun, J.).

³⁰ *Id.* at 21 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934)).

³¹ *Id.* at 24.

³² *Id.* at 25 n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

³³ *Id.* at 24.

³⁴ *Id.* at 25.

³⁵ *Id.*

³⁶ *Id.* at 26; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-11, at 620 (2d ed. 1988) ("Despite the Framers' evident inattention to the danger that states might be even more tempted to break their own promises than to help private debtors break theirs, the Court seems correct in stressing the heightened need for judicial oversight when 'the State's self-interest is at stake, and hence in adopting 'a dual standard of review,' with stricter scrutiny of state (or federal) abrogations of governmental obligations than of legislative interference in the contracts of private parties.").

³⁷ See *United States v. Winstar Corp.*, 518 U.S. 839, 874, 888-89 (1996) (plurality opinion of Souter, J.) (recounting the history of the doctrine, and assuming, without holding, that it applies to contracts made by the federal government as well as to those made by states).

governments in other jurisdictions, such as Canada and the United Kingdom, to bind themselves via contract.³⁸ Of all the attributes of sovereignty that cannot be surrendered, however, perhaps none poses a greater obstacle to the enforcement of sovereign commitments than the sovereign's immunity from suit.

B. Sovereign Immunity

The plaintiff bondholders in *United States Trust* were fortunate to have been able to bring suit against New Jersey at all, much less to have prevailed upon appeal to the Supreme Court. As in other Anglo-American jurisdictions,³⁹ anyone in this country who seeks judicial enforcement of a commitment made by the government must contend with the formidable obstacle of sovereign immunity.⁴⁰ In its simplest form, sovereign immunity refers to the rule that a sovereign is immune from suit in its own courts unless it gives consent.⁴¹ Sovereign immunity ensures the ability of the state and federal governments to escape judicial enforcement of their contractual obligations and debts⁴² for the same conceptual reason that Parliament cannot irrevocably commit the United Kingdom to membership in the European Union⁴³ – namely, the paradoxical

³⁸ See Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 471-79, 490-93 (1999) (comparing American, British, and Canadian approaches to sovereign contractual liability, and observing that the same “principle of legislative supremacy” that underlies the doctrine of parliamentary sovereignty is also “bedrock in American law”).

³⁹ See *id.* at 471 (describing sovereign immunity as “the starting point in Anglo-American jurisdictions” for any discussion of the law of government contracts).

⁴⁰ See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19-39 (1963) (identifying the enforcement of government contracts as one of the few contexts in which sovereign immunity has traditionally operated to bar suit).

⁴¹ See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 16-17 (1890) (“The suability of a State without its consent was a thing unknown to law. This has been so often laid down and acknowledged by courts that it is hardly necessary to be formally asserted.”); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.) (“A sovereign is exempt from suit ... on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”); THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (deeming it “inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent”).

⁴² See, e.g., JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 58-80 (1987) (discussing the largely successful efforts of Louisiana and other states to avoid federal judicial enforcement of their debts); Hadfield, *supra* note 38, at 471-73, 479 (describing how Congress can, by withdrawing consent to suit or eliminating jurisdiction in pending suits, prevent courts from adjudicating the contractual obligations of the federal government).

⁴³ See *supra* note 19.

inability of sovereign power to restrict itself. A sovereign has the power to subject itself to suit in its own courts today, but it also has the power to revoke its consent tomorrow, and it cannot rid itself today of the power to revoke its consent tomorrow.⁴⁴

The history of sovereign immunity doctrine in this country is, in significant part, a story of how states have struggled from the nation's inception to avoid paying their debts. The states had incurred heavy debts in the course of the Revolutionary War; in some cases, interest payments alone amounted to 90% of all government expenditures.⁴⁵ Efforts by state governments to dilute or repudiate their debts were common,⁴⁶ and such policies had predictably ruinous effects upon the ability of the states to obtain further capital.⁴⁷ Creditors favored ratification of the Constitution in the hope that it would institute a strong national government willing and able to assume and discharge public debt on terms favorable to them.⁴⁸ The provisions of the Constitution were indeed kind, on the whole, to creditors⁴⁹ – too much so, in the eyes of some. North Carolina, for example, initially declined to ratify the Constitution partly for fear that the Contract Clause⁵⁰ and the prohibitions against issuance of paper money or enforcement of tender laws⁵¹ would require states to honor their debts at face value.⁵²

⁴⁴ See, e.g., *Lynch v. United States*, 292 U.S. 571, 580-82 (1934) (observing that “immunity from suit is an attribute of sovereignty which may not be bartered away,” and that Congress may withdraw all judicial and administrative remedies for breach of the federal government’s contracts “[s]o long as the contractual obligation is recognized” and honored by other means); *District of Columbia v. Eslin*, 183 U.S. 62, 62-66 (1901) (dismissing for lack of jurisdiction a suit to enforce contractual liabilities incurred by the District of Columbia’s Board of Public Works because Congress had enacted a statute directing the dismissal of such proceedings and forbidding the payment of judgments in such cases).

⁴⁵ See WILLIAM G. ANDERSON, *THE PRICE OF LIBERTY: THE PUBLIC DEBT OF THE AMERICAN REVOLUTION* 27 (1983).

⁴⁶ Rhode Island, for example, forced its creditors to accept partial repayment of principal in badly devalued paper money, while North Carolina chose simply to repudiate one-quarter of the value of its outstanding debt certificates. See *id.* at 30, 32.

⁴⁷ See *id.* at 24.

⁴⁸ See *id.* at 40-41; CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* chs. 10, 12 (forthcoming 2005) (describing Hamilton’s successful efforts to secure adoption of a constitution that would enable the federal government to salvage its creditworthiness).

⁴⁹ See, e.g., ANDERSON, *supra* note 45, at 40-41; JOHNSON, *supra* note 48, at ch. 10.

⁵⁰ U.S. CONST. art. I, § 10, cl. 1.

⁵¹ See *id.*

⁵² See ANDERSON, *supra* note 45, at 30; JOHNSON, *supra* note 48, at ch. 12.

The Anti-Federalists argued, in particular, that the federal judiciary contemplated by Article III of the proposed Constitution would enable creditors to obtain federal enforcement of state debts. The criticism, made by Brutus and echoed by other Anti-Federalists, that Article III would enable individuals to obtain federal “judgments and executions ... against the state for the whole amount of the state debt”⁵³ prompted Hamilton to insist in *Federalist No. 81* that sovereign immunity would shield the states from federal judicial enforcement: “It is inherent in the nature of sovereignty,” he asserted, “not to be amenable to the suit of an individual without its consent.”⁵⁴ As it turned out, however, the fears expressed by Brutus were well founded. In *Chisholm v. Georgia*,⁵⁵ the Supreme Court concluded that it had jurisdiction under Article III over a suit brought by a citizen of South Carolina against the unconsenting state of Georgia to collect money owed for goods sold to Revolutionary forces.⁵⁶ Scholars have disagreed over whether it was understood at the time the Constitution was ratified that the states would enjoy sovereign immunity from suit in federal court.⁵⁷ Nevertheless, *Chisholm* created such a “shock of surprise,” in the Court’s own words,⁵⁸ that the states quickly secured passage of the Eleventh Amendment, which stripped the federal courts of jurisdiction over suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁵⁹

The Reconstruction era inaugurated a second round of debt repudiations by state governments that would culminate, once again, in the expansion of sovereign immunity. In Southern states left destitute by the Civil War and the

⁵³ BRUTUS XIII, N.Y. J., Feb. 21, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 428, 429 (Herbert J. Storing ed., 1981); see LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 57 (1988).

⁵⁴ THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see *Hans v. Louisiana*, 134 U.S. 1, 12-14 (1890) (quoting the views of Hamilton, Madison, and John Marshall); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1305-06 (1998).

⁵⁵ 2 U.S. (2 Dall.) 419 (1793).

⁵⁶ See *id.* at 452 (opinion of Blair, J.); *id.* at 466 (opinion of Wilson, J.); *id.* at 479-80 (opinion of Jay, C.J.); JOHNSON, *supra* note 48, at ch. 12; Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19, 20-23 (1967).

⁵⁷ See ORTH, *supra* note 42, at 22-29; John V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747, 750 (1981); Pfander, *supra* note 54, at 1272-73.

⁵⁸ *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

⁵⁹ U.S. CONST. art. 11; see LEVY, *supra* note 53, at 59; Orth, *supra* note 42, at 7.

end of slavery, “carpetbagger” state governments compounded antebellum debts with extravagant borrowing and spending.⁶⁰ The end of Reconstruction and the restoration of home rule to the former Confederate states proved disastrous to former slaves and state creditors alike.⁶¹ The question was not whether the Southern states would attempt to repudiate their debts, but how they would seek to do so.⁶² As if to mock the notion that constitutions enable sovereigns to make credible commitments, Louisiana and North Carolina amended their constitutions to *prohibit* the full repayment of their bonds.⁶³ Litigation over the Louisiana amendment and similar legislative maneuvers would prove to have far-reaching consequences for the law of sovereign immunity.

On its face, the Eleventh Amendment purported only to eliminate federal jurisdiction over lawsuits brought against a state by citizens of *another* state or by subjects of a *foreign* state; its language did not speak to suits by a citizen against his own state, to suits brought by a state itself, or to suits brought by a foreign nation. In *Hans v. Louisiana*,⁶⁴ however, the Court held that the states enjoy sovereign immunity in federal court from suits brought by their *own* citizens: it construed the Eleventh Amendment, in effect, as merely the visible reminder of a broader constitutional “rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals.”⁶⁵ Bondholders sought federal judicial enforcement by other means but were frustrated repeatedly by the judicial expansion of sovereign immunity doctrine. Some sought to avoid the Eleventh Amendment, and to bring themselves within Article III’s explicit grant of federal jurisdiction over suits between states, by assigning their bonds to states – namely, New York and New Hampshire – that had volunteered to sue the debtor states for payment and to remit any net recovery to the original bondholders.⁶⁶ The ploy failed: the Supreme Court reasoned, in *New Hampshire*

⁶⁰ See ORTH, *supra* note 42, at 5; Orth, *supra* note 57, at 753-54.

⁶¹ See Orth, *supra* note 57, at 758.

⁶² See, e.g., ORTH, *supra* note 42, at 94-96 (describing the tactics of Virginia’s “Readjusters”).

⁶³ See ORTH, *supra* note 42, at 66; *Baltzer v. North Carolina*, 161 U.S. 240, 241 (1896) (describing the 1879 amendment to North Carolina’s constitution prohibiting the repayment of certain bonds absent voter approval).

⁶⁴ 134 U.S. 1 (1890).

⁶⁵ *Id.* at 21.

⁶⁶ See ORTH, *supra* note 42, at 66-71.

v. Louisiana,⁶⁷ that the Eleventh Amendment barred suits in which a state acted as a “mere collecting agent” for private citizens.⁶⁸ Nor did the Constitution permit a *foreign* sovereign to bring suit against an unconsenting state in federal court, as Monaco discovered when it attempted to collect on bonds issued by Mississippi.⁶⁹

In sixteenth-century England and France, the ease with which the sovereign could renege upon its commitments raised the cost and increased the difficulty of public borrowing, to the sovereign’s own detriment. By the same token, the protection of sovereign immunity may do states more harm than good. History surely teaches creditors that sovereign immunity enables states to repudiate their debts without fear of judicial intervention, and rational creditors must be expected to demand greater returns in exchange for taking such risks. Nevertheless, the idea that sovereigns must enjoy immunity from suit absent their consent – an idea long ago criticized by Chief Justice Jay as “feudal”⁷⁰ – is one that the Supreme Court has only nurtured in recent years.⁷¹

C. Unenforceability of Judgments

Even if a sovereign explicitly waives its constitutional immunity from suit and allows a suit to proceed to judgment without revoking its consent, there remains the issue of whether a court can then enforce that judgment against the sovereign. Such enforcement raises both practical and legal problems. As a practical matter, it is not surprising that a court might balk at rendering money

⁶⁷ 108 U.S. 76 (1883).

⁶⁸ *Id.* at 89. *But see* *South Dakota v. North Carolina*, 192 U.S. 286, 309-22 (1904) (holding, by a 5 to 4 vote, that South Dakota could sue on its own behalf for payment on bonds that it had received by way of outright gift); ORTH, *supra* note 42, at 83-85 (describing how creditors sought to encourage repayment by threatening to donate state bonds to sovereigns capable of bringing suit in federal court).

⁶⁹ *See* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934); ORTH, *supra* note 42, at 85-86, 140-41.

⁷⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457-58 (1793) (opinion of Jay, C.J.); *see also, e.g.,* *United States v. Nordic Village*, 503 U.S. 30, 42-43 (1992) (Stevens, J., dissenting) (denouncing the Court’s “love affair” with the “thoroughly discredited” doctrine of sovereign immunity).

⁷¹ *See, e.g.,* *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacks power under the Indian Commerce Clause to abrogate the sovereign immunity of states); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks power under Article I to subject nonconsenting states to private suits for damages in state court); *Nordic Village*, 503 U.S. at 33-34

judgments against a distinct sovereign or, worse still, a coordinate branch of government. When courts dare to direct their judgments at the institutions of government that control the powers of purse and sword, they may be lucky merely to escape retaliation, much less to secure compliance. This inability of courts either to resort to force or to allocate scarce resources leads courts to fret over their “legitimacy,” which refers in practice simply to their ability to obtain voluntary compliance with their decisions.⁷²

Not surprisingly, the practical difficulty of enforcing judgments against an unconsenting sovereign has loomed large in the Court’s sovereign immunity decisions.⁷³ In *Chisholm v. Georgia*, for example, Chief Justice Jay balked at the notion that the federal courts could entertain private suits for damages against the federal government itself, in light of the problem of enforcement: “in all cases of actions against States or individual citizens,” he observed, “the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid.”⁷⁴

The obstacles to enforcement of judgments against a sovereign may not, however, be wholly practical in nature. It may be *constitutionally* impossible for a court to compel a sovereign to honor a judgment. Consider the tortured history of the Court of Claims, a specialized court created by Congress to hear a wide range of money claims, including contractual claims, against the United States.⁷⁵ Prior to creation of this court, the Supreme Court had held that no money judgment can be executed against the United States until Congress has appropriated the necessary sum from the Treasury.⁷⁶ No court, however, can

(insisting that any waiver by the federal government of its sovereign immunity be “unequivocally expressed” and narrowly construed).

⁷² See Law, *supra* note 18, at 679.

⁷³ See, e.g., *Louisiana v. Jumel*, 107 U.S. 711, 728 (1882) (questioning the notion that a federal court could “assume all the executive authority of the State,” including its taxing and spending powers, in order to ensure that a state’s bonds were repaid in full); ORTH, *supra* note 42, at 67, 77.

⁷⁴ 2 U.S. (2 Dall.) at 478 (opinion of Jay, C.J.).

⁷⁵ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-57 (1962) (plurality opinion of Harlan, J.) (recounting the history of the Court of Claims).

⁷⁶ See *id.* at 570 (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)).

compel Congress to make the necessary appropriation.⁷⁷ Nor can Congress bind itself to do so: burdened in this respect with legislative omnipotence, it may always decline to appropriate, just as it may always choose to repeal any appropriation that it enacts. As a result, the Court of Claims is *legally* incapable of enforcing its money judgments against the United States.⁷⁸ This problem of legal enforceability did not deter Congress from creating the Court of Claims, or from attempting to designate it a federal court within the meaning of Article III.⁷⁹ Twice, however, the Supreme Court concluded that the Court of Claims lacked Article III status,⁸⁰ and on both occasions, Congress revised the law in an effort to bring the Court of Claims within the scope of Article III.⁸¹

In *Glidden Co. v. Zdanok*,⁸² the Supreme Court finally extended the Court of Claims official membership in the federal judiciary. To reach that result, however, a plurality of the Court found it necessary to contend with the argument, suggested long ago by Chief Justice Taney, that the Court of Claims lacks judicial power for purposes of Article III because the money judgments that it renders are legally unenforceable and lack effect absent voluntary compliance on the part of Congress.⁸³ Writing for the plurality, Justice Harlan acknowledged

⁷⁷ See, e.g., *id.* at 568-71; *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 303 (1854) (expressly rejecting the proposition that a federal court “can command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States”); *Williams v. United States*, 289 U.S. 553, 580 (1933) (“[A] power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency.”).

It is not entirely clear whether individual legislators might, in lieu of Congress itself, be enjoined to vote for an appropriation necessary to satisfy a federal judgment. The prospects for obtaining enforceable injunctive relief against individual members of Congress seem, however, rather dim. Cf. *Spallone v. United States*, 493 U.S. 265, 278-80 (1990) (noting the relevance of both the Speech or Debate Clause and the doctrine of legislative immunity to the range of remedies available against legislators, and holding that the use of contempt sanctions against city councilmembers for failure to pass legislation required by a federal injunction constituted an abuse of equitable discretion). I am indebted to Richard Fallon for his thoughts on this question.

⁷⁸ See *Glidden*, 370 U.S. at 568-70; 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-12, at 361, 364 (3d ed. 2000) (categorizing money judgments rendered by the Court of Claims against the United States as “imperfectly enforceable” and “entirely dependent upon subsequent legislative action”).

⁷⁹ See *Glidden*, 370 U.S. at 552-58.

⁸⁰ See *id.* at 554-56 (discussing, inter alia, *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865)); *Gordon v. United States*, 117 U.S. 697, 702 (1865) (posthumous opinion of Taney, C.J.); *Williams v. United States*, 289 U.S. 553, 567-81 (1933).

⁸¹ See *Glidden*, 370 U.S. at 531-32, 554.

⁸² 370 U.S. 530 (1962).

⁸³ See *id.* at 569 (discussing *Gordon v. United States*, 117 U.S. at 702).

the problem that “if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States.”⁸⁴ The plurality’s response to this theoretically intractable problem was astonishingly practical, as constitutional reasoning goes. Rather than attempt to argue that the Court of Claims could enforce its judgments as a matter of law, it relied instead upon the fact that, as a historical matter, Congress had refused only fifteen times in seventy years to pay a judgment of the Court of Claims – a record “surely more favorable to prevailing parties than that obtaining in private litigation.”⁸⁵ In light of the fact that successful plaintiffs were more likely to obtain actual satisfaction from decisions of the Court of Claims than from the legally efficacious judgments of other courts against private parties, the plurality refused to be unduly troubled by the constitutional unenforceability of money judgments against the United States.⁸⁶

The efforts of Congress to confer Article III status upon the Court of Claims amount in substance to the efforts of an omnipotent sovereign to make a credible commitment. It is obviously in the federal government’s best interest to encourage individuals to contract with the United States as willingly as they would with ordinary private parties. The alternative is costly: potential contracting parties can be expected to demand a risk premium in their dealings with their government to compensate them for the possibility that Congress will exercise its inalienable sovereign power to repudiate contractual debts. To put minds at ease, Congress created the Court of Claims and sought to confer upon it the irrevocable guarantees of judicial independence contained in Article III – namely, life tenure and protection from salary diminution.

It is tempting to view *Glidden* as proof that there is nothing a court can do to enable a sovereign to make credible commitments if judgments against the sovereign happen to be unenforceable as a matter of constitutional law. On this view, neither the existence of the Court of Claims nor the imprimatur of Article

⁸⁴ *Id.* at 570.

⁸⁵ *Id.*

⁸⁶ *See id.* at 70 (questioning whether, in light of Congress’s superior record of actual compliance, “the capacity to enforce a judgment is always indispensable for the exercise of judicial power”).

III status conferred by *Glidden* does anything to encourage private parties to contract with the United States on favorable terms. In substance, it might be argued, the plurality opinion in *Glidden* did nothing more than point to Congress's record of voluntary compliance and ask potential contracting parties to decide for themselves, in light of this record, whether to take the risk that Congress might exercise its inalienable sovereign power to repudiate its financial obligations – and, if so, what premium to demand in exchange for assuming this risk. If Congress's past performance, by itself, is inadequate to assuage the fears of potential contracting parties, there is nothing the federal judiciary can do to reduce those fears any further: a court cannot bolster the credibility of Congress's promises by rendering admittedly unenforceable judgments. The efforts of Congress to interpose the federal courts between itself and contracting parties amount, therefore, to nothing more than an unconvincing attempt by Congress to bootstrap additional credibility from its own reputation.

This view, I will argue in Part III, is mistaken. There are conceptual reasons to think that the existence of the Court of Claims, and its official status as a “true” federal court within the meaning of Article III, do in fact help to persuade potential contracting parties that the United States will honor its contractual commitments. More generally, Part III will argue that a court can enable a sovereign to make *credible* commitments even if constitutional rules or practical considerations render the sovereign incapable of making *binding or irrevocable* commitments. Before it can be explained how courts can help sovereigns to make credible commitments even in the face of constitutional barriers, however, we must first identify the types of commitment problems that sovereigns confront, and that courts may be capable of solving. To that end, the next part of this article proposes and illustrates two analytical distinctions – a distinction between effective and persuasive commitments, on the one hand, and between the problems of overcommitment and undercommitment, on the other.

II. TYPES OF COMMITMENTS AND COMMITMENT PROBLEMS

A. Effective Versus Persuasive Commitments

Social scientists have resorted to a few paradigmatic examples to illustrate

why individuals might wish to restrict their own options. Ulysses tied himself to the mast so that he might experience the song of the sirens without also dooming himself.⁸⁷ Military leaders have burned their own bridges, or sunk their own ships, in order to prevent even the thought of retreat and thereby increase the likelihood of victory.⁸⁸ Other examples are decidedly less glorious, but perhaps more familiar to the average person. I may want to lose weight but realize that, once I am hungry, I will eat indiscriminately, so I order my meals in advance and keep no fattening foods readily available.⁸⁹ I do not want to drive while intoxicated, but I am afraid that I may attempt to do so anyway once I have consumed a few too many drinks, so I hand my keys to the host immediately upon my arrival.⁹⁰ Though I might enjoy driving on both sides of the road, I would willingly commit myself, and everyone else, to drive on only one side. Indeed, I might even prefer to specify a particular side of the road.⁹¹

These examples all share a common structure: there exists some valuable end that cannot be achieved unless we stay the course (or agree upon the same course), but we know in advance that we will be sorely tempted to stray (or find ourselves unable to coordinate). As a result, we seek in advance to limit our future options, or to “precommit” ourselves.⁹² Thomas Schelling has thus characterized deliberate precommitment as “anticipatory self-command.”⁹³ As

⁸⁷ See ELSTER, *supra* note 2, at 3, 94; ELSTER, *supra* note 14, at 36.

⁸⁸ See, e.g., AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 309 (1999) (quoting SUN TZU, THE ART OF WAR 110 (Samuel B. Griffith trans., 1963)) (“Wild beasts, when they are at bay, fight desperately. How much more is this true of men!”); Jon Elster, *Don’t Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1761-63 (2003).

⁸⁹ See, e.g., THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 84-85 (1984); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. REV. 1, 1-2, 4-5 (1984).

⁹⁰ See SCHELLING, *supra* note 89, at 88; Schelling, *supra* note 89, at 1-2.

⁹¹ See RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 51-52 (1988) (using Sweden’s switch from driving on the left to driving on the right as an example of a legal rule that solves a coordination problem).

⁹² See, e.g., ELSTER, *supra* note 2, at 4 (defining “precommitment” as synonymous with such terms as “self-binding,” “commitment,” and “self-commitment”); Ferejohn & Sager, *supra* note 15, at 1936-38 & 1938 n.15 (drawing a distinction between “internal” and “external” commitments, but adhering deliberately to the conventional terminology of “commitment” and “precommitment”); Sunstein, *supra* note 14, at 636-42 (discussing “constitutional precommitment strategies”); HOLMES, *supra* note 14, at 173 (“To achieve his desired ends despite his melting resolve, an individual must restrict his available options.”).

⁹³ Schelling defines “anticipatory self-command” as follows: “a person in evident possession of her faculties and knowing what she is talking about will rationally seek to prevent, to compel, or

for the reasons why people seek to precommit themselves, Jon Elster uses the concept of “time-inconsistency” to describe conflict between what we wish to accomplish now and what we may choose to do later,⁹⁴ while Russell Hardin identifies “coordination” as the imperative that leads us to bind ourselves with legal rules and constitutions.⁹⁵ By their very nature, coordination problems occur only at a collective level, but problems of time-inconsistency can occur at the collective level as well. For example, as political philosophers have long observed, freedom of expression is valuable not only to those who hold unpopular viewpoints, but also to those in the majority, because it makes possible “the correction and instruction of the majority” and thereby enhances the quality of democratic decisionmaking.⁹⁶ Even a society that values freedom of expression, however, may be tempted in the heat of the moment to silence dissidents. A polity might therefore try to restrain itself in anticipation of its own weakness by adopting a constitutional provision that protects freedom of expression from popular or legislative infringement – a provision that can be amended only with great difficulty, and that is enforceable by judges who cannot easily be replaced or removed from office.⁹⁷

Time-inconsistency and coordination are not, however, the only reasons why people make commitments. Often we are motivated to make commitments not to regulate our own behavior, but to persuade others to behave a particular

to alter her own later behavior - to restrict her own options in violation of what she knows will be her preference at the time the behavior is to take place.” Schelling, *supra* note 89, at 1.

⁹⁴ ELSTER, *supra* note 2, at 24-45 (discussing time-inconsistency); *see also* ELSTER, *supra* note 14, at 65-86 (using both time-inconsistency and endogenous preference change to explain why choices may conflict over time).

⁹⁵ *See, e.g.*, HARDIN, *supra* note 91, at 80 (arguing that the point of legal rules is to “constrain individuals’ choice of strategy in order to produce a better outcome than would have resulted from unconstrained choices”); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 140 (1999) (describing the establishment of a constitution as “a massive act of coordination”).

⁹⁶ HOLMES, *supra* note 14, at 172; *see also, e.g.*, JOHN STUART MILL, ON LIBERTY 15-52 (Elizabeth Rapaport ed., Hackett Publishing 1978) (1859) (“The beliefs which we have most warrant for have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded.”).

⁹⁷ *See, e.g.*, HOLMES, *supra* note 14, at 135-37, 169-72 (discussing the First Amendment); Sunstein, *supra* note 14, at 637 (citing speech and voting rights as examples of “precommitment strategy” by which people seek to “protect democratic processes against their own potential excesses or misjudgments”); Freeman, *supra* note 14, at 348-55 (arguing that countermajoritarian judicial review constitutes a form of collective “precommitment” to the ideals underlying “democratic sovereignty”); *see also, e.g.*, ELSTER, *supra* note 14, at 88 (using the Greek practice of ostracism, “which in practice was the right to banish well-known demagogues,” as an example of precommitment to democracy).

way. All of the examples described above concern situations in which actors must commit themselves *effectively*: that is, the actors in question cannot achieve their ends unless they actually confine themselves to a particular course of action. It is often the case, however, that actors merely seek to commit themselves *credibly*: their goals do not require that they actually behave a certain way, but rather that they convince others that they will behave that way. Thus, for instance, I cannot succeed at losing weight unless I actually prevent myself from binge-eating, but I can succeed at borrowing money from others if I merely persuade them that I will repay the debt. It may be that the only way for me to convince others that I will honor my debts is to make a commitment that actually forces me to make payments. But the opposite may instead be true: there may be some difference between a commitment that looks binding to others and one that will in fact constrain me to act a certain way. In the eighteenth century, for example, Sir Robert Walpole saved the Bank of England from collapse by introducing the idea of a “sinking fund,” the purpose of which was not to repay the national debt, but rather to convince the public that it would be repaid.⁹⁸

To distinguish between these two types of situations is to contrast what might be called *effective* and *persuasive* commitments. In the first type of situation, actors cannot achieve their ends unless they actually refrain from certain behavior. In such cases, commitments must actually be binding, or *effective*, in order for actors to achieve their goals. In the second type of situation, by contrast, the goal of making a commitment is to persuade others that one’s ability to perform certain acts is impeded. In such cases, commitments need only be credible, or *persuasive*, to fulfill their purpose. Actors do not make persuasive commitments for the purpose of actually constraining themselves. They may in fact prefer to fool others – to convey the impression that they have restrained themselves, while remaining free in reality to do as they choose. One makes an *effective commitment* in order to restrain oneself, whereas one makes a *persuasive commitment* in order to persuade others that one is restrained. An effective

⁹⁸ E.g., ANDERSON, *supra* note 45, at 43-44; P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756*, at 84-89, 210-12 (1967) (describing both the fund’s salutary impact on English public finance and the tendency of politicians to raid the fund for purposes other than repayment of the national debt).

commitment serves its purpose if it imposes actual constraint; a persuasive commitment serves its purpose if others believe that it imposes actual constraint – that is, if the commitment is credible.

B. Undercommitment Versus Overcommitment

Both the plight of the English and French monarchies in the seventeenth century and the more recent history of the Court of Claims illustrate the same type of commitment problem – namely, the difficulty of making credible, or persuasive, commitments. Though this problem affects a broad range of ordinary economic actors,⁹⁹ it is harder for sovereigns to solve. Like other economic actors, sovereigns require capital, goods, and services, but they are unlikely to obtain the desired quantity and quality of such things without the voluntary participation of private parties.¹⁰⁰ Private parties may be reluctant, however, to deal with a sovereign that cannot credibly commit to honor its end of a bargain. Ordinarily, private parties can render their commitments credible by making them legally binding and therefore eligible for enforcement by the sovereign. But sovereign enforcement is not a highly credible option for the sovereign itself, for the kinds of reasons discussed in Part I. Even if the sovereign somehow solves the paradox of omnipotence and manages to bind itself *legally* with its own laws, it is not clear why private parties should, as a *practical* matter, trust the sovereign to honor its commitments. As history has demonstrated, not even the threat of retaliation over repeat play may be enough to deter a sovereign from repudiating its debts.¹⁰¹ The risk that the sovereign will do so is reason for private parties to demand a premium in their dealings with the sovereign, or perhaps to refuse to deal at all. In such situations, the challenge for the sovereign is to convince others that it will make good on its promises – that is, to commit credibly.

⁹⁹ See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 167-205 (1985) (exploring the making of credible commitments in the context of exchange between private firms).

¹⁰⁰ Cf. Hadfield, *supra* note 38, at 467 (observing that, “[t]hrough the use of contracts, government has been able to perform its functions more effectively by drawing on private resources to deliver governmental goods and services”).

¹⁰¹ See *supra* notes 6-7 and accompanying text.

The inability of an actor to commit itself adequately in the eyes of others might be called the problem of *undercommitment*. It should be apparent that this type of commitment problem arises only when actors seek to make persuasive commitments: because effective commitments are not intended to influence the beliefs of others, they need not be credible to others. At the opposite end of the spectrum, however, lies a different species of commitment problem. Imagine a family law regime under which divorce is illegal under any circumstances and adultery is a felony that carries a mandatory sentence of imprisonment. A successful marriage requires substantial investment, and neither partner may be willing to make the necessary investment if each fears that the other will break the commitment and leave for a more attractive opportunity.¹⁰² That is, undercommitment is a potential impediment to a successful marriage. Draconian divorce and adultery laws may alleviate this problem by rendering marital commitments highly credible. At the same time, however, such laws may discourage people from making marital commitments in the first place, precisely because they so thoroughly exclude all other future possibilities – including, for example, the possibility of making a new marital commitment to a different person after a previous marriage has irretrievably failed for unforeseen reasons beyond one’s own control. Commitments that cannot be broken or modified for any reason are risky because they can limit one’s freedom of action in ways that prove unexpectedly onerous or costly in light of unforeseen circumstances. In other words, actors may experience a fear of *overcommitment* – of becoming unexpectedly or unacceptably constrained if they choose to commit. This fear may discourage rational actors from committing in the first place.

Like the problem of undercommitment, the problem of overcommitment affects sovereigns as well as individuals. For instance, Europe’s existing nation-states might be said to face both problems in deciding whether to deepen their commitments to the European Union, as ratification of the proposed Constitution for Europe would entail.¹⁰³ On the one hand, to the extent that membership in the E.U. offers prosperity, security, and influence, the obvious way for member

¹⁰² See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 49-50 (1988).

¹⁰³ See TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Dec. 16, 2004, O.J. (C 310) *passim* (2004).

states to heighten these benefits is to integrate more closely.¹⁰⁴ On the other hand, member states fear the loss of their own sovereignty and the creation of “an identity-smothering United States of Europe.”¹⁰⁵ Insofar as the member states have defined their commitments to the E.U. in legal terms, it is not surprising that European courts have been required to chart a path between the twin perils of undercommitment and overcommitment. National courts have clashed repeatedly with the European Court of Justice over the reach of E.U. law and, in particular, the question of *Kompetenz-Kompetenz* – namely, who has the authority to define the limits of the E.U.’s authority.¹⁰⁶ Predictably, the European Court of Justice has fought to establish the supremacy and domestic enforceability of E.U. law, while national courts have resisted the notion that the E.C.J. alone is entitled to decide the extent of the member states’ legal subjugation to the E.U.¹⁰⁷ By alleviating fears of overcommitment, however, the recalcitrance of the national courts may actually facilitate further commitment by the member states. The knowledge that national courts will perform a sanity check on the actions of the E.U. – together, perhaps, with some reassurance that the E.C.J. itself will police the outer limits of E.U. power¹⁰⁸ – may render the prospect of closer integration less threatening to national political actors and

¹⁰⁴ See, e.g., Tony Blair, *Foreword* to FOREIGN & COMMONWEALTH OFFICE, WHITE PAPER ON THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE 1 (2004) (arguing that “a Britain strongly engaged in the European Union has much greater political influence than a Britain disengaged from Europe”); *Europe’s incoming tide*, ECONOMIST, Nov. 6, 1999, at 12, 14-15 (noting the argument made by British proponents of European integration that the United Kingdom’s failure to join the common currency impairs its influence over the E.U.’s economic policymaking).

¹⁰⁵ *Europe’s incoming tide*, *supra* note 104, at 14; see also, e.g., KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 65 (2001) (describing disagreement in Germany over the prospect of a “United States of Europe”).

¹⁰⁶ See, e.g., ALTER, *supra* note 105, at 49, 101-04; PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 284 (3d ed. 2003) (defining *Kompetenz-Kompetenz* as the question of “who has ultimate authority to define the allocation of competence as between the [E.U.] and the Member States”).

¹⁰⁷ See, e.g., *Brunner v. The European Union Treaty (“Maastricht Decision”)*, 2 BverfGE 2134/92 & 215992 (F.R.G.), translated in 1994 (1) C.M.L.R. 57; ALTER, *supra* note 105, at 16-24, 59-181 (discussing, inter alia, decisions by French, German, Italian, and Danish courts); SIMON HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION ch. 4 (2d ed. forthcoming 2005).

¹⁰⁸ See, e.g., *Opinion 2/94, Accession by the Community to the ECHR*, 1996 E.C.R. I-1759, ¶¶ 23-26, at I-1787 to I-1789 (holding that the E.U., as currently constituted, lacks the power to join the European Convention on Human Rights) (“No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.”); *Case 376/98, Germany v. European Parliament & Council*, 2000 E.C.R. I-8419, ¶¶ 76-118, at I-8523 to I-8532 (holding that it was not within the power of the E.U. to adopt a directive regulating tobacco advertising on the basis of a qualified majority vote of the member

therefore more palatable.¹⁰⁹

For an example closer to home, the Supreme Court's decision in the *Charles River Bridge Case*¹¹⁰ starkly illustrates why it is necessary for sovereigns to steer a course between undercommitment and overcommitment – and how courts may help them to do so. The stage for the Charles River Bridge dispute was set by an earlier case, *Trustees of Dartmouth College v. Woodward*,¹¹¹ in which the Court had tackled the problem of sovereign undercommitment. That case involved legislative efforts by New Hampshire to assert control over Dartmouth College, which had been privately founded and owed its corporate existence to a charter granted in colonial times by the British Crown.¹¹² The trustees of the college argued, and the Court agreed, that the charter constituted a binding contract with the sovereign, and that New Hampshire's efforts to amend the charter by legislation therefore violated the Contract Clause.¹¹³ Writing for the Court, Chief Justice Marshall reasoned that failure to regard such charters as binding upon the sovereign would only deter the kind of philanthropy that had established Dartmouth College in the first place.¹¹⁴ That is, the Court explicitly

states, and that adoption of the directive would instead member state unanimity); HIX, *supra* note 107, ch. 4 at 17.

¹⁰⁹ See, e.g., ALTER, *supra* note 105, at 54 (describing how the E.C.J. has fueled perceptions that European integration “unduly compromise[s] national sovereignty and threaten[s] the national constitutional order”); Anthony Arnall, *A Preemptive Strike from the Palais Royal*, 30 EUR. L. REV. 1, 1-2 (2005) (discussing the Conseil Constitutionnel's recent holding that, under the proposed Constitution for Europe, the extent of the supremacy of E.U. law over French law would continue to be governed by the French Constitution, not the case law of the E.C.J., and concluding that a broader reading of the E.C.J.'s power “would doubtless have made more difficult the task of securing a positive outcome in the forthcoming French referendum” on the proposed E.U. constitution).

¹¹⁰ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

¹¹¹ 17 U.S. (4 Wheat.) 518 (1819).

¹¹² See *id.* at 519-51, 626-27, 631-35.

¹¹³ See *id.* at 626-50.

¹¹⁴ The gifts that established the college, the Chief Justice observed, were donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.

Id. at 647.

grasped that failure to hold the sovereign to its commitments would only discourage highly desirable behavior on the part of private actors.

As Martin Shapiro has explained, the Court's decision in *Dartmouth College* proved an economic boon to the states.¹¹⁵ In the immediate aftermath of the Revolution, the federal government and the states alike were poor in land and tax revenue.¹¹⁶ Even the western lands owned by the United States were relatively worthless without the necessary infrastructure to transport persons and goods.¹¹⁷ To their advantage, these financially impoverished sovereigns did possess "the greatest development resource of all governments" – namely, the power to make laws, which includes the ability to grant corporate charters and monopolies in exchange for private investment in infrastructure.¹¹⁸ However, a sovereign that is incapable of making credible commitments is also incapable of tapping the investment-generating potential of its own lawmaking powers: one is unlikely to invest in infrastructure if there is nothing to prevent the sovereign from confiscating or destroying the value of one's investment.¹¹⁹ By signaling that the federal judiciary would force states to honor whatever charters they issued, the *Dartmouth College* decision made it possible for states to commit themselves credibly and "thus at a stroke ... filled the state treasuries."¹²⁰

The Court's solution in *Dartmouth College* to the problem of undercommitment, however, placed the states in a new quandary. *Dartmouth College* had been decided in a time of rapid technological advance, and no sooner had states issued charters to secure the private construction of turnpikes and

¹¹⁵ See Martin Shapiro, *Introduction to Charles Warren, The Charles River Bridge Case*, 3 GREEN BAG 2d 75, 76 (1999).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ In Shapiro's words:

[I]f your riches consist in your capacity to make legal promises of things like monopoly privileges, then you are only as rich as the confidence others have that you will or must keep your promises. Where a sovereign makes promises by law, precisely because he is sovereign and they are law, the promises may be broken. The sovereign, of course, may repeal or amend his laws at any time. Thus the paradox that a sovereign's law-making capacities are a potentially rich development resource for government but also one of little practical value.

Id.

¹²⁰ *Id.*

canals than they wished to encourage railroad expansion instead.¹²¹ The states needed the freedom to make new commitments that would promote new forms of investment, but their earlier commitments threatened to block the way. If the charters previously issued to turnpike and canal companies were construed as conferring monopoly privileges, the owners of the old infrastructure could blackmail or exclude any railroads that sought to compete.¹²² The states were thus caught between the Scylla of undercommitment and the Charybdis of overcommitment. On the one hand, to give the old commitments their intended scope might preclude the states from making new commitments. On the other hand, to permit the states simply to repudiate their old commitments to the turnpike and canal operators would ruin the credibility of any new commitments that might be offered to the railroad entrepreneurs.

Such was the dilemma that the Court confronted in the *Charles River Bridge Case*. Early in its colonial history, Massachusetts had granted to Harvard College the right to operate ferry service between Charlestown and Boston.¹²³ Over a century later, the state issued a corporate charter to John Hancock and others that authorized them to build a bridge in place of the ferry, but also obligated them to make annual payments to Harvard to compensate for the loss of income.¹²⁴ Unlike the ferry that it had replaced, the Charles River Bridge proved enormously profitable, but the extent of its profits roused the ire of the public, which clamored for a bridge that would be free of tolls.¹²⁵ In response, the state legislature eventually chartered the competing Warren Bridge, subject to the condition that it would become a free bridge once its investors had recouped a specified return.¹²⁶ Realizing that their investment would soon be rendered worthless, the proprietors of the Charles River Bridge challenged the state's

¹²¹ See *id.* at 76-77.

¹²² See *id.* at 77.

¹²³ See Charles Warren, *The Charles River Bridge Case*, 3 GREEN BAG 2d 75, 79 (1999) [hereinafter Warren, *Part I*]. The facts recounted here are drawn from Charles Warren's exhaustive account of the case, which varies in minor details from the Court's own summary. Compare *id.* at 78-91 and Charles Warren, *The Charles River Bridge Case, Part II*, 3 GREEN BAG 2d 203 *passim* (2000) [hereinafter Warren, *Part II*] with *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 536-39 (1837). For discussion of the case's historical context, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 130-39 (1977).

¹²⁴ See Warren, *Part I*, *supra* note 123, at 79.

¹²⁵ See *id.* at 79-82.

¹²⁶ See *id.* at 84-85.

issuance of the Warren Bridge charter as an unconstitutional impairment of their own charter.¹²⁷ Neither the original colonial grant of ferry service to Harvard nor the Charles River Bridge charter, however, had contained any explicit grant of monopoly privileges with respect to the river crossing.¹²⁸

The implications of the case for the nation's economic development were not lost on the Court. Chief Justice Taney, writing for the majority, and Justice Story, in dissent, agreed that the state's ability to make commitments in the form of charters was critical to securing needed infrastructure. They clashed instead over what reading of the state's existing commitments would best ensure the future flow of private investment. Justice Story argued emphatically that failure to protect private investors from repeated state efforts to confer the same right of way would have ruinous effects upon future investment:

No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant: and that success will not be the signal of a general combination to overthrow its rights, and to take away its profits.¹²⁹

In Story's view, no compromise was possible between the alternatives of promise-breaking and promise-keeping. If the sovereign's existing commitments were rendered worthless, so too were its future commitments. There could be no point, in turn, to preserving the sovereign's ability to make worthless commitments.

¹²⁷ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 539 (1837).

¹²⁸ See *id.* at 549 (describing the Charles River Bridge charter); *id.* at 536 (quoting early legislation that granted Harvard "the liberty and power" to operate ferry service); Warren, *Part I, supra* note 123, at 79 (quoting the resolution of the General Court of Massachusetts Bay Colony that "the ferry between Boston and Charlestown is granted to the College").

¹²⁹ *Charles River Bridge*, 36 U.S. (11 Pet.) at 608 (Story, J., dissenting); see also HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 18 (1991) (noting the view held at the time by "many prominent lawyers, including Joseph Story and Alexander Hamilton," that monopoly rights were "essential to economic development" and "should be implied in charters for works of public improvement"); *id.* at 313 (observing that toll bridges are characterized by high fixed costs that can render them economically unviable in the face of competition, and describing Daniel Webster's argument to the Court on behalf of the Charles River Bridge to this effect).

The majority of the Court, by comparison, was loathe to construe existing charters as conferring monopoly privileges, for fear of rendering the states incapable of promoting infrastructural improvements. Warned Chief Justice Taney:

Let it once be understood that such charters carry with them [monopoly privileges]; and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in rail roads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.¹³⁰

Taney found room to maneuver, however, between the problem of undercommitment that Story found insurmountable, and the prospect of overcommitment that could choke economic development. The solution was a lawyer's trick – a rule of contractual interpretation, drawn surreptitiously from the civil law tradition, that ambiguities in a contract with the sovereign would be construed in favor of the sovereign.¹³¹ No doubt the proprietors of the Charles River Bridge – and probably the Massachusetts legislature as well¹³² – believed from the outset that the first bridge's charter necessarily implied some form of monopoly that would exclude the construction of a second bridge a mere 260 feet away.¹³³ Nevertheless, the first charter's failure to confer a monopoly in unmistakable terms proved fatal to the argument.

¹³⁰ *Charles River Bridge*, 36 U.S. (11 Pet.) at 552-53 (Taney, C.J.).

¹³¹ *See id.* at 544-49; Shapiro, *supra* note 115, at 77-78 (discussing the civil law origins of the rule). This “canon of construction disfavoring implied governmental obligations in public contracts” has spawned what is known today as unmistakability doctrine: any contractual surrender of sovereign power, the Court has explained, must be expressed in “unmistakable terms.” *United States v. Winstar Corp.*, 518 U.S. 839, 871-72, 874 (1996) (plurality opinion of Souter, J.) (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)).

¹³² *See Warren, Part I, supra* note 123, at 82 (describing a joint legislative committee's conclusion that construction of a new bridge would impair the charter rights of the old bridge).

¹³³ *See id.* at 85.

The Court's decision thus placed potential contracting parties on notice that only an explicit promise of monopoly privileges would suffice to guarantee such privileges. But at the same time, it left potential contracting parties with no reason to doubt that an *explicit* promise would indeed be enforced against the sovereign. This means of escape from the old charters was, by its nature, not one that could be repeated, for careful investors could now avoid the fate of the Charles River Bridge by insisting upon an explicit statement of their monopoly rights.¹³⁴ For the very same reason, however, the Court's decision in the *Charles River Bridge Case* did little to deter such investors from bargaining with the states in the future. In the meantime, and with the benefit of hindsight, the states had the opportunity to learn a valuable lesson – namely, that it would behoove them to think twice before conferring monopolies of long or indefinite duration.¹³⁵

III. COURTS AS COMMITMENT OPTIMIZERS

A. Between Scylla and Charybdis: The Path of Restrained Restraint

By itself, the problem of sovereign overcommitment is not hard for courts to solve. As a practical matter, a court may be unable and therefore unwilling to enforce commitments against a coordinate branch of government, as Chief Justice Jay candidly confessed in *Chisholm*.¹³⁶ But when a court simply declares that the government is free of any legal commitment, there is nothing to enforce and thus no possibility of disobedience. The challenge for courts, rather, is to solve the problem of overcommitment without also creating a problem of undercommitment, and vice versa. If, for example, the Supreme Court's only goal in the *Charles River Bridge Case* had been to liberate the states from their

¹³⁴ Subsequent decisions of the Taney Court never wholly repudiated the principle that states could escape an express grant of monopoly privileges, but forced investors to take ever greater care in their dealings with states. See HOVENKAMP, *supra* note 129, at 26 (discussing cases in which the Taney Court narrowly construed grants of monopoly and “applied every available argument to permit states to withdraw from previous entanglements with private corporations”); *id.* at 33-35 (concluding that, by the end of the nineteenth century, the notion that corporate charters amounted to contracts with the state that conferred “unique privileges” was itself “dead”).

¹³⁵ See *id.* at 27 (describing how states learned to hedge their commitments by enacting statutory reservation clauses).

¹³⁶ See *supra* note 74 and accompanying text.

previous commitments, it could simply have limited or overruled *Dartmouth College*. The Court's actual task, however, demanded greater finesse. As Shapiro puts it: "How could the judges arrange it so that the government could break its old promises while still retaining its capacity to make new ones that would be believed?"¹³⁷ To solve both types of commitment problems that sovereigns face, courts must perform a balancing act: they must enable the sovereign to make credible commitments, without also rendering the sovereign ineffectual by excessively restricting its freedom of action.

One way in which courts can try to achieve this balance is to distinguish between commitments that encourage desirable behavior – such as the establishment of private educational institutions, or public lending at favorable interest rates – and should therefore be judicially enforced, and those that permit undesirable behavior, such as gambling, which need not be judicially enforced.¹³⁸ The constitutional rule that a state cannot contract away its police power to protect public health, safety, or morals¹³⁹ enables, if not requires, courts to apply precisely this distinction. To allow a state to revoke gambling charters may discourage subsequent investment in casinos, but that may not be a bad thing even from the state's point of view. Like the Taney Court's adoption of a pro-sovereign rule of contractual interpretation, however, this particular solution is difficult to repeat because other actors can be expected to learn from the first time that it is used. Presumably, a sovereign does not issue a gambling charter in the first place unless it has concluded that the benefits of the activity – the tax revenues generated and the jobs created – will outweigh its costs. A court may enable the sovereign to change its mind once by releasing it from such commitments, but once it has been judicially established that gambling charters are subject to revocation, the sovereign may be unable to regain the faith of investors should it experience yet another change of heart.

Another way for courts to strike the necessary balance between undercommitment and overcommitment is to weigh the importance and urgency

¹³⁷ Shapiro, *supra* note 115, at 77.

¹³⁸ See *Stone v. Mississippi*, 101 U.S. 814, 818-21 (1880) (holding that the Contract Clause does not prevent a state from prematurely revoking a charter to operate a lottery, in light of the fact that lotteries are "a species of gambling, and wrong in their influences").

of the sovereign's reasons for wanting to break a particular commitment. This approach underlies the judicially fashioned constitutional rule that states retain the inalienable ability to impair contracts to the extent "reasonable and necessary to serve an important public purpose."¹⁴⁰ Such a rule means that judicial enforcement of a state commitment turns upon a judicial assessment of both the importance of the state's reasons for breaking the commitment and the availability of other means by which the state might realize its objectives. Balancing and means-end analysis of this type is, of course, not unique to Contract Clause doctrine or even American constitutional jurisprudence; it amounts instead to a generic approach taken by most courts whenever they are asked to review governmental action that, on its face, oversteps constitutional limitations.¹⁴¹

B. The Emperor Has No Clothes: The Nature of Judicial Power and the Credibility of Sovereign Commitments

Whichever approach that a court adopts, the credibility of the sovereign's commitments will rest upon the court's reputation for allowing the sovereign to break its commitments only in exceptional cases: the more leeway that the court allows the sovereign, the less credible that the sovereign's commitments become. The efficacy of any judicial solution to the problem of sovereign undercommitment is likely to depend in substantial part upon the reputation of the courts. In particular, for a judicial solution to be effective, the courts must cultivate a reputation not only for deciding cases involving the sovereign in an acceptably impartial manner, but also for rendering judgments that are in fact efficacious.

Why is the reputation of the judiciary so crucial to solving the problem of

¹³⁹ See *supra* text accompanying notes 29-35.

¹⁴⁰ *United States Trust*, 431 U.S. at 25.

¹⁴¹ See, e.g., DAVID M. BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* 15-16 (1995) (arguing that "the rules of constitutional law can be reduced to two basic principles or tests" – namely, balancing and means-end analysis); Law, *supra* note 18, at 687-98 (explaining why balancing and means-end analysis amount to a form of "generic constitutional analysis" shared by constitutional courts worldwide); Martin Shapiro, *The Success of Judicial Review and Democracy*, in *ON LAW, POLITICS, & JUDICIALIZATION* 149, 179 (Martin Shapiro & Alec Stone Sweet eds., 2002)

sovereign undercommitment? At root, there are only a few ways by which one actor can persuade another that it will honor a commitment, none of which is foolproof. One way is to post a bond or offer a hostage – that is, to surrender something of value that will be forfeited if the commitment is broken.¹⁴² The posting of a bond may simply shift the risk of being cheated from one party to the other, of course, insofar as there is no guarantee that the bond itself will be returned.¹⁴³ Another way is to convey information about type – that is, to signal one’s innate characteristics and predispositions.¹⁴⁴ To revisit an earlier example,¹⁴⁵ one might place more confidence in the marriage vows of the type of person who falls madly and irrevocably in love (assuming, of course, that one believes that such types exist and can be identified).¹⁴⁶ If, however, it is too easy for actors to transmit false and self-serving information about themselves – that is, to engage in what game theorists call “cheap talk”¹⁴⁷ – then the information that they send ceases to be credible. A final option is third-party enforcement. To express a commitment to someone else in the form of a legally binding

(“Ultimately the rights provisions of all constitutions come down to the proposition that government may not limit a right unless it has a very, very good reason to do so.”).

¹⁴² See WILLIAMSON, *supra* note 99, at 163-205 (describing how economic actors post bonds or offer hostages in order to render their commitments credible); David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 109-10 (James E. Alt & Kenneth A. Shepsle eds., 1990) (observing that the posting of a bond can lead transacting parties to trust one another and to uphold their reputations).

¹⁴³ The risk that the bond itself will be confiscated leads Oliver Williamson to use the example of a king’s ugly daughter as the ideal hostage: the daughter’s great value to the king ensures that the king will honor his obligations, while the daughter’s presumably limited value to the hostage-taker reduces the hostage-taker’s incentive to keep her. See WILLIAMSON, *supra* note 99, at 176-77. The example is intended not, of course, to endorse the view that the worth of a woman depends upon her physical attractiveness, but rather to illustrate in simple terms that the ideal hostage has greater value to the hostage-giver than to the hostage-taker.

¹⁴⁴ See, e.g., JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 219-20 (1994) (discussing how knowledge about a player’s “type” – such as its willingness to wage war as opposed to its propensity to surrender – will influence a opponent’s choice of strategy); FRANK, *supra* note 102, at 91-94 (arguing that “moral sentiments” are “practical devices for solving commitment problems,” and that cooperative behavior is more likely among those who can credibly convey that they are “motivated, at least in part, by considerations other than material self-interest”); Kreps, *supra* note 142, at 92-93, 118-20 (observing that firms and universities cultivate reputations in order to attract employees and students, respectively).

¹⁴⁵ See *supra* text accompanying note 102.

¹⁴⁶ See FRANK, *supra* note 102, at 83-84; see also, e.g., Kreps, *supra* note 142, at 90-94, 100-31 (arguing that “corporate culture” can communicate the manner in which a firm will behave in the face of unforeseen contingencies and thereby help the firm to find and maintain economic opportunities).

¹⁴⁷ See, e.g., MORROW, *supra* note 144, at 250-56; DOUGLAS C. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 303 (1994) (defining “cheap talk” as “a statement that may convey information even though the statement is costless, nonbinding, and nonverifiable”).

contract, enforceable by the sovereign, is to offer a commitment with at least some credibility. But as most lawyers know, such enforcement can be costly to obtain and uncertain in likelihood – so costly and uncertain, perhaps, that a lawsuit may not be worth the effort.

These basic strategies need not be wholly distinct or mutually exclusive. To rely upon one's reputation partakes of both bond-posting and signaling of type: a reputation conveys information about one's type, but it is also a thing of value that can be forfeited by bad behavior. Bonds and hostages may be surrendered to a third party with a reputation for trustworthiness. Nor must these strategies make it impossible for a determined actor to break its commitments. Contracts may ordinarily be breached upon payment of damages; even constitutions can be amended by their own terms or abrogated by revolution. For these strategies to succeed at the task of rendering commitments credible, they need only ensure that commitment-breaking appears highly burdensome and therefore unlikely.

The strategy of third-party enforcement poses unique challenges, however, when sovereign commitments are involved. There is, at the outset, a conceptual obstacle to be overcome: how can a sovereign's own courts be said to provide third-party enforcement of the sovereign's own commitments? The fragmentation of sovereign power, accomplished by such mechanisms as federalism and separation of powers, constitutes an obvious answer. There is nothing conceptually implausible or paradoxical about federal judicial enforcement of commitments made by a state or a coordinate branch of government. Indeed, it was the very prospect that the federal courts would enforce state debts that prompted adoption of the Eleventh Amendment.¹⁴⁸ The supremacy of federal law¹⁴⁹ ensures, moreover, that states cannot legally abolish their commitments simply by changing their own laws.¹⁵⁰ Nor is it novel to think

¹⁴⁸ See *supra* Part I.B.

¹⁴⁹ See U.S. CONST. art. VI, cl. 2.

¹⁵⁰ *Indiana ex rel. Anderson v. Brand*, 431 U.S. 95 (1938), offers a striking example of the extent to which federal constitutional law can prevent a state from relying upon state law to escape its commitments. *Brand* concerned the Indiana legislature's partial repeal of a law that purported to grant tenure to schoolteachers who had met specified requirements. See *id.* at 101-04. The Indiana courts had held that, as a matter of state constitutional law, the legislature was constitutionally incapable of conferring irrevocable tenure upon the state's teachers. See *id.* at

that the separation of powers can enable a government to commit itself. North and Weingast draw precisely this conclusion from the ascendancy of Parliament and the courts following the Glorious Revolution,¹⁵¹ while Jon Elster has credited Jeremy Bentham, in particular, with the first explicit statement of “the idea that separation of powers can facilitate political precommitment.”¹⁵²

Even if the fragmentation of sovereign power makes it *conceptually* plausible for courts to enforce sovereign commitments, there remains the question of whether courts are *practically* capable of enforcing those commitments. As argued above, courts demonstrate obsessive concern with their own legitimacy – that is, their ability to secure voluntary compliance with their decisions – precisely because they lack the instruments of coercion.¹⁵³ In the absence of assistance from the other branches, some judicial decisions may lack practical effect.¹⁵⁴ A federal court may, at the extreme, be able to obtain such assistance against a recalcitrant state: it is unusual for the President to deploy troops in support of a federal judgment, but it is not unprecedented.¹⁵⁵ Federal enforcement of federal judgments against the *federal* government, however, is another story. The President cannot logically be expected to use force against himself, and for him to do so against Congress would amount to a military coup. Moreover, even if the courts could somehow muster coercive power against the political branches, they remain vulnerable to painful retaliation: even the relatively independent Article III judiciary can legally be denied operational funding, stripped of large swaths of jurisdiction, and targeted with court-packing and impeachment campaigns.

114-17 (Black, J., dissenting). Nevertheless, the Court concluded that the partial repeal of the teacher tenure law violated the Contract Clause. *See Brand*, 431 U.S. at 105-09.

¹⁵¹ *See supra* text accompanying notes 3-13.

¹⁵² *See* Elster, *supra* note 88, at 1773 (“A unicameral assembly is too powerful to precommit itself – it is unable to make itself unable to untie itself from the mast.”) (citing JEREMY BENTHAM, *POLITICAL TACTICS* 26 (Michael James et al. eds., 1999) (1843)).

¹⁵³ *See supra* text accompanying notes 72-74.

¹⁵⁴ *See* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, 9-169 (1991) (identifying types of judicial decisions that cannot be implemented without the affirmative cooperation of other political actors, and offering school desegregation as an example).

¹⁵⁵ *See* RICHARD KLUGER, *SIMPLE JUSTICE* 753-54 (1977) (noting President Eisenhower’s reluctance to deploy troops to Little Rock in the wake of *Brown v. Board of Education*).

The practical difficulty of enforcing judgments against another branch of government – not to mention the possibility of retaliation – poses two thorny questions for courts. First, should courts even attempt to decide cases in which litigants seek judicial enforcement of commitments made by the other branches? The relevant considerations will not be exclusively legal or normative, for a careless response may jeopardize the judiciary’s institutional interests. Second, what can courts do to make such commitments credible, absent any means of enforcement? Close consideration of the *Glidden* scenario¹⁵⁶ suggests that the answer to both questions may turn precariously upon the reputation of the judiciary. On the one hand, in deciding whether to hear cases against the other branches, the judiciary must aim to preserve its reputation for rendering efficacious judgments. Only by protecting its reputation can the judiciary enhance the credibility of sovereign commitments. On the other hand, in order to preserve this reputation, the judiciary must be highly selective as to which sovereign commitments it chooses to adjudicate in the first place.

There are good institutional reasons for courts to avoid rendering judgments that lack practical effect. As a general matter, no legal system can operate without some degree of voluntary compliance¹⁵⁷; sovereign enforcement is imperfect and consumes finite resources. But courts that engage in countermajoritarian review of executive and legislative action are especially dependent upon voluntary acquiescence, as they have little or no coercive power at their disposal in confrontations with the elected branches. There are only two basic ways, in turn, for courts to cultivate such compliance with their decisions. The first way is to author persuasive decisions. At their best, judges devise compelling legal and normative arguments that win public sympathy and prove difficult for political actors to dispute or ignore. In *realpolitik* terms, constitutional theory is therefore of much practical value to courts, insofar as it elucidates and illuminates effective rhetorical strategies for winning acceptance.

The second way for courts to cultivate compliance is to render only decisions that are likely to be obeyed. The underlying logic is simple. Absent

¹⁵⁶ *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); see *supra* Part I.C.

¹⁵⁷ See HART, *supra* note 2, at 50-78 (discussing the “habit of obedience” that characterizes “any society where there is law”).

any real means of enforcement, obedience to judicial decisionmaking is a political habit. Judicial decisions not backed by force are efficacious in part for the same reason that paper money not backed by gold is valuable: both are accepted because they are accepted. People will not accept intrinsically worthless pieces of paper in exchange for intrinsically valuable goods and services if they do not believe that they will be able to exchange those pieces of paper for other, intrinsically valuable goods and services. Likewise, political actors may not obey judicial decisions if they doubt that other political actors will do the same: there is little obvious cost to ignoring the edicts of a court that others already disregard with impunity. By contrast, the fact that people do accept paper money or judicial decisions in and of itself begets further acceptance. Value, as measured by exchange, is socially constructed; power, as measured by obedience, is the same. Only the uninitiated would think to say that the emperor has no clothes. In game-theoretic terms, political obedience to judicial decisionmaking can be considered a form of cooperative equilibrium¹⁵⁸: effective judicial dispute resolution may be valued by all political actors, but its success relies upon their own continued obedience.

If political actors learn through experience and observation that judicial decisions may be revised or ignored without consequence, the habit of obedience may be broken, just as a cooperative equilibrium can unravel in the face of defection. The appearance of judicial weakness breeds judicial weakness; the appearance of judicial power breeds judicial power. And the obvious way for

¹⁵⁸ An equilibrium is a situation in which no player believes that it can achieve a better outcome by unilaterally changing strategies, in light of its beliefs as to the strategies of the other players and the probabilities of relevant events. In a cooperative equilibrium, the players attain a superior outcome through the common choice of cooperative strategies than they could achieve individually through the pursuit of uncoordinated, selfish strategies. See, e.g., MORROW, *supra* note 144, at 80-98, 262-68 (defining Nash equilibrium, and discussing mutual cooperation in an iterated Prisoner's Dilemma); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 505-07 (2005) (contrasting the non-cooperative equilibrium of the single-iteration Prisoner's Dilemma with the possibility of cooperation over repeat play).

Russell Hardin has made the broader claim that a constitution as a whole can survive *only* if it forms the basis of an equilibrium. Because constitutions "lack the benefit of an outside enforcement agency," he argues, a stable constitution "must be self-enforcing" and "must be a coordination": "Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations." RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 98, 140 (1999); see also Hardin, *supra* note 14, at 113-19.

courts to cultivate the appearance of judicial power is to pick only those fights that they can win, and to decide only those cases in which they are confident of their practical ability to vindicate the rights of successful litigants.¹⁵⁹ A prudent court might therefore refuse, for example, to decide so-called “political questions” that could trigger conflict with the other branches,¹⁶⁰ or to render decisions that are subject to executive or legislative revision.¹⁶¹ The actual existence of these doctrines, as a matter of judge-made constitutional law, suggests that the Supreme Court has a more profound grasp of the necessities of judicial power than it is sometimes prepared to admit.¹⁶²

Just as reputation helps courts to obtain acceptance of their decisions without resort to coercion, reputation can also enable courts to render sovereign commitments credible – even commitments that they have no way of enforcing. If they are to preserve the very reputation that makes this magic possible, however, courts must be careful in selecting which commitments they are prepared to bless. On the one hand, they cannot be too harsh upon the sovereign, lest the sovereign balk and jeopardize their reputation for rendering efficacious judgments. On the other hand, they cannot afford to be too lenient upon the sovereign, lest they jeopardize their reputation for impartiality while leading creditors and others to conclude that the sovereign can repudiate its

¹⁵⁹ See Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2027 (1996) (arguing that the purpose of the constitutional rule against executive revision of judicial decisions, and indeed “the sine qua non of an Article III court,” is “the practical ability to vindicate the interests of successful litigants”).

¹⁶⁰ See David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 132-34 (1996) (discussing the judicially fashioned doctrines by which American and Japanese courts avoid deciding what they deem to be “political questions”); Law, *supra* note 18, at 705 (suggesting that courts share a “generic” need “to define and justify their power in such a way as to secure widespread acceptance,” and that adoption of a “political question” doctrine is one such tactic).

¹⁶¹ See *Executive Revision of Judicial Decisions*, *supra* note 159, at 2022-24 (discussing the rules against executive and legislative revision and their justification on separation of powers grounds).

¹⁶² The *descriptive* claim made here that courts have selfish institutional reasons for refusing to decide certain types of cases – reasons that have to do with the preservation of their own power – should not be confused with the *normative* argument that courts should refrain, for the sake of democracy, from deciding certain types of cases. In practice, however, the two strains of argument have not always remained distinct. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23, 111-98 (2d ed. 1986) (arguing that judicial review can “weaken the democratic process” over time, and lauding the Court’s “passive virtues” and its various “techniques of ‘not doing,’ devices for disposing of a case while avoiding judgment,” *id.* at 169, such as the political question doctrine); LEARNED

commitments unpredictably or with excessive ease. The extent to which this balancing act poses obvious institutional perils to the judiciary may help to explain the Supreme Court's reluctance to conclude – as it ultimately did in *Glidden*, but only after years of prodding by Congress¹⁶³ – that the Court of Claims was a full-fledged member of the Article III judiciary, and that their reputations would henceforth be mutually dependent.

Why, then, was a majority of the Court finally willing in *Glidden* to stake the federal judiciary's most valuable yet vulnerable asset – its reputation – upon the judgments of the Court of Claims? And what good did the Court achieve by doing so? *Glidden* placed the judiciary in the undeniably awkward position of rendering judgments that are both legally and practically unenforceable.¹⁶⁴ It is a time-honored truism that, for every right, there must exist a remedy,¹⁶⁵ yet the work of the Court of Claims consists precisely of deciding rights for which there exists no remedy. Nevertheless, the decision was both sensible for the judiciary and advantageous for the nation.

From the perspective of the judiciary, Congress's nearly perfect record of honoring money judgments meant that the federal courts risked little damage to their precious reputation for rendering efficacious judgments. The Court minimized this risk by acting only with the benefit and reassurance of hindsight; had it conferred Article III status upon the Court of Claims from the very outset, it would have lacked the necessary information upon which to assess the potential damage to the judiciary's reputation.

From the sovereign's point of view, the fact that its contracts and debts are to be adjudicated by a highly reputable judiciary increases the credibility of its commitments and thus lowers its costs in transacting with private parties. This should be the case, moreover, even if the judiciary lacks the formal or practical

HAND, THE BILL OF RIGHTS 14-15, 27-29 (1958) (arguing that the power of judicial review “need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution”).

¹⁶³ See *Glidden*, 370 U.S. at 541 (plurality opinion of Harlan, J.); *supra* text accompanying notes 79-82.

¹⁶⁴ See *Glidden*, 370 U.S. at 569-70 (noting that, as a constitutional matter, Congress cannot be compelled to appropriate money); *supra* text accompanying notes 72-74 (discussing the practical inability of courts to coerce other branches of government).

¹⁶⁵ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a settled and invariable principle ... that every right, when withheld, must have a remedy, and every injury its proper redress.”) (quoting Blackstone's *Commentaries*).

power to enforce its judgments against the sovereign. The willingness of the courts to stake their own valuable reputation upon the sovereign's voluntary compliance gives the sovereign's commitments more credibility than the sovereign could achieve strictly on the basis of its own good behavior. Of the three basic strategies described above for making commitments credible – bond-posting, type-signaling, and third-party enforcement¹⁶⁶ – only the third is unavailable to courts in the situation posed by *Glidden*: insurmountable legal and practical obstacles preclude the enforcement of judgments against an unconsenting Congress. A favorable reputation gives courts the means by which to pursue the other two strategies.

First, the judiciary can post its own reputation as a bond for performance of the sovereign's obligations. Congress's own reputation, by itself, can be expected to allay the fears of potential contracting partners to a substantial degree. If, however, Congress chooses not only to dishonor its debts and contractual obligations, but to do so in disregard of an Article III court, it sacrifices not only its own valuable reputation but also that of the federal courts. A prudent sovereign is unlikely, in turn, to want to jeopardize the reputation of the judiciary. A judiciary of good repute – one that elicits voluntary compliance by dint of its reputation – is valuable to the sovereign not merely because it can bolster the credibility of sovereign commitments, but more importantly because it discharges a crucial sovereign responsibility – that of dispute resolution¹⁶⁷ – at minimal cost to the sovereign in enforcement resources¹⁶⁸ or political support.¹⁶⁹

¹⁶⁶ See *supra* text accompanying notes 142-147.

¹⁶⁷ See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1-37 (1981) (suggesting that the very origins of organized government lie in the substitution of law and courts for consensual dispute resolution); *id.* at 79 (arguing that sovereigns secure acceptance and loyalty from their subjects by providing “official dispute settlement and other legal services better than those available elsewhere”); Alec Stone Sweet, *Judicialization and the Construction of Governance*, in *ON LAW, POLITICS, & JUDICIALIZATION*, *supra* note 141, at 55, 55-71 (explaining how “systems of governance emerge and evolve” from “triadic dispute resolution”).

¹⁶⁸ See SHAPIRO, *supra* note 167, at 13-14 (noting that courts “rarely have the administrative resources to follow up on their resolutions,” and that judicial systems tend to operate upon a premise of voluntary compliance).

¹⁶⁹ The existence of courts willing and able to resolve controversial issues can spare rulers the political costs of having to confront such issues themselves. Cf. Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 *passim* (1993) (arguing that elected leaders prefer to avoid political responsibility for resolving controversial issues that divide their own parties, and that they “consciously invite the judiciary to resolve [such] controversies” instead).

Second, a judicial reputation for rendering fair and efficacious judgments gives private parties reason to expect that the courts will deliver more of the same in cases involving sovereign commitments. The mere knowledge that one can sue the United States in a “real” federal court – the type with a reputation for rendering fair and efficacious judgments – is likely to shape one’s expectations. The fact of Article III adjudication is cheap and reliable information that one’s legal rights are likely both to be decided impartially and to receive practical effect. Some private parties may well infer from the availability of an Article III forum that the contractual commitments of the United States will be enforced in much the same way as those of any other party. That is, they may (incorrectly) construe the judiciary’s reputation as evidence of a willingness and ability to enforce the federal government’s financial commitments.

The more sophisticated may realize that a federal court has no legal or practical power to compel the payment of money judgments against the United States. Nevertheless, they too may conclude from the track record of Article III courts that their legal rights will be fairly decided, and that any judgment they obtain is likely to be honored. That is, they may grasp that the Article III judiciary is profoundly unwilling to decide cases wherein its judgments will be ignored – so unwilling, in fact, that it will impose limits upon its own jurisdiction to avoid doing so.¹⁷⁰ The fact that the judiciary is willing to render money judgments against the sovereign signals to private parties the judiciary’s belief that the sovereign will honor those judgments. Moreover, this signal is credible because it is costly for the judiciary to send false signals: the courts cannot render sham decisions for the sovereign to disregard without also jeopardizing their own reputation and power.

When constitutional barriers prevent the sovereign from binding itself, the problem of undercommitment is presented in the starkest of terms. In such cases, a reputable court may be able to parlay its own reputation into added credibility for the sovereign’s commitments, as *Glidden* demonstrates. That process entails a certain amount of circularity, however, if not sleight of hand.

¹⁷⁰ See *supra* notes 159-162 and accompanying text (discussing the “political question” doctrine and the rules against executive or legislative revision of judicial decisions).

The judiciary preserves its reputation for rendering efficacious judgments by lending its imprimatur only to commitments that it knows will be honored. But those commitments, in turn, become more credible because the judiciary has a reputation for rendering efficacious judgments.

CONCLUSION: FEDERALISM AND THE FORGOTTEN LESSONS OF THE PAST

Sovereigns face more than one variety of commitment problem. Though issues of undercommitment, or “credible commitment,” have attracted all the scholarly attention, the potential for overcommitment is of no less practical concern to sovereigns. At the root of both problems is a tension between what appears beneficial or expedient in the short run, and what happens to be prudent in the long run: it cannot be assumed that what a sovereign demands or promises in the short run will prove to be in the sovereign’s best interests in the long run. The problem of undercommitment is particularly acute for sovereigns because, of the three basic strategies available for making commitments credible – bond-posting, type-signaling, and third-party enforcement – the last may be difficult or unavailable for both legal and practical reasons. As others have pointed out, it is possible for constitutional arrangements to remedy the problem by placing constraints upon the sovereign. But the reverse is also true: by entrenching inalienable governmental powers and immunities, a constitution can ordain the paradoxical situation in which the sovereign has too much power for its own good.

In the absence of any other authority to which a sovereign might conceivably respond, it falls upon courts to police – or, more accurately, to optimize – the sovereign’s commitments as best they can. The challenges that they face are several. First, they must steer a course for the sovereign between overcommitment and undercommitment. That is, they must relieve the sovereign from past commitments that prove crippling, but they must do so without impairing the sovereign’s ability to make credible commitments in the future. Second, they must find ways to bolster the credibility of the sovereign’s commitments, even when they have no way of imposing either practical or legal constraint upon the sovereign. Third, they must accomplish these tasks without

undermining the basis of their own power – namely, their reputation for rendering fair and efficacious judgments.

The manner in which the Supreme Court has handled these tasks offers reason for both hope and disappointment. Nearly two centuries ago, the Marshall and Taney Courts demonstrated a keen grasp of the distinction between what a state may wish to do in the short run, and what is actually in the best interests of the state in the long run. In *Dartmouth College* and the *Charles River Bridge Case*, the Supreme Court approached enforcement of the Contract Clause with a pragmatic and paternalistic regard for the credibility of sovereign commitments and the future availability of private capital. In more recent times, the Justices have had occasion to remember that the enforcement of costly commitments is in the sovereign’s own “long-run interest as a reliable contracting partner,”¹⁷¹ and that expansion of the sovereign’s opportunities for renegeing can serve only to “undermin[e] the Government’s credibility at the bargaining table and increas[e] the cost of its engagements.”¹⁷²

Paternalistic concern for the sovereign’s own long-run interest constitutes a particularly compelling justification for judicial enforcement of sovereign commitments insofar as public officials with an eye to reelection cannot be relied upon to pursue commitment-keeping policies that yield dividends in the long run but are costly in the short run. This potential disparity between what elected officials may *proclaim* to be in the public interest and what is *actually* in the public interest renders it both unnecessary and unwise for a court to imply – as the Supreme Court did in *United States Trust*¹⁷³ – that its goal in policing such commitments is to prevent the sovereign from pursuing its self-interest. The conflict in such cases is not simply between the interests of private parties who

¹⁷¹ *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion of Souter, J.); *see id.* at 871-910 (holding the United States liable for breach of contract to financial institutions that had agreed to acquire insolvent competitors in exchange for the right to engage in particular accounting practices, and which were themselves driven into insolvency by Congress’s subsequent decision to prohibit such practices); *id.* at 913 (Breyer, J., concurring) (expressing concern for the government’s practical ability “to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting”).

¹⁷² *Id.* at 884.

¹⁷³ *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977) (promising careful scrutiny of a state’s efforts to impair its own contractual obligations because, in such cases, “the State’s self-interest is at stake”); *supra* note 36 and accompanying text.

deal with the sovereign, on the one hand, and those of the sovereign, on the other. Rather, to the extent that the credibility of sovereign commitments is at stake, the interests of the private plaintiff and the sovereign coincide.

To deny a child candy is not necessarily to act against the child's self-interest. The same can be said when a sovereign is forced to keep its promises. The current Court, however, has proven fervently and dramatically permissive in at least one damaging respect. Its affinity for the idea of sovereign immunity and reluctance to interpose the federal courts between government and citizen are by now well documented.¹⁷⁴ Amidst its paeans to federalism, the Rehnquist Court might do well to recall what the Marshall and Taney Courts so clearly grasped – namely, that federal judicial enforcement of state commitments can be in the best interests of the states themselves. What once was learned, it seems, is easily forgotten.

¹⁷⁴ See, e.g., *United States v. Nordic Village*, 503 U.S. 30, 42-43 (1992) (Stevens, J., dissenting) (denouncing the Court's "love affair" with sovereign immunity); *TRIBE*, *supra* note 78, §§ 3-25 to 3-30, at 519-98 (discussing the Court's sovereign immunity and abstention doctrine); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 *passim* (1987) (objecting that the Court has "perverted" the concepts of federalism and sovereignty "into doctrinal defenses for abusive governments"); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 *S. CT. REV.* 1 *passim* (questioning whether the Court's enthusiasm for state sovereign immunity amounts to a coherent strategy for advancing federalism); cf. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. CHI. L. REV.* 429, 433, 481-86 (2002) (suggesting that the Rehnquist Court's efforts to advance federalism have been inconsistent, but that its actions in the area of sovereign immunity have been especially "bold").