The Judicialization of Police

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Abstract

This article contends that the origins of judicial review under the United States Constitution lay not in the common law, nor in “judicial duty,” natural law, popular sovereignty, or written constitutions, but rather in police powers handed down from the monarchical tradition conceived as a constituted government’s inherent prerogative of self-preservation. Nationalists at the Federal Convention in 1787 wanted to give Congress such a prerogative in the form of an unqualified preemptive negative on state legislation. They did not succeed. Yet with the adoption of the Supremacy Clause, the superintending police powers originally embodied in the congressional negative devolved on the judicial department and, ultimately, the Supreme Court. Questions remained whether the Court could in fact exercise such powers consistent with Article III’s jurisdictional limitations and, later, the Eleventh Amendment’s bar on state suability. With these questions in mind, the analysis devotes special attention to the first case in which the Supreme Court struck down a state law under the Supremacy Clause: *Ware v. Hylton* (1796). The article concludes, however, that the judicialization of police at the American founding would find its most potent historical expression in the Court’s prospective remedial powers over state enforcement officials first reserved by the Marshall Court and later confirmed in *Ex Parte Young* (1908).

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This article asks whether the Constitution of the United States, as understood by its original proponents, gave the federal government police powers. The conventional historical wisdom says that the Constitution reserved police powers to the states alone and that the framers meant for the federal government, as one of limited power, to possess no general policing authority.¹ In modern American constitutional jurisprudence, the police power has thus come to function as both a constraint on federal power and a shield from principled judicial scrutiny of the state governments. Rarely has a modern legal historian or constitutional scholar seriously investigated the historical existence of a federal police power.²

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¹ See, e.g., *Bond v. United States*, 572 U.S. ___ (2014) (slip opinion at 8) (noting that the states retained “broad” police powers, but that the federal government “has no such authority and can exercise only the powers granted to it”).

² For an excellent exception, see Christopher Tomlins, Necessities of State: Police, Sovereignty and the Constitution, 20 J. Pol’y Hist. 47 (2008) (examining Federal police power in immigration and Indian affairs in the nineteenth century). Ernst Freund’s influential early twentieth-century treatise on the police power noted a few constitutional grounds for federal police powers in the powers to regulate commerce and Indian affairs, but otherwise proceeded on the assumption that the states and localities retained all the major police powers worthy of discussion. See Ernst Freund, The Police Power: Public Policy and Constitutional Rights (1904). Provoked by the Supreme Court’s invalidation of the Keating-Owen Child Labor Act of 1916, Robert E. Cushman’s series of articles in the progressive era examined whether, in view of text
Rather, judges and scholars alike have tended uncritically to accept at face value the Federalists’ representations as to the intended repositories of police powers in 1787. I shall suggest here that this constitutes a considerable oversight in our constitutional commentary and jurisprudence, which has distorted our historical knowledge of what actually happened at the levels of both constitutional discourse and constitutional structure in and after 1787. To be sure, neither the Federalists nor their Antifederalist counterparts actually used the term police to describe federal power. The concept, however, shaped their attitudes toward federal authority in ways that problematize prevailing scholarly understandings of the federal government as one of defined powers and of the judicial function with respect to those powers.

This article begins with the premise that the American framers perceived the crisis under the Articles of Confederation as primarily a policing problem with regard to the states. To address this problem, James Madison and other nationalists at the Federal Convention fought hard to vest Congress with a preemptive discretionary negative on all state legislation. The negative garnered significant support at the Convention’s outset, but concerns over its practicability and potential to instigate overt conflicts between the federal and state governments ultimately caused most the delegates to abandon it. With the subsequent adoption of the Supremacy Clause, however, the courts contemplated in Article III inherited and in the process altered, though not beyond recognition, the superintending police function vis-à-vis the states originally embodied in the congressional negative. The Supremacy Clause, of course, bound the state judges by name. The very logic of supremacy, however, together with the specter of inconsistent judgments and compromised judicial independence at the state level, prevented reformers in 1787 from relying on the state judges alone to perform this function in cases where federal authority came under threat from the states. In the end, it fell to the Supreme Court to keep the states in line short of war through, among other things, judicial review of state legislation. The article contributes to the literature in this area by locating the historical origins of the Court’s

and case law, Congress had police powers under the Commerce, Taxing, and Postal Clauses. See Robert E. Cushman, National Police Power under the Commerce Clause of the Constitution, 3 Minn. L. Rev. 289 (1919) [Part I]; 3 Minn. L. Rev. 381 (1919) [Part II]; 3 Minn. L. Rev. 452 (1919) [Part III]; Robert E. Cushman, National Police Power under the Taxing Clause of the Constitution, 4 Minn. L. Rev. 247 (1920); Robert E. Cushman, National Police Power under the Postal Clause of the Constitution, 4 Minn. L. Rev. 402 (1920). Cushman examined congressional power only and did not focus on historical understandings in 1787. William Crosskey’s controversial mid-century historical opus motioned toward federal police powers under the Constitution lost to the eighteenth century. William Winslow Crosskey, Politics and the Constitution in the History of the United States (1953). Recent historical work on the Necessary and Proper Clause suggests a far broader grant of implied power to the federal government at the founding than the conventional historical wisdom recognizes. See John Mikhail, The Necessary and Proper Clauses, 102 Geo. L.J. 1045 (2014). Richard Primus’s recent article rejects the so-called “internal-limits” doctrine traditionally applicable to exercises of congressional power, arguing, inter alia, that the founders did not embrace the doctrine. See Richard Primus, The Limits of Enumeration, 124 Yale L.J. 576 (2014). The article makes few historical claims and Primus “takes no position on whether the Constitution authorizes Congress to do whatever a national government with a police power could do,” but rather argues that in construing a particular power we “should not exclude an otherwise reasonable construction on the grounds that it would leave Congress constrained only by process limits and affirmative prohibitions.” Id. at 583.
authority to negative state legislation not in the common law, nor in “judicial duty,” natural law, popular sovereignty, or written constitutions, but rather in police powers handed down from the monarchial tradition conceived as a constituted government’s inherent prerogative of self-preservation.

I. Law and Police in the Anglo-American Eighteenth Century

Although etymologically related to the Latin term politia and, going forward, to the English term policy, the first iterations of the term police in history occurred in late-medieval France, carrying the denotation of good order and administration. Scholars, however, have identified its conceptual antecedents in classical times—specifically, in the idea of patria potestas or household governance, the discretionary power wielded by a head of household over family members. The state’s police power, on this view, becomes household governance writ large. The Germanic variation on the classical household, mund—referring to a household’s peace and the father’s prerogative to secure it—apparently became appropriated during the early modern period in both England and on the Continent to conceptualize a monarch’s open-ended powers to keep order and guarantee the common welfare. Blackstone’s discussion of the police power in the Commentaries does something to confirm this understanding in the eighteenth century.

We should underline at the outset the distinction between police as an institution and police as a discourse of power; and, within the discourse of power, between police as a noun, referring to a government’s discretionary authority to pursue broad ends such as security, the peace, and the general welfare; and police as a verb, referring to magisterial action taken to anticipate and prevent violations of even clearly defined laws. To this configuration of historical usages we may add the expression police offense, defined as prohibited conduct that threatens protected state interests instead of violating them, and which therefore serves to prevent harm rather than punish it. In all these respects, histo-

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3 See Oxford English Dictionary (online), entry for Police (2014).
5 Id. at 11-21; see also William J. Novak, Common Regulation: Legal Origins of State Power in America, 45 Hastings L.J. 1061, 1085-86 (1994) (observing these features in the English monarchial tradition).
7 On police as preventative in nature, see Dubber, supra note 4, at 68-69. Dubber provocatively argues that the definition of police has come to rest on “its very undefinability.” Id. at 120. In Commonwealth v. Alger, Massachusetts Chief Justice Lemuel Shaw explained his state’s police powers as an inheritance of sovereignty itself—i.e., “all the power which exists anywhere” unlimited by the common law—rendering “all social and conventional rights . . . subject to such reasonable limitations . . . [as determined] necessary and expedient.” 61 Mass. 53, 82, 83, 85 (1851). In the License Cases, Chief Justice Taney defined the police power as “the power of sovereignty, the power to govern men and things within the limits of its dominion.” License Cases, 5 U.S. (5 How.) 504, 583 (1847); see also New York v. Miln, 36 U.S. (11 Pet.) 201, 141 (1837) (noting that police power extends to “men and things” within the state’s jurisdiction). The early twentieth-century treatise writer Ernst Freund defined the police power with reference to two characteristics: “it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion.” Freund, supra note 2, at 3.
8 See Dubber, supra note 4, at 22-23, 76.
rians and scholars of the eighteenth century have contrasted police with *law*, conceived as remedial justice administered under delimiting standing rules chiefly through the instrumentality of the courts.\(^9\) Over and above the offices of county sheriffs and federal marshals, distinct police departments as such did not exist in either England or the United States until well into the nineteenth century.\(^10\) Yet if it lacked an institutional identity, commentators can agree that police had an important historical presence as a discourse and “science” in the eighteenth century on both sides of the Atlantic.\(^11\)

On the American side, historians have argued that the concept of police took on a particular meaning in the context of the American Revolution’s “democratic promise.”\(^12\) Some have gone so far as to suggest that police became linked in American constitutional culture to the popular will and to the pursuit of happiness itself.\(^13\) The state constitutions, a few of which employed the term “police” in describing powers thereunder, gave some expression to the idea of police as popular majoritarian rule.\(^14\) All this changed, however, with ratification of the Constitution, after which an alternative paradigm of law ultimately prevailed over, subsumed, and in the process transformed the concept of police in America. The Constitution of 1787 and its judicial interpreters become, from this perspective, the primary historical instantiations of *law* in the early republic, and police becomes re-fashioned as security rather than happiness, falling primarily within the bailiwick of the states and local government, where governmental exertions proceeding under its banner would enjoy relative immunity from judicial scrutiny.\(^15\)

Such characterizations of police under the Constitution, however, tend simply to take the bait of the Federalists rather than seriously examining whether and how the Federalists drew on the historical traditions of police extant in 1787, even if they did not use the term. Here I want to highlight one strain of eighteenth-century police discourse surrounding those powers that flowed from the inherent authority of a constituted sovereign government to preserve and defend itself: the prerogative of sovereign self-preservation. This species of power remained indifferent to the rights of subjects or citizens. It did not admit of any legal limitations and could justify a constituted government pursuing all manner of discretionary measures designed to anticipate and prevent challenges to its aut-

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\(^11\) See Dubber, supra note 4, at 47-93.

\(^12\) Tomlins, supra note 9, at 38.

\(^13\) See id.

\(^14\) See, e.g., Md. Const. of 1776, Decl. of Rights, art. II; Pa. Const. of 1776, Decl. of Rights, art. III.

\(^15\) See Tomlins, supra note 9, at 39. For all intents and purposes, the Supreme Court shares this view of constitutional history. See supra note 1.
authority. For evidence that police so conceived occupied the minds of the Federalists in 1787, we need look no further than Publius himself. “[E]very government,” Hamilton wrote, “ought to contain in itself the means of its own preservation.” To protect the national community “against future invasions of the public peace by . . . domestic convulsions,” Publius believed, “[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.”

But how did the American doctrine of popular sovereignty impact this strain of eighteenth-century police discourse? Popular sovereignty’s conflation of ruler with ruled and its corresponding commitment to the autonomy of citizens stood in some tension with the power to police, whose very existence and exercise presupposed a strict separation between ruler and ruled, and therefore heteronomy rather than autonomy. Certainly, anyone familiar with the standard sources from the ratification debates knows that the Federalists habitually depicted the Constitution as the people’s creation and the government created thereunder as ultimately answerable to them. Yet our present inquiry turns not on the identity of either the Constitution’s ratifiers or the electorate, but on the question of sovereignty in day-to-day governance under the ratified frame of government. Here we might heed Benjamin Rush who in 1787 insisted that while the people might possess some sovereignty on election days, “[a]fter this, it is the property of their rulers.” Moreover, notwithstanding founding-era historians’ unconstrained use of the phrase “popular sovereignty” to distinguish early American constitutional culture, the historical actors themselves in 1787 never uttered it in connection with the system they contemplated under the Federal Constitution. The record reveals only one man running amongst the Federalists in 1787 referring with any regularity to the American people as “sovereign” under the Constitution. All others reserved application of this term to constituted governments.

17 The Federalist No. 34, supra note 16, at 228, 227 (Alexander Hamilton). It also bears noting that the Preamble to the Constitution made the federal government’s primary purpose to pursue police-related ends, including “domestic Tranquility” and “the general Welfare.” U.S. Const. pmble.; see also Tomlins, supra note 2, at 50 (“[T]he Preamble declares that all federal power is directed toward ‘police’ ends—improvement and security for all.”).
20 Often they used it to refer to the state governments. See, e.g., The Federalist No. 47, supra note 16, at 365 (James Madison) (suggesting that equality in the Senate recognized the “independent and sovereign States”). The state ratifying conventions produced many other instances of this usage. See, e.g., 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, at 26 (Jonathan Elliot ed., 1891) [hereinafter Elliot’s Debates] (Theophilus Parsons noting at the Massachusetts convention that the Senate embodied the “sovereignty of the states”); 3 id. at 527 (George Mason asking at the Virginia convention, “Is the sovereignty of the state to be arraigned like a culprit, or private offender?”). They also used the term to refer to the federal government. See The Federalist No. 9, supra note 16, at 122 (Alexander Hamilton) (noting that equal
Historians and scholars have done much to debunk the myth of American statelessness at the state and local levels in the late eighteenth and nineteenth centuries. Fewer historical commentators have questioned perceived statelessness at the federal level prior to the Civil War—this in part because the Jeffersonian legacy did in fact do much to render the federal government practically invisible to many Americans during this period. Even after the Civil War, leading monographs contend, the federal government continued to exist as a mere “state of courts and parties.” To be sure, the anti-statist doctrines cultivated by the Jeffersonians cast a long historical shadow in the nineteenth century—and beyond. The movement for constitutional reform in 1787, however, in which Jefferson played no appreciable part, proceeded on a contrary set of motivations and understandings.

Reformers in 1787 made it their mission to create a reified federal state entity, distinct from and superior to the people and states, and thereby capable of policing both by its prerogative of self-preservation. The Constitution declared the federal government supreme within its sphere, depositing all the traditional indicia of governmental sovereignty—including the power to tax, to take private property, to regulate immigration and naturalization, to coin money and punish counterfeiting, to declare war, and to enter into treaties—in the central government, even if it allocated some of these powers among the different departments in some innovative ways. Congress’s oft-overlooked plenary authority under Article 1, Section 8 over designated seats of government and annexes “in all cases whatsoever” provides additional compelling textual support for a contemplated sovereign federal state in 1787, as do the Constitution’s broad provisions for federal military power vis-à-vis internal threats. On a more practical level, the substantial licensure, collection, and inspection infrastructure established in the ports and distilleries soon after ratification, together with the considerable federal court system created by the Judiciary
Act of 1789 (conceived as an arm of the federal state rather than its monitor), gave immediate and concrete expression to the new federal state.  

Probably the most powerful founding-era evidence touching both the intended locus of sovereignty and the question of “stateness” in 1787, however, lay in the Constitution’s treason clause and in judicial decisions in the 1790s expounding it. The crime of treason in the Anglo-American eighteenth century held the distinction of being, simultaneously, a criminal offense and a police offense.  

As it developed in England, the whole object of the jurisprudence surrounding the crime became anticipating and preventing the actual crime—killing the king—by targeting certain predecessor offenses some of which, over time, morphed into treason itself.  

The United States Constitution established a constitutional definition of treason that borrowed language from old English statutes and assumed that the judiciary would adjudicate treason cases subject to constitutional evidentiary requirements (an overt act confirmed by two witnesses) and congressional punitive determinations. The Federalists suggested that the Constitution’s treason provisions circumscribed the crime so as to prevent the English doctrines of constructive treason from taking hold in the American context.  

In fact, however, the crime of treason against the federal state, or “the United States,” had the potential to extend further than in England because the American “sovereign” could, both in theory and practice, encompass much more than a personal monarch could.  

Early Congresses, moreover, did not apparently feel too constrained by the treason clause, using its underlying principles to create crimes found nowhere in the Constitution. In 1790, for example, Congress defined a crime called “misprision of treason,” which created a legal duty for citizens to police treasonous activity subject to fines and imprisonment, by criminalizing failure to report knowledge of it to officials.  

The Sedition Act of 1798 subsequently made any combination or conspiracy formed to oppose the government or its laws short of treason itself, a criminal misdemeanor punishable by fines and imprisonment.  

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26 See supra note 8 and accompanying text.

27 See Dubber, supra note 4, at 25-30 (discussing emergence of constructive and petit treason).


29 See James Willard Hurst, The Law of Treason in the United States 126-45 (1945). This did not assuage the Antifederalists. Luther Martin, for example, objected to the Treason Clause as follows: “By the principles of the American revolution, arbitrary power may and ought to be resisted, even by arms if necessary.” Yet if a state ever attempted to so resist federal power, Martin contended, “the State and every of its citizens who act under its authority are guilty of a direct act of treason.” Luther Martin, The Genuine Information, reprinted in 3 The Records of the Federal Convention of 1787, at 223 (Max Farrand ed., 1911) [hereinafter Convention Records].


31 Act of Apr. 30, 1790, ch. 9, § 2, 1 Stat. 112.

32 Act of July 14, 1798, ch. 74, § 1, 1 Stat. 596.
administrative mechanism to police sedition. Policing sedition fell to the people, while punishing it fell to the federal courts. To be sure, the federal judges adjudicated crimes against the new federal state with a singular vigor in the 1790s. Yet, as American legal historians know well, the judges did much more than mechanically enforce criminal prohibitions defined in congressional statutes. They also created crimes not specifically set forth in the Constitution or legislation but that found justification in the same prerogative of sovereign self-preservation that underlay treason. The family of common law crimes established by the Federalist judges in the 1790s around the conceptual core of treason fell within the ambit of police offenses.

II. Policing the States

Shays’s Rebellion certainly illustrated for reformers in 1787 that individuals could threaten governmental authority in significant ways that required both prevention and punishment, and the post-ratification tax rebellions confirmed this threat’s persistence into the 1790s. Experience under the Articles of Confederation, however, demonstrated that the states and not individuals posed the most formidable threats to federal authority and therefore presented the most serious policing problem in 1787. As it happened, the federal government would receive scant legislative jurisdiction over the states under the Constitution (treason and the family of police offenses it spawned applied only to individuals) and therefore could not police the states by quite the same means it might police individuals. The Articles of Confederation created peculiar difficulties for the continental government in this regard and states’-rights Antifederalists had a vested interest in perpetuating those difficulties during and after the ratification debates. Sovereign self-preservation required the credible threat of coercion and the sovereign states would not be coerced so long as they remained sovereign. The absence of any effective means of federal sovereign self-preservation vis-à-vis the contumacious states under the Articles of Confederation stands as a key historical motivation for constitution reform in 1787. One cannot easily read James Madison’s pre-Convention essay regarding the “Vices” of the confederation without sensing Madison’s urgent desire to invest the federal government with adequate means by which not only to sanction the state legislatures for impinging upon the “general interest,” but to prevent those incursions from occurring in the first instance.

The Constitution of 1787 attempted to answer the problem of governing the sovereign states in a number of ways. The Article I Section 10 prohibitions, for example, divested the states of sovereignty in certain matters, even if the question remained how precisely that divestiture would get enforced. Equal representation in the Senate, moreo-


34 See Dubber, supra note 4, at 95-104.

35 2 Convention Records, supra note 29, at 27; James Madison, Vices of the Political System of the United States, in 2 The Writings of James Madison 361-69 (Gaillard Hunt ed., 1901) [hereinafter Madison Writings].
ver, incorporated some measure of state sovereignty into the federal government itself. A third way to deal with the states lay in simply avoiding them altogether and instead governing individuals and, by all appearances, the framers understood most of Article I Section 8 to do just that.36

In Philadelphia, the Virginia Plan had offered more direct ways of dealing with the policing problem created by disobedient states under the Articles of Confederation. First, it contained a “force clause” giving the federal government the power to employ military force against recalcitrant states.37 Madison and others, however, successfully argued that more prudent and peaceful measures recommended themselves. Toward this end, Madison championed another provision in the Virginia Plan that would have given Congress authority to negative any and all legislation passed in the states prior to enactment.38 The congressional negative held special appeal for key nationalists, who deemed it indispensable to peaceably defending the “general authority . . . against encroachments of the subordinate authorities.”39

The structural homologies that the congressional negative shared with eighteenth-century understandings surrounding the police power merit an appreciation that they have not received in the historical literature. The negative both embodied a federal police power (the noun) and gave Congress the power to police (the verb). Its objective lay specifically in preserving federal authority as such over the states. It had a significant discretionary component, operating without any textual or structural limits outside the political process. Finally, the negative would have also anticipated and prevented state legislative violations before they became operative in the manner of police, rather than sanctioning existing violations in the manner of law. No one in Philadelphia expressly referred to the congressional negative as a police power. Yet the delegates could not have easily avoided the conclusion had they thought about it in these terms. For a number of reasons ranging from practical to ideological, the congressional negative met its demise in Philadelphia and one imagines would have encountered great opposition among the Antifederalists had it survived the Convention.40 Yet, as leading constitutional historians recognize, its animating principles lived on and, with the adoption of the Supremacy Clause, powers linked to the congressional negative became vested in the courts.41

36 This, in turn, resulted in divestitures of state sovereignty in certain areas and, in others, concurrent jurisdiction tipping in favor of the federal government under the Supremacy Clause in cases of conflict.
37 1 Convention Records, supra note 29, at 21.
38 Id.
40 On which see Hobson, supra note 39.
III. Judicializing Police

So did either a police power or a power to police (or both) vis-à-vis the states devolve upon the courts under the Supremacy Clause? James Madison himself had his doubts. To properly answer, however, we must identify what courts we are talking about—state or federal; in what capacities those courts would act with respect to the state governments—as a matter of original jurisdiction or in some kind of reviewing capacity; and, ultimately, what kinds of remedies the courts had at their disposal to preserve federal supremacy against state incursions. As it happened, the state courts would continue to handle the lion's share of the country's judicial business in the early republic. The Judiciary Act of 1789, however, reserved for the federal courts at the outset exclusive original jurisdiction in a number of areas touching national concerns, including federal crimes. The Supremacy Clause, of course, bound the state judges by name. The logic of supremacy itself, however, demanded federal supervision of the state judges, most of whom, if they did not stand for popular elections in the states, retained connections with the state legislatures deemed too close for comfort by many Federalists. The Article III federal judges would therefore proceed under the same duties as the state judges, with the difference that, in the case of the federal judges, the scope of this duty authorized superintendence over the state judges themselves when necessary to preserve federal authority and independence. The Judiciary Act established a number of mechanisms by which the federal courts might act toward these ends if called on to do so in justiciable cases or controversies. Yet whatever Congress did or did not do in the years after ratification, Article III required the creation of a single Supreme Court to possess direct authority over the states in two central respects. First, Article III gave the Court original jurisdiction over all “Cases . . . in

42 5 Madison Writings, supra note 35, at 28.
43 See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
44 U.S. Const. art. VI, § 2. cl. 3.
45 The Judiciary Act of 1789, which by no means legislated to the limits of the Constitution, expressed this constitutional imperative in Section 25. See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85. On political controls over the state judges under the state constitutions, see Gerhard Casper, Separating Power: Essays on the Founding Period 136 (1997). The possibility of inconsistent rulings among the state courts also necessitated a judicial monitor at the federal level. See The Federalist No. 82, supra note 16, at 460 (Alexander Hamilton) (observing that, in matters of national concern, an appeal from the state courts would “naturally lie to that tribunal [the Supreme Court] which is destined to unite and assimilate the principles of national justice and the rules of national decisions”).
46 See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) (opinion of Chase, J.) (noting that “National or Federal Judges are bound by duty and oath to the same conduct” as the state judges under the Supremacy Clause).
48 Id. § 12, 1 Stat. 79-80 (setting forth removal procedures); see also infra notes 52, 57, 58, and accompanying text (discussing additional mechanisms of superintendence).
which a state shall be Party."⁴⁹ Here, of course, the Court would not “police” the states any more than it would police individual litigants in a given case or controversy.⁵⁰ To the extent that state suability offered a viable constitutional mechanism for governing the states, however, ratification of the Eleventh Amendment thereafter took it off the table in most cases.⁵¹

The Supreme Court’s authority over the states, however, had dimensions independent of its capacity to subject states directly to the judicial process as civil defendants consistent with the Constitution. It also had authority over state courts. This included the discretionary supervisory authority traditionally wielded by superior courts over inferior ones in the English judicial tradition to issue writs of mandamus, prohibition, and habeas corpus (among others) to state courts and judges under appropriate circumstances.⁵² These

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⁴⁹ U.S. Const. art. III, § 2.

⁵⁰ The rise of so-called “preventative adjudication” in suits between individuals, which prevents injuries from occurring through judicial declarations of rights with preclusive effect, would await the twentieth century. See generally Samuel Bray, Preventative Adjudication, 77 U. Chi. L. Rev. 1275 (2010). On the first state declaratory judgment acts, see Charles C. Ascher & James M. Wolf, Current Legislation, 20 Colum. L. Rev. 106, 106-07 (1920). While such adjudication had roots in English Chancery practices, courts in England did not begin to entertain declaratory relief requests not ancillary to legal remedies until well into the nineteenth century. See Itzhak Zamir, The Declaratory Judgment 7 (1986). For further discussion of preventative adjudication in constitutional cases, see infra notes 79, 80, 81, and accompanying text.

⁵¹ U.S. Const., Amendment XI. See also Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Constitution bars citizens of a state from suing the state for damages without its consent in the federal courts based on federal question jurisdiction).

⁵² See James E. Pfander, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 Nw. U. L. Rev. 191, 199-200 (2007). Chief Justice Jay stated in 1792 that the practices of King’s Bench and Chancery in England would provide the model for “the practice of this Court.” 1 Documentary History of the Supreme Court of the United States, 1789-1800, at 203 (Maeva Marcus ed., 1985) [hereinafter DHSC]. Section 13 of the Judiciary Act of 1789 provided for prohibition and mandamus authority in the Supreme Court, though did not mention the state courts by name. See Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 81. Section 14 gave the federal courts power to issue writs of scire facias (compelling a person to come before the court and show cause), habeas corpus, and any others “provided for by statute” or “necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.” Id. § 14, 1 Stat. 81-82. At least two federal cases in the 1790s confirmed that the Court’s supervisory writ authority applied regardless of whether the Court had statutory jurisdiction, appellate or original, on other grounds. See United States v. Peters, 3 U.S. (3 Dall.) 121, 129 (1795) (granting petition to bar proceedings in admiralty by writ of prohibition); United States v. Lawrence, 3 U.S. (3 Dall.) 42, 47 (1795) (hearing application for a writ of mandamus to the district court despite no other jurisdictional grounds). Later, Marbury v. Madison held the Judiciary Act’s grant of mandamus authority to the Court unconstitutional insofar as it purported to authorize the Court to issue the writ as an original matter to Secretary of State Madison because, according to Marshall, the case did not otherwise fall within the original jurisdiction laid out for the Court in Article III (i.e., litigation involving states or affecting ambassadors, public ministers or consuls), which Marshall regarded as an exclusive and delimiting grant. 5 U.S. (1 Cranch) 137, 176 (1803). Subsequent cases revised the Court’s position on its prerogative writ authority in the direction of broadening it. See Ex Parte Bollman & Ex Parte Swartwout, 8 U.S. (4 Cranch) 75 (1807). None of these cases, however, involved petitions from state court litigants and therefore none directly touched upon the question of whether the Constitution empowered the Court to supervise state courts through prerogative writs in the absence of other statutory jurisdiction. To the extent the Court ever had any prerogative writ authority capable of providing an independent basis for jurisdiction vis-à-vis state courts, two factors conspired to produce its demise over the course of the nineteenth century: first, the rise of states’-rights federalism from whose influence neither Marshall nor Story or Kent, let alone Taney, could extricate themselves; and, second, the federal courts’ early concession of jurisdictional dependence on
inherited writs had a distinctive policing component insofar as all might interfere with pending state court proceedings prior to final resolution of those proceedings. The anti-injunction clause in the Judiciary Act of 1793 forbidding federal judges from issuing “writs of injunction” to stay proceedings in state courts only confirmed that the judicial power established in the Constitution authorized federal injunctive relief against the state courts in the first instance. Notwithstanding the modern Supreme Court’s fairly broad constructions of the anti-injunction rule, the rule originally (and understandably) confined itself to single circuit-riding justices and therefore did nothing to affect the Supreme Court’s jurisdiction. The federal judiciary’s authority to enjoin state officials from enforcing unconstitutional state laws, moreover, rendered the anti-injunction rule essentially nugatory in constitutional cases.

In addition to its inherent supervisory authority, the Supreme Court also possessed appellate jurisdiction over state high courts in cases where state law threatened federal authority, and Congress arguably lacked power to meddle with this essential super-intending function that became memorialized in Section 25 of the Judiciary Act of 1789. Congress. To the extent that the Court’s inherited supervisory writ authority entailed power to intervene in state proceedings prior to their final resolution as per state procedures, moreover, the Court’s twentieth-century abstention doctrines erected additional barriers. See Donald K. Doernberg, Sovereign Immunity or the Rule of Law: The New Federalism’s Choice 132-47 (2005).

53 The original forms of habeas corpus applied pre-conviction. See Ex Parte Bollman & Ex Parte Swartwout, 8 U.S. (4 Cranch) 75, 98-101 (1807) (discussing different forms of the writ).
55 See id. § 5, 1 Stat. at 335; see also William T. Mayton, Ersatz Federalism under the Anti-Injunction Statute, 78 Colum. L. Rev. 330, 332-38 (1978). The legislation also did nothing to limit the federal courts sitting in equity from issuing injunctive relief to state courts on motion rather than writ in matters over which they had acquired jurisdiction prior to the state court in question. See James E. Pfander, The Anti-Injunction Act and the Problem of Federal-State Jurisdiction Overlap, 91 Tex. L. Rev. 1, 8 (2013).
56 See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 739 (1824) (holding that Eleventh Amendment does not apply to suits against “officers and agents of the State, who are intrusted with the execution of [state] laws”) (syllabus); Ex Parte Young, 209 U.S. 123, 150-52 (1908). After the decision in Ex Parte Young, Congress mandated that only three-judge district courts could issue injunctive relief in cases challenging the constitutionality of state laws, from whose decisions litigants could appeal directly to the Supreme Court. See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (current version at 28 U.S.C. § 2284 (2000)). On preventative injunctions of state enforcement officials in constitutional cases, see infra notes 79, 80, 81, and accompanying text.
57 Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85; see also Lawrence G. Sager, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 51 (1981) (observing that “as the delegates to the Constitutional Convention made their peace on issue after issue, the Supreme Court’s superintendence of state compliance with national law emerged as the fulcrum of the national government” and that, while debates occurred over whether the Supreme Court’s appellate oversight would constitute a sufficient restraint on the states, the necessity of such oversight remained undisputed). The early Supreme Court employed Section 25’s critical machinery for the first time in 1796 when in Olney v. Arnold, a complex revenue case brought by recalcitrant Rhode Island merchants against the conscientious federal customs collector Jeremiah Olney, the Court reversed the Rhode Island Superior Court of Judicature by writ of error in favor of Olney. 3 U.S. (3 Dall.) 308 (1796). For the most detailed discussion of the case available, see Maeva Marcus, Introduction to Olney v. Arnold; Olney v. Dexter, in 7 DHSC, supra note 52, at 565-77. For documents relating to the case, see id. at 577-624.
Related to this facet of the Court’s constitutional jurisdiction lay the power to nullify state legislation or constitutions contrary to the United States Constitution, federal law or federal treaties—without question the defining aspect of judicial review as understood by the framers of the Constitution, the Judiciary Act of 1789, and the federal judges in the 1790s.\textsuperscript{58} As to whether we can say that the Court received some kind of police power over the states, this aspect of the Court’s authority warrants closer attention, for it had descended directly from the congressional negative via the Supremacy Clause and Article III in Philadelphia. To assess its operation more fully in this light, we turn to the first case after ratification in which the Supreme Court struck down a state law under the Supremacy Clause—\textit{Ware v. Hylton} in 1796.\textsuperscript{59}

\textit{Ware} began as a transatlantic contract case filed by a British decedent’s administrator against Virginian merchants in the Virginia federal circuit court. To fund its war efforts, Virginia passed sequestration legislation in 1777 permitting those Virginians owing money to British creditors to pay some or all of the money owed to the creditor into the state treasury in exchange for a state certificate purporting to discharge liability for the amount deposited.\textsuperscript{60} The defendants in \textit{Ware} had paid money into the treasury in 1780 and, when sued in \textit{Ware}, pled the sequestration act in defense. The plaintiffs, in turn, pled Article IV of the Treaty of Peace (enacted in 1783), which provided that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”\textsuperscript{61} The circuit court held that the defendants had satisfied the debt under state law to the extent paid to the state treasury and the Treaty of Peace could not compel them to pay those monies again to the plaintiff.\textsuperscript{62} The basis for the two-judge majority’s decision lay in the terms of the treaty as applied to the particular facts of the case. At the time of the Treaty’s enactment in 1783, circuit judge James Iredell held, the plaintiffs did not qualify as “creditors” within Article IV’s contemplation because state law, together with the defendant’s affirmative act of payment into the treasury, had already completed the defendant’s release from liability.\textsuperscript{63}

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\footnote{58 On original understandings in this regard, see Rakove, supra note 41, at 1045; see also The Federalist No. 80, supra note 16, at 445 (Alexander Hamilton) (discussing judicial power and emphasizing its purpose of “enforcing” the Constitution’s “restrictions on the authority of the State legislatures”).}
\footnote{59 See \textit{Ware v. Hylton}, 3 U.S. (3 Dall.) 199 (1796).
\footnote{60 An act for sequestering British Property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties (Oct. 1777 session), reprinted in 9 William Waller Henning, The Statutes at Large, Being a Collection of All the Laws of Virginia . . . [1619-1792], at 377 (1969).
\footnote{61 Definite Treaty of Peace Between the United States of American and his Britannic Majesty, 8 Stat. 80 (Sept. 3, 1783), art. IV [hereinafter Treaty of Peace].}
\footnote{62 See Marcus, Introduction, in 7 DHSC, supra note 52, at 210-13.
\footnote{63 See id. at 211-12; see also \textit{Ware}, 3 U.S. at 277 (Justice Iredell reiterating the reasons for the circuit court’s judgment); William Tilghman’s Notes on the Justices’ Opinions, in 7 DHSC, supra note 52, at 347.}}
The Supreme Court reversed and awarded damages and costs to the plaintiffs. All the participating justices agreed that the Supremacy Clause made Article IV of the Treaty of Peace supreme over the sequestration act and thereby rendered the Virginia legislation null and void. Harkening back to the theories and practices that prevailed under the Articles, the defendants’ counsel argued on appeal that the federal government lacked power to repeal a state law and therefore that Article IV could purport to do no more than order the state legislatures to repeal legal impediments to British claims. Since Virginia had not actually repealed the legislation, on this view, the defendant could rely on it notwithstanding the treaty. The justices in *Ware* readily concluded that one of the Constitution’s primary purposes lay in eliminating such state prerogatives. In the lead opinion, Justice Chase stressed that the Supremacy Clause “entirely removed” any doubts as to the self-executing scope of Article IV. By “force” of the Supremacy Clause alone, Chase held, state laws impairing British contract rights became “totally annihilat[ed]” and “prostrated before the treaty.”

There still remained, however, the circuit court’s finding (embraced by the defendants) that at the time of the Treaty’s enactment in 1783, no valid debt existed as to the money already paid into the treasury and therefore the Treaty did not apply to the parties at bar irrespective of the Supremacy Clause. Justice Cushing registered the decisive response. Article IV, Cushing held, voided the sequestration act “*ab initio*,” with the result that its provisions never possessed the force of law and therefore nothing the defendants did under its auspices could ever boast legal validity.

To what extent did the *Ware* decision involve an exercise of police or police-like powers over Virginia? As a functional matter, the decision certainly operated to preserve and protect federal authority and supremacy against offending state exertions. The doctrine of voidance *ab initio*, moreover, did in fiction precisely what Madison and the nationalists in Philadelphia had envisaged the congressional negative doing in fact. At the same time, the *Ware* decision rested on the terms of an executive treaty that together with the Constitution and the Judiciary Act’s jurisdictional stipulations established limits on what the judges could do, whereas the congressional negative contemplated no such limitations applicable to Congress in the first instance. On the other hand, the Constitution contained no meaningful textual limitations bounding the executive power from which treaties flowed beyond the procedural requirement of consulting the senate, and Justice Chase, while reserving for the courts a special role in declaring state law repugnant to trea-

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64 *Ware*, 3 U.S. at 285.
65 Id. at 216-17 (arguments of defendants’ counsel Alexander Campbell).
66 Id. at 236.
67 Id. at 237, 242. Justice Iredell recused himself from voting in the decision but interposed a longwinded reiteration of his circuit court opinion anyway.
68 Id. at 282 (“[T]he plain and obvious meaning of it, goes to nullify, *ab initio*, all laws, or the impediments of any law, as far as they might have been designed to impair, or impede, the creditor’s right, or remedy, against his original debtor.”).
ties null and void—“Courts must adjudge the laws creating the impediments void”—held that federal treaties themselves remained all but exempt from judicial review. The retroactive effect accorded both the treaty and the Supremacy Clause by the judges in *Ware*, moreover, essentially rendered both into ex post facto directives and, as such, in considerable tension with the rule of law. Finally, it bears emphasis that no constitutional mechanism existed to check or limit the Court’s construction of the Treaty of Peace as applied to the parties in *Ware*, even as the case’s history suggested that reasonable judges might disagree as to the propriety of that construction.

Did the *Ware* decision anticipate or prevent wrongdoing in the manner of police, or simply remedy accomplished wrongs in the manner of law? Confining our view to the parties in *Ware*, the answer seems clear. The Court determined plaintiff’s contract rights in light of applicable law and ordered the defendant to pay damages to compensate the plaintiffs for a wrong (refusal to pay) already done. This suggests the paradigm of law not police. Here, however, our question is not whether the Court policed the parties to the case itself, but whether the decision effectively policed the state of Virginia through anticipatory prevention of some greater public wrong. What in this case might the greater public wrong have been? Extrapolating from Madison’s comments, it would consist in the aggregate private harm to individuals, together with the real if somewhat intangible degradation of federal authority, caused by the legislation over time. What, then, would serve as the fitting judicial remedy for this public wrong? The answer again seems clear: Voiding the legislation *in fact* by, for example, enjoining the state to repeal it; and requiring the state to make existing claimants whole.

In *Ware*, the basis for the larger constitutional wrong certainly had occurred—Virginia had passed an act that impeded British creditors’ rights in contravention of supreme law in the form of the Treaty of Peace. The particular individuals at bar in *Ware*, however, could plead only one small part of the greater public wrong caused by the legislation. And while the judicial fiction of void *ab initio* did insinuate that the Court had within its contemplation rights not specifically claimed in the case, the fact remained that the Court’s jurisdiction extended no further than the named litigants.

Nor, for the same reason, did or could the *Ware* Court order the fitting judicial remedy vis-à-vis Virginia for the greater public wrong. Here again, the Court’s remedy could apply only to the litigants. Virginia had not been served with process in the case and did not otherwise appear in the caption. Indeed, not only did the *Ware* Court remain inca-

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69 William Tilghman’s Notes on the Justices’ Opinions [in *Ware*], in 7 DHSC, supra note 52, at 344.
70 *Ware*, 3 U.S. at 237 (“If the Court possess a power to declare treaties void, I shall never exercise it but in a very clear case indeed.”).
71 The early federal judges established this principle without controversy in *Hayburn’s Case*. See 2 U.S. (2 Dall.) 409, 411 (1792).
72 See supra note 50.
73 See 5 Madison Writings, supra note 35, at 28.
pable of ordering Virginia to affirmatively do or pay anything (because the state was not a
party), but, as we have noted, the Eleventh Amendment ratified soon thereafter barred all
the federal courts from asserting jurisdiction over the states in cases brought by individuals.
The Eleventh Amendment thrust the Court into a twice-removed position with respect to
the states, capable of reaching them only indirectly through individuals but unable under
ordinary circumstances to determine all the underlying rights claims or otherwise to bring
the full sanction of the law to bear upon the states as political entities.74

With all these things said, however, we cannot quite conclude that the Court’s
pronouncements in Ware affected only the particular parties to the litigation. The Court
directed its holding, in part, to state legislation and therefore the authority of the state
government. We need not posit a fully developed vision of judicial supremacy in 1796 to
appreciate that cases such as Ware, by remedying private wrongs via nullifications of state-
level legislative improprieties, publically marked out the parameters of federal authority in
ways that preserved national supremacy for its own sake and that might prevent augmenta-
tions to the aggregate private harm arising from the legislation going forward.

IV. Conclusion: Police Without Law

The foregoing analysis has a number of revisionary implications for contemporary consti-
tutional understandings, a few of which I shall highlight in closing. First, the analysis
reminds us that a police-related discourse of illimitation flowing from the federal govern-
ment’s intended prerogative of sovereign self-preservation coexisted with a legal discourse
of limitation in the minds of key framers, in the Constitution’s text, and in the initial e-
forts to operationalize the Constitution in the 1790s. As demonstrated in Ware, beyond
the Preamble perhaps no clause in the Constitution gave fuller expression to this dis-
course of limitation than the treaty power; and no department of government would
bring this power to bear internally on states and individuals with more constitutional con-
sequence than the federal judiciary. In recent decades the Supreme Court has tended
carefully to avoid questions that might force it to confront the Article II treaty power’s
sweeping scope.75 If and when the Court has an opportunity squarely to address the mat-
ter in the future and chooses to pursue it, the justices will, as always, find no internal
textual limits by which to cabin the treaty power and will have to grapple with substantial
historical evidence that the Federalists understood it as unshackled by either textual or
structural limitations.76

74 See infra notes 79, 80, and accompanying text.

75 The Court has recently intimated that “principles of federalism” might limit it. See Bond v. United States,
572 U.S. __ (2014) (slip opinion at 10).

76 The treaty power, in Publius’s words, could have “no constitutional shackles” for “it is impossible to
foresee or to define the extent and variety of national exigencies, or to define the extent and variety of the
means which may be necessary to satisfy them.” The Federalist No. 23, supra note 16, at 185, 184
(Alexander Hamilton) (emphasis omitted). Little direct historical evidence exists as to whether the framers
believed the Bill of Rights applied to treaties. After the Supreme Court’s decision in Missouri v. Holland, 252
U.S. 416 (1920), wherein the Court rejected the Tenth Amendment as an independent limitation on the
Second, understanding judicial review as an exercise of the prerogative of sovereign self-preservation problematizes the idea that protecting individual rights stood as the original animating purpose of judicial review under the Constitution. Federal sovereignty in 1787 certainly encompassed the rights invoked in Article I, Section 10, but by no means did it end with them. It seems clear that the justices in Ware felt no special sympathy for the British creditors whose rights the sequestration act had impeded. While the Court ultimately ruled in favor of the creditors, the seriatim opinions had a larger message regarding the constitutional supremacy of the federal government that transcended the parties’ respective claims. That the Ware Court beat the Supremacy Clause’s drum so hard and heavy suggests that the justices in 1796 made protecting federal authority against state encroachments an important constitutional end in and of itself, independent of the litigants’ claimed rights.77

Third, we often think of judicial review not only as an expression of law, but the quintessential expression of fundamental law in the American constitutional order. As to original understandings of federal judicial review of state law, what I have offered here suggests more complex origins that lay, in part, in the discourse of police vis-à-vis the states embodied in the Virginia Plan’s congressional negative. Although historians and scholars have failed to appreciate it, the congressional negative would have vested Congress with both police powers and the power to police, each flowing from the federal government’s inherent prerogative of sovereign self-preservation vis-à-vis the states. After its defeat in Philadelphia, moreover, the congressional negative’s constitutional function devolved on the courts and, ultimately, the Supreme Court in the form of judicial review of state legislation. To go so far already permits us to view judicial review of state law under the Constitution in a whole new historical light—not as an expression of fundamental law, but as the judicialization of police.

To say that police became judicialized as a constitutional matter in Philadelphia, however, leaves open the extent to which the Court in fact inherited or exercised either police powers or the power to police, or both, with regard to the states. Seen through the prism of Ware, the judicialization of police produced in practice something like a mongrel of law and police. Janus-faced, the Ware court cast its analytical gaze simultaneously in both directions, corresponding to an underlying tension between the limits of the Court’s treaty power, commentators suggested that the individual rights provisions in the Bill of Rights might be similarly inapplicable to treaties. See, e.g., Thomas Reed Powell, Constitutional Law in 1919-20, 19 Mich. L. Rev. 1, 13 (1920). In Reid v. Covert, however, a plurality of justices held that military court proceedings taking place in foreign nations pursuant to executive agreements did have to comply with grand jury indictment and trial by jury requirements, but otherwise seemed to broaden Holland’s holding as to the Tenth Amendment. See 354 U.S. 1, 18 (1957); see also Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 425-26 (1998) (discussing Reid). But see Bond v. United States, 572 U.S. ___ (2014) (slip opinion at 10) (suggesting that principles of federalism might limit the treaty power).

77 See Ware, 3 U.S. (3 Dall.) at 237 (opinion of Chase, J.) (asserting that the federal government “has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator”). The same can be said of many of the key Marshall Court decisions, and even a few cases in the Taney era. See, e.g., Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).
jurisdiction and the plenary character of its received constitutional function. Its jurisdiction extended no further than the named private litigants. Accordingly, the scope of the Court’s remedy remained exceedingly narrow as compared to the broad preemptive scope of the proposed congressional negative. At the same time, however, the judicial fiction of voidance ab initio (which had real legal effects) purported to anticipate and prevent every wrong that had occurred or might ever occur under the Virginia legislation’s banner. If the Ware Court remedied a private wrong in fact, then, it policed a public wrong in fiction. The power to police the states embodied in the failed congressional negative therefore lived on, if not in the judicial process per se, then in the judicial imagination. Yet even the latter formulation understates the extent to which the Court’s decisions striking down state laws in cases between individuals would implicate the discourse of police, for the judicial process itself in such cases also served a policing function. Indeed, the very limits of the Court’s jurisdiction to justiciable cases or controversies between individual litigants—limits shored up by the Eleventh Amendment—meant that each alleged private wrong arising from repugnant state legislation otherwise within the Court’s jurisdictional reach could constitute nothing more (and nothing less) than a vicariously committed police offense vis-à-vis the greater constitutional wrong caused by the legislation. 78

To truly understand the judicial process’s policing functions in constitutional cases, however, we must look beyond Ware and into the nineteenth century when the Court began carving out for the federal judiciary additional means by which to reach the states in connection with nullifying legislation notwithstanding the Eleventh Amendment. In Ex Parte Young, the Supreme Court confirmed what it considered a well-established principle, that the Eleventh Amendment applied only to cases naming the states as defendants and therefore did not preclude suits in federal courts against individual state officials (in this case, the Minnesota Attorney General) to enjoin those officials from enforcing state laws deemed contrary to the federal Constitution. 79 The federal courts, in other words, still lacked power to command a state as such to take affirmative action or otherwise draw on its treasury to compensate individual claimants for harms already done. 80 Sitting in equity, however, they could prevent a state from doing harm in the future—not by enjoining the

78 See supra note 8 and accompanying text (defining police offense).

79 Ex Parte Young, 209 U.S. 123, 150-52 (1908) (citing nineteenth-century cases). While most of the cases cited by the Court postdated the Civil War, the eight-judge majority in Young did not find the Fourteenth Amendment’s alteration of federal-state relations relevant to the Eleventh Amendment analysis, and placed considerable weight in the 1824 case of Osborn v. Bank of the United States. Id. at 150 (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)). In the sole dissent, Justice Harlan declared that the principle endorsed by the Court would “work a radical change in our governmental system” that would enable even inferior federal courts “to supervise and control the official action of the States as if they were ‘dependencies’ or provinces.” Id. at 175.

legislature to repeal the offensive law or by declaring it void *ab initio* so as to reach past transactions, but by directly commanding the relevant individual administrative officials to cease enforcing it on a prospective basis.\footnote{This might occur by orders of injunction or, as in cases such as *Roe v. Wade*, by simply declaring the respective rights and duties in question. 410 U.S. 113, 166 (1973) (holding that the Court’s declared opinion as the rights in question sufficed to conclude the matter without an injunction: “we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional”).} Judicial review from this perspective looks less like a mongrel of law and police than, in essence, *police without law*. If the object of power had changed when measured against the failed congressional negative—from the legislative to the administrative branches of the states, and from collective bodies to individuals—the nature of that power had remained the same.

Finally, all these observations suggest a theory of federalism at sharp variance with the one adopted by the modern Supreme Court. Rather than embracing its originally contemplated police-like superintending function over the states on behalf of the federal government as a whole, the modern Court now essentially permits the states and individuals acting in their name to police Congress.\footnote{See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *Alden v. Maine*, 527 U.S. 706 (1999); *Bond v. United States*, 564 U.S. ___ (2011); *Bond v. United States*, 572 U.S. ___ (2014).} Perhaps no other feature of the modern Court’s jurisprudence labors under so much historical contradiction.