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The Paradox of Omnipotence: Courts, Constitutions, and Commitments

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THE PARADOX OF OMNIPOTENCE: COURTS, CONSTITUTIONS, AND COMMITMENTS*

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I. 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, 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,

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

² PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, 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 Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989), reprinted in *THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN WORLD* 16, 17, 43-47 (Paul W. Drake & Mathew D. McCubbins eds., 1998).

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 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.⁸ At the outset of the seventeenth century, however, neither regime could credibly commit itself to repay debts or to honor property rights.⁹ 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

⁴ See *id.* at 16 (discussing the importance of sovereign commitment to property rights).

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

⁶ See *id.* at 16, 20-21 (observing 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 rulers to 'irresponsible behavior'"); see also STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 129-31 (1999) (noting the extent to which sovereigns have tended to repudiate financial commitments); 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) (same); 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) (same).

⁷ North & Weingast, *supra* note 3, 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 3, at 13, 14.

⁸ North & Weingast, *supra* note 7, at 14.

⁹ *Id.*

kings alike earned a reputation for expropriating wealth, repudiating debts, and reneging upon commitments, by means ranging from currency manipulation to outright force.¹⁰ Not surprisingly, creditors took such behavior into account and demanded higher interest rates from kings than from their wealthy subjects.¹¹

North and Weingast argue that the constitutional settlement imposed in England by the Glorious Revolution of 1688 brought a halt to such faithless conduct.¹² Henceforth, only Parliament could authorize taxes or provide for the financial needs of the Crown.¹³ Parliament, in turn, represented commercial interests that would not tolerate governmental disregard for property rights.¹⁴ 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.¹⁵ According to North and Weingast, 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, because lenders concluded that the Crown would honor its debts.¹⁶ It was the

¹⁰ 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); see also Shepsle, *supra* note 6, at 250 (discussing the capital market repercussions of sovereign default).

¹¹ See Root, *supra* note 6, at 253 (noting the adverse effect of sovereign default on public borrowing costs); Shepsle, *supra* note 6, at 250 (same).

¹² See North & Weingast, *supra* note 3, at 29-30 (characterizing the Glorious Revolution as a "fiscal revolution").

¹³ *Id.*

¹⁴ See *id.* at 32 (describing the reconfigured balance of power between King and Parliament); DAVID STASAVAGE, PUBLIC DEBT AND THE BIRTH OF THE DEMOCRATIC STATE: FRANCE AND GREAT BRITAIN, 1688-1789, at 79-82, 99-129, 176 (2003) (arguing that the rise of parliamentary power, coupled with the development of the Whig Party, enhanced the political influence of government creditors).

¹⁵ See North & Weingast, *supra* note 3, at 30, 32-33 (noting that new assurances of the continuing "supremacy of common law courts" favored private rights).

¹⁶ See *id.* at 35-39. A number of economic historians have, however, questioned the extent to which the cost of public borrowing decreased as a result of the Glorious Revolution. See STASAVAGE, *supra* note 14, at 68-82 (reporting that interest rates on government debt were on average lower to following the Glorious Revolution but nevertheless remained volatile for several decades, and arguing that changes in partisan control of Parliament contributed significantly to this volatility); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial*

accidental genius of the Glorious Revolution, conclude the authors, 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.¹⁷ 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.¹⁸

Thanks to North, Weingast, and others writing in the same vein,¹⁹ it is now fairly conventional to observe that constitutional arrangements can and do benefit sovereigns by imposing limits upon their power. This school of thought is well-summarized by John Ferejohn and Larry Sager:

Independence: Evidence from Eighteenth-Century England, 7 AM. L. & ECON. REV. 1, 5 (2005) (describing controversy regarding economic effect of Glorious Revolution); Nathan Sussman & Yishay Yafeh, *Constitutions and Commitment: Evidence on the Relation Between Institutions and the Cost of Capital*, 3-5, 21-22 (Center for Economic Policy Research, Discussion Paper No. 4404, 2004), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=558641> (suggesting that, in the short term, the Glorious Revolution engendered instability that actually increased interest rates). Though Professors Klerman and Mahoney decline to place causal weight upon the Glorious Revolution, they do concur in the broad outline of the argument made by North and Weingast that institutional changes can decrease the cost of public borrowing, insofar as their econometric analysis suggests that eighteenth-century statutes granting greater independence to the judiciary decreased the cost of government borrowing. See Klerman & Mahoney, *supra*, at 8-25. I am indebted to Dan Klerman for bringing this historical evidence to my attention.

¹⁷ North & Weingast, *supra* note 3, at 35-39, 44.

¹⁸ See *id.* at 45-46 (describing Louis XIV's inability to respond to fiscal crisis with "fundamental institutional change").

¹⁹ See, e.g., ELSTER, *supra* note 2, at 88-174 (considering reasons and devices for "precommitment" in the context of constitutional law); JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 87-96 (rev. ed. 1984) (same); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134-77 (1995) (explaining constitutional "precommitment" as a solution to "the paradox of democracy"—namely, the inability of democracy to function successfully without restraints); STASAVAGE, *supra* note 14, at 1-25 (describing the relationship between government's ability to make credible commitments and the cost of public debt); 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"); Russell Hardin, *Why a Constitution?*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 100-19 (Bernard Grofman & Donald Wittman eds., 1989) (arguing that constitutional constraints impose limits that "discipline . . . to more productive use"); Shepsle, *supra* note 6, at 250-51 (observing that limitations on governmental discretion can often be welfare-enhancing); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 635-42 (1991) (characterizing constitutional precommitments as enabling devices that facilitate self-government).

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 constitutionally barred from expropriating property is thereby better able to attract capital.²⁰

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

²⁰ 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 (1999) (describing and critiquing "the 'precommitment' view of constitutional constraints").

provides, in effect, that Parliament lacks legal power over the extent of its own legal power.²¹ 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."²² Such legislative omnipotence renders the United Kingdom theoretically incapable, for example, of forever relinquishing its control over

²¹ 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) (observing that "there are no fundamental constitutional laws that Parliament cannot change, other than the doctrine of parliamentary sovereignty itself"); 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").

²² DICEY, *supra* note 21, 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. 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 21, 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 European Union 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. If Parliament were to enact legislation that withdraws the United Kingdom from the European Union, however, there is little question—at least for now—that British courts would honor the withdrawal. See GOLDSWORTHY, *supra* note 21, 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").

Canada or Australia²³ or of making a binding membership commitment to the European Union.²⁴

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 II elaborates the argument that constitutions do not necessarily solve commitment problems but can instead aggravate them by entrenching inalienable governmental powers and immunities.²⁵ Part III argues that actors make profoundly different types of commitments that engender more than one variety of commitment problem.²⁶ In particular, it is necessary to distinguish between *effective* and *persuasive* commitments, on the one hand, and the problems of *underpersuasive* and *overeffective* commitment, on the other. Other scholars have dwelt mainly upon what might be termed the problem of underpersuasive commitment—namely, the inability of sovereigns to make persuasive commitments in the absence of adequate limitations upon their own power. The potential for overeffective commitment, 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 underpersuasiveness runs the risk of hobbling the government permanently while exceeding what is necessary to ensure the government's ability to make persuasive

²³ See, e.g., HART, *supra* note 2, at 120-22 (noting doubts as to whether “courts in the United Kingdom would recognize the legal competence of . . . Parliament . . . irrevocably to cut down its powers”); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 3.5(d), at 3-11 to 3-13 (4th ed. 1997 & Supp. 2005) (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) (observing that “parliamentary sovereignty . . . prevents Parliament from ridding itself of legislative power over former British colonies”); Winterton, *supra* note 21, *passim* (questioning the efficacy of legislative efforts to limit power of future Parliaments).

²⁴ See, e.g., GOLDSWORTHY, *supra* note 21, at 244 (observing that “if Parliament were tomorrow to legislate to terminate Britain’s membership . . . British courts would almost certainly acquiesce”); Law, *supra* note 23, at 664-65 n.37 (describing parliamentary sovereignty and its consequences); O. Hood Phillips, Q.C., *Self-Limitation by the United Kingdom Parliament*, 2 HASTINGS CONST. L.Q. 443, 467 (1975) (deeming it “[t]he 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 Parliament’s legal ability to abolish the House of Lords).

²⁵ See *infra* notes 29-106 and accompanying text.

²⁶ See *infra* notes 107-164 and accompanying text.

commitments. Part IV explores how courts can navigate a course between these perils and manage the extent of the sovereign's commitments, even in the face of constitutionally entrenched barriers to commitment.²⁷ It will be argued, 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. The discussion will focus mainly upon Supreme Court decisions, but also upon the occasional foreign example. Finally, this Article concludes with some observations as to why lawsuits against the government can be in the government's own best interests, and how the doctrine of sovereign immunity, of which the Court has recently been so enamored, may in fact do the sovereign more harm than good.²⁸

II. THE CONSTITUTIONAL ENTRENCHMENT OF SOVEREIGN OMNIPOTENCE

A. THE MULTIFARIOUS CONCEPT OF SOVEREIGNTY

What is a constitution, and what is a sovereign? Each of these threshold questions is itself the subject of an extensive literature.²⁹ For present purposes, a constitution can be defined, along Diceyan lines, as the set of rules and practices—written or otherwise—that allocates, and structures the exercise of, public power.³⁰ The sovereign, in turn, can be understood simply as the repository of this power. By allocating and defining public power in different ways, different constitutions create different kinds of sovereigns. For

²⁷ See *infra* notes 165-208 and accompanying text.

²⁸ See *infra* notes 209-217 and accompanying text.

²⁹ See generally, e.g., PROBLEMATIC SOVEREIGNTY (Stephen D. Krasner ed., 2001) (collecting various accounts of how real-world sovereignty fails to comply with any tidy theoretical definition); Michael A. Gillespie, *Sovereign Selves and Sovereign States: Political Theory for a New Millennium*, in FREEDOM AND THE HUMAN PERSON (Richard L. Velkley ed., forthcoming 2006) (explaining and critiquing traditional notions of individual and state sovereignty); Antonio Estella, *Constitutional Legitimacy and Credible Commitments in the European Union*, 11 EUR. L.J. 22, 31-34 (2005) (identifying and contrasting “two models of what constitutions are and should be,” the “instrumental model” and the “axiological model”); Hardin, *supra* note 19, at 100-19 (taking issue with the conventional view that constitutions are social contracts, and arguing instead that they are coordination devices).

³⁰ See DICEY, *supra* note 21, at 23-32, 39-70 (defining England's unwritten “constitution”).

example, a constitution can concentrate sovereign power in the hands of a single individual, or it can disperse power among actors and institutions—some of which may even fall outside the state’s borders.³¹ A monarch who claims absolute power as a matter of divine right is one type of sovereign; a government such as our own, in which competing actors endowed with overlapping powers continually frustrate one another in their efforts to make effective policy, is another type of sovereign.

The ability of a sovereign to make commitments that are binding, or merely credible, will depend upon how a given constitution happens to configure sovereign power. The mere existence of a constitution tells us nothing about a sovereign’s capacity for either action or restraint. Rather, certain aspects of a constitution may facilitate sovereign commitment, while other aspects may hinder it. One relevant variable is the extent to which sovereign power is concentrated or diffuse. As North and Weingast observe, the English monarchy was hamstrung in its efforts to make credible commitments by the very fact that it shared power with no one: prior to the Glorious Revolution, the relevant constitutional arrangements featured no actor who could prevent the king from changing his mind as to prior commitments.

By contrast, a diffusion of sovereign power—as in the form of federalism, or a tripartite separation of powers—creates a multitude of sovereign actors and equips them with the means to obstruct one another. The natural result of an abundance of veto players is policy stability, or gridlock.³² A tendency toward gridlock not only makes

³¹ See, e.g., KRASNER, *supra* note 6, at 11, 20 (describing how states can allocate authority among domestic, supranational, and extranational actors); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 19-23, 45-107, 235-43 (2004) (discussing how collaboration between the European Court of Justice and national courts has curtailed the policymaking autonomy of the European Union’s member states); Law, *supra* note 23, at 664-65 n.37 (describing how the United Kingdom’s membership in the European Union and incorporation of the European Convention on Human Rights have strengthened the role of British and European judges at the expense of Parliament).

³² See, e.g., GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* 19-37 (2002) (explaining why “policy stability,” or the difficulty of significant change in the status quo, “increases in general with the number of veto players”); Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in *PRESIDENTS, PARLIAMENTS, AND POLICY* 61-63 (Stephen Haggard & Mathew D. McCubbins eds., 2001) (discussing the relationship between policy stability and number of veto players).

it difficult for the sovereign to do things, but also makes it difficult for the sovereign to *undo* things. Thus, a government prone to gridlock should be slow to make commitments, but it should also be slow to break them once they have been made. In particular, the greater the number of veto players, the more likely it becomes that those who bear the cost of repudiation will have controlling influence over a veto player and can thus prevent the government from repudiating in the first place.³³

Even a constitution that diffuses and restricts sovereign power can, however, erect other barriers to sovereign commitment. Our own Constitution, in particular, confers upon the government a variety of powers that cannot be alienated and immunities from judicial process that cannot be irrevocably waived. The result is to render certain sovereign commitments legally unenforceable or, indeed, void from the outset. Three constitutional barriers to sovereign commitment will be discussed here—the notion that sovereigns enjoy inalienable powers, the doctrine of sovereign immunity, and the rule that money judgments cannot be enforced against the United States.

B. INALIENABLE ATTRIBUTES OF SOVEREIGNTY

Constitutions routinely implement what Stephen Holmes calls the “self-destruction taboo”: that is, they render the sovereign incapable of disabling itself, or of alienating its own power.³⁴ To render a sovereign incapable of disabling itself, however, is also to ensure that the sovereign can escape its commitments. If the sovereign cannot limit its future freedom of action, it cannot commit itself to any particular course of action either.

The Supreme Court’s decision in *United States Trust Co. of New York v. New Jersey*³⁵ 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

³³ Cf. STASAVAGE, *supra* note 14, at 79-82, 99-129, 176 (suggesting that the cost of public borrowing in England varied with the parliamentary strength of the Whig Party, which represented the interests of the creditor class).

³⁴ HOLMES, *supra* note 19, at 114.

³⁵ 431 U.S. 1 (1977).

of New York and New Jersey, a public body created by a bistate compact between New York and New Jersey.³⁶ 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.³⁷ 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.³⁸ 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.³⁹ By the mid-1970s, however, New York and New Jersey were so desirous of expanding the Port Authority’s commuter rail operations that they retroactively repealed the 1962 covenant.⁴⁰ 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.”⁴¹ The New Jersey courts rejected the claim.⁴²

The Supreme Court looked more favorably upon the argument and struck down the repeal of the covenant.⁴³ For the dissenters, the majority’s use of the Contract Clause to invalidate state legislation reeked unacceptably of the *Lochner* era.⁴⁴ 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.⁴⁵

³⁶ *Id.* at 2.

³⁷ *Id.* at 7.

³⁸ *Id.* at 9-10.

³⁹ *Id.* at 10-11.

⁴⁰ *Id.* at 13-14.

⁴¹ U.S. CONST. art. I, § 10, cl. 1; *U.S. Trust*, 431 U.S. at 3.

⁴² *U.S. Trust*, 431 U.S. at 3-4.

⁴³ *Id.* at 32.

⁴⁴ *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).

⁴⁵ *Id.* at 23 (majority opinion); *id.* at 46-49 (Brennan, J., dissenting).

In the majority's formulation, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."⁴⁶ 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."⁴⁷ On the one hand, the Court deemed it beyond question that states possess "the power to enter into effective financial contracts".⁴⁸ states reserve no "sovereign right to withhold payment" when they "borrow money and contract to repay it."⁴⁹ 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."⁵⁰ Deliberate impairment of a contractual obligation remains constitutional "if it is reasonable and necessary to serve an important public purpose":⁵¹ a state cannot, for example, be forced to honor a financial commitment that would prevent it from acting for "health or safety reasons."⁵² 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."⁵³

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,⁵⁴ but

⁴⁶ *Id.* at 23 (majority opinion).

⁴⁷ *Id.* at 21 (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934)).

⁴⁸ *Id.* at 24.

⁴⁹ *Id.* at 25 n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

⁵⁰ *Id.* at 24.

⁵¹ *Id.* at 25.

⁵² *Id.*

⁵³ *Id.* at 26. Professor Tribe's discussion of *United States Trust* highlights this aspect of the case:

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.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-11, at 620 (2d ed. 1988).

⁵⁴ See *United States v. Winstar Corp.*, 518 U.S. 839, 874, 888-89 (1996) (plurality opinion) (recounting the history of the doctrine, and assuming, without holding, that it applies to federal as well as state contracts).

the concept is hardly unique to this country. The doctrine of parliamentary sovereignty also imposes analogous limits upon the capacity of governments in other jurisdictions, such as Canada and the United Kingdom, to bind themselves via contract.⁵⁵ 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.

C. 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,⁵⁶ anyone in this country who seeks judicial enforcement of a commitment made by the government must contend with the formidable obstacle of sovereign immunity.⁵⁷ 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.⁵⁸ Sovereign immunity ensures the ability of the state and federal governments to escape judicial enforcement of their contractual obligations and debts⁵⁹ for the same conceptual reason that

⁵⁵ 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").

⁵⁶ See *id.* at 471 (describing sovereign immunity as "[t]he starting point in Anglo-American jurisdictions" for any discussion of the law of government contracts).

⁵⁷ See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19-39 (1963) (identifying enforcement of government contracts as one of the few contexts in which sovereign immunity has traditionally operated to bar suit).

⁵⁸ See, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("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."); *Hans v. Louisiana*, 134 U.S. 1, 16-17 (1890) ("The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."); 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*").

⁵⁹ 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 55, at 471-73, 479 (describing how Congress can, by withdrawing consent to suit or

Parliament cannot irrevocably commit the United Kingdom to membership in the European Union⁶⁰—namely, the paradoxical 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.⁶¹

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 ninety percent of all government expenditures.⁶² Efforts by state governments to dilute or repudiate their debts were common,⁶³ and such policies had predictably ruinous effects upon the ability of the states to obtain further capital.⁶⁴ 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.⁶⁵ The provisions of the Constitution were indeed kind, on the whole, to creditors⁶⁶—too much so, in the eyes of some.

eliminating jurisdiction in pending suits, prevent courts from adjudicating federal contractual obligations).

⁶⁰ See *supra* note 24 and accompanying text.

⁶¹ 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 federal breach of contract “[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 dismissal of such proceedings and forbidding payment of judgments in such cases).

⁶² WILLIAM G. ANDERSON, *THE PRICE OF LIBERTY: THE PUBLIC DEBT OF THE AMERICAN REVOLUTION* 27 (1983).

⁶³ 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. *Id.* at 30, 32.

⁶⁴ See *id.* at 24 (noting, for example, that “[r]unaway inflation, caused in large part by excessive currency emissions and lax taxing practices, ruined the states’ credit and made attempts to borrow money futile”).

⁶⁵ See *id.* at 40-41; CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 223-46 (2005) (describing Hamilton’s successful efforts to secure adoption of a constitution that would enable the federal government to salvage its creditworthiness).

⁶⁶ See, e.g., ANDERSON, *supra* note 62, at 40-41 (describing how various constitutional

North Carolina, for example, initially declined to ratify the Constitution partly for fear that the Contract Clause⁶⁷ and the prohibitions against issuance of paper money or enforcement of tender laws⁶⁸ would require states to honor their debts at face value.⁶⁹

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”⁷⁰ 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.”⁷¹ As it turned out, however, the fears expressed by Brutus were well founded. In *Chisholm v. Georgia*,⁷² 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.⁷³ 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.⁷⁴

provisions facilitated discharge of public debt); JOHNSON, *supra* note 65, at 223-46 (same).

⁶⁷ U.S. CONST. art. I, § 10, cl. 1.

⁶⁸ *Id.* (“No state shall . . . coin Money . . . make any thing but gold and silver Coin a Tender in Payment of Debts . . .”).

⁶⁹ ANDERSON, *supra* note 62, at 30; JOHNSON, *supra* note 65, at 270-71.

⁷⁰ BRUTUS (XIII) (Feb. 21, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 428, 430 (Herbert J. Storing ed., 1981); *see also* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 57 (1988) (describing Anti-Federalist criticism of Article III).

⁷¹ THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted); *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) (describing Hamilton’s attack on Brutus’s assumption that federal courts would possess jurisdiction to enforce state contracts).

⁷² 2 U.S. (2 Dall.) 419 (1793).

⁷³ *Id.* at 450 (opinion of Blair, J.); *id.* at 466 (opinion of Wilson, J.); *see also* JOHNSON, *supra* note 65, at 263-68 (setting forth *Chisholm*’s factual background); Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19, 20-23 (1967) (same).

⁷⁴ *See, e.g.*, ORTH, *supra* note 59, at 22-29 (canvassing the conflicting views held by

Nevertheless, *Chisholm* created such a “shock of surprise,” in the Court’s own words,⁷⁵ 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.”⁷⁶

The Reconstruction era inaugurated a second round of debt repudiations by state governments that would once again culminate in the expansion of sovereign immunity. In southern states left destitute by the Civil War and the end of slavery, “carpetbagger” state governments compounded antebellum debts with extravagant borrowing and spending.⁷⁷ The end of Reconstruction and the restoration of home rule to the former Confederate states proved disastrous to former slaves and state creditors alike.⁷⁸ The question was not whether the southern states would attempt to repudiate their debts, but rather how they would seek to do so.⁷⁹ 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.⁸⁰ 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

Madison, Hamilton, Marshall, and others, and likening “[t]he search for the original understanding on state sovereign immunity . . . to the quest for the Holy Grail”); John V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747, 750 (1981) (observing that “no consensus has emerged on the original understanding of sovereign immunity under the Constitution of 1787”); Pfander, *supra* note 71, at 1272-73 (noting that “many understood Article III to have subjected states to suit in federal court to some degree,” and describing revisionist scholarly accounts of the Eleventh Amendment that challenge the Court’s view of history).

⁷⁵ *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

⁷⁶ U.S. CONST. amend. XI; see LEVY, *supra* note 70, at 59 (describing how states reacted to *Chisholm*); ORTH, *supra* note 59, at 7 (same).

⁷⁷ ORTH, *supra* note 59, at 7; Orth, *supra* note 74, at 753-54.

⁷⁸ Orth, *supra* note 74, at 758-59.

⁷⁹ See, e.g., ORTH, *supra* note 59, at 94-96 (describing tactics employed by Virginia’s “Readjusters”).

⁸⁰ See *Baltzer v. North Carolina*, 161 U.S. 240, 241 (1896) (describing the 1879 amendment to North Carolina’s constitution prohibiting repayment of certain bonds absent voter approval); ORTH, *supra* note 59, at 66 (describing the debt ordinance provision of Louisiana’s new constitution).

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.⁸¹ In *Hans v. Louisiana*,⁸² 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.”⁸³ Bondholders sought federal judicial enforcement by other means but were frustrated repeatedly by the judicial expansion of sovereign immunity doctrine.⁸⁴ 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 remit any net recovery to the original bondholders.⁸⁵ The ploy failed: the Supreme Court reasoned, in *New Hampshire v. Louisiana*,⁸⁶ that the Eleventh Amendment barred suits in which a state acted as a “mere collecting agent” for private citizens.⁸⁷ 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.⁸⁸

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.⁸⁹ By the same token, the protection of sovereign

⁸¹ See *supra* note 76 and accompanying text (discussing U.S. CONST. amend. XI).

⁸² 134 U.S. 1 (1890).

⁸³ *Id.* at 21.

⁸⁴ *Id.* at 5-6 (argument for plaintiff in error).

⁸⁵ ORTH, *supra* note 59, at 68-71.

⁸⁶ 108 U.S. 76 (1883).

⁸⁷ *Id.* at 89. *But see* *South Dakota v. North Carolina*, 192 U.S. 286, 310-20 (1904) (holding, 5-4, 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 59, 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).

⁸⁸ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934); ORTH, *supra* note 59, at 85-86, 140-41.

⁸⁹ See *supra* notes 8-11 and accompanying text.

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”⁹⁰—is one that the Supreme Court has only nurtured in recent years.⁹¹

D. 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 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.⁹²

Not surprisingly, the practical difficulty of enforcing judgments against an unconsenting sovereign has loomed large in the Court’s sovereign immunity decisions.⁹³ In *Chisholm*, for example, Chief

⁹⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471-72 (1793) (opinion of Jay, C.J.); *see also* *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).

⁹¹ *See, e.g.*, *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); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacks power under the Indian Commerce Clause to abrogate state sovereign immunity); *Nordic Village*, 503 U.S. at 33-34 (majority opinion) (insisting that any federal waiver of sovereign immunity be “unequivocally expressed” and narrowly construed).

⁹² *See* Law, *supra* note 23, at 679 (discussing the concept of “legitimacy”).

⁹³ *See, e.g.*, *Louisiana v. Jumel*, 107 U.S. 711, 728 (1882) (questioning whether federal courts can ever “assume all the executive authority of the State,” including its taxing and

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.”⁹⁴

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.⁹⁵ 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.⁹⁶ No court, however, can compel Congress to make the necessary appropriation.⁹⁷ Nor can Congress bind itself to do so: burdened in

spending powers, in order to ensure that state bonds are repaid in full); ORTH, *supra* note 59, at 66-67, 77 (contrasting the Court’s refusal to enforce state bonds held by private bondholders with its willingness to enforce state bonds held by the United States, and attributing this difference to “fears of rendering unenforceable judgments” that “haunted the Court” in the former case but not in the latter).

⁹⁴ *Chisholm*, 2 U.S. (2 Dall.) at 477.

⁹⁵ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-57 (1962) (plurality opinion) (recounting the history of the Court of Claims).

⁹⁶ *Id.* at 570 (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)).

⁹⁷ See, e.g., *id.* at 568-71 (discussing the exclusivity of congressional responsibility for appropriations and spending); *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.”); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 303 (1854) (expressly rejecting the proposition that federal courts 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”).

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 use of contempt sanctions against city council members for failure to pass legislation required by a federal injunction

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.⁹⁸ 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.⁹⁹ Twice, however, the Supreme Court concluded that the Court of Claims lacked Article III status,¹⁰⁰ and on both occasions, Congress revised the law in an effort to bring the Court of Claims within the scope of Article III.¹⁰¹

In *Glidden Co. v. Zdanok*,¹⁰² 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.¹⁰³ Writing for the plurality, Justice Harlan acknowledged 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.”¹⁰⁴ The plurality’s response to this theoretically intractable problem was astonishingly practical,

constituted an abuse of equitable discretion). I am indebted to Richard Fallon for his thoughts on this question.

⁹⁸ See 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”); *supra* note 97 (citing cases).

⁹⁹ See *Glidden*, 370 U.S. at 552-58 (discussing the history of the Court of Claims).

¹⁰⁰ See *id.* at 554-56 (discussing the Court’s earlier holdings regarding the constitutional status of the Court of Claims); *Williams v. United States*, 289 U.S. 553, 567-81 (1933) (holding that the Court of Claims was not an Article III court); *Gordon v. United States*, 117 U.S. 697, 702 (1865) (posthumous opinion of Taney, C.J.) (setting forth the previously unpublished rationale for the Court’s earlier holding in *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865)).

¹⁰¹ See *Glidden*, 370 U.S. at 531-32, 554 (discussing *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), and *Williams v. United States*, 289 U.S. 553 (1933)).

¹⁰² 370 U.S. 530 (1962).

¹⁰³ See *id.* at 569 (discussing *Gordon*, 117 U.S. at 702).

¹⁰⁴ *Id.* at 570.

as constitutional reasoning goes. Rather than attempt to argue that the Court of Claims could enforce its judgments as a matter of law, Justice Harlan 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.”¹⁰⁵ 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.¹⁰⁶

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 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

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* (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”).

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. Therefore, the efforts of Congress to interpose the federal courts between itself and contracting parties amount to nothing more than an unconvincing attempt by Congress to bootstrap additional credibility from its own reputation.

This view, it will be argued in Part IV, 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 IV argues 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.

III. A TYPOLOGY 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.¹⁰⁷ Military leaders have burned their own bridges and sunk their own ships to prevent even the thought of retreat and thereby increase the likelihood of victory.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

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.¹¹² Thomas Schelling has thus characterized

¹⁰⁷ ELSTER, *supra* note 19, at 36; ELSTER, *supra* note 2, at 3, 94.

¹⁰⁸ See, e.g., AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 309 (1999) (“Wild beasts, when they are at bay, fight desperately. How much more is this true of men!” (quoting SUN TZU, THE ART OF WAR 110 (Samuel B. Griffith trans., Oxford Univ. Press 1963))); 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) (citing historical examples of bridge-burning and ship-sinking tactics employed by actual military leaders).

¹⁰⁹ See, e.g., THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 84-87 (1984) (using dieting and weight loss to illustrate why individuals might seek to commit themselves in advance); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. REV. 1, 4-5 (1984) (same).

¹¹⁰ SCHELLING, *supra* note 109, at 88; Schelling, *supra* note 109, at 1-2.

¹¹¹ 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 example of a legal rule that solves a coordination problem).

¹¹² See, e.g., ELSTER, *supra* note 2, at 4 (defining “precommitment” as synonymous with such terms as “self-binding,” “commitment,” and “self-commitment”); HOLMES, *supra* note 19, at 173 (“To achieve his desired ends despite his melting resolve, an individual must restrict his available options.”); Ferejohn & Sager, *supra* note 20, at 1936-38, 1938 n.15 (distinguishing

deliberate precommitment as “anticipatory self-command.”¹¹³ As 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,¹¹⁴ while Russell Hardin identifies “coordination” as the imperative that leads us to bind ourselves with legal rules and constitutions.¹¹⁵

Not only individuals, but also governments, experience problems of time-inconsistency and coordination. A familiar example is that of a legislature that wishes to restrain its spending habits. On the one hand, efforts to reduce spending are likely to encounter a coordination problem: each legislator may agree that it would be best to reduce overall spending, but no particular legislator is willing to abandon the pork-barrel projects that favor his or her own constituents. On the other hand, the legislators may also face a problem of time-inconsistency: they may fear, for good reason, that they will succumb later to profligate spending habits that they wish now to forswear.

Time-inconsistency and coordination are not, however, the only reasons why actors make commitments. Often we are motivated to make commitments not to regulate our *own* behavior, but to persuade *others* to behave a particular way. All of the examples described above concern situations in which actors must commit themselves *effectively*: that is, the actors in question cannot achieve

between “internal” and “external” commitments, but adhering deliberately to the conventional terminology of “commitment” and “precommitment”); Sunstein, *supra* note 19, at 636-43 (discussing constitutional precommitment strategies).

¹¹³ Schelling, *supra* note 109, at 1. 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 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.

Id.

¹¹⁴ ELSTER, *supra* note 2, at 24-45; *see also* ELSTER, *supra* note 19, at 65-86 (using both time-inconsistency and endogenous preference change to explain why choices may conflict over time).

¹¹⁵ *See, e.g.*, HARDIN, *supra* note 111, at 80 (arguing that the point of legal rules is to “constrain individuals’ choices 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 establishment of a constitution as “a massive act of coordination”).

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 concept 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.¹¹⁶

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 accomplish 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. To distinguish the two types of commitment, one must ask whose behavior a particular

¹¹⁶ E.g., ANDERSON, *supra* note 62, 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 debt repayment).

commitment is intended to influence: the intent of an effective commitment is to influence one's own behavior at a later time, whereas the intent of a persuasive commitment is to influence someone else's behavior. We might say, therefore, that effective commitments are *self-regarding* in character, whereas persuasive commitments are *other-regarding* in character.¹¹⁷

Because the two types of commitments serve different purposes, they also entail wholly different criteria of success. An effective commitment is successful if it imposes actual constraint upon the commitment-maker; a persuasive commitment is successful if others believe that it imposes actual constraint—that is, if the commitment is credible. In the case of effective commitments, it is irrelevant to the commitment-maker whether others find the commitment credible; actual efficacy is the only measure of success. In the case of persuasive commitments, only credibility matters; to the extent that such a commitment actually constrains the commitment-maker, that constraint is the unwanted price that the commitment-maker must pay for credibility.

Consider, for example, China's commitment to grant Hong Kong a substantial measure of self-rule—a commitment made to prevent mass emigration and capital flight, if not also to make the prospect of reunification less frightening to Taiwan.¹¹⁸ To the extent that the commitment lacks credibility, China jeopardizes the value of its prize territory and does nothing to encourage Taiwanese reunification.¹¹⁹ Yet Chinese interests are also frustrated, however, to the extent that this commitment actually prevents China from meddling in Hong Kong's political affairs at will.¹²⁰ In this situation,

¹¹⁷ I am indebted to Andrei Marmor for suggesting the terminology of “self-regarding” and “other-regarding” commitments.

¹¹⁸ See James McCall Smith, *One Sovereign, Two Legal Systems: China and the Problem of Commitment in Hong Kong*, in *PROBLEMATIC SOVEREIGNTY*, *supra* note 29, at 105, 105-29 (describing how various commitments to Hong Kong's autonomy contained in the 1984 Sino-British Joint Declaration and the 1990 Basic Law were primarily intended to reassure the business community and local residents).

¹¹⁹ See *id.* at 110-17 (describing the deliberate revocability and ambiguity of China's legal commitments to Hong Kong's autonomy, and the extent to which Hong Kong's continuing success therefore rests upon the ongoing reaction of local residents, foreign investors, and other states to China's actions).

¹²⁰ See *id.* at 111 (characterizing China's management of Hong Kong as an “ongoing trade-off . . . between political control and economic advantage”).

the Chinese commitment to Hong Kong is persuasive in character, because it is intended to reassure residents and investors. The success of this commitment, in turn, can be measured by the extent to which it provides such reassurance without actually constraining Beijing.

The distinction drawn thus far between effective and persuasive commitments has hinged upon the *intent* of the actor making the commitment, and not upon the actual *result* of the commitment. Logically speaking, however, a commitment can be characterized either on the basis of the goals that it is intended to serve, or on the basis of the consequences that it actually produces. Under an intent-based approach, for example, a commitment made with the goal of persuading others, but without the goal of actually binding the actor, would be characterized as a persuasive commitment, regardless of whether it actually persuades anyone or constrains the actor. Under a result-based approach, by contrast, a commitment that both persuades others and constrains the actor would be characterized as both persuasive and effective, regardless of what the actor had in mind when making it.

To see the difference between the two approaches, imagine that the world community has imposed sanctions on a rogue state for acquiring weapons of mass destruction. The rogue state would prefer to keep its arms but, in order to end the sanctions, commits itself to disarmament by actually destroying its weapons-making facilities and materials. However, because other countries cannot verify to their own satisfaction that the relevant facilities and materials have been destroyed, they continue to impose sanctions. If one labels commitments according to their underlying intent, the rogue state's commitment ought to be characterized as a persuasive one, because the rogue state's true goal was to persuade the world community that it no longer poses a threat, not to constrain itself. If one instead labels commitments according to their actual results, however, the commitment should be deemed an effective one, not a persuasive one: it would be irrelevant that the rogue state's actions failed to have their desired persuasive impact, and indeed, backfired by imposing unwanted constraint.

From a strategic perspective, at least, there is good reason to attach greater weight to the goals and incentives of the commitment-

maker than to the actual consequences of the commitment itself. Simply put, a commitment made for the purpose of persuading others cannot be trusted to the same extent as a commitment made for the purpose of constraining the commitment-maker. A commitment that is intended to be effective may be prone to unintended failure but is sincere in nature: though success cannot necessarily be guaranteed, the commitment-maker's incentive is to make the commitment as effective as possible. A commitment that is intended to persuade, by contrast, is manipulative in nature and potentially ineffective by design. An actor who makes a persuasive commitment is likely to know more about the actual consequences of his actions than others do,¹²¹ and has reasons to exploit this informational advantage by fashioning a commitment that is less constraining than it appears to others. By distinguishing commitments according to their underlying intent, we distinguish situations that are prone to deception from those that are not.

In practice, persuasive and effective commitments are likely to be intertwined in ways that make them difficult to distinguish. First, actors have every reason to disguise their persuasive commitments as effective commitments: the more effective a commitment appears to be, the more persuasive it will be. Second, persuasiveness may demand effectiveness: the only way to make a commitment persuasive may be to make the commitment effective. Third, commitments may sometimes be made for mixed motives: one may seek both to bind oneself and to persuade others that one is bound. For example, Congress has both self-regarding and other-regarding reasons for wanting to restrain itself from engaging in wanton deficit spending. On the other hand, the cost of public borrowing decreases if foreign investors can be persuaded that the United States is committed to borrowing less; on the other hand, an actual reduction in public borrowing will dampen interest rates and thereby promote

¹²¹ Cf., e.g., JOHN BLACK, A DICTIONARY OF ECONOMICS 15 (2d ed. 2002) (defining "asymmetric information" as a "situation where economic agents do not all have the same information," and observing that "[t]his is of course the actual situation in any real economy"); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 61, 219 (1994) (defining "private information," in the context of game theory, as information that is known only by a particular player, and noting that players in real-life games of strategy "generally have different information" about the uncertainties that they face).

domestic economic growth, regardless of what foreign investors think.

Efforts to solve collective action problems,¹²² in particular, are likely to combine both persuasive and effective commitment-making in a tangled way. Many problems can only be solved, and many goals can only be achieved, by coordinated effort on the part of many actors. Given the opportunity, however, individual actors may be tempted to shirk their own contributions and to rely parasitically on the efforts of others—that is, to become what economists call free riders.¹²³ In such situations, some degree of effective commitment is required if the common goal is to be achieved: highways cannot be built, for example, unless people effectively commit themselves to pay the necessary taxes. To secure the necessary effective commitments from others, each actor offers a persuasive commitment: I persuade you to commit to paying taxes by making a commitment to pay taxes as well. Of course, each actor would prefer to give merely a persuasive commitment while others give effective commitments: I would prefer a system in which others are actually bound to pay taxes, yet I can escape paying. No one, however, wishes to play the fool by exchanging an effective commitment for a basket of empty promises. The solution, then, is for everyone to commit to arrangements that prevent cheating, as in the form of a government that imprisons tax evaders. To be sure, commitments may not always be as effective as they appear: for example, the tax code to which we commit may contain generous loopholes that deliberately favor me in ways that are not obvious to you. Even so, the persuasive commitment that I make must at least *appear* effective to you if it is to do its job of persuading you to make an effective commitment. If it proves impossible for me to deceive you, then I may have no choice but to make a persuasive commitment that is also, in fact, effective.

¹²² See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 5-65 (1971) (discussing institutional and organizational responses to the underprovision of public or collective goods).

¹²³ See BLACK, *supra* note 121, at 187 (defining a “free rider” as “[a] person or organization who benefits from a public good, but neither provides it nor contributes to the cost of collective provision”).

B. THE PROBLEMS OF UNDERPERSUASIVE AND OVEREFFECTIVE COMMITMENT

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,¹²⁴ 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.¹²⁵ 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 reasons both logical and practical.

First, as discussed at the outset of this Article, the paradox of omnipotence makes it difficult, as a logical matter, for a sovereign to impose limits on itself, much less to enforce those limits. Second, it is not clear how the sovereign can be trusted, as a practical matter, to police itself. The problem is an age-old one: *quis custodiet ipsos custodes?*¹²⁶ Thus, 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

¹²⁴ 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).

¹²⁵ Cf. Hadfield, *supra* note 55, 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”).

¹²⁶ Translated from the Latin: “Who will watch the watchmen themselves?” See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 684 n.187 (2001) (attributing the phrase to the Roman satirist Juvenal).

obligations.¹²⁷ 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.

An obvious solution for the sovereign, but one with equally obvious limitations, is to submit to an even higher sovereign authority. Just as individuals can form a government with power to enforce their commitments, governments can form a union with power to do the same. As Alec Stone Sweet and Martin Shapiro have suggested,¹²⁸ federalism can be understood as a way in which sovereigns solve collective action problems—from the lowering of trade barriers to the provision of military defense—by instituting a higher authority capable of enforcing their commitments to one another. There necessarily comes a point, however, beyond which one can no longer pass the buck upward. Even if, for example, efforts toward free trade and collective security were to culminate in a global government, there would then arise the question of how that global government could itself make credible commitments.

The inability of an actor to commit itself adequately in the eyes of others might be called the problem of *underpersuasive commitment*, or (for purposes of brevity) *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, it is irrelevant whether they are credible to others. The problem of underpersuasive commitment ought to be distinguished from what might be called the problem of *ineffective commitment*—that is, the actual inability of an actor to bind itself in an effective way. Problems of ineffective commitment can be of genuine concern for sovereigns as well as for individuals: a

¹²⁷ See *supra* notes 6-7 and accompanying text.

¹²⁸ See Martin Shapiro, *The Success of Judicial Review and Democracy*, in MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, & JUDICIALIZATION* 149, 149-61 (2002) (arguing that “successful constitutional judicial review is caused by and may be requisite to successful federalism” because it prevents member states from violating their commitments to one another); STONE SWEET, *supra* note 31, at 7-8 (explaining how the goal of building “larger and open markets,” and the resulting need for enforcement of each member state’s commitments, foster the acceptance and expansion of judicial review at the federal or supranational level).

government that wishes to manage its finances in a prudent manner, for example, may nevertheless lack any effective means of preventing itself from overspending.

As noted above, persuasiveness and effectiveness often exist in tandem but need not always do so. A commitment may be underpersuasive because it is ineffective: a commitment that patently fails to restrain the commitment-maker is unlikely to induce much in the way of reliance. If it is widely known, for example, that the King of England cannot prevent himself from renegeing upon debts, his commitments will not be terribly credible. A commitment may, however, appear more or less effective than it actually is. An ineffective commitment can still be persuasive if its ineffectiveness can be concealed or is not evident to others. Alternatively, an actor may be capable of binding itself but incapable of demonstrating that fact to the satisfaction of others, as in the case of the rogue state that cannot prove it has disarmed.

At the opposite end of the spectrum lies a species of commitment problem that is perhaps less obvious but of considerable practical significance. 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.¹²⁹ 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

¹²⁹ See ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 49-50 (1988) (discussing commitment problems in the context of marriage).

ways that prove unexpectedly onerous or costly in light of unforeseen circumstances. In other words, actors may experience a fear of *overeffective commitment*, or *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 underpersuasive commitment, the problem of overeffective commitment 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 now-moribund Constitution for Europe would have entailed.¹³⁰ On the one hand, to the extent that membership in the E.U. offers prosperity, security, and influence, the obvious way for member states to heighten these benefits is to integrate more closely.¹³¹ On the other hand, member states fear the loss of their own sovereignty and the creation of "an identity-smothering United States of Europe."¹³² 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 underpersuasive commitment and overeffective commitment. 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.¹³³

¹³⁰ See Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. (C 310) 47 (2004).

¹³¹ See, e.g., Tony Blair, *Foreword to FOREIGN & COMMONWEALTH OFFICE, WHITE PAPER ON THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE* 1, 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 E.U. economic policy).

¹³² *Europe's Incoming Tide*, *supra* note 131, 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").

¹³³ See, e.g., ALTER, *supra* note 132, at 49, 101-04 (describing how national courts have challenged the E.C.J.'s assertion of "authority to determine the confines of European powers, and thus its own powers"); 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

Predictably, the European Court of Justice has fought to establish the supremacy and domestic enforceability of E.U. law,¹³⁴ 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.¹³⁵ By alleviating fears of overeffective commitment, 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. power¹³⁶—may render the prospect of closer integration less threatening to national political actors and therefore more palatable.¹³⁷

allocation of competence as between the [E.U.] and the Member States”).

¹³⁴ See, e.g., STONE SWEET, *supra* note 31, at 64-107 (discussing European politics of judicial supremacy).

¹³⁵ 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 132, 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 131-34 (2d ed. 2005) (describing resistance of some national courts to the “emerging constitutionalization” of the E.U. and, in particular, to the doctrines of “direct effect” and “supremacy” of E.U. law).

¹³⁶ 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, and stating more broadly that “[n]o 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 C-376/98, Germany v. European Parliament & Council, 2000 E.C.R. I-8419, ¶¶ 76-118, at I-8522 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 states, and that adoption of the directive would instead require member state unanimity); HIX, *supra* note 135, ch. 4 at 126-27, 131-35 (discussing the reluctance of national courts to recognize the supremacy of E.U. law, and characterizing the E.C.J.’s decision in *Germany v. European Parliament & Council* as “a strategic signal by the ECJ to the [national] governments that it can be trusted in competence-conflict decisions”).

¹³⁷ See, e.g., ALTER, *supra* note 132, 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 Pre-emptive 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).

For an example closer to home, the Supreme Court's decision in the *Charles River Bridge Case*¹³⁸ 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*,¹³⁹ 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.¹⁴⁰ 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.¹⁴¹ 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 initially established Dartmouth College.¹⁴² That is, the Court explicitly 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.¹⁴³ In the

¹³⁸ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

¹³⁹ 17 U.S. (4 Wheat.) 518 (1819).

¹⁴⁰ *Id.* at 519-51, 626-27, 631-35.

¹⁴¹ *Id.* at 626-50.

¹⁴² As the Chief Justice observed, the gifts that established the college 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.

¹⁴³ Martin Shapiro, *Introduction to Charles Warren, The Charles River Bridge Case*, 3 GREEN BAG 2d 75, 76 (1999).

immediate aftermath of the Revolution, the federal government and the states alike were poor in land and tax revenue.¹⁴⁴ Even the western lands owned by the United States were relatively worthless without the necessary infrastructure to transport persons and goods.¹⁴⁵ 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.¹⁴⁶ A sovereign that is incapable of making credible commitments, however, 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.¹⁴⁷ 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.”¹⁴⁸

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 canals than they wished to encourage railroad expansion instead.¹⁴⁹ The states needed the freedom to make new commitments that would promote new forms of investment, but their earlier commitments threatened to block the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 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.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 76-77.

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.¹⁵⁰ 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 a ferry service between Charlestown and Boston.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ Realizing that their investment would soon be rendered worthless, the proprietors of the Charles River Bridge challenged the state's issuance of the Warren Bridge

¹⁵⁰ *Id.*

¹⁵¹ Charles Warren, *The Charles River Bridge Case*, 3 GREEN BAG 2d 78, 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 (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 a discussion of the decision's historical context, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 130-39 (1977).

¹⁵² Warren, *Part I*, *supra* note 151, at 79.

¹⁵³ *Id.* at 79-82.

¹⁵⁴ *Id.* at 84-85.

charter as an unconstitutional impairment of their own charter.¹⁵⁵ Neither the original colonial grant of ferry service to Harvard nor the Charles River Bridge charter, however, contained any explicit grant of monopoly privileges with respect to the river crossing.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸

¹⁵⁵ *Charles River Bridge*, 36 U.S. (11 Pet.) at 539.

¹⁵⁶ *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 151, 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").

¹⁵⁷ *Charles River Bridge*, 36 U.S. (11 Pet.) at 420; *id.* at 536 (Story, J., dissenting).

¹⁵⁸ *Id.* 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 improvements"); *id.* at 313 (observing that toll bridges are characterized by high fixed costs that can jeopardize their economic viability in the face of competition, and describing Daniel Webster's argument to the Court on behalf of the Charles River Bridge to this effect).

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.

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.¹⁵⁹

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.¹⁶⁰ No doubt the proprietors of the Charles

¹⁵⁹ *Charles River Bridge*, 36 U.S. (11 Pet.) at 552-53 (Taney, C.J.).

¹⁶⁰ *Id.* at 544-49; see also Shapiro, *supra* note 143, at 77-78 (discussing the civil law origins

River Bridge—and probably the Massachusetts legislature as well¹⁶¹—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.¹⁶² Nevertheless, the first charter’s failure to confer a monopoly in unmistakable terms proved fatal to the argument. In turn, this narrow construction of the Charles River Bridge charter left countless holders of similar charters—bridge, canal, and turnpike operators alike—without means to prevent state legislatures from granting whatever new monopoly privileges might be necessary to attract the investment of railroad entrepreneurs in the next wave of transportation infrastructure.

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.¹⁶³ 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

of the rule). This “canon of construction disfavoring implied governmental obligations in public contracts” has spawned what is known today as the 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. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)).

¹⁶¹ See Warren, *Part I*, *supra* note 151, at 82 (describing a joint legislative committee’s conclusion that construction of a new bridge would impair the charter rights of the old bridge).

¹⁶² *Id.* at 85.

¹⁶³ Subsequent decisions of the Taney Court never wholly repudiated the principle that a state would be bound by an express grant of monopoly privileges, but nevertheless forced investors to take ever greater care in their dealings with states. See HOVENKAMP, *supra* note 158, at 25-27 (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”).

opportunity to learn a valuable lesson—namely, that it would behoove them to think twice before conferring monopolies of long or indefinite duration.¹⁶⁴

IV. COURTS AS COMMITMENT MANAGERS

A. HOW COURTS CALIBRATE THE EXTENT OF SOVEREIGN COMMITMENT

As a practical matter, the problem of sovereign overcommitment is easier for courts to solve than the problem of undercommitment. Undercommitment can defy judicial solution if, for example, a court is simply unable and therefore unwilling to enforce commitments against a coordinate branch of government, as Chief Justice Jay candidly confessed in *Chisholm*.¹⁶⁵ By comparison, 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 problem of overcommitment is cured with a single stroke. The most challenging task that courts face, however, is to solve the problem of overcommitment without *also* creating a problem of undercommitment, and vice versa. Like Goldilocks in search of the perfect porridge,¹⁶⁶ judges must labor to find a happy medium.

If, for example, the Supreme Court's only goal in *Charles River Bridge* had been to liberate the states from their 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?"¹⁶⁷ 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.

¹⁶⁴ See *id.* at 27 (describing how states learned to hedge their commitments by enacting statutory reservation clauses).

¹⁶⁵ See *supra* note 94 and accompanying text.

¹⁶⁶ Credit belongs to Matt Spitzer for aptly dubbing this a "Goldilocks problem".

¹⁶⁷ Shapiro, *supra* note 143, at 77.

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.¹⁶⁸ The constitutional rule that a state cannot contract away its police power to protect public health, safety, or morals¹⁶⁹ 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 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.”¹⁷⁰ Such a rule means in effect 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

¹⁶⁸ See *Stone v. Mississippi*, 101 U.S. 814, 818-21 (1879) (holding that the Contract Clause does not prevent a state from prematurely revoking a charter to operate a lottery, given that lotteries are “a species of gambling, and wrong in their influences”).

¹⁶⁹ See *supra* notes 46-52 and accompanying text.

¹⁷⁰ *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977).

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.¹⁷¹

Whichever approach 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 sovereign undercommitment? The remainder of Part IV develops the answer to this question in stages. Part IV.B identifies the basic strategies available to ordinary actors for making commitments persuasive. Part IV.C discusses the extent to which these strategies are unavailable to sovereigns. Part IV.D explores the murky relationship between judicial reputation and judicial power. Finally, Part IV.E draws together the strands of the argument and explains how courts can draw upon their reputation for rendering fair and efficacious judgments to bolster the credibility of sovereign commitments.

B. THE BASIC STRATEGIES FOR MAKING PERSUASIVE COMMITMENTS

¹⁷¹ 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); SHAPIRO & STONE SWEET, *supra* note 128, at 179 ("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."); LAW, *supra* note 23, at 687-98 (explaining why balancing and means-end analysis amount to a form of "generic constitutional analysis" shared by constitutional courts worldwide).

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.¹⁷² 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.¹⁷³ Another way is to convey information about type—that is, to signal one’s innate characteristics and predispositions.¹⁷⁴ To revisit an earlier example,¹⁷⁵ 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).¹⁷⁶ 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”¹⁷⁷—then the

¹⁷² See WILLIAMSON, *supra* note 124, 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 posting of bonds can lead transacting parties to trust one another and to uphold their reputations).

¹⁷³ 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 124, 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.

¹⁷⁴ See, e.g., FRANK, *supra* note 129, 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”); MORROW, *supra* note 121, at 219-20 (discussing how knowledge about a player’s “type”—such as its willingness to wage war as opposed to its propensity to surrender—will influence an opponent’s choice of strategy); Kreps, *supra* note 172, at 92-93, 118-20 (observing that firms and universities cultivate reputations in order to attract employees and students, respectively).

¹⁷⁵ See *supra* note 129 and accompanying text.

¹⁷⁶ See FRANK, *supra* note 129, at 83-84 (observing that a person’s known propensity for “[s]trong feelings of affection” can influence our beliefs as to that person’s motivations and capacity for marital commitment); cf. Kreps, *supra* note 172, 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).

¹⁷⁷ E.g., 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”); MORROW, *supra* note 121,

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 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.

C. PERSUASIVE COMMITMENT AND THE PLIGHT OF THE SOVEREIGN

The strategy of third-party enforcement poses unique challenges, however, when sovereign commitments are involved.¹⁷⁸ 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

at 250-56.

¹⁷⁸ See, e.g., KRASNER, *supra* note 6, at 127, 149 (observing that third-party enforcement of sovereign obligations is problematic, if not impossible, and that the absence of such enforcement dissuades creditors from lending to sovereigns in the first place).

the Eleventh Amendment.¹⁷⁹ The supremacy of federal law¹⁸⁰ ensures, moreover, that states cannot legally abolish their commitments simply by changing their own laws.¹⁸¹ Nor is it novel to think 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,¹⁸² 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*.”¹⁸³ It must be noted, however, that a constitutional separation of powers scheme can instead frustrate efforts by a sovereign to commit itself, as the Supreme Court has demonstrated in striking down various efforts by Congress to curtail its own spending habits.¹⁸⁴

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

¹⁷⁹ See *supra* notes 62-70 and accompanying text (discussing *Chisholm v. Georgia* and its aftermath).

¹⁸⁰ U.S. CONST. art. VI, cl. 2.

¹⁸¹ *Indiana ex rel. Anderson v. Brand*, 303 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. *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. *Id.* at 114-17 (Black, J., dissenting). Nevertheless, the Court concluded that the partial repeal of the teacher tenure law violated the Contract Clause. *Id.* at 105-09 (majority opinion).

¹⁸² See *supra* notes 3-18 and accompanying text.

¹⁸³ See Elster, *supra* note 108, 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., Oxford Univ. Press 1999) (1843)).

¹⁸⁴ See *Clinton v. New York*, 524 U.S. 417, 436-48 (1998) (striking down Congress’s efforts to confer line-item veto power upon the President as a violation of the constitutional scheme for joint legislative and executive participation in lawmaking established by the Presentment Clause, and expressly leaving open the question whether an executive line item veto power “impermissibly disrupts the balance of powers among the three branches of government”); *Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986) (striking down, on separation-of-powers grounds, portions of the Gramm-Rudman-Hollings deficit reduction legislation).

decisions—precisely because they lack the instruments of coercion.¹⁸⁵ In the absence of assistance from the other branches, some judicial decisions may lack practical effect.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

D. THE EMPEROR HAS NO CLOTHES: JUDICIAL REPUTATION AND THE NATURE OF JUDICIAL POWER

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

¹⁸⁵ See *supra* notes 92-94 and accompanying text.

¹⁸⁶ 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).

¹⁸⁷ See RICHARD KLUGER, *SIMPLE JUSTICE* 753-54 (1976) (noting President Eisenhower's reluctance to deploy troops to Little Rock in the wake of *Brown v. Board of Education*).

¹⁸⁸ See, e.g., WALTER F. MURPHY ET AL., *COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 331-40 (6th ed. 2005) (discussing various executive and legislative checks on judicial power); Keith E. Whittington, *Judicial Review and Interpretation: Have the Courts Become Sovereign When Interpreting the Constitution?*, in *THE JUDICIAL BRANCH* 116, 132-36 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (same).

the *Glidden* scenario¹⁸⁹ 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 compliance,¹⁹⁰ 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 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 any real means of enforcement, obedience to judicial decisionmaking is a political habit. Judicial decisions not backed by force are efficacious partly 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

¹⁸⁹ See *supra* notes 102-106 and accompanying text (discussing *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)).

¹⁹⁰ See HART, *supra* note 2, at 50-78 (discussing the “habit of obedience” that characterizes “any society where there is law”).

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 begets further acceptance. Judicial power, like monetary value, is socially constructed. Indeed, one might conceive of judicial power as the product of a cooperative equilibrium¹⁹¹: a system of judicial dispute resolution may be of value to everyone, but its efficacy depends upon our 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 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.¹⁹² A prudent court might therefore refuse, for example, to decide so-called “political questions” that could trigger

¹⁹¹ 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 121, 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, 502-04 (2005) (contrasting the noncooperative 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 19, at 113-19 (making the same argument).

¹⁹² 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”).

conflict with the other branches¹⁹³ or to render decisions that are subject to executive or legislative revision.¹⁹⁴ 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.¹⁹⁵

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 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

¹⁹³ See David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 132-34 (1996) (discussing judicially fashioned doctrines by which American and Japanese courts avoid deciding what they deem to be “political questions”); Law, *supra* note 23, 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).

¹⁹⁴ See *Executive Revision of Judicial Decisions*, *supra* note 192, at 2022-24 (discussing constitutional rules against executive and legislative revision and their justification on separation of powers grounds).

¹⁹⁵ 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 M. 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,” such as the political question doctrine); LEARNED 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”).

prodding by Congress¹⁹⁶—that the Court of Claims was a full-fledged member of the Article III judiciary, and that their reputations would henceforth be mutually dependent.¹⁹⁷

E. ENFORCEMENT WITHOUT FORCE: THE SUBTLE ARTS OF THE LEAST DANGEROUS BRANCH

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.¹⁹⁸ It is supposedly a truism that, for every right, there must exist a remedy,¹⁹⁹ 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,

¹⁹⁶ *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) (plurality opinion of Harlan, J.); *supra* notes 99-102 and accompanying text.

¹⁹⁷ *Glidden*, 370 U.S. at 584.

¹⁹⁸ *See id.* at 569-70 (noting that, as a constitutional matter, Congress cannot be compelled to appropriate money); *supra* notes 92-94 and accompanying text (discussing the practical inability of courts to coerce other branches of government).

¹⁹⁹ *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 WILLIAM BLACKSTONE, 3 COMMENTARIES *109)).

even if the judiciary lacks the formal or practical power to enforce its judgments against the sovereign. The willingness of 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 enforcement²⁰⁰—only the third is unavailable to courts in the situation posed by *Glidden*: insurmountable legal and practical obstacles preclude the actual enforcement of judgments against an unconsenting Congress. A favorable reputation gives courts several other means by which to bolster the credibility of sovereign commitments.

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 resolution²⁰¹—at minimal cost to the sovereign in enforcement resources or political support. It is obviously cheaper to solve divisive conflicts by adjudication than by show of force.²⁰² The existence of courts willing

²⁰⁰ See *supra* notes 172-177 and accompanying text.

²⁰¹ See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-37 (1981) (suggesting that the 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”); SHAPIRO & STONE SWEET, *supra* note 128, at 55-71 (explaining how “systems of governance emerge and evolve” from “triadic dispute resolution”).

²⁰² Cf. SHAPIRO, *supra* note 201, 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).

and able to resolve controversial issues can also spare rulers the political costs of having to confront such issues themselves.²⁰³ When any resolution is bound to antagonize a broad swath of the public, kings and presidents alike may find it convenient to hide behind the bench.

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.

More sophisticated actors 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.²⁰⁴ 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

²⁰³ See 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).

²⁰⁴ See *supra* notes 192-195 and accompanying text (discussing the “political question” doctrine and the rules against executive or legislative revision of judicial decisions).

decisions for the sovereign to disregard without also jeopardizing their own reputation and power.

Third, whatever the *legal* consequences (or lack thereof) of a particular judgment, it can be *politically* awkward for the sovereign to disregard a well-reasoned decision by a reputable court. As constitutional practice in other countries illustrates, political considerations can be enough to secure sovereign compliance even with judicial pronouncements that do not purport to be legally binding. For example, section 33 of the Canadian Charter of Rights and Freedoms—commonly known as the “notwithstanding” clause—empowers a provincial legislature, acting expressly and by supermajority, to reenact a law that the Canadian Supreme Court has declared unconstitutional.²⁰⁵ Yet the political unpopularity of passing laws that have already been declared unconstitutional has helped to ensure that, outside of Quebec—which has in any event refused to ratify Canada’s constitution—the notwithstanding clause has seen actual use only once.²⁰⁶ In the United Kingdom, by comparison, British courts cannot strike down parliamentary legislation in the first instance but do have the power, under the Human Rights Act 1998, to declare such legislation incompatible with the European Convention on Human Rights.²⁰⁷ Though Parliament is free to leave the impugned law in force, it is widely assumed that a declaration of incompatibility will generate sufficient political pressure to ensure that the law is repealed or amended to comply with the Convention.²⁰⁸

²⁰⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 ch. 11 (U.K.).

²⁰⁶ *E.g.*, HOGG, *supra* note 23, § 36-2, at 36-4 (noting that, outside Quebec, on only one occasion has a legislature invoked the notwithstanding clause to bring into force a law held by the Canadian Supreme Court to violate rights guaranteed by Canada’s constitution); Barbara Billingsley, *Section 33: The Charter’s Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331, 339-40 (2002) (same); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 97-98 (1997) (same); *cf.* Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALTA. L. REV. 293, 302-03 (1991) (arguing that the notwithstanding clause has not necessarily been invoked even when it ought to have been).

²⁰⁷ Human Rights Act, 1998, c. 42, § 4 (Eng.); *see* PAUL P. CRAIG, ADMINISTRATIVE LAW 559-63, 585-86 (4th ed. 1999) (discussing the Human Rights Act, and the issuance of a “declaration of incompatibility”); Lord Lester of Herne Hill QC & Lydia Clapinska, *Human Rights and the British Constitution*, in THE CHANGING CONSTITUTION 62, 75, 79-81 (Jeffrey Jowell & Dawn Oliver eds., 5th ed. 2004) (same).

²⁰⁸ *See, e.g.*, CRAIG, *supra* note 207, at 552-56; Lord Lester & Clapinska, *supra* note 207,

In both the Canadian and British examples, there exist perfectly legal means by which the sovereign can override or ignore what the courts have decided. Nevertheless, the act of adjudication by a reputable court has political ramifications that hinder the sovereign from doing so. If it is generally understood that the sovereign is politically averse to ignoring judicial decisions, courts may be able to bolster the credibility of the sovereign's commitments simply by adjudicating them. Even if the sovereign retains the legal ability to repudiate, it is at least somewhat reassuring that the courts will blow the whistle on such behavior, and that the mere act of whistleblowing by a reputable court imposes political costs upon the sovereign.

In sum, it is difficult, but not impossible, for a sovereign to make persuasive commitments. In the worst of scenarios, constitutional barriers and practical considerations alike prevent the sovereign from binding itself and preclude anything resembling traditional judicial enforcement. Even 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. 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. Provided that the courts have taken adequate care of their reputation, the very fact of judicial involvement signals to private parties that the sovereign's commitments are likely to be honored, even if a judgment against the sovereign cannot be enforced in any traditional sense. This signal is credible, in turn, because open disregard of the courts by the sovereign imposes costs upon the sovereign and the courts alike.

V. CONCLUSION: THE CONSTITUTION AS COMMITMENT

at 79-81 (observing that declarations of incompatibility create "a powerful incentive" for Parliament to take remedial action); Lord Irvine of Lairg, *The Development of Human Rights in Britain under an Incorporated Convention on Human Rights*, 1998 PUB. L. 221, 225-29 (discussing practical implications of the rights-protection scheme established by the Human Rights Act).

Sovereigns face more than one variety of commitment problem. Though the problem of underpersuasive commitment, or “credible commitment,” has monopolized scholarly attention, the potential for overeffective commitment 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 steward—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 constraints 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 *Charles River Bridge*, 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,"²⁰⁹ 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."²¹⁰

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*²¹¹—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 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

²⁰⁹ *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion); *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").

²¹⁰ *Id.* at 884 (plurality opinion).

²¹¹ *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977) (promising careful scrutiny of state efforts to impair state contractual obligations because, in such cases, "the State's self-interest is at stake"); *supra* note 53 and accompanying text.

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.²¹² Yet the sweep of sovereign immunity doctrine may well do the sovereign more harm than good. The “dignity and respect” to which sovereigns are entitled, we are told, help to justify their immunity from suit.²¹³ But what sovereign enjoys “dignity and respect” when it dishonors its commitments and refuses to defend what it has done before a judge?

To be sure, sovereigns bear unique responsibility for the welfare of society as a whole and must therefore retain a freedom of action greater than that of ordinary economic actors.²¹⁴ There is little reason to think, however, that the blunderbuss of sovereign immunity is necessary to ensure that the government does not overcommit itself. As discussed above, it is already well established that any surrender of sovereign power must occur in unmistakable terms²¹⁵ and, indeed, that a sovereign’s police powers cannot be surrendered at all.²¹⁶ Courts have in the past applied these doctrines to relieve sovereign overcommitment and will no doubt continue to do so in the future. Nor is there anything to prevent judges from adding to this corpus of sovereign contracts law, if needed. As the unmistakability and reserved powers doctrines

²¹² See, e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 42-43 (1992) (Stevens, J., dissenting) (denouncing the Court’s “love affair” with sovereign immunity); *TRIBE*, *supra* note 98, §§ 3-25 to 3-30, at 519-98 (discussing the Court’s sovereign immunity and abstention doctrines); 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 Court’s recent efforts to advance federalism have been inconsistent, but that its actions in the area of sovereign immunity have been especially “bold”). See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 *passim* (1987) (arguing 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).

²¹³ *Alden v. Maine*, 527 U.S. 706, 749 (1999) (quoting *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 268 (1997)).

²¹⁴ See *Hadfield*, *supra* note 55, at 532-37 (arguing that governmental liability for breach of contract should be treated as a question of public law due to the government’s unique responsibilities as sovereign).

²¹⁵ See *supra* note 160 (discussing “unmistakability” doctrine).

²¹⁶ See *supra* notes 35-55 and accompanying text (discussing “reserved powers” doctrine).

illustrate, courts are perfectly capable of fashioning common law principles that are more responsive to the sovereign's unique circumstances than the rules of ordinary private law. It remains open, for example, for courts to narrow the range of remedies available against the sovereign for breach of contract by excluding recovery of expectation damages, as Gillian Hadfield has urged.²¹⁷ From a plaintiff's perspective, the existence of a body of public contracts law that restricts governmental liability is surely preferable to a constitutional rule of sovereign immunity that enables the government simply to deny any kind of judicial recourse at all.

Above all, it must be remembered that the impact of sovereign immunity extends far beyond the cost of government borrowing or contracting. The consequences of sovereign commitment and judicial enforcement cannot be reduced entirely to a matter of dollars and cents. Our Constitution is itself a commitment. At root, it embodies a sovereign commitment to exercise power only within specified limits. As a form of commitment, the Constitution succeeds only if it is both effective and persuasive: it must be *effective*, in that it must actually restrict the sovereign if our liberty is to be secure, but it must also be *persuasive*, in that it must win popular acceptance of the government that it creates.

By deciding suits against the sovereign, courts promote the success of the Constitution-as-commitment along both dimensions. First, they may sometimes discourage or restrain the sovereign from exceeding constitutional bounds, notwithstanding their limited capacity for coercion. That is, courts have a role to play in making the Constitution an *effective* commitment. Second, and no less importantly, the mere availability of a credible judicial forum for complaints against the government confers legitimacy upon the entire constitutional order. Even if courts cannot actually enforce the law against the sovereign, they can still provide valuable information about the extent of sovereign compliance with the law. Assuming that the sovereign does in fact honor the Constitution and the rule of law, this information will serve only to reinforce the

²¹⁷ See Hadfield, *supra* note 55, at 532-37 (arguing for availability of reliance damages, but not expectation damages, in actions against the sovereign for breach of contract).

legitimacy of the regime in the eyes of the people. A faithful sovereign thus has much to gain from judicial monitoring of its actions. A tyrannical government, by contrast, has much to hide, and an expansive doctrine of sovereign immunity may indeed bolster the legitimacy of such a regime by shielding its behavior from unwelcome judicial scrutiny. Yet this is all the more reason for courts to set aside the notion of sovereign immunity, and to exercise jurisdiction over suits against the government. For what greater service can the courts perform than to warn the people when tyranny is upon them?