Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments

Thomas B. McAFFee, Jay S. Bybee, and A. Christopher Bryant

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Powers Reserved for the People and the States

A History of the Ninth and Tenth Amendments

A Reference Guide to the United States Constitution

Thomas B. McAffee, Jay S. Bybee, and A. Christopher Bryant
This book is dedicated to our families

To Lynda, and to Bryan, Justin, Gavin, and Trenton
—Tom

To Dianna, and to Scott, David, Alyssa, and Ryan
—Jay

To my father, Alvin, and the memory of my mother, Phyllis
—Chris
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One can conceive of the United States Constitution in many ways. For example, noting the reverence in which it has been held, one can think of it as equivalent to a sacred text. Unfortunately, most of its devotees have had less knowledge and even less understanding of the document than they have had reverence for it. Sometimes it is treated as primarily a political document and on that basis has been subjected to analysis, such as Charles Beard’s *An Economic Interpretation of the Constitution of the United States*. One can plausibly argue that the Constitution seems most astounding when it is seen in the light of the intellectual effort that has been associated with it. Three brief but highly intense bursts of intellectual energy produced, and established as organic law, most of the Constitution as it now exists. Two of these efforts, sustained over a long period of time, have enabled us better to understand that document.

The first burst of energy occurred at the Constitutional Convention. Although some of the delegates’ business, such as the struggle between populous and nonpopulous states about their representation in Congress, was political, much of it was about fundamental issues of political theory. A few of the delegates had or later achieved international eminence for their intellects. Among them were Benjamin Franklin, Alexander Hamilton, and James Madison. Others, although less well known, had first-rate minds. That group includes George Mason and George Wythe. Many of the delegates contributed intelligently. Although the Convention’s records are less than satisfactory, they indicate clearly enough that the delegates worked mightily to constitute not merely a polity but a rational polity—one that would rise to the standards envisioned by the delegates’ intellectual ancestors. Their product, though brief, is amazing. William Gladstone called it “the most wonderful work ever struck off.”

Despite the delegates’ eminence and the Constitution’s excellence as seen from our place in history, its ratification was far from certain. That state of affairs necessitated the second burst of intellectual energy associated with that
document: the debate over ratification. Soon after the Convention adjourned, articles and speeches—some supporting the Constitution and some attacking it—began to proliferate. A national debate commenced, not only about the document itself, but also about the nature of the polity that ought to exist in this country. Both sides included many writers and speakers who were verbally adroit and steeped in the relevant political and philosophical literature. The result was an accumulation of material that is remarkable for both its quantity and its quality. At its apex is The Federalist Papers, a production of Alexander Hamilton, James Madison, and John Jay that deserves a place among the great books of Western culture.

Another burst, not as impressive as the first two but highly respectable, occurred when the Bill of Rights was proposed. Some delegates to the Constitutional Convention had vigorously asserted that such guarantees should be included in the original document. George Mason, the principal drafter of the Virginia Declaration of Rights, so held, and he walked out of the Convention when he failed to achieve his purpose. Even those who had argued that the rights in question were implicit recognized the value of adding protection of them to the Constitution. The debate was thus focused on the rights that were to be explicitly granted, not on whether any rights ought to be explicitly granted. Again many writers and speakers entered the fray, and again the debate was solidly grounded in theory and was conducted on a high intellectual level.

Thus, within a few years a statement of organic law and a vital coda to it had been produced. However, the meaning and effect of many of that document’s provisions were far from certain; the debates on ratification of the Constitution and the Bill of Rights had demonstrated that. In addition, the document existed in a vacuum, because statutes and actions had not been assessed by its standards. The attempt to resolve these problems began after Chief Justice John Marshall, in Marbury v. Madison, asserted the right of the U.S. Supreme Court to interpret and apply the Constitution. Judicial interpretation and application of the Constitution, beginning with the first constitutional case and persisting until the most recent, is one of the sustained exertions of intellectual energy associated with the Constitution. The framers would be surprised by some of the results of those activities. References in the document to “due process,” which seems to refer only to procedures, have been held also to have a substantive dimension. A right to privacy has been found lurking among the penumbras of various parts of the text. A requirement that states grant the same “privileges and immunities” to citizens of other states that they granted to their own citizens, which seemed to guarantee important rights, was held not to be particularly important. The corpus of judicial interpretations of the Constitution is now as voluminous as that document is terse.

As the judicial interpretations multiplied, another layer—interpretations of interpretations—appeared, and also multiplied. This layer, the other sustained intellectual effort associated with the Constitution, consists of articles, most of them published in law reviews, and books on the Constitution. This material varies in quality and significance. Some of these works of scholarship result
from meticulous examination and incisive thought. Others repeat earlier work, or apply a fine-tooth comb to matters that are too minute even for such a comb. Somewhere in that welter of tertiary material is the answer to almost every question that one could ask about constitutional law. The problem is finding the answer that one wants. The difficulty of locating useful guidance is exacerbated by the bifurcation of most constitutional scholarship into two kinds. In “Two Styles of Social Science Research,” C. Wright Mills delineates macroscopic and molecular research. The former deals with huge issues, the latter with tiny issues. Virtually all of the scholarship on the Constitution is of one of those two types. Little of it is macroscopic, but that category does include some first-rate syntheses such as Jack Rakove’s *Original Meanings*. Most constitutional scholarship is molecular and, again, some fine work is included in that category.

In his essay, Mills bemoans the inability of social scientists to combine the two kinds of research that he describes to create a third category that will be more generally useful. This series of books is an attempt to do for constitutional law the intellectual work that Mills proposed for social science. The author of each book has dealt carefully and at reasonable length with a topic that lies in the middle range of generality. Upon completion, this series will consist of thirty-seven books, each on a constitutional law topic. Some of the books, such as the book on freedom of the press, explicate one portion of the Constitution’s text. Others, such as the volume on federalism, treat a topic that has several anchors in the Constitution. The books on constitutional history and constitutional interpretation range over the entire document, but each does so from one perspective. Except for a very few of the books, for which special circumstances dictate minor changes in format, each book includes the same components: a brief history of the topic, a lengthy and sophisticated analysis of the current state of the law on that topic, a bibliographical essay that organizes and evaluates scholarly material in order to facilitate further research, a table of cases, and an index. The books are intellectually rigorous—in fact, authorities have written them—but, due to their clarity and to brief definitions of terms that are unfamiliar to laypersons, each is comprehensible and useful to a wide audience, one that ranges from other experts on the book’s subject to intelligent nonlawyers.

In short, this series provides an extremely valuable service to the legal community and to others who are interested in constitutional law, as every citizen should be. Each book is a map of part of the U.S. Constitution. Together they map all of that document’s territory that is worth mapping. When this series is complete, each book will be a third kind of scholarly work that combines the macroscopic and the molecular. Together they will explicate all of the important constitutional topics. Anyone who wants assistance in understanding either a topic in constitutional law or the Constitution as a whole can easily find it in these books.
Most of the work on this book was completed while we were colleagues at the William S. Boyd School of Law at the University of Nevada, Las Vegas. We acknowledge the financial and academic support that UNLV provided to us. While we have benefited from our long association and from the opportunity to review each other’s work, we also recognize that our views on the Ninth and Tenth Amendment have been influenced, but not dictated, by that association. We each carry from this project our own distinct visions of the role of these important amendments. We hope that the reader will find our visions harmonious.

While we remain friends, we are no longer colleagues at UNLV. Judge Bybee completed Chapters 1 and 3 at UNLV before taking a leave of absence to serve as assistant attorney general for the Office of Legal Counsel at the U.S. Department of Justice. He was subsequently appointed to the U.S. Court of Appeals for the Ninth Circuit. Consequently, Professor Bryant was given the task of completing the treatment of the Court’s use of reserved powers doctrine in the twentieth century. He departed UNLV for the University of Cincinnati, where he completed Chapters 5 and 6, treating the Supreme Court’s federalism decisionmaking of the last century. Meanwhile, Professor McAffee completed Chapter 2, on the history of the Ninth and Tenth Amendments, and Chapters 4 and 7, tracing the Supreme Court’s consideration of fundamental rights doctrine from the reconstruction era forward. He remains on the UNLV faculty.

As we note below, we are indebted to many people who contributed in one way or another to this project. Of course, we alone remain responsible for its content.

*Thomas B. McAffee:* My thinking about constitutionalism has been powerfully influenced by mentors and friends over many years. From my earliest years in law, I am grateful for thoughtful discussion about law and the Constitution with Ed Firmaige and Chris Blakesley, as well as my former colleague, Pat Kelley. Since getting engaged in constitutional scholarship, my thought
has been greatly enhanced by the opportunity to read and consider the extremely thoughtful, careful, and always thought-provoking work of William Van Alstyne, Richard Kay, Michael McConnell, Fred Gedicks, Steven Smith, Philip Hamburger, Larry Alexander, and Steven J. Heyman. The few occasions in which we have been able to devote a bit of time to conversation has been especially enriching and stimulating; I will always be grateful. More recently, I have been especially helped by Jay Bybee, Chris Bryant, John V. Orth, and David Tanenhaus. I’m also grateful for much help from research assistants over many years.

Jay S. Bybee: It was a pleasure to work with my colleagues Tom and Chris, I was ably assisted by my research assistants, Anne Marie Doucette, David Newton, and Briant Platt. This work represents the cumulative influence of half a lifetime of lunchroom discussions, watercooler conversations, and informal office debates. I cannot begin to acknowledge the contributions of my classmates and the faculty at the J. Reuben Clark Law School at Brigham Young University, my students and faculty colleagues at the Paul M. Hebert Law Center at Louisiana State University and the William S. Boyd Law School at UNLV, colleagues at the U.S. Department of Justice and the Office of the White House Counsel, and friends throughout the academy. Although I cannot name them individually, I hope that I have been able to convey in other ways how grateful I am for their influence.

A. Christopher Bryant: I thank the University of Cincinnati College of Law and the James E. Rogers Research Grant Foundation at UNLV for financial support. I am also very grateful to Andy Spalding of the Boyd Law School as well as Chris Laver and Lynsay Gott, both of the University of Cincinnati, for excellent research assistance.
The U.S. Constitution, for all of its resilience as a document and for its pre-eminence as an organic act, can lay few claims to originality. It was modeled after state constitutions, which themselves followed a long history of colonial charter-making. Those first state constitutions laid the groundwork for federal principles of separation of powers, the concept of a bill of rights, and even the unique contribution of the U.S. Constitution, federalism. Although the overall design of our constitution evidences the brilliance of its Framers, the details are patched together from these state sources, then familiar to its drafters. We still can admire the way our Constitution drew the best from, and then improved on, its sources.

There are several reasons why a brief review of state constitutions is important to understanding the Ninth and Tenth Amendments, and indeed, all of the Constitution. First, the states enacted their constitutions in response to a request from the Continental Congress and completed them before Congress approved the Articles of Confederation. Whether or not the U.S. Constitution borrowed any particular scheme, section, or word formula from any state constitution, those constitutions represent a tradition of constitution drafting. We should know something of those sources. Unfortunately, our academic interest in the state constitutions has frequently lagged behind our intrigue with their federal counterpart. As Jefferson Powell has written, the “consequence of this disinterest in the history of state constitutional cases has been the impoverishment both of our understanding of American legal history and of the fundamental issues raised by the enterprise of defining and limiting governmental power through written constitutions.” For this, we have paid a price in a lack of understanding of our constitutional heritage. Second, the U.S. Constitution plainly did borrow—heavily—from state constitutions, both in its forms and its phrases. Gordon Wood has noted that “[t]he office of our governors, the bicameral legislatures, tripartite separation of powers, bills of rights, and the unique use of constitutional conventions were all born during the state constitution-making period between 1775 and the early 1780s.” The Framers of the federal
Constitution borrowed some of its best-known phrases from state constitutions. The Pennsylvania Constitution, for example, made it the duty of the chief executive of Pennsylvania to “take care that the laws be faithfully executed.”\(^4\) The Georgia Constitution guaranteed the right of “the free exercise of ... religion,”\(^5\) a phrase that appeared as early as 1663 in the Charter of Rhode Island and Providence Plantations.\(^6\)

Perhaps most important, at least for our purposes, the Ninth and Tenth Amendments guarantee “rights ... retained by the people” and “reserved to the States respectively, or to the people.” What were these rights that the people retained? What rights did the states reserve? And why was the Constitution so indefinite as to reserve rights to the states or the people, without specifying which of those parties reserved the right? Rights and powers were reserved to the states because state legislatures, representing the sovereign people, were conceived as holding plenary power; thus rights and powers are held by the state unless the people, by express constitutional provision, limit or proscribe state rights and powers.\(^7\) The state constitution is the critical source of the rights retained or reserved to the people; and these rights “reserved to the States respectively, or to the people” refer to the powers the people delegated to their own state governments or retained for themselves. The Ninth and Tenth Amendments neither prescribed nor prejudged how the people choose to organize their state governments and reserve or delegate their rights and powers.

COLONIAL Charters AND WRITTEN CONSTITUTIONS

The origins of important provisions in the U.S. Constitution can be traced to English history. The idea of due process, fair trials, and representation dates back at least to Magna Carta. The origins of the U.S. Constitution as a written constitution, however, are much closer, both temporally and spatially, and may be found in the earliest colonial charters and compacts. The Mayflower Compact, signed in 1620, began with these words:

We whose Names are under-written, the Loyal Subjects of our dread Sovereign Lord King James ... Do by these Presents, solemnly and mutually, in the presence of God and one another, Covenant and Combine our selves together into a Civil Body Politick, for our better ordering and preservation ... and by virtue hereof and do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Officers ... as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience.\(^8\)

The brief compact concluded with the signatures of forty-one men of the Massachusetts Bay colony. For these early inhabitants of Massachusetts, transplanted pilgrims escaping the harsh religious strictures of England and continental Europe, the Mayflower Compact united the new colonists in the shared purpose of governing themselves as a community. It constituted, or ordered,
colonists as a single colony. Reflecting the colonists’ religious faith and their English heritage, the Mayflower Compact was written in the form of a covenant.

The colonists’ reliance on covenant for the form of the Compact was understandable. The term “covenant” had religious and legal connotations. In the religious sense, a covenant was a pact between a person or persons and God. The covenant tradition has its origins for Western society in the covenants of the Old Testament between God and Abraham or God and the Jews, his chosen people. In the Abrahamic covenant, God promised Abraham an “everlasting covenant” in which God would “multiply thee exceedingly” so that Abraham would be a “father of many nations.” As Daniel Elazar has documented, the idea of a covenant is a bold one in which “[t]he omniscient and omnipotent God ... chooses to limit Himself through a pact with his creatures.”

The term “covenant” had a distinct, but related, meaning within the common law. A covenant was a special form of contract in which the parties invoked the king as witness to the agreement by placing the contract under the king’s seal (whether or not the king had in fact witnessed the contract). Certain kinds of transactions—notably those involving land transfers—had to be placed under seal. Covenants (or contracts under seal) were not subject to certain defenses that were available to the signatories to an ordinary contract. For example, proof of fraud in the inducement voids a contract by implying that, because of fraud by one of the parties, the contract was never successfully entered into. One who had entered into a contract under seal could not assert the defense of fraud; the fact that the king (or the owner of the seal) had “witnessed” the contract so solemnized the act that the parties were estopped from complaining that the contract was void. The common law ordinarily required that the parties to a contract have exchanged meaningful consideration, and contracts often recited the receipt of some kind of consideration as the basis for the promises in the contract. By contrast, in a contract under seal, taking an oath (a promise made with God as witness) was a sufficient substitute for other consideration.

The use of covenants to establish civil governments melded the early colonists’ religious and legal traditions. Consider once again the Mayflower Compact. The signatories, describing themselves as loyal subjects of the king, promised before God and each other as witnesses that they covenanted among themselves as a civil body and pledged their obedience to its laws and officers. The Mayflower Compact was the first of many such compacts and covenants. Little wonder that Donald Lutz has concluded that it was this tradition of local government that was “the seedbed of American constitutionalism.” So embedded was the concept that one clergyman exclaimed that “a civil Constitution or form of government is of the nature of the most sacred covenant or contract.” And one early American writer, invoking Biblical imagery, advised that if the U.S. Constitution proved

a wise one, calculated to preserve the invaluable blessings of liberty, to secure the inestimable rights of mankind, and promote human happiness then, if you accept it,
you will lay a lasting foundation of happiness for millions yet unborn; generations to
come will rise up and call you blessed.18

There were several consequences of this pattern of compact and covenant-
making in early America. First, colonial Americans became accustomed to the
idea of a written constitution.19 The English possessed, of course, written docu-
ments such as Magna Carta (1215) and the Bill of Rights (1689), but these
were responses to crises in English history and clarified existing law.20 The
English “Constitution” was not a fixed document, but rather a collection of
rights, laws, and customs that was truly organic, in the sense that it was an
ever-expanding body of law.21 In the most literal sense of the word “consti-
tution,” the English Constitution represented all the laws and rules by which
the English constituted themselves, including positive law enacted by parlia-
ment and judge-made common law. Written American charters and constitu-
tions were a departure from English practice that moved Americans in the
direction of the Civil Law tradition of continental Europe. Second, the very
nature of a covenant suggested that governments could be subject to, and there-
fore limited by, law. “The God of covenant theology was a God who governed
by laws which even he observed. The universe he ruled was a constitutional
one.”22 Accordingly, “[i]f God had bound himself by covenant to observe cer-
tain laws, no earthly delegate could claim unlimited authority.”23 Written con-
stitutions gave the people a common, recognized source of law, a tangible
reminder that the law was superior to any man. “All constitutions,” wrote a cit-
izen of Philadelphia, “should be contained in some written Charter.”24

The idea of written fundamental law must have appealed to the communal
origins of the colonies. Although the American colonies had landed and mer-
chant classes that were loyal to the monarchy, the colonies never knew the
kind of hierarchical society that existed in England. A written, common
source of law satisfied the deepest democratic urges of the colonists. As the
people came to accept the notion of their own sovereignty, they established
their governments on the authority of the people as a whole.25 The covenant
was made among the people as individuals with the people as a whole stand-
ing as witness—that is, the Constitution was created by and on the authority
of “We the people.” It is no surprise that Chief Justice John Marshall wrote
in Marbury v. Madison (1803) that “in America, . . . written constitutions have
been viewed with so much reverence.” The written constitution, he wrote, was our
“greatest improvement on political institutions.”26

EARLY COLONIAL CHARTERS
The earliest colonial charters established processes for enacting laws, adopted
substantive laws, and declared certain rights belonging to the people. These
constitutions were not primitive efforts at self-government. The first state
“constitution,” denominated as such, appears to be the “Fundamental Constitu-
tions of North Carolina” of 1669, while the earliest bill of rights may be
the “Massachusetts Body of Liberties,” adopted in 1641. The “Fundamental Constitutions” consisted of 120 numbered provisions, each of which was a “fundamental constitution” of North Carolina. Massachusetts’ “Body of Liberties” included ninety-eight numbered provisions and was a near-comprehensive constitution. It covered general principles such as due process and equal protection of the laws; it provided for elections, the issuing of fines, the selection of juries, and the punishment of barratry; and it regulated other matters of public concern such as domestic violence and inheritance. But the Body of Liberties also contained substantive provisions that governed what we would call “private law,” including tort, replevin, fraudulent conveyances, and monopolies. The liberties referred to all of the ordinary rules by which the inhabitants of Massachusetts constituted themselves. The Body of Liberties recognized the varied sources of the liberties expressly included:

96. Howsoever these above specified rites, freedoms, Immunities, Authorities and privileges, both Civil and Ecclesiastical are expressed only under the name and title of Liberties, and not in the exact form of laws, or Statutes, yet we do with one consent fully Authorize, and earnestly entreat all that are and shall be in Authority to consider them as laws. . . .

William Penn’s “Charter of Liberties,” adopted in 1682, set up a provincial council to work with the governor. Subsequently, Pennsylvania adapted a “Frame of Government of Pennsylvania” that incorporated the Charter of Liberties and added sections providing for citizens’ rights, such as the right to a jury trial, the right to trial in English, the right to bail, and the right to appear and plead one’s own cause.

These early charters recognized the colonists as legal subjects of the king. As subjects of the king, the colonists laid claim to the king’s protection. The first land grant charters declared the colonists within the protection of the crown to “enjoy all Liberties, and franchises, and Immunities of free Denizens and natural Subjects” as if they had been born and resided in England. In Calvin’s Case (1609), Lord Coke described the relationship between the king and his subjects as a reciprocal one in which “the Sovereign is to govern and protect his subjects” and “the subject oweth to the King his time and faithful ligeance.” Coke explained that “ligence is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.” As Lord Coke described it, kings and subjects were bound together naturally just as “the ligatures or strings knit together the joints of all the parts of the body,” except that ligeance was “a higher and greater conexion.”

Thomas Hobbes and John Locke reformulated Coke’s natural reciprocity and described the relationship between people and government as one of contract, a formulation that would fit comfortably within the colonists’ legal and religious framework. According to Hobbes, the relationships of people
existing in nature are defined either by force or consent. When men and women voluntarily confer a portion of their natural rights upon others, they consent to be governed. The mechanism for consenting is the compact or covenant. Sir Henry Maine later observed that Lord Coke’s “phraseology, borrowed from the Law of Contract, . . . crystallized into the theory of an actual original compact between king and people.” John Locke took Hobbes’ theory and put it into its popular form in his Second Treatise on Government. The subtle shift from Coke to Hobbes to Locke and from a relationship between king and subject based on nature to one based on mutual consent and contract served at least one extremely important function. It offered a rationale by which the people could dissolve their governments. Contract law contemplated the possibility of breach and, hence, a remedy at law. When government violates the consent of the governed, the people may declare the government in breach and the contract at an end. As Locke argued, “when he who has the supreme executive power neglects and abandons that charge . . . there certainly is no government left. . . . [And] the people are at liberty to provide for themselves by enacting a new [government].”

If contract theory supplied a good explanation for both how people entered into contract with the king and the reasons they might end that contract, it also supplied a reason for the colonists to object to Parliament. The colonists did not object to Parliament’s regulation of those matters affecting the British Empire, such as mutual defense and external trade; on those matters the colonies completely consented. However, as between the American colonists and Parliament with respect to American affairs, there was no quid pro quo; there was no reciprocity of rights and duties. As Richard Bland argued in 1764, in every instance . . . of our External government we are and must be subject to the authority of the British Parliament, but in no others; for if the Parliament should impose laws upon us merely relative to our Internal government, it deprives us . . . of the most valuable part of our birthright as Englishmen, of being governed by laws made with our own consent.

Parliament demanded obedience, but it offered nothing to the colonists in return. Indeed, the colonists’ lack of representation in Parliament made the contract one of adhesion; it was a contract vitiated by coercion. Benjamin Franklin explained that the only “bond of [the] union” between Britain and the colonies was “not the Parliament, but the King.” Because the colonists regarded Parliament as lacking authority in the colonies’ internal matters, King George III’s support for Parliament’s noxious acts constituted a breach of his own obligation to the colonies. However, the colonies were slow to accuse the king. In 1775, the Continental Congress issued a prelude to the Declaration of Independence in its Declaration of the Causes and Necessity of Taking up Arms. Congress was careful to enumerate that the attempts to “enslav[e] these colonies by violence,” “depriv[e] us of the accustomed and inestimable privilege of trial by jury,” and “exempt[ ] the ‘murderers’ of colonists from legal trial, and in effect, from punishment” should
be laid at the feet of the “legislature of Great Britain.” The colonists meant to indict Parliament, not the king.

Ultimately, however, the enforcement of onerous acts such as the Stamp Act and the Intolerable Acts required the assent of King George. Even as British troops were posted to American soil, the colonists were slow to accuse his majesty of breaching his obligations and hoped that their petitions would persuade Parliament to abandon its ill-conceived path. When hostilities broke out in Massachusetts in April 1775, the colonists still hoped to free themselves from Parliament, but remain under the sovereignty of King George. George Washington and his soldiers referred to British troops in Boston as “ministerial troops.” “We ... cannot yet prevail upon ourselves to call them the King’s troops.” Thomas Jefferson wrote of General Gage that “we are at a loss to determine, whether he intends to justify himself as the representative of the King, or as the Commander-in-Chief of his Majesty’s forces in America.” The hiring of foreign troops confirmed the king’s intentions. If General Gage thought himself the king’s representative, then Jefferson argued Gage could not (as he had done) make it treason for the inhabitants of Massachusetts to assemble; if Gage was commander-in-chief, it was because the king considered the colonies to be in rebellion.

In August 1775, King George declared America in rebellion. In the minds of the colonists, the king had become the aggressor and ceased to be their protector. Judge William Henry Drayton, charging a grand jury in Charleston in 1776, observed that “subjection is not due even to a king, de jure, or of right, unless he be also king de facto, or in possession of the executive powers dispensing protection.” Because King George had employed “the most violent measures ... —Measures, carrying conflagration, massacre and open war,” he had “also broken the original contract between king and people.” “If, then,” wrote Benjamin Franklin, “a king declares his people to be out of his protection; ... he wages war against them; [and] ... he excites domestic insurrections among their servants, ... [d]oes not so atrocious a conduct towards his subjects dissolve their allegiance?” In his autobiography, written years later, Jefferson recalled that during the debate over independence in the Continental Congress, a proponent of separation had asserted the following:

That, as to the King, we had been bound to him by allegiance, but that this bond was now dissolved by his assent to the last act of Parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his protection; it being a certain position in law, that allegiance & protection are reciprocal, the one ceasing when the other is withdrawn.

In May 1776, Rhode Island declared its independence on the grounds that “in all states existing by compact, protection and allegiance are reciprocal,” and that the king had turned against them. By the king’s actions, wrote an anonymous editorialist, he “unkings himself.”

The Declaration of Independence was a formal declaration of the breach between the king and his subjects and prompted “a fuller expression [of the
contract theory\] than at any other time during the Revolution."50 While Congress had addressed its Declaration of 1775 to Parliament, the 1776 Declaration of Independence was a bill of particulars directed personally to King George. "He has abdicated government here, by declaring us out of his protection, and waging war against us."51 Among the other charges were claims that the king had "obstructed the administration of justice," "protect[ed] [armed troops], by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States," and "excited domestic insurrections amongst us."52 The colonists accused the king of violating the English Constitution, including the English Bill of Rights (1689). The king had "made Invasions on the Rights of the People," kept standing armies, quartered troops among the colonists, and answered their "repeated Petitions" with "repeated Injury."53 Additionally, the king had violated the terms of the colonists’ charters, "abolishing our most valuable laws, and altering fundamentally the Forms of our Government."54 The signatories, acting "in the Name, and by Authority of the good People of these Colonies," declared themselves "absolved from all allegiance, to the British crown" and announced that "all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved."55 The Declaration stated that the states were "FREE AND INDEPENDENT \ldots with the full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do."

In the end, the English Constitution had failed the colonists. In their minds, it had traveled the distance from being the "glorious constitution, the best that ever existed among men,"56 to a "vile charter."57 It was a valuable lesson, to know that even a constitution cannot guarantee the respect of governors, legislators, and magistrates. One result was a deeper American commitment to the idea of a written constitution:

During the struggle leading to independence, the colonists had set forth the arguments of reason, based on English constitutionalism and natural law, and these had gone unheeded. In the end, the unwritten English constitution failed them; and though they justified revolution by the same resort to reason and nature, revolt supplied an extralegal remedy for the perceived tyranny visited upon them. The Americans came to believe that if the pattern of tyranny and revolution were to be avoided, it was crucial that the principles of liberty and republican government be set in a form not easily disputed.58

As James Cannon, one of the drafters of the Pennsylvania Constitution, explained, "To deduce our rights from the principles of equity, justice, and the Constitution, is very well; but equity and justice are no defense against power."59

THE STATE CONSTITUTIONS

Once the former colonists declared a breach of the social contract and their freedom from further obligations to the king under it, they faced momentous
questions: What do we do now? Where does the power lie? In May 1776, two months before the signing of the Declaration of Independence, the Continental Congress adopted a resolution calling on the states to author new constitutions “on the authority of the people.” But by what authority would the states reconstitute themselves, and who was Congress that it could request such a thing? And if “the people” formally reconstituted themselves as states, what implications would this have for a confederacy or a national constitution?

In answer to these questions, the colonists assumed various positions. For some, the power rested with the states, which continued to operate under their charters, the colony having been freed from further obligation to the crown by the king’s actions. This was the “simplest and least disruptive course” taken by the corporate colonies, Connecticut and Rhode Island. As a result, Connecticut did not adopt a constitution until 1818; Rhode Island, until 1842. In most of the colonies, however, the state legislatures adopted constitutions, a practice that raised serious questions about the authority of the legislature, the legislature’s power to amend the constitution as it would with ordinary legislation, and, ultimately, the legitimacy of the constitution. Eight states—Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia—adopted constitutions in 1776 (four of them before the Declaration of Independence); Georgia and New York adopted constitutions in 1777. Six states—Delaware, Georgia, Maryland, New Hampshire, Pennsylvania, and South Carolina—would adopt at least one more constitution before 1800. Pennsylvania and Massachusetts adopted their constitutions—perhaps the two most “radical” and influential state documents—by special convention. In Massachusetts, the legislature had adopted a constitution in 1778, only to have the people reject it and demand a role in its passage. Massachusetts adopted its constitution by convention in 1780, and it remains the oldest functioning constitution in the world.

As Americans began the task of drafting constitutions, perhaps the one thing they feared most was a monarch. The fear translated easily into the creation of relatively weak state governors, which as Gordon Wood has pointed out, were “a pale reflection . . . of his regal ancestor.” If curbing executive power had been the drafters’ only concern, we might have seen a simple transfer of authority in state constitutions from governors to legislatures; Americans, however, also had reason to suspect legislative bodies. Even before Americans had denounced the king, they had decried Parliament. Even the House of Commons had “abandoned its defensive role and attained so much power that it threatened oligarchy. . . . Commons had become . . . the enemy of the people, not their protector.” To the extent that the House of Commons had lacked American representation, the drafters could take measures to make state assemblies more representative, for example, by expanding the electorate, providing for instruction of legislators, and securing rotation in office. Realigning power between executive and legislature would help cure abuses, but it would not prevent injury to those fundamental rights of life, liberty, and property that Americans had inherited from English tradition. In the
English system, subjects held such rights against the crown alone; Parliament, because it was a representative body, had no formal restraints except its own notion of what was right. If Americans followed the English example, a transfer of power from executive to legislature would not reduce or constrain the power, it would only move the potential for abuse to another forum, because the government as a whole remained plenary.

The drafters of the first state constitutions approached these two distinct problems—the fear of concentrated executive authority and a suspicion of general governmental power—with remarkable clarity and foresight. They provided for a government with separated powers and then, in declarations of rights, placed some powers beyond the reach of any arm of the government. The concerns are answered, quite didactically, in the 1776 Pennsylvania Constitution, one of the most influential of the early constitutions. Pennsylvania titled its preamble “Declaration of Rights and Frame of Government, to be the Constitution of this Commonwealth.” As the title suggested, the Pennsylvania Constitution was divided into two distinct sections, each with its own heading and subsections. The first section was “A Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania,” and consisted of enumerated rights held by individuals. The second section was the “Plan or Frame of Government for the Commonwealth or State of Pennsylvania,” and created a tripartite government.

One Philadelphian offered the view that “A Constitution, when completed, resolves the two following questions: First, What shall the form of government be? And second, What shall be its power?” Notice that, despite the question having underscored government “power,” it was in fact the second question that was most centrally answered by the states’ declarations of rights. Once the structure and form of the government was established, the fundamental question became how to reconcile the need for government “energy” to accomplish the things for which we need government, with the need to effectively limit that power to preserve individual rights. As James Madison put it, referring to the proposed federal Constitution, “In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable government to control the governed; and in the next place, oblige it to control itself.”

In the ratification of the new federal Constitution, its proponents faced the task of simultaneously confirming the need for more expansive national power while also seeking to more effectively limit legislative power than had the states. In general, rather than moving away from republican government, the Framers and proponents of the federal Constitution sought to supply republican cures for the diseases of republicanism. So even when its Framers became critics of unbridled democracy, as when James Wilson complained, “[w]ith how much contempt we have seen the authority of the people treated by the legislature of the state,” it was always with the intent of vindicating the power of the people rather than seeking to adopt a nonrepublican government. Indeed, Gordon Wood has observed that state constitution reformers
consistently relied on the theme that the legislatures were abusing the people by violating their written constitutions. As a principal draftsman of the Constitution and the Bill of Rights, James Madison’s approach was twofold: (1) he put most of his reliance on structural features designed to prevent the exercise of arbitrary power, such as the bicameral legislature, the system of checks and balances, and the political safeguards provided by the extended republic created by the Constitution; and (2) he sought to “proceed with caution” to make the “revisal” of the Constitution “a moderate one.” Madison supported safeguards “against which I believe no serious objection has been made by any class of our constituents” and as to which “they have been long accustomed to have interposed between them and the magistrate who exercised sovereign power.” Consistent with this approach, Madison explained to Edmund Randolph that he had limited his amendments to those “which are important in the eyes of many and can be objectionable in those of none.”

The states freely borrowed from one another, and a number of states bifurcated their constitutions in this same manner. We discuss below the most important questions to which the early constitutions responded, the form of government and declarations of right.

The Form of Government

The new constitutions had to establish some source of authority, some sense of their legitimacy and right to legal recognition and popular acceptance, much as earlier colonists traced their authority to govern to their royal charter and their continued allegiance to the king. State constitutions began, as they inevitably do today, with a preamble or colophon, a declaration of who set forth the Constitution and for what purposes. The states that drafted first were generally less reflective on the question of authority than were later states and more tentative about the permanence of their intentions. For example, Delaware’s Constitution simply announced itself as “The Constitution, or System of Government, agreed to and resolved upon by the Representatives in full Convention,” and New Hampshire adopted a short constitution that simply continued the colonial legislature. New Jersey provided that “if a reconciliation between Great-Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this charter shall be null and void.”

Nearly one-third of the states announced the constitution as the work of a collegial body “being a full and free representation of the people” or “the representatives of the people, from whom all power originates.” Still others attributed the Constitution to the people themselves, not just their representatives. North Carolina declared that “all political power is vested in and derived from the people only,” while Pennsylvania focused on the right of the people “by common consent, to change [their government].” The Constitutions of Virginia and Pennsylvania each made protection of the people the essence of
government, a notion that owed much to Lord Coke, Hobbes, and Locke: “That government, is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community.” Both constitutions followed this purpose with the declaration that “the community had an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it.” The New Jersey Constitution of 1776 offered the social contract as an explanation for its break from Great Britain and suggested the ancient exchange of allegiance for protection as the basis—“in the nature of things”—for a new grant:

Whereas all the constitutional authority ever possessed by the kings of Great Britain over these colonies, or their other dominions, was, by compact, derived from the people, and held of them, for the common interest of the whole society; allegiance and protection are, in the nature of things, reciprocal ties, each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn.

Maryland and Massachusetts expressly referred to the social compact. The first section of the Maryland constitution began with the statement that “all government of right originates from the people, [and] is founded in compact only.” Nowhere was the theory of the social compact explained more completely than in the Preamble of the Massachusetts Constitution:

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people convenants [sic] with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

The new constitutions established state governments as governments of plenary powers. Indeed, the Georgia Constitution, for example, declared that government ought to have the “power to make such laws and regulations as may be conducive to the good order and well-being of the State.” New Hampshire stated that the legislature possessed “full power and authority” to make “all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions.” Several constitutions added that English common law would be in force except to the extent that the legislature altered the common law or the law was repugnant to the written constitution. The constitutions thus established themselves as acts of positive law, and as law superior to all other laws, including those laws and traditions that formed the English Constitution. The Virginia Constitution was most emphatic on this point: The governor served under the constitution and not by virtue of any English law, statute, or custom. This was an important departure from English practice, because it made positive law superior to judge-made common
law and a written constitution first among positive laws. Most states provided that the Constitution could be amended by the legislature, but generally the constitutions required a super majority vote and sometimes required that the legislature enact the proposed amendment twice during different legislative sessions. In many states, the people expressly reserved the right to alter or even abolish the form of government.

Modern Americans seem well aware that one of the claims that led to the American Revolution was the assertion that members of American civil society hold certain inalienable rights. We suspect that far fewer Americans fully understand that a prominent feature of a number of our early state constitutions were so-called “inalienable rights” clauses: provisions that explicitly recognized “[t]hat all men are born equally free and independent, and have certain natural, inherent and inalienable rights.” But there are two problems with unduly emphasizing these clauses. The first is that such provisions have generally been viewed as making statements of principle, but not as stating enforceable limitations on government power. Alan Tarr offers some perspective on this feature:

[T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people’s representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power.

The second problem with undue emphasis on inalienable rights clauses is that the founding generation—those who brought us the state constitutions with their inalienable rights clauses, as well as those who brought us the federal Constitution—perceived the right of the people, as sovereign, to make and amend constitutions, as being the most fundamental, and indeed the most inalienable, right of all. From the perspective of the founding generation, in the midst of debating appropriate methods for construing constitutional rights, we have all but missed the “right” deemed most fundamental by those who brought us the state and federal constitutions: the right of the people collectively to make determinations about how they should be governed. Even someone whose constitutional views were perceived as somewhat radical even in his own day—views that eventually brought us, for good and ill, the Lochner era—Judge Thomas M. Cooley, acknowledged that American constitutionalism was not rooted in a judicial discretion to determine what powers government should have and what should be the relationship between government and its citizens:

In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion.
The state constitutions were based on a strong sense of separation of powers. In virtually all of the first constitutions, there was at least a functional separation of powers. In addition, in most of the constitutions—and, in some cases, in their declarations of rights—there was an express statement of the separation of powers. The Massachusetts provision is one of the clearest:

the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.\textsuperscript{103}

Curiously for us, when the drafters in Maryland, Massachusetts, North Carolina, and Pennsylvania included an express separation of powers provision, they placed it in the Declaration of Rights section of the constitution rather than in the Form of Government section. But this serves as a healthy reminder that the concept of separation of powers was intended as a way to prevent abusive government and was viewed as itself a “right” of the people.\textsuperscript{104}

The colonists feared the power of the executive over all, and that source of concern is reflected in the early constitutions. Little wonder that “the lack of safeguards against the abuse of legislative power is the single most striking characteristic of the early state constitutions.”\textsuperscript{105} In contrast to our present practices, the first state governors were typically appointed by the state assembly.\textsuperscript{106} Moreover, governors served for very short terms—often as short as one year—and were subject to rotation in office provisions.\textsuperscript{107} As the Maryland Declaration of Rights stated, “a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.”\textsuperscript{108} The first state executives might see to the execution of the laws, return improper laws to the assembly, issue pardons, secure embargoes, serve as commander-in-chief, make limited appointments to vacancies in office, and call (but not adjourn) the state assembly.\textsuperscript{109} But even these familiar functions were frequently subject to the governor securing the advice and consent of some advisory body, such as a privy council. Furthermore, some states expressly refused some of these powers to their executives. Maryland and North Carolina provided that their governors had no power to suspend the laws; Georgia denied its executive the pardon power; Maryland, the veto power.\textsuperscript{110}

**Declarations of Rights**

As we have mentioned, six states (Delaware, Maryland, Massachusetts, North Carolina, Pennsylvania, and Virginia) adopted a separate section within their constitution entitled a “Declaration of Rights” or a “Bill of Rights.” Even the states that did not separately denominate such a section, however, incorporated rights into their constitutions that were included in most declarations of rights. There is a wide variety of rights protected in the first state
constitutions, and no state arrived at a comprehensive or even near-comprehensive list of rights. The list, considered as a whole, however, is quite impressive. We can see in these state enumerations of fundamental rights the origins in the U.S. Constitution of Articles I, Sections 9 and 10, and the Bill of Rights. For our purposes, we do not need to catalog the rights guaranteed by the states, nor will we compare their details with the comparable provisions in the U.S. Constitution; it is sufficient to offer brief evidence that the states had identified fundamental rights that would also find some protection in the federal constitution.

All of the states that adopted constitutions between 1776 and 1784 (when New Hampshire adopted a second, and far more substantial, constitution) protected, in some form, the free exercise of religion. The formulation varied greatly. Some states expressly stated that the state guaranteed the right of free exercise so long as that the exercise did not threaten public health or safety. Maryland stated that there would be no test oaths. Nearly every state made some separate mention of an establishment of religion. On this point, however, there was far less agreement. Some states forbade government establishment of religion, others unabashedly authorized state collection of taxes for religious institutions. Most states disqualified ministers from holding public office and at least one state (North Carolina) also disqualified atheists and those who denied the truth of the Protestant religion or the authority of the Old and New Testaments. Most states guaranteed the freedom of the press and the right of assembly and petition; fewer states protected the right to free speech, and some only protected the right of speech and debate within the legislature.

State constitutions provided for citizens to keep and bear arms (and the right of conscience to refuse to bear arms) and forbid the quartering of soldiers. With respect to criminal proceedings, most states expressly prohibited searches and seizures without a warrant; preserved the right to notice of all charges and to confront witnesses; guaranteed the right to a jury, and prohibited excessive fines, bail, or punishment and double jeopardy. States prohibited bills of attainder or "sanguinary laws" and ex post facto laws. Georgia mentioned the right of habeas corpus; New York recognized the right to be represented by counsel.

Finally, the states included other rights in their constitutions that either are not found in the federal constitution or circulate in the periphery. Delaware prohibited slavery. Maryland prohibited the poll tax, and Maryland and North Carolina forbade monopolies. Pennsylvania guaranteed emigration to and from the state and the right to hunt and fish. Several states enacted provisions relating to schools and estates.

The Tension between Forms of Government and Declarations of Rights

We ought to note several additional points about state declarations of right. First, as Donald Lutz has pointed out, when states drafted the declaration of
rights and form of government sections, the bill of rights nearly always came first.131 State declarations of rights were first and foremost a declaration, a statement of who the people were that constituted the government. The early charters and constitutions specified “the shared goals and values, a shared meaning, that defined (self-defined) the basis for the people living together” and created and described “institutions for collective decision making.”132 The drafters likely considered the declaration of rights essential as a statement, but not necessarily law in the sense that the rights were enforceable—and surely not in the sense that we regard rights as enforceable by the judiciary against the legislature or executive. Rather, the government had to respect the rights found in the declaration, making the provisions self-enforcing.133 Thus, the early Framers frequently used the term “ought” instead of the mandatory “shall” in their declarations.134

Second, the bifurcation of the early state constitutions into a “declaration of rights” and a “plan or form of government” illustrates a division in thinking among the early Americans about what constitutions and governments should do. By locating the declarations of rights at the beginning of the document, the states suggested that these rights occupied a preferred position as declarations of principle. They appear as axioms that cannot be violated or, more practically, rogations, entreaties, or precatory declarations to those who would govern to respect such principles. However, beyond axiomatic expression, the declaration of rights ceded the general powers of government to the state as a political institution. In our modern conception, a bill of rights protects rights of the people against the government. They disable government or create an immunity in the people against governmental actions thought to violate their natural rights as people or citizens. It appears logical to us that the federal Bill of Rights follows the articles of the Constitution because it is these articles that give life and meaning to a government capable of trampling on our rights. In other words, it seems strange to begin a constitution that will pronounce what government can do with a statement of what government cannot do. Placement of the declaration of rights indicates that early Americans understood that they must be subject to some authority or law. That state constitutions began with a declaration of rights shows that the colonists had not completely relinquished the idea of the divine right; rather, they believed that, especially since King George had “unkinged” himself, the people were endowed with a divine, “unalienable right” of governing themselves consistently with the natural rights philosophy they had embraced.135 If such a democratic government was inevitable and itself a right, it was consonant to open state constitutions with a declaration of the rights the people did not cede to government.136

Finally, this tension between a declaration of rights and the form and powers of government played itself out more than a decade later in the drafting of the U.S. Constitution and the decision to include a bill of rights.137 Jeffersonian republicans proceeded from the assumption that government was a necessary evil and must be limited. Hamiltonian federalists argued that government was essentially good and must be empowered.138 But what did these
perspectives suggest about the need for a bill of rights? If government is
good, as Hamilton believed, is it also inevitable? If so then perhaps a bill of
rights is necessary, a position that Hamilton could not support. “[B]ills of
rights,” Hamilton argued, are “stipulations between kings and their subjects,
abridgments of prerogative in favor of privilege, reservations of rights not sur-
rendered to the prince.” In the federal constitution, “the people surrender
nothing” and accordingly “have no need of particular reservations.”139 If we
should suspect all government, as Jefferson advocated, then does a constitu-
tion that enumerates the powers of government eliminate the need for a bill of
rights? Jefferson conceded that a declaration of rights was “necessary by way of
supplement” because “a constitutive act . . . [might] leave[] some previous
article unnoticed, and raise[] implications against others.”140

James Madison would reflect later in Federalist No. 47 that although the first
state constitutions had “many excellent principles,” they also “carried] strong
marks of the haste, and still stronger of the inexperience, under which they
were formed.” These first constitutions may evidence the haste Madison spoke
of. Even in their haste, however, the drafters of the first constitutions stated
clearly enough that the people had reconstituted themselves as governments
within the boundaries of the former colonies. Congress had asked for a moment-
ous thing, and the states answered promptly and seriously. And what was done
would not be easily given up, even for a national charter. Whatever the mem-
bers of the Continental Congress thought in 1776 as they urged the states to
author their own charters, even as Congress attempted to draft articles of con-
federation, any future articles of confederation and federal constitution would
have to recognize the authority by which the states were constituted.

THE ARTICLES OF CONFEDERATION

A number of influential colonists believed that following the Declaration of Inde-
pendence, the United States should adopt a constitution. Although the Continental
Congress had urged the states to adopt their own constitutions (which most did),
it was clear that some colonists anticipated that a new constitution would super-
sede state efforts. For example, the Massachusetts Constitution stated,

The people of this commonwealth have the sole and exclusive right of governing them-

selves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exer-
cise and enjoy every power, jurisdiction and right, which is not, or may not hereafter be,
by them expressly delegated to the United States of America, in Congress assembled.141

In June 1776, Congress appointed a committee composed of one representa-
tive from each of the colonies to draft a confederation. The committee, headed
by John Dickinson of Pennsylvania, supplied a draft in July, and Congress
debated the Dickinson draft in July and August.

The Dickinson draft was a remarkably forward-thinking document, and
many of its provisions found their way into our present U.S. Constitution. An
ambitious document, it occasioned substantial controversy over questions of representation in the confederacy, authority to limit the territorial expansion of the colonies, and slavery. Among the most controversial provisions was Article III of the Dickinson draft, which provided,

**ART. III. Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation.**

Article III appeared to reserve to the states the right of self-government in “Laws, Rights, and Customs, as it may think fit,” but what Article III gave with one hand, it took with the other. The draft limited state reservations to “all matters that shall not interfere with the Articles of Confederation.” Article XVIII added that the United States would not “interfere in the internal Police of any Colony,” but it again recited that the prohibition applied “[no] further than such Police may be affected by the Articles of this Confederation.”

Dickinson’s draft, as Merrill Jensen has observed, favored “a centralized government that would take the place of the British government.” But the problem was that the states had grown independent of each other, both legally and psychologically. And while Congress debated the articles of confederation, the states had worked out their own internal constitutions, which generally purported to be complete. Once the states began operating under their own constitutions as political entities, they only reluctantly gave up power. Not only were state governments reluctant to give up their power, state constitutions, in the minds of their citizens and politicians, had filled the void left when the colonies declared themselves free of the crown.

As the confederation debates spilled over into 1777, Thomas Burke of North Carolina argued vigorously against Article III of the Dickinson draft. The reservation of internal police, Burke contended, implied that the states “resigned every other power,” and that Congress might “explain away every right belonging to the States.” As Burke pointed out, the presumption in the Dickinson Draft resided with Congress; the states reserved their internal police only insofar as it did not interfere with the operation of the Articles.

Burke successfully urged Congress to reverse the presumption. The resulting provision, found in Article II of the Articles of Confederation would become the basis for the Constitution’s enumerated powers doctrine (and, ultimately, the Tenth Amendment):

**ART. II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.**

As revised, Article II reaffirmed the final paragraph of the Declaration of Independence (that the states were sovereign), but it also recognized that
Congress had assumed some of the state’s sovereign responsibilities. Article II tried to make clear that the presumption of state sovereignty was defensible only upon proof (“expressly delegated”) that the states had ceded responsibility elsewhere; otherwise, the Articles of Confederation did not alter any distribution of power within state governments or between the states and their people. The formula fit well within eighteenth-century political thinking, which held that only one entity at a time could possess sovereignty and that once a sovereign is recognized, it cannot be dispossessed of any of its powers except by “express consent narrowly construed.” Article II, as revised, would shortly become the Tenth Amendment, and the new Amendment would test the presumption that the states and the people had reserved their powers.

NOTES

5. Ga. Const art. LVI (1777), reprinted in 2 State Constitutions, supra note 4, at 784.
6. 6 State Constitutions, supra note 4, at 3213.
9. Genesis 17:2–8 (King James).
12. Holmes, supra note 11, at 402–03.
15. Donald Lutz has carefully distinguished between contract, compact, and covenant. Contracts were agreements between parties in which each party assumed mutual obligations; while the law might enforce such agreements, the contract itself was not law. Compacts and covenants were both forms of contract. A compact is a mutual agreement having the force


19. See McAfee, supra note 1, at 10.


21. See F.W. Maitland, The Constitutional History of England (1908); Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 260–61 (1969). Indeed, the Framers of the federal Constitution believed that one of the problems leading to their own revolution was precisely that a constitution based on a tradition of practice had simply failed to supply the clarity needed to ensure that equity and justice prevailed over power. See Thomas B. McAfee, “The Constitution as Based on the Consent of the Governed–Or, Should We Have an Unwritten Constitution?” 80 Or. L. Rev. 1245, 1252–56 (2001).

22. Wardle, supra note 17, at 16.

23. Id.


26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). That the American founders believed in the unique effectiveness of written law is clear. See, e.g., McAfee, supra note 21, at 1252–55.

27. Reprinted in Colonial Origins, supra note 8, at 70.


29. Charter of New England (1620), reprinted in 3 State Constitutions, supra note 4, at 1839 (spelling modernized). See also Charter of Virginia (1606), reprinted in 7 State Constitutions, supra note 4, at 3788–89.


31. Id.


40. Tate, supra note 35, at 377–78.


42. 1 The Papers of Thomas Jefferson 214–16 (J. Boyd ed., 1950).


47. 1 The Papers of Thomas Jefferson, supra note 42, at 22.


50. Tate, supra note 35, at 381.

51. The Declaration of Independence para. 25 (U.S. 1776).

52. Id. ¶ 10, 17, and 29.

53. Id. ¶ 13, 16, 30.

54. Id. ¶ 23.

55. Id. ¶ 32. The Declaration of Independence followed closely the Virginia Constitution of 1776. The latter made even clearer that the king had “abandon[ed] the helm of government, and declar[ed] us out of his allegiance and protection.” Va. Const. of 1776 ¶ 22, reprinted in 7 State Constitutions, supra note 4, at 3815.


58. McAffee, supra note 1, at 10.

59. Quoted in Wood, supra note 21, at 293.

60. See Anonymous, “The Alarm: or, an Address to the People of Pennsylvania on the Late Resolve of Congress,” in 1 American Political Writing, supra note 24, at 321.


62. The adoption of the Rhode Island constitution brought about Dorr’s Rebellion, in which two different governments claimed the right to rule, and was at issue in one of the most important cases in constitutional history, Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See, e.g., Anonymous, “The Alarm: or, an Address to the People of Pennsylvania on the late Resolve of Congress,” in 1 American Political Writing, supra note 24, at 322; Demophilus, “The Genuine Principles of the Ancient Saxon, or English Constitution,” in 1 American Political Writing, supra note 24, at 341; and Philodemus, “Conciliatory Hunts, Attempting, by a Fair State of Matters, to Remove Party Prejudice,” in 1 American Political Writing, supra note 24, at 610, 619. See Marc W. Krumen, Between Authority & Liberty:
There appears to be some differences between Professors Kruman and Wood. Professor Wood wrote that “in all of the states in 1776 therefore (except Pennsylvania where the circumstances were peculiar) the constitutions were created by the legislatures, when they were still sitting, or by Revolutionary congresses considered to be legally imperfect legislatures, although still representative of the people.” Wood, supra note 21, at 307. Professor Kruman argues against “the usual formulation ... that the congresses of the different revolutionary states were simply legislatures writing constitutions” and insists that “no ordinary legislature wrote any of the first state constitutions.” Kruman, supra, at 24, 29. Leonard Levy has opined that “Massachusetts was the first state that formed its fundamental law by a specially elected convention,” the remainder being enacted by “legislatures, sometimes calling themselves conventions.” Leonard W. Levy, Origins of the Bill of Rights 10 (1999).

64. See Robert F. Williams, “The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutiona...


67. See Kruman, supra note 63, at 37–38.

68. Kruman, supra note 63, at 9.

69. On instruction of legislators, see, e.g., Mass. Decl. of Rights art. XIX (1780), reprinted in 3 State Constitutions, supra note 4, at 1892; N.H. Const. art. XXXII (1784), reprinted in 4 State Constitutions, supra note 4, at 2457; and N.C. Decl. of Rights art. XVIII (1776), reprinted in 5 State Constitutions, supra note 4, at 2788. On rotation in office, see, e.g., Md. Const. art. XXVII (1776), reprinted in 3 State Constitutions, supra note 4, at 1695; Mass. Const. pt. I, art. VIII (1780), reprinted in 3 State Constitutions, supra note 4, at 1890–91; N.H. Const. pt II § 10 (1784), reprinted in 4 State Constitutions, supra note 4, at 2467; N.C. Const. art. XXXVII (1776), reprinted in 5 State Constitutions, supra note 4, at 2793; and Va. Bill of Rights § 5 (1776), reprinted in 7 State Constitutions, supra note 4, at 3813. See Kruman, supra note 63, at 50–52. See also Jay S. Bybee, “Ulysses at the Mast: Democracy, Federalism, and Sirens’ Song of the Seventeenth Amendment,” 91 Nw. U.L. Rev. 500, 515–35 (1997) (discussing early practices and debates over rotation, recall, and instruction). Instruction of legislators would have been inconsistent, however, with the Madisonian view of meaningful legislative deliberation, and hence proposals to include a right of instruction in the federal Bill of Rights were rejected. Thomas B. McAffee, “The Federal System as Bill of Rights: Original Understandings, Modern Misreadings,” 43 Vill. L. Rev. 17, 118–20 (1998).

70. Anonymous, “Four Letters on Interesting Subjects (1776),” in 1 American Political Writing, supra note 24, at 385.

71. This is one reason that attempts to draw a broad distinction between the Ninth and Tenth Amendments—the first relating to “rights” and the second being about “powers”—does not really work. See, e.g., McAffee, supra note 1, at 83 & n. 4. “Most Americans, and even many legal thinkers, find it difficult to fathom that the framers of the unamended Constitution saw this limited grant of federal authority as an adequate alternative to a comprehensive statement of rights in a declaration or bill of rights.” Id. at 83.

74. Id. at 349–52.
76. Wood, supra note 21, at 443–44.
77. McAfee, supra note 72, at 100–02. Madison shared the view of most Federalist supporters of the Constitution that “liberty may be endangered by the abuses of liberty, as well as by the abuses of power,” and “the former rather than the latter is apparently most to be apprehended by the United States.” The Federalist No. 63, at 422, 428–29 (James Madison) (Jacob E. Cooke ed., 1961).
78. James Madison, “Debates in the House of Representatives (June 8, 1789),” in Creating the Bill of Rights: The Documentary Record From the First Federal Congress 79 (Helen E. Veit et al. eds., 1991) [hereinafter Creating the Bill of Rights].
79. Id.
82. Del. Const. preamble, reprinted in 1 State Constitutions, supra note 4, at 562. See also N.H. Const. preamble (1776), reprinted in 4 State Constitutions, supra note 4, at 2451–53; and N.J. Const. preamble (1776), reprinted in 5 State Constitutions, supra note 4, at 2594–95. In its 1784 constitution, New Hampshire stated that “government of right originates from the people, [and] is founded in consent.” N.H. Const. preamble (1784), reprinted in 4 State Constitutions, supra note 4, at 2453. Delaware’s second constitution, adopted in 1792, followed the federal constitution (“We the people . . . .”). Del. Const. preamble (1792), reprinted in 1 State Constitutions, supra note 4, at 568.
83. N.H. Const. art. 4 (1776), reprinted in 4 State Constitutions, supra 4, at 2452.
84. N.J. Const. art. XXIII (1776), reprinted in 5 State Constitutions, supra note 4, at 2598.
85. S.C. Const. art. 1 (1776), reprinted in 6 State Constitutions, supra note 4, at 3243 (“full and free representation of the people of this colony”); Ga. Const. preamble (1777), reprinted in 2 State Constitutions, supra note 4, at 777–78. See also N.Y. Const. art. 1(1777), reprinted in 5 State Constitutions, supra note 4, at 2628; Va. Const. preamble (1776), reprinted in 5 State Constitutions, supra note 4, at 3814–15.
86. N.C. Const. art. 1 (1776), reprinted in 5 State Constitutions, supra note 4, at 2787; Pa. Const. preamble (1776), reprinted in 5 State Constitutions, supra note 4, at 3081.
87. Va. Decl. of Rights § 3 (1776), reprinted in 7 State Constitutions, supra note 4, at 3813; Pa. Const. of 1776 § V, reprinted in 5 State Constitutions, supra note 4, at 3082. The Virginia Declaration of Rights stated that the right to reform or abolish government belonged to “a majority of the community.” The Pennsylvania Constitution omitted the reference to the majority. See also Donald S. Lutz, The Virginia Declaration of Rights and Constitution, in Roots of the Republic: American Founding Documents Interpreted 150–53, 155 n.3 (Stephen L. Schechter ed., 1990).
88. N.J. Const. preamble (1776), reprinted in 5 State Constitutions, supra note 4, at 2594.
89. Md. Const. art. I (1776), 3 State Constitutions, supra note 4, at 1686.
90. Mass. Const. preamble (1780), reprinted in 3 State Constitutions, supra note 4, at 1888–89.
92. Ga. Const. art. VII (1777), reprinted in 2 State Constitutions, supra note 4, at 779. See also N.C. Const. preamble, reprinted in 5 State Constitutions, supra note 4, at 2789–90; N.J. Const. art. XXII (1776), reprinted in 5 State Constitutions, supra note 4, at 2598; N.Y. Const. art. XXXV (1777), reprinted in 5 State Constitutions, supra note 4, at 2634.
94. See, e.g., Del. Const. art. XXV (1776), reprinted in 1 State Constitutions, supra note 4, at 566–67; Md. Decl. of Rights 111 (1776), reprinted in 3 State Constitutions, supra note 4, at 1686; N.J. Const. art. XII (1776), reprinted in 5 State Constitutions, supra note 4, at 2598; N.Y. Const. art. XXXV (1777), reprinted in 5 State Constitutions, supra note 4, at 2635.
96. See, e.g., Del. Const. art. XXX (1776), reprinted in 1 State Constitutions, supra note 4, at 568; Md. Const. art. LIX (1776), reprinted in 3 State Constitutions, supra note 4, at 1791.
97. See, e.g., Md. Decl. of Rights V (1776), reprinted in 3 State Constitutions, supra note 4, at 1687; Pa. Decl. of Rights V (1776), reprinted in 5 State Constitutions, supra note 4, at 3082–83; and Va. Decl. of Rights § 3 (1776), reprinted in 7 State Constitutions, supra note 4, at 3813.
99. Penn. Const. of 1776, Declaration of Rights § 1, reprinted in 5 State Constitutions, supra note 4, at 3082.
100. See, e.g., McAffee, supra note 91, at 778–80.
104. As one of the current authors has observed, the provisions guaranteeing separation of powers in state declarations of rights “reflects their framers’ recognition of the connection between governmental structure and the preservation of liberty.” McAffee, supra note 1, at 25.
105. Id. at 26.
106. Del. Const. art. VII (1776), reprinted in 1 State Constitutions, supra note 4, at 563; Md. Const. art. XXV (1776), reprinted in 3 State Constitutions, supra note 4, at 1688; N.J. Const. art. VII (1776), reprinted in 5 State Constitutions, supra note 4, at 2596; N.C. Const.
art. XV (1776), reprinted in 5 State Constitutions, supra note 4, at 2791; Pa. Const. § 19 (1776), reprinted in 5 State Constitutions, supra note 4, at 3086; S.C. Const. art. III (1776), reprinted in 6 State Constitutions, supra note 4, at 3243; and Va. Const. (1776), reprinted in 7 State Constitutions, supra note 4, at 3816.

107. See, e.g., Ga. Const. art. XXII (1777), reprinted in 2 State Constitutions, supra note 4, at 781; Md. Const. art. XXI (1776), reprinted in 3 State Constitutions, supra note 4, at 1694; and N.C. Const. art. XV (1776), reprinted in 5 State Constitutions, supra note 4, at 2791.

108. Md. Decl. of Rights XXXI (1776), reprinted in 3 State Constitutions, supra note 4, at 1689.


110. Ga. Const. art. XIX (1777), reprinted in 2 State Constitutions, supra note 4, at 781; Md. Decl. of Rights VII (1776), reprinted in 3 State Constitutions, supra note 4, at 1687; Md. Const. art. LX (1776), reprinted in 3 State Constitutions, supra note 4, at 1701; N.C. Decl. of Rights V (1776), reprinted in 5 State Constitutions, supra note 4, at 2787.

111. Del. Decl. of Rights §§ 2, 3 (1776), reprinted in 1 State Constitutions, supra note 4, at 566; Ga. Const. art. LVI (1777), reprinted in 2 State Constitutions, supra note 4, at 784; Md. Decl. of Rights XXXIII (1776), reprinted in 3 State Constitutions, supra note 4, at 1689; Mass. Decl. of Rights II (1780), reprinted in 3 State Constitutions, supra note 4, at 1889; N.H. Const. art. V (1784), reprinted in 4 State Constitutions, supra note 4, at 2454; N.J. Const. art. XVIII (1776), reprinted in 5 State Constitutions, supra note 4, at 2597; N.Y. Const. art. XXXVIII (1777), reprinted in 5 State Constitutions, supra note 4, at 2636–37; N.C. Decl. of Rights XIX (1776), reprinted in 5 State Constitutions, supra note 4, at 2788; Pa. Decl. of Rights II (1776), reprinted in 5 State Constitutions, supra note 4, at 3082; S.C. Const. art. XXXVIII (1778), reprinted in 6 State Constitutions, supra note 4, at 3255–56; Va. Bill of Rights § 16 (1776), reprinted in 7 State Constitutions, supra note 4, at 3814.

112. Ga. Const. art. LVI (1777), reprinted in 2 State Constitutions, supra note 4, at 784.

113. Md. Decl. of Rights XXXV (1776), reprinted in 3 State Constitutions, supra note 4, at 1690.

114. See, e.g., Del. Const. art. XXIX (1776), reprinted in 1 State Constitutions, supra note 4, at 567; N.J. Const. art. XIX (1776), reprinted in 5 State Constitutions, supra note 4, at 2597; N.C. Decl. of Rights XXXIV (1776), reprinted in 5 State Constitutions, supra note 4, at 2788; Pa. Decl. of Rights II (1776), reprinted in 5 State Constitutions, supra note 4, at 3082. See also Ga. Const. art. LVI (1776), reprinted in 2 State Constitutions, supra note 4, at 784 (providing that people residing in state “shall not, unless by consent, support any teacher or teachers except those of their own profession”).

115. Md. Decl. of Rights XXXIII (1776), reprinted in 3 State Constitutions, supra note 4, at 1689; Mass. Decl. of Rights II (1780), reprinted in 3 State Constitutions, supra note 4, at 1889; and N.H. Const. art. VI (1784), reprinted in 4 State Constitutions, supra note 4, at 2454.
116. Del. Const. art. XXIX (1776), reprinted in 1 State Constitutions, supra note 4, at 567; Ga. Const. art. LXII (1777), reprinted in 2 State Constitutions, supra note 4, at 785; N.Y. Const. art. XXXIX (1777), reprinted in 5 State Constitutions, supra note 4, at 2637; N.C. Decl. of Rights XXXI, XXXII (1776), reprinted in 5 State Constitutions, supra note 4, at 2793; and S.C. Const. art. XXI (1778), reprinted in 6 State Constitutions, supra note 4, at 3246.

117. Ga. Const. art. LXI (1777), reprinted in 2 State Constitutions, supra note 4, at 785; Md. Const. Decl. of Rights VIII, XI (1776), reprinted in 3 State Constitutions, supra note 4, at 1687; Mass. Decl. of Rights XVI, XIX, XXI (1780), reprinted in 3 State Constitutions, supra note 4, at 1892; N.H. Const. art. XXII, XXX, XXXII (1784), reprinted in 4 State Constitutions, supra note 4, at 2456-57; N.C. Decl. of Rights XVIII (1776), reprinted in 5 State Constitutions, supra note 4, at 2788; Pa. Decl. of Rights XII, XVI (1776), reprinted in 5 State Constitutions, supra note 4, at 3083-84; S.C. Const. art. XLIII (1778), reprinted in 6 State Constitutions, supra note 4, at 3257; and Va. Bill of Rights § 12 (1776), reprinted in 7 State Constitutions, supra note 4, at 3814.


119. Md. Decl. of Rights XXVIII (1776), reprinted in 3 State Constitutions, supra note 4, at 1688; Mass. Decl. of Rights XXVII (1780), reprinted in 3 State Constitutions, supra note 4, at 1892; and N.H. Const. art. XXVII (1784), reprinted in 4 State Constitutions, supra note 4, at 2456.

120. Md. Decl. of Rights XXIII (1776), reprinted in 3 State Constitutions, supra note 4, at 1688; Mass. Decl. of Rights XIV (1780), reprinted in 3 State Constitutions, supra note 4, at 1891; N.H. Const. art. XIX (1784), reprinted in 4 State Constitutions, supra note 4, at 2456; N.C. Decl. of Rights XI (1776), reprinted in 5 State Constitutions, supra note 4, at 2788; Pa. Decl. of Rights X (1776), reprinted in 5 State Constitutions, supra note 4, at 3083; and Va. Bill of Rights § 10 (1776), reprinted in 7 State Constitutions, supra note 4, at 3814.

121. Md. Decl. of Rights XIX–XXI (1776), reprinted in 3 State Constitutions, supra note 4, at 1688; Mass. Decl. of Rights XII (1780), reprinted in 3 State Constitutions, supra note 4, at 1890; N.H. Const. art. XV (1784), reprinted in 4 State Constitutions, supra note 4, at 2455; N.C. Decl. of Rights VII (1776), reprinted in 5 State Constitutions, supra note 4, at 2787; and Pa. Decl. of Rights IX (1776), reprinted in 5 State Constitutions, supra note 4, at 3083.

122. Ga. Const. art. LIXI (1777), reprinted in 2 State Constitutions, supra note 4, at 785; Md. Decl. of Rights III (1776), reprinted in 3 State Constitutions, supra note 4, at 1686-87; Mass. Decl. of Rights XV (1780), reprinted in 3 State Constitutions, supra note 4, at 1891; N.H. Const. art. XX (1784), reprinted in 4 State Constitutions, supra note 4, at 2456; N.Y. Const. art. XLI (1777), reprinted in 5 State Constitutions, supra note 4, at 2637; N.C. Decl. of Rights IX, XIV (1776), reprinted in 5 State Constitutions, supra note 4, at 2787–88; Pa. Decl. of Rights XI (1776), reprinted in 5 State Constitutions, supra note 4, at 3083; Pa. Const. § 25 (1776), reprinted in 5 State Constitutions, supra note 4, at 3088; and Va. Decl. of Rights §§ 8, 11 (1776), reprinted in 7 State Constitutions, supra note 4, at 3813–14.

123. Ga. Const. art. LIX (1776), reprinted in 2 State Constitutions, supra note 4, at 785; Md. Decl. of Rights XIV, XXII (1776), reprinted in 2 State Constitutions, supra note 4, at 1688; Mass. Decl. of Rights XXVI (1780), reprinted in 3 State Constitutions, supra note 4, at 1892; N.H. Const. art. XVI, XXXIII (1784), reprinted in 4 State Constitutions, supra note 4, at 2456.
4, at 2455, 2457; N.C. Decl. of Rights X (1776), reprinted in 5 State Constitutions, supra note 4, at 2788; Pa. Const. § 29 (1784), reprinted in 5 State Constitutions, supra note 4, at 3089; and Va. Bill of Rights § 9 (1776), reprinted in 7 State Constitutions, supra note 4, at 3813.

124. Md. Decl. of Rights XXV, XXIV (1776), reprinted in 3 State Constitutions, supra note 4, at 1688; Mass. Decl. of Rights XXIV–XXV (1780), reprinted in 3 State Constitutions, supra note 4, at 1892; N.C. Decl. of Rights XXIV (1776), reprinted in 5 State Constitutions, supra note 4, at 2788.

125. Ga. Const. art. LX (1776), reprinted in 2 State Constitutions, supra note 4, at 785.

126. N.Y. Const. art. XXXIV (1777), reprinted in 5 State Constitutions, supra note 4, at 2635.

127. Del. Const. art. XXVI (1776), reprinted in 1 State Constitutions, supra note 4, at 567.

128. Md. Decl. of Rights XIII, XXXIX (1776), reprinted in 3 State Constitutions, supra note 4, at 1687–89; and N.C. Decl. of Rights XXXII (1776), reprinted in 5 State Constitutions, supra note 4, at 2788.


130. Ga. Const. art. LV, LVIII (1776), reprinted in 2 State Constitutions, supra note 4, at 784–85; N.J. Const. art. XVII (1776), reprinted in 5 State Constitutions, supra note 4, at 2597; and Pa. Const. § 43 (1776), reprinted in 5 State Constitutions, supra note 4, at 3091.

131. Lutz, supra note 8, at xxxvii.

132. Id. at xxxvi.

133. Tarr, supra note 101, at 76–79.

134. See, e.g., McAfee, supra note 1, at 24; Donald S. Lutz, Popular Consent and Popular Control: Whig Political Theory in Early State Constitutions 64–66 (1980). While there is no question that those who adopted the Constitution had lived under an unwritten constitution, developments that occurred during the early years of the American republic “marked a shift from viewing a constitution as the principles distilled from custom and practice, reflecting an ancient wisdom validated by a rational process, to a supreme enactment of the sovereign people.” Thomas B. McAfee, “Prolegomena to a Meaningful Debate of the Unwritten Constitution Thesis,” 61 U. Cin. L. Rev. 107, 131–32 (1993). But the transition to viewing constitutions this way was not completed before the adoption of the federal constitution.


136. See Jack Nips, “The Yankee Spy,” reprinted in 2 American Political Writing, supra note 24, at 977 (“Whenever it is understood that all power is in the monarch—that subjects possess nothing of their own, but receive all from the potentate, then the liberty of the people is commensurate with the bill of rights that is squeezed out of the monarch.”).

137. For a treatment of how the tension between collective self-rule and the idea of stating limits on the power of the people’s representatives was confronted in the drafting of the federal Bill of Rights, see McAfee, supra note 1, at 119–147.


139. See, e.g., The Federalist No. 84 (Alexander Hamilton).


141. Mass. Decl. of Rights IV (1780), reprinted in 3 State Constitutions, supra note 4, at 1890.
142. Jensen, supra note 48, at 250; McDonald, supra note 138, at 37.
143. Jensen, supra note 48, at 111; see, also, id. at 83–84.
The Drafting of the Ninth and Tenth Amendments

The traditional understanding of the Ninth and Tenth Amendments can only be understood against the backdrop of the arguments used to defend the decision of the Constitution’s Framers to omit a bill of rights. This defense placed its emphasis on the structure of the federal government, and the role it was to play in securing the people’s rights. In September of 1787, the Convention that drafted the Constitution rejected a proposal to establish a committee to draft a bill of rights for the proposed Constitution, as well as a subsequent call for a provision to guarantee freedom of the press. Roger Sherman, an important delegate to the Convention, argued that a free press guarantee was “unnecessary” because “[t]he power of Congress does not extend to the Press.” Stating the same point more generally, George Washington later explained that the proposed Constitution did not need a bill of rights because “the people evidently retained every thing which they did not in express terms give up.” Defenders of the Constitution relied on the example of the Articles of Confederation—a document with limited and enumerated powers that generated no opposition from those interested in securing basic rights. In The Federalist, for example, Madison posed the question, “Is a Bill of Rights essential to liberty?” He answered that the “Confederation had no Bill of Rights.” The basic idea was simple—if you have granted an enumerated set of limited powers, you have accomplished the same thing as if you had included a bill of rights.

The defenders of the proposed Constitution had consistently relied on the enumeration of powers in Article I as the equivalent of a bill of rights. Article I had “by positively securing what is not expressly delegated,” provided “an explicit reservation of every right and privilege which is nearest and most agreeable to the people.” It was thus “no accident that the Ninth Amendment was placed alongside the Tenth,” for “[b]oth provisions originally guarded the federalist structure of the Constitution.” But the Constitution’s defenders went even further, arguing that the inclusion of a bill of rights would create an inference against all rights omitted from the bill of
rights. As James Wilson said it in Pennsylvania, “If we attempt an enumeration [of rights], everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete.”

In the years leading to the Philadelphia Convention, “Americans who discussed natural liberty and constitutions typically assumed that only such natural liberty as was reserved by a constitution would be a constitutional right.” It was a standard view that the state governments, “unlike governments of delegated and enumerated powers had (as representatives of the sovereign people) all powers not constitutionally forbidden them.” The consistent understanding was that as a government of “plenary” power, “a state constitution does not grant governmental power but merely structures and limits it.” To its Framers, precisely because the proposed federal Constitution gave power to the national government only when it was explicitly conferred, it raised an inference in favor of liberty. James Wilson explained this before the Pennsylvania Ratifying Convention:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] every thing which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and every thing which is not given, is reserved.

THE POTENTIAL RISKS OF THE CONSTITUTION, WITH AND WITHOUT A BILL OF RIGHTS

It is often unnoticed that the argument from the grant of limited federal powers as a device for securing rights is part of the argument that a bill of rights would create the danger of ceding too many rights to government. Indeed, an implication of a bill of rights in many minds was precisely that the government was empowered to do whatever had not been forbidden to it, an assumption at odds with the Federalist conception of the enumerated powers scheme. For example, Wilson saw the inclusion of a bill of rights as a clear implication that the people had thrown “all implied power into the scale of government.” By contrast, the Constitution as drafted “reserves all implied power to the people.” Why would this be? Because, according to Wilson, you may choose to protect rights by stating a limited grant of power, which is what the proposed Constitution embodied, or you may protect rights in a
government of general legislative powers by stating the rights as “exceptions” to the grant of powers—that is, by stating them as a bill of rights, or as a statement of the limits on the powers you have granted to government.

Wilson stated a general understanding of the power granted to legislatures by the state constitutions. As a leading scholar on the early state constitutions, Professor Donald Lutz, has noted, the drafters of those constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.”18 When the Constitution was briefly considered by Congress before its transmittal to the states, Nathaniel Gorham of Massachusetts explained that “a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers.”19 The natural rights were viewed as “imperfect” rights that did not become constitutional and legal rights until embodied in a written Constitution.20 Indeed, it is clear that “the provisions contained in the state constitutions were not drafted as legal limitations on political power,”21 and that when James Madison drafted a proposed Bill of Rights for the federal Constitution he deliberately used language of command and prohibition to state specific limits on government power and steered away from “language that could be construed as stating open-ended limits on government power.”22

Modern readers have been tempted to believe that Wilson was concerned that unwritten, inherent limitations on government would be sacrificed by a bill of rights. But Wilson could not have been concerned that a bill of rights might exclude unwritten limitations on government because, outside the context of a government of enumerated powers, he was very clear that there would not be any enforceable, unwritten limitations on government. Wilson later confirmed this himself:

In short, … I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given [as in the state constitutions], which is not the principle of the proposed Constitution.23

Wilson recognized that the state constitutions needed bills of rights to clarify the limits that the people would impose on their state governments.

James Iredell, an important defender of the Constitution, and later an Associate Justice on the Supreme Court, made the point even more clearly before the North Carolina Ratifying Convention:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [federal] Constitution before us, I think … a bill of rights is not only unnecessary, but would be absurd and dangerous.24
Wilson and Iredell made clear that without the enumerated powers scheme, there would have been no security for the natural rights, unless those rights were explicitly protected by a bill of rights. The natural rights did not of themselves create implied constitutional limitations on government power.

Unsurprisingly, then, Wilson clarified that if “a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been ... necessary to stipulate that the liberty of the press should be preserved inviolate.” Indeed, given that Congress would be empowered to regulate the press in the District of Columbia, given its general regulatory powers there, the “compact” that should be adopted to govern the District should include a provision for freedom of the press. But such a guarantee in the federal Constitution would be “merely nugatory” because no such regulatory power had been granted to Congress; indeed, such a guarantee would actually be dangerous because it could be construed “to imply that some degree of power was given, since we undertook to define its extent.”

The Federalist objection to a bill of rights, then, flowed directly from the contention that the enumerated powers scheme defined and limited federal legislative power and served as a substitute for a declaration of specific rights limitations on government power. The objection amounted to a claim that an attempt to adopt the device of limiting provisions would undermine the system already in place. The “mischief,” then, that the Constitution’s proponents feared from inclusion of a bill of rights was the inference that a bill of rights’ statement of specific limitations on government powers might be taken as exclusive, to the detriment of the security of rights provided for by the federal scheme of limited powers.

All too often, the Federalist argument that enumerating exceptions to powers might generate the conclusion that Congress was intended to be a legislature of “general powers,” subject only to the exceptions set forth in a bill of rights, is misconstrued as an argument expressing fear of losing implied rights. It is seldom noted that these arguments almost invariably object to a bill of rights being “annexed to the federal plan.” One looks in vain to discover similar objections being advanced against including a bill of rights in the state constitutions. Little wonder that someone as thoughtful and sophisticated as James Madison would link the two arguments together. Summing up the ratification debate argument, it was Madison who contended that “the Constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be necessary as if the residuum was thrown into the hands of the government.” And when Madison presented his proposed Bill of Rights to Congress, he advanced this very argument:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not
singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against. 35

THE RISKS OF FAILING TO “RESERVE” THE POWERS NOT GRANTED

Just as the Federalists feared the undermining of the rights-protective enumerated powers scheme, their anti-Federalist opponents were concerned that the Constitution’s drafters had omitted the equivalent of Article II of the Articles of Confederation. It was Article II that provided that each state “retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.” 36 Opponents of the proposed Constitution contended that, given the omission of an Article II provision, the Constitution would be construed as a surrender of all rights and as confirming an intent to create a government of unlimited powers. 37 It is thus no coincidence that the ratification-period writings and speeches objecting to the omission of a bill of rights almost uniformly refer to the omission of a provision expressly reserving all rights and powers not specifically granted and demand a remedy to this omission as a part of the proposed bill of rights. 38

This is why Samuel Adams could refer to a proposal for a general reservation of powers and assert: “This appears, to my mind, to be a summary of a bill of rights, which gentlemen are anxious to obtain.” 39 In Virginia, Patrick Henry summed up his argument that a bill of rights was “indispensably necessary” by insisting “that a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government.” 40 In North Carolina, Samuel Spencer went so far as to contend that if the Constitution included a guarantee that “every power, jurisdiction, and right, which are not given up by it, remain in the states”—the equivalent of Article II of the Articles of Confederation, the provision that inspired our Tenth Amendment—there would be no need for a bill of rights. 41 And George Mason insisted that without such a general reservation “many valuable and important rights would be concluded to be given up by implication.” 42

AVOIDING THE RISKS: DRAFTING THE NINTH AND TENTH AMENDMENTS

The Proposal of the Virginia Ratifying Convention

It is critical to understand that the history of the drafting and consideration of the Ninth and Tenth Amendments began at the Virginia Ratifying Convention in July of 1788. The convention appointed a committee to draft recommended
amendments, and this committee included such important Federalists as John Marshall, George Wythe, and James Madison, as well as leading anti-Federalists, Patrick Henry and George Mason. Virginia’s first proposal reflected the anti-Federalist demand for an express reservation of rights and powers and resembled the second Article of Confederation. It provided: “That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.”

Proposals anticipating the Tenth Amendment were offered, however, by each ratifying convention that could propose amendments. These proposals were proffered because the fears that gave rise to the Tenth Amendment stood near the center of the debate over the omission of a bill of rights. Modern legal scholars have largely perceived the Tenth Amendment as nothing more than a federalism provision relating to state and federal powers. In general it has not been thought of as an individual rights provision—hence, law school courses dealing with the Bill of Rights, even those dealing with incorporation of the Bill of Rights through the Fourteenth Amendment, have typically ignored the Tenth Amendment. But the anti-Federalists who insisted on a provision for reserving rights and powers to the people saw it as, among other things, a way to protect the people’s rights. Even their Federalist opponents agreed that it was important to reserve as the people’s rights all the powers not granted to the federal government, but they argued that Article I of the Constitution already reserved rights to the people by enumerating a limited set of powers to the federal government.

Virginia’s seventeenth proposal, on the other hand, spoke more directly to the Federalist argument that enumerating rights would threaten the principle of limited powers. It reads as follows:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

During the Convention’s proceedings both sides had addressed the potential danger presented by a bill of rights. As a result, the drafting committee recommended an amendment designed to resolve these oft-expressed fears. From this recommended amendment, Madison drafted what became the Ninth Amendment.

It is noteworthy that the New York ratifying convention addressed both concerns expressed during the debate over ratification in a single proposed amendment. It declared:

[T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers,
do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution.\textsuperscript{50}

Notice first that these proposals guaranteed as rights all the powers not “delegated” to the federal government, but they also focused directly on avoiding an extension of congressional powers, in derogation of the contemplated scheme of enumerated, limited powers. This reflects that the most serious risk presented by a bill of rights was its threat to the rights-protective enumerated powers scheme. The amendment could be stated as prohibiting an inference of extended powers precisely because the rights that might be jeopardized by an enumeration of rights were those secured by the Constitution’s enumerated powers. With the inference of extended powers foreclosed, the rights retained by federal structure would be secure.\textsuperscript{51}

The specifics of the text of the proposed amendment confirm this general impression. The first clause, for example, which prohibits an inference of extended powers from specified prohibitions, attempts to foreclose exactly what Wilson had feared—specifically, that a superfluous free press guarantee might be read as suggesting that some regulatory power had actually been granted by implication. The second clause of Virginia’s proposal also confirms that the feared mischief was an inference that the provisions of the Bill of Rights had been substituted for the prior-existing scheme of enumerated powers. This clause initially provides that some of the limitations in the Bill of Rights might constitute “exceptions to the specified powers,”\textsuperscript{52} a construction that does not pose a threat to the concept of enumerated powers, because it merely recognizes that some of the specifically granted powers might be broad enough to be abused.\textsuperscript{53} It then further clarifies that other stated prohibitions, those that might well be redundant of the security offered by the enumerated powers scheme, should be viewed “as inserted merely for greater caution” rather than as suggestive of extended, or general, national powers that require limitations.\textsuperscript{54}

The purpose of Virginia’s proposed amendment, then, was to clarify that the Constitution would secure rights both through the enumeration of limitations on government power and the general reservation of rights through the scheme of enumerated powers. The specified rights limitations were supposed to supplement, rather than undercut, the “enumerated powers” strategy adopted by the Philadelphia Convention.\textsuperscript{55} Given the nature of the process of enumerating powers and reserving rights, it simply misses the point to claim that these state proposals reflected “emphasis on states’ rights, not the sovereignty of the people” inasmuch as popular sovereignty was exercised through the state ratifying conventions.\textsuperscript{56}

\textbf{The Ninth and Tenth Amendments in Congress}

There is reason to think that Madison would have understood and embraced the purposes of the Virginia Convention. He was, after all, a key
participant in the debate over the omission of a bill of rights, and before the Virginia Convention he offered the argument that a bill of rights would be dangerous as well as unnecessary. Madison was, moreover, a member of the committee appointed by the Virginia Convention to draft the Virginia proposal to meet the oft-expressed fears concerning a bill of rights. Madison begins by restating the standard argument that leads to the Tenth Amendment and, eventually, to the Ninth as well. “Because the powers are enumerated,” it follows “that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people.” Or as he summarized the Federalist position, “a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government.” In short, Madison confirmed the correlation between the argument that a bill of rights was not necessary and the argument that a bill of rights would create a “danger” for the system of rights recognized by the Constitution.

In turn, Madison assured Congress that the feared danger “may be guarded against,” and that he had drafted a proposal to that end. Madison’s draft of what would become the Ninth Amendment reads as follows:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Madison’s language rather clearly tracks the Virginia proposal aimed at addressing the Federalists’ fears of adding a bill of rights to the Constitution. It prohibits an inference of enlarged powers from “exceptions” to granted powers, and it identifies the same permissible inferences—that the exceptions are either “actual limitations” on the granted powers, where they are essential notwithstanding the enumerated powers scheme, or inserted merely as cautionary provisions, where the same security would likely have come about from the enumerated powers scheme. The obvious continuity in language between the Virginia-recommended amendment and Madison’s proposal confirms that Madison worked from the Virginia amendment and that his goal was to address the concerns raised during the ratification debates. Read together with Madison’s explanation of the mischief to which the provision was to respond, moreover, the proposal seems to provide the contemplated “remedy” of a provision expressly prohibiting the feared inference of essentially unlimited powers subject only to specifically enumerated limitations—to the end of securing the rights retained by the scheme of enumerated powers.

Some commentators have emphasized, however, that Madison’s proposed amendment included language not found in its Virginia precursor. The proposed amendment’s language not only prohibited an inference of enlarged federal powers, but also an inference that would “diminish the just importance of other rights retained by the people.” Accordingly, it has been suggested that
Madison’s language “stamped the Bill of Rights with his own creativity,” and that his proposal, in contrast to the Virginia-proposed amendment, addressed for the first time the question of unenumerated rights. But Madison linked the proposed amendment to the ratification-period debate over a bill of rights and did not intimate that he had made a creative contribution. Indeed, the suggestion that Madison’s proposal was the first to address the question of unenumerated rights ignores the fact that the Virginia proposal was drafted to ensure the security of the rights omitted from the enumeration of rights in a bill of rights—the rights already secured by the system of enumerated powers.

The Ratification Debate in Virginia

The continuity between the Virginia proposal, with its emphasis on preserving the rights-protective scheme of limited powers, and the final draft of the Ninth Amendment was strongly confirmed by Madison during the process of ratifying the Bill of Rights. Late in the fall of 1789, the amendments proposed by Congress came up for ratification by the Virginia assembly. An important Virginian, Edmund Randolph, objected to the final form of the proposed Ninth Amendment and, in particular, to the changes Congress had introduced. Describing the proposed amendment as a “reservation against constructive power,” Randolph argued that it should operate “as a provision against extending the powers of Congress” rather than “as a protection to rights reducable [sic] to no definitive certainty.”

In a letter to Madison summarizing the assembly debate, assemblyman Hardin Burnley suggested that he and others did not “see the force of the distinction” presumed by Randolph’s argument. Burnley contended that if the Constitution’s grant of “powers [is] not too extensive already,” the Amendment as drafted would protect “the rights of the people & of the States” and prevent “an improper extension of power.” Burnley expressed difficulty in understanding why Randolph could not perceive that the other rights “retained by the people” referred to the residual rights defined by reference to enumerated powers. Thus, Burnley was confident that the people’s rights would be adequately protected by the proposed amendment, provided the Convention had adequately defined federal powers in the first place.

In relaying the report of the assembly debate to President Washington, Madison adopted Burnley’s argument, rejecting the idea that there was a significant distinction between the Virginia proposal and the amendment proposed by Congress, a distinction he thought “fanciful.” According to Madison, so long as federal powers were adequately defined so that one could draw a line “between the powers granted and the rights retained,” it hardly mattered whether the rights were secured by stating that they may not be abridged, or that the powers should not be extended. Both Burnley and Madison, then, rejected criticism of the final form of the Ninth Amendment by contending that the Amendment merely stated the substance of the original
Virginia proposal in different language. Burnley’s entire argument rested on the supposition that the Constitution’s grant of “powers [is] not too extensive already,” and Madison’s on the assumption that one could indeed draw a line “between the powers granted [and] the rights retained.” They agreed that the Ninth Amendment’s purpose was to preserve the security of rights, which was supplied by the federal system of enumerated powers.

The Ninth Amendment “Remedy” and Natural Rights

Despite the evidence reviewed above, some analysts have contended that the Ninth Amendment was written to affirm that the Constitution generally incorporates the idea of natural rights limits on government powers, apart from the limits supplied by the enumerated powers scheme or the Bill of Rights. To a large extent, this view rests on a misconstruction of arguments against a bill of rights advanced by those who defended the Constitution. In modern times, for example, we often have seen cited a speech by James Iredell in which he predicted that adoption of a bill of rights would lead to a construction of the Constitution as including only the rights named in the bill of rights. But Iredell was quite satisfied with the presumption against government power and in favor of rights that he took as implicit in the proposed Constitution’s system of limited and enumerated powers. It is sometimes not recognized that Iredell was quite clear that a bill of rights would be both “necessary” and “proper” in a constitution that created “a general legislature,” like those in the states, because otherwise the rights the people deserved would be insecure. So the “danger” of rights to which Iredell referred was uniquely related to the idea of reversing the inference against power in favor of rights that he perceived as logically arising from enumerated federal powers.

Quite recently, however, some have argued that a pure natural rights reading is confirmed by the particular language embodied in the Ninth Amendment. History, it has been contended, reveals a “specific understanding of the phrase ‘retained by the people.’” We are told that “under social contract theory,” this phrase refers to “natural rights ‘retained’ during the transition from the state of nature to civil society.” Madison would have realized this in choosing language that conveyed the idea of preexisting rights.

It is certainly true that social contract theory did hold that some rights are, or ought to be, “retained” as individuals enter civil society, but the Ninth Amendment is not plausibly read as simply restating this familiar doctrine. For one thing, the Ninth Amendment’s text refers to “other” rights retained by the people, suggesting that the enumerated rights in the Bill of Rights are also retained. But the rights in the Bill of Rights included a good deal more than what we think of as natural rights. In fact, it was Madison who explained to Congress that bills of rights often “specify positive rights” that, although they are not granted by nature, are “essential to secure the liberty of the people.”
The Federalist proponents of the Constitution, James Madison included, were emphatic that as important as certain natural rights were, including those characterized as “inalienable” natural rights, such as freedom of the press, they were not “declaratory” in the sense of being implicit in a written Constitution. According to James Wilson, a free press provision would be absolutely essential in a state constitution because state legislatures were legislatures of general legislative powers—thus, although a free press provision had no place in the federal Constitution, perhaps one should be added to the fundamental law governing the District of Columbia.85 This is why proponents of the Bill of Rights could characterize its provisions as they did:

When the First Congress proposed the Bill of Rights to the states, it described the Bill as encompassing “further declaratory and restrictive clauses” added “in order to prevent misconstruction or abuse of [the Constitution’s] powers.” The idea of “restrictive” clauses preventing “abuse” of constitutional powers is clear enough today. But many today seem not to understand the role of “declaratory” clauses designed to prevent “misconstruction”—designed, that is, to clarify.”86

The federal Bill of Rights included provisions, such as the guarantee of freedom of the press, that was intended to be only “declaratory” of the implications of this being a government of enumerated powers; other provisions, such as the clause prohibiting “unreasonable” searches and seizures, might well be “restrictive” of the powers actually granted to Congress.87

Moreover, if we review the ratification debate, we will discover that the word “retained” permeated the discussion of enumerated powers and reserved rights that was so central to the Bill of Rights debate. Madison himself, for example, explained that “because the powers are enumerated,” it followed that “all that are not granted by the constitution are retained.”88 We might also recall that Madison rejected the suggestion of Edmund Randolph that the Ninth Amendment should not be framed as a guarantee of “retained rights” on the ground that, however it was finally worded, the important thing was that the powers “retained” delineated the difference between the rights held by the people and the powers granted to Congress. It is true that, as illustrated in his writings in The Federalist Papers, Madison did not “trust transient majorities.”89 But he did, as Professor Scheiber has reminded us, “trust the people.”90 Madison was prepared “to rest all our political experiments on the capacity of mankind for self-government.”91 He and the other founders were, like Alexander Hamilton, inclined to trust “the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness.”92

THE TENTH AMENDMENT’S HISTORY93

Traditionally, the Tenth Amendment has been understood as a purely structural guarantee designed to clarify the implications flowing from the
Constitution’s grant of limited powers to the national government. It makes explicit what was already implicit in Article I of the Constitution, with its grant of limited powers to the national government: that the federal government was to be a government of limited, rather than general powers, and that the states would continue to exercise power over the vast range of matters over which the national government was not granted authority. Madison confirmed this purpose when he presented a draft of what became the Tenth Amendment to the First Congress and acknowledged that, for this reason, many would think it completely unnecessary.

Most scholars have agreed with Justice Stone’s well-known dictum that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” That the Tenth Amendment states a “truism” does not necessarily mean, however, that the idea of state sovereignty underlying the Amendment has no implications for limiting the exercise of national power. The dual system of sovereignty created by the Constitution presumes the existence of effective state governments; the Tenth Amendment reflects this commitment, although its text states no affirmative limits on national power. These boundaries to federal power must necessarily come from our efforts to define the limited powers intended to be granted to the national government under the Constitution.

The Fundamental Rights Construction of the Tenth Amendment

Because of the debate over the meaning of the Ninth Amendment, however, some modern scholars have offered the view that the Tenth Amendment refers to fundamental rights that serve to limit the powers granted to the national government. This fundamental rights reading is viewed as the result of what is deemed a portentous change of language as the Senate added the words “or to the people” to the language describing to whom the powers “not delegated” were reserved. It is argued that

But the text and history of the Tenth Amendment confirm that this interpretation is based on a preference for reading an anachronistic interpretation of the Ninth Amendment into the Tenth.

The Text of the Tenth Amendment

The text of the Tenth Amendment states that what is reserved to the people and the states are the “powers not delegated.” This text speaks of the
residuum from powers actually given by the Constitution—the same language Madison employed to describe reserved powers. 101 That the powers not delegated are to be understood straightforwardly is confirmed by Redlich’s admission that it referred to the residuum from granted powers before the addition of language stating that the powers were to be understood as reserved by the people. 102 This understanding also fits together well with the arguments advanced by those who defended the Constitution during the debate over its ratification. They repeatedly contended that the “the people’s” rights were adequately secured by the limited grants of power to the national government in Article I. 103

While the Constitution’s critics in general disagreed with the claim that the enumerated powers scheme was a sufficient safeguard of popular rights, they agreed that a general reservation of sovereign power was itself an important mechanism for securing the rights of the people. 104

**The Tenth Amendment’s Historical Context**

The contextual evidence confirms that the Tenth Amendment’s meaning did not turn on whether it was drafted in favor of “the states,” “the people,” or both. The Tenth Amendment grew out of one of the fundamental objections advanced against the Constitution—that the Constitution’s drafters had created an unlimited national government that would eventually subsume the states as sovereign entities. The Constitution omitted the provision that had been deemed the central clause of the Articles of Confederation by those most anxious to retain a state-centered system of government—Article II, the state sovereignty provision. Article II had provided that each state “retains every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States.” 105 The anti-Federalists argued that the omission of Article II raised an inference of unlimited sovereignty in the national government, especially given the natural tendency of interpreters to presume that the omission of such crucial language from a succeeding document must have a purpose. 106 Those interpreting the Constitution would thus conclude that the federal government possessed general powers that superseded all the powers of the states. 107

While the state sovereignty guarantee embodied in Article II referred to retained “rights,” it is clear that this language reserved sovereign power to the states rather than specific individual rights in the modern sense. 108 Even so, this sort of reservation of sovereign power was viewed as a critical means of securing popular rights. For example, if the Constitution forced the states to surrender all sovereign power to the national government, then the new government would possess the legal authority to invade common law and natural rights, which had previously been subject only to the limitations imposed by state law. This is why it was clear to one of the Constitution’s early and foremost critics, George Mason, that “many valuable and important rights would be concluded to be given up by implication.” 109 This virtually
unlimited grant of power to the federal government would mean, in particular, that the limits on power in favor of rights—traditionally secured by the state declarations of rights—would remain insecure because of the lack of a federal counterpart to the state constitutions’ declarations of rights.

And this is why Patrick Henry asserted before the Virginia ratifying convention that “a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government.” Henry was not requesting the insertion of new limits on the powers granted by Article I. Instead, Henry was echoing the pervasive call for a general reservation-of-power clause that would operate to enhance the security of the people and the states against excessive federal power—power that could easily be employed in derogation of the traditional liberties protected by each of the states.

Similarly, the New York ratifying convention set forth what was probably the most precisely worded of all the proposed “general reservation” amendments:

[T]hat every Power, Jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same....

Additional constitutional amendments proposed by Virginia and other states spoke in terms of the reserved rights and powers of the states, but these provisions were just as often touted as important guarantees of popular rights. Provisions framed in terms of “the people,” such as the New York provision, could equally be described as “states rights” proposals. Thus, Samuel Adams argued before the Massachusetts convention that a proposed amendment declaring that “all powers not expressly delegated to Congress are reserved to the several states” was “a summary of a bill of rights, which gentlemen are anxious to obtain.” In the voluminous materials relating to the debate over ratification of the Constitution, there does not appear to be a single statement suggesting that there was thought to be a critical difference of substance between the New York and Virginia forms of the proposed amendment.

Adding “the People” to the Tenth Amendment

This is not to say that the distinction between “the people” and “the states” had no relevance to those who employed the terms. Indeed, the Federalist proponents of the Constitution frequently relied on the doctrine of popular sovereignty to justify the Philadelphia Convention’s decision to draft a new Constitution, rather than to follow the original charge to amend the Articles of Confederation, as well as to explain how governmental authority could be divided between the national and state governments without running into traditional opposition against divided sovereignty. If the people were truly the sovereign, as posited in American revolutionary theory, they held the
authority to reconsider their commitment to the Articles of Confederation and to surrender state power in favor of a stronger central government.

Federalists reasoned that because “the people give some of their power to the institutions of the national government, some to the various state governments, and some at other extraordinary times to constitutional conventions for the specific purpose of making or amending constitutions,” it follows that they “may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government.”115 By contrast, the anti-Federalists tended to be stronger proponents of state power, and many of them continued to see the states as the central building blocks in the union symbolized by the Constitution. These differing perspectives undoubtedly played a role in the tendency of some to emphasize the reserved powers of the states and for others to stress the concept of the reserved sovereign power of the people.

At the same time, the different formulations of various “general reservation” proposals did not reflect differences of great substance as to their intended meaning and application. Madison, for example, was an important proponent of the popular sovereignty rationales for explaining the Convention’s authority and the Constitution’s adoption of a popular ratification process. Yet, he also served on the committee that drafted proposed amendments for the Virginia ratifying convention, which drafted its reserved powers provision in terms of powers reserved to the states. In his own draft, Madison followed Virginia’s lead, also focusing on the reservation of sovereign power to the states.

What little evidence we have from the First Congress tends to confirm that the language change to the proposed amendment, adopted in the Senate, reflected the preference embodied in the New York proposal, namely, that a stated general reservation of power should reflect that it is the people who grant and reserve powers to both the federal and state governments, and therefore that the reserved powers are reserved first to the people and second to the states. A similar proposal was offered in the House on August 22, 1789, but Representative Daniel Carroll objected to the change “as it tended to create a distinction between the people and their legislatures.”116 The House Committee of the Whole thereafter rejected the addition of language that would have emphasized that the powers were reserved to the people.117

The question of wording arose again in the Senate, undoubtedly because the House version seemed to hearken back to the notion that it was the states who had delegated authority to the nation in the first instance. The Senate version of the Tenth Amendment conformed more completely to the theory of the Constitution defended by its chief proponents.118 And because most of those who had criticized or defended the Constitution saw no great difference of substance in the basic thrust of the proposed amendments—with or without the reference to the people’s reserved powers—it is not surprising that the language change passed with a minimum of discussion or debate.

Little wonder that early commentators understood the Tenth Amendment as a straightforward reservation of sovereign power to the states (and,
ultimately, the people). Thus, Joseph Story confirms that the Tenth Amendment was “a mere affirmation of what ... is a necessary rule of interpreting the constitution.” He concluded:

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.

In short, the unique history of the Tenth Amendment’s development and the general theory of the nature of the Constitution provide a complete explanation of the purpose of adding language to the Amendment as drafted by Madison and approved by the House of Representatives. The Tenth Amendment made explicit what was already implicit in Article I of the Constitution—the federal government would exercise delegated powers, and all other powers were reserved to the people and to the states.

The reference to “the people” was added to underscore that it is the people who delegate and reserve powers. The rights reserved under the language originally proposed were the same rights as those reserved by the text finally adopted, and they consisted of all the liberty retained after defining the scope of the powers delegated by the Constitution. The Tenth Amendment is a general reservation of undelegated powers; it is not a fundamental rights provision. This may prompt some to wonder: what does the Tenth Amendment add? According to Professor Amar, “The best answer, I think, is emphasis. These words are a kind of exclamation point, an italicization, of the Constitution’s basic themes of federalism and popular sovereignty.”

THE “IMPROPER” EXERCISE OF FEDERAL POWERS

The traditional understanding of the Necessary and Proper Clause is that it performs the mundane task of affirming the fundamental idea that Congress has the authority to exercise reasonable discretion in choosing the means by which to implement the goals set forth in the legislative powers granted by Article I, Section 8. As suggested by its derogatory nickname, the “Sweeping Clause” generated great fears among those who were concerned that the Constitution portended a tyrannical federal government. During the debate over ratification of the Constitution, the Constitution’s anti-Federalist opponents launched some of their harshest attacks on the Sweeping Clause, charging that its purpose was to grant unlimited authority to Congress to establish a “consolidated” government of general legislative powers that could displace state authority at will. In its defense, the Federalists denied that the Necessary and Proper Clause carried the implication of unlimited power, contending that if the principle set forth by the clause was not accepted, there would have been no point in empowering the national government. They assured their opponents that the clause was purely declaratory in nature—that it merely set forth the principle of
agency that would have followed naturally, with or without such an explicit text, from the necessity of ancillary authority even in a system of limited grants of power.125

But the Constitution’s leading proponents lacked the help of modern legal commentators. A consequence was that they overlooked that the clause referred to as the Sweeping Clause was actually the most powerful limiting clause in the original Constitution. At least that is the conclusion reached by Gary Lawson and Patricia Granger.126 As construed and applied by Lawson and Granger, the so-called Sweeping Clause might have been better nicknamed the “Back Draft Clause,” because it would have served as an open-ended jurisdictional limitation on the powers actually delegated to the national government by the Constitution. This jurisdictional boundary of federal power would operate in favor of principles of separation of powers, states’ rights, common law rights, and individual natural rights, to be explicated over time by the federal judiciary.127 The defense of the Constitution would have been greatly simplified had the Federalists used the clause as the sort of weapon it would have been if it meant what Lawson and Granger now claim.128

Indeed, in light of the time and energy devoted to considering the omission of a bill of rights from the proposed Constitution, during the debate over its ratification, “one would expect calls for a Bill of Rights to be met with the claim that the document already incorporated such protections.”129 Such arguments, of course, were not made, and instead “proponents of the Constitution made the less reassuring argument that Congress had been given no power to undermine cherished individual freedoms, such as freedom of speech.”130 Indeed, the Necessary and Proper Clause figured in this defense of the Constitution, but only in its role as a declaratory provision confirming that what was not granted was reserved.131 The provision as understood by Lawson and Granger, moreover, would have belonged in Article I, section 9—the provision that included affirmative limitations on Congress’s powers, and the provision in which Madison initially proposed to include the amendments constituting the Bill of Rights.132

The Text of the Necessary and Proper Clause

Lawson and Granger contend that, when read in historical context, the word “proper” itself suggests a fundamental limitation on Congress’s powers. They first observe that the word’s definitions circa 1787 included both the idea of being “fit,” “adapted,” or “suitable,” on the one hand, as well as the idea of being peculiarly within a particular domain or not “belonging to more.”133 They contend that the latter meaning, which they describe as “jurisdictional,” was the meaning intended by the Framers, both because it was common “in contexts involving the allocation of governmental powers”134 and because this understanding would avoid conflict with “the venerable legal maxim of document construction that presumes that every word of a statute or constitution is used for a particular purpose.”135 After all, the alternative
meaning of the term, referring to fitness or suitability, would render “proper” as redundant of “necessary,” leaving the former without any real function in the clause.136

But the antiredundancy maxim exists in tension with other maxims that require the meaning of general terms to be limited according to their proximity and relation to other words used in the same text.137 Strikingly, in McCulloch v. Maryland (1819), Chief Justice Marshall, on whom the authors rely in support of the maxim they invoke,138 applied the principle underlying these other maxims in rejecting Maryland’s argument that the term “necessary” required a law to be essential or indispensable. Based on the premise that “we may derive some aid from that which [the word ‘necessary’] is associated,” Marshall found that the “only possible effect” of the Framers’ addition of the term “proper” was “to qualify that strict and rigorous meaning” and “to present to the mind the idea of some choice of means of legislation, not straitened and compressed within the narrow limits for which gentlemen contend.”139

Having concluded that the term “proper” had been employed to refer to measures that are “fitting” or “adapted” to accomplish authorized ends, Marshall argued that his more “limited construction” of “necessary” better squared with “the usual course of the human mind,” and avoided attributing to the Framers the use of contradictory terms.140 The other view treated “necessary” as “controlling the whole sentence, and as limiting the right to pass laws without which the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory.”141

**The Text Placed in Historical Context**

Marshall’s analysis raises important questions regarding the jurisdictional interpretation offered by Lawson and Granger. The term “necessary,” particularly as construed in *McCulloch* and ever since, merely restates what the Framers believed would be apparent even without the clause: that Congress’s powers implicitly included the authority to take action as needed to accomplish the authorized ends. In contrast, Lawson and Granger suggest that the word “proper” plays a critical role as the textual source of important, external limitations on congressional authority.142 Their interpretation appears to warrant limiting Congress’s powers in ways that would seem strained based on the wording of the grants of power themselves, especially because it would provide a basis for imposing individual rights. The more limited interpretation of the word “proper” fits more cohesively with the word “necessary” and with what we know of the purpose of the clause to declare the existence of an ordinary power of Congress.

Alternatively, there is a construction of “proper” that fits with all the maxims referred to above and also comports with the purpose of including an executory power provision in the first place. It is possible that the term “proper” was employed because of its fit, on the one hand, with “necessary” to suggest that Congress has a reasonable, but limited, discretion to implement its powers and, on the other hand, because it confirms what would be true
without any executory power clause: that Congress’s ancillary powers are subject to constitutional limitations or, in other words, that Congress’s executory power is only effective within the jurisdictional parameters of the Constitution. Under this construction, the term makes a distinctive contribution in that it provides a barrier against misconstructions that could occur if the term “necessary” were used alone—for example, the idea that Congress could pass any law with a requisite connection to promoting an authorized end, notwithstanding limitations stated or implied elsewhere in the Constitution.\(^{143}\)

At the same time, the above reading not only makes “proper” fit well with the term “necessary,” but also it does not turn a clause authorizing ancillary powers into a powerful limiting provision. In short, this alternative construction neither renders the clause wholly superfluous nor potentially revolutionary in its implications. The Necessary and Proper Clause, as understood by the Constitution’s defenders during the debate over ratification, “acts as a ratchet to enhance, but not diminish, each branch’s discretion. Thus, although Congress cannot impede, divest, or interfere with the other branches, it can make laws to structure the executive and judicial powers.”\(^{144}\)

Moreover, if the term “proper” in the Necessary and Proper Clause were construed to enforce principles of individual liberty against Congress, additional theory still would be needed to justify imposing such limits on state governments.\(^{145}\) Perhaps even more devastating to the theory, however, is that it isn’t at all clear that any “propriety” limitation, stemming from the Necessary and Proper Clause, would even apply to legislation that proceeded directly under an enumerated power, without invoking the so-called Sweeping Clause at all.\(^{146}\) A consequence is that “[a]n odd dichotomy could arise in which persons and states would possess greater rights when Congress acted pursuant to the Necessary and Proper Clause than when it directly exercised its enumerated powers.”\(^{147}\) When considering that any such limitations would apply only to Congress, and would not affect the actions of the president or federal courts, more doubts about whether the interpretation makes good sense are raised.\(^{148}\)

The alternative interpretations of the Necessary and Proper Clause also more fully comport with the positions taken during the debate over the ratification of the Constitution. As pointed out above, James Wilson justified the omission of a free press guarantee on the ground that Congress had not been granted a power “to regulate literary publications.”\(^{149}\) But if the word “proper” in the Necessary and Proper Clause served as a reference to unspecified limitations on the powers granted, based on widely accepted limiting norms, Wilson’s example would fail. Considering Wilson’s deep commitment to natural law and natural rights, his failure to see the potential for reading such limitations into the text of the Constitution is significant. For even if Congress had been given power to regulate literary publications, such a power would have been subject to an implied limitation in favor of a free press. Liberty of the press, after all, had been protected under state declarations of rights and was viewed by many as a natural and inalienable right because it was an outgrowth of freedom of thought and speech.\(^{150}\)
Even so, Wilson stated the conventional understanding. When Madison presented a draft of a proposed bill of rights to Congress, he referred to the arguments against the need for a bill of rights, which cited the Constitution’s limited powers scheme. Explaining that he now believed that a bill of rights could guard against abuses of congressional power, Madison used the example of a criminal statute that might be enforced with a general search warrant if there were no constitutional guarantee against unreasonable searches and seizures. He stated:

The general government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions that state governments had in view.”

Again, however, if the key to a limited delegation of powers was to be the requirement that laws be “proper” as well as “necessary,” Madison’s example would have had no force. In fact, Madison would have been arguing at most for the value of adding clarity to prior-existing limitations, rather than the necessity of adding a bill of rights to the Constitution to secure basic liberties.

Madison’s analysis strikes a fair balance between the Federalists’ somewhat inflated claims about the rights-protective capacity of enumerated powers and the overblown anti-Federalist claims that the Constitution portended an unlimited national government. For at least a century, the federal government under the Constitution remained a government directed toward a small number of national concerns, suggesting that the Federalist defense of the omission of a bill of rights was not wholly implausible. At the same time, it seems difficult to deny the force of the anti-Federalist arguments that if it was essential to secure the right to jury trial in criminal cases, it was equally essential to secure the other procedural rights traditionally associated with due process of law. The Federalists never managed to provide an effective response to such arguments.

Madison’s analysis, moreover, is consistent with the alternatives to the broad jurisdictional reading of the Necessary and Proper Clause as described above. But it cannot be reconciled with the broad jurisdictional reading proffered by Lawson and Granger. It is Madison’s analysis, however, that comports with the weight of the historical evidence, including evidence of a pattern of design running from the Articles of Confederation to Article I of the Constitution and evidence of the Framers’ understanding of the enumerated powers scheme in the design of the Constitution.

NOTES

The basic account of the history of the Ninth Amendment found here is based on the account given in Thomas B. McAffee, “A Critical Guide to the Ninth Amendment,” 69 Temple L. Rev. 61, 65–82 (1996) [hereinafter cited as “Critical Guide”]. For authorities who agree that the Ninth Amendment is closely related to the Tenth and was intended to secure rights defined as a residue from the powers granted by the Constitution, see Steven D. Smith, The Constitution & the Pride of Reason 46 (1998) (contending that “by insisting that the national government would exercise only the limited powers granted it, the framers believed they had effectively provided such protection” of individual rights); David P. Currie, The Constitution of the United States: A Primer for the People 54 (1988) (concluding that the purpose of Ninth Amendment was to prevent the Bill of Rights from being taken “to imply a broad construction of the powers given Congress to limit the ‘rights’ of the people”); Bradford R. Clark, “Unitary Judicial Review,” 72 Geo. Wash. L. Rev. 319, 337–47, 346 (2003) (recognizing that “the Ninth and Tenth Amendments were designed to work together to guard against the same danger: unwarranted expansion of federal power at the expense of individual rights”); Forrest McDonald, “The Bill of Rights: Unnecessary and Pernicious,” in The Bill of Rights: Government Proscribed 387, 388–93, 397 (Ronald Hoffman and Peter J. Albert eds., 1997) [hereinafter cited as Government Proscribed] (concluding that Ninth Amendment was “designed to ensure that the interpretation of the Constitution espoused by the Federalists during the contests over ratification—that it established a government of limited, delegated powers—would prevail”); McAffee, “Critical Guide,” supra, at 64 n. 16 (collecting authorities); Thomas B. McAffee, “Prolegomena to a Meaningful Debate of the ‘Unwritten Constitution’ Thesis,” 61 U. Cinc. L. Rev. 107, 108 n. 5 (1992) (collecting authorities) [hereinafter cited as “Unwritten Constitution” Thesis]; and Thomas B. McAffee, “The Bill of Rights, Social Contract Theory, and the Rights ‘Retained’ by the People,” 16 So. Ill. L.J. 267, 268 n. 3 (1992) (collecting authorities) [hereinafter cited as “Rights ‘Retained’ by the People”]. See also Philip A. Hamburger, “Natural Rights, Natural Law, and American Constitutions,” 102 Yale L.J. 907 (1993); and Richard S. Kay, “Book Review,” XLIV Am. J. Leg. Hist. 430, 431 (2000) (reviewing Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding (2000)) (concluding that McAffee successfully demonstrates that widely articulated fears about a federal Bill of Rights were addressed by “an express declaration of some rights along with cautionary rules of construction in the Ninth and Tenth Amendments”).


4. 2 James Madison, Debates in the Federal Convention of 1787, at 565 (Gaillard Hunt & James Scott eds., 1987). Had Sherman carefully studied the work of modern commentators, presumably he would have advanced instead the argument that freedom of the press is simply “retained,” given the Constitution’s embodiment of social contract political theory and freedom of the press’s status as an “inalienable” right under that theory, no matter what powers had been granted the national government. See infra notes 62, 149–50 and accompanying texts. Notice that Sherman does not say that the power of Congress cannot extend to the press, or that a law limiting the power of the press would be “improper” under the Necessary and Proper Clause; his point is the basic and straightforward one that, in fact, Congress had not been granted any powers directly concerning the press. See infra notes 24–26 and accompanying text (suggesting that if Congress had been granted a power to regulate literary publications, a free press provision would have been essential, as it
might well be in the District of Columbia, where “general” legislative powers would be exercised; contending that the “danger” of including a free press provision would be the implication of such a regulatory power, given that such a provision could be seen as an attempt to define its extent).


7. An assumption of their arguments was that the states were governments of plenary powers, subject only to being limited by the terms of the written state constitutions’ Declarations of Rights. By contrast, the Articles of Confederation both granted rather specific powers to the national government and specifically provided that each state “retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.” 1 The Documentary History of the Ratification of the Constitution 86 (Merrill Jensen ed., 1976) [hereinafter Ratification of the Constitution].

8. 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 151, 153 (Jonathan Elliot ed., 2d ed., 1866) (Dr. Charles Jarvis, Massachusetts Ratifying Convention, Feb. 4, 1788) [hereinafter Elliot’s Debates].


10. 2 Ratification of the Constitution, supra note 7, at 388. Notice that Wilson is not merely expressing concern about the loss of a right that did not happen to be stated in the text, but an extremely broad inference of implied general power. Even advocates of an unenumerated rights reading of the Ninth Amendment frequently acknowledge that the danger generated by the attempt to enumerate the people’s rights, as “the powers reserved,” was the implication of virtually unlimited power in government. See, e.g., Randy E. Barnett, “A Ninth Amendment for Today’s Constitution,” 26 Valp. U. L. Rev. 419, 424 (using Wilson’s assertion that “[i]f we attempt an enumeration, everything that is not enumerated is presumed to be given”); infra note 20 (Calvin Massey acknowledging that under state constitutions the powers were “presumptively unlimited”). But compare id. at 428 (the “thought that the people had surrendered all their rights to state governments” is “belied by the swift incorporation into most state constitutions of provisions identical to the Ninth Amendment”).

11. Philip Hamburger, “Natural Rights, Natural Law, and American Constitutions,” 102 Yale L.J. 907, 932 (1993). Moreover, although Americans contended “that some portions of natural liberty were inalienable and therefore ought not to be infringed, they tended to consider a government’s infringement on an inalienable right a reason for questioning the legitimacy of the legal system that permitted such a violation rather than a basis for making a claim through such a system.” Id. at 932–33.

12. McDonald, Government Proscribed, supra note 1, at 388. It is, in a word, astonishing, to read a three hundred fifty-seven page book, seeking to confront the powers granted to government, and the rights retained by the people, and never so much as encounter the fundamental idea that from the beginning state legislatures have been considered to be institutions of plenary power. See Randy E. Barnett, Restoring the Lost Constitution: The Pre- sumption of Liberty (2004) [hereinafter cited as Restoring the Lost Constitution]. But see Randy E. Barnett, “The Proper Scope of the Police Power,” 79 Notre Dame L. Rev. 429, 494 (2004) [hereinafter cited as “Police Power”] (making express arguments for rejecting “the view of the police power as unlimited and plenary”); see generally id. at 455–56, 479–95. For other examples of scholars who appear not to grasp that the state legislatures’ plenary powers was at the center of the textualism that characterized a good deal of constitutional argument from the federal ratification debates forward, see Scott Douglas Gerber, To Secure These Rights: The Declaration of Independence and Constitutional Interpretation
119 n. * (1995) (finding that “Justice Iredell’s rejection of natural-rights-based judicial review marked the first time (I have found) that was done by a sitting judge in a nonslavery context”); Suzanna Sherry, “The Founders’ Unwritten Constitution,” 54 U. Chi. L. Rev. 1127, 1161 n. 143 (1987) (perceiving the debate over the adoption of a federal Bill of Rights as not extremely relevant to determining whether the idea of natural or customary rights are inherently enforceable constitutional norms was predominant at the time of the adoption of the Constitution); Thomas C. Grey, “The Original Understanding and the Unwritten Constitution, in Toward a More Perfect Union: Six Essays on the Constitution” 145, 149 (Neil L. York ed., 1988) [hereinafter cited as “Original Understanding”] (notwithstanding arguments by Wilson, Iredell, and others during the ratification debates, asserting that “Iredell gave what seems to have been the first explicit statement of full-fledged constitutional positivism: the doctrine that judicial review can enforce written but not unwritten constitutional principles”).

13. See G. Alan Tarr, Understanding State Constitutions 7 (1998) (“state governments have historically been understood to possess plenary legislative powers”); David E. Bernstein, “Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism,” 92 Geo. L.J. 1, 32 (2003) (although the federal government was thought to be a “government of limited and enumerated powers,” the states “were thought to be sovereign and could only be restrained by express constitutional provisions”); Christian G. Fritz, “The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West,” 25 Rutgers L.J. 945, 965 (1994) (state legislatures were viewed as having “plenary power excepting what the people chose to withhold”; this “virtual omnipotence stemmed from the operation of popular sovereignty at the state level,” given that as “the creature of that supreme power—the people,” the legislature “must be limited by the state’s Constitution”), quoting, 1 Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878, at 209, 826 (Sacramento, State Office, 1880–81); Note, “Unenumerated Rights Clauses in State Constitutions,” 63 Tex. L. Rev. 1321, 1331 (noting that “scholars have regarded state governments as possessing plenary power”).

14. G. Alan Tarr & Mary Cornelia Alis Porter, State Supreme Courts in State and Nation 50 (1998). See also Bd. of Directors v. All Taxpayers, 529 So. 2d 384, 387 (La. 1988) (stating that “a state constitution’s provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature,” which “may enact any legislation that the state constitution does not prohibit”); State ex rel. Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978) (“When the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby”); Donald S. Lutz, Popular Consent and Popular Control 60 (1980) (the drafters of the state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights”); James T. McHugh, “The Dominant Ideology of the Louisiana Constitution,” 59 Alb. L. Rev. 1579, 1611–13 (1996); Robert F. Williams, “State Constitutional Law Processes,” 24 Wm. & Mary L. Rev. 169, 178 (1983) (“State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power.”).

15. 2 Ratification of the Constitution, supra note 7, at 388.
16. Id.
17. Id.
18. Lutz, supra note 14, at 60. See also supra note 10 and accompanying text (governments under state constitutions were viewed as holding “all powers not constitutionally forbidden”); McAffee, Inherent Rights, supra note 1, at 133–34; McDonald, supra note 1, at
390 & n. 6, quoting, Supplement to Max Farrand’s The Records of the Federal Convention of 1787, at 284 (James H. Hutson ed., 1987) (observing that Rufus King and Nathaniel Gorham had contended that a Bill of Rights was essential where there is a legislature of “full power & authority,” but not where its powers are “explicitly defined”). This remains the general view of legislative powers under state constitutions even today. See, e.g., G. Alan Tarr and Mary Cornelia Aldis Porter, State Supreme Courts in State and Nation 50 (1998) (recognizing that “[a]ccording to traditional legal theory, the state governments inherently possess all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it”).

19. Nathaniel Gorham, 1 Ratification of the Constitution, supra note 7, at 335 (Sept. 27, 1787). This is why “no previous state constitution featured language precisely like the Ninth’s—a fact conveniently ignored by most mainstream accounts.” Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 124 (1998).

20. Philip A. Hamburger, “Natural Rights, Natural Law, and American Constitutions,” 102 Yale L.J. 907, 935 (1993). See also Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution’s Unenumerated Rights 87 (1995) (unenumerated rights advocate acknowledging that under the state constitutions the grant of powers was “presumptively unlimited” because it rested on the “presumption that state governments possess all powers except those explicitly denied them”). Even Professor Barnett, perhaps the most unrelenting advocate of unenumerated fundamental rights secured by the text of the Ninth Amendment, admits that, under the early state constitutions the problem of empowering government to do what is necessary without enabling it to violate rights “seemed obvious: Let the people rule as directly as possible through their representatives,” inasmuch as “the people can be trusted not to violate their own rights.” Barnett, Restoring the Lost Constitution, supra note 12, at 36.


22. Id. at 771.

23. 13 Ratification of the Constitution, supra note 7, at 391 (Pennsylvania Ratifying Convention, Nov. 18, 1787).

24. 4 Elliot’s Debates, supra note 8, at 149 (North Carolina Ratifying Convention, July 28, 1788). Iredell’s description of the North Carolina constitution’s grant of general legislative powers—powers that could only be limited by the express terms of a bill of rights—would have been echoed by any one familiar with the assumptions behind the state constitutions.

25. Even advocates of an unenumerated affirmative rights interpretation of the Ninth Amendment have acknowledged that Federalists “feared a Bill of Rights would imply that the federal government was a government of general powers rather than of limited, enumerated powers.” John Choon Yoo, “Our Declaratory Ninth Amendment,” 42 Emory L.J. 967, 995 (1993); see also Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution’s Unenumerated Rights 87 (1995) (acknowledging that governments under state constitutions were “universally” regarded as “possessing all powers except those explicitly denied them in their constitutive documents”).

26. The standard view that is reflected in the adoption of the federal Bill of Rights is Patrick Henry’s: “If you intend to reserve your inalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights.” 3 Elliot’s Debates, supra note 8, at 445 (Virginia Ratifying Convention, June 14, 1788). Henry thus advocated adoption of a “declaration of rights containing those fundamental, inalienable privileges,” that were “essential to liberty and happiness,” Patrick Henry, “An Address Before the Virginia Ratifying Convention” (June 24, 1788), in 2 Bernard Schwartz, The Bill
of Rights: A Documentary History 819 (1971), quoted in Yoo, supra note 25, at 996. But this advocacy was based on the assumption that rights must be found in the written Constitution to receive constitutional status. Henry’s position contradicts any idea “that the Ninth Amendment was also intended as declarative of a fundamental principle.” Yoo, supra note 25, at 996.

27. 13 Ratification of the Constitution, supra note 7, at 337, 340 (Speech at a Public Meeting in Philadelphia, Oct. 6, 1787). See also McDonald, Government Proscribed, supra note 1, at 393 n. 10, quoting 3 The Framing of the Constitution of the United States 256 (Max Farrand ed., 1913) (observing that Charles Cotesworth Pinckney argued as to “the impropriety of saying anything about” liberty of the press because “to have mentioned it in our general Constitution would perhaps furnish an argument . . . that the general government holds a right to exercise powers not expressly delegated to it”); Alexander Hamilton, The Federalist No. 84, supra note 6 (a bill of rights “would contain various exceptions to powers which are not only incongruous, but dangerous”).

28. Id. at 340.

29. Id. at 340. Wilson is an especially important figure to have offered such an unequivocally positivist argument in that it is his analysis before the Pennsylvania Ratifying Convention that is almost universally regarded as supplying the argument that led to the adoption of the Ninth Amendment. See McAfee, supra note 3, at 1249–54. At least one recent commentator has read natural law–based constitutional arguments advanced by Justice Wilson in a couple of cases as also supporting an implied natural rights interpretation of the written Constitution—a position that, so far as we are aware, Justice Wilson never adopted. See Arthur E. Wilmarth, Jr., “Elusive Foundations: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic,” 72 Geo. Wash. L. Rev. 113, 144–89 (2003).

30. The Federalist argument that a bill of rights could be “dangerous” in raising an inference of general legislative power—that would grow out of the “sovereignty” implied by the need to state a comprehensive set of limits on government power—has been borne out historically, and, ironically enough, the inherent limitations interpretation of the Ninth Amendment may have contributed to the problem. See, e.g., McAfee, Inherent Rights, supra note 1, at 171–72 (suggesting that national experience in justifying enlarged powers from presumed national sovereignty has presented “a kind of vindication of Edmund Randolph’s concern that the amendment, after it had been altered in Congress, did not adequately state that limiting provisions raised an inference ‘against extending the powers of Congress by their own authority’”); McDonald, Government Proscribed, supra note 1, at 398–400 (providing early examples of arguments in favor of enlarged federal powers being based on the explicit statements of limitations in the federal bill of rights).

31. See, e.g., Barnett, Restoring the Lost Constitution, supra note 12, at 224.

32. 2 Ratification of the Constitution, supra note 7, at 391 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787).

33. McAfee, “Inalienable Rights,” supra note 2, at 774 (noting that “we have no record showing that James Madison, James Wilson, James Iredell, or any other of the leading figures who defended the proposed Constitution were opponents of including a bill of rights in the constitutions of their states, or expressed a general reservation about reducing appropriate limits on government to written form”).

34. 1 Annals of Cong. (Joseph Gales ed., 1789), at col. 438. For additional analysis of Madison’s speech before Congress in presenting his proposed Bill of Rights, see McAfee, “Original Meaning,” supra note 3, at 1285–87.

35. 1 Annals of Cong., supra note 34, at col 456. Notice that Madison contends that this is a plausible argument against admitting a bill of rights “into this system”; it is not a general argument against all bills of rights. Id. At least before the admission of a bill of rights,
the enumerated powers scheme would have an implication against the power to invade numerous rights. But with the inclusion of a bill of rights, the rights “not singled out” arguably would be “assigned into the hands of the General Government.” Id.

36. 1 Ratification of the Constitution, supra note 7, at 86.


38. See, e.g., “A Democratic Federalist,” in 2 Ratification of the Constitution, supra note 7, at 193, 194 (Oct. 17, 1788); A Federal Republican, in id. at 303, 304 (Nov. 28, 1787).

39. 2 Elliot’s Debates, supra note 8, at 130, 131 (Samuel Adams, Massachusetts Ratifying Convention, Feb. 1, 1788).

40. 3 Elliot’s Debates, supra note 8, at 445, 445 (Patrick Henry, Virginia Ratifying Convention, June 14, 1788).

41. 4 Elliot’s Debates, supra note 8, at 163, 163 (Samuel Spencer, North Carolina Ratifying Convention, July 19, 1788); accord, 2 Ratification of the Constitution, supra note 7, at 303, 306 (A Federal Republican, Nov. 28, 1787) (need for a bill of rights or declaration that all “not decreed to Congress” is reserved to the states).

42. 3 Elliot’s Debates, supra note 8, at 444, 444 (George Mason, Virginia Ratifying Convention, June 14, 1788). Considering, then, that it was the fear of national power that prompted the anti-Federalist opponents of the Constitution to demand a bill of rights, it is hardly surprising that Madison’s proposal for limitations on state powers was simply not adopted.

43. 2 Schwartz, supra note 26, at 764–65.

44. Id. at 842.

45. See, e.g., McAffee, Inherent Rights, supra note 1, at 87 (“It is little wonder that every state convention that offered proposed amendments to the Constitution included an amendment based on Article II of the Articles of Confederation”); Amar, supra note 19, at 123 (“the Tenth was the only one proposed by every one of the state ratifying conventions that proposed amendments”); McAffee, “Original Meaning,” supra note 3, at 1242 (“[A] provision like the tenth amendment is the only one that appears in the proposals of every ratifying convention that offered any.”).

46. Id. at 844.

47. See McAffee, Inherent Rights, supra note 1, at 95–96 (recounting Edmund Randolph’s defense of Federalist “danger” argument and criticism of the rebuttal that they had already supplied a “partial” bill of rights in drafting the proposed Constitution); McDonald, Government Proscribed, supra note 1, at 394–95 (describing arguments by both sides at Virginia convention, including Randolph’s defense).

48. Id. at 840–45.

50. Schwartz, supra note 26, at 911–12. North Carolina and Rhode Island also offered proposed amendments to secure the scheme of limited powers from an adverse inference based on the enumeration of “exceptions” to power in the Constitution. Id. at 970 (North Carolina); 1 Elliot’s Debates, supra note 8, at 334 (Rhode Island). While these later-recommended amendments were submitted after Congress had proposed the bill of rights for ratification by the states, they reflect the concern of the later state conventions with confronting the potential implications of the addition of a bill of rights to the Constitution.

51. This is why we disagree with the claim that those who link this proposed amendment with the Ninth Amendment “mistake the Tenth for the Ninth.” Yoo, supra note 25, at 991.

52. 2 Schwartz, supra note 26, at 844.

53. It is critical to recognize that the provision’s draft rests directly on the structural guarantee of enumerated powers and only secondarily on a recognition that some provisions might supply “actual limitations” on granted powers. It is certainly accurate that “the Framers of the Constitution unquestionably preferred structural constraints to ‘paper barriers’ enforced by judges.” Randy E. Barnett, “Reconceiving the Ninth Amendment,” 74 Cornell L. Rev. 1, 24 (1988). But all too often we seem not to notice that the purely structural guarantee, based on the system of limited and enumerated powers, is the primary one, and the textual (or “actual”) limitation is the backup. In this scheme of things, the Constitution was considered a “bill of powers,” and “rights of the people” were defined as “the great residuum.” 1 Annals of Cong., supra note 34, at 438. Given that the scheme of enumerated powers was therefore thought to serve the purposes of a bill of rights, there is no reason to assume a different status for unenumerated rights under the federal Bill of Rights than such rights would have had under the declarations of rights of the states.

54. 2 Schwartz, supra note 26, at 844.

55. Prominent Federalists followed the example of Alexander Hamilton, who “argued that any list of rights would imply that the new federal government, instead of being restricted, retained the authority to delimit and define rights; that is, it would be able to control those areas of activity not explicitly stated as rights.” Charles A. Miller, “The Forest of Due Process of Law: The American Constitutional Tradition,” in Nomos XVIII, Due Process 3, 42 n. 28 (J. Roland Pennock & John W. Chapman eds., 1977). This is why it is accurately asserted that “[t]he Ninth and Tenth Amendments are an attempt to meet Hamilton’s argument.” Id.

Although an argument could be made that this construction renders the Ninth and Tenth Amendments redundant, the ratification debate clearly establishes that the parties were unwilling to leave these conclusions to inference. Professor Amar is right that “[c]onstitutional text matters and a clear textual affirmation of a principle that might otherwise be left to inference is something to be desired. Our constitutional tradition includes many kinds of argument from history, from structure, from precedent, and so on—but perhaps the most solid form of argument, at least to some of those who helped frame our written Constitution, was a clear argument from the text itself.” Akhil Reed Amar, “Constitutional Redundancies and Clarifying Clauses,” 33 Val. U. L. Rev. 1, 12 (1998).

56. Yoo, supra note 25, at 991.

57. 3 Elliot’s Debates, supra note 8, at 620 (June 24, 1788); accord, Letter from Madison to Jefferson (Oct. 17, 1788), in 1 Schwartz, supra note 26, at 614–15 (stating he could support bill of rights “provided that it be so framed as not to imply powers not meant to be included in the enumeration”).

58. See supra notes 33–35 and accompanying texts.

59. 1 Annals of Cong., supra note 34, at col. 455.

60. Id.

61. Id. at col. 456.

62. Id. at col. 452.
63. *Id.* In our judgment, the evidence that Madison based his proposed amendment on these state proposals is more than “inconclusive.” Yoo, *supra* note 25, at 992 n. 104, and we find implausible the claim that Madison borrowed the language about rights from state bills of rights “which strongly outlined the rights of the people.” *Id.* at 992. See McAffee, “Rights ‘Retained’ by the People,” *supra* note 1, at 299–305.

64. The amendment proposed by the New York ratifying convention strongly confirms that the purpose of the Ninth Amendment, as originally proposed, was to protect the enumerated powers scheme and to lend support to what became the Tenth Amendment. The New York proposal stated:

[T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains with the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution.

2 Schwartz, *supra* note 26, at 911–12. After Congress proposed the Bill of Rights for ratification, North Carolina and Rhode Island also proposed language that would prohibit an inference of enlarged or constructive power from the specific limitations on power. *Id.* at 970 (North Carolina); 1 Elliot’s Debates, *supra* note 8, at 334 (Rhode Island).

65. The purpose of amending the Constitution to ensure that the people and states “retained” what they had not granted as powers to the federal government is also reflected in the amendment proposed by Roger Sherman:

And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor Shall any [limitations on] the exercise of power by the government of the united States [in] the particular instances here in enumerated by way of caution be construed to imply the contrary.

Roger Sherman’s “Proposed Committee Report (July 21–28, 1789),” reprinted in, *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 267 (Helen E. Veit et al. eds., 1991) [hereinafter *Creating the Bill of Rights*]. See McAffee, “Rights ‘Retained’ by the People,” *supra* note 1, at 296–305; *Id.* at 302 n. 98 (finding that Sherman’s draft proposal followed “the New York pattern of confronting the closely related concerns of the Ninth and Tenth Amendments in a single provision,” and that his language was clearly “to prevent an overthrow of the scheme of limited powers that preserved the rights and powers of the people and the states”). But see Randy E. Barnett, “James Madison’s Ninth Amendment,” in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 7 n. 16 (Randy E. Barnett ed., 1989 (arguing that Sherman’s proposal referring to “certain natural rights which are retained by the[ ] [people] when they enter into Society” was “the sentiment that came to be expressed in the Ninth”; ignoring that the paragraph described as closely resembling “what came to be the Tenth” tracks the language of the state proposals from which Madison drafted the Ninth Amendment); Yoo, *supra* note 25, at 993–94 (referring to Sherman’s natural rights proposal as his “notes on what would become the Ninth Amendment”; not noting that what he describes as a “predecessor to the Tenth” follows the state proposals that Madison drafted as the Ninth, forbidding an inference of power from restrictions “enumerated by way of caution”).

66. See, e.g., Barnett, *supra* note 53, at 10 (noting that Madison’s draft focused both on the problem of extended powers and the loss of unenumerated rights).
67. 1 Annals of Cong., supra note 34, at col. 456.
69. Id. at 280.
70. See supra notes 21–27 and accompanying text for discussion of Madison’s role in the debates over a bill of rights.
71. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 2 Schwartz, supra note 26, at 1188.
72. Id.
73. Id.
74. Letter from Madison to Washington (Dec. 5, 1789), in 2 Schwartz, supra note 26, at 1189, 1190.
75. Id. If the very distinction between preventing extended powers and losing unnamed rights were purely “fanciful,” as Madison thought, it could only be because the risk of losing rights, feared by Madison, Wilson, and others, was based on the assumption that the creation of a bill of rights acknowledged the federal government to be of “general powers,” subject only to the limitations imposed by the named rights. An important reason that many have such difficulty conceptualizing this point is precisely that they are so rights-grounded in their orientation that they don’t really accept the idea that government ever could hold general powers that would be limited only by the rights named in a bill of rights. The assumption is that there would always be implicit—“inherent” or “inalienable”—rights that invariably limit government, and this assumption prompts many simply to miss the positivist legal arguments that so thoroughly dominated the debates over ratification of the Constitution.
76. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 2 Schwartz, supra note 26, at 1188.
77. Letter from Madison to Washington (Dec. 5, 1789), in 2 Schwartz, supra note 26, at 1189, 1190.
79. See supra notes 8–19 and accompanying text.
81. Id.
82. Rosen thus concludes that it is erroneous to suppose that Madison’s draft “added nothing to a precursor of the Ninth Amendment proposed by Virginia.” Id. at 1075 & n. 11; accord, Yoo, supra note 25, at 991 (contending that those who link the Ninth Amendment to the state ratifying convention proposals “mistake the Tenth [Amendment] for the Ninth”).
84. 1 Annals of Cong., supra note 34, at col. 454.
85. See supra notes 25–26 and accompanying text.
86. Amar, supra note 55, at 15 (quoting 2 Documentary History of the Constitution of the United States of America 321 (1894)).
87. Thomas B. McAffee, “The Federal System as Bill of Rights: Original Understandings, Modern Misreadings,” 43 Vill. L. Rev. 17, 88–91, 104–120 (1998) [hereinafter cited as “Original Understandings, Modern Misreadings”]. For the view that the Fourth Amendment is both declaratory and restrictive, depending on whether one needs an argument for unequenumerated fundamental rights or not, see infra note 150.

88. 1 Annals of Cong., supra note 34, at col. 455 (emphasis added).


90. Id.

91. Id.

92. Id. (Quoting Alexander Hamilton, The Federalist No. 78, supra note 6, at 527.)


95. James Madison, Debates in the House of Representatives (June 8, 1789), reprinted in Creating the Bill of Rights, supra note 65, at 85. For useful commentary, see Amar, supra note 55, at 11–12.

96. United States v. Darby, 312 U.S. 100, 124 (1941). Justice Stone’s formulation, of course, has had its critics. See, e.g., John R. Vile, “Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby,” 27 Cumb. L. Rev. 445 (1997). The Constitution’s Tenth Amendment substantially tracks an earlier provision, Article II of the Articles of Confederation, that provided that each state “retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.” 1 Ratification of the Constitution, supra note 7, at 86. Notwithstanding that Article II’s language makes it clear that the states keep all authority except what they have “expressly delegated” to the nation, it has been claimed that it “declares the existence of state rights and powers that cut across federal powers.” Yoo, supra note 25, at 980. The result, according to this single commentator, is that “the rights of the states independently preexist the central power and thus would still operate to check the federal government even if Article II did not expressly recognize their existence.” Id. On this view, of course, federal supremacy would yield any time states wanted to recognize a “right” under state law—a kind of “reverse preemption.” See infra, Chapter 7, “Substantive Due Process and the Ninth Amendment as a Modern Phenomena,” notes 32–45 and accompanying text (critiquing similar view).

Needless to say, even though most students of the Tenth Amendment agree that the historic materials show that it is “[d]eclaratory of the overall constitutional scheme” and “had no independent force as originally understood,” Charles Lofgren, “The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention,” in Government from Reflection and Choice: Constitutional Essays on War, Foreign Relations and Federalism 113 (1986), a modern commentator suggests that “the Ninth Amendment sought to accomplish the same purpose [of declaring unenumerated rights that cut across federal power] by employing the same words.” Yoo, supra note 25, at 981. According to Yoo, such “rights of the people would act as a check on federal powers, even if the Ninth Amendment had not expressly said so.” Id.

97. See House Resolution and Articles of Amendment (Aug. 24, 1789), reprinted in Creating the Bill of Rights, supra note 65, at 41 n. 23. The Senate added “or to the people” on September 7, 1789. Id.

99. The understanding that links the purposes of the Ninth and Tenth Amendments receives strong support from those who lived through the events of the founding period. See, e.g., St. George Tucker, “View of the Constitution of the United States” (May 9, 1803), reprinted in Languages of Power: A Sourcebook of Early American Constitutional History 153, 156 (Jefferson Powell ed., 1991) (linking Ninth and Tenth Amendments and arguing that the “sum of all” is that “the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or the people, either collectively or individually, may be drawn in question”).

100. U.S. Const. Amend. X. Strangely enough, however, it has been suggested that “perhaps individual rights find a better home in the Tenth Amendment, where the text does speak about powers ‘reserved to the States respectively, or to the people,’ in much the same way Madison did.” Yoo, supra note 25, at 986.

101. Debates in the House of Representatives (June 8, 1789), reprinted in Creating the Bill of Rights, supra note 65, at 82.

102. Redlich, supra note 8, at 807.

103. See, e.g., Dr. Charles Jarvis, Debates in the Convention of the Commonwealth of Massachusetts (Feb. 4, 1788), in 2 Elliot’s Debates, supra note 8, at 153.

104. See McAffee, “Original Meaning,” supra note 3, at 1244–45 (citing a number of anti-Federalist advocates).

105. 1 Ratification of the Constitution, supra note 7, at 86.

106. See, e.g., “An Old Whig II (Oct. 17, 1787),” reprinted in, 13 Ratification of the Constitution, supra note 7, at 400 (contrasting Article II’s reservation of sovereignty with the proposed Constitution, in which there was nothing “which either in form or substance bears the least resemblance to the second article of the confederation”).

107. “Centinel V (Dec. 4, 1787),” reprinted in, 13 Ratification of the Constitution, supra note 7, at 346 (omission of Article II’s language “manifests the design of consolidating the states”).

108. Thus, while Virginia drafted its proposed amendment in the language of Article II (“power, jurisdiction, and right”), “Amendments Proposed by the Virginia Convention (June 27, 1788),” reprinted in Creating the Bill of Rights, supra note 65, at 19, Madison employed the less redundant terminology (“powers”) in the draft of the bill of rights he proposed to Congress in June of 1789. “Madison Resolution (June 8, 1789),” reprinted in Creating the Bill of Rights, supra note 65, at 14.

109. George Mason, “Debates in the Convention of the Commonwealth of Virginia (June 14, 1788),” reprinted in 3 Elliot’s Debates, supra note 8, at 444. But the “rights” that would be given up by implication would be the entire body of rights subject to invasion without limitation if the Constitution were construed as granting general powers—they were not unstated limitations on powers specifically granted in the Constitution.

110. Patrick Henry, “Debates in the Convention of the Commonwealth of Virginia (June 16, 1788),” reprinted in 3 Elliot’s Debates, supra note 8, at 150. The very fact that Henry would argue for securing exactly the same “rights” (every one “not conceded to the general government”) for the people and the states, tracking the language of Article II of the Articles of Confederation—the predecessor to the Tenth Amendment of the federal Constitution—clarifies that he and many others believed that a critical dimension of the rights “retained” by the people would be the straightforward reservation of all not granted as powers to the national government. Henry, of course, was equally insistent that the
so-called “inalienable” rights needed to be expressly enumerated to be adequately secured. See supra note 26.


112. See, e.g., “The Ratification of the Twelve States (Sept. 28, 1787),” reprinted in, 1 Elliot’s Debates, supra note 8, at 322 (Massachusetts) (“all powers not expressly delegated ... are reserved to the several states”); Id. at 325 (South Carolina) (states “retain every power not expressly relinquished by them”); Id. at 326 (New Hampshire) (powers are “reserved to the several states”). For Virginia’s proposed language, see “Madison Resolution (June 8, 1789),” reprinted in Creating the Bill of Rights, supra note 65, at 19.

113. “Debates in the Convention of the Commonwealth of Massachusetts (Feb 1, 1788),” reprinted in, 2 Elliot’s Debates, supra note 8, at 131.

114. See, e.g., Gordon S. Wood, The Political Ideology of the Founders, in Toward a More Perfect Union 7–19 (Neill York ed., 1988) (observing that the idea and role of popular sovereignty was altered by Federalist attempts to confront the objections to shifting the locus of sovereignty from the states to the national government).

115. Id. at 22.


117. Id. at 198. A similar amendment had been proposed by Thomas Tudor Tucker, but it was combined with a proposal to insert the word “express” into the amendment, a change which Madison adamantly opposed. Id. at 197. Tucker’s proposed changes were thus rejected by the House. Id.

118. For an illustration of the potential significance of the state-compact theory versus the view that the people of the nation adopted the Constitution, see the discussion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402–05 (1819) (arguing against state-compact theory employed by Maryland’s counsel to justify strict construction of federal powers under Article I of the Constitution).


120. Id.

121. Amar, supra note 55, at 11.

122. U.S. Const. art. 1, § 8, cl. 18.

123. See James Madison, The Federalist No. 44, supra note 6, at 305 (clause was included to remove “a pretext which may be seized on critical occasions for drawing into question that essential powers of the Union”); Alexander Hamilton, The Federalist No. 33, supra note 6, at 205–06 (the clause was introduced “for greater caution, and to guard against all caviling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union,” suggesting further that the Convention, fearing state jealousy of federal power, apparently thought it “necessary, in so cardinal a point, to leave nothing to construction”). The problem, though, has never completely gone away. Even today, “it is widely thought that these words stand as a free-standing font of plenary or virtually plenary legislative power, and that this reading of these words draws support from Marshall’s landmark opinion in McCulloch v. Maryland. But nothing could be further from the truth.” Amar, supra note 55, at 5.


125. James Madison, The Federalist No. 44, supra note 6, at 304–05; James Wilson, “The Pennsylvania Convention Debates (Dec. 4, 1787),” reprinted in 2 Ratification of the Constitution, supra note 7, at 482 (the clause says “no more than that the powers we have
already particularly given shall be effectually carried into execution’’). The purpose of the Necessary and Proper Clause, then, was not to neither shrink nor expand the powers granted in Article I, section 8, but simply to, in Justice Marshall’s words, “remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420–21 (1819), See Amar, supra note 55, at 5.


127. Id. at 271 (the clause “serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated rights”).

128. As Professor Amar has observed “if the Necessary and Proper Clause had truly been designed to shrink the natural breadth of the previous enumerations, its Federalist friends would have drafted and explained it as an obvious shrinkage clause (because to win Ratification of the Constitution, they needed to ease fears of states’ rightists). But they neither drafted it nor defended it as a shrinkage clause.” Amar, supra note 55, at 5.


130. Id. Consequently, freedom of the press, even if not protected by the omission of a power over the press, would be secured by the Necessary and Proper Clause against an “improper” law that sought to abridge the press’s freedom, to make someone the subject of a general search warrant, see infra note 139, or to impose a civil trial without a jury. Lawson & Granger, supra note 126, at 320–21. For a general overview, see McAffee, “Original Understandings, Modern Misreadings,” supra note 87, at 97–120.

131. See generally McAffee, “Original Meaning,” supra note 3, at 1246–47, 1250–51. The Constitution’s defenders would all have agreed that

[i]f the listing of powers was intended merely to exemplify or illustrate what was intended to be a general set of national powers, rather than to define and limit the powers to be exercised by the nation, there would have been no reason to state the power to execute the other named powers. The Necessary and Proper Clause rather obviously includes the pregnant negative; namely, that if an act of Congress does not bear the stated relationship to one of the enumerated powers, Congress will have acted beyond the scope of its constitutional authority.


132. And, of course, this is why James Madison, the drafter of the Ninth Amendment and the Bill of Rights generally, did not object when Alexander Hamilton argued in The Federalist Papers that the Necessary and Proper Clause, far from being an important limiting provision, “may be chargeable with tautology and redundancy,” but still served a useful purpose in clarifying “the great and essential truth” that enumerated powers carry with them needed ancillary powers. Alexander Hamilton, The Federalist No. 33, supra note 27, at 205–06. Compare James Madison, The Federalist No. 44, supra note 27, at 303 (arguing that “[w]ithout the substance of this power, the whole Constitution would be a dead letter”). See also Amar, supra note 55, at 7–8 (although the Necessary and Proper Clause is arguably a redundancy, Hamilton’s argument illustrates that “declaratory and clarifying” clauses are the norm for those who drafted the Constitution).

133. Lawson & Granger, supra note 126, at 291.

134. Id.

135. Id. at 290.

136. If the canon against redundancy, however, is properly read as an “anti-nullity” maxim, rather than as a rule against any sort of repetition, as suggested by Professor Amar, supra note 55, at 3, the Necessary and Proper Clause could quite readily be understood as “a declaratory provision designed to remove all doubts.” Id. at 5.
137. See generally Reed Dickerson, *The Interpretation and Application of Statutes* 233–34 (1975).
140. *Id.* at 418–19.
141. *Id.* at 413.
143. This reading could even be described as a “jurisdictional” interpretation, provided it is understood that the jurisdictional boundaries are the ordinary ones, external to the Necessary and Proper Clause, for which the term “proper” could serve as textual confirmation. On this reading, the clause does not establish any “internal limits” on the grants of power in Article I, Section 8.
146. *Id.*
147. *Id.*
148. *Id.*
150. Unsurprisingly, Lawson and Granger include freedom of the press among the rights that they believe were secured by the jurisdictional impact of the Sweeping Clause, even without a bill of rights. Lawson & Granger, *supra* note 126, at 318–19. Notice, though, that, historically, Professor Barnett acknowledged that Madison took the view that the Necessary and Proper Clause, under the unamended Constitution, permitted Congress to enact legislation authorizing the use of “general” search warrants—on the basis that such a prohibition constituted a “positive right” that would not be enforceable absent the text of the Fourth Amendment—while freedom of the press, being a natural right, would have given rise to a fitting legal and constitutional conclusion that a law invading press freedom would be unconstitutionally “improper.” Randy E. Barnett, “Necessary and Proper,” 44 *U.C.L.A. L. Rev.* 745, 780 (1997) [hereinafter “Necessary and Proper”]. In 1997, at least, Barnett apparently believed that Madison thought “that general warrants would have to be expressly prohibited to be improper,” *id.*, and the pursuit of the enumerated ends, such as exercising the power to tax, could be employed “by using means that do not themselves violate the rights retained by the people,” *id.* at 781—something that apparently the use of general warrants did not do.

If Barnett’s efforts strike some as curious, one must at least appreciate that it was essential (if Barnett was to reconcile Madison’s argument) that the Necessary and Proper Clause necessitated the prohibition contained in the Fourth Amendment with the notion that the Clause was also one of the keys to implementing the rights of the people in that it prohibited laws that were simply “improper” because they violated fundamental individual rights. Given that Barnett had previously been on record that “the Necessary and Proper Clause exacerbates the means-end problem with a scheme of delegated powers,” *supra* note 53, at 13, and had used Madison’s general warrants example to illustrate why we needed a bill of rights, *id.* at 12–15, it was at least plausible that he would be anxious to explain how Madison could be committed to the need for enumerated rights while still insisting that there were unenumerated rights. The answer, in 1997 at least, was that, as Madison underscored when presenting his Bill of Rights to Congress, some rights are “positive rights,” that serve as “actual” limitations on granted powers, while other rights are natural rights that are “retained” as citizens join the social contract. Barnett, “Necessary and Proper,” *supra*, at 779–80.
Barnett’s 1997 analysis, of course, would have come as a grave disappointment to James Otis, not to mention John Adams, who contended, paraphrasing Lord Coke, that an act, even of Parliament, “against natural Equity is void,” and that therefore laws that permitted the use of general search warrants the “Reason of the Common Law” may “control.” M. H. Smith, The Writs of Assistance Case 357 (1978). Otis concluded, moreover, that “acts against the fundamental principles of the British constitution are void,” and that “[t]his doctrine is agreeable to the law of nature.” Id. at 362. But Otis and Adams need not worry. Professor Barnett has changed his mind, although apparently without feeling the need to explain why:

Although using general warrants might “be considered necessary,” their use would still be improper and unconstitutional. Nor would it be fair to conclude from this quotation that impropriety was limited to violations of express restrictions on power. There is little doubt that the use of general warrants would have been considered improper during the two-year hiatus between ratification of the Constitution and that of the amendments. The impropriety of using general warrants stems from the need to protect the person and his property from unreasonable searches and seizures. (Barnett, Restoring the Lost Constitution, supra note 12, at 187.) Accord, Barnett, “The Original Meaning of the Necessary and Proper Clause,” 6 U. Pa. J. Const. L. 183, 218–20 (2003).

Barnett apparently also concluded that Wilson was directly contradicting Madison, in asserting that a free press provision would have been essential had Congress been granted power to regulate literary publications. He relies on Madison’s use of the ratification-debate assurances that freedom of the press would not be threatened by the powers granted, construing Madison’s argument that Congress’s powers should not be “extended by remote implications” as based on a theory of “unenumerated rights.” Barnett, “Necessary and Proper,” supra, at 781. The much more straightforward proposition that when Madison said “the powers not given were retained,” id., he meant it, simply goes ignored. 151. James Madison, “Debates in the House of Representatives (June 8, 1789),” reprinted in Creating the Bill of Rights, supra note 65, at 82–83.

Enumerated, Necessary and Proper, and Reserved Powers: Challenges for the Early Congresses

As every lawyer who has ever tried to draft a contract will comprehend, it is one thing to understand a client’s contractual interests and quite another to reduce those interests to writing and to account for all the contingencies. With its novel separation of powers and complex relationships between two sets of governments, the Constitution presented a monumental task for its drafters. Reducing the theory to text and law was a challenge equal to its theory.

In this chapter, we discuss the mechanics of reserving powers to the states. We explain how the Constitution creates power in the three great departments of the government and how those powers may be exclusive or concurrent with the powers of the states. We then discuss the various mechanisms by which the Constitution may reserve exclusive power to the states. Having reviewed the theory and mechanics of exclusive rights, we then look at two early examples of how the Constitution dealt with controversial matters that some of the Framers had declared were reserved to the states. We first discuss the Sedition Act and the claims that Congress had neither power over the press nor the authority to define crimes other than those enumerated in the Constitution. We then turn to the arguments over whether Congress had power to create a national bank.

Both these instances provide us with an interesting framework within which to view the Constitution. The debates over the Sedition Act of 1798, in which the Federalists sought to silence the critics of President John Adams by punishing the common law crime of “sedition libel,” were carried on in Congress and in the efforts of Virginia and Kentucky to overturn the acts. The debates over the Bank of the United States were conducted in Congress; among three members of President George Washington’s cabinet, Secretary of State Thomas Jefferson, Treasury Secretary Alexander Hamilton, and Attorney General Edmund Randolph; and finally before the Supreme Court in McCulloch v. Maryland (1819). In these two case studies, we get a glimpse of how four entities having a deep interest in the outcome—Congress, the president, the
Supreme Court, and the states—viewed Congress’s powers, the reserved powers of the states, and the way in which we construe the Constitution.

CONSTITUTIONAL ARCHITECTURE

The Constitution did not assign nor divide power between the states and the national government in the same way that it divided power among the three great departments of the national government. In drafting the Constitution, the Framers confronted two separate problems of divided government: First, a horizontal division of power among three branches collectively exercising the singular power of the United States; and second, a vertical demarcation of authority between distinct sovereigns exercising different powers.¹

The challenge in separating the powers was to describe three entities exercising a single power; for federalism, it was to describe two sets of sovereigns exercising two separate, but sometimes overlapping, powers. These differences required distinct approaches. In the first three articles of the Constitution, the Framers took pains to set out the powers (the horizontal division) that would belong to each of the three departments of the new national government. Each of these articles begins with an affirmative allocation of powers in a vesting clause. Separation of powers questions begin with the premise that the national government, as a whole, possesses the power at issue; the question is to which department the power has been granted. Federalism questions begin from the quite different premise that states have the general power of a sovereign and the national government is of limited powers; the question is whether there is any power in the national government at all and, if so, whether that power is exclusive or concurrent.²

As the Framers thought about drafting a federal constitution, they started with the idea that the people already had granted all authority inherent in the government to an existing set of sovereigns—the states—and that the states exercised that authority consistent with the charters agreed upon between the people and the several states. The Declaration of Independence had declared the states to be free and independent states, having “full Power to levy War, conclude Peace, contract Alliances [and] establish Commerce.” Indeed, when “the People” ratified the Constitution of 1787, they ratified it state by state, rather than ratifying in a vote by the people as a whole in a national referendum. There was logic to this state-by-state process. By ratifying the Constitution, the states were ceding a portion of their sovereignty to a new entity, the “United States.” The act of ratification effectively amended state constitutions; because the people of one state could not amend the constitution of another, the mode of ratification (like the mode of amending the Constitution) called for state-by-state ratification.³

The states ceded a portion of their authority (“All legislative Powers herein granted”) to Congress, including their collective powers to impose taxes, incur debt, issue coin and securities, regulate commerce among the states and with other sovereigns, and control the engines of war. The states further
relinquished their rights to act as independent sovereigns and enter into
 treaties with foreign countries, coin money, grant titles of nobility, and wage
war. The states gave up their powers to lay duties on the goods of other
states, to treat citizens of other states as aliens who lack the privileges and
immunities of their own citizens, and to regard the public acts of other states
as those of foreign powers. The Constitution also made clear that states might
maintain a separate militia and provide their own rules regarding freedom
of religion, speech, press, and petition. States retained an express right to
territorial integrity against efforts to divide or combine states, the right not to
be deprived of equal representation in the Senate without the state’s consent,
and the right to exercise the powers of a free and independent state that they
had not ceded.⁴

The Constitution granted power to the national government and reserved
power to the states, but the Constitution did not grant power to the states; that
had already been accomplished through existing state constitutions and charters.⁵
The task for the Framers, accordingly, was to describe those powers actually
granted to the national government, powers that might be exercised either exclu-
sively or concurrently with the states. Nominally, the process for recognizing
concurrent state and federal powers was straightforward: because the states were
presumed to hold all legislative powers not specifically denied them, a simple
grant of power to Congress would vest such power concurrently in the states
and Congress.⁶ For example, when the Constitution granted Congress the power
to “collect Taxes,” Congress shared this revenue-raising power with state gov-
ernments. The Constitution provided two mechanisms for recognizing exclusive
power in the United States. First, the Constitution may expressly grant exclusive
power to the United States. The District of Columbia Clause, for example, pro-
vides that Congress may “exercise exclusive Legislation in all Cases whatso-
ever, over such District.” Second, the Constitution may grant power to the
United States and then disable the states with respect to the same power, thus
creating exclusive power in the United States. For example, the Constitution
granted Congress the power to “coin Money,” and provides that “[n]o State
shall . . . coin Money.” This combination of power in Congress and disability
in the states guarantees Congress exclusive control over the coining of money.
In the absence of a state-disabling clause, the United States and the individual
states would have concurrently possessed the authority to coin money.

The Constitution does not grant—indeed, given preexisting state constitu-
tions, it could not have granted—power to the states. But the Constitution
does ensure exclusive powers in the states. The process for guaranteeing
exclusive state power, however, is more complicated than the process for
granting exclusive congressional powers.⁷ In theory, the states might have
exclusive power in three cases: (1) when the Constitution expressly recognizes
power in the states; (2) when the power is expressly forbidden to Congress
(and not forbidden to the states); and (3) when the power is not granted to
Congress (and not forbidden to the states). The first case is the least likely
because it would be redundant for the U.S. Constitution to grant power to the
states. There is one area in which, until recently, it was thought the Constitution granted an express power to the states: the regulation of “intoxicating liquors.” The Twenty-first Amendment, which repealed the Eighteenth Amendment (which prohibited the “manufacture, sale or transportation of intoxicating liquors”), grants the states “virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system” (California Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc., 1980), although the Court held in 2005 that “the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake.” The Twenty-First Amendment is atypical of the rest of the Constitution, undoubtedly a consequence of the troubled history of Prohibition. The second case may be illustrated by the First Amendment, which prohibits Congress from establishing religion, interfering with religious free exercise, and abridging freedom of speech, the press, and petition. At least before the adoption of the Fourteenth Amendment, the First Amendment disabled Congress alone from engaging in such actions, thus guaranteeing exclusive state control (if there was to be any governmental control at all) over speech, press, and religion, and protecting state religious establishments.

Determining the third case—exclusive power in the states through the absence of power in Congress—is a far more vexing task. In the first two cases, our task was to find either a constitutional provision conferring power on the states or a clause denying power to Congress. Our task in the third case is to prove the negative—that, with respect to a particular subject, the Constitution does not confer any such power on Congress, nor deny it to the states. For those powers affirmatively granted to the United States, and for those negative powers, or disabilities, imposed on the states, the Constitution supplies the powers or disabilities themselves; it does not ask us to imagine or define those powers or disabilities. By contrast, the powers retained by the states are defined by what has not been committed to the United States or prohibited to the states. The challenge of determining what powers belong to the states is not impossible, but the Constitution has made the task difficult, because it cannot be done directly or affirmatively, as can be done with respect to the powers of Congress. In other words, to define state authority under the Constitution, we must determine what the Constitution has not assigned to Congress. The deep theory of the Constitution’s division of authority between the United States and the states—and, more important, the Constitution’s reservation of exclusive authority to the states and the people—proves to be an awkward mechanism, because exclusive state authority cannot be determined by reference to the Constitution directly, but only by studying the substance of something else, namely the powers of Congress.

**THE RELEVANCE OF THE FIRST CONGRESSES**

Once the states ratified the Constitution, the task of interpreting it fell largely to the earliest Congresses. Their views of their own powers are an interesting
contrast to the views of the Framers and those delegates responsible for ratifying the Constitution. Moreover, of necessity, congressional interpretations of the Constitution long preceded the judgments of the courts. The Constitution did not create any mechanism for the legislature to seek an advisory opinion from the Supreme Court. Accordingly, Congress had no recourse but to decide as a collegial body what the limits on its authority were. There is, of course, a danger in trusting Congress to decide the limits of its own powers. However, the first Congresses were remarkably aware of the Constitution and conscientiously debated its meaning in a way that would be quite foreign to modern legislators.

The first Congresses faced the momentous task of putting into practice the novel theory of the Constitution. As David Currie has reviewed so capably, the first Congresses took this responsibility most seriously.

The quality of the constitutional debates in the First Congress was impressively high. To begin with, the members exhibited an intimate knowledge of what the Constitution actually said. One has the impression they must have had copies of the document at their elbows at all times. Moreover, they had obviously devoted considerable effort to trying to figure out what its various provisions might mean. 11

It bears repeating that those were debates. The members of the First Congress, many of whom participated in the Philadelphia convention or in the ratifying conventions, did not come to the First Congress of one mind as to what the Constitution meant. In particular, they had diverse views on the most fundamental questions for constitutional federalism: What powers does Congress possess? What powers had the Constitution left securely to the states? Despite the conscientiousness of those first constitutional interpreters, we may ask whether the Constitution successfully fulfilled its announced intention: to provide for a national government of limited and enumerated powers, reserving to the states and the people the residual, a residual that, it seems fair to say, was thought to be substantial.

**The Sedition Act of 1798**

In 1798 John Adams was in the second year of his presidency. Adams did not enjoy wide popular support and had been elected over Thomas Jefferson in one of the closest elections in U.S. history. In 1794, under the Jay Treaty, the United States had entered into a tentative peace agreement with England, but was uncertain of its relationship with the French revolutionary government. In early 1798, news that the French government had refused to receive U.S. envoys triggered anti-French sentiment, sent the nation preparing for war with France, and raised Adams’ popularity. 12

The Adams-led Federalists “thought in terms of authority” 13 and “insisted that government be endowed with sufficient power to hold in check the passions and prejudices of the people,” 14 a power judiciously exercised by the
propertied class. By contrast, the Democrat-Republicans, lead by Vice President Thomas Jefferson, “stressed liberty . . . rather than authority or security” and were suspicious of the elitist Federalists. As James Morton Smith observed,

each party feared that its opponent was so identified with Old World influences that it constituted a threat to American institutions. The Republican feared that Federalist sympathy for England denoted a secret desire to maintain monarchical forms and class distinctions. The Federalist feared that the sympathy of the Jeffersonians for France indicated a desire to plunge the United States into confusion, institute the Terror, destroy government, uproot religion, and seize private property.16

The Federalists in Congress determined to anticipate any forthcoming crisis by shoring up John Adams’ public support. Among other things, they exploited American suspicion of aliens residing in the United States (a majority of which, particularly the Irish, seemed to favor the Republicans) by adopting legislation that lengthened the time required for citizenship, granted the president the power to deport aliens he thought were dangerous, and authorized the president to jail or deport aliens in case of war. In July 1798, shortly after adopting the alien acts, Congress also proposed a Sedition Act to silence John Adams’ vociferous critics (“the Jacobins of our country”) in the press. The fate of the Sedition Act was never really in doubt. The Republicans mounted a vigorous assault on the Act, to which the Federalists offered a modest defense, a defense tempered by the luxury of knowing the result was secure. The Republicans mounted one last effort to overturn the acts when the Virginia and Kentucky legislatures denounced the acts as unconstitutional in a series of resolutions. Additionally, the Kentucky Resolutions declared that a state could decide for itself whether the acts were constitutional and Kentucky pronounced the Alien and Sedition Acts void. Other states adopted resolutions disavowing the Virginia and Kentucky Resolutions. The debates over the Virginia and Kentucky resolutions are an important part of the broader debate. James Madison authored the Virginia Resolutions and a subsequent report, and Thomas Jefferson wrote the Kentucky Resolutions.

The Sedition Act made criminal the “writing, printing, uttering or publishing of any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame.”18 Through the Sedition Act, Congress codified, in part, the common law rule of seditious libel, altering it, however, to provide that truth constituted a defense and that the jury might make findings of fact and law.19 Seditious libel is an offense closely related to treason, and the Constitution gives Congress “Power to declare the Punishment of Treason.” But because treason is expressly defined by the Constitution, it is not clear that any other definition, including lesser offenses, would have been either necessary or proper.

The debates over the constitutionality of the Sedition Act focused on three important questions. First, had the Constitution granted Congress the power to
define and punish the crime of seditious libel? Second, assuming it did, had the First Amendment nevertheless disabled Congress from enacting such provisions? Third, did the Tenth Amendment reserve to the states the exclusive power to enact seditious libel laws?²⁰

**CONGRESS, THE SEDITION ACT, AND THE POWER TO PUNISH CRIME**

The Constitution expressly granted to Congress the power to punish crime in three cases: counterfeiting securities and coin of the United States, piracies and felonies committed on the high seas, and treason.²¹ In the latter case, the Constitution did not even leave to Congress the power to define treason, the Constitution defining it as levying war against the United States or giving aid and comfort to their enemies. In the state ratifying conventions, the delegates expressed concern as to whether the Constitution limited Congress’s jurisdiction over crime to these three enumerated crimes, or whether Congress’s power under the Necessary and Proper Clause might give it broader authority.²² At the Virginia convention, Patrick Henry, volatile and given to hyperbole, warned that Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by.²³

Delegate George Nicholas responded that the enumerated powers doctrine barred Congress from defining crimes not enumerated:

[Mr. Henry] says that, by the Constitution, [Congress has] power to make laws to define crimes and prescribe punishments;... Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution... They cannot legislate in any case but those particularly enumerated.²⁴

In North Carolina, Iredell reassured the delegates that Congress had “power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; but they have no power to define any other crime whatever.” Congress, Iredell said, was “excluded as much from the exercise of any other authority, as they could be by the strongest negative clause that could be framed.”²⁵ St. George Tucker, writing perhaps the earliest commentary on the Constitution, stated his view in 1803 that the enumeration meant that the states had exclusive control over all other crimes:

[Congress is] not entrusted with a general power over [the subject of crimes and misdemeanors], but a few offences are selected from the great mass of crimes... All
felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively. 26

Other early thinkers, however, suggested that Congress might define additional crimes consistent with its power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” A month after the Constitutional Convention finished its final draft, Colonel George Mason wrote George Washington to explain his objections to a Constitution he refused to sign. Mason worried that the Necessary and Proper Clause might permit Congress to “constitute new crimes.” 27 Thomas Sergeant, who wrote an early commentary, did not deny that Congress might define new crimes, but suggested that the power was naturally limited: “[T]he express grant [of power to punish] does not prevent the exercise of the punishing power in any other cases, where it may be a necessary and proper sanction to enforce [Congress’s] decrees.” 28

There are a couple of ways in which Congress might naturally have claimed power to define crimes, in addition to the three enumerated crimes, without admitting that Congress held a general power to define and punish crime. First, the Constitution gave Congress power over various subject matter, such as copyrights, bankruptcy, coinage, post roads, and commerce. Thus, Congress might define crimes in aid of its authority over these various subjects. For example, Congress might punish the violation of copyright through criminal or civil sanctions as a means of “securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discourses.” 29 Or, Congress might punish theft of the mails as means “necessary and proper” to maintain its authority to “establish Post Offices and post Roads.” 30 It is clearly a leap to go from Congress establishing post offices to Congress punishing theft of the mails, but the step illustrates how the criminal sanctions help support the power to establish—and, by implication, maintain—post offices. Although it was a substantial step from concluding that Congress had power only over the enumerated crimes to permitting Congress to enact both civil and criminal legislation in subject areas over which Congress had authority, the conclusion does not seem to abuse either the notion of the enumerated powers or the Necessary and Proper Clause. But to say that Congress may define new crimes in cases in which it thinks it is necessary and proper simply begs the question of how “necessary” and how “proper” any crime might be to an enumerated power Congress seeks to exercise.

Second, Congress had exclusive power over certain geographic places. In the District of Columbia Clause, Congress acquired “exclusive” power over the District and “all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” And the Territory Clause granted Congress the power to make “all needful Rules and Regulations” for U.S. territory and property. Congress’s exclusive power over federal enclaves surely included the power to define and punish crimes generally in such territory.
In the Sedition Act, the Federalists made several arguments in support of Congress’s power to define and punish the crime of seditious libel. They argued that Congress had power to suppress insurrection and repel invasions, and that “[t]he alien and sedition acts ... form[ed] ... an essential part in these precautionary and protective measures, adopted for our security.” Even more generally, Representative Harrison Gray Otis argued that the federal government must possess the implied power to defend itself: “From the nature of things, ... the National Government is invested with a power to protect itself” and could not be “dependent on an individual State for its protection.”

A House Committee Report reasoned that a law to punish false, scandalous, and malicious writings against the Government, with intent to stir up sedition, is a law necessary for carrying into effect the power vested by the Constitution in the Government of the United States; because the direct tendency of such writings is to obstruct the acts of the Government by exciting opposition to them, to endanger its existence by rendering it odious and contemptible in the eyes of the people, and to produce seditious combinations against the laws, the power to punish which has never been questioned.

The Constitution, the Federalists claimed, expressly committed to Congress the power to declare war, support armies and navies, suppress insurrection, and repel invasions, and they referred to the recent incidents in Europe as evidence that the Constitution must be “adapted to a crisis of extraordinary difficulty and danger.” The Federalists further argued that the Sedition Act did not depart from the Constitution as the First Congress understood it. “Congress has passed many laws for which no express provision can be found in the Constitution, and the constitutionality of which has never been questioned.” Representative Otis explained that the First Congress had punished crimes that did not fall within the three enumerated crimes to which no exception had been taken. For example, stealing public records, perjury, obstructing the officers of justice, bribery in a Judge, and even a contract to give a bribe ... were all punishable, and why? Not because they are described in the Constitution, but because they are crimes against the United States—because laws against them are necessary to carry other laws into effect. ... Finally, the Federalists claimed that the federal government could not rely on the states to punish sedition and, therefore, Congress was simply codifying the common law crime, which the federal courts must have had power to punish.

Republicans answered by arguing that, the First Amendment aside, Congress simply had no power to enact such legislation. They began with the most literal of arguments. Representative John Nicholas claimed “it was not
within the powers of the House to act upon this subject” because he had “looked in vain amongst the enumerated powers given to Congress in the Constitution, for authority to pass a law like the present.” Madison argued in defense of the Virginia Resolutions that the power to suppress insurrections could not support the Sedition Act “with the least plausibility.” Representative Nathaniel Macon went further, quoting from James Iredell’s and James Wilson’s remarks during the ratifying debates to show that Congress has “no power to define any other crime whatever.”

Albert Gallatin of Pennsylvania, one of the most vocal critics of the sedition laws, pointed out that no one could claim that a specific power to punish seditious libel was given to Congress, and if Congress could claim it at all, it must derive from a “more general authority.” If congress had the power, generally, to provide for the punishment of any offenses against Government . . . such a power . . . would embrace the punishment of any . . . act, which, though not criminal in itself, might be obnoxious to the persons who happened to have Government in their hands.

But, he said, the Constitution had specified the offences Congress could punish; he then proceeded to list piracy and felonies on the high seas, counterfeiting, treason, offences within U.S. territories and property, and offences against the laws or exercise of the Constitutional authority of any department—which offences Congress had a right to define and punish, by virtue of the clause of the Constitution which empowered them to pass all laws necessary and proper for carrying into execution any power vested by the Constitution in them.

He defended Congress’s previous crime acts, including provisions punishing theft of the mails and punishing tax evasion, as evidence that it had “hertofore strictly adhered to the specification of the Constitution.”

The Necessary and Proper Clause, he pointed out, required a basis in some other enumerated power of Congress or the United States; otherwise, the majority’s argument would give Congress a “general guardianship over the morals of the people.” Representative Gallatin also specifically addressed the claim that Congress found its power in the Necessary and Proper Clause:

[The Necessary and Proper Clause] was strict and precise; it gave not a vague power, arbitrarily, to create offenses against Government, or to take cognizance of cases which fall under the exclusive jurisdiction of the State courts. In order to claim any authority under this clause, the supporters of this bill must show the specific power given to Congress or to the President, by some other part of the Constitution . . . .

. . . . [T]he bill now under discussion justified the suspicions of those who, at the time of the adoption of the Constitution, had apprehended that the sense of that generally expressed clause might be distorted for that purpose. It was in order to remove these fears, that the [First] amendment . . . was proposed and adopted.
On this question, the Republicans had made two fair, related points. If we were going to imply inherent powers in the federal government, what was the point to the Vesting Clause in Article I, which conferred on Congress “[a]ll legislative Powers herein granted?” What limiting principles were there once we started down that road? Additionally, if, as the Federalists argued, the Necessary and Proper Clause supported Congress’s acts, which of the “foregoing” enumerated powers was Congress “carrying into Execution?” Aside from the question of the degrees of separation between an enumerated power and a power “necessary and proper” to the execution of such power, the Federalists could only muster the most general of powers in support of Congress’s authority. It was hard, even in the context of the tension between the United States and France, to find that the Sedition Act aided the power to declare war, or even the power to call the militia to “suppress Insurrections and repel Invasions.” Proponents of a federal system of representative government found it difficult and challenging to apply the theory of enumerated powers. If the Necessary and Proper Clause was construed expansively at all, the risk was the steady accretion of federal authority, giving the national government power that would be difficult to limit at all.

CONGRESS, THE SEDITION ACT, AND THE FIRST AMENDMENT

As we have discussed in chapters 1 and 2, by the time of the drafting of the Bill of Rights, every state had been through the process of drafting and ratifying some kind of declaration of fundamental rights. Every state except Connecticut had adopted some kind of guarantee of religious freedom, and nine states had also guaranteed freedom of speech, press, and petition. Given the Framers evident familiarity with such provisions, it may seem surprising that the Framers of the Constitution of 1787 did not include a Bill of Rights as a matter of course. The omission of a Bill of Rights was quite deliberate and consistent with the structure of the new Constitution. During the ratification debates in North Carolina in 1788, Henry Abbott remarked that the people “wish to know if their religious and civil liberties be secured under this system, or whether the general government may not make laws infringing their religious liberties…. Many wish to know what religion shall be established.” James Iredell, Federalist, former North Carolina attorney general, and future Supreme Court Justice, responded that he was “astonished” that anyone should conceive that Congress had “authority to interfere in the establishment of any religion whatsoever.” He added,

If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass … Every one would ask, “Who authorized the government to pass such an act?” It is not warranted by the Constitution, and is barefaced usurpation.

What Iredell meant, of course, was that the Constitution did not affirmatively authorize Congress to establish religion; the implication being that if Congress were not expressly authorized, it had no such authority.
Whatever other differences there were between the Federalists and the anti-Federalists over the design of the new Constitution, there was widespread agreement that the new government did not possess “a shadow of right . . . to intermeddle with religion.” The disagreement was whether the Constitution should say so, with the anti-Federalists contending that including express protections was the only way to be confident that the right was secured. James Madison, Alexander Hamilton, and others had argued vigorously that no bill of rights protecting religion, speech, press, and petition was necessary because the Constitution granted Congress no power to legislate in these areas. Given the centrality of the rights some feared could be endangered, the argument against rights guarantees was sometimes generalized to the extent of claiming that the limited powers extended to the national government made a bill of rights altogether superfluous. There are, however, pointed examples in which proponents of the Constitution implicitly admitted that the failure to include a given right protection reflected instead a conclusion that determining a single, uniform rule might be more trouble than it was worth or, alternatively, that this was an area in which legislative discretion could be trusted. Apart from the issue of the necessity of a bill of rights, proponents of the Constitution also contended that a bill of rights could in fact be dangerous. Indeed, Hamilton had argued that the inclusion of a bill of rights would be not only unnecessary . . . but . . . dangerous. [A bill of rights] would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . They might urge . . . that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government.

The First Congress responded to the anti-Federalist criticism of the Constitution and proposed a bill of rights that forbade Congress from making laws respecting the establishment of religion, prohibiting the free exercise of religion, or abridging the freedom of speech, press, and petition. The First Congress added the Ninth Amendment to address Hamilton’s concern. As David Currie has explained,

To the argument that a Bill of Rights was dangerous because it might ‘disparage’ other rights by implying ‘that those rights which were not singled out, were intended to be assigned into the hands of the General Government,’ [Madison] responded with what became the Ninth Amendment . . . . Despite Hamilton’s fears, the prohibition of laws abridging freedom of the press was not to be taken to imply that Congress had any power over the press at all.

If the Ninth Amendment ensured that the mention of religion, speech, press, and petition did not imply that the federal government otherwise possessed such
power, the Tenth Amendment suggested that the power over such subjects was reserved to the states and the people. Despite the assurances of Madison, Hamilton, and others, the Sedition Act of 1798 tested the fundamental premise of the Constitution, that Congress had to have a source of authority to enact legislation and otherwise the power was reserved to the states and the people.

In the Sedition Act debates, the Federalists argued that punishing seditious libel did not infringe the “freedom of the press.” They argued that Congress had the power to defend itself against sedition and that the freedom of the press did not extend to libel. For the Republicans, the First Amendment was surplusage, merely confirming the absence of congressional control over religion, speech, press, and petition. The real issue for the Republicans was not what comprehended freedom of speech and press, but whether Congress had any power at all in this area. Any law might incidentally affect speech and press, but the Sedition Act was, after all, a law about speech and press, and that Congress had no power to enact. According to Rep. Nicholas, “[W]hen the Constitution had not an express provision on the subject of the liberty of the press, the understanding of the members of the convention was complete on the subject,” but “[i]n pursuance of the same idea, the Congress … and the State Governments proceeded to declare the meaning of the Constitution, in this respect, in the most express terms.” Republicans admitted that states did have similar libel laws, but far from showing that the national government possessed the same power, as the Federalists had argued, this fact demonstrated that the national government was dependent on the states for protection.

The Act spawned vigorous objection from Virginia and Kentucky, which urged repeal of the Act. In the Virginia debates, John Marshall took up the Federalists’ arguments, although he found himself in the minority. Marshall argued that the First Amendment itself was proof of the existence of Congress’s power, an argument that proved that Alexander Hamilton’s concerns over a bill of rights were well founded. “It would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press, if the power itself does not exist.” He then made a more subtle argument. He suggested that there was a difference between the First Amendment’s treatment of religion and that of speech, press, and petition. According to Marshall, the authors of the First Amendment having “well weighted” the different terms “manifest a difference of intention”:

Congress is prohibited from making any law RESPECTING a religious establishment, but not from making any law ABRIDGING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropped, and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression to religion and the press, manifests a difference of intention with respect to the power of the national legislature over those subjects, both in the person who drew, and in those who adopted this amendment.

Madison, the author of the Virginia Resolutions, replied to Marshall that Virginia ratified the original Constitution on the express understanding that “the
liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."

"Words," Madison said, "could not well express, in a fuller or more forcible manner . . . that the liberty of conscience and the freedom of the press were equally and completely exempted from all authority whatever of the United States." The House of Representatives referred the Virginia and Kentucky Resolutions to a select committee, whose report, reflecting the Federalist majority, added to John Marshall’s arguments:

[In the First Amendment it] is manifest that the Constitution intended to prohibit Congress from legislating at all on the subject of religious establishments, and the prohibition is made in the most express terms. Had the same intention prevailed respecting the press, the same expressions would have been used, and Congress would have been "prohibited from passing any law respecting the press." [Congress is] not, however, "prohibited" from legislating at all on the subject, but merely from abridging the liberty of the press. It is evident they may legislate respecting the press [and] may pass laws for its regulation . . . provided those laws do not abridge its liberty.

Instead of the First Amendment proving an embarrassment to the Sedition Act’s supporters, the Federalists had turned the First Amendment on its head and used it as evidence for Congress’s power to enact the Sedition Act. The Republican minority assailed the notion of a “boundary between what is prohibited and what is permitted. The Constitution has fixed no such boundary, therefore, they can pretend to no power over the press, without claiming the right of defining what is freedom.”

THE TENTH AMENDMENT

Federalists and Republicans cited the Tenth Amendment, although not with equal force. Representative Otis reminded the representatives that many of the states had also punished common law seditious libel. The Sedition Act was, thus, “perfectly analogous to the laws and usages under which they had all been born and bred.” Accordingly, he reasoned, if the Sedition Act violated the Constitution, “each State had infringed upon its own constitution; for it was not more true that all the powers not given to Congress were retained by the States, than that all the powers not given to the States were retained by the people.” Otis’s argument completely misperceived the structure of the Constitution and the role of the Tenth Amendment. It was true that the powers not given the states were retained by the people, but the Constitution did not specify the powers given to the states. That was a matter regulated by state constitutions. The analogy between the federal government and state governments was a poor one. Moreover, it perversely attempted to use the reserved rights of the people as a claim for novel federal power.

The Republicans employed the Tenth Amendment in three distinct ways: First, they argued that the Tenth Amendment reinforced the idea that the federal government was a government of limited and enumerated powers. Thus,
Representative Nicholas argued that it was not only “universally admitted, in the abstract” that federal powers were limited, but also that the Tenth Amendment “positively declared” it so. Second, it served as a rule of narrow construction. Representative Gallatin stated that the Tenth Amendment was added “for greater security.” Gallatin advanced that the constitutional structure confirmed in the Tenth Amendment required Congress to demonstrate, by text, the source of its authority to act. If Congress can act through powers implied and undefined “all the reserved powers of the people or of the States will be swallowed up at their pleasure.” The doctrine of limited powers would be “completely annihilated” by generous construction.

Third, the Republicans maintained that the Tenth Amendment guaranteed exclusive state powers over all matters not committed to Congress and, because Congress possessed no power in this area, the states held the exclusive power to punish seditious libel. In 1804 Thomas Jefferson explained to Abigail Adams: “While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.” The Kentucky Resolutions, authored by Thomas Jefferson, made this argument more directly:

Resolved, That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the laws of nations, and not other crimes whatever; and it being true, as a general principle, and one of the amendments to the Constitution having also declared “that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,”—therefore, also, the [Sedition Act and the Bank Fraud Act] (and all other acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force; and that the power to create, define, and punish, such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory.

The debates over the Sedition Act were vigorous and highly partisan. Nearly every Federalist supported the act, while nearly all Republicans opposed it. In these debates, it is sometimes difficult to separate arguments of political expediency from more principled arguments about the Constitution. The Federalists had little text on which to base their arguments; they appealed largely to the idea that the Constitution had created a government, and that even a government of limited powers has an implied power to defend itself. The Necessary and Proper Clause supported both the notion of an implied power and sustained the expansion of any inherent or implied power in the Constitution. Yet, as the Federalists pointed out, no one in Congress contested the power of Congress to punish seditious acts, although the Republicans’ arguments about the lack of an enumerated power authorizing punishment of seditious libel applied with equal force to the section of the bill punishing actions.
For the Republicans, who were more naturally suspicious of expansive powers in the new government, the enumerated powers doctrine appeared spectral. If Congress could justify the Sedition Action on the basis of either inherent powers or through a broad reading of the Necessary and Proper Clause—particularly when the Sedition Act seemed to fly in the face of the First Amendment, and after being given repeated assurances from leading Federalists that the First Amendment was not even necessary—Republicans had cause for concern that the new federal government would shortly become a government of general powers. The Republicans’ arguments reveal a deep suspicion that the enumerated powers principle was proving to be a sieve, and that nearly anything might be justified under an expanded reading of the Necessary and Proper Clause. Although some Republicans continued to maintain that Congress could only punish the enumerated crimes, most Republicans—and almost certainly the Federalists—would have conceded that Congress could make acts criminal such as were necessary and proper to the enforcement of powers plainly belonging to Congress. In the end, as Mark DeWolfe Howe wrote, “a crisis which seems to us to have been concerned with freedom seemed to the statesmen of 1798 to be a crisis in federalism.”

In hindsight, it is easy to blame the Federalists for their politically opportunistic construction of the Constitution, a construction that would be made acceptable on more politically palatable terms in *McCulloch*. But the Sedition Act debates demonstrate a far more difficult problem: the practical challenges of executing the Constitution’s design. The debates show how hard it is to create a government of enumerated powers and anticipate the needs of even a limited government. And if the Framers could not anticipate the legitimate needs of the new government, and if the Constitution was to be sufficiently flexible to adapt to crises, then was the design of truly limited powers adequate to any purpose at all? Each decision in favor of a flexible construction of the Constitution was necessarily a decision in favor of the federal government; concomitantly, it was a decision against state powers (at least exclusive state powers).

The Sedition Act deprived the states of their exclusive control over seditious libel, but to what consequence? No one pressed seriously that, if the federal government punished seditious libel against its own officers, Virginia would suffer the loss of essential functions. This suggests that the Republicans, as a constitutional matter, were more concerned with the idea of implied powers and its implications for the future than with the actual loss of residual powers to the states via the Sedition Act—and, of course, with the impact on freedom of speech and the pressure of having such powerful antidotes as the prohibitions on seditious libel being applied by a distant federal government. The Republicans argued that Virginia’s libel laws were sufficient to protect federal officers. Again, no one seemed to think that the state was particularly well suited to punish seditious libel against federal officers; even if the states were adequate, they were not particularly interested in shielding federal officials.

What did the Sedition Act debates mean for the Tenth Amendment? Did the Tenth Amendment merely state the obvious, that the states’ power was
residual and consisted of whatever Congress did not in fact assume? So under-
stood, it would be understandable how Madison could both underscore that the 
language he drafted for the Tenth Amendment was merely “declaratory,” and 
perhaps even redundant, even as he assumed that it would support the Federal-
ist position during the debate over ratification of the Constitution. But if one 
accepts the premise that the Tenth Amendment does not help to identify or 
define federal powers—which the “declaratory” interpretation seems to 
suggest—it would also seem to follow that the only shield for the states was 
not an enumerated powers doctrine, but the states’ representation in Congress.81 
This would also mean that the Supreme Court would have no role (or nearly 
no role) in mediating boundary disputes between the federal government and 
the states. This result, of course, is not far from where we’ve wound up in the 
long run—but the “long run,” as we shall see, is a bit of a wandering trail.

McCulloch v. Maryland and the Bank of the United States

By the end of the Revolutionary War, the debt load of the young American 
republic was massive, in excess of $50 million. When the debt was created by 
issuing IOUs during the war, it had been assumed that the debt would serve 
as a credit against future taxes. Speculators, however, purchased the debt at a 
reduced value and demanded specie in return.82 But the war had drained gold 
and silver, the only internationally recognized legal tender, from American 
Sources in order to finance the conflict. After the war, British traders 
demanded payment in hard currency, in turn placing pressure on urban mer-
chants, who demanded payment from their agrarian debtors in currency as 
well.83 The entire situation was exacerbated by persistent deflation, which, 
without currency, made the repayment of debt even more difficult.

The Confederation and the states languished in recession for nearly a dec-
ade following the war. In 1781, Robert Morris, the Confederation’s superin-
tendent of finance, and Alexander Hamilton proposed that Congress charter a 
Bank of North America, the first bank in North America.84 The bank never 
met its expectations. Several states made the bank’s notes tender for payment 
of state taxes and two states, Massachusetts and New York, granted charters 
of incorporation to the bank because they doubted that Congress had the 
power to do so. New York issued the charter with the reservation that 
“nothing in this act contained shall be construed to imply any right or power 
in the United States in Congress assembled to create bodies politic or grant 
letters of incorporation in any case whatever.”85 Bank officials themselves 
doubted the bank’s legitimacy, and they sought a charter from Pennsylvania. 
Pennsylvania issued the charter, and the bank was still operating when the 
Constitution was adopted in 1789.

In Philadelphia in 1787, the Framers made the United States liable for the 
debts incurred under the Articles of Confederation and gave the United States 
the power to discharge those debts by imposing taxes and borrowing on the 
credit of the United States. The Framers also debated whether to grant
Congress the power to incorporate establishments such as banks. At the time, American practice did not recognize a general corporate law; rather, states issued charters to specific corporations on an individual basis. During the debates, Benjamin Franklin proposed granting Congress the power to cut new canals “where deemed necessary.” Madison did not object, but suggested that the drafters enlarge Franklin’s suggestion and give Congress power “to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent.” Rufus King objected that in Philadelphia and New York the power to incorporate would be assumed to refer to establishing banks. Given the actions of those two states with respect to the Bank of North America, this would have been a source of some contention. The delegates limited the motion to the chartering of a canal company, and the motion failed.

Although the exchange was brief, the framers had considered two different questions. First, should Congress be empowered to charter corporations? Second, may Congress incorporate a bank? Benjamin Franklin and James Madison had offered two different kinds of proposals. Franklin’s proposal to empower Congress to cut canals, which did not specify the means for doing so, left unstated whether Congress could charter a corporation to do the job or charge a federal body (the Army, or perhaps the Army Corps of Engineers, for example) with performing the task directly. Madison, by contrast, focused on granting Congress the means—chartering corporations—to accomplish U.S. interests, without prejudging what those interests might be. Madison’s power of incorporation, moreover, was limited to those instances in which the states were incompetent, a potentially significant constraint.

In December 1790, Secretary of the Treasury Alexander Hamilton proposed that Congress charter a national bank. At the time, Baltimore, Boston, New York, and Philadelphia had banking systems, which maintained regular commercial relationships. The new bank, however, would do more than facilitate commerce, it would aid the government in collecting taxes and loan money to the Treasury. Furthermore, it might aid the United States in its newly acquired responsibility to assume the state debts incurred through the Revolutionary War. Congress moved promptly. The House considered the measure in extensive debates between February 1–8, 1791. Congress sent a bill to President Washington on February 14, in a vote that largely followed regional lines. In the meantime, President Washington had requested the opinions of three members of his cabinet, Attorney General Edmund Randolph, Treasury Secretary Hamilton, and Secretary of State Thomas Jefferson. The attorney general submitted two memoranda on February 12, offering the view that the bank was unconstitutional; Jefferson agreed and, in his opinion on February 15, he urged the president to veto the bank bill. Hamilton sent his opinion on February 23 in support of the bank, having had the benefit of responding to both Randolph’s and Jefferson’s memoranda. President Washington signed the bill on February 25, 1791.

The Bank of the United States operated until 1811, when Congress refused to extend its term amidst claims that the bank should not be renewed because
it was unconstitutional. Five years later, with the War of 1812 occurring in the intervening period, Congress again proposed a Bank of the United States and its critics again argued that chartering a bank exceeded Congress’s power. This time, however, President James Madison supported the Bank on the grounds that objections to the bank were “precluded ... by repeated recognitions ... in the acts of the legislative, executive, and judicial branches of the government ... [and the] concurrence of the general will of the nation.” Jefferson remained vocally opposed to the Bank. The Bank’s most able defender, Alexander Hamilton, had been killed in a duel with Aaron Burr in 1804.

In 1819, the Supreme Court in McCulloch v. Maryland upheld the power of Congress to establish a national bank. Although McCulloch ended formal arguments over the constitutionality of the bank, the debate spilled out of the Court and into the newspapers. In Virginia, two prominent state jurists, writing under pseudonyms, assaulted the opinion. In an extraordinary display of pique, Chief Justice Marshall joined the debate and responded to these attacks, also under a pseudonym. As Marshall historian Kent Newmyer observed, “at no time during American history, not even in the Court-packing battle of the late 1930s, was there such a sustained root-and-branch attack on the Supreme Court as an institution.”

Notwithstanding the Supreme Court’s approval, given the enormous controversy prompted by the Court’s decision, the second bank was not rechartered. In 1832, despite Congress’s attempt to extend the bank’s charter, President Andrew Jackson vetoed the bank on the basis of his independent judgment that the bank was unconstitutional. Then, in 1833, he instructed his Acting Secretary of the Treasury (and former Attorney General) Roger Taney to withdraw government funds and place them in state-chartered banks. The move came at a heavy political price; the Senate rejected Taney as secretary of the treasury, the first cabinet nominee rejected by that body, and it issued a resolution of censure against Jackson. Even so, the bank expired in 1836.

The debates of 1791 are among the most important discussions of the Constitution and its interpretation in our history. So central are those debates that 28 years later, Chief Justice John Marshall referred unmistakably (although not by name) to arguments that were made in 1791, criticizing the views of Madison and Jefferson and adopting—nearly verbatim—portions of Hamilton’s opinion for the president.

MADISON, JEFFERSON, AND RANDOLPH

James Madison opened the debate over the bank in the House of Representatives with a simple question: “Is the power of establishing an incorporated bank among the powers vested by the constitution, in the legislature of the United States?” Madison began with an observation about the “peculiar manner in which the Federal Government is limited.” The federal government, he said, did not have “a general grant out of which particular powers...
are excepted; it is a grant of particular powers, leaving the general mass in other hands.\textsuperscript{98} He then suggested that there were three clauses under which the bank might fall—the power “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”; the power “To borrow Money on the credit of the United States”; and the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”\textsuperscript{99} Madison pointed out that the bank did not lay any tax, it did not borrow any money, and the bank was not “\textit{necessary to the end, and incident to the nature}, of the specified powers.” Madison recognized that even though the bank did not fall within the literal language of the Taxing and Borrowing Clauses, it might be implied, and the Necessary and Proper Clause seemed to admit some powers by implication. The real question was this: How much implication does the Constitution embrace?

Madison understood well the centrality of the question. He answered that the Necessary and Proper Clause was “merely declaratory of what would have resulted, by unavoidable implication” and that the “\textit{doctrine of implication was a tender one.}” He warned that

The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used, which . . . might be conceived to be conducive to the successful conducting of finances, or might be \textit{conceived to tend to give facility} to the obtaining of loans.

Mark the reasoning on which the validity of the bill depends. To borrow money is made the \textit{end}, and the accumulation of capital \textit{implied as the means}. The accumulation of capital is, then, the \textit{end}, and a bank implied as the \textit{means}. The bank is then the \textit{end}, and charter of incorporation, a monopoly, capital punishments, &c. implied as the \textit{means}.

If implications, thus remote, and thus multiplied, can be linked together, a chain may be formed, that will reach every object of legislation, every object within the whole compass of political economy.\textsuperscript{100}

Later, as president, Thomas Jefferson echoed similar reasoning on a bill granting a charter to a mining company:

Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt the reasoning who has ever played at ‘\textit{This is the House that Jack Built}? Under such a process of filiation of necessities the sweeping clause makes clean work.\textsuperscript{101}

Even Madison had admitted that some implication was both “\textit{necessary}” and “\textit{proper},” but how far did the Constitution’s delegation of authority to Congress extend?\textsuperscript{102} The power to tax surely included the power to create a Department of Taxation, complete with its own building and administrator. Such matters would seem essential to effective taxation. Congress might
authorize a vault in which to keep tax revenues and guards to watch the vault. But does the power to tax suggest a bank to house the vault and an army to protect the bank? Or, following Jefferson’s tongue-in-cheek reference to the “House that Jack Built,” if Congress can create a bank and hire an army, can it charter the construction company to build the bank and a federal arms manufacturer to supply the army? Madison’s concern that each new means (the bank) becomes an end in itself, which in turn justifies a new means (a construction company), is well taken; there is no end to the game.

**The Impact on State Laws and Institutions as a Factor**

Madison had identified a dilemma for which neither he nor anyone else had a clear and easy solution. What Madison proposed was a rule of strict or narrow construction (which, in practice, was more of a standard or guideline than a rule). Madison’s analysis can be thus summarized:

For Jefferson, and subsequently for the advocates of the state of Maryland, the crucial step in the analysis was the insistence that the word “necessary” be understood as stating a stringent requirement: the power to be exercised by implication was required to be essential to implementing the enumerated power, a power that must be inferred if the granted power is not to be nugatory. This was the key to ensuring that the national government remained a government of a few powers, leaving the many powers to the states. It appears, however, Madison sensed the vulnerability of the strict necessity test to the objection that a great many things that are plainly incidental to, and logically comprehended within, a delegated power might nevertheless not be absolutely necessary. Without abandoning the insistence that mere convenience would not suffice, Madison offered the further suggestion that the nature of the power being asserted as ancillary should itself be an important area of focus; the question of the required fit between means and end would be determined on this approach both by how directly and immediately the ancillary power furthered an authorized end, as well as by the intrinsic importance of the power offered as a means to other ends. Under this test, the Constitution would “condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.” Put somewhat more bluntly, the more important the implied power, the closer the connection must be to the express power if it is to be justified under the Necessary and Proper Clause. Despite the differences in emphasis between Madison and other opponents of the bill, however, in each case the question related to the nature of the relationship required between a law passed as a means to some enumerated power as an authorized end.103

Madison justified his approach by resorting to several different kinds of arguments. First, Madison pointed out that the bank would interfere with state powers. A national bank would preempt a state bank and would “interfere with the rights of States to prohibit as well as to establish, banks, and the circulation of bank notes.”104 Thus, a national bank could override a state’s bank regulatory scheme. Second, he made an argument *reductio ad absurdum*. To imply in the enumerated powers such latitude of interpretation “would give to
Congress an unlimited power; would render nugatory the enumeration of particular powers; [and] would supersede all the powers reserved to the State Governments."\textsuperscript{105} For Madison, these consequences were so contrary to the purpose of the Constitution that any construction of the Constitution that would bring about these results must be wrong.

**The Ninth and Tenth Amendments**

Finally, Madison cited both the Ninth and Tenth Amendments—the "explanatory amendments"—as evidence that the Constitution must be construed narrowly; "the former, as guarding against a latitude of interpretation—the latter as excluding every source of power not within the constitution itself."\textsuperscript{106} Madison employed the Ninth and Tenth Amendments in a manner consistent with the arguments over those amendments made during the Sedition Act debates seven years later. While acknowledging that the Ninth and Tenth Amendments added no substance to the Constitution (hence, they were "explanatory amendments"), Madison saw the amendments as reinforcing the enumerated powers doctrine.\textsuperscript{107} They "guard[ed] against a latitude of interpretation."\textsuperscript{108}

Attorney General Edmund Randolph and Secretary of State Thomas Jefferson arrived at roughly the same place through a different line of reasoning.\textsuperscript{109} Randolph observed that there is a difference between laws and constitutions; a constitution prescribes a subject matter that numerous laws may fulfill. The laws, he said, require a "closer adherence to the literal meaning," while a constitution should be construed with "a discreet liberality."\textsuperscript{110} But, he also noted, there is also a difference between the federal constitution and state constitutions. The federal constitution requires "stricter" interpretation, "because there is a greater danger of error in defining partial, than general powers."\textsuperscript{111}

In his written opinion for the president, Thomas Jefferson began with the Tenth Amendment, which he considered "the foundation of the constitution... To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of boundless field of power, no longer susceptible of any definition."\textsuperscript{112} Jefferson then construed the Necessary and Proper Clause literally. The Constitution, he said, "allows only the means which are 'necessary,' not those which are merely convenient for effecting the enumerated powers." Jefferson understood that by "necessary," the Constitution meant "without which the grant of the power would be nugatory."\textsuperscript{113} In the case of the bank, a national bank might have made it easier to transport money between the states or between states and the Treasury, but "a little difference in the degree of convenience cannot constitute the necessity, which the constitution makes the ground for assuming any non enumerated power."

**HAMILTON**

Alexander Hamilton opened his opinion to the president with a powerful argument, one that seemed capable of fairly meeting important points made by
Madison, Randolph, and Jefferson. All governments are of limited authority; “each has sovereign power as to certain things, and not as to other things.” The fact that the federal and state governments have divided the sovereignty of the people doesn’t mean that one or the other “is not sovereign with regard to its proper objects.” And for every power vested in a government, Hamilton argued, the government may “employ all the means requisite, and fairly applicable, to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society.”114 The point was well articulated, but it still did not address Jefferson’s argument that the federal government could exercise implied powers only that were “necessary,” not merely convenient, nor did it answer Madison’s concern about piling implication on implication. Hamilton responded to Jefferson that “necessary” did not mean—in either its “grammatical, nor popular sense”—that “without which the grant of the power would be nugatory.” Rather, “necessary” meant “no more than needful, requisite, incidental, useful, or conducive to.”115 Hamilton had offered an extraordinarily broad reading of the Necessary and Proper Clause and implied powers, one that would have sent a strict constructionist screaming from the room. But Hamilton argued that the principle was bounded. In a passage that John Marshall would heavily paraphrase in McCulloch, Hamilton argued that “if the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution it may safely be deemed to come within the compass of the national authority.”116

Hamilton then proceeded in two steps: first, to show that chartering a corporation might be a reasonable means to an express end; and second, to show that there was a relationship between the bank and the objects of a number of the enumerated powers. Hamilton’s point on the chartering of corporations was powerfully made. He pointed out, for example, that Congress had exclusive authority over the seat of government (soon to be the District of Columbia). Because Congress’s authority was exclusive, if Congress did not possess the power to charter corporations in the District, then no entity did. The argument was a good one and, if Hamilton had been arguing that Congress could charter banks within the District of Columbia, it probably would have been conclusive. Where Hamilton was on shakier ground was in suggesting that because Congress might exercise the power to charter corporations in the District, it might exercise that power outside of the District as well. As Madison had pointed out, the argument for a national bank outside of the District required a double implication—that Congress had the general power to charter corporations and that it had the authority to create a bank. Neither of those authorities was express. Hamilton then argued, effectively and in some detail, that a bank had a relation “more or less direct” to the power to collect taxes, borrow money, regulate trade between the states, and raise and maintain fleets and armies, and that the bank’s relation to trade between the states and
maintaining fleets and armies was “immediate.”"\textsuperscript{117} He made additional arguments based on the United States’ control of property and the Coinage Clause.

With respect to state control of banking, Hamilton was diversionary. He argued that the bank would not abridge any right of the states or any individual. “The State may still erect as many banks as it pleases; every individual may still carry on the banking business to any extent he pleases.”\textsuperscript{118} That point was true as far as it went, but it did not respond to Madison’s argument that the states would lose their power to prohibit certain banking practices as well as the power to give state-chartered banks exclusive operating rights. Once the federal government established a bank, the Supremacy Clause would necessarily shield the bank from state regulation. As a result, a national bank could compete unfairly with state banks by ignoring state regulations.

The national bank legislation provided the states with greater cause to complain about federal encroachment than the Sedition Act, because the bank posed a greater threat to powers that the states really cared about. First, the Sedition Act did not apply to seditious libel against state officials. It did not purport to preempt state sedition laws. Second, it was not clear that the states had an interest in punishing sedition against federal officials. But, third, even if a state did, state sedition laws remained largely unaffected by the Sedition Act. In fact, because of the dual sovereignty doctrine in criminal law, a seditious act against the federal government, if punishable under state law as well, might be charged under both laws. Hence, the states had little occasion to see the Sedition Act as a threat to their claim to exclusive control of seditious libel.

The bank posed a much more important, although still not a direct, threat to exclusive state control of banks and bank charters. As Hamilton and others pointed out, the national bank legislation did not preclude the states from chartering state banks. It did not affect the manner in which individuals banked or their ability to choose their banks. The national bank did not preempt any state banks. But Hamilton’s argument worked only insofar as he directed our attention to the national bank as an additional bank. Madison had argued that exclusive control of banking was affected to the extent that the national bank performed tasks prohibited by the state.

\textbf{Marshall’s Opinion in \textit{McCulloch}}

John Marshall’s opinion for the Court in \textit{McCulloch v. Maryland} may be the most important opinion in American legal history. Although most legal casebooks begin with \textit{Marbury v. Madison} (1803), thereby suggesting that \textit{Marbury} is first in the constitutional canon, \textit{McCulloch} deals with the question of \textit{how} we construe the Constitution rather than \textit{who} gets to construe it. \textit{Marbury}, of course, makes Marshall’s opinion in \textit{McCulloch} of lesser import than it might have been had the Court not already asserted the power of substantive constitutional review. Certainly for federalism, however, \textit{McCulloch} remains the preeminent opinion.
The context for *McCulloch* was a scene envisioned by Madison: Does the chartering of a national bank threaten exclusive state control of banking? After Congress created the second Bank of the United States, a number of states—including Georgia, Illinois, Indiana, Kentucky, Maryland, North Carolina, Ohio, and Tennessee—adopted antibank provisions. The Maryland antibank statute provided that banks operating without authority from the state could issue bank notes only on stamped paper furnished by Maryland. The fees for the stamped paper varied according to the value of the note. In the alternative, a bank could simply pay a flat fee of $15,000 annually. Penalties for violators, including bank officials, were $500 per offense, one half to the informer and one half to the state. The only bank in Maryland operating without a state charter was the Bank of the United States. John James brought this action for himself and the State of Maryland against James McCulloch, the cashier of the Baltimore branch of the bank. Maryland joined the suit to claim that the legislation creating the bank was unconstitutional. The bank rejoined that the Maryland tax was unconstitutional under the Supremacy Clause. The County Court found for Maryland and the Maryland Court of Appeals affirmed.119

Maryland argued to the Supreme Court that the Constitution was an act of the states, and that this called for construing the Constitution narrowly. As the Court paraphrased the argument, “The powers of the general government . . . are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.”120 Chief Justice Marshall, writing for the Court, rejected this argument outright. He acknowledged that the delegates to the constitutional convention were selected by state legislatures, and he admitted that the constitution was ratified on a state-by-state basis. Marshall, however, maintained that the Constitution was adopted by the people, who

acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.121

Marshall, of course, was precisely the kind of “political dreamer . . . wild enough to think . . . of compounding the American people into one common mass.” In nearly the same breath, Marshall concluded that the federal government was “emphatically, and truly, a government of the people . . . the government of all; its powers are delegated by all; it represents all, and acts for all.”122

Maryland’s point was important enough to merit extended discussion. Indeed, the point was critical. It was the result of two principles of
eighteenth-century political thinking: Only one entity at a time can possess sovereignty; and a sovereign, once constituted, cannot be deprived of any of its powers except by “express consent narrowly construed.”\textsuperscript{123} If, as Maryland claimed, sovereignty reposed principally in the states, then exceptions to their sovereignty must be narrowly construed. Maryland’s claim meant that the Constitution had to be construed in the most narrow fashion, because any concession to Congress would have to come at the expense of state sovereignty. If, as Marshall claimed, the people and not the states were sovereign, then the Constitution might be given a broader construction for its limited but general powers.

Marshall had set up a false dichotomy in which we had to choose between recognizing the sovereignty of state governments or recognizing the sovereignty of the people as a whole. The excluded middle consisted of the people, organized by states, which was the political sovereignty recognized in the ratification, amendment, and electoral college processes.\textsuperscript{124} As we pointed out in Chapter 1, the ratification process recognized the sovereignty of the people and the position of the states. State-by-state ratification by the people was necessary because the ratification of the U.S. Constitution effectively amended state constitutions. Because the people of one state were not competent to amend the constitution of another, ratification could not have proceeded in the form of a national referendum. The people, as Marshall had used the term, were not sovereign. The excluded middle more accurately describes the sovereign. The idea of the sovereignty of people within the several states was a more complex notion than either Maryland’s argument for the sovereignty of state governments or Marshall’s argument for recognizing the sovereignty of the people of the United States as a whole, and it called for a different approach to constitutional interpretation. If the people, organized by states, were sovereign, then the federal constitution represented express consent to an exception to the state constitutions and must be narrowly construed. Instead, Marshall found that the people as a whole had adopted the Constitution, which meant that there was no presumption against depriving the states of their powers and, consequently, no presumption against the exercise of federal power.

The presumption was indeed critical to Marshall’s next point—that the failure to discover the power to establish a bank or create a corporation was not fatal to the Bank of the United States. Under the doctrine of enumerated powers, Congress must affirmatively demonstrate the source of its authority. Marshall observed that there was no power to establish a bank or create a corporation. But then he shifted his focus from looking for a clause granting the power to claiming that there was no prohibition on the power. Reminding us that the Articles of Confederation had reserved to the states all powers not “expressly delegated,” Marshall observed that nothing in the Constitution “excludes incidental or implied powers.” This was a near reversal of the doctrine of enumerated powers. He then cited the Tenth Amendment as justification.
Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only that the powers “not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;” thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. 125

Marshall had effectively read the Tenth Amendment out of the Constitution. Under Marshall’s reading of the Framers’ intent, the Tenth Amendment quieted “the excessive jealousies which had been excited”—in other words, it was a sop, a palliative to pacify the anti-Federalists whose concerns had been “excessive.” By contrasting the Amendment with Article II of the Articles of Confederation and pointing out that the Tenth Amendment had omitted the term “expressly,” Marshall turned the Tenth Amendment on its head. Far from ensuring that power would be reserved to the states, Marshall argued that the Tenth Amendment confirmed that the federal government possessed powers implied and not enumerated. The presence of the Tenth Amendment worked against state claims of reserved power.

In effect, Marshall had reversed the way that we approach the Constitution. Later in the opinion, Marshall repeated his approach in a neat syllogism: “[A]ll legislative powers appertain to sovereignty.” 126 “[T]he powers given to the government imply the ordinary means of execution.” 127 “[The government which has a right to do an act ... must ... be allowed to select the means,” accordingly, “those who contend that [the government] may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.” 128 His statement was a contrast to Madison’s view that the Constitution was “not a general grant, out of which particular powers are excepted.” 129 Thus, anyone opposing the means must demonstrate that the Constitution contains a prohibition on power rather than a grant of power. Chief Justice Marshall memorialized this in McCulloch’s most famous line, one that Marshall borrowed heavily from Alexander Hamilton: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 130

CONCLUDING THOUGHTS

The arguments over the Sedition Act and the Bank of the United States provide a fascinating context in which to view the question of the powers reserved to the states and the people. Although the Federalists prevailed in their arguments in both cases, we have embraced the Federalists’ arguments.
over the Bank, but rejected their position on the Sedition Act. Ironically, in the process of disclaiming the Sedition Act, we have embraced McCulloch’s methodology, so that we tend to criticize the Sedition Act not because it was outside of Congress’s enumerated powers, but because the Act violated an enumerated disability, the First Amendment.

Gerald Gunther has written that

[t]o conclude that the Bank was constitutional was to beat a moribund horse. But explain that the Bank was constitutional because the Constitution should be broadly and flexibly interpreted, because one could not expect such a document to specify every power that the national government might properly exert, because one should not be miserly in finding implied national powers, because Congress legitimately had broad discretion in selecting means to achieve the ends listed in the recital of delegated national powers in the Constitution—all this was to touch a very live nerve indeed…. With this opinion, the Court provided a reservoir of justifications for national action perhaps even fuller than Marshall intended—one repeatedly drawn on during the Era of Good Feelings and the Age of the Robber Barons and the New Deal and our civil rights crises by those who have sought to expand the area of national competence.131

In the end, McCulloch gave Congress broad rein to decide both the purposes that were encompassed within its enumerated powers and the means to bring about those purposes. The Court had announced that Congress would have broad leeway unless it crossed express prohibitions in the Constitution. By reading the Constitution this way, the Court shifted the focus from enumerated powers to enumerated disabilities. That fact is evident today, in that Congress has far less to fear from the Court finding that Congress has acted outside the commerce or spending powers, and more to fear from the Court finding that the First Amendment or the Due Process or Equal Protection Clauses prohibit Congress’s actions. In fact, the Court would not strike congressional legislation as exceeding its enumerated powers until Hepburn v. Griswold (1870).132 McCulloch relegated the Tenth Amendment to surplusage at best, and, from the perspective of the states, an inference contrary to its intended purpose.

NOTES


4. See Mayor of the City of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837) (“A state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States.”)


6. This was both the assumption on which the early state constitutions were drafted and the clear implication (for many) of the Tenth Amendment. See also Forrest McDonald, *The Bill of Rights: Unnecessary and Pernicious, in The Bill of Rights: Government Proscribed* 387, 388 (Ronald Hoffman & Peter J. Albert eds., 1997) (“unlike governments of delegated and enumerated powers,” the states “had (as representatives of the sovereign people) all powers not constitutionally forbidden them”); Donald S. Lutz, *Popular Consent and Popular Control* 60 (1980) (drafters of state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights”); McAffee, supra note 2, at 751 & n.16.

7. Unlike Congress, the states do not need to plead the source of their powers affirmatively; we assume they exercise general police powers. A person who wishes to challenge an exercise of state power might do so on several grounds: first, that the exercise is inconsistent with the state’s own constitution; second, that the exercise is inconsistent with the exercise of a power granted to Congress; and third, that the exercise is prohibited by the U.S. Constitution. In the ordinary course, the absence of an expressly defined power in the United States, or the absence of an express prohibition in the U.S. Constitution, meant that the states could exercise the power consistent with the state’s constitution. See Thomas C. Marks, Jr. & John F. Cooper, *State Constitutional Law in a Nutshell* 1–7 (West, 1988).


10. See Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845) (“The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws ....”). See also Akhil Reed Amar, “The Bill of Rights and the Fourteenth Amendment,” 101 Yale L.J. 1193, 1272–75 (1992); Bybee, Taking Liberties with the First Amendment, supra note 1, at 1571–76.


13. Smith, supra note 11, at 10. See 8 Annals of Cong. 2016 (1798) ("if we had anything to apprehend on account of our liberty, the danger did not arise from Government having too much power, but from its want of power") (statement of Rep. Kittera).

14. Miller, Crisis in Freedom, supra note 11, at 16.

15. Smith, supra note 11, at 11.

16. Id. at 12.


20. One of the first members of Congress to object to the Sedition Act, John Nicholas of Virginia, framed the issues nicely. He "confessed it was strongly impressed upon his mind, that it was not within the powers of the House on this subject." Nicholas said he had "looked in vain amongst the enumerated powers ... for an authority to pass a law like the present; but he found what he considered as an express prohibition against passing it." He then quoted the Tenth Amendment as the means for "quiet[ing] the claims of the people ... with respect to the silence of the Constitution as to the liberty of the press." 8 Annals of Cong. 2139–40 (1798).

21. The Framers regarded "defining" crime as a power apart from "punishing" crime. 2 The Records of the Federal Convention of 1787, at 614–15 (Max Farrand ed., rev. ed., 1966). Article I, section 8, clause 10, recognizes this distinction as well (Congress shall have the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.").


24. Id. at 451.

25. 4 Elliot, supra note 22, at 219.


31. 9 Annals of Cong. 2991 (1799) (committee report).

32. 8 Annals of Cong. 2146 (1798).


34. 9 Annals of Cong. 2987–88 (1799).

35. 9 Annals of Cong. 2990 (1799) (committee report).

36. 9 Annals of Cong. 2988 (1799) (committee report).

37. 8 Annals of Cong. 2147 (1798). Otis also pointed to language in the Judiciary Act of 1789, which “sav[ed] to suitors in all cases the right of a common law remedy, where the common law was competent to give it.” See 1 Stat. 77 (1789). Otis “[could not] perceive how this competency applied to civil and not to criminal cases.” 8 Annals of Cong. 2147 (1798).


39. Id. at 2139.

40. 4 Elliot, supra note 22, at 568.

41. 8 Annals of Cong. 2152 (1798) (emphasis in original). The passage Macon quoted is found at 4 Elliot, supra note 22, at 219. See also id. at 540 (Thomas Jefferson’s report on the Kentucky Resolutions).


43. 8 Annals of Cong. 2158 (1798).

44. 8 Annals of Cong. 2159 (1798).


49. Id. Art. I, § 8, cl. 11.

50. Id. Art. I, § 8, cl. 15.


54. 4 Elliot, supra note 22, at 191–92.

55. Id. at 194.

56. 3 Id. at 330 (statement of James Madison).

57. See, e.g., 2 Farrand, supra note 20, at 617–18 (statement of Roger Sherman) (opposing a guarantee of “liberty of the Press” because “It is unnecessary—The power of Congress does not extend to the Press.”); 2 Elliot, supra note 22, at 436 (statement of James Wilson) (“A proposition to adopt a [bill of rights] that would have supposed that we were throwing into the
general government every power not expressly reserved by the people would have been spurned at, in [the constitutional convention], with the greatest indignation’’; Id. at 449 (statement of James Wilson) (“It is very true . . . that this Constitution says nothing with regard to [freedom of the press], nor was it necessary; because it will be found that there is given to the general government no power concerning it.”); and 3 id. at 469 (statement of Edmund Randolph) (“No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion”).

58. McAffee, supra note 5, at 104–13 (section entitled “Civil Juries and Standing Armies: The Rights Omitted”). The classic example was the defense offered to the omission of a guarantee of a right to trial by jury in civil cases, which “rested on justifications for not restricting legislative discretion, as well as on the mechanism that would prevent serious abuses from the discretion actually granted.” Id. at 104.


60. Currie, supra note 10, at 853 (footnotes omitted) (quoting 1 Annals of Cong. 456 (Joseph Gales ed., 1789)).

61. Id. at 853 n. 455. See Permoli v. Municipality No. 1, 44 U.S. (3 How.) at 609 (1845); Ex parte Garland, 71 U.S. (4 Wall.) 333, 397–98 (1867) (Miller, J., dissenting).


63. 8 Annals of Cong. 2153–54 (1798) (statement of Rep. Livingston); Id. at 2151–52 (statement of Rep. Macon). The Republicans also pointed out that the Sedition Act conflicted with the separation of functions, that whatever power the federal courts might have to enforce the common law of libel, Congress was forbidden to legislate here. “The question was not whether the Courts of the United States had, without this law, the power to punish libels, but whether, supposing they had not the power, Congress had that of giving them this jurisdiction—whether Congress were vested by the Constitution with the authority of passing this bill.” 2 Annals of Cong. 2157–58 (1798) (statement of Rep. Gallatin).

64. Marshall thus initiated what has become something of a tradition—making the same argument on behalf of federal power, as an inference from enumerated limits on that power, which the Federalists had feared during the debate over a federal Bill of Rights. For an example of even the Supreme Court offering such an argument on behalf of federal powers, see Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding 171–72 (2000).


67. 4 Elliot, supra note 22, at 576 (quoting the Virginia Resolution). See also id. at 572–73.


69. 9 Annals of Cong. 2990 (1799).

70. Id. at 3011 (statement of Rep. Nicholas). Representative Nicholas argued that to distinguish “abridging” from “respecting” as the Federalists had done “implie[d] that freedom of the press was before limited,” and, more significantly, that Congress possessed the same power to define the right of petition to Congress itself. Id.

71. 8 Annals of Cong. 2149 (1798).

72. 9 Annals of Cong. 3003 (1799). See also 8 Annals of Cong. 1975 (1798) (“if all of the powers are delegated to Congress by the [General Welfare Clause, art., I, § 8, cl.1] how could it be said that the powers not delegated were reserved to the States?”) (statement of Rep. Gallatin).

73. 8 Annals of Cong. 2158 (1798).

74. 9 Annals of Cong., 2996 (1799). See also id. at 2999.


76. Thomas Jefferson to Abigail Adams, September 11, 1804, reprinted in, XI The Writings of Thomas Jefferson 49, 51 (Andrew C. Lipscomb ed., 1903) [hereinafter Writings].

77. 4 Elliot, supra note 22, at 540.

78. Levy, supra note 18, at 280.

79. 9 Annals of Cong. 2988 (1799) (committee report).


81. It may well be that as Madison began to realize that if the Tenth Amendment does not do much of anything to help one define or limit federal power—especially given Madison’s own acknowledgment that it was purely declaratory and perhaps redundant—he also began to think that the only way to be confident that the Federalist position underscoring the centrality of the limited powers scheme would actually have effect would be to construe the Ninth Amendment as a ground for a restrictive interpretation of granted powers. See Kurt T. Lash, “The Lost Original Meaning of the Ninth Amendment,” 83 Tex. L. Rev. 331, 396–414 (2004). The Federalists had also taken the view that what they proposed that became the Ninth Amendment was also merely declaratory, but Madison had only underscored the point in Congress as to the Tenth Amendment.


85. Quoted in Hammond, supra note 83, at 51.

86. 2 Farrand, supra note 20, at 615.

87. Id. at 616.

88. In support of the view that the evidence of the votes at the constitutional convention, and the reasons for those votes, “is far less decisive of the actual intent of the members of the Convention than has sometimes been supposed,” see Thomas B. McAffee, “Reed Dickerson’s Originalism—What it Contributes to Contemporary Constitutional Debate,” 16 S. Ill. U. L.J. 617, 642 (1992). See id. at 641–45 (summarizing evidence suggesting that decision to omit Madison’s proposal for a power to create corporations was truly ambiguous in nature); H. Jefferson Powell, “Rules for Originalists,” 73 Va. L. Rev. 659, 684–85 (1987) (cautioning against presuming consensus from limited data); and James B. Thayer, “Legal Tender,” 1 Harv. L. Rev. 73, 78 n. 2 (1887) (noting the tendency of ratification prospects to influence the debate over whether to expressly include certain powers).
89. Hammond, supra note 83, at 197.
90. Id. at 114–15.
92. During the debates, the members of Congress reprised the debates of 1791. Several
members referred to the Tenth Amendment. See, e.g., Legislative and Documentary History of
the Bank of the United States 168 (1832; M. St. Clair Clark & D.A. Hall comp., A. M. Kelley,
(remarks of Rep. Desha); Id. at 229 (remarks of Rep. Johnson).
93. Quoted in Hammond, supra note 83, at 233–34.
94. See Gerald Gunther, John Marshall’s Defense of McCulloch v. Maryland (Stanford
debate that gave rise to the case and that continued even after the case was decided, see
McAffee, supra note 5, at 121–30.
98. Id.
99. Other members of Congress added to the list of enumerated powers that might sup-
port the bank. In addition to the Taxing, Borrowing, and Necessary and Proper Clauses,
they cited the Commerce, War, and District of Columbia Clauses in Article I, section 8; the
Territories Clause in Article IV; and even the Preamble.
100. Documentary History of the Bank, supra note 91, at 42.
101. Letter from Thomas Jefferson to Edward Livingston (April 30, 1800) reprinted in,
XI Writings, supra note 75, at 828–29.
102. Madison consistently underscored that he had opposed including the word
“expressly” in the Tenth Amendment because he perceived the need for implied powers,
even as he was insistent that the Constitution did not implicitly authorize the exercise of “a
great and important power.” 2 Annals of Cong. 1949 (1791).
103. McAffee, supra note 5, at 123–24.
104. Documentary History of the Bank, supra note 91, at 41. See also id. at 73 (state-
105. Id. at 41.
106. Id. at 44. See Lash, supra note 80, at 396–414.
107. For the argument that Madison’s contentions were not based on the idea of unenum-
erated rights secured by the Ninth Amendment or the Necessary and Proper Clause, see
McAffee, supra note 5, at 126–130.
108. Other members of Congress actually referred to the amendments in support of the
bank. John Lawrence of New York argued that there was “nothing in the constitution
expressly against it, and therefore we ought not to deduce a prohibition by construction.”
Similarly, William Smith of South Carolina reasoned that because no state individually
could create a national bank, state powers were not infringed and, furthermore, “[t]he power
to establish a national bank must reside in Congress.” Id. at 64.
109. Randolph evidently believed that a national bank was necessary, although he
thought it beyond Congress’s powers to establish it. See Walter Dellinger & H. Jefferson
111. Id.
112. Id. at 91.
113. *Id.* at 93.
114. *Id.* at 95.
115. *Id.* at 97.
116. *Id.* at 99.
117. *Id.* at 106.
118. *Id.* at 112.
120. *Id.* at § 7.
125. White, *supra* note 119, at § 16.
126. *Id.* at § 19.
127. *Id.* at § 18.
128. *Id.* at § 20.
The constitution-making process is an extremely human one in which people are inclined to lean rather heavily on existing patterns—especially if they have been perceived as reasonably effective at achieving the ends of constitutionalism. The Constitution’s Framers believed that the system of enumerated powers raised an inference against government power and in favor of liberty. By contrast, the state constitutions started with a presumption in favor of government power. The state governments, “unlike governments of delegated and enumerated powers, had (as representatives of the sovereign people) all powers not constitutionally forbidden them.”

STATE POWER BEFORE THE CIVIL WAR

The practice of making and amending constitutions became a central feature of American government in the nineteenth century, and Americans were well aware of the distinction between “normal governmental operations” and constitution-making, as they warned against mistaking “the architect of a grand edifice with the people who subsequently occupy it.” The founding generation quickly recognized “that constitutions differed from ordinary statutes and that greater popular input and control were required for their adoption.” Consequently, constitutions were frequently amended as the need was perceived, and it also became typical “to encourage constitutional fidelity, declaring that the legislature ‘shall have no power to add to, alter, abridge, or infringe any part of this Constitution.”

Modern advocates of unwritten constitutionalism, however, have sought to reconcile this commitment to popular sovereignty with the idea of substantive limits on the power of the people to amend their constitutions. If the declarations of rights found in the early state constitutions stated, “the inherent natural rights which formed an integral and unalterable part of the broader fundamental law,” one would expect to see courts grapple with the task of articulating the limits imposed by the tradition of unwritten fundamental law, which included the inalienable rights that would restrict even the content of
the written constitutions. Indeed, one would expect such limits to be used as arguments against proposals for specific constitutional provisions, particularly given that the people have on occasion adopted constitutional provisions, state or federal, that strike the modern mind as partial or unjust.

Provisions that strike the modern mind as quaint, unfair, or even absurd are part of the reality of our constitutional heritage—a part that goes back to the very beginning. In 1776, Virginia altered the Virginia Bill of Rights’ provision that referred to “inherent” rights so that it applied only to those who “enter into society,” to ensure that the provision would not raise serious constitutional issues regarding slavery. In similar fashion, the founding generation adopted a federal Constitution that deliberately left the positive law status of slavery to be determined, from time to time, on a state-by-state basis. It is clear that they sacrificed “the Lockean ideal of human equality to establish the union they saw as vital to the development of the nation.” Little wonder that, when Madison proposed that Virginia’s “inherent rights” guarantee be added to the Constitution’s preamble, the provision’s assurance that “all men are by nature equally free and independent,” and the reference to natural (“inherent”) rights, were both omitted from a provision worded in the hortatory language that had characterized the unenforceable provisions of the state declarations of rights. Madison’s use of the “softer,” hortatory language (“ought to be” secured), in contrast to his otherwise pervasive use of the language of prohibition and command, “is suggestive that he was seeking to avoid legally undermining slavery even while paying appropriate lip service to the basic principle of equal rights.”

One can readily see the Thirteenth Amendment’s prohibition of slavery as the eventual fulfillment of the “promise” implicit in the Declaration of Independence—as part of a sort of “completion” of the Constitution—or, perhaps, as an attempt to at least partially undo some of the effects of a grievous wrong. However one ultimately assesses the American slavery compromise, there is not much question that at least one of the effects of our federal system—including both the Ninth and Tenth Amendments—for well over half a century, was to lend at least an indirect support to the slavery system. Even as the proposed Bill of Rights was being considered, Southern slave-holders began to contend that the Ninth Amendment would actually protect slavery by preventing a misconstruction of national power as abolitionist in nature. In the antebellum period, there were at least some cases that based holdings of concurrent state power, or of strict construction of national power, at least in part on the Ninth Amendment.

When the president of the 1846 New York state constitutional convention proposed to add “without regard to color” to a proposed guarantee of “certain unalienable rights,” the convention rejected “the prospect of explicitly enhancing the constitutional rights of New York’s black population” by deleting the entire section. Perhaps unsurprisingly for the era, the same convention rejected the proposal to extend the franchise to women, assuming, as the chair of the Committee on the Elective Franchise explained, that the
elective franchise was “not a natural right,” and had traditionally been limited “to mature age and the male sex.” 17

As a general matter, nineteenth-century American constitutions “vested ultimate power in the sovereign people, but defined ‘the people’ in narrow terms.” 18 Thus, it was the standard practice of this age to deny even free Blacks the right to vote. 19 Apart from the exclusion of women and blacks from “complete political citizenship,” modern Americans would be surprised that the same could be said of “a significant proportion of adult white men.” 20 Property qualifications for holding public office, or even for voting, were standard state constitutional provisions early in the nation’s history. 21 What may shock modern Americans even more is that some states excluded people from voting in elections based on their country of origin or their religion. 22

Early in the nineteenth century, most judges were appointed by the legislature or the governor for life. When one examines the “vested property rights of the merchant, landlord, and slave-owning classes,” and the protection they received from judges appointed for life, it is difficult not to conclude that “[t]he constitutional order thus replicated the hierarchical and authoritarian principles that pervaded society.” 23 As the nation developed, it acquired a “coherent social vision” that stressed “[u]niversal white manhood suffrage and laissez-faire economic principles” that became the “expression of a society of small-holding farmers and petty bourgeois urban artisans and shopkeepers.” 24 A result was the greater stress on the themes of separation of powers, which meant, in practice, strengthening the hands of governors and the judiciary. 25

LIMITS ON FEDERAL POWER IN THE WAKE OF THE CIVIL WAR

As we have seen, the Supreme Court initially approached federal powers with an attitude of deference to Congress. Indeed, under the hands of Justice John Marshall, the Court seemed to be on the path of actively encouraging the use of national power. 26 And in the intervening years, under the leadership of Chief Justice Taney, the Court combined this deferentialism to federal power with a gradual recognition of greater authority in commerce-related matters in the states, even as it developed its so-called dormant Commerce Clause doctrine limiting state commercial regulatory authority. 27 Thus, in Paul v. Virginia (1868), in a decision that perhaps anticipated what later became known as “dual federalism,” the Court held that states could substantially regulate the insurance industry, even regarding insurance issued by foreign corporations, because “[i]ssuing a policy of insurance is not a transaction of commerce.” However they may be marketed, or the insurance contract negotiated, the insurance policies “do not take effect” until delivered by the local agent. 28 “They are, then, local transactions, and are governed by the local law.” 29 The implication seemed to be “that states could regulate insurance because it was not commerce, and this “seemed to mean that Congress could not regulate it at all.” 30
At the same time, however, the Court during this era, in the License Tax Case (1866), recognized the power of Congress to use its taxing power as a device to aid the states in the enforcement of their criminal prohibitions. In the process, the Court set up a tension between its predominant view permitting the national government to reinforce state criminal law, lending moral support to the states, and the view it would later develop. That later view articulated a distinction between a genuine exercise of federal power and a “pretextual” use of a federal tax or regulation as a “penalty” designed to accomplish an illegitimate end, unrelated to the goal of collecting funds or protecting or securing commercial transactions against state interference. The Court remained, in short, in the era of deferentialism as to the exercise of national power. In fact, it was not until after the Civil War that the Court, then led by Justice Chase, first struck down a federal statute enacted pursuant to Congress’s power to regulate commerce.

In United States v. Dewitt (1870), the challenged federal statute prohibited the sale of illuminating oil made of naphtha, even if it were sold within a single state. According to Chief Justice Chase, given that the very purpose of the Commerce Clause was to enable Congress to prevent state interference with commerce, a federal law that did precisely that could hardly pass muster. Consequently, “the only oil whose flammability Congress could limit was that moving in interstate or foreign commerce.” But with the appointment of two new justices, as of 1871, the Supreme Court “saw a shift back to deference toward the other branches of government.”

So when the Court decided The Daniel Bell (1871), it upheld a federal safety regulation of a ship operating solely in the waters of a river in Michigan, concluding that because the ship was to accomplish a part of the goods’ interstate journey, it was an “instrumentality” of interstate commerce—commerce “among the states.” Moreover, if a ship in Michigan waters was unsafe, the lack of safety would affect the ships that were more immediately involved in interstate shipping. So early in the game, the Court anticipated what later would become a focus on the “flow” or “stream” of commerce—a doctrinal development that in the long run paved the way for the New Deal era expansion of federal regulatory authority.

STATE POWER AND INDIVIDUAL RIGHTS

As we would expect, the state constitutions reflect the political history of the nation, and the people sometimes made decisions that are regrettable to an enlightened outlook. Early state constitutions, for example, limited public office-holders to Protestants, barred practicing ministers from holding public offices, and occasionally established an official state religion. Although most slave states tended to follow the federal practice of mentioning slavery “only indirectly,” some state constitutions “state formally, and perhaps somewhat redundantly, the conditions of American slavery: that only whites could be citizens, hold public office, or vote; and that the principles of equal rights
and due process apply only to freemen.”

States that joined the confederacy adopted constitutional provisions to safeguard slavery.

The “Right” to Amend Constitutions

Consistent with the nation’s commitment to the principle of popular sovereignty, however, courts have been unwilling to impose any substantive limits on the authority of the sovereign people to amend their constitutions. Early in the twentieth century, “leading conservatives” asked the Supreme Court “to invalidate a number of amendments” on the ground that they were themselves unconstitutional. More recently, “there has been considerable writing by those, generally of a ‘liberal’ political persuasion, who argue that it is possible to imagine an ‘unconstitutional’ amendment and that, in such circumstances, it would be the duty of the Court to void such an alteration.” To date “the Supreme Court of the United States has never accepted such an invitation to activism,” and, according to at least one expert, “should never do so.” But it remains, at least, a theoretical possibility.

In the context of state constitutional law, the argument that certain amendments were themselves unconstitutional consistently has been rejected by state courts. It was contended, for example, that the constitution prohibited any change in the state’s Bill of Rights, but the argument was rejected. Contrast this approach with the relatively recent contention that the proposed constitutional amendment to permit the statutory prohibition of flag burning conflicts with the Constitution. To burn a flag is to engage in free speech, and it is an inalienable natural right—one of the sorts of rights protected by the federal Ninth Amendment. Trying to reconcile this constitutional theory with a premise of popular sovereignty, the author contended that such an amendment “could have been enforced” if “it had denied explicitly that speech is a natural right.” On this view, the people hold the constitutional authority to decide that flag burning is not the exercise of an inalienable natural right, but lack the authority to deny the right to exercise what they confess is an inalienable natural right. But if the Ninth Amendment secures the right to burn a flag, because doing so is to exercise an inalienable natural right—and, indeed, if our Ninth Amendment theory is that some rights are “inalienable” and cannot be given up by omission from constitutional text—why should it make any difference what “the people” think about whether flag burning exercises a right or whether the right is “inalienable”? The very concept of inalienable natural rights is one that limits, at least in moral and political theory, the power of the people. But the Framers believed that the authority of the people to make basic decisions about government was itself an “inalienable” right. Consequently “[d]epartures from the document—amendments—are to come from the People, not from the High Court,” because otherwise “we are left with constitutionalism without the Constitution, popular sovereignty without the People.”

Sooner or later, we will have to decide which is more fundamental—the right to make decisions about government or the right, in some instances, to
be free of government. We do this sort of thing all the time; courts have been given a final authority to interpret the Constitution, but that does not prevent the Senate from determining that a member of the Supreme Court has behaved so abusively in administering his or her office and interpreting the Constitution that impeachment and conviction is warranted. The possibility that such authority might be abused tells us little about whether the Framers believed the balance of risks justified their decision to grant it. The people of the United States either held constitutional authority to permit the institution of slavery, with all its tragic consequences, or they did not; it would not make a difference whether they recognized that slavery denied inalienable natural rights or rationalized a different view of the institution.

For the founding generation, the authority of the people to decide questions about government, including what rights government officials might not intrude upon, would have been axiomatic. According to Keith E. Whittington, “Both the existence of a written constitution and the specification of a supermajority to amend it are indicative of the continuing locus of sovereignty in the people themselves.” Moreover, a “constitution is in its essence amendable.” If popular sovereignty is taken seriously, it follows that “[w]hat makes a fundamental law constitutive by this account of the constitutional enterprise also makes it amendable.” For the “authority of the constitutional order, and thus its bindingness for all that goes on under it, is vested in the proposition that it could be other than what it is.” It follows that constitutional “amendability is necessary for constitutional interpretability,” and that the “possibility of amendment inescapably implies precisely the boundedness of the constitutional order at any time.”

The Rights “Retained” by State Constitutions

Implications for Understanding the Original Meaning of the Ninth Amendment

Soon after the Court’s decision in Griswold v. Connecticut (1965), Alfred Kelly noted that “if the Ninth Amendment were concerned primarily with safeguarding individual liberties, one might expect to find similar provisions in some of the bills of rights of contemporary state constitutions; but the Ninth Amendment is unique.” John Hart Ely responded that, although the point is “technically accurate,” it missed that nineteenth-century state constitutions frequently included provisions that prohibited disparaging other rights retained by the people. Ely, moreover, expresses great confidence that these provisions “were inspired by the Ninth Amendment,” and he contrasts this with the fact that “for reasons that are entirely obvious,” constitutional Framers did not “copy or paraphrase Article I, Section 8 or other provisions of the federal Constitution that related to the bounds of federal power.” For Ely the conclusion is clear:

The fact that constitution-makers in, say, Maine and Alabama in 1819 saw fit to include in their bills of rights provisions that were essentially identical to the Ninth
Amendment is virtually conclusive evidence that they understood it to mean what it
said and not simply related to the limits of federal power.\textsuperscript{57}

At the least, however, there is a mystery here worthy of exploration in greater
depth. If those who brought us the federal Bill of Rights were concerned that
there was, in general, a danger in setting forth the people’s rights—inasmuch as
it might be inferred that the rights positively set forth exhausted those rights and
would have the effect of disparaging unnamed rights—we would expect a similar
hesitancy about bills of rights in other cases. Logically, we would expect
such concerns to have motivated a desire for analogous security to that provided
for in the Ninth Amendment in other settings in which the people set forth their
rights in a bill of rights. From this perspective, it seems barely relevant that
“there weren’t many state bills of rights of any sort—or for that matter many
states—back then.”\textsuperscript{58} States adopted constitutions on numerous occasions during
the more than thirty years between the adoption of the federal Bill of Rights and
Alabama’s adoption in 1819 of a “little Ninth Amendment.”\textsuperscript{59}

It is clear, for example, that Theophilus Parsons was an opponent of the
constitution proposed for Massachusetts in 1778, in part because it did not
include what the people were entitled to—a bill of rights.\textsuperscript{60} On the other hand,
Parsons spoke at the Massachusetts ratifying convention in favor of the pro-
posed Constitution and, according to the convention’s reporter, “demonstrated
the impracticability of forming a bill, in a national constitution, for securing
individual rights, and showed the inutility of the measure, from the idea, that
no power was given to Congress to infringe on any one of the natural rights
of the people.”\textsuperscript{61} If Parsons’ argument was \textit{not} based on the federal Constitu-
tion’s unique enumerated powers scheme, but referenced implied rights that
would limit government regardless of the grant of powers, provided there was
no bill of rights, he would be expected to return to Massachusetts demanding
that its bill of rights should be amended to include a guarantee of rights not
enumerated in the state’s bill of rights.\textsuperscript{62}

Similarly, we have no record showing that James Madison, James Wilson,
James Iredell, or any other of the leading figures who defended the proposed
Constitution were opponents of including a bill of rights in the constitutions
of their states, or that they expressed a general reservation about reducing
appropriate limits on government to written form. Considering that Americans
during the founding era tended to distinguish American constitutionalism from
its English counterpart based on the American inclination to put in writing
“basically immutable limitations on government power,”\textsuperscript{63} it would be sur-
prising if they had. Professor Ely does not emphasize it, but it was more than
thirty years before the state of Alabama included a so-called mini-Ninth
Amendment in its state constitution, and it was more than eighty years before
any of the thirteen original states adopted such a provision.\textsuperscript{64} But if the
ratification-era debate over the proposed federal Constitution brought home a
new concern about putting rights in writing, we would expect the impact of
that debate to be relatively immediate as well as far-reaching, rather than
delayed and spotty, at best.
For some, the state constitutional equivalents of the Ninth Amendment become evidence that the debate leading to the Ninth Amendment did not turn on the distinction between governments of general legislative powers and governments of enumerated powers. If such a distinction drove the debate leading to the Ninth Amendment, according to Professor Sherry, “we would not expect to find the equivalent of the Ninth Amendment in state constitutions because it would serve no purpose.” The traditional reading of the Ninth Amendment, on this view, is clearly wrong because “there is no reason to incorporate language protecting ‘reserved’ rights in the constitution of a general government, such as a state government.” One might hope for more explanation. It was James Wilson who justified the convention’s decision to omit a bill of rights by explaining that the people in the states had “invested their representatives with every right and authority which they did not in explicit terms reserve,” while national power “is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union.” And it was Nathaniel Gorham who explained that “a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers.” By contrast, the national government did not involve a legislature with “unlimited powers,” and the people could count on the protection of their rights ensured by enumerated powers. These arguments, that draw the distinction between governments of general legislative powers and governments of enumerated powers, are those that lead directly to the Ninth Amendment.

This standard distinction between the state and federal constitutions, and the difference it makes in understanding the people’s rights, is recognized even today. The first state to adopt a mini-Ninth Amendment, Alabama, said expressly in the same constitution “that everything in the article [setting forth the Declaration of Rights] is excepted out of the general powers of government.” And Alabama’s Supreme Court has concluded that “the Federal Constitution is a grant of powers, while the state Constitution is only a limitation of power” (Alford v. State ex rel. Attorney Gen., 1910). Even more directly on point, that court has specifically stated that the constitution’s mini-Ninth Amendment refers only to “rights enumerated in the preceding . . . sections of the Constitution constituting the bill of rights . . . .” (Johnson v. Robinson, 1939). Another Supreme Court in a state that adopted a mini-Ninth Amendment, Maine, stated that the “the legislative power is plenary except as it may have been circumscribed expressly or inferentially by the constitution of the state or nation” (Ace Tire Co. Inc. v. Municipal Officers, 1973). See also Baxter v. Waterville Sewerage Dist. (1951) (concluding that the “people of the state of Maine” conferred upon the legislative department “the whole of their sovereign power of legislation, except in so far as they delegated some of this power to the Congress” and “imposed restrictions on themselves, by their own constitution”).

If scholars had taken a closer look at the history of state constitutions, they would not have been surprised that these constitutions included provisions of
doubtful worth about which an argument could be made that they "serve no purpose." There are at least two problems that have contributed to the situation. The first is that there has been a historic tendency to borrow, sometimes rather uncritically, provisions from earlier constitutions. As Professor Friedman has observed:

[In the typical constitution, the bill of rights was a copy-cat version of the bill of rights of some other state or some earlier constitution. The provisions were carried over without much thought or debate.... The federal Bill of Rights, of course, was the ultimate source of most state provisions (except for a few of the original states).]

The second problem is that the early state constitutions, from which a certain amount of this borrowing was done, were not drafted with judicial review in mind. These constitutions "were not yet accorded full status as a higher law," and "were not viewed as legalistically as they are today." The state constitution declarations of rights "were framed in terms of 'ought' or 'ought not' rather than 'shall' or 'shall not,'" or sometimes "as statements of political ideals."

Part of the transition that Madison and others accomplished was to shift bill of rights guarantees in the federal Constitution to enforceable prohibitions and commands. It is true that Madison went to great lengths to ensure that "[t]he structure & stamina of the Govt. are as little touched as possible," and that the proposed amendments would be limited to those "which are important in the eyes of many and can be objectionable in those of none." But the declarations found in the early state constitutions were even more cautious about challenging legislative authority. It has been accurately observed by Leslie Goldstein that the state declarations set forth "moral admonitions" that were not treated as binding legal obligations. But Madison deliberately shifted away from declarations of rights as "a public elaboration, almost a celebration, of a people's fundamental values," that served mainly to remind legislators that "action contrary to these commitments should not be undertaken lightly."

As the practice of judicial review developed, however, judges in the various states confronted difficult decisions about how to treat constitutional provisions that were not designed for legal enforcement. A classic example was the nearly universal practice of including clauses recognizing "[t]hat all men are born equally free and independent, and have certain natural, inherent and inalienable rights...." The question is whether such a provision states a general principle that is largely accepted by the people but is not intended to establish a legally enforceable limitation on the powers of government. While there are variations according to the state involved, as well as the issue, it is fair to say that state courts have not in general treated such "inalienable rights" clauses as establishing an independent basis for recognizing an enforceable fundamental law right. They are not treated as creating enforceable limits on government power. As a general proposition, the mini-Ninth
Amendments have received similar treatment; most states continue to treat their legislatures as holding general legislative powers and to enforce specific, enumerated limits on government authority.\textsuperscript{86} In short, the state counterparts to the Ninth Amendment have not in general been viewed as stating enforceable limits on government power.

It is difficult to imagine them being treated in another way, given our constitutional order’s theory of popular sovereignty. A classic example of another approach is illustrated by the contention that the proposed constitutional amendment to permit the statutory prohibition of flag burning conflicts with the Constitution.\textsuperscript{87} To burn a flag was to engage in free speech, and free speech was an inalienable natural right—one of the sorts of rights protected by the Ninth Amendment. Trying to reconcile this constitutional theory with a premise of popular sovereignty, the author contended that such an amendment “could have been enforced” if “it had denied explicitly that speech is a natural right.”\textsuperscript{88} On this view, the people hold constitutional authority to decide that flag burning is not the exercise of an inalienable natural right, but they lack the authority to deny what they confess is an inalienable natural right.\textsuperscript{89} But if the Ninth Amendment secures the right to burn a flag, because doing so is to exercise an inalienable natural right—and, indeed, if our Ninth Amendment theory is that some rights are “inalienable” and cannot be given up by their omission from constitutional text—why should it make any difference what “the people” think about whether flag burning exercises a right or whether the right is “inalienable”?\textsuperscript{90}

The very concept of inalienable natural rights is one that limits, at least in moral and political theory, the power of the people.\textsuperscript{91} But the founders were just as clear that the power of sovereignty is unlimited as they were that there are inalienable rights.\textsuperscript{92} So we now face a fundamental question: we can treat the founders as speaking the sentiments of an unlimited sovereign people on the applicability of a particular right, or we can choose to view their powers as substantively limited by an “inalienable” right—but we can’t have it both ways.\textsuperscript{93} And the Framers did not unequivocally resolve the issue for us, as they managed to speak both ways. The 1776 Pennsylvania Declaration of Rights said that “all men are born equally free and independent, and have certain natural, inherent, and inalienable rights.”\textsuperscript{94} The same Declaration stated that “the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.”\textsuperscript{95} Undoubtedly a member of the founding generation would characterize the Constitution as an exercise in collective self-government, and might add that one of its purposes was to provide security for the rights the people held and deserved.\textsuperscript{96} It would take almost two centuries before fundamental accounts of the Constitution would place securing rights at the very center of the constitutional project, even ahead of the people’s power to make fundamental decisions about their government.\textsuperscript{97}

The only way to harmonize the founders’ commitment to popular sovereignty and inalienable rights is to fully recognize the institutional implications
of one’s decision. A decision to render “inalienable rights” clauses, or mini-Ninth Amendments, enforceable at the highest level of generality, is a decision to be ruled by judges rather than the popular sovereign. Even if we pay appropriate lip service to the idea that those who adopted the Constitution had authority to establish fundamental law, this will make little difference if we also find that they delegated effective authority for establishing governing norms to constitutional interpreters—which, in this country, means the courts.

The result would not be that we would live lives protected by natural law. At a practical level, we would live our lives under judges’ views about the requirements of natural law. Yet commentators have noted that in modern cases raising the most challenging political-moral questions—especially those on abortion, homosexuality, and the right to die—the treatment of the core moral questions have been unenlightening at best. Moreover, contrary to assumptions widely held, the workload of the Court and its deliberative process confirms that it is an unlikely place to center hopes for meaningful and systematic moral dialogue. We also tend to assume that more rights invariably translates into more freedom, which can only be good. But it seems clear that the rights of some may be purchased at the cost of great harm to the community as a whole; government does not typically circumscribe rights solely for its own benefit.

As Professor Soper has recognized, under a system in which judges feel free to implement natural law, “the system remains positivist in the most significant sense, with judges simply serving as the sovereign in the place of the legislature.” Those who framed the Constitution thought that sovereignty rested in the people. Even if we see the Constitution’s purpose as being to protect rights, or to “establish justice,” we would be better off in the long run to also recognize the sovereignty of constitution-makers. But the easiest way to harmonize all of this is to read the Ninth Amendment consistently with the Framers’ intentions. The question is not simply whether a right should be understood to be “inalienable,” but whether there was sufficiently widespread agreement that it should be secured by the written Constitution as a limitation on government power. The Framers did not equate constitutional and “inalienable” rights and they were able to distinguish moral and legal claims.

**Should the Unenumerated Rights Interpretation of the Ninth Amendment be “Incorporated” and Applied to Limit States?**

Justice Goldberg acknowledged that the Ninth Amendment, and the entire federal Bill of Rights, was not written to limit state governments. But the Fourteenth Amendment, he said, “prohibits the States as well from abridging fundamental personal liberties.” To hold that the basic right of privacy in marriage, Goldberg reasoned, “may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.” Justice Goldberg, then, relied on an “incorporation plus” view of
the relationship between the original Bill of Rights and the Fourteenth Amendment and viewed the Ninth Amendment as a means of challenging the conventional idea that the Court should limit its use of close judicial scrutiny to cases arising under the particular provisions of the federal Bill of Rights.  

Perhaps the most novel effort to justify Justice Goldberg’s reading of the Ninth Amendment begins with the textual source of incorporation theory—the Privileges or Immunities Clause of section 1 of the Fourteenth Amendment. Professor Amar begins his argument by acknowledging that when the Ninth Amendment is viewed “merely as a federalism-based companion to the Tenth,” it does not “sensibly incorporate in any refined way.” Acknowledging that the amendment originally “sounded in federalism,” Amar finds it significant that by 1867 fifteen states “had borrowed from the federal template and adopted ‘baby Ninth Amendments.’” Having already concluded that “refined” incorporation requires modern interpreters to discover the personal rights that attached to what may originally have been conceived as protections for majorities within the states, he finds that the Ninth Amendment “soon took on a substantive life of its own, as a free-floating affirmation of unenumerated rights.” According to Amar, it becomes extremely relevant that Senator James Nye of the Thirty-Ninth Congress “described the Ninth as a kind of gap filler among the first eight amendments, lest something essential in the specification of ‘natural and personal rights’ in earlier amendments should have been overlooked.”

Given the distinct possibility that state constitutions simply copied rather uncritically the Ninth Amendment, because it was found in the federal Bill of Rights, one would hope for substantial and powerful evidence that it had indeed mutated “into a celebration of liberal civil rights of persons” before it was “incorporated” as a virtually open-ended unenumerated rights guarantee. In fact, however, “the bulk of historical evidence makes it more likely that the Ninth Amendment, like the Tenth, was not understood to protect individual rights from state action.” Indeed, in our judgment the historical evidence points against the individual rights thesis.

As Professor Perry first noted, there are at least two questions of relevance to evaluating whether a person can make a claim under the Privileges or Immunities Clause of the Fourteenth Amendment: “(1) what are the fundamental rights guaranteed under the Amendment and (2) what is the nature of the protection afforded these rights.” The “incorporation” controversy presents the first of these issues and concerns whether the rights guaranteed by the federal Bill of Rights are among the “privileges or immunities” protected by section 1. But it may well be that answering the second question is more relevant and important to evaluating whether a person can base a Fourteenth Amendment claim on an unenumerated right. While Amar devotes considerable energy to justifying application of the Bill of Rights to the states, it is fair to say that he “remains relatively silent” on the second question.

One answer to this second question, provided by Professor Harrison, is that once we are beyond the protections guaranteed by the relatively specific
guarantees of the federal Bill of Rights and are referring to what might be described as “common-law rights,” the rights are given only “antidiscrimination” protection. He explains: “In textual terms, this means that the term ‘abridge’ in the Privileges or Immunities Clause has an antidiscrimination rather than a prohibitionist meaning, just as it has in Section 2 of the Fourteenth Amendment and in the Fifteenth Amendment.” Professor Amar seems to think “that the term ‘abridge’ might have a ‘two-tiered’ meaning that embraces this antidiscrimination notion in connection with private law rights but calls for prohibitionism in connection with other kinds of rights.”

The “other kinds of rights,” of course, are the rights found in the Bill of Rights of the federal Constitution, where for Amar the more appropriate analogy is not the equality guarantee of the Article IV “Privileges and Immunities Clause,” but its “fundamental-rights counterpart in the First Amendment, whose language section 1 so carefully tracks.” If Amar seriously maintains the distinction between common law rights and rights protected directly by the Constitution, all of the “unenumerated” rights, those not “specified and declared by We the People,” would receive “antidiscrimination” protection only, and we would not in reality face the prospect of judicially discovered and declared fundamental rights. The only problem is that Professor Amar has been as equivocal in addressing this question as any who drafted constitutions, past or present. If he followed the lead of those who brought us the Fourteenth Amendment, Professor Amar’s answer would not, however, be a difficult one.

A central motivation of those who drafted and ratified the Fourteenth Amendment was to combine federal empowerment to protect the civil rights of the freedmen with a structure that did not altogether shift the basic power to regulate those rights away from the states. Responding to an argument that proponents of the Civil Rights Act of 1866 would effectively grant general legislative powers to Congress, Representative Shellaburger of Ohio contended that the law “neither confers nor defines nor regulates any right whatever,” but only requires “that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.” Professor Harrison’s analysis of the Privileges or Immunities Clause, then, supplied an interpretation “that is textually sound and that constitutionalizes the Civil Rights Act without writing a uniform national private law into the Constitution.” Professor Amar’s equivocal treatment reflects that he is torn between the attraction of an unenumerated rights provision that permits courts to impose rights on government, as they become satisfied that the people are entitled to them, and the historical evidence showing that the adopters of the Fourteenth Amendment believed they were leaving substantial power in the states to decide on the scope and content of basic rights—subject only to the requirement that their laws not reflect invidious discrimination.

But the dilemma is a false one—or at least not one presented by the historic materials. At the time of reconstruction, the distinction between
governments of general powers, subject only to rights limitations specified in constitutional documents, and governments of enumerated powers, was well understood. Consider these words of explanation by Thomas Cooley:

In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion. 130

Cooley’s analysis makes clear that, under the Civil War era state constitutions, the legislatures are entities in which “[p]lenary power” is “the rule,” and “[a] prohibition to exercise a particular power is an exception.” 131 Nothing in the history of the drafting of the Fourteenth Amendment suggests that its purpose was to change this understanding of state power in the federal system. Unfortunately, when section 1 of the Amendment came before the Court for the first time, in Slaughter-House Cases (1873), the Court misconstrued it because it could not see how a reading of the Privileges or Immunities Clause that linked it to the rights protected by the Civil Rights Act of 1866 could be reconciled with a general state power to determine and define basic civil rights. 132 In its penultimate paragraph, the Court stated:

[U]p to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the [States]. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the [States] lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it has declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belong exclusively to the States? 133

According to Justice Miller, then, “a broader holding would radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.” 134 Similarly, the dissenting opinion of Justice Field contended that the Court must choose whether to construe the provision in question as “a vain and idle enactment,” 135 or as referring to “the inalienable right of every citizen to pursue his happiness,” 136 as well as “those [legal privileges] which of right belong to the citizens of all free governments.” 137 Justice Field was correct, then, that Justice
Miller’s parade of horribles “quite arguably was precisely what the authors of the amendments had in mind,” so long as one realizes that the Fourteenth Amendment does not give vague instructions for discovering inalienable, une-numberated rights, but for determining when legislation is so “partial” and unfair as to “abridge” rights of citizenship guaranteed by positive law.

As of 1873, when the Supreme Court decided the Slaughter-House Cases (1873), it had only occasionally been tempted to discover and apply “inherent” limits on government power. But at this point in the nation’s history, it was as likely to reconsider and reverse such decisions as it was to insist on the right to reverse legislative decisions with which it disagreed. The Court was not yet prepared to engage in “the incessant quest for the judicial holy grail,” the attempt to discover “a clause that lets us strike down any law we do not like.” But it would not be long before the Court would refer to “implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name” (Loan Association v. Topeka, 1875).

And by the end of the post–Civil War era, “the Court had begun to treat the states as though they too had only enumerated powers—to enact laws ‘fairly adapted’ to the protection of public safety, health, morals and order.” By then the handwriting was on the wall, and, despite the Court’s ability to examine laws with considerable deference for presumed legislative prerogatives, it still managed to articulate the view that if the facts showed that a particular law “has no real or substantial relation” to legitimate police power ends, “it is the duty of the courts to so adjudge, and thereby give effect to the Constitution” (Mugler v. Kansas, 1887). But even if the substantive due process era was forthcoming, and the Court did not learn the lesson that “[t]hose who fail to take the tide at its flood commonly end up missing the boat,” there is nothing in the history to suggest that a purpose of the Civil War amendments was to enable the Court to obtain “the judicial holy grail.”

When John Bingham, the principle draftsman of the Fourteenth Amendment, argued for incorporation of the Bill of Rights, he described the “privileges and immunities of citizens of the United States” as “chiefly defined in the first eight amendments to the Constitution of the United States.” Professor Lash has observed that not only were the Ninth and Tenth Amendments consistently linked to each other, but also “both of these Amendments were omitted from general discussions regarding the rest of the Bill of Rights.” Justice Henry Brown contended that the first eight amendments had incorporated “certain fixed principles of natural justice which had become permanently fixed in the jurisprudence of the mother country” (Brown v. Walker, 1895). Other cases from the same era used the same division.

It is thus “no surprise that John Bingham left both the Ninth and Tenth Amendments off his list of privileges or immunities protected from state action by the Fourteenth Amendment.” Similarly, Senator Jacob Howard said the phrase included “the personal rights guaranteed and secured by the first eight amendments of the Constitution.” Even Professor Amar
acknowledges that “both Bingham and Howard seemed to redefine ‘the Bill of Rights’ as encompassing only the first eight rather than ten amendments, presumably because they saw the Ninth and Tenth Amendments as federalism provisions.”\textsuperscript{150} But their approach cannot be surprising. As Professor Levinson has observed, even radical abolitionist lawyers, whom one would expect to have “the greatest incentive to do so,” did not rely on the Ninth Amendment as a restriction on the power to protect slavery.\textsuperscript{151}

A critical question, then, is whether one ought to give greater weight to the use of the language of the Ninth Amendment in state constitutions—and to general silence when the same language is invoked to justify a broad reading of the Privileges or Immunities Clause—or to the pervasive evidence that states were understood, even by the amendment’s Framers, to be governments possessing general legislative powers subject only to specific constitutional limitations. In the context of Fourteenth Amendment studies generally, and with particular focus on the incorporation controversy, Amar has demonstrated that inferences drawn from silence, when a person might have spoken words of clarification, can much too easily be overdrawn and overstated.\textsuperscript{152} Conversely, that it was not until 1965 that the Ninth Amendment was invoked to justify heightened scrutiny of legislation having an impact on unenumerated fundamental rights, and in a federal rather than a state court, suggests the significance of the silence that had previously prevailed on the issue—that issue being the applicability of the incorporation of an “unenumerated rights” interpretation of the Ninth Amendment state equivalents.

In many ways, to fall into the temptation to read the Privileges or Immunities Clause as an unenumerated rights guarantee is to fall into the same trap as that facing interpreters of the Ninth Amendment as originally drafted. Precisely because those who framed the federal Constitution, as well as the Fourteenth Amendment, were by and large people who believed in a moral reality that justified the effort to limit government, it is tempting to think that we, as interpreters, have been conveyed the task of determining what limits on government moral reality requires. But the Framers of the Constitution and Fourteenth Amendment confronted the difficulties of limiting government by a written Constitution. In the process, one has to face not only the question of what limits should be imposed, but also institutional questions about how the precise scope of those limits are to be determined as well as enforced.

One of Professor Amar’s Barron contrarians, Chief Justice Lumpkin, was clearly committed to finding natural law–based limits on government. But he acknowledged that, considering that “our ideas of natural justice are vague and uncertain,”\textsuperscript{153} an open-ended search for natural rights might give judges “freedom to make, rather than to find, natural law.”\textsuperscript{154} Sounding increasingly like Justice Black, Lumpkin contended for application of the Bill of Rights to the states, nonetheless, arguing that “as to questions arising from these amendments, there is nothing indefinite” inasmuch as the people “have defined accurately and recorded permanently their opinion, as to the great principles which they embrace….\textsuperscript{155}” Lumpkin effectively explains why it
makes some sense to incorporate the Bill of Rights. But there were good reasons why the Framers adopted a federalism-based Ninth Amendment, and there are good reasons not to incorporate an unenumerated rights interpretation into the Fourteenth Amendment.

UNENUMERATED RIGHTS AND CONSTITUTIONAL INTERPRETATION

Despite the modern claim that history "supports the judicial protection of the natural rights 'retained by the people'," it remains true that "[f]or two hundred years the Supreme Court of the United States has never seriously considered a general constitutional right to liberty." Even so, for a number of years, there has been a scholarly debate as to whether the history of the Ninth Amendment warrants courts in construing the Constitution to generate fundamental moral rights, as determined from time to time by the judiciary. As a participant in that debate, I admit that it has sometimes been disappointing to have a judge express a view that perceives the historic materials as supplying the wrong answer, or as raising a question that is largely irrelevant legally. The metaphor that has been used (and used abusively, I always thought) has been the comparison between the Ninth Amendment and an inkblot that couldn't be interpreted because it could mean almost anything. Even though I remain convinced that the historical question is a matter of some importance, and deserves our best efforts at obtaining a correct answer, I am now persuaded that, even leaving the historical issues to one side, courts have properly viewed "inalienable rights" and other "unenumerated rights" clauses (including the federal Ninth Amendment and the state mini-Ninth Amendments) as not stating meaningful, or enforceable, limitations on government power.

A recent, important work on the theory of constitutional interpretation offered these observations:

In order for the text to serve as law, it must be rulelike. In order to be a governing rule, it must possess a certain specificity in order to connect it to a given situation. Further, it must indicate a decision with a fair degree of certainty. Such certainty and specificity need not be absolute, but the law does need to provide determinate and dichotomous answers to questions of legal authority. In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms. Similarly, the Constitution is binding only to the extent that judges do not have discretion in its application. Although the application of the law may require controversial judgments, the law nonetheless imposes obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another. For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests. Thus, constitutional interpretation necessarily is the unfolding of constitutional law. Debates over constitutional meaning become debates over the proper formulation of relatively narrow rules.

The Framers may have believed in natural rights, but the security offered by their Bill of Rights was limited to "those that experience had shown were
suitable for constitutional protection, and they were secured by inclusion in a
legally enforceable bill of rights." 161 By and large, those who framed the
American constitution avoided adopting anything "so general that it can
scarcely form the basis of any action to challenge governmental restrictions
upon liberty." 162 Unlike those who have fought revolutions to vindicate broad
ideals that all too often have not been translated into meaningful accomplish-
ments, the American revolutionaries avoided centering their issues on principles
"too general to be made the basis of judicial decision in specific cases." 163

The Framers did not see the world we live in, but that is one of the reasons
they did not write a constitution that spoke to every question we might want to
have addressed. Still, when their intentions and understanding are clear, there
are those of us who are not prepared to accept the idea that their intentions are
"normally irrelevant to the needs of our society two centuries later." 164 If this
history makes anything clear it is that, when James Madison drafted the Ninth
Amendment, his purpose was not to provide "an affirmation of the independent
foundation of individual rights" by the "declaration of the doctrine of nontex-
tual rights." 165 If we have only managed to "retain" all "the values deemed
worthy of protection during the different periods of the nation's develop-
ment," 166 we have not done more than what was accomplished by the French
Revolution, which Professor Schwartz characterized as establishing "only gen-
eral principles deemed fundamental to man and hence universally applicable,"
but not as creating meaningful "legal rules, enforceable as such by the
courts." 167 We have a Constitution that has been imperfect but still successful
in securing the basic rights that all people should have.

NOTES

1. Forrest McDonald, "The Bill of Rights: Unnecessary and Pernicious," in The Bill of
[hereinafter cited as Government Proscribed]. Accord, Donald S. Lutz, Popular Consent
and Popular Control 60 (1980) (the drafters of the state constitutions "assumed that govern-
ment had all power except for specific prohibitions contained in a bill of rights").

L.J. 945, 993 (1994) 993, quoting 1 Debates and Proceedings of the Constitutional Conven-
tion of the State of California, Convened at the City of Sacramento, Saturday, September
18, 1878, at 172.

3. G. Alan Tarr, Understanding State Constitutions 69 (1998). The materials found in
the text of this chapter accompanying notes 3–35 are based on Nathan N. Frost, Rachel
Beth Klein-Levine, & Thomas B. McAffee, "Courts Over Constitutions Revisited: Unwrit-

4. Id. at 71 (citing state constitutional provisions based on quoted language).

5. See, e.g., Suzanna Sherry, "The Founders' Unwritten Constitution," 54 U. Chi. L.
McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Found-

6. Sherry, supra note 5, at 1134.


18. James A. Henretta, “Foreword: Rethinking the State Constitutional Tradition,” 22 *Rutgers L.J.* 819, 832 (1991). Indeed, Professor Scheiber has observed that the most palpable and enduring ‘contribution’ of federalism to American political life after the Founding was its service as a structure for preservation of slavery for 70 years and then for
perpetuation of discrimination and Jim Crow for nearly another century. Whatever values of federalism and the arguments for the states that we may, in our political discourse, still admire and advance, this darker side of the actual record of governance has to be kept clearly in mind.


19. The same convention only narrowly defeated a proposal that would have denied the right to vote to free blacks. Henretta, supra note 16, at 361. But New Jersey, Pennsylvania, Connecticut, and Rhode Island “had excluded free blacks from the polls,” id. at 362–63, and the Pennsylvania Supreme Court “upheld the verdict of the people,” finding “that blacks ‘might be unsafe depositories of popular power.’” id., quoting Hobbs v. Fogg, 6 Watts 553, 557 (Pa. 1837). “Among non-Southern states, the right to vote was restricted to whites or freemen in Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Michigan, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin.” Gardner, supra note 16, at 1272. In Wisconsin, the 1848 convention “overwhelmingly rejected universal male suffrage because, they said, their constituents could never support Negro suffrage.” Gordon B. Baldwin, “Celebrating Wisconsin’s Constitution 150 Years Later,” 1998 Wisc. L. Rev. 661, 671. By contrast, considering that “so many thousands of Wisconsin inhabitants had recently arrived from abroad, they agreed that resident aliens who sought United States citizenship could vote.” Id. at 672. See generally Tarr, supra note 3, at 101 n. 23 (observing that “most state constitutions effectively defined African-Americans as not part of the politically relevant portion of the American people, denying even free blacks the right to vote”; and in “most states women were also excluded from suffrage for most of the century”).

20. Id. As examples, only taxpayers could vote for the lower house of the legislature in North Carolina, and one had to hold 50 acres of property to vote for senators. Id. Similarly, the 1780 Massachusetts Constitution apportioned seats in its upper house by reference to the wealth of counties represented. Id.

21. See, e.g., Gardner, supra note 16, at 1272–73 (finding that “property qualifications for office holding were not uncommon among the first generation of American constitutions”).

22. See, e.g., Tarr, supra note 3, at 106–07 (noting that “Oregon specifically excluded Chinese residents from voting”); Id. at 108 (observing “the California Constitution of 1879 disenfranchised Chinese residents, and the Idaho Constitution of 1889 both Chinese and Mormons”).

23. Henretta, supra note 18, at 833.

24. Id. at 834.

25. See id. at 834–35. Professor Henretta thus supplies a useful reminder that “[t]he flowering of the doctrine of judicial review in the last half of the nineteenth century was neither accidental nor a plot hatched by judges or corporate interests”; it was, rather, “the intended outcome of the liberal democratic constitutional revolution of the mid-nineteenth century.” Id. at 835.


27. Two leading commentators observe that “from Marshall’s death in 1835 until 1888, few restrictions were placed on the national commerce power.” Id.

28. Id.

29. In Paul v. Virginia, the Court concluded that insurance contracts “do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.” Id.

31. During the period from 1864 to 1873, eight federal statutes were invalidated. For discussion, see Charles Fairman, *6 History of the Supreme Court of the United States—Reconstruction and Reunion 1864–88*, part one, at 1426 (1971).

34. The Daniel Bell, 77 U. S. (10 Wall.) 557 (1871).

36. *Id.* at 1269.
37. *Id.*
38. *Id.* at 1270–71.


41. *Id.* at 41.
42. *Id.*
43. Downs v. Birmingham, 198 So. 2d 231, 236 (Ala. 1940) (holding that there is “no limitation on the nature of amendments contained in the Alabama constitution”); Opinion of the Justices, 263 Ala. 158, 161, 81 So. 2d 881, 883 (1955) (the people “can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they ‘shall forever remain inviolate’”). For an equally strong endorsement of the plenary power of the people to alter their system of government and amend their constitution, see Gatewood v. Matthews, 404 S.W.2d 716 (Ky. 1966). For further discussion, see Albert P. Brewer, “Constitutional Revision in Alabama: History and Methodology,” 48 Ala. L. Rev. 583, 602–06 (1997); Robert F. Williams, “The Florida Constitutional Revision Commission in Historic and National Context,” 50 Fl. L. Rev. 215, 225 (1998) (concluding that “the people of the state apparently cannot bind themselves in the constitution as to the substance of constitutional amendments”).

45. *Id.* at 1074.
46. For a more preliminary treatment of the confusion this approach reflects and encourages, see McAffee, “Social Contract Theory,” *supra* note 9, at 281 n. 40.
47. One might just as well treat an amendment permitting prohibition of flag burning as implicitly rejecting the thesis that flag burning is the exercise of the right of free speech—or at least the rejection of the idea that this particular exercise of speech activity fits into what is appropriately deemed the exercise of an “inalienable” right. For a critique of the views expressed by one other brave soul who has clearly and explicitly argued that courts might reject


51. Id. at 164–65.

52. Id. at 165.

53. Id.


55. Ely, supra note 54, at 203 n. 87 (observing that “one discovers that no fewer than twenty-six of them [the state constitutions] contained provisions indicating that the enumeration of certain rights was not to be taken to disparage others retained by the people”).

56. Id. Ely does not indicate, however, that the Ninth Amendment, unlike Article I, section 8, is found within the federal Bill of Rights, and it became a standard nineteenth-century practice to copy provisions from the federal Bill of Rights into state constitutions. As Ely also observes, however, several of these state constitutions “were quite clear about distinguishing this caveat,” apparently referring to “unenumerated” rights, from those stating “that unenumerated powers are not to be inferred.” Id. See, e.g., Const. of Kansas (1855) art. I, § 22, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America 1181 (Francis N. Thorpe ed., 1909) [hereinafter State Constitutions] (providing that “all powers not herein delegated shall remain with the people”). If Ely and others wonder why a state constitution establishing a legislature with general powers would include an “unenumerated” rights provision, they might also ponder why such a constitution would include a prohibition on “undelegated” powers. It is, after all, a matter of standard understanding that “the Federal Constitution is a grant of powers, while the state Constitution is only a limitation of power.” Alford v. State ex rel. Attorney Gen., 54 So. 213, 222 (Ala. 1910). What does this mean if it isn’t that states are governments of “unenumerated” (or “undelegated”) powers?

Compare Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 280 (1998) (observing that none of the states that adopted counterparts to the Ninth Amendment had “adopted baby Tenth Amendments”) [hereinafter cited as The Bill of Rights]; John Choon Yoo, “Our Declaratory Ninth Amendment,” 42 Emory L.J. 967, 1013 (1993) (observing that “none of the states that had baby Ninths included separate Tenth Amendment analogues”). Professors Amar and Yoo apparently see it as significant that state constitutions included Ninth Amendment counterparts, but not Tenth Amendment counterparts, suggesting that they may be more inclined to accept the “redundancy” argument than the Tenth Amendment fundamental rights argument. But notice that Amar relies on Chief Justice Joseph Henry Lumpkin to illustrate the position he describes as Barron “contrarian,” because it rejected the Supreme Court holding that the federal Bill of Rights does not limit the states. But Lumpkin was equally emphatic that the Tenth Amendment implied that “‘the people’ had certain rights in contradistinction to the ‘states.’” Amar, The Bill of Rights, supra, at 154.

57. Ely, supra note 54, at 203 n. 87. See also Suzanna Sherry, “Natural Law in the States,” 61 Cinc. L. Rev. 171, 181–82 (1992) (concluding that “[b]ecause both the state
constitutions and the federal constitution contain such language strongly suggests that the language was put in to safeguard unwritten inalienable rights’’).

58. Ely, supra note 54, at 203 n. 87. Compare Randy E. Barnett, ‘‘A Ninth Amendment for Today’s Constitution,’’ 26 Valp. U. L. Rev. 419, 428 (1991) (the ‘‘thought that the people had surrendered all their rights to state governments’’ is ‘‘belied by the swift incorporation into most state constitutions of provisions identical to the Ninth Amendment’’).

59. Ely, supra note 54, at 203 n. 87. See Ala. Const. art. I, sect. 30 (1819), reprinted in 1 State Constitutions, supra note 56, at 96, 98. Moreover, as Professor Lash has observed, ‘‘every court and every scholar who addressed the Ninth Amendment in the first period of constitutional law read the Ninth in pari materia with the Tenth as one of the twin guardians of federalism.’’ Lash, supra note 15, at 643. None read it as a libertarian guarantee of unenumerated individual rights.

60. See Theophilus Parsons, ‘‘The Essex Result,’’ in 1 American Political Writing During the Founding Era 1760–1805, at 480, 507 (C. Hyneman & D. Lutz eds., 1983).

61. Theophilus Parsons, 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 161–62 (Feb. 5, 1788) (emphasis added) (J. Elliot ed., 2d ed., 1866) [hereinafter Elliot’s Debates]. See also James Wilson, 2 The Documentary History of the Ratification of the Constitution 337, 391 (Merrill Jensen ed., 1976) [hereinafter Ratification of the Constitution] (Pennsylvania Ratifying Convention, Nov. 28, 1787) (arguing that a bill of rights ‘‘would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution’’) (emphasis added); James Iredell, 4 Elliot’s Debates, supra, at 149 (North Carolina Ratifying Convention, July 28, 1788) (arguing that although a bill of rights would be ‘‘necessary’’ as to a government in which ‘‘the powers of legislation are general,’’ where the powers are ‘‘of a particular nature, and expressly defined, as in the case of the Constitution before us,’’ a bill of rights is ‘‘unnecessary’’ as well as ‘‘absurd and dangerous’’) (emphasis added).

62. Of course, some have insisted on reading Parson’s statement as a reference to inherent, unwritten limits on federal powers, but for an alternative construction and explanation of Parsons’ (and other Federalists’) defense of the Constitution’s omission of a bill of rights, see Thomas B. McAffee, ‘‘The Original Meaning of the Ninth Amendment,’’ 90 Colum. L. Rev. 1215, 1270 n. 216 (1990) [hereinafter cited as ‘‘Original Meaning’’].

63. McAffee, Inherent Rights, supra note 5, at 16. In particular, Madison distinguished between ‘‘a constitution established by the people, and unalterable by the government’’ and a mere ‘‘law established by the government,’’ under which Parliament was ultimately ‘‘uncontrollable.’’ James Madison, The Federalist No. 53, at 359, 360–61 (Jacob Cooke ed., 1961), quoted in, McAffee, Inherent Rights, supra note 5, at 32 n. 43.

64. In 1868, North Carolina adopted a mini-Ninth Amendment. Ely, supra note 54, at 203 n. 87.

65. Sherry, supra note 57, at 181.

66. Id. at 181–82. See also Yoo, supra note 56, at 968 (concluding that ‘‘[t]he presence of these provisions in state constitutions undermines the reading of the Ninth Amendment as a rule of construction’’); Barnett, supra note 58, at 428.

67. See Chapter 2, ‘‘The Drafting of the Ninth and Tenth Amendments,’’ notes 11–49 and accompanying text; McAffee, Inherent Rights, supra note 5, at 17–18, 33 n. 49, 37 n. 82, 84–85, 89–90, 128–131, 133–134, 137–140, 144–45, 155 n. 66 (setting forth basis for a claim that the distinction between governments of general versus enumerated powers was central to the Federalist argument that led to adoption of the Ninth Amendment).

68. 2 Ratification of the Constitution, supra note 61, at 388.

69. Nathaniel Gorham, 1 Ratification of the Constitution, supra note 61, at 335 (Sept. 17, 1787).
70. It is almost a matter of hornbook law to recognize that “[s]tate governments are considered to be governments of plenary power.” Note, “Unenumerated Rights Clauses in State Constitutions,” 63 Tex. L. Rev. 1321, 1333 (1985). Indeed, this law student sounds almost like Professor Sherry in asserting that these provisions “seem out of place in the constitutions of state governments, whose power scholars generally consider to be plenary.” Id. at 1331.


72. Thus the ratification era debate over the omission of a bill of rights centered on whether the federal Constitution adequately defined, and limited, the powers. See, e.g., McAffee, “Original Meaning,” supra note 62, at 1230–32, 1246–47, 1232 n. 62 (citing statements by Washington, Madison, Hamilton, and James Iredell). Thus, James Wilson said that “when general legislative powers are given [as in the states], then the people part with their authority and, on the gentleman’s principle, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power.” 2 Ratification of the Constitution, supra note 61, at 470 (Dec. 4, 1787). See also Henry Lee, 3 Elliot’s Debates, supra note 8, at 186 (Virginia Ratifying Convention, June 9, 1788) (whereas under state governments, the people “reserved to themselves certain enumerated rights” and “the rest were vested in their rulers,” under the federal Constitution, “the rulers of the people were vested with certain defined powers”).

73. It appears that the court’s holdings in Johnson and Alford remain good law today. But see In the Matter of J.L. Dorsey, 7 Port. 291 (1838) (accepting argument that Alabama government was one of “enumerated” powers and the legislature lacked power to implicitly prohibit dueling); Yoo, supra note 56, at 1016–18 (relying on Dorsey for baby Ninth Amendments as “powerful rights-bearing texts”). See also id. at 415 (finding that the “Legislature . . . is plenary and unrestricted except by specific limitations in the constitution”).

74. Sherry, supra note 57, at 181. See supra note 57 and accompanying text. We confess that the state constitutional equivalents of the Ninth Amendment might well have gotten our nomination for treatment in the already-classic Constitutional Stupidities, Constitutional Tragedies (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

75. Lawrence M. Friedman, “State Constitutions in Criminal Justice in the Late Nineteenth Century,” 53 Albany L. Rev. 265, 266 (1989). See also Gordon B. Baldwin, “Celebrating Wisconsin’s Constitution 150 Years Later,” 1998 Wisc. L. Rev. 661, 673 (new states “did not adopt novel forms of government,” but borrowed from “state constitutions predating the federal, and those constitutions adopted by states under the mantle of the Northwest Ordinance” as well as other states); G. Alan Tarr, “Models and Fashions in State Constitutionalism,” 1998 Wisc. L. Rev. 729, 730 (“[c]onstitutional borrowing in the United States is as old as the nation”). For one thing, “states seeking congressional approval for their admission to the Union sought to avoid controversy by modeling their constitutions on those of existing states”). Id. at 731.

76. This omission of explicit provision for judicial review “reflects the confidence reposed in the revolutionary-era legislatures,” and “there is little reason to think that the framers of the early state constitutions intended the exercise of judicial review.” McAffee, Inherent Rights, supra note 5, at 43 n. 133. See generally id. at 15–16; 23–24; 41–43 nn.108–118; 134–137; 159–60 nn. 94–97. For a discussion of the impact of the language in these state declarations on the drafting of the Bill of Rights, including the Ninth Amendment, see McAffee, “Social Contract Theory,” supra note 9, at 296–305.


79. McAffee, Inherent Rights, supra note 5, at 24; Leslie Friedman Goldstein, In Defense of the Text: Democracy and Constitutional Theory 74–76 (1991); McDonald, in Government Proscribed, supra note 1, at 388 (finding that early state declarations “were, by and large, mere statements of principle . . . without substantive force in law”). See, e.g., Va. Const., Bill of Rts § 4 (1776), reprinted in 7 State Constitutions, supra note 56, at 3813 (stating principle “[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services”); Id. § 12 (stating that “freedom of the press” is one of “the great bulwarks of liberty,” and stating further that it “can never be restrained but by despotic governments”). Sometimes the two methods were combined. See id. § 11 (stating that “in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred”).

80. See McAffee, Inherent Rights, supra note 5, at 65–66, 80–81, 120–21, 147–48. For insight into this process, and in particular the role played by Roger Sherman’s proposal to place the amendments at the end of the document rather than “scattering them throughout the document as Madison wanted,” see Lutz, “Pedigree of the Bill of Rights,” in Government Proscribed, supra note 1, at 70; see generally id. at 70–74.


82. Goldstein, supra note 79, at 74. Compare Alexander Hamilton, The Federalist No. 84, supra note 63, at 579 (Constitution’s provision by “We the People” is more effective than “these aphorisms” in a bill of rights that “would sound much better in a treatise of ethics than in a constitution of government”).


84. See, e.g., Const. of Penn., Decl. Rts. § 1 (1776). Indeed, it is fair to say that this is the provision that inspired the title of the book Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding, supra note 5. Professor McAffee referred to them as “inherent” rights, in part, because modern readings of the Ninth Amendment are divided
between those who rely exclusively on “natural rights” and those who find another basis (the English constitution, for example) for thinking that “unwritten rights” were thought to be protected. The related question is whether the founders saw these “inherent” rights as being legally enforceable.

85. Professor Schwartz refers, for example, to Article 8 of the French Declaration of Rights of Man and Citizen, which provides that “[e]very law which violates the inalienable rights of man is essentially unjust and tyrannical,” and further, “is not a law at all.” Schwartz, supra note 78, at 426. According to Professor Schwartz, such articles “state abstract principles that, however high-sounding, add nothing to the practical rights possessed by Frenchmen.” Id. at 425.

86. Such provisions are “drafted only in the hortatory terms of the general rights mankind ought to have.” Id. at 426. But it is critical that the language do more than make an “abstract declaration of inviolability” that is too likely to have “no effect, deterrent or otherwise,” on decisions made by government officials. Id. at 425. The American system has worked as effectively as it has precisely because we have “guaranteed specific rights in legally enforceable terms.” Id.

87. Rosen, supra note 44, at 1073.

88. Id. at 1074.

89. This supplies an example of what Professor Smith has described as “regulatory reason” that has slipped into “constitutional sophistry.” Steven D. Smith, The Constitution & the Pride of Reason 84–124 (1998).

90. One might just as well treat an amendment permitting prohibition of flag burning as involving an implicit rejection of the thesis that flag burning is the exercise of the right of free speech—or at least the rejection of the idea that this particular exercise of speech activity fits into what is appropriately deemed the exercise of an “inalienable” right.

91. See, e.g., Harry V. Jaffa, “What Were the ‘Original Intentions’ of the Framers of the Constitution of the United States,” 10 U. Puget Sound L. Rev. 351, 360 (1987) (under traditional social contract theory “the collective sovereignty of the people—such as that which ordained the Constitution—is limited”).

92. See, e.g., James Wilson, 2 Ratification of the Constitution, supra note 61, at 362 (Nov. 24, 1787) (right of popular sovereignty is the people’s inalienable right, of “which no positive institution can ever deprive them”).

93. For efforts that seem to me to reflect the desire to have it “both ways,” see Rosen, supra note 44; Yoo, supra note 56.


95. Id. § V (1776).

96. A modern historian has correctly asserted that “[t]he principle enunciated in the Declaration of Independence that governments derive their just powers from the ‘consent of the governed’ lies at the foundation of the American republic.” Merrill Peterson, “Thomas Jefferson, the Founders, and Constitutional Change,” in The American Founding: Essays on the Formation of the Constitution 276, 276 (J. Barlow, L. Levy, & K. Masugi eds., 1988). While the theme of securing personal rights figured in the debate over the Constitution, and animated the pressure to add a bill of rights to the Constitution, there is no question that the debate over the inclusion of a listing of rights reflected a recognition that the goal was to strike the right balance between personal rights and the government’s needs. The purpose was “to provide for the energy of government on the one hand, and suitable checks on the other, to secure the rights of particular states, and the liberties and properties of the citizens.” Thomas B. McAffee, “The Federal System as Bill of Rights: Original Understandings, Modern Misreadings,” 43 Vill. L. Rev. 17, 100 (1998) [hereinafter cited as “Federal System as Bill of Rights”], quoting, “Letter from Roger Sherman and Oliver Ellsworth to

97. See, e.g., Lawrence Sager, “You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?” 64 Chi.-Kent L. Rev. 239, 263 (1988); Thomas B. McAffee, “A Critical Guide to the Ninth Amendment,” 69 Temple L. Rev. 61, 92–93 (1996) (citing additional sources) [hereinafter cited as “Critical Guide”]. Some of this new emphasis on “rights talk” reflected the need to counter what has become a modern inclination to feel and express concerns about various “ antidemocratic” features of our constitutional order—including the doctrine of judicial review. It is helpful to recall that in the years following the Declaration of Independence, we moved toward the recognition that there is a tension between democratic government and a just government. Gordon S. Wood, The Creation of the American Republic, 1776–87 (1971).

But there remained a basic faith in the commitment of the American people to a just constitutional order—sufficient to place a basic trust in the people to make a decision that would move us in the right directions. So the Framers retained a commitment to popular sovereignty. Moreover, as Professor Smith has accurately observed, Federalist proponents of the Constitution relied not so much on the “specific legal devices” employed in the Constitution to restrict the exercise of government to legitimate functions as on “the people themselves as they pursue complex and competing interests and visions in an extended Republic.” Smith, supra note 89, at 68.

98. For documentation of the importance attached to popular sovereignty by the Framers, see McAffee, Inherent Rights, supra note 5, at 125–127, 172–173; McAffee, “Substance Above All,” supra note 47, at 519 n. 56. It is critical, in any event, to recognize that our choice “is not between natural right and majoritarian rule” but “one set of human institutions and another, none of which is infallible.” Michael W. McConnell, “A Moral Realist Defense of Constitutional Democracy,” 64 Chi-Kent L. Rev. 89, 96 (1988).


100. Id. at 1537.

101. See Lino A. Graglia, “Judicial Review, Democracy, and Federalism,” 4 Det. C.L. Rev. 1349, 1350–51 (1991) (rights are not “costless benefits,” but serve to create new benefits to some interests while diminishing others; trade-offs “are necessarily involved”).


103. There is no way to preclude a priori that liberty and justice will not be the victims of the activist imposition of unenumerated rights. Professor Michael McConnell writes:

If rights are wrongly conceived, they can be as inimical to justice and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the right to life. Enforcement of the right to voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children’s rights against parental control conflicts with parents’ rights to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions on the other side.

McConnell, supra note 98, at 103–04.

104. For a more complete critique of reliance on the Ninth Amendment as a justification of a general search for inalienable, natural rights, see McAffee, “Substance Above All,” supra note 47.

106. *Id.* at 491 n. 5.

107. For additional comment on Justice Goldberg’s treatment of the relationship between the Fourteenth Amendment and the federal Bill of Rights, see McAfee, “Critical Guide,” *supra* note 97, at 61 n. 7; Chapter 7, “The Ninth Amendment and Substantive Due Process as Modern Phenomena,” notes 17–26 and accompanying text. As Professor Lash perceptively observes, Justice Goldberg relied directly on Joseph Story’s 1833 commentaries, which traced the Ninth Amendment to Alexander Hamilton’s fear of constructive power in Federalist No. 84. *Lash, supra* note 15, at 600. Story’s reading fit perfectly with “Madison’s draft of the Ninth Amendment” as “a rule of interpretation preventing the constructive enlargement of federal power.” *Id.*

108. *Amar, The Bill of Rights, supra* note 56, at 280. There is no question that Professor Amar agrees that the Ninth Amendment as originally drafted had “federalism roots” and was tied to “the unique enumerated power strategy of Article I.” *Id.* at 124. See *id.* at 123–24; McAfee, *Inherent Rights, supra* note 5, at 158 n. 91. It is noteworthy, however, that at least two of Professor Amar’s students who have “bought” his unenumerated rights “incorporation” theory nevertheless reject his view that the Ninth Amendment was originally a provision tied to concerns of federalism and popular sovereignty and not to securing unenumerated substantive rights. *Rosen, supra* note 44; *Yoo, supra* note 56.

109. *Id.* In developing the thesis that the “privileges or immunities” clause transformed the Ninth Amendment, Amar relies heavily on research of a former student of his. *Yoo, supra* note 56.

110. The “incorporation” controversy is by itself a large one, and, fortunately, we need not fully confront it here. For Amar’s arguments on behalf of incorporation of the federal Bill of Rights, see, *Amar, The Bill of Rights, supra* note 56, at 181–294. For additional arguments on both sides, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); and Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (1989).


112. *Id.* at 281, quoting Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (emphasis added). See also *Yoo, supra* note 56, at 1025–26. For Amar and Yoo, the evidence is supplemented when Senator John Sherman relied on the Ninth Amendment in support of the Civil Rights Act of 1875. *Amar, The Bill of Rights, supra* note 56, at 281; *Yoo, supra* note 56, at 1027–30.

113. See *supra* note 23 and accompanying text.

114. This may well be one of those areas in which there is reason to “fear that the metaphor of incorporation will continue to mislead us, even once Professor Amar’s analysis has demonstrated that the metaphor serves no useful purpose.” Gary Lawson, “The Bill of Rights as an Exclamation Point,” 33 *U. Rich. L. Rev.* 511, 523 (1999). See also Douglas G. Smith, “Reconstruction or Reaffirmation? Review of ‘The Bill of Rights: Creation and Reconstruction,’” 8 *Geo. Mason L. Rev.* 167, 197 (1999) (concluding from Amar’s analysis that “the incorporation thesis in its various incarnations is a misnomer,” although Fourteenth Amendment drafters “viewed the Bill of Rights as one source among many for determining what the terms ‘privileges’ and ‘immunities,’ as used in Section One, meant”).


118. One reason the issue remains relevant is that there is almost universal agreement that the Supreme Court’s decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)—that is, that the clause protected only a narrow set of uniquely national rights—was
simply wrong. See, e.g., John Harrison, “Reconstructing the Privileges or Immunities Clause.” 101 Yale L.J. 1385, 1414 (1992) (the Privileges or Immunities Clause was “effectively banished from the Constitution” in the Slaughter-House Cases); Thomas B. McAffee, “Constitutional Interpretation—The Uses and Limitations of Original Intent,” 12 U. Dayton L. Rev. 275, 282–83 (1987) [hereinafter cited as “Constitutional Interpretation”] (citing lengthy list of commentators with diverse views on constitutional interpretation and meaning who agree that the Court misconstrued the Privileges or Immunities Clause).

119. Smith, supra note 114, at 191.
120. See generally Harrison, supra note 118.
121. Lawson, supra note 114, at 512 n. 5.
122. Id., citing Amar, The Bill of Rights, supra note 56, at 178–79 & n. *. But see Lawson, supra note 114, at 512 n. 5 (Professor Lawson confirming that he is “not (yet?) persuaded that it is the best reading of the word ‘abridge’ in Section 1 of the Fourteenth Amendment”); Smith, supra note 114, at 193–98 (formulating an alternative vision of the sort of protection offered).

123. U.S. Const. art. IV, section 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” See Harrison, supra note 118, at 1398 (Article IV’s provision “forbids the states from giving unfavorable treatment to visiting out-of-state Americans with respect to the body of rights that constitutes the privileges and immunities of state citizenship”); Id. at 1400 n. 48 (concluding that interstate Privileges and Immunities Clause is “perfectly adapted for an intrastate equality rule, under which every citizen has the same rights, whatever the state determines they shall be”).

125. Id. at 178 n. *.
126. Professor Hartnett accurately observes that “Amar is rather non-committal in addressing the extent to which the privileges or immunities clause protects common law rights.” Edward J. Hartnett, “The Akhil Reed Amar Bill of Rights,” 16 Const. Comm. 373, 393 (1999). Hartnett contends that Amar’s noncommitment on this issue underscores the significance of Amar’s dodge regarding the incorporation of the Ninth Amendment. Amar asserts that incorporation of the Ninth Amendment ‘does not matter’ because any unenumerated rights that it affirms (other than federalism) add little to the privilege or immunities clause.

Thus, Amar punts the Ninth Amendment question to the Privileges or Immunities Clause, and then punts on an important question regarding the Privileges or Immunities Clause. Id. at 393 n. 31.

127. See, e.g., Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 105 (1990) (goal was to recognize the “states’ primacy in establishing and maintaining individual rights, with Congress given authority to intervene only when the states were remiss in fulfilling their obligations”); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 7–8 (1988) (concluding that history supports both the view that the amendment was “to provide blacks with full protection of their rights” and that its goal was to not “upset the existing balance of federalism”); McAffee, “Constitutional Interpretation,” supra note 118, at 286 n. 74 (concluding that “the states were to retain sovereignty over basic rights subject to an essentially exclusive judicial responsibility to determine under what circumstances the protected privileges had been ‘abridge[d]’”).

128. Cong. Globe, 39th Cong., 1st Sess. 1293 (1866), quoted in, Harrison, supra note 118, at 1403 n. 59. See also id. at 1089 (Congressman Bingham stating that the purpose of the amendment was to protect “the equal right of all citizens of the United States in every
State to all privileges and immunities of citizens’'); Id. at 474 (Senator Trumbull contending that “any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty’’); Id. at 1760 (Senator Trumbull clarifying that a state “may grant or withhold such civil rights as it pleases; all that is required is that, in some respect, its laws shall be impartial’’); Id. at 2766 (Senator Howard contending that absent “equal justice to all men and equal protection under the shield of law, there is not republican government’’).

129. Harrison, supra note 118, at 1392.

130. Thomas Cooley, Constitutional Limitations 104 (6th ed., 1890). Thus, the leading commentator of an earlier era, Supreme Court Justice Joseph Story, concluded that, absent an express prohibition contained within its state constitution, a state “might pass a bill of attainder, or ex post facto law, as a general result of its sovereign legislative power.” Joseph Story, 3 Commentaries on the Constitution of the United States 238 (1833).


132. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 , 74–78 (1873). See supra note 118 (documenting the claim that “there is almost universal agreement that the Supreme Court’s decision … was simply wrong’’); McAffee, “Constitutional Interpretation,” supra note 118, at 282–83.

133. Id. at 77.

134. Id. at 78.

135. Id. at 96 (Field, J., dissenting).

136. Id.

137. Id. at 97, quoting, Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

138. Currie, supra note 30, at 344–48. Even Justice Field’s dissenting opinion, however, was a good more equivocal than is suggested by the cited language. He clarifies, for example, “If under the fourth article of the Constitution equality or privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.” Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 101 (Field, J., dissenting). Indeed, although Justice Field insisted that the amendment protected “the inalienable right of every citizen to pursue his happiness,” he even qualified this by acknowledging that even this pursuit was “unrestrained, except by just, equal, and impartial laws.” Id. at 111.

139. For the view that even the Fourteenth Amendment’s relatively open-ended command that basic laws must equally secure the rights of all need not be read as granting authority to judges to develop an unenumerated rights theory that has the effect of discarding the written Constitution, see McAffee, “Inalienable Rights,” supra note 10, at 359–94; Thomas B. McAffee, “The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?” 80 Ore. L. Rev. 1245, 1270–76 (2001).

140. See, e.g., id. at 322–27; Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1857). And it would not be many years before the Court would echo without attribution “the natural-law utterances of earlier Justices.” Currie, supra note 30, at 382.

141. Currie, supra note 30, at 329 (noting that both Hepburn and Sanford were aberrations “in a history of generally sympathetic interpretation of the affirmative grants of congressional power’’).

142. Id. 346–47.

143. Id. at 377.

144. Id. at 378.


146. Lash, supra note 15, at 673.
Indeed, Professor Lash observes that even as the Court considered the issue of incorporation, it often characterized arguments in favor of “total incorporation” as favoring incorporating the first eight amendments. Id. at 673–74.


158. See, e.g., Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J. dissenting) (stating the view that parental right at stake in that case was one of the “unalienable” rights referred to in the Declaration of Independence, as well as one of the “other rights retained by the people” in the Ninth Amendment; but, nevertheless, finding that the Declaration of Independence is “not a legal prescription” and that the Ninth Amendment’s prohibition on denying or disparaging unnamed rights is far removed “from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people”). But see Amar, The Bill of Rights, supra note 56, at 280–83.


161. Schwartz, supra note 78, at 423. The American Framers thus avoided the adoption of a principle that “may serve as the foundation for a system of political philosophy, but it can scarcely be the basis by itself for legal protection of specific personal rights and liberties.” Id. at 424.
The Reserved Powers from 1895 through World War II

OVERVIEW

During the first half of the twentieth century, the U.S. Supreme Court’s interpretation of the Tenth Amendment changed dramatically. For much of this period, the Court read the amendment as an emphatic affirmation of the enumerated powers doctrine. On this reading, the very existence of the amendment not only permitted but indeed required rigorous judicial scrutiny of federal legislation. Otherwise, many Justices believed, Congress would have been free to so enlarge Article I, section 8’s specific grants of authority as to intrude on, if not altogether eclipse, the powers the Tenth Amendment reserved to the states and the people therein. Between 1895 and 1936, the Court resisted, albeit sporadically, congressional encroachments on the traditional domains of the state governments, especially when those encroachments took the form of attempts to regulate the nation’s economy.

This somewhat sporadic judicial resistance manifested itself in two closely related but analytically distinct doctrinal approaches. The first attempted to protect the reserved powers by affirmatively defining them, largely by reference to historical practice, and then nullifying what the Justices deemed to be particularly egregious invasions of those regulatory realms that had traditionally belonged exclusively to the state governments. This approach was vulnerable in at least two ways. For one, the Framers of the Tenth Amendment (and, indeed, Article I, section 8, as well) had taken just the opposite approach—identifying the powers of the federal government and leaving the reserved powers wholly undefined. Accordingly, the text of the Constitution provided weak support for the Court’s effort to delineate the areas of authority properly sheltered from congressional overreaching. More important, during this period the Justices only selectively held the line against federal expansion. On at least some occasions, the Court acquiesced in congressional intrusion into the realm of morals regulation, for example, even though the states’ claim to exclusive authority was at least as strong as it was with respect to economic regulation. This selectivity in the protection of state authority
exposed the Justices to the criticism that their asserted dedication to federalism was merely a stalking horse for hostility to any legislative innovations, state or federal, altering the common law distribution of wealth.\(^3\)

On occasion, the Court took a second, subtly different, and we think more promising, approach in its attempt to protect the reserved powers from congressional usurpation. This approach, which more closely tracked the Constitution’s text, required the Court to assess the constitutionality of an Act of Congress by first defining the scope of the authority granted by the specific enumerations in Article I, section 8, and then determining whether any grant of power extended far enough to authorize the challenged federal statute. The Tenth Amendment evidenced the central importance to the founders of the enumerated powers scheme as a means of limiting the power of Congress. Accordingly, the Court frequently invoked the amendment in support of a canon of constitutional construction favoring interpretations of Article I, section 8’s provisions that sufficiently cabined them to leave in reserve substantial authority to the states and the people. On this reading, the Tenth Amendment did not itself invite judicial definition of the reserved powers but merely stressed that such powers existed and were significant. The Tenth Amendment served to keep the existence of these reserved powers ever present in the judicial mind engaged in the admittedly difficult task of delineating the scope of congressional authority. This second approach, while more sound than the first as a matter of constitutional theory, nevertheless remained as subject as the first to the problem of selective (and apparently politically motivated) invocation.

To be clear, the Court did not always carefully distinguish between these two roles for the Tenth Amendment, and as often as not conflated them. Not surprisingly, then, the case law concerning the meaning of the Tenth Amendment remained in disarray, and many of the cases continued to divide the Court, as the Great Depression and President Franklin Roosevelt’s comprehensive package of legislative responses stressed the Court’s confused construction of the amendment past the breaking point.\(^4\) While debate continues as to why the Court profoundly changed course in the New Deal era, few if any contest the proposition that it did so. In retrospect, we can see that rulings then issued signaled the Court’s abandonment of its long-standing effort to enforce the promise of the Tenth Amendment, largely leaving the matter to resolution by the political branches of the national government. Subsequent rulings made it difficult even to imagine a federal economic regulation that the Court would deem to be beyond the power of Congress. Insofar as the judicial construction of the Tenth Amendment was concerned, it had, by World War II, become a dead letter.

**FEDERALISM BEFORE THE NEW DEAL**

Throughout the first third of the twentieth century, the Supreme Court struggled, ultimately in vain, to impose meaningful limits on the powers Article I, section 8, granted to Congress.\(^5\) The story of this ill-fated attempt to preserve the enumerated powers doctrine begins in 1895 with the Court’s decision in United States v. E. C. Knight Co.
Congress had in 1890 passed the Sherman Antitrust Act, which in pertinent part declared unlawful “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States,” and made a criminal of “[e]very person who shall monopolize or attempt to monopolize . . . any part of the trade or commerce among the several States.”6 In 1892, the American Sugar Refining Company purchased four Philadelphia sugar refineries and thereby “acquired nearly complete control of the manufacture of refined sugar within the United States.” The U.S. attorney general responded by bringing suit under the Sherman Act to reverse these four transactions. Were a twenty-first-century antitrust lawyer confronted with a complaint alleging that his or her client had “entered into an unlawful and fraudulent scheme” to acquire control of 98 percent of the nation’s manufacturing of a staple product, perhaps the last argument considered by way of defense would be that, even if the allegations of the complaint were true, the conduct alleged did not fall within the ambit of congressional authority.7 But the American Sugar Refining Company not only advanced this claim but also persuaded the federal trial judge, all three judges of the intermediate appellate panel, and eight of the nine U.S. Supreme Court Justices of the claim’s validity—a fact in itself evidencing the gulf that separates late-nineteenth-century assumptions about federal-state relations from our own.

Writing for the Supreme Court majority, Chief Justice Fuller began his opinion by conceding that “the existence of a monopoly in manufacture [wa]s established by the evidence.” Furthermore, he acknowledged that such a monopoly “might unquestionably tend to restrain external as well as domestic trade” or commerce in refined sugar. But that restraint, “however inevitable, and whatever its extent,” would, he opined, be a mere “indirect result” of the conceded monopoly in production. Congress could not have meant the Sherman Act to reach so far, for were the Act to be construed so broadly its constitutionality would be “doubtful” at best.8

Although Chief Justice Fuller did not expressly invoke the Tenth Amendment, he made it clear that a narrow interpretation of the Sherman Act was compelled by due concern for the powers the Tenth Amendment reserved to the states.9 Echoing the Amendment’s text, he lectured that

the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, . . . is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive.

This state “police power” was not to be confused with Congress’s power over interstate and foreign commerce. While the latter power “furnishe[d] the strongest bond of union,” the former was “essential to the preservation of the autonomy of the states as required by our dual form of government.” Accordingly, “the delimitation between” these two powers, “however sometimes perplexing, should always be recognized and observed.” For Fuller and the seven Associate Justices joining his majority opinion, this
fundamental “delimitation” tracked the line between manufacturing and commerce. “Commerce succeeds to manufacture, and is not a part of it,” Fuller reasoned. Rather, interstate commerce subject to regulation by Congress included “[c]ontracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit.” But Congress’s power did not extend to goods manufactured in one state for eventual export to and sale or resale in another, “and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.” Thus, even assuming that the defendant companies attempted to monopolize the production of refined sugar and that such an effort would “indirectly” but significantly affect interstate commerce, the defendants did not violate the Sherman Act, as construed by the Court.10

Justice Harlan alone dissented. Here, as in other landmark cases, the “great dissenter” lost the battle only to win the war, his solitary opinion prophesying a jurisprudence decades before its time. Harlan’s lengthy dissenting opinion (roughly three times as long as Fuller’s opinion for the Court) raised numerous objections to the majority’s interpretation of the Sherman Act and the Constitution’s Commerce Clause. Most important for our purposes, Justice Harlan invoked the broad construction Chief Justice Marshall gave the Necessary and Proper Clause in McCulloch v. Maryland (1819)—Fuller’s majority opinion had ignored both the Clause and the precedent—as support for the proposition that the Constitution granted Congress considerable discretion as to the means it might choose to pursue constitutionally legitimate ends. Harlan argued that, via the Commerce Clause as supplemented by the Necessary and Proper Clause, the Constitution empowered Congress to regulate not only interstate “commerce” but also any intrastate activity that directly interfered with or obstructed such commerce. And, furthermore, the effect on interstate commerce of a combination or conspiracy to control all domestic manufacture of a product was sufficiently direct and immediate to be within Congress’s regulatory authority. In Justice Harlan’s words:

Any combination . . . that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other states . . . affects, not incidentally, but directly, the people of all the states; and the remedy for such evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all.11

Yet, in spite of his forceful dissent from the Court’s disposition of the case, Justice Harlan nevertheless agreed with the majority that an effect on interstate commerce had to be a direct one before Congress would be permitted to regulate its cause. He attempted to reassure his colleagues by declaring that “the preservation of the just authority of the states is an object of deep
concern to every lover of his country” and conceding that “[n]o greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished.” Thus, even Justice Harlan’s difference with the E.C. Knight majority was ultimately a matter of degree, not one of kind—a disagreement about how the distinction between direct and indirect effects should be understood and applied, but not one about whether such a distinction should be preserved.

Near the end of his dissent, Justice Harlan accused the majority of “in effect” nullifying the Sherman Act and leaving Congress powerless as to the growing accumulations of capital that increasingly dominated the national economy. These prophesies of doom proved to be overstated, for neither the Fuller Court nor that led by Fuller’s successor, Chief Justice White, consistently opposed every invocation of the Sherman Act or every broad assertion of congressional authority to regulate interstate commerce. As to the Sherman Act, just four years after the E.C. Knight decision, the Court held that an agreement among private companies to forego competition in interstate sale of pipe violated the Act (Addyston Pipe & Steel Co. v. United States, 1899). The E.C. Knight case was distinguished on the ground that the effect of manufacture on commerce was merely indirect, whereas obstruction of interstate commerce was the “direct and immediate result” of a noncompete agreement. E.C. Knight was further limited by the Court’s 1904 holding that the Sherman Act prohibited a consolidation of ownership and control of what had been competitor transcontinental railways and that, so construed, the Act was within the ambit of congressional power over interstate commerce (Northern Securities Co. v. United States, 1904). Of course the railway consolidation forbidden in Northern Securities bore a striking likeness to the sugar consolidation permitted in E.C. Knight. Justice Harlan’s Northern Securities plurality opinion distinguished E.C. Knight as a case about a consolidation in manufacture that would indirectly affect interstate commerce in the goods produced, whereas “[r]ailroad companies are instruments of commerce, and their business is commerce itself.” Four dissenters could abide neither this distinction nor its implications for the scope of congressional power over the emerging national economy. Nevertheless, the ultimate verdicts in the Addyston Pipe and Northern Securities cases demonstrated that E.C. Knight had narrowed but not eviscerated the Sherman Act. These decisions also marked the persistence on the Court of divergent views about the scope of congressional power under the Commerce Clause and called into question the vitality of the underlying vision, if not the narrow holding, of the E.C. Knight ruling.

**Promoting Morality as Regulating Commerce**

This ambiguity in the case law was exacerbated by contemporaneous decisions upholding other federal statutes, many of which sought to protect public morality. The Justices, perhaps inclined by their own moral sensibilities to
sustain what they perceived to be salutary safeguards against vice, in so doing acceded to increasingly broad constructions of Congress’s authority over interstate commerce. A seminal ruling came in *The Lottery Case* (Champion v. Ames, 1903), in which a bare majority of the Justices sustained an 1895 federal statute enacted “for the Suppression of Lottery Traffic through National and Interstate Commerce.” A federal grand jury indicted Champion for allegedly employing the Wells Fargo Express Company to ship by rail from Dallas, Texas, to Fresno, California, a number of lottery tickets, which on their face advertised a chance at a $32,000 capital prize. That the shipment through several states by common carrier of items intended for sale constituted interstate commerce would seem beyond contest. But both counsel for Champion and the dissenting opinion mightily contested the point nevertheless. The dissent’s resistance to this self-evident conclusion flowed from the troubling fact that, in enacting the challenged statute, Congress had for perhaps the first time exercised its power over interstate commerce to deter private conduct because Congress perceived it to be injurious to public morality. In enacting the 1895 statute Congress attempted to use its constitutional power “to regulate” interstate commerce to prohibit transport of an offensive article (to suppress a disfavored form of commerce) rather than to remove state-law barriers to commercial development. This novel use of the commerce power threatened to displace state regulatory authority in ways that prior statutes had not. As Chief Justice Fuller noted in his dissenting opinion for himself and three other Justices, the police power—that is, “[t]he power to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity”—was “a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive....” Fuller concluded that to permit Congress to convert, in effect, its power over the channels of interstate commerce into a “general police power would be to hold that it may accomplish objects not intrusted to the general government, and to defeat the operation of the 10th Amendment....”

Thus, Chief Justice Fuller employed the Tenth Amendment as a rule of interpretation, forbidding a construction of Congress’s power over interstate commerce that would accord it a police power akin to that reserved to the states. But having properly read the Tenth Amendment to preserve this authority to the states, the Chief Justice still faced the formidable task of explaining why congressional power to regulate interstate commerce did not encompass the prerogative to criminalize interstate transport of items so plainly intended for sale. As noted above, Fuller vainly resisted the obvious conclusion that lottery tickets were articles of commerce. Somewhat more cogently, his dissent suggested that, in any event, the power “to regulate” interstate commerce did not permit prohibition of even a portion of the same and, relatedly, that the commerce power was limited by its original purpose—namely, “to form a more perfect union by freeing [interstate] commerce from state discrimination,
and not to transfer [to Congress] the power of restriction.” Fuller warned that “the necessary consequence” of the majority’s recognition of a virtually unlimited congressional power over interstate transportation was “to take from the states all jurisdiction over [any] subject so far as interstate communication is concerned.” The majority’s endorsement of this broad understanding of the commerce power constituted “a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government.” Indeed, Fuller concluded his dissenting opinion by noting that “[o]ur form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions: the form may survive the substance of the faith.”

Justice Harlan’s answer to Fuller’s invocation of the Tenth Amendment presaged the mid-twentieth-century understanding of the provision as an empty tautology:

If it be said that the Act of 1895 is inconsistent with the 10th Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

For Harlan and the five-Justice majority, the Tenth Amendment merely restated the enumerated powers doctrine. It did not, however, provide any guidance for the judicial task of delineating the scope of those enumerated powers granted the national government. If the powers granted in Article I, section 8, as construed by Congress and the Supreme Court, permitted federal displacement of the states’ police power, the Tenth Amendment counseled no hesitation because its literal command would still be honored, even while it was emptied of all content. In other words, the states and the people would in a literal, albeit hollow, sense retain those powers not surrendered even if the Court construed the powers granted to be all encompassing. The Tenth Amendment would thereby be honored even while it was interpreted to “reserve[]” nothing for the states because all had been “delegated” to the central government. Consonant with his reading of the Tenth Amendment, Harlan dismissed Fuller’s assertions that the power to regulate commerce was limited to removing barriers to interstate exchange. Here Harlan relied heavily on Chief Justice Marshall’s broad dicta in Gibbons v. Ogden (1824) that the commerce “power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.” Because a single “state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the ‘widespread pestilence of lotteries’ and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another.”

As Chief Justice Fuller had feared, The Lottery Case supplied the precedent for numerous federal statutes selectively forbidding interstate transport in an
attempt to suppress goods, or as often forbidding conduct, deemed dangerous to public health or morals. For example, the Court thereafter upheld federal statutes imposing prohibitive taxation on the sale of artificially colored oleomargarine (McCray v. United States, 1904) and criminalizing interstate transport of “adulterated articles of food or drugs” (Hipolite Egg Co. v. United States, 1911). Extending the recognition in The Lottery Case of congressional power to forbid interstate transport for the purpose of suppressing temptations to moral vice, the Court in Hoke v. United States (1913) upheld a 1910 statute “commonly known as the white slave act.” That federal statute made it a felony to transport any woman or girl—or to persuade, induce, or entice any woman or girl to go—from one state to another for the purpose of “prostitution or debauchery, or for any other immoral purpose.” Justice McKenna, writing for a unanimous Court, reasoned that surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, ... the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and enslavement in prostitution and debauchery of women, and, more insistently, of girls.

Indeed in Hoke the Court seemed to embrace without reservation the broadest implications of The Lottery Case. Justice McKenna observed that

[our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people, and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.]

Nor did the Court recoil from the apparent consequence that Congress could employ its authority over interstate commerce, in effect, to exercise a general police power over the entire nation: “Congress has power over transportation ‘among the several states;’ ... the power is complete in itself[,] Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise[,] and the means may have the quality of police regulations.”

The full import of Hoke was revealed when, less than four years later, the Court, this time over Justice McKenna’s dissent on nonconstitutional grounds, affirmed the felony convictions of two men under the same statute for traveling from California to Nevada, this time in the company of their voluntary mistresses (Caminetti v. United States, 1917). Caminetti in effect made fornication a federal crime so long as the minimal requirement of an interstate nexus was established by the prosecution. A few days before, invoking Hoke and The Lottery Case, Chief Justice White’s opinion for the Court had observed, albeit in dicta, that Congress had power to prohibit all shipment or transport of...
intoxicating beverages “in the channels of interstate commerce” (James Clark Distilling Co. v. Western Md. Railway Co., 1917). Within two years the Court would uphold a federal “tax” statute (revealingly known as the Harrison Anti-Narcotic Act), which in effect imposed criminal penalties for unauthorized distribution of heroin and its derivatives (United States v. Doremus, 1919), as well as the War-Time Prohibition Act, a federal statute (enacted before the ratification of the Eighteenth Amendment) prohibiting the sale for beverage purposes of any distilled spirits (Hamilton v. Kentucky Distilleries & Warehouse Co., 1919). In the latter case, after acknowledging that “the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment,” Justice Brandeis’s opinion for a unanimous Court continued:

it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose.

This observation was in turn advanced still another substantial step in 1925, when the Court further extended this line of precedents to affirm a criminal conviction under a federal statute prohibiting the transport of stolen motor vehicles across state lines (Brooks v. United States, 1925). Chief Justice Taft’s opinion for a unanimous Court in Brooks expressly condoned a congressional police power over interstate commerce:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power for the benefit of the public, within the field of interstate commerce.

The Brooks opinion was the first to concede this much so frankly. But this concession flowed ineluctably from The Lottery Case and its numerous progeny. In those decisions, the Court had invariably rejected the argument that Congress’s selective prohibition of interstate transport had unconstitutionally invaded the powers reserved by the Tenth Amendment.

Promoting Morality as a Pretextual Use of Commerce Power

Yet in Hammer v. Dagenhart (1918), a bare five-Justice majority of the Court embraced this very argument, which so often had been rebuffed in the context of traditional morals regulation, as the ground for invalidating a federal statute prohibiting interstate transportation of goods produced by child labor. In pertinent part, a 1916 Act of Congress made it unlawful for a “producer, manufacturer, or dealer [to] ship or deliver in interstate or foreign commerce . . . any article or commodity the product of any . . . manufacturing establishment,”
which had in the previous thirty days employed children under the age of fourteen, or employed beyond set hours children between the ages of fourteen and sixteen. Justice Day’s opinion for the Court argued that “[t]he act, in its effect, [did] not regulate transportation among the states, but aimed to standardize the ages at which children may be employed in mining and manufacturing within the states.” Were the Court to uphold the statute, “all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states,” thereby destroying “the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.”

The exact role the Tenth Amendment played in Day’s analysis was somewhat unclear. His opinion concluded that the challenged Act was “in a two-fold sense repugnant to the Constitution. It not only transcended the authority delegated to Congress over commerce but also exerted a power as to a purely local matter to which the federal authority does not extend.” To the extent Day asserted merely that the Tenth Amendment reiterated and reinforced the limitation of the federal government to its constitutionally enumerated powers, or even that the Amendment counseled in favor of constructions of those powers that would leave to the states substantial independent regulatory authority, his reliance on the Amendment was altogether appropriate. But to the extent Day discovered in the Tenth Amendment a judicial duty to identify affirmatively those spheres of authority belonging traditionally and exclusively to the states and to forbid them to the federal government, even if within the apparent ambit of one of Congress’s enumerated powers, the Justice committed the Court to a task beyond both the judiciary’s competence and the constitution’s textual mandate. The Court’s vulnerability in attempting such an ambitious agenda would be made only too plain in the coming years.

The more immediate difficulty for Justice Day, however, was to square the Court’s sudden solicitude for the states’ reserved powers with the long line of decisions commencing with The Lottery Case, which repeatedly upheld federal legislation that “in ... effect” accomplished police power-type objectives. Rather feebly, Justice Day attempted to set this contrary line of authority to one side on the ground that “[i]n each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results” whereas by the time the products of child labor were ready for interstate shipment, “the labor of their production [wa]s over” and any harm to laborers already complete. As Justice Holmes observed in his justly celebrated dissenting opinion for himself and Justices McKenna, Brandeis, and Clarke, “[i]t does not matter whether the supposed evil precedes or follows transportation. It is enough that in the opinion of Congress the transportation encourages the evil.” Indeed, the Court in an opinion by Chief Justice Taft would unanimously so hold in Brooks, finding it sufficient that a federal prohibition on interstate transport of stolen cars suppressed theft of automobiles in the states from which they were taken. As Professor David Currie wrote of the
Hammer decision: “[i]t is hard to believe that the majority found its own distinctions persuasive.”35

It was as though, after years of thoughtless neglect, the Court in 1918 finally awoke too late to the realization of its duty to safeguard the states’ reserved powers.36 Ultimately, it was Justice Holmes who, in his inimitable fashion, most eloquently summarized the conflict between Hammer and the Court’s prior decisions upholding federal prohibitions on the interstate transport of disfavored articles:

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our moral conceptions where, in my opinion, they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon the questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink, but not as against the product of ruined lives.37

Of course, to say that Hammer could not be reconciled with the Court’s prior rulings is not to say that Hammer was wrongly decided, for the error may have been made in some, if not all, of the cases to have gone before it. Regardless, the manifest tension between Hammer and its progeny, on the one hand, and the Court’s numerous decisions affirming broad assertions of congressional authority, on the other hand, persisted throughout the near decade of William Howard Taft’s tenure as Chief Justice.38 In 1930 Charles Evan Hughes succeeded as chief justice the man who had, then as president, first appointed Hughes to the Court twenty years before. At this changing of the guard, the reserved powers of the states rested on a frail foundation. Severe, sustained, worldwide economic depression would in the next decade shake that foundation past the point of collapse.

NEW DEAL FEDERALISM

Roosevelt’s First Term

If, as others have concluded, the ultimate clash between President Franklin Delano Roosevelt’s New Deal and the Supreme Court constituted a “Great Constitutional War,”39 then the first shot fired by the Court was its January 7, 1935, decision in Panama Refining Co. v. Ryan. The Court there struck down a provision of the National Industrial Recovery Act of 1933 (NIRA) on the ground that it delegated legislative authority to the president in violation of separation of powers principles. Because Panama Refining concerned the
proportion division of authority among the political branches of the federal government, that decision did not directly implicate the states’ reserved powers. Three months later, however, the Court struck down in its entirety another federal statute, this time concluding that Congress had exceeded its power under the Commerce Clause when in 1934 it had enacted the Railroad Retirement Act (Railroad Retirement Board v. Alton R. Co., 1935).

Justice Owen Roberts authored the majority opinion in *Alton*, in which he was joined only by those aging Justices who would soon be infamously labeled the “four horsemen.” This slim majority rejected the U.S. attorney general’s argument that the Act, which established a compulsory retirement and pension regime for all railroad workers, could be sustained as a measure to promote the safety and efficiency of interstate transport by rail. More specifically the government claimed that the Act encouraged retirement by workers 65 or older—a class allegedly overrepresented in an aging railway workforce protected from layoffs by seniority rules and disproportionately liable to accident-causing misstep or infirmity. Justice Roberts first answered that “it does not follow … that the man of that age is inefficient or incompetent” and that the wisdom of long experience could be counted on to more than offset any advantages supplied by youthful vigor. With the benefit of hindsight, one spies a peculiar presaging of the coming crisis. Within two years of the *Alton* decision, President Roosevelt would propose legislation authorizing one additional Supreme Court Justice for each member of the Court over the age of 70 who declined to retire. Roosevelt would nominally justify the proposal as a measure to counteract the inevitable decline in capacity suffered by “aged or infirm judges,” and, in the light of that intervening development, Roberts’s insistence in his *Alton* opinion on the irrelevance of age to competence appears at once both prescient and comically defensive. In any event, Congress’s commonsense assumption, which was supported by expert opinion, that on average advanced age equated with a declined capacity for railway labor was, as Chief Justice Hughes pointed out in his dissenting opinion, precisely the kind of reasonable resolution of a debatable question to which the Court had in prior rulings deferred.41

Justice Roberts proffered an alternative, equally unpersuasive, but ultimately even more revealing answer to the government’s aged-worker defense of the Act. He opined that, even if Congress could compel the retirement of senior railway laborers, Congress could not as a means to that end impose a pension program on the industry. If the ends of safety and efficiency in interstate rail transportation “demand[ed] the elimination of aged employees, their retirement from the service would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant.” To the government’s assertion “that it would be unthinkable to retire a man without pension and … that attempted separation of retirement and pensions [was] unreal in any practical sense,” Justice Roberts answered that “[t]he supposed impossibility [arose] from a failure to distinguish constitutional power from social desirability.”42 Given the Court’s
manifest hostility to the redistributive nature of the Act, it must have been tempting at the time to hint that the Court, rather than Congress or the attorney general, had failed in the effort to properly identify the line between the two distinct inquiries.43

Justice Roberts, however, insisted that the Court was engaged in a project larger and more fundamental than that of merely protecting the haves from the have nots. He rooted in the Tenth Amendment the Court’s attempt to distinguish between laws intended to improve rail safety, which he deemed within Congress’s power under the Commerce Clause, and laws aimed instead at improving “the social welfare of the worker,” which Congress lacked authority to enact. The second sentence of the majority opinion’s analysis of the case stressed that “[t]he federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people.”44 This close paraphrase of the Tenth Amendment highlights the Court’s underlying concern that the enumerated powers of Congress not be construed so broadly as to permit intrusion on the reserved powers of the states. Justice Roberts and his colleagues in the Alton majority acknowledged that the Constitution empowered Congress to enact laws immediately connected to safe or efficient operation of the railroads. (Indeed, given the Court’s prior precedents, this authority was by 1935 beyond contest.) But Justice Roberts steadfastly refused to take the next logical step and permit congressional regulation of the workers’ welfare, even where, as the government argued and the dissent concluded, the connection between this welfare and rail safety was palpable. Justice Roberts justified this refusal by a classic “parade of horribles,” which in his estimation established that to uphold the Act would mean that Congress could undertake innumerable regulatory functions traditionally committed to the reserved powers of the states. Were Congress permitted cognizance of workers’ welfare,

[the catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of congressional power.45

As the dissent pointed out, the Court’s treatment of the Commerce Clause and Tenth Amendment issues was unnecessary. An earlier portion of the majority opinion had held that certain provisions of the Act deprived affected railroad companies of their property in violation of the Fifth Amendment’s guarantee of “due process of law” and, furthermore, that the entire Act was therefore void because the provisions held to contravene due process were
“inseparable” from the remainder. The majority may have added its Commerce Clause analysis as an alternative holding to alert Congress to the futility of tinkering with the Act’s provisions in an effort to meet the Court’s due process objections. To be sure, the Roosevelt administration took note of the Alton decision, not out of any great solicitude for the Railroad Retirement Act, which the president had only reluctantly signed into law, but rather because lawyers in the administration feared that the ruling foretold the demise of many more beloved and centrally important New Deal statutes. It took a mere three weeks for the Court to prove their worst fears well founded.

May 27, 1935, came to be known as “Black Monday” among the New Dealers. On that date the Supreme Court issued three unanimous decisions holding unconstitutional different and important elements of the administration’s program for economic recovery. In the decision of greatest relevance here, A.L.A. Schechter Poultry Corp. v. United States, the Court effectively dismantled the rest of the NIRA, which had been a centerpiece of the 1933 New Deal legislative agenda, on the ground (among other things) that the Act exceeded the enumerated powers of Congress and impermissibly invaded the sphere of state authority guarded by the Tenth Amendment. In pertinent part, NIRA authorized the president to approve, and thereby render legally binding, industry-specific codes of fair competition. Pursuant to this delegated authority, Roosevelt had by executive order sanctioned a “Live Poultry Code” that comprehensively regulated New York City’s poultry industry. That code prescribed maximum hours and minimum wages for industry employees, protected their collective bargaining rights, and governed the very manner of sale by slaughterhouse owners to retailers. Schechter Poultry Corp., a Brooklyn firm engaged in the poultry slaughterhouse business, allegedly failed to comply with the code’s hours and wage regulations and its requirement that retail dealers not be permitted to select the most healthy-looking individual birds out of a particular coop or half coop. (This last allegation, when joined with a claim that the defendants had on one occasion sold an “unfit” bird, accounts for the conventional, albeit somewhat incongruous, designation of the decision as “The Sick Chicken Case”). The case thus presented the question whether Congress’s power to regulate commerce among the states extended so far as to permit it to control the activities of New York slaughterhouses, which purchased the vast majority of their birds from out-of-state sources but in turn resold them exclusively to New York retailers.

Delivering the opinion of the Court, Chief Justice Hughes set the tone and foreshadowed the ultimate conclusion by dismissing at the outset the government’s contention that “the grave national [economic] crisis with which Congress [had been] confronted” counseled in favor of NIRA’s constitutionality. Acknowledging that “[e]xtraordinary conditions may call for extraordinary remedies,” Hughes nonetheless lectured that “[e]xtraordinary conditions do not create or enlarge constitutional power.” This constraint flowed directly from the Tenth Amendment. “Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment,” which Hughes proceeded to quote in full.
The Amendment, having been solemnly invoked at the opinion’s outset, influenced the Court’s construction of Congress’s power to regulate interstate commerce, which the Court found to be insufficient to redeem the challenged poultry code. Because the “stream” of interstate commerce had reached its ultimate destination once the chickens arrived in New York State, the Court concluded that Schechter Poultry’s business transactions, both with its own employees and with its immediate suppliers and customers, were not “in” interstate commerce. Could Congress nevertheless regulate them on the ground that they affected interstate commerce in live chickens? That the hours worked by and the wages paid to Schechter Poultry’s employees affected interstate commerce in poultry Hughes did not deny. Rather, he stressed that to serve as a predicate for constitutional exercise of the commerce power such effects had to be “direct” not “indirect.” For Hughes, while “[t]he precise line” between direct and indirect effects could “be drawn only as individual cases [arose], the distinction [was] clear in principle.” The Tenth Amendment’s influence as a rule counseling narrow constructions of the enumerated powers was also reflected in Hughes’s assertion that this line between direct and indirect effects on interstate commerce was “a fundamental one, essential to the maintenance of our constitutional system.” Were the Court to disregard it, “there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government.” Likewise, the necessity of preserving for the states a meaningful sphere of authority pushed the Court to the conclusion that the admitted effects on interstate commerce of the wages paid to and hours worked by slaughterhouse employees were merely indirect, placing these matters beyond the reach of Congress. To find otherwise would be to conclude that “the federal authority under the commerce clause extend[ed] to the establishment of rules to govern wages and hours in interstate trade and industry generally throughout the country, thus overriding the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce.”

The Chief Justice wrote for a unanimous Court. Yet Justice Cardozo appended his thoughts in a concurrence, which was largely devoted to issues other than the scope of congressional power. On that question, Cardozo wrote that “little can be added to the opinion of the court.” With the benefit of hindsight, however, we can discern critical fault lines between Cardozo and his colleagues in the former’s observations that the distinction between direct and indirect effects was a “consideration . . . of degree,” the application of which “may at times be uncertain.” In just over a year, this hairline split would open into a chasm between two opposing ideological wings of the Court. Of course, a lot of things can happen in a year.

One of those things was Roosevelt’s public reaction to _Schechter Poultry_. After a workweek of ominous official silence, on Friday, May 31, Roosevelt summoned the White House press corp to receive the first public expression of the president’s disappointment and anger. After comparing the _Schechter_
Poultry decision to the Court’s ignominious ruling in Dred Scott v. Sanford (1857), Roosevelt framed the matter in the starkest of terms:

We are facing a very, very great national non-partisan issue.... We have got to decide ... whether in some way we are going to ... restore to the Federal Government the powers which exist in the national governments of every nation in the world.

Having attacked the Court for relegating the country to what he derisively characterized as a “horse and buggy” definition of interstate commerce,” Roosevelt indicated that the administration had not yet decided on a response but was continuing to study the problem.55

Although the administration’s reaction to Court’s May 1935 rulings was overtly hostile, in the short run, the Court held its ground. In United States v. Constantine (1935), one of the first rulings of the ensuing October 1935 term, the Court struck down a federal revenue statute that imposed an oppressive tax on alcohol retailers who violated applicable state law. In a dissenting opinion for himself and Justices Stone and Brandeis, Justice Cardozo argued that the tax’s severity could be justified on the theory that illegal businesses both earn higher profits and more easily evade taxation than their more reputable competitors. The majority, however, in an opinion by Justice Roberts, concluded that the tax was so high as to amount to a federal penalty for the violation of state law and that “[i]n this view the statute [was] a clear invasion of the police power, inherent in the states, reserved from the grant of powers to the federal government by the Constitution.” Justice Roberts lectured that the recognition of a congressional power to “impose cumulative penalties above and beyond those specified by state law for infractions of the state’s criminal code ... would obliterate the distinction between the delegated powers of the federal government and those reserved to the states and to their citizens” because “the concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority.”56

That same day a unanimous Court, this time in an opinion by Justice Cardozo, invalidated section 5(i) of the federal Home Owners’ Loan Act of 1933. The offensive section permitted state building and loan associations to convert to federal associations in contravention of the state laws under which the corporations had been chartered. Assuming for the sake of argument that Congress had the power to charter federal savings and loan associations, Justice Cardozo opined that such a power did not extend to transforming “creatures of the state” into “creatures of the Nation.” Perhaps presaging late-twentieth-century notions of the Tenth Amendment as an affirmative prohibition on congressional regulation of the states qua states,57 Justice Cardozo reasoned that the challenged statute invaded “the sovereignty or quasi sovereignty of” the states in violation of “the Tenth Amendment[, which] preserves a field of autonomy against federal encroachment.”58

While in hindsight these two rulings evidence the Hughes Court’s continuing commitment to vigorous judicial protection of the states’ reserved powers, on the day they were both decided, December 9, 1935, they were overshadowed
by oral arguments in United States v. Butler (1936). That far-more-high-
profile case concerned a challenge to the constitutionality of key provisions of
the Agricultural Adjustment Act of 1933 (AAA), another statute enacted in
the first one hundred days after Roosevelt’s inauguration and centrally impor-
tant to his administration’s legislative agenda. Less than a month later the
Court ruled in Butler, dealing Roosevelt another chastening blow. In a muddled,
and much maligned, majority opinion by Justice Roberts, the Court struck
down the challenged provisions as contravening the Tenth Amendment.

Butler attacked the constitutionality of the portions of the AAA that author-
ized the secretary of agriculture to tax processors of selected agricultural com-
modities to raise revenue. The Act, in turn, permitted the secretary to spend
the proceeds of those taxes as rental or benefit payments to those producers of
the same commodities who voluntarily agreed to reduce the quantities they
produced in any given market year. Justice Roberts began his analysis by
identifying the first and third sections of Article I, section 8, as the only con-
stitutional provisions even arguably conferring on Congress the authority to
enact the challenged sections of the AAA. Of the latter, which in pertinent
part conferred on Congress authority “[t]o regulate Commerce with foreign
Nations, and among the several States,” Justice Roberts made short work. He
concluded that the government had wisely declined to rely on this grant of
authority as the AAA “did not purport to regulate transactions in interstate or
foreign commerce” but rather attempted “the control of agricultural produc-
tion, a purely local activity.” That Justice Roberts could so succinctly dis-
pense with the Commerce Clause, in apparent accord with both President
Roosevelt’s Department of Justice and the three Justices who dissented on
other grounds in Butler, suggests that as late as January 1936 E. C. Knight’s
distinction between production, on the one hand, and “commerce” or trade,
on the other, was still firmly fixed in the legal mind.

Justice Roberts devoted the greater part of his opinion for the Court to
rejecting the claim that the challenged provisions were within Congress’s power
“[t]o lay and collect Taxes, ... to pay the Debts and provide for the common
Defence and general Welfare of the United States.” First, Justice Roberts
endorsed the government’s inevitable concession that the italicized language
qualified the taxing power and did not of its own force extend to Congress an
independent, all-encompassing authority to do whatever it deemed would best
advance the “general Welfare.” More debatable (though still plausible) was
Roberts’s rejection of the Madisonian interpretation of the power to tax and
spend as limited to the enforcement of other powers enumerated in Article I,
section 8. Via Roberts’s opinion for the Court in Butler, the Court finally took
sides in the founding-era dispute between James Madison and Alexander
Hamilton over the proper scope of the revenue authority. As paraphrased by
Justice Roberts, Hamilton had insisted that clause 1 of Article I, section 8,
“confer[red] a power separate and distinct from those later enumerated,” that
this power was “not restricted in meaning by the grant of them,” and that
“Congress consequently ha[d] a substantive power to tax and to appropriate
limited only by the requirement that it shall be exercised to provide for the
The choice between the Madisonian and Hamiltonian interpretations of the clause presented the Court with an opportunity to read the Tenth Amendment as supplying a general preference for narrow over broad interpretations of the federal government’s enumerated powers and then to invoke this principle as support for siding with Madison. For whatever reason, however, the Court declined that course, instead expressly adopting the broader Hamiltonian reading of the clause.

Having done so, Justice Roberts had gone a long way toward painting himself into a proverbial corner. For as Madison himself had forcefully argued in opposition to the Hamiltonian position, such an unconstrained construction of the authority to tax and spend made available to Congress powers of awesome breadth, which could be used to invade the reserved powers of the states. Of course, the intervening ratification of the Sixteenth Amendment had only exacerbated the danger that Congress would abuse its taxing and spending powers. By adopting the Hamiltonian interpretation of this authority, Roberts apparently accepted that the only limitation on its exercise was that it be employed for the “general” welfare, which is to say not merely for the local benefit of some section of the nation. And as Justice Stone stressed in his Butler dissent, Justice Roberts’s majority opinion assiduously avoided a declaration that the AAA sections at issue did not provide for the general welfare. Instead, Roberts struggled to reconcile the Hamiltonian view of the spending power with the Court’s conclusion that the challenged AAA provisions violated the Tenth Amendment. This he attempted by discovering, in the latter, an affirmative limitation on the manner in which Congress could exercise its broad authority to tax and spend.

Justice Roberts’s effort was amenable to at least two distinct interpretations. The first concludes that he, having in the first part of his opinion pushed the Madisonian interpretation of the General Welfare Clause out the front door, later in the opinion invited that same interpretation back in through the window, at least for the limited purpose of dispensing with the hated sections of the AAA. Much language in Justice Roberts’s opinion seemingly equating the Tenth Amendment with the Madisonian reading of the clause supports this first interpretation. For example, Roberts opined that the Tenth Amendment in effect established that “powers not granted [to the federal government] are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.” One page later Roberts, in an almost perfect paraphrase of the Madisonian position, declared that the power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

To the extent that these passages suggest, as Madison long before had maintained, that Congress could, consistent with the Constitution, use its
powers to tax and spend only as a tool for executing some other enumerated power (in other words, to the extent that these passages revived the Madisonian view Justice Roberts had previously interred), then Justice Roberts’s Butler opinion is, as Professor Currie succinctly observed, “nonsense.”65

But an alternative reading would at least save Roberts the embarrassment of having authored an internally self-contradictory judicial opinion (which, in any event, would no doubt be neither the first nor the last of its kind). On this second reading, Roberts distinguished between, on the one hand, congressional dictates as to how appropriated funds were to be employed and, on the other hand, congressional imposition of secondary or incidental conditions on the grant recipient’s independent conduct. Congress was free to require that appropriated funds be spent as Congress intended; but Congress could not leverage its conceded power over the purse to secure compliance with regulation of other primary conduct that Congress lacked constitutional authority to impose directly. The distinction was the same as that which differentiates, on the one hand, the power to preclude a grant recipient from spending any portion of grant funds on buying specific, disfavored books and, on the other hand, the power to prohibit anyone who accepts a grant from possessing or reading these books, however obtained. The former power, although broad, is at least limited to controlling the actual expenditure of awarded funds. The latter power uses the power to spend as a jumping-off point, from which virtually any regulatory objective may be achieved. In enacting the AAA, which paid farmers not to farm, Congress attempted via an appropriation to purchase primary conduct (the recipient’s agricultural abstinence) that it lacked power to compel directly. The Butler majority may have feared that, were the Court to sustain such a measure, the Constitution’s careful limitation of Congress to enumerated powers would be wholly undone.66 Accordingly, the Tenth Amendment, read literally as a mere reaffirmation of the enumerated powers scheme, compelled rejection of the boundless construction of the spending power on which the AAA was premised.

So understood, Justice Roberts’s opinion for the Court in Butler is neither illogical nor radical.67 To be sure, the Constitution does not expressly prohibit Congress from purchasing compliance with a regulatory scheme it lacks the power to enact. But the central place given the limitation of Congress to enumerated powers, both in the document and the history of its drafting and ratification, arguably counsels against this reading. Moreover, Justice Roberts’s more narrow construction of the spending power fit at least as well with the pertinent constitutional text and imposed no crippling limitation on core federal functions. By adopting the Hamiltonian construction, Roberts acknowledged a virtually unlimited power in Congress actually to direct how federal funds were to be spent. Accordingly, Congress could still spend federal funds to construct identified internal improvements, stimulate a flagging economy, and mitigate the hardships the depression had visited on the millions thereby impoverished, even assuming Congress lacked independent Article I, section 8, authority to accomplish these objectives. Of greatest significance for present
purposes, the Butler opinion, so understood, made appropriate use of the Tenth Amendment, reading the provision as confirmation of the unamended Constitution’s scheme of limiting the federal government to enumerated powers and thereby leaving all else to the states and the people. On this reading, the Butler opinion sensibly sought to effectuate this scheme by preferring a plausible but moderate construction of an enumerated power to, at best, an equally plausible interpretation that would have in effect ceded virtually unlimited authority to Congress.

Nevertheless, Justice Roberts’s opinion in Butler did not long survive as the law of the land. Both history and almost all commentators have been more kind to then-Justice Stone’s dissenting opinion. The explanation may lie in Roberts’s at best muddled and at worst unintelligible presentation. Although many passages in Roberts’s Butler opinion suggest the saving construction we attribute to it, while still other passages of the opinion seem to revive the Madisonian interpretation of the General Welfare Clause that Roberts purportedly laid to rest at the outset. Given the opinion’s many ambiguities, it should hardly be surprising that Justices Stone, Brandies, and Cardozo, who dissented, and most commentators both at the time and throughout the intervening decades, dismissed the ruling in Butler as illogical and result-oriented. Ultimately, the scope of this judicial tragedy became enormous, for such vulnerable opinions as the one authored by Roberts for the Court in Butler contributed in some admittedly immeasurable way to the subsequent interring of the Tenth Amendment.

In spite of its shortcomings, five other Justices joined Justice Roberts’s opinion invalidating the challenged sections of the AAA on the ground that they “invade[d] the reserved powers of the states.” Publicly, President Roosevelt declined to comment on the ruling. Privately, however, he “hardened [his] resolve at some point to meet the constitutional impasse [between the New Deal and the Supreme Court] head-on.” After the Butler decision, the spring of 1936 was rather uneventful until May 18, when a bare five-Justice majority invalidated yet another New Deal effort in Carter v. Carter Coal Co.

The Court’s decision in Carter confirmed widely held expectations by according the Bituminous Coal Conservation Act of 1935 the same ignoble fate meted out a year before to the NIRA in Schechter Poultry. The Coal Act authorized the creation of coal industry codes that would both fix prices and govern labor relations. Justice Sutherland, who delivered an opinion for himself and four other Justices, invoked the Tenth Amendment near the beginning of his argument in answer to what he perceived in section 1 of the Act to be a congressional assertion that the Act’s “constitutionality could be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution.” Sutherland made use of the occasion to reaffirm, as he acknowledged “perhaps at unnecessary length,” the vitality of the enumerated powers doctrine implicit in the unamended Constitution and made explicit by the Tenth Amendment. Accordingly, he concluded that the Act
could be sustained only if it were deemed an appropriate exercise of Congress’s Article I, section 8, power to regulate interstate commerce—a proposition that the Roosevelt administration had in the litigation conceded. Sutherland next marshaled an impressive line of judicial authority for a second uncontested proposition, that is, that coal mining, like agriculture and manufacturing, was not itself “commerce” within the meaning of the grant to Congress. Then at long last Sutherland arrived at the crux of the dispute, whether relations between covered employers and their miners had a “direct” effect on interstate commerce, in which case these relations were within the reach of Congress’s well-established authority to protect commerce from threatened injury or interruption. The distinction between direct and indirect effects on interstate commerce, Sutherland opined, was “not formal, but substantial in the highest degree,” a “fundamental” distinction, “essential to the maintenance of our constitutional system.” To be sure, the line between the two types of effect was “not always easy to determine.” To clarify matters, Sutherland elaborated on the difference, and in so doing may have broken new ground:

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximally—not mediatly, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. . . . [T]he matter of degree has no bearing upon the question here, since that question is not—What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?

Applying these criteria, it was to Sutherland and his colleagues in the majority clear that whatever effects labor strife in the coal industry imposed on interstate commerce, however great their magnitude, they were merely “secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.”

It bears emphasis that, with the conclusion that Congress lacked power over labor relations between coal miners and coal mine operators, Chief Justice Hughes wholeheartedly concurred. The Chief Justice wrote separately, however, solely because he rejected the majority’s additional conclusions that the price-fixing provisions could not be severed from the labor sections of the Act and, thus, that the former had to fall with the latter. Indeed, even Justice Cardozo’s dissenting opinion, in which Stone and Brandeis joined, was agnostic as to whether the Commerce Clause empowered Congress to regulate labor relations in coal mining. Like Hughes, Cardozo found the price-fixing provisions to be both severable and constitutional. Moreover, Cardozo would have dismissed as premature the complainants’ challenge to the
labor sections of the Act, and would thus have avoided ruling on their constitu-
ctionality. Nevertheless, Cardozo expressly disavowed Sutherland’s characteri-
zation of the distinction between direct and indirect effects. Because this ex-
change revealed a fissure among the Justices that another year would widen
into a rift, Cardozo’s rejoinder to Sutherland merits close study. Having noted
the power of Congress to reach noncommercial threats to interstate commerce,
Cardozo observed that

Mining and agriculture and manufacture are not interstate commerce considered by
themselves, yet their relation to that commerce may be such that for the protection
of the one there is need to regulate the other. Sometimes it is said that the relation must
be ‘direct’ to bring that power into play. In many circumstances such a description will
be sufficiently precise to meet the needs of the occasion. But a great principle of con-
stitutional law is not susceptible of comprehensive statement in an adjective. The
underlying thought is merely this, that the law is not indifferent to considerations of
degree. It cannot be indifferent to them without an expansion of the commerce clause
that would absorb or imperil the reserved powers of the states. At times, as in the case
cited, the waves of causation will have radiated so far that their undulatory motion, if
discernible at all, will be too faint or obscure, too broken by cross-currents, to be
heeded by the law. In such circumstances the holding is not directed at prices or wages
considered in the abstract, but at prices or wages in particular conditions. The relation
may be tenuous or the opposite according to the facts. Always the setting of the facts
is to be viewed if one would know the closeness of the tie. Perhaps, if one group of
adjectives is to be chosen in preference to another, ‘intimate’ and ‘remote’ will be
found to be as good as any. At all events, ‘direct’ and ‘indirect,’ even if accepted as
sufficient, must not be read too narrowly. A survey of the cases shows that the words
have been interpreted with suppleness of adaptation and flexibility of meaning. The
power is as broad as the need that evokes it.

*Carter* proved to be the last case in which the Hughes Court invalidated New
Deal legislation. Indeed, nearly sixty years would pass before the Supreme
Court would next invalidate an Act of Congress on the ground that it
exceeded congressional authority over interstate commerce.

**Roosevelt’s Second Term**

The Court’s rulings in *Butler* and *Carter* met mixed reviews, including at
times bitter criticism from Democratic congressmen. But between the May
1935 press conference held in reaction to *Schechter Poultry* and his November
1936 reelection, President Roosevelt assiduously avoided public comment on
the Supreme Court. Finally, on February 5, 1937, Roosevelt responded to the
Court’s invalidation of so much of his legislative agenda, when he unveiled his
infamous bill to “reform” the federal judiciary. He sought congressional au-
thorization to appoint as many as six additional Justices to the Court—one for
each sitting Justice over the age of seventy who refused to retire. The proposal
was immediately identified for what it truly was—a plan to pack the Court
with Justices more inclined to sustain New Deal legislation. “Almost over-
night,” the request sparked “a nationwide debate on the court plan and the
very fundamentals of U.S. government.” In the midst of this storm of contro-
versy, the Court decisively altered its course, producing within the first ten
weeks after the announcement of the plan a half dozen rulings sustaining broad
governmental power to regulate relations between employers and employees.

Most relevant here, on April 12, 1937, the Court issued five decisions
rejecting constitutional challenges to the National Labor Relations Act
(NLRA). In three of the five cases, the Court split five to four on the scope of
congressional power under the Commerce Clause. In the lead case, NLRB v.
Jones & Laughlin Steel Corp. (1937), Chief Justice Hughes—writing for him-
self and Justices Stone, Roberts, Cardozo, and Brandeis—in essence, although
without attribution, adopted for the Court the approach to Commerce Clause
issues that Justice Cardozo had set forth less than a year before in his Carter
dissent, which neither Hughes nor Roberts had joined. As noted above, that
approach treated the distinction between direct and indirect effects on inter-
state commerce as one of degree rather than kind, and hence accepted as a
relevant consideration the magnitude of the impact a regulated activity might
have on the free flow of commerce among the states. Accordingly, Chief
Hughes’s opinion in Jones & Laughlin Steel Corp. stressed the size and extent
of the respondent’s operations. Then the fourth-largest producer of steel in the
nation, Jones & Laughlin’s activities stretched over eight states, supplying
sales offices in more than twenty U.S. cities. Although its steel plants were
centered in Pennsylvania, roughly 75 percent of the firm’s product was
shipped out of the state. The Court, agreeing with the NLRB, likened Jones &
Laughlin’s Pennsylvania mills to the heart of a self-contained, highly integrated body. They draw in the raw materials
from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent [Steel Corporation] has elaborated.

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000
men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000
men manufacture steel, and 83,000 men transport its product.

In light of the enormity of the Jones & Laughlin corporation, and the adoption of
Justice Cardozo’s method of treating considerations as to the directness of effects
as matters of degree, Chief Justice Hughes succinctly and forcefully dismissed
the employer’s claim that labor relations at its Aliquippa, Pennsylvania, plant
bore at most an “indirect” relation to the sustenance of interstate commerce.

[S]toppage of [respondent’s] operations by industrial strife would have a most serious
effect upon interstate commerce. In view of respondent’s far-flung activities, it is idle
to say that the effect would be indirect or remote. It is obvious that it would be
immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.89

Intimating that Jones & Laughlin had all but invited congressional regulation by its own spatial and financial growth, Chief Justice Hughes asked, rhetorically,

[w]hen industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?90

Jones & Laughlin Steel Corp. upheld the NLRA so applied without overruling the Court’s recent decisions in Schechter Poultry or Carter or, indeed, any other case.91 To be sure, the Hughes opinion finally wrote into the law Justice Cardozo’s view that the distinction between direct and indirect effects on interstate commerce was a difference of degree rather than kind, a view the majority opinions in Schechter Poultry and Carter had rather pointedly declined to embrace. But at various points in his Jones & Laughlin opinion, Hughes stressed the Court’s continuing solicitude for the Tenth Amendment. For example, he acknowledged that, were the NLRA construed to reach all productive industry in the nation, “the act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment.” In language that the late-twentieth-century Court would harken back to for support of its effort to reinvigorate some limits on congressional authority under the Commerce Clause, Hughes cautioned that the Court’s rulings must leave intact “the distinction, which the commerce clause itself establishes, between commerce ‘among the several States’ and the internal concerns of a state.” As Hughes explained, “[t]hat distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.”92 By tying the Court’s holding to prior precedent and reemphasizing the centrality of the enumerated powers scheme, Hughes sought to downplay the extent to which the Court’s decision in Jones & Laughlin Steel Corp. constituted a break from prior practice and understandings.93

In his dissent for himself and the other three recalcitrant “horsemen,” however, McReynolds exposed this disconnect. As evidence of the incongruity between the Court’s holding and the clear import of its prior rulings, McReynolds pointed to the unanimous verdict of all the lower federal court judges who ruled on the matter that the NLRA could not, consistent with the Constitution, be applied to manufacturing firms, of whatever size. McReynolds resisted the adoption of Cardozo’s approach to delineate between direct and indirect effects on interstate commerce; McReynolds relied on Carter, among other cases, for the proposition that the proper inquiry was one that examined
the proximity of the cause to the effect rather than the sheer magnitude of the former. Then, arguing in the alternative, McReynolds contended that even if size of operations were deemed material to the Commerce Clause issue, the majority was nevertheless in error. He answered the majority’s recitation of facts reflecting the enormity of the Jones & Laughlin corporation with facts from the companion case brought by the NLRB against the Friedman-Harry Marks Clothing Company (1937). As he pointed out, Friedman-Harry Marks was but one of 3,300 similar firms nationwide and alone accounted for less than one-half of one percent of the men’s clothing made in the United States. In answer to Chief Justice’s dire predictions of the devastating effects that would flow from any sustained strike by Jones & Laughlin’s workers, McReynolds observed that were Friedman-Harry Marks closed permanently “the ultimate effect on commerce in clothing obviously would be negligible.” As commentators have subsequently observed, the Friedman-Harry Marks case was hard to distinguish from Schechter Poultry, where a mere two years before the Court had been unanimous in its conclusion that NIRA had exceeded the enumerated powers of Congress. The contrast between Schechter Poultry and the April 12, 1937, NLRA decisions revealed that a significant jurisprudential shift had occurred and that the latter rulings left “very little beyond the reach of [Congress’s] commerce power.” Of course this last revelation likewise meant that little was left of the reserved powers that the Tenth Amendment purported to protect.

What the NLRA decisions did for congressional power under the Commerce Clause, two May 24, 1937, rulings did for congressional power to tax and spend. Both cases rejected Tenth Amendment challenges to different provisions of the 1935 Social Security Act and, in so doing, effectively gutted the Court’s ruling in Butler the prior term. Most controversial and most telling was the decision in Steward Machine Co. v. Davis (1937), in which the Court by a five-to-four vote upheld the unemployment compensation provisions of the Act. Those provisions imposed a tax on companies employing more than eight workers, allowing, however, a credit of up to 90 percent of this tax for employer contributions to qualifying state law unemployment compensation funds. In short, the Act imposed a significant federal tax burden on most of the nation’s employers and simultaneously excused compliance with nearly all of this obligation insofar as state legislatures enacted, and employers paid into, qualifying unemployment compensation programs. The effect of the Act was dramatic. The year before Congress passed the Social Security Act, only Wisconsin had adopted a state unemployment compensation program; by the time the Court ruled in May 1937, forty-two states had been spurred on to follow Wisconsin’s example. Writing for the Court, Justice Cardozo attributed this flurry of state legislative activity to the Act’s salutary leveling of “obstructions to the freedom of the states”:

[If states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.]
Of course Justice Cardozo’s invocation of a danger that the states might engage in a “race to the bottom” turned on its head one of the principle theoretical justifications for federalism—namely, that competition among jurisdictions for residents would promote both efficiency in government and individual freedom of choice. Rather than a laudatory virtue of a federal system, for Cardozo this potential for jurisdictional competition constituted a reason for, in effect, imposing a national solution.

This same rationale apparently underpinned Justice Cardozo’s attempt to distinguish the instant case from the line of authority culminating in *Butler*. Justice Cardozo observed that the tax struck down in *The Child Labor Tax Case* (1922) had sought to influence the conduct of private parties. Indeed, the same could be said of the taxing and spending scheme invalidated in *Butler* itself. The challenged provisions of the Social Security Act, however, induced state legislatures to action where before reticence had dominated. Whereas *Butler* arguably stood for the proposition that Congress could not as an incident to receipt of federal funds purchase compliance with a regulation of private conduct it lacked power to enact directly, *Steward Machine Co.* seemed to teach that Congress could condition a state’s residents’ eligibility for a tax credit on that state’s legislature enacting laws of a certain character. Oddly, that Congress had in enacting the Social Security Act brought economic pressure to bear directly on state governments was treated as redemptive. It would, perhaps, be a mistake to take this distinction too seriously, for Justice Cardozo also pointedly observed that the *Butler* “decision was by a divided court, a minority taking the view that the objections were untenable.” Although stopping short of expressly overruling *Butler*, Justice Cardozo’s opinion for the Court in *Steward Machine Co.* nevertheless signaled that a different majority had coalesced in the intervening months and that these Justices saw for the Court a much narrower role in protecting the reserved powers from congressional invasion.

As important as the Court’s April and May 1937 rulings was Justice Van Devanter’s contemporaneous announcement of his retirement plans. On May 18, Van Devanter wrote to President Roosevelt to alert him that he would step down from the Court at the end of the 1936–37 term. Roosevelt filled the vacancy with an early, vocal critic of the Supreme Court’s conservativism and a dedicated supporter of his court-packing plan, Senator Hugo Black of Alabama. In the wake of the July 1937 Senate rejection of Roosevelt’s Supreme Court bill, additional judicial retirements mooted that legislative setback. By February 1941, all of the “four horsemen” had left the Court, and a majority of the Justices were Roosevelt appointees.

**Roosevelt’s Third Term**

If the spring 1937 rulings interred the Tenth Amendment, the Court’s February 1941 decision in *United States v. Darby* supplied the eulogy. Issued two days after the retirement of Justice McReynolds (the last of the
“horsemen” to retire), Justice Stone’s opinion for a unanimous Court sustained the Fair Labor Standards Act of 1938 (FLSA), expressly overruling Hammer v. Dagenhart along the way. The FLSA excluded from interstate commerce goods manufactured by workers who worked more than specified maximum hours or were paid less than a specified minimum wage. Declining to inquire into congressional motive, the Court, in an opinion by (soon-to-be Chief) Justice Stone, started and ended its analysis with the observation that a prohibition on shipment of particular goods in interstate commerce was literally, and therefore constitutionally, a regulation of interstate commerce: “[w]hile manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.” The only problem with this formalistic approach was that it had been authoritatively rejected by the Court a little over two decades before in Hammer. By this the Court was not long detained. After lavishing praise on the Holmes’s dissent in Hammer, and noting that “Hammer v. Dagenhart has not been followed,” Justice Stone found “inescapable” the “conclusion … that Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted.” Accordingly, the much-maligned decision was at last expressly “overruled,” in part because of the patent inconsistency of early twentieth-century judicial efforts to enforce the Tenth Amendment.

Stone, however, could not halt there. In addition to the prohibition on interstate shipment, the FLSA also mandated compliance with the wage and hours regulations by all workers engaged in the production of goods “for” interstate commerce—defined as goods manufactured with the expectation that “all or some part” of them would in due course be shipped to out-of-state customers. This direct regulation of manufacturing could not itself be deemed regulation of interstate commerce according to the formalistic theory dominating the first half of Stone’s opinion. Accordingly, Stone resorted to a more flexible, pragmatic approach that recognized congressional authority over all intrastate activities “which have a substantial effect on [interstate] commerce,” subject only to the requirement that the regulatory means chosen by Congress be “reasonably adapted to the attainment of the permitted end.” Other commentators have noted the tension between the two halves of Stone’s opinion for the Court. By abiding this tension, Justice Stone’s Darby opinion implied that the Court would sustain congressional legislation under the Commerce Clause so long as the challenged statute could on any plausible theory be deemed an appropriate means for regulating commerce among the states. Darby thus inaugurated a period of near prostrate judicial deference to Congress’s views about the scope of its power under the Commerce Clause.

Even more significant for present purposes was Justice Stone’s rejection of Darby’s Tenth Amendment argument. Near the end of his opinion for the
Court, Stone announced that “[o]ur conclusion is unaffected by the Tenth Amendment,” because that provision

states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by [this Court’s] decisions under the Sherman Act and the National Labor Relations Act. . . .

At one level it is hard to quarrel with the quoted passage as every statement therein is literally true. Yet in the context in which it appeared, the significance of the passage reached far beyond its literal import to imply that the Tenth Amendment was not merely a truism but also a tautology—a self-referential proposition true only because essentially devoid of content. On this tautological reading, the assertion that everything not given was retained tells the reader nothing about what was retained, or indeed whether anything of significance was retained. According to this interpretation of the Tenth Amendment, it would provide no constitutional protection to the reserved powers of the states or the people—the animating purpose behind the adoption of the provision. So read, the Amendment, which undeniably reflected the centrality of the enumerated powers scheme to the Constitution’s ratification, would not even support a principle of constitutional construction preferring those interpretations of Congress’s enumerated powers that would best preserve for the states a robust role in governance. In short, the true import of the quoted passage was to render the Tenth Amendment a dead letter—a historical irrelevancy.

That the quoted passage meant all this and nothing less is demonstrated by its textual and historical contexts. Textually, Justice Stone’s swan song for the Tenth Amendment came in the wake of the Darby opinion’s affirmation of a broad understanding of congressional power under the Commerce Clause and the commitment of the Court to a course of deference to congressional conclusions concerning the scope of that power. The treatment of Darby’s Tenth Amendment argument came almost as an afterthought, literally a passing acknowledgment that the Court’s analysis of Article I was “unaffected” by the existence of the Amendment. So placed, the discussion signaled that future invocation of the Tenth Amendment would have no impact on the judicial process of fleshing out Article I, section 8’s bare bones. Historically, the passage marked the ascendancy of the New Deal Court, which abandoned efforts
to keep the federal government within its proper sphere and substituted instead an alternative constitutional agenda presciently set out in footnote four of the Court’s opinion in United States v. Carolene Products Co. (1938). It is far from a coincidence that both Carolene Products and Darby were decided after the spring 1937 watershed and that Justice Stone authored both opinions for the Court.

But the most powerful evidence of Darby’s significance is provided by the clarity of hindsight. In the thirty-five years that passed between Darby and National League of Cities v. Usery (1976), on only one occasion did the Court invoke the Tenth Amendment to invalidate federal government action, and even then the ruling provoked a constitutional amendment overturning the decision. As this history demonstrates, Darby signaled the Court’s abandonment of a four-decades-long effort to protect the states’ reserved powers from congressional intrusion.

That effort had suffered from a lack of both judicial craftsmanship and consistency. As to the former, the Justices’ failure to reconcile their efforts with the text of the Tenth Amendment left their rulings without a firm constitutional foundation. The Tenth Amendment defined the reserved powers as those “not delegated to the United States by the Constitution, nor prohibited by it to the States”—and thus directed inquiry back to the enumeration of federal authority found in the Constitution’s first three Articles. Neither the Tenth Amendment nor any other provision in the Constitution attempted to enumerate the reserved powers. Yet time and again throughout the first thirty years of the twentieth century, the Court undertook to do just that by converting a question concerning the scope of congressional power under Article I, section 8, to an inquiry into what matters had been left exclusively to the states. This approach no doubt seemed appropriate if not inevitable given the then-prevailing understanding of federalism as “dual sovereignty”—meaning that the federal and state governments operated in separate and distinct spheres in which each government exercised dominion altogether unchecked by the other. On this understanding of federalism, judicial identification of the reserved powers was merely the mirror image of judicial delineation of the enumerated powers of Congress.

By so recasting the issue, however, the Court forsook the legitimacy uniquely afforded by rooting judicial rulings firmly in the text of Constitution. By instead relying on such extra-textual sources of authority as perceived traditions in the division of regulatory responsibility between the federal and state governments, the Court all but invited the criticism that its federalism decisions were in substance ad hoc and reactionary judicial policymaking, beyond the judiciary’s competence and legitimacy. This vulnerability was exacerbated by the Court’s failure to apply a circumscribed view of congressional authority with the necessary consistency. During this period, the Court often sustained federal morals legislation that constituted as serious an invasion of the states’ reserved powers as the progressive, social welfare legislation it invalidated as inconsistent with the Tenth Amendment. This inconsistency further undermined
the Court’s legitimacy by prompting the charge that the Court’s Tenth Amend-
ment decisions were driven by the laissez faire policy preferences of conserva-
tive Justices rather than by any principled, policy-neutral commitment to a
limited role for the federal government. As political pressure for social welfare
legislation increased, so did the frequency and force of such criticism, until the
Court itself abandoned the effort to protect the powers reserved by the Tenth
Amendment from congressional overreaching.

NOTES

1. See Jay S. Bybee, “The Tenth Amendment Among the Shadows: On Reading the
(criticizing one of the Court’s Tenth Amendment opinions as not grounded in the “black
and white” of the text of the Constitution but rather rooted in “an importation into our Con-
stitutional Law of outside theorizing,” some of which was the authoring Justice’s “own im-
mediate fabrication”).
3. The Court’s contemporaneous and aggressive assertions of its own prerogatives—both
to articulate a general common law and to invalidate state legislation deemed incompatible
with the Fourteenth Amendment—likewise challenged the genuineness of the Justices’ solici-
tude for the states’ reserved powers. A comprehensive examination of either of these issues is
beyond the scope of this volume. But it merits notice that recently Professor Post, using the
Taft Court as his focus, has not only identified these same tensions but also offered an expla-
nation as to why they remained submerged until the late 1930s. He argues that during much
of this period the Justices were relatively blind to these inconsistencies because, with a few
prominent exceptions (such as Justices Holmes and Brandeis), they understood the U.S.
Supreme Court to be a common law court, “empowered ... to discern the core American
values that transcended structural divisions between national and local spheres of power.”
Professor Post continues:

From this perspective, the enforcement of common law rights was prerequisite for individual lib-
erty, as well as for the very practice of local self-government. That is why the Court seems never
to have conceived itself as an arm of a national sovereignty that was distinct from and potentially
competitive with the states. Instead the Court imagined itself as the fountainhead of the very
rights that gave vibrancy and meaning to the life of free men and thereby to the institutions of
local self-government.

Robert Post, “Federalism in the Taft Court Era: Can It Be ‘Revived?’” 51 Duke L.J. 1513,
1592–93 (2002). Professor Post persuasively contends further that “this perspective” domi-
nated not only the Court’s announcement of federal common law, in those cases brought
within federal judicial jurisdiction because of the parties’ diversity of state citizenship, but
also the Court’s “substantive due process” decisions, which recognized certain economic
rights as fundamental and therefore immutable individual liberties sheltered from state intru-
sion by the Fourteenth Amendment. See also Nathan N. Frost, Rachel Beth-Klein-Levine, &
Thomas B. McAffee, “Courts Over Constitutions Revisited: Unwritten Constitutionalism in
the States,” 2004 Utah L. Rev. 333, 371–92. Because these facially distinct doctrinal cate-
gories were linked at this most basic level, they stood or fell together. This insight in part
explains why the Court renounced its century-old assertion of the authority to declare a gen-
eral common law in 1938, see Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)—that year also
being the eye of the constitutional storm then working significant changes in the Court’s role as a protector of both the individual’s liberty of contract and the states’ reserved powers. This last transformation, the one most clearly implicating the Tenth Amendment, is the focus of the latter part of this chapter.

4. Whether greater judicial skill, clarity of analysis, and integrity would have altered the final outcome is impossible to say. It may well be, as others have argued, that the forces driving the centralization of power in twentieth-century American government were so strong as to be irresistible and to make inevitable the Court’s abandonment of efforts to preserve the states’ reserved powers. The record left by the Justices in the form of their published opinions does, however, suggest that they could have done a better job in their efforts to sustain the promise of the Tenth Amendment than they did.

5. During the nineteenth century, the Court had on rare occasion been obliged to remind Congress that its enumerated powers were not without limits. See, e.g., United States v. DeWitt, 76 U.S. 41 (1869) (holding federal statute prohibiting the preparation for sale or sale of certain illuminating oils to be unconstitutional as beyond Congress’s power over interstate commerce).


7. Compare James W. Ely, Jr., The Fuller Court: Justices, Rulings, and Legacy 130 (2003) (“to modern eyes there is an air of unreality about E.C. Knight”).

8. United States v. E. C. Knight Co., 156 U.S. 1, 11–17 (1895). For an excellent essay expertly grounding the E. C. Knight Co. decision in its historical context, see Charles W. McCurdy, “The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869–1903,” 53 Bus. Hist. Rev. 304 (1979). Professor McCurdy defends the E.C. Knight majority against charges leveled by, among others, the distinguished Professor Corwin. See, e.g., Edward S. Corwin, “The Antitrust Act and the Constitution,” 18 Va. L. Rev. 355 (1932). Corwin and other critics accused the E.C. Knight majority of covertly advancing a laissez faire ideology by sheltering the rapidly growing industrial “trusts” from any effective regulation by federal or state authorities. As McCurdy demonstrates, however, in 1895 the Justices had good reason to believe that the states would be capable of disciplining the trusts, where necessary, via the state governments’ plenary power over the law of both domestic corporate organization and foreign corporations’ in-state operations. See McCurdy, 53 Bus. Hist. Rev. at 308–09 & 330–36.

9. See David N. Mayer, “Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment,” 25 Cap. U. L. Rev. 339, 372 (1996) (“Although Fuller’s opinion did not explicitly mention the Tenth Amendment, it is obvious that he sought to delineate federal power to regulate interstate commerce, by drawing these distinctions, in order to preserve a meaningful sphere of action for state police powers.”).

10. E. C. Knight Co., 156 U.S. at 12–13. As Professor Mayer has noted, the distinction between manufacturing and commerce was, contrary to the views of some critics of the E.C. Knight decision, not the Court’s creation. Rather, the distinction can at the very least be traced back to the Congress that enacted the Sherman Act. See Mayer, supra note 9, at 371. Scholars are divided as to whether the distinction can be traced back to the founding era. Compare Grant S. Nelson & Robert J. Pushaw, Jr., “Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues,” 85 Iowa L. Rev. 1, 13–55 (1999) (late-eighteenth-century understanding of the word commerce included both trade and manufacturing), with Randy E. Barnett, “The Original Meaning of the Commerce Clause,” 68 U. Chi. L. Rev. 101, 129–30 (2001) (distinction in Knight between commerce and manufacturing in keeping with late-eighteenth-century understanding of the terms and their usage by the founders in the Philadelphia and state ratifying conventions), with Grant S. Nelson & Robert J. Pushaw, Jr., “A Critique of the Narrow Interpretation of the Commerce Clause,” 96 Nw. U. L. Rev. 695, 707 (2002) (replying to Professor Barnett).
11. *Id.* at 33 (Harlan, J., dissenting) (emphasis added) (citing *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)).

12. *E. C. Knight Co.*, 156 U.S. at 19 (Harlan, J., dissenting). See also *id.* at 21 (Harlan, J., dissenting) (asserting that Congress’s power over commerce “embrace[s] ‘every species of commercial intercourse’ between the United States and foreign nations and among the states, and therefore it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States.”) (emphasis added) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824)).


14. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240 (1899). To be sure, as David Currie has observed, “the acquisition of competing sugar refineries in *E. C. Knight* eliminated competition for [interstate] sales more effectively than the agreement in *Addyston Pipe,*” because an agreement not to compete can always be dishonored whereas the American Sugar Refinery Co. was never going to compete with itself. David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986*, at 23 (1990). This oddity is perhaps best explained as the by-product of the Fuller Court’s determination to draw a line cabining congressional authority, even if the line was an arbitrary one. “The truth is that there was no logically convincing place to draw [such a line]. What logical extension of the necessary-and-proper argument offends the spirit of enumerated powers is a question of degree, and thus any line the Court drew would very likely have appeared arbitrary.” *Id.* at 24.


16. See *Northern Securities*, 193 U.S. at 410 (Holmes, J., dissenting) (suggesting that the Court’s disposition of the case “very nearly, if not quite, contradict[ed] the decision in [E.C. Knight]*); *id.* at 380 (White, J., dissenting) (relying on E.C. Knight).

17. Compare Nelson & Pushaw, *supra* note 10, at 78 (“The Justices’ laissez faire economic philosophy led them to strike down progressive regulations in areas like production and employment, yet their moral puritanism resulted in sustaining legislation that prohibited illicit sex, lotteries, and other vices.”) (footnotes omitted).

Presumption of Liberty 306–12 (2004) (discussing whether the power “to regulate” within the meaning of the Commerce Clause should be construed to include the power to prohibit).

19. Champion, 188 U.S. at 347, 357.

20. The tax was relatively transparent protectionism shielding the buttery industry from competition, justified by undocumented claims that artificially colored oleomargarine somehow endangered public health, or at the least engendered consumer confusion. For an insightful and deliciously ironic history of “the first battle in the margarine war,” which culminated in the passage of 1886 Act ultimately challenged in McCray, see Geoffrey Miller, “Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine,” 77 Cal. L. Rev. 83 (1989).


22. Id. at 322.

23. Id.

24. Id. at 323.

25. In James Clark Distilling Co., 242 U.S. 311 (1917), the Court rejected a constitutional challenge to the Webb-Kenyon Act, which prohibited shipment of intoxicating liquors into a state only if the shipment violated state law. A few weeks after the decision in James Clark Distilling Co., Congress enacted the Reed Amendment, which further extended the federal prohibition on interstate transport of alcohol. See United States v. Hill, 248 U.S. 420 (1919) (upholding federal criminal prosecution of one who carried a single quart of liquor from Kentucky into West Virginia for personal use, even though West Virginia law permitted the conduct); Id. at 428 (McReynolds, J., dissenting) (“[T]he Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the state’s internal affairs”).

26. Chief Justice White’s dissent should haunt all who may have at times grown weary of the federal government’s present-day, never-ending, uncompromising, and all-consuming “war on drugs.” White, joined by three other Justices, concluded that the Harrison Anti-Narcotic Act, though in form a revenue measure, was in truth a comprehensive narcotics regulation and therefore “beyond the constitutional power of Congress” as “a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the states.” Doremus, 249 U.S. at 95. Six years later the Court in Linder v. United States, 268 U.S. 5 (1925), attempted to cabin the congressional authority acknowledged by the Doremus majority. In Linder, a unanimous Court via an opinion penned by Justice McReynolds reversed the criminal conviction of a physician whose sole offense was to provide a known addict with a relatively small quantity of narcotics for “the purpose of [temporarily] relieving conditions incident to the addiction.” Observing that “[o]bviously, direct control of medical practice is beyond the power of the federal government,” Justice McReynolds insisted that Congress could not have intended the Act upheld in Doremus to be applied in the circumstances before the Court. A year later in United States v. Daugherty, 269 U.S. 360 (1926), the opinion for the Court, also penned by McReynolds, went out of its way to signal the Court’s willingness to reconsider the holding of Doremus. Nonetheless, McReynolds’s treatment of prior narcotics cases in Linder underscored the narrowness of the Linder holding and foreshadowed the Court’s ultimate acquiescence in Congress’s exercise of its revenue authority to effect a national criminal prohibition on nonmedical distribution of narcotics. See, e.g., Alston v. United States, 274 U.S. 289 (1927) (Justice McReynolds, writing for a unanimous Court, affirning criminal conviction of one who purchased morphine and cocaine from packages lacking the revenue stamps required by the Harrison Anti-Narcotic Act); Nigro v. United States, 276 U.S. 332 (1928) (holding, over the dissents of Justice McReynolds and Sutherland, that Congress’s power to tax permitted it,
in effect, to criminalize the sale of narcotics to any persons other than registered narcotics dealers, who were strictly regulated by the Harrison Act, or to persons holding prescriptions issued by a physician); Compare Lambert v. Yellowley, 272 U.S. 581 (1926) (Sutherland, J., dissenting, for himself and Justices McReynolds, Butler, and Stone) (arguing that the Eighteenth Amendment’s prohibition of intoxicating liquors “for beverage purposes” did not empower Congress to establish the maximum amount of liquor a physician could lawfully prescribe, and that the latter regulation constituted an impermissible intrusion into the reserved power of the states to control the practice of medicine within their borders).


28. Id. at 156. Less than a month later Justice McReynolds, writing for himself and Justices Day and Van Devanter, tried in vain to limit the damage Hamilton had done to the states’ reserved powers. Dissenting from the Court’s decision upholding as a war measure prohibition of near beer so weak as to be nonintoxicating, Justice McReynolds argued that the connection between watered-down beer and U.S. military necessities circa autumn 1919 was so attenuated as to expose Congress’s assertion of its war powers as a mere pretext for an invasion of the police power of the states. See Ruppert v. Caffey, 251 U.S. 264, 310 (1920) (McReynolds, J., dissenting). Having gone along with the Court in Hamilton, however, Justice McReynolds and his fellow dissenters seemed to be unduly concerned about closing the barn door after the horse had escaped.


31. Id. at 271–74.

32. Id. at 276.

33. See, e.g., Currie, supra note 14, at 97 (“By this peculiar reference to ‘twofold’ unconstitutionality, Day may only have meant to make the obvious point that a statute Congress was not authorized to pass offended the tenth amendment as well. If he meant that a measure lying within Congress’s delegated authority might nevertheless be invalid because the matter was ‘purely local,’ however, the statement was quite insupportable. As able Justices had said before and would say again, the tenth amendment takes nothing from the federal government that other provisions have given; it reserves to the states only those powers not granted to the United States.”) (italics in original; footnotes omitted).

34. Brooks, 267 U.S. at 438–39. See also Currie, supra note 14, at 176 (observing that Chief Justice Taft’s opinion for the Court in Brooks “made no effort to show that stolen cars were harmful to anyone in the state to which they were transported [and thus] left Hammer dangling without visible support and exposed the Court to a serious charge of inconsistency”). Professor Currie attempted to reconcile Hammer with Brooks on the ground that the federal statute affirmed in Brooks reinforced rather than supplanted state policy (apparently on the reasonable assumption that all states criminalized car theft whereas at least some permitted the child labor effectively proscribed by the statute struck down in Hammer). Id. Although this argument might square the two rulings considered in isolation, it ignores that by the time Brooks was decided the Court had, over Justice McReynolds’s passionate dissent, already upheld a federal criminal prosecution under a statute forbidding transport of even a small amount of liquor for personal consumption into a state that by law permitted the same. See United States v. Hill, 248 U.S. 420 (1919) (upholding federal criminal prosecution of one who carried a single quart of liquor from Kentucky into West Virginia for personal use, even though West Virginia law permitted the conduct); Id. at 428 (McReynolds, J., dissenting) (“[T]he Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddled with the state’s internal affairs”). Thus, the Court did not in fact make conformity with state law a
predicate to the exercise of the federal police power acknowledged in \textit{Brooks} (and repudiated in \textit{Hammer}).

35. Currie, \textit{supra} note 14, at 98. The distinguished Professor Corwin was even more hostile to \textit{Hammer}. See, e.g., Corwin, \textit{supra} note 2, at 254–55. For an assessment far more charitable to the \textit{Hammer} majority, see Epstein, \textit{supra} note 15, at 1427.

36. To be sure, there were other, isolated instances during this period of the Court tenaciously resisting broad (or indeed even fairly moderate) assertions of congressional authority. For example, in Newberry \textit{v. United States}, 256 U.S. 232 (1921), three Justices, including somewhat surprisingly Justice Holmes, joined Justice McReynolds plurality opinion concluding that Article I, section 4’s grant to Congress of the power to “make or alter [state] regulations” concerning the “times, places, and manner of holding elections for Senators and Representatives” did not reach so far as to permit application of a federal anticorruption statute to primaries at which U.S. Senate candidates were chosen. But rulings such as Hammer and Newberry were rare exceptions to a rule of judicial passivity as Congress more and more frequently employed its enumerated powers, construed broadly, to accomplish police power objectives. See Currie, \textit{supra} note 14, at 101 (observing that, during this period, “the Justices were not prepared to do much to ensure the preservation of areas in which the central government could not exercise authority. Rather they were content to surprise the country every now and then, as in \textit{Hammer v. Dagenhart}, with a bolt out of the blue.”) (footnotes omitted) (citing Newberry \textit{v. United States} as well).

37. \textit{Hammer}, 247 U.S. at 280 (Holmes, J., dissenting). Curiously, when the Court struck down the federal child labor tax as an impermissible end run around \textit{Hammer}, Justices Holmes and Brandeis silently joined the majority opinion. Bailey \textit{v. Drexel Furniture Co. (The Child Labor Tax Case)}, 259 U.S. 20 (1922). Whether their acquiescence reflected their perception that Congress’s power to tax was more liable to abuse, and thus more appropriately subjected to probing judicial scrutiny, as some have wondered, see Currie, \textit{supra} note 14, at 174, or whether they simply threw in the proverbial towel remains, for the present authors at least, a mystery.

38. Compare, e.g., \textit{The Child Labor Tax Case}, 259 U.S. 20 (1922) with, e.g., Brooks \textit{v. United States}, 267 U.S. 432 (1925). For an exhaustive and illuminating account of the Taft Court’s federalism jurisprudence, in all its manifestations, see Post, \textit{supra} note 3, at 1569 (“The question is why the Taft Court so forcefully sought to maintain this distinction [between commerce and manufacturing] in the context of child labor regulation, when it was unraveling analogous distinctions in the context of railroad rates, stockyards, and boards of trade.”).


41. Railroad Retirement Bd. \textit{v. Alton R.R.}, 295 U.S. 330, 379 (1935) (Hughes, C.J., dissenting). The majority stressed accident data showing that the railroads had become safer as the average age of the workforce increased, but this argument confused correlation with causation: “the increase in safety attributable to technological advances did not disprove the self-evident risks created by elderly workers.” Currie, \textit{supra} note 14, at 226 n.107.

42. \textit{Alton}, 295 U.S. at 367.

43. Compare Thomas Reed Powell, \textit{Vagaries and Varieties in Constitutional Interpretation} 42 (1956) (sardonically suggesting \textit{Alton} established that “[i]t is a regulation of interstate commerce to help railroads but not to help railroad employees.”).

44. \textit{Alton}, 295 U.S. at 346.

45. \textit{Id.} at 368.
46. Id. at 375. The Alton decision has been characterized as a significant retrenchment: “The level of scrutiny it reflected ... was at opposite poles from the test of necessity and propriety of federal legislation that Marshall had laid down in the national bank case ... one would have to go back to the 1908 decision forbidding Congress to protect the union rights of interstate rail workers to find another case in which the commerce clause was so grudgingly construed as in the case of the Alton Road.” Currie, supra note 14, at 226 (footnotes and citations omitted).


48. Id. at 89.

49. The other two “Black Monday” decisions were Louisville Bank v. Radford, 295 U.S. 555 (1935), and Humphrey’s Executor v. United States, 295 U.S. 602 (1935), neither of which directly addressed the division of authority between the central and the state governments.

50. An alternative basis for the Schechter Court’s holding was that the NIRA constituted an unconstitutional delegation of legislative authority to the executive branch.


52. For an analysis more favorably inclined toward the proposition that emergencies justify the relaxation of constitutional constraints on the scope, concentration, and centralization of government power, see Eric A. Posner & Adrian Vermeule, “Accommodating Emergencies,” 56 Stan. L. Rev. 605 (2003).


54. Id. at 551, 554 (Cardozo, J., concurring). The central purpose of Justice Cardozo’s concurring opinion was to reconcile his conclusion on the nondelegation issue in the Schechter Poultry case (namely, that in authorizing the president to adopt codes like that regulating the live poultry industry in New York, Congress had impermissibly delegated legislative authority to the executive branch) with his dissent in Panama Refining.

55. McKenna, supra note 39, at 112–13 (quoting 4 The Public Papers and Addresses of Franklin D. Roosevelt: 1935, at 205, 215–16 (Samuel I. Rosenman ed., 1938)). See also Leuchtenburg, supra note 47, at 90. Professors McKenna and Leuchtenburg both emphasize that President Roosevelt’s commentary on the Court’s May 1935 decisions was not well received, even by many of his political allies.

56. United States v. Constantine, 296 U.S. 287, 295–96 (1935). The Constantine majority’s willingness to look behind the revenue-raising form of the challenged act to discern a “prohibitory intent” contrasted sharply with the Court’s earlier deference to Congress’s use of taxing power to effectuate regulatory ends. See, e.g., supra notes 20 & 26 and accompanying text; but see Bailey, 259 U.S. 20.

57. See Chapter 6, infra note 15 and accompanying text.

58. Hopkins Fed. Sav. & Loan Ass’n v. Cleary, 296 U.S. 315, 337 (1935). Indeed, in a concluding passage limiting the scope of the Court’s holding, Justice Cardozo suggested that the Court had not ruled on the scope of the federal government’s enumerated powers: “No question is here as to the scope of the war power or of the power of eminent domain or of the power to regulate transactions affecting interstate or foreign commerce.” Id. at 343. By apparently recognizing the possibility that a measure might be within the compass of one of Congress’s enumerated powers but nevertheless violate the Tenth Amendment as an impermissible invasion of state sovereignty, Justice Cardozo’s opinion in Hopkins Federal Savings & Loan Ass’n prefigures late-twentieth-century judicial efforts to revive the Tenth Amendment without narrowing prior, all-encompassing judicial constructions of Congress’s enumerated powers. See supra note 57. A few weeks later, however, the Hughes Court demonstrated that its solicitude for state sovereignty was not without limits. In United States v. California,
297 U.S. 175 (1936), the Court unanimously rejected California’s challenge to congressional regulation of the state’s operation of a terminal railroad carrying interstate freight, although the Court found the state’s operation of the line to be an exercise of the power incontestably “reserved to the states.” Id. at 183. The Court described Congress’s authority to regulate interstate commerce as “plenary,” declaring that a state could no more resist the exercise of that authority than could an individual. Id. at 185. The Court likewise rejected the state’s claim that compelling it to answer the enforcement action brought by the United States in federal district court impermissibly “subjected a sovereign state to . . . inconvenience and loss of dignity.” Indeed, the Hughes Court reached these conclusions after expressly conceding for argument’s sake that California acted in its “sovereign” rather than its “private” capacity when operating the railroad. Id. at 184.


60. As Justice Story had argued, were the clause read to grant an independent authority to do whatever Congress deemed best, then this power would render superfluous the ensuing clauses of Article I, section 8, which granted more specific powers to Congress. See Butler, 297 U.S. 1, 64 (1936) (relying on 1 Joseph Story, Commentaries on the Constitution of the United States § 907 (5th ed., 1891)).

61. See Butler, 297 U.S. at 65–66. Here as well Justice Roberts relied on Justice Story’s endorsement of the Hamiltonian position. See id. at 66. For a compelling argument that the Court should have sided with Madison over Hamilton on this issue, see Currie, supra note 14, at 230–31.


63. See Felix Morley, Freedom and Federalism 102 (2d ed., 1981) (“The Sixteenth Amendment has not only given the central government access to virtually unlimited funds, with all the power, prestige and extravagance resulting therefrom. It has also served to make the financing of State and local government more onerous, and therefore to encourage the acceptance of ‘federal’ aid for all sorts of services which in both theory and practice were formerly regarded as the clear and full responsibility of local government.”). The Seventeenth Amendment, which provided for the direct election of U.S. Senators, likewise worked a fundamental change in the very structure of American federalism that resulted in unforeseeable consequences. See Jay S. Bybee, “Ulysses at the Mast: Democracy, Federalism, and the Siren’s Song of the Seventeenth Amendment,” 91 Nw. U. L. Rev. 500, 505 (1997) (attempting an assessment of the Seventeenth Amendment’s consequences); see also id. at 506 n.34 (listing other scholarly treatments of the Seventeenth Amendment’s significance).


65. Currie, supra note 14, at 229.

66. “If, in lieu of compulsory regulation of subjects within the states’ reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of section 8 of article I would become the instrument for total subversion of the governmental powers reserved to the individual states.” Butler, 297 U.S. at 75; see also id. at 78 (describing as the “sole premise” of the government’s argument the proposition “that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to
the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”).

67. Justice O’Connor’s dissenting opinion in South Dakota v. Dole, 483 U.S. 203 (1987), seems to advance an interpretation of Butler similar to the second, we think more plausible, one that we set forth in the text. See id. at 216 (O’Connor, J., dissenting) (reading Butler as distinguishing between constitutionally sound specifications as to “how the [federal] money should be spent” and constitutionally problematic “regulatory” conditions predicking a state’s eligibility for federal funds on the state’s acquiescence in a national rule that Congress could not have imposed directly; arguing that Butler properly required that conditions on spending be nonregulatory).

68. For example, Roberts observed that Article I did not authorize Congress to regulate agricultural production, and then deduced from this premise the conclusion that “legislation by Congress for that purpose is forbidden.” Butler, 297 U.S. at 68. Of course, treating the subject of agricultural production as wholly beyond the reach of the taxing and spending powers misses the point. Under our second (and preferred) reading of Butler, Congress could give money to farmers and require that they use the same to buy seed for soybeans but not for corn, compare, id. at 85 (Stone, J., dissenting), as in such a case Congress would merely be directing how the granted funds could be spent. On our second reading of Butler, the AAA was unconstitutional not because it had the effect of regulating agricultural production, but because it conditioned receipt of funds not merely on an agreement about to how they would be spent but rather on an agreement to abide by regulation of independent conduct otherwise clearly beyond the reach of Congress.

69. “The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.” Butler, 297 U.S. at 69. We find it difficult, if not impossible, to square the quoted passage with the opinion’s prior rejection of the Madisonian construction of the General Welfare Clause.

70. For example, the second sentence of Justice Stone’s dissenting opinion implied that the majority’s conclusion was the product of some combination of fuzzy thinking and doubts about the likely efficacy of the AAA. Justice Stone observed that “[t]he present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the act.” Butler, 297 U.S. at 78 (Stone, J., dissenting). Indeed, the quoted sentence may well have so seriously stung that it provoked Justice Roberts’s often ridiculed paean to policy-neutral or policy-blind judicial review. See Butler, 297 U.S. at 62–63 (“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”). Many have attacked these perhaps ill-chosen words as naively reducing judicial review to an almost mechanistic function. For a more balanced and forgiving treatment of this passage of Roberts’s opinion, see Currie, supra note 14, at 227; see also McKenna, supra note 39, at 137–40 (discussing contemporaneous reaction to both the Butler majority and dissenting opinions and noting that Stone’s “was one of the strongest dissents registered since the Holmes era”).

71. Compare Currie, supra note 14, at 231 (“Justice Roberts . . . may well have reached the right result in striking down the Agricultural Adjustment Act, but by conceding too much [by endorsing the Hamiltonian view] he made it seem quite untenable; and that boded poorly for the future of the federal system.”).
72. *Butler*, 297 U.S. at 68. Justice Brandeis voted to sustain the AAA even though he had early and often expressed his hostility to the Act in private communications with the administration and its allies in the legal profession. Accordingly, historian Marian McKenna found it “hard to accept the notion that [Brandeis] voted his conscience in the *Butler* case.” See McKenna, supra note 39, at 133.

73. McKenna, supra note 39, at 139, 142.


75. While most emphatically reaffirming “that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers,” Sutherland’s opinion for the *Carter* Court qualified this assertion by noting that “[t]he question in respect of the inherent power of that government as to the external affairs of the Nation and in the field of international law is a wholly different matter which it is not necessary now to consider.” Six months later in United States *v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), the Court, again in an opinion by Justice Sutherland, in effect stated that the enumerated powers doctrine, and therefore the Tenth Amendment, had no application in the field of foreign affairs. *Id* at 316. This view built upon a similar suggestion in the opinion of Justice Holmes for the Court in Missouri *v. Holland*, 252 U.S. 416 (1920), which upheld a federal statute implementing a treaty governing migratory birds in spite of an assumption that the subject would have been beyond the enumerated powers of Congress in the absence of the treaty. In *Holland*, Holmes pontificated that, in answering “the … question … whether [the implementing statute was] forbidden by some invisible radiation from the general terms of the Tenth Amendment,” the Court was obliged to “consider what this country has become in deciding what that amendment has reserved.” *Id.* at 433–34. Anticipating Sutherland’s assertion in *Curtiss-Wright*, Holmes hinted that the enumerated powers doctrine might not limit the federal treaty power. On the tension between these two foreign affairs opinions and the principle reaffirmed by the Tenth Amendment that the federal government was one of enumerated, and therefore limited, powers, see G. Edward White, *The Constitution and the New Deal* 53–60, 70–85 (2000). See also Curtis A. Bradley, “The Treaty Power and American Federalism,” 97 *Mich. L. Rev.* 390 (1998) (challenging the “nationalist view” of the treaty power that excepts it from the constraints of federalism); David M. Golove, “Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power,” 98 *Mich. L. Rev.* 1075 (2000) (defending nationalist view of the treaty power in response to Bradley’s critique); Curtis A. Bradley, “Correspondence: The Treaty Power and American Federalism, Part II,” 99 *Mich. L. Rev.* 98 (2000).

76. *Carter*, 298 U.S. at 317 (Hughes, C.J., concurring in the judgment in part, and dissenting in part).

77. *Id.* at 307 (majority opinion) (internal quotation marks and citations omitted).

78. *Id.* at 307–08 (italics added). Because for Sutherland the line between direct and indirect effects on interstate commerce turned on the nature of the relationship between cause and effect, and not at all on the magnitude of the latter, he anticipated but expressly rejected the aggregation principle that the Court would adopt five years later in *Wickard v. Filburn*, 317 U.S. 111 (1942), discussed *infra* note 109.

79. *Carter*, 298 U.S. at 309. Some have suggested that Sutherland went further than prior precedent when he insisted that the magnitude of a regulated subject’s impact on interstate commerce was constitutionally irrelevant. See, e.g., Currie, supra note 14, at 224 (asserting that “there was no compelling reason for Sutherland’s conclusion that the magnitude of the effect had to be ignored”).

80. After acknowledging that “Congress … has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it,” Chief Justice Hughes continued: “But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly.” *Carter*, 298 U.S. at 317 (Hughes, C.J., concurring in the judgment in part and dissenting in part). Indeed, Hughes
underscored the point by observing that were the Court to hold otherwise it would in effect amend the Constitution. “If the people desire to give Congress the power to regulate industries within the state, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.”\textsuperscript{81} \textit{Id.} at 318.

\textsuperscript{81} \textit{Carter}, 298 U.S. at 312–16.

\textsuperscript{82} \textit{Carter}, 298 U.S. at 324–41 (Cardozo, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{83} \textit{Id.} at 327–28 (internal quotation marks and citations omitted).

\textsuperscript{84} “Each adverse decision produced new outbursts of hostility [from various affected New Deal constituencies], but only stony silence came from the White House. Shortly after Roosevelt denounced \textit{Schechter} for putting the country back in the horse-and-buggy age, Oswald Garrison Villard, editor of \textit{The Nation}, offered to bet anyone that the president would not again refer to the Supreme Court or the issues involved until after the election. Villard got no takers, but he would have won that bet.” McKenna, \textit{supra} note 39, at 181.

\textsuperscript{85} McKenna, \textit{supra} note 39, at xi.

\textsuperscript{86} The first indication that the Court might be more tolerant of regulatory legislation was provided by the March 29, 1937, decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), which rejected a constitutional attack on a state wage and hours statute. While Justice Roberts’s decisive vote in \textit{Parrish} has been labeled the “switch in time that saved nine” by dissipating support for Roosevelt’s court-packing plan, the NLRA cases decided two weeks later were of far greater significance. See generally Bruce Ackerman, \textit{We the People: Transformations} 364 n.34 (1998) (“If any single case was crucial, it was \textit{Jones & Laughlin}, not \textit{Parrish}. If Justice Roberts had joined the four conservatives in striking down the [NLRA], the Justices would have deprived the New Deal of its only creative solution to the proliferating sit-down strikes that were precipitating all-out class war in America’s industrial heartland.”). For a view that the NLRA cases were anything but revolutionary, see Barry Cushman, \textit{Rethinking the New Deal Court: The Structure of a Constitutional Revolution} 175 (1998).

\textsuperscript{87} In one of the other two cases, the Court unanimously sustained the application of the NLRA to an operator of motor buses running between Virginia and the District of Columbia on the ground that the firm was itself “an instrumentality of interstate commerce.” Washington, Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 146 (1937). That the “four horsemen,” dissenters in four of the five Wagner Act cases decided that same day, joined the majority in \textit{Washington, Va. & Md. Coach Corp} reveals their tacit agreement with the Chief Justice’s conclusions in his \textit{Jones & Laughlin} opinion that the NLRA was not facially invalid, that it could consistent with the Constitution apply to at least some employers, and that the constitutional question—whether the Act as applied was within Congress’s constitutional authority—would arise and be determined on a case-by-case basis. “Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred by the Board, is left by the statute to be determined as individual cases arise.” NLRB v. \textit{Jones & Laughlin Steel Corp.}, 301 U.S. at 32. In \textit{Associated Press v. NLRB}, 301 U.S. 103 (1937), the four dissenters assumed arguendo that application of the Act to the named news organization was within the ambit of the Commerce Clause, dissenting nevertheless on the independent ground that, so applied, the Act violated the First Amendment. \textit{Id.} at 136–41 (Sutherland, J., dissenting). One guesses that the dissenters’ eloquent appeals to the Court’s duty to protect the freedom of speech—such as “the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time”—would have had far more rhetorical force had these same Justices not a few years before dissented from Chief Justice Hughes’s...
landmark free speech opinion in Near v. Minnesota, 283 U.S. 697 (1931). In the other three NLRA cases decided on April 12, 1937, these four dissenters resisted applications of the Act on the ground that, so applied, it exceeded the enumerated powers the Constitution granted to Congress. See Jones & Laughlin Steel Corp., 301 U.S. at 76 (McReynolds, dissenting); NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 (1937) (incorporating by reference Justice McReynolds’s dissenting opinion in Jones & Laughlin Steel Corp.); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937) (same).

88. Jones & Laughlin Steel Corp., 301 U.S. at 27.
89. Id. at 41.
90. Id. The Court likewise rejected the corporation’s Fifth and Seventh Amendment challenges to the NLRA. See id. at 46–49.
91. Hughes did, however, read both the E.C. Knight and Carter decisions quite narrowly. To illustrate, the latter was creatively recast as a ruling significant not so much for its treatment of congressional power under the Commerce Clause but rather for its conclusions that the challenged statute violated the nondelegation doctrine and the Due Process Clause of the Fifth Amendment. Id. at 41.
93. Professor Cushman contends that the NLRA decisions did not, in fact, significantly break with prior understandings concerning congressional power under the Commerce Clause. See, e.g., Cushman, supra note 86, at 175. Professor Cushman’s exhaustive research and insightful analysis demonstrate the close relationship in the early twentieth-century legal mind between, on the one hand, the public/private distinction and, on the other hand, much if not all of that period’s constitutional jurisprudence. Still it overstates the case to say that the NLRA decisions were in accord with the Hughes Court’s prior Commerce Clause rulings. Both the reasoning of the opinions and the divisions among the Justices suggest that Carter marked the end of one era and Jones & Laughlin Steel Corp. the beginning of another. In any event, Professor Cushman agrees that the New Deal ultimately worked a fundamental change in American federalism. The primary difference between his view and ours is that he maintains that Wickard v. Filburn, 317 U.S. 111 (1942), discussed infra note 109, rather than the NLRA decisions five years earlier, affected the crucial transformation. See Cushman, supra note 86, at 175 & 212–25; see also Barry Cushman, “Formalism and Realism in Commerce Clause Jurisprudence,” 67 U. Chi. L. Rev. 1089, 1137–49 (2000) (discussing Wickard).
95. Currie, supra note 14, at 237. But see Cushman, supra note 86, at 156–76 (contesting the claim that the NLRA decisions marked any significant jurisprudential shift).
96. These provisions excluded from taxation some whole industries (such as agriculture and private domestic service) as well as smaller classes of employers. Steward Machine Co., 301 U.S. at 574.
99. Because 90 percent of the cost of a qualifying unemployment compensation scheme would be imposed on a state’s employers via federal taxation even if the state declined to enact such a scheme, a state’s refusal to enact a qualifying statute would in effect deny its unemployed (or more accurately those unemployed or in fear of becoming unemployed) a huge federal subsidy. Not surprisingly, in 1935–36, few states were willing to turn aside significant federal economic assistance.

101. This new majority consisted of the three *Butler* dissenters joined by Justice Roberts and Chief Justice Hughes. It bears emphasis that Justices Sutherland and Van Devanter declined to join the dissent penned by Justice McReynolds for himself and Justice Butler. Instead Justice Sutherland, writing for himself and Justice Van Devanter, explained their disagreement with the majority on the narrow ground that the Tenth Amendment forbade the provisions of the Social Security Act that required participating states to deposit their respective unemployment compensation funds with the U.S. Treasury, which would hold them in trust and release them only for stipulated purposes. In his words, “[b]y these various provisions of the act, the federal agencies are authorized to supervise and hamper the administrative powers of the state to a degree which not only does not comport with the dignity of a quasi sovereign state—a matter with which we are not judicially concerned—but which deny to it that supremacy and freedom from external interference in respect of its affairs which the Constitution contemplates—a matter of very definite judicial concern.” *Steward Machine Co.*, 301 U.S. at 613–14 (Sutherland, J., dissenting). Sutherland’s dissent made plain, however, that he and Justice Van Devanter had no quarrel with the Social Security Act’s “inducement” of states to enact qualifying unemployment compensation schemes. *Id.* at 609–10. This position was at the very least in some tension with these two Justices’ votes in *Butler*, indicating that perhaps Hughes and Roberts were not the only ones phased by intervening events. Only Justices McReynolds and Butler firmly held the line. Also perhaps telling is that McReynolds’s dissent did not so much attempt to resurrect the distinction, arguably at work in *Butler*, between congressional conditions on how funds could be spent and regulations of other conduct imposed as requirements for eligibility for federal funds, but rather seemed to attempt the resurrection of the Madisonian interpretation of Article I, section 8, clause 1. Cardozo was on solid ground when, in his opinion for the Court in *Helvering v. Davis*, 301 U.S. 619, 640 (1937), he responded to a similar attempt by noting that Roberts’s opinion in *Butler* had explicitly sided with Hamilton over Madison.


105. *Id.* at 116–17.

106. *Id.* at 119–121.

107. See, e.g., Geoffrey R. Stone et al., *Constitutional Law* 206 (5th ed., 2005) (“Darby is divided into two parts. Are the analyses the same in both?”).

108. Moreover, on one reading of Stone’s opinion, Congress’s direct regulation of production could be sustained as a tool for enforcing the ban on interstate shipment, even if the regulated production did not substantially affect interstate commerce. As Professor Gunther has observed, this argument lacked any stopping point. Congress could regulate any local activity, “without any showing of the impact of the local activity on commerce—simply by having the regulatory scheme include a ban on interstate shipments, and then justifying the regulation as a means to effectuate that ‘commerce-prohibiting’ sanction.” Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 195–196 (13th ed., 1997). Both in the Court’s decision in *Darby*, and in its decision a year later, in *Wickard v. Filburn*, the expansion of federal authority was grounded in the text of the Necessary and Proper Clause. See Martin, H. Redish, *The Constitution and Political Structure* 52–53 (1994). According to Professor Engdahl, “since the 1950s, courts and commentators have frequently misconceived Congress’s broadened commerce power as a function of the Commerce Clause rather than as a result of the Necessary and Proper Clause.” David E. Engdahl, *Constitutional Federalism* 31 (2d ed., 1987); see also Stephen Gardbaum, “Rethinking Constitutional Federalism,” 74 *Tex. L. Rev.* 795, 807 (1996). A related argument is that these cases illustrate the
Court’s abandonment of any sort of enforceable requirement that Congress act only when it is truly in pursuit of authorized “purposes”; the only means for giving effect to this sort of “purpose” requirement would be the use of the “pretext analysis” suggested in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). See Gil Seinfeld, “The Possibility of Pretext Analysis in Commerce Clause Adjudication,” 78 Notre Dame L. Rev. 1251 (2003).

109. The full import of Darby was made clear a little over a year later in Wickard v. Filburn. There, the Court unanimously rejected farmer Filburn’s claim that Congress lacked the power to tell him (actually to authorize the U.S. secretary of agriculture to tell him) how much winter wheat he could grow on his small family farm. An opinion penned by Justice Jackson, who had served as Roosevelt’s solicitor general and then attorney general before joining the Court, explained that Congress’s authority to regulate interstate commerce extended so far as to permit the imposition of a 222-bushel ceiling on Filburn’s wheat production, even if that wheat never left the Filburn farm. This conclusion followed even though his wheat production considered in isolation was neither in itself interstate commerce nor an activity having a substantial effect on such commerce. It sufficed that the entire nation’s homegrown wheat production, when considered in the aggregate, could be said to substantially affect commerce among the states (Wickard v. Filburn, 1942). After Filburn, it was hard to imagine a congressional regulation of any remotely economic activity that would not pass constitutional muster. As Professor Currie has observed: “But that was only to write the epitaph; constitutional federalism had died in 1937.” Currie, supra note 14, at 238. See generally Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics (1941) (Jackson’s engaging narrative of the clash between the New Deal and the Hughes Court, first published during his last year of service as Roosevelt’s attorney general).

110. United States v. Darby, 312 U.S. at 123–24 (citations omitted).

111. Reacting to the same oft-quoted passage from Darby, Professor Van Alstyne expressed sentiments similar to those set forth in the text, far more eloquently than the current authors could hope to:

[The tenth amendment provides an express federalism marker which ought not be lightly dismissed as merely tautological of the doctrine of enumerated powers. The doctrine of enumerated powers, standing alone, is ideologically indifferent to federalism interests; the tenth amendment is not. To put the matter somewhat differently, applying the doctrine of enumerated powers with no tenth amendment sense leads one away from the understanding that federalism is not an exercise simply to see how wide one hand (Congress) can be made to swing (through the “interpretation” of its enumerated powers); there is supposed to be another “hand” out there that claps against this hand and not just empty space to be filled up by nationalism. The tenth amendment is a significant counter referent against which the fairness of interpreting enumerated powers may be measured. Its dismissal as a “truism” by Justice Stone in United States v. Darby, 312 U.S. 100, 124 (1941) was more hubris than insight, a reflection of judicial values in the age of the national state.

Van Alstyne, supra note 98, at 773 n.15.


113. U.S. Const. amend. XXVI.
Reserved Powers in the Second Half of the Twentieth Century

OVERVIEW

By the end of World War II, the Supreme Court had made it reasonably clear that henceforth it would play little or no role in enforcing the Constitution’s enumerated powers scheme. Rather, Congress would be the final arbiter of questions concerning the scope of its own authority. To be sure, the Court never so held in just so many words. But the Court had embraced such broad interpretations of Congress’s powers to tax, spend, and regulate interstate commerce that it became a challenge even to imagine a federal statute that the Court would invalidate as beyond the powers granted the central government. Any doubts that may have survived the War were gradually put to rest as, during the near four decades separating 1936 from 1975, the Court upheld every statute challenged on the ground that it exceeded the power of Congress “[t]o regulate Commerce . . . among the several States.”

Of course, this judicially unchecked expansion of congressional authority effected a corresponding diminution in the powers reserved by the Tenth Amendment—so much so that, by mid-century, Justices as well as commentators were moved to wonder publicly whether the provision retained any legal significance. Not all were comfortable with the Court’s abdication of its role as a champion of federalism and the reserved powers, a role that past Justices had hailed as among the Court’s most important. Still, none of the sitting Justices were willing to revisit the New Deal era’s constitutional controversies. During this same period, the Court aggressively asserted its prerogative to review state and federal legislation to ensure conformity with the Court’s concomitantly expanding interpretations of select Bill of Rights provisions. Eventually, the contrast between the Court’s rising voice on behalf of some parts of the Bill of Rights and its thunderous silence on behalf of the Tenth Amendment became impossible for several Justices to ignore. Some of these same Justices had previously spearheaded (while the others had at least acquiesced in) the Court’s renunciation of its pre–New Deal efforts to cabin congressional power. In so doing these Justices, with the aid of their Brethren,
had drained the Tenth Amendment of its original meaning—that the central government’s powers were limited and enumerated. Unwilling or unable to revive the Amendment’s original content, but discomfited by the presence of a patently empty constitutional provision, these Justices sought for some substitute to fill the void. They found it, at least temporarily, in a doctrine restraining federal regulation of the “States Qua States.”

That doctrine, initially aired in the dissenting opinions of Justices Douglas and Rehnquist, first garnered the support of a Supreme Court majority in National League of Cities v. Usery (1976). The doctrine launched in National League of Cities attempted to restrain Congress not by narrowing the prevailing, extremely broad constructions of any of its Article I, section 8 powers, but instead by presumptively exempting state and local governments from the exercise of those powers. Congressional power continued to extend to virtually anything a private person might do, but Congress’s power to regulate identical conduct by state or local governments, even by subjecting them to the same generally applicable rules governing similarly situated private persons, would henceforth be circumscribed. The proponents of this States Qua States doctrine listed as chief among its virtues the restoration of the Tenth Amendment to its place of proper honor. But this doctrine promised only that state government entities would enjoy an immunity from some federal regulation, not that the federal government would respect the powers the Tenth Amendment had reserved to the states or the people. Quite to the contrary, National League of Cities, and even more clearly its progeny, forthrightly conceded that, at least insofar as the Court was concerned, Congress could under the Commerce Clause regulate virtually any private conduct and that when it chose to do so the Supremacy Clause of Article VI empowered Congress to supplant any inconsistent state constitutional provisions or laws. Thus, the States Qua States doctrine, while touted as a resurrection of the Tenth Amendment, in fact did nothing to protect the reserved powers against congressional usurpation.

We canvass below the development of this doctrine, focusing on the Justices’ treatment of and reliance on the Tenth Amendment in this context, where it has received the bulk of the attention the Court has accorded it in recent decades. In brief, just nine years after National League of Cities was decided, it was expressly overruled in a decision purporting to inter the States Qua States doctrine. Nonetheless, a few years later the doctrine made something of a comeback, albeit in the narrower, more focused form of a constitutional prohibition on federal commandeering of state government officials. This history, however, must not be allowed to obscure the passing of the enumerated powers doctrine and, with it, the reserved powers to which the Tenth Amendment refers. All sides of these debates assumed that the Court either could not, or at least should not, restore a regime in which the powers of the federal government were “few and defined,” and those reserved to the states and the people were accordingly “numerous and indefinite.” All the Justices participating in these cases acquiesced in judicial abandonment of the reserved
powers to the vicissitudes of the national political process. Precisely for this reason, this entire line of cases—which excited passionate and sometimes acrimonious dissension among the Justices and precipitated a glut of commentary by academics—in the end, was “much ado about almost nothing.”

At the very end of the century, the Court decided three cases that perhaps portend the resurrection of at least some modest judicial role in confining Congress to its enumerated powers. These three rulings supply a footing for a restrained hope that the twenty-first century will witness a limited revival of the reserved powers. Even such a qualified prognosis, however, is as yet premature. First and most important, the case law is simply too recent, indeterminate, and fragile to justify confident conclusions about likely future developments. In addition, the Court’s intervening decision in Gonzales v. Raich (2005) may once again signal judicial retreat from any effort to confine Congress to its enumerated powers.

**Regulation of the States Qua States**

In 1938 Congress enacted the Fair Labor Standards Act (FLSA), and ever since the fate of the Tenth Amendment has been inextricably bound up with this statute and the several amendments made to it over the years. As originally enacted, the FLSA established minimum wages and maximum hours for employees producing “goods, which, at the time of production, the employer ... intends or expects to move in interstate commerce.” In United States v. Darby (1941), a unanimous Supreme Court held that the FLSA was a legitimate exercise of Congress’s power over interstate commerce. Justice Stone’s opinion for the Court in *Darby* expressly recorded that the Justices’ “conclusion [wa]s unaffected by the Tenth Amendment,” because that provision was deemed by them to “state ... but a truism that all is retained which has not been surrendered.” In sustaining the Act, the Court eviscerated the Amendment, and thus the Court thereby inaugurated a more than sixty-year era during which the constitutional health of the FLSA would vary inversely with the consequence the Court accorded the Tenth Amendment.

The next collision between the FLSA and the Tenth Amendment arose out of congressional revisions of the Act in 1961 and 1966. The former amendment expanded the FLSA’s scope from just those workers producing goods for interstate commerce to all workers “employed in an enterprise engaged in [interstate] commerce or in the production of goods for [interstate] commerce.” The effect of these amendments “was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of employers subject to the Act.” The 1966 Amendments further enlarged the FLSA’s coverage by eliminating the 1938 Act’s “exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools.” In Maryland v. Wirtz (1968), the Supreme Court sustained both sets of amendments against the states’ various constitutional challenges. The Court, in an opinion by (the
second) Justice Harlan, unanimously held that Congress’s power under the Commerce Clause extended to all employees of any private “enterprise” engaged in interstate commerce. Justice Harlan’s opinion for the Court also rejected as “simply . . . not tenable” the states’ claim that the FLSA could “not be constitutionally applied to state-operated institutions because the power [of Congress] must yield to state sovereignty in the performance of governmental functions.” Harlan lectured Maryland and its sister states that valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.11

In rejecting Maryland’s invocation of “state sovereignty,” however, the Court was not unanimous. Justice Douglas, who as an ardent New Dealer must have struck at least some of the other survivors of that era’s constitutional revolution as an unlikely champion of federalism, authored a dissenting opinion on this point, in which Justice Stewart joined. Presaging the reasoning of subsequent Supreme Court majorities, Douglas argued that the 1966 Amendments authorized “such an invasion of state sovereignty protected by the Tenth Amendment” that the amendments in his view were “not consistent with our constitutional federalism.” The extension of the FLSA wage and hours standards to the states violated the Tenth Amendment because these standards “disrupt[ed]” and “overwhelm[ed] state fiscal policy.” The FLSA “force[d]” states “either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas.” Douglas called for a state immunity from at least some forms of regulation under the Commerce Clause analogous to state immunity from at least some forms of federal taxation.12 Otherwise, “the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment.”13

Three years later, in 1971, Justice Rehnquist replaced Justice Harlan. Although the two men shared much of the same conservative ideology,14 their different interpretations of the Tenth Amendment proved fatal, at least temporarily, to the holding of Wirtz. In National League of Cities the Court—in an opinion authored by Rehnquist for a conspicuously fragile, five-Justice majority—expressly overruled Wirtz a mere eight years after it was decided. In the subsequent of the two cases, plaintiffs the National League of Cities, joined by the National Governors’ Conference and various states and municipalities, challenged the 1974 amendments to the FLSA, which “extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions.” Both in discussing the nature of this constitutional challenge and in ruling on the question, Justice Rehnquist meticulously distinguished between issues concerning the breadth of the power Article I granted to Congress, which were not raised in the case, and “affirmative” constitutional limits on the manner
in which Congress might exercise its power, which were. The plaintiffs’ complaint, Rehnquist noted “was not that the conditions of employment of [the covered] public employees were beyond the scope of the commerce power had those employees been employed in the private sector,” but rather that the FLSA, as amended in 1974, “‘infringed a constitutional prohibition running in favor of the States As States.’” That prohibition arose out of “the established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of” Supreme Court cases.\textsuperscript{15}

According to Rehnquist, those cases had authoritatively established that Congress’s power to regulate interstate commerce was extremely broad, “even when its exercise pre-empt[ed] express state-law determinations contrary to the result which ha[d] commended itself to the collective wisdom of Congress.” Justice Rehnquist then went out of his way to note that the plaintiffs in the instant case “in no way challenge[d] these decisions establishing the breadth of authority granted Congress under the commerce power.” In other words, the plaintiffs conceded as beyond contest, and the Court reaffirmed, that Congress had extensive authority to supplant contrary state laws governing “‘even activity that is purely intrastate’” whenever Congress could rationally conclude that “‘the activity, combined with like conduct by others similarly situated, affects commerce among the States.’” The consequence, of course, was to leave “[t]he powers . . . reserved to the States” entirely to the unchecked will of Congress. In this sense, the Court’s efforts in \textit{National League of Cities} and its progeny to revivify the Tenth Amendment failed even before they started.

Having in effect conceded away any constitutional protection of the states’ role as regulator—a concession that the Court itself implied to be unavoidable—the plaintiffs sought instead to protect the states’ role as employer, in at least some circumstances. As paraphrased by Justice Rehnquist, the plaintiffs argued that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because [they are] found to offend against the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment. Appellants’ essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.\textsuperscript{16}

Where in the Constitution could one find this affirmative constitutional protection of “States As States,” a protection analogous to those spelled out in the Fifth and Sixth Amendments? Justice Rehnquist answered that “an express declaration of this limitation is found in the Tenth Amendment.”

While the Tenth Amendment has been characterized as a truism, stating merely that all is retained which has not been surrendered, it is not without significance. The
Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.\textsuperscript{17}

Of course, as many commentators have pointed out,\textsuperscript{18} the literal language of the Tenth Amendment does no such thing. Rather, the Amendment reaffirms that the federal government is one of enumerated and thereby limited powers and that all other authority remains with the states or the people therein. But Justice Rehnquist had, with the plaintiffs, already admitted that the FLSA’s wage and hours rules were well within the broad scope the Court had for almost forty years accorded to Congress’s power to regulate interstate commerce. Unwilling to reconsider the implications of these rulings, the Court in 1976 faced a Hobson’s choice. It could acknowledge that it properly played virtually no role in preserving federalism, a position from which a majority of the Justices understandably recoiled. So the Court embarked on what appeared to these Justices to be the only alternative course—to find some surrogate for the enumerated powers doctrine or, in other words, to find some different content to fill the vacuum created by the post–New Deal reading of the Tenth Amendment.

The substitute was suggested by the very nature of the instant case (or perhaps more accurately by the identity of the plaintiffs therein). The Court would continue to abide the New Deal era constitutional settlement—which accorded sweepingly broad interpretations to Congress’s Article I, section 8, powers. But henceforth the Court would more carefully scrutinize direct federal regulation of the states and invalidate those measures that unduly impinged on the “attributes of sovereignty attaching to every state government.” Applying this new framework to the case at hand, Justice Rehnquist declared that “the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime” constituted an “undoubted attribute of state sovereignty.” Not every intrusion upon state power would violate the Constitution, however; the question was one of degree. Less clear was by what standard the constitutional intrusions would be differentiated from the unconstitutional ones. At various places in his opinion Justice Rehnquist seemed to offer different formulations—whether the federal law would (1) intrude on “functions essential to separate and independent existence,” (2) “interfere with traditional aspects of state sovereignty,” or (3) “impermissibly interfere with integral governmental functions” or other “activities . . . typical of those performed by state and local governments.” Regardless, the majority’s verdict on the 1974 amendments was that “this exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.”\textsuperscript{19}

Justice Blackmun, the crucial fifth Justice necessary to establish a majority, joined Justice Rehnquist’s opinion for the Court in a concurrence that proved to be a harbinger of things to come. Like Justice Brennan, who wrote the
principal dissent, Justice Blackmun “was not untroubled by certain possible implications of the Court’s opinion,” but nevertheless joined the opinion for the Court because he thought the discrete result of the case—the invalidation of the 1974 amendments—“necessarily correct.” Nor did Blackmun “read the [Court’s] opinion so despairingly as” did Brennan. Rather, Blackmun understood Rehnquist’s opinion to “adopt[] a balancing approach,” which allowed “federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” It was on the basis of that understanding that Justice Blackmun supplied Justice Rehnquist with the fifth vote necessary to a majority.\(^20\)

As Justice Blackmun noted, Justice Brennan took a far less sanguine view of the majority opinion. Indeed, in a spirited dissent for himself and Justices White and Marshall, Justice Brennan predicted that “profoundly pernicious consequences” would in time flow from the Court’s opinion and likened it to the “line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis in the 1930s.”\(^21\) In particular, Justice Brennan was less confident than Justice Blackmun that the majority’s legal test permitted balancing of state and federal interests. Noting that the majority “disclaim[ed] any reliance on the costs of compliance with the amendments in reaching today’s result,” Justice Brennan feared that “the newly discovered state-sovereignty constraint could operate as a flat and absolute prohibition against congressional regulation of the wages and hours of state employees under the Commerce Clause.” In his view, “[t]he portent of such a sweeping holding is so ominous for our constitutional jurisprudence as to leave one incredulous.”\(^22\) The majority struck “a catastrophic judicial body blow at Congress’s power under the Commerce Clause.”\(^23\) Moreover, Brennan lambasted the majority for its “cavalier” overruling of Maryland v. Wirtz “by an exercise of raw judicial power.” To do so, he claimed, the majority disregarded an “unbroken line of precedents that firmly rejected” their “ill-conceived abstraction.” This the majority Justices did merely because they wished to “invalidate[ ] a congressional judgment with which they disagree[d].” He enlarged on this theme in unequivocal terms:

I cannot recall another instance in the Court’s history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected, clearly renders today’s decision an ipse dixit reflecting nothing but displeasure with a congressional judgment.\(^24\)

Aside from castigating the majority for what he perceived to be an abuse of the judicial role, Justice Brennan marshaled three arguments in opposition to Rehnquist’s analysis for the majority. The first was textual: “there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution.” In particular, the Court’s discovery of a state sovereignty limitation in the Tenth Amendment must,
Brennan thought, “astound scholars of the Constitution,” as “nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress.”25 Perhaps most significant for present purposes, Brennan observed in support of his reading of the Amendment that the majority’s States Qua States doctrine was ill-suited to protect the reserved powers. As he noted, state authority was far more seriously endangered by the undisputed power of Congress to preempt the state laws regulating the conduct of private citizens than by direct federal regulation of the minimum wage paid to state government employees.26 Brennan’s second argument was structural, and over time has proven to be far more controversial. Relying in part on Professor Herbert Wechsler’s 1954 law review article championing “The Political Safeguards of Federalism,”27 Brennan reasoned that the Constitution, by providing for state representation in the U.S. Congress, committed to the political branches of the federal government questions concerning the propriety of particular federal intrusions on state sovereignty. The architecture “of our federal political system”—in which the legislative power was vested in “the representatives of the people elected from the States”—made it “highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States.” These political safeguards of federalism, Brennan insisted, made federal judicial protection of the states at once both unnecessary and inappropriate. Re-examination of congressional compromises in this area would subject to “judicial supervision … a policy judgment that our system of government reserves to Congress.”28 Justice Brennan’s third, and time would prove prescient, argument criticized the majority’s approach as being not only wrong but also manifestly unworkable. That the States Qua States doctrine launched by the Court in National League of Cities was unmanageable was demonstrated, Brennan argued, “by my Brethren’s inability to articulate any meaningful distinctions among state-operated railroads, state-operated schools and hospitals, and state-operated police and fire departments.”29

**Overruling National League of Cities**

A mere eight years had intervened between Wirtz and National League of Cities. In just nine years National League of Cities was itself overruled in Garcia v. Metropolitan Transit Authority (1985). Indeed, in the near decade between National League of Cities and Garcia, the Supreme Court, although professing adherence to the former decision’s States Qua States doctrine, in fact sustained every federal regulation challenged on this basis.30 In Garcia, the Court confronted yet another constitutional challenge to the application of the FLSA’s wage and hours provisions to a political subdivision of a state. By 1985, however, Justice Blackmun’s reservations concerning the holding of National League of Cities had ripened into firm opposition. It fell to him, then, to author the opinion for the new five-Justice majority, which sustained the Act and expressly overruled National League of Cities.31
Justice Blackmun identified two principal reasons for the Court’s, and his own, reversal of course. First, the States Qua States doctrine, at least as established in *National League of Cities*, had proved “unworkable.” That doctrine, as clarified by the Court’s intervening decisions, was triggered only by federal regulation of state activity within an “area of traditional governmental functions.” Eight years of experience, Blackmun concluded, had revealed that the neither the Supreme Court nor the lower federal courts could articulate and adhere to a principled, intelligible demarcation of those governmental functions *National League of Cities* protected. The Court had previously rejected a “purely historical standard” that arbitrarily protected only those state functions with a demonstrable pedigree. Nor had the governmental/proprietary distinction proved any more illuminating under *National League of Cities* than it had in the area of intergovernmental tax immunity, where it had been discarded after a protracted and tedious judicial effort to invest it with suitable content. Any attempt by the courts to designate those governmental functions rightfully deemed indispensable or necessary, as determined by an economic appraisal, was doomed; among other potential failings with such an approach, it was “open to question how well equipped courts [were] to make this kind of determination about the workings of economic markets.”

Taken together, these observations taught that “[a]ny rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes”—an approach “[un]faithful to the role of federalism in a democratic society.” Accordingly, the *Garcia* majority rejected “as unsound in principle and unworkable in practice” the traditional governmental function standard that had come to circumscribe the state immunity from federal regulation recognized in *National League of Cities*. Having done so, the majority proceeded to reconsider whether such a judicially enforceable immunity existed in any circumstances whatsoever.

This second, more fundamental inquiry brought Justice Blackmun to his second, and more profound, objection to *National League of Cities*. That decision was erroneous not only because the judiciary had found it difficult if not impossible to implement but also, and more important, because the Constitution committed the preservation of federalism to Congress, not the courts.

Starting down the path to this conclusion, Justice Blackmun examined the constitutional text: “Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress’s actions with respect to the States.” As we observed in connection with our discussion of *National League of Cities*, the same could have been said of the Tenth Amendment. But, Justice Blackmun continued, “the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for ‘[b]ehind the words of the constitutional provisions are postulates which limit and control.’”

Founding-era expectations manifested in numerous intervening Supreme Court opinions indicated that the states remained sovereign “only to the
extent that the Constitution [did] not divest[] them of their original powers and transfer[] those powers to the Federal Government.” Paraphrasing, but not referencing, the Tenth Amendment, Justice Blackmun conceded “that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution.” Had he stopped there, Justice Blackmun’s statement would have been unassailable. Unfortunately, he continued in the vein of Darby, asserting that the principle manifested in the Tenth Amendment provided “no guidance about where the frontier between state and federal power lies.” This view ignores the Amendment’s implied promise that the reserved powers would not be a null, or inconsequential, set. In any event, Justice Blackmun ultimately concluded that the federal judiciary did not have a “license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”

Justice Powell authored the principal dissent, in which Chief Justice Burger and Justices Rehnquist and O’Connor joined. Powell stressed at the outset of his dissenting opinion that stare decisis principles mandated greater respect for National League of Cities as established constitutional law (although he neglected to mention that National League of Cities had itself overruled Maryland v. Wirtz). But he swiftly shifted to a frontal assault on the majority’s opinion as wrong on its merits, because it was contrary to both the text and history of the Constitution. He insisted that the Framers expected “the separate sphere of sovereignty reserved to the States [to] ensure that the States would serve as an effective counterpoise to the power of the Federal Government.” In support of this historical claim, Powell brought forward passages of The Federalist Papers stressing the limitation of the new central government to the few powers enumerated in the Constitution. He did this without apparent recognition of the irony that the States Qua States doctrine, which he so adamantly defended, was itself both predicated on and made necessary by the reality that the enumerated powers scheme survived in name only.

Powell stressed that the text of the Constitution likewise compelled the states’ immunity from at least some forms of direct congressional regulation under the Commerce Clause. Here, Powell rested his argument more squarely on the Tenth Amendment than had Justices Douglas, Stewart, or Rehnquist before him. Powell cited the Amendment no less than fourteen times, asserted that “the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized,” and accused the majority of effectively reading the Amendment out of the Constitution. In answering the majority’s reliance on the “political safeguards” as a surrogate for judicial enforcement of the Amendment, Powell denounced the majority for partial (and arbitrary) abdication of its duty to exercise faithfully the power of judicial review, first recognized by the Court in Marbury v. Madison (1803), “the most famous case in our history.” Skeptical that the political process would by itself protect the states from congressional overreaching, Powell concluded that “judicial enforcement of the Tenth Amendment [wa]s essential to maintaining the federal system so carefully
designed by the Framers and adopted in the Constitution.”  His dedication to the Tenth Amendment was in itself commendable. Unfortunately, like Rehnquist in his opinion for the Court in *National League of Cities*, Powell expressly acquiesced in the post–New Deal reading of the Commerce Clause that rendered nugatory the enumerated powers scheme the Tenth Amendment sought to protect. In lieu of meaningful limitations on the scope of congressional authority, which would have concomitantly preserved the states’ substantial independent regulatory authority, Powell sought merely to continue the States Qua States doctrine established by *National League of Cities*. But of course that doctrine aimed at safeguarding states’ unfettered control of their own enterprises, abandoning efforts to protect the states’ regulatory authority over their citizenry. While Powell’s approach had the virtue of investing the modern Tenth Amendment with some content, it nonetheless fell far short of protecting the reserved powers, as the Amendment literally required.

Perhaps the most telling opinion filed in *Garcia* was the separate dissent of the Court’s most junior member. In 1981 President Reagan had filled the vacancy created by Potter Stewart’s retirement by tapping Sandra Day O’Connor to serve as the first female U.S. Supreme Court Justice. In addition to joining Justice Powell’s *Garcia* dissent, she also authored a substantial separate opinion, which both signaled the centrality of federalism to her emerging jurisprudence and foretold her future role as a leader in the Rehnquist Court’s “federalism revival” of the 1990s. Justice O’Connor wrote separately in part to dispute the majority’s claim that the states’ independent authority to determine whether and if so how to regulate the primary conduct of their private citizens (in short the “reserved powers”) constituted “[t]he essence of our federal system.” To the contrary, she insisted, in the modern era “[t]he true ‘essence’ of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.” Far more so than had either Justices Powell or Rehnquist, Justice O’Connor candidly conceded that the States Qua States doctrine was a judicially improvised, second-best substitute for the Framers’ reliance on a robust enumerated powers doctrine, which she viewed as an anachronism in the post–New Deal legal landscape. “[T]he emergence of an integrated and industrialized national economy” had compelled the Court’s acquiescence in “a breathtaking expansion of the powers of Congress,” especially the power of Congress to regulate interstate commerce. The Framers of the Constitution had expected that power to be “used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise.”

For Justice O’Connor “[t]his perception of a narrow commerce power was important not because it suggest[ed] that the commerce power should be as narrowly construed today” but rather because “it explain[ed] why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress.” Intervening technological and economic developments, however, had
required the Court to be “increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems.” Under the modern Commerce Clause jurisprudence, Congress could reach not only “virtually every activity of a private individual” but also “virtually every state activity.”45 With this nearly limitless power Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.46

The Court, O’Connor lectured, ought not sit idly by while Congress devoured the states. Rather the Court was obligated to develop doctrinal mechanisms to honor “[t]he spirit of the Tenth Amendment,” which “of course, [wa]s that the States retain their integrity in a system in which the laws of the United States are nevertheless supreme.” Because changed circumstances had rendered the literal command of the Tenth Amendment—that the powers not permitted the federal government be retained by the states and the people—a dead letter, the Court must find alternative ways to protect the Amendment’s “spirit.”47 The so-called “political safeguards” of federalism were not alone sufficient, because, as she put it, “[w]ith the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint.”48 Accordingly, the Court was obligated “to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.” Because National League of Cities had commenced the Court’s best effort to date to do just this, the majority was wrong to abandon it. Nor would Justice O’Connor admit ultimate defeat on this score, for she, like Justice Rehnquist, believed that the Court would “in time again assume its constitutional responsibility.”49

THE ANTICOMMANDEERING CASES

Justice O’Connor’s commitment to a particular vision of American federalism manifested itself in numerous decisions during the twenty-four years she served on the Court. Even so, her first and most important authoritative construction of the Tenth Amendment was set forth in her opinion for the Court in New York v. United States (1992). That case arose out of New York State’s constitutional challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985. In that statute, Congress addressed the failure of the great majority of states to honor a prior (1980) statutory command to devise and implement policies ensuring the safe disposal of the commercial radioactive waste produced
within their respective borders. The 1985 Act employed three different incentive schemes to spur the recalcitrant state legislatures to tackle this politically unpalatable problem. The first and most direct simply provided for the secretary of energy to make monetary payments to states meeting a series of deadlines culminating in the ultimate goal—demonstration of the ability to dispose of all in-state generated waste no later than January 1, 1993. To complement this carrot, the Act presented the states with the formidable stick of subsequent denial of access to licensed out-of-state disposal facilities. Finally, and most controversially, the so-called “take-title” provision of the Act declared that any state failing to adopt an appropriate plan by January 1, 1996, would be obligated to take both title to and possession of any waste generated within the state “upon the request of the generator or owner of the waste.” That same subsection of the Act further provided that such a state “shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste.” The Court, over the dissenting votes of three Justices, invalidated the take-title provision on the ground that Congress had therein impermissibly “crossed the line distinguishing encouragement from coercion.”

Justice O’Connor’s opinion for the Court, much like her dissent in *Garcia*, stressed changed circumstances as the cause for what she frankly conceded to be judicial innovation to preserve some form of federalism. After asserting that the Framers of the Constitution could not have conceived of the intervening expansion of the role of government in general and of the federal government in particular, O’Connor conceded that “the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.” For example, “[a]s interstate commerce [became] ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress’[s] commerce power.” In light of this evolution, counsel for the state of New York declined even to argue that the Commerce Clause did not accord Congress the power to regulate radioactive waste disposal. So, too, had Congress’s spending power expanded significantly “[a]s conventional notions of the proper objects of government spending changed over the years.” This portion of what the principal dissent would disparagingly label the Court’s “civics lesson” ultimately concluded with the intimation that precisely because the enumerated powers doctrine had been rendered meaningless in the twentieth century, the Court was obligated to find some alternative way to protect the states. Justice O’Connor found just such a limitation implicit in the Tenth Amendment.

**The Anticommandeering Principle**

In her view, the Tenth Amendment not only underscored the fact that Congress was limited to the powers granted it by the Constitution but also constrained the manner in which those powers could be employed. Just as the
First Amendment’s protection of the freedom of speech restrained the ways in which Congress might regulate even those publishers indisputably engaged in interstate commerce (and thus indisputably within the scope of an enumerated power), so, too, the Tenth Amendment’s protection of “state sovereignty” likewise restrained Congress. Of course one striking discord in this analogy is that the First Amendment expressly prohibits Congress from “abridging the freedom of speech, or of the press,” whereas the word “sovereignty” appears nowhere in the Tenth Amendment. To be sure, O’Connor acknowledged as much, conceding that “this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology.” Rather cryptically, O’Connor added that “[i]nstead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.” From this assertion O’Connor derived the desired conclusion that “[t]he Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.” For good reason, O’Connor downplayed the significance of this shift in both focus and meaning. “[T]hese questions can be viewed in either of two ways,” she wrote, concluding that

[in the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.]

Saying that this difference was immaterial did not, however, make it so. To the contrary, whereas limiting the scope of Congress’s Article I powers would shelter the reserved powers from congressional usurpation, reading into the Tenth Amendment some form of state immunity from direct congressional regulation would not.

Nonetheless, the Court speaking through Justice O’Connor substituted the latter constraint for the former. Whatever the outer boundaries of this implied state government immunity, Justice O’Connor deemed it clear that Congress could not, as the 1985 Act’s take-title provision in effect attempted, simply commandeer the state legislatures by requiring that they enact into law a federal regulatory regime. She derived this “anticommandeering” principle from both recent Supreme Court precedent and her reading of founding-era history. The dissenters attacked her reliance on both as fundamentally and fatally flawed, but we need not and do not take sides in that debate here. That exchange made pellucidly clear that, while the Court’s anticommandeering principle might follow from a valid construction of some other constitutional provision or from the Constitution’s overall architecture, it had nothing to do with either the text or the history of the Tenth Amendment. Indeed, the majority’s constitutional bar on federal commandeering of the state legislatures at once supplanted, and sought to prevent congressional abuses unimaginable under, a robust
enumerated powers doctrine. Whatever limited protection the doctrine might provide to states as states, it does nothing to advance the Tenth Amendment’s purpose, the preservation of the reserved powers.

Justice Scalia’s opinion for the Court in Printz v. United States (1997) went a long way toward admitting as much. *Printz* extended the anticommandeering principle from state legislatures, the focus of the ruling in New York v. United States, to state executives, which the Court found to have been unconstitutionally conscripted by a provision of the Brady Handgun Violence Protection Act. In that 1993 federal statute, Congress accorded the U.S. attorney general five years to make available “a national instant background-check system.” In the interim, Congress required that handgun dealers, before transferring possession of a handgun, provide the local Chief Law Enforcement Officer (CLEO) of the transferee’s residence with a copy of the transferee’s “Brady Form,” which was to include the transferee’s name, address, date of birth, and sworn statement that he or she was not prohibited by applicable local, state, or federal law from possessing a handgun. Unless within a statutory exception, the dealer was thereafter required “to wait five business days before consummating the sale.” The constitutionally offensive section of the Brady Act ordered CLEOs who had received a Brady Form to “make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems were available and in a national system designated by the Attorney General” of the United States.

Whereas New York v. United States had established “that Congress cannot compel the States to enact or enforce a federal regulatory program,” Justice Scalia’s opinion for himself and four other Justices in *Printz* extended that principle to prohibit Congress from “conscripting the State’s officers directly.” Hence, Scalia concluded, the Brady Act’s attempt to add to the duties of local CLEOs violated the Constitution.

While precedent, namely New York v. United States, “most conclusively” doomed the challenged provision of the Brady Act, Scalia also grounded the enlarged anticommandeering principle in both “historical understanding and practice” as well as “the structure of the Constitution.” In a deliberate departure from Justice O’Connor’s firm reliance on the Tenth Amendment, Justice Scalia conceded at the outset of his analysis that “there is no constitutional text speaking to this precise question.” In his view, the continuation of the states’ sovereignty under the U.S. Constitution was, however, reflected throughout the Constitution’s text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.”
Only at the end of this long list of at best marginally relevant constitutional provisions did Justice Scalia acknowledge the Tenth Amendment. Even then, the reference came almost as an afterthought and as support for nothing more than the lone proposition discernable from the Amendment’s text. Justice Scalia observed that “the Constitution’s conferral upon Congress of [discrete and enumerated] governmental powers” implied that others were reserved to the states, “which implication was rendered express by the Tenth Amendment. . . .” The Amendment was, according to Scalia, relevant only as one among several constitutional provisions presupposing the proper structural balance between the central government and the states. This balance itself was the true source of the anticommandeering principle.

Although she concurred in Justice Scalia’s opinion, Justice O’Connor wrote separately to buttress the construction of the Tenth Amendment she had set forth in New York v. United States. Her view, simply put, was that the Brady Act “violate[d] the Tenth Amendment”—period. Indeed, her brief opinion cited no other constitutional provision, nor indeed any judicial precedent, in support of the ultimate conclusion that the Brady Act was unconstitutional.67 But as the principal dissent, authored by Justice Stevens, correctly observed, the anticommandeering principle simply could not be derived from the Tenth Amendment. As he put it, “‘[u]nlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers.’” This conclusion flowed ineluctably from the Amendment’s language, which “plainly refers only to powers that are ‘not’ delegated to Congress.”68 A construction of the Amendment that ignored this language, would exceed the limits of reasonable interpretation and instead be transparent improvisation. As Justice Stevens argued in his dissent, the very fact that Justice Scalia’s majority opinion had sought to shift the basis of the anticommandeering principle away from the Tenth Amendment by rooting it instead in notions of constitutional structure demonstrated that Scalia recognized the inherent weakness of Justice O’Connor’s construction of the Amendment.69

Of course, that Justice Stevens was right to conclude that the Tenth Amendment did not itself prohibit federal commandeering of state legislators and executive officials does not necessarily mean that such a prohibition could not be derived from the Constitution’s text, structure, and history when considered holistically. For present purposes, however, it suffices to observe that such a doctrine does nothing to ensure the vitality of the reserved powers, the real concern of the Tenth Amendment.

Whatever progress the opinions in Printz made toward acknowledging that proposition may have been undercut by Chief Justice Rehnquist’s brief opinion for a unanimous Court in Reno v. Condon (2000). There the Court rejected South Carolina’s challenge to the Drivers’ Privacy Protection Act of 1994 (DPPA), which “regulate[d] the disclosure of personal information contained in the records of state motor vehicle departments.”70 Writing for the Court, the Chief Justice perhaps too succinctly summarized the anticommandeering cases
in the following terms: “In New York and Printz, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.” Whether that characterization reflected a self-conscious preference among some or all of the Justices for O’Connor’s dependence on the Tenth Amendment over Scalia’s reliance on constitutional structure more generally, the Chief Justice’s opinion does not say. In any event, the Court distinguished both New York and Printz on the ground that, unlike the federal statutes at issue in those cases, the DPPA did “not require the States in their sovereign capacity to regulate their own citizens,” but rather directly regulated “the States as the owners of data bases.” The DPPA did “not require the South Carolina Legislature to enact any laws or regulations, and it did not require state officials to assist in the enforcement of federal statutes regulating private individuals.” With these differences identified, the Court held “that the DPPA was consistent with the constitutional principles enunciated in New York and Printz.” The Court also found it unnecessary to determine whether, as South Carolina maintained, “Congress may only regulate the States by means of ‘generally applicable’ laws, or laws that apply to individuals as well as States.” South Carolina’s challenge to the DPPA did not properly present that issue because, the Court concluded, the DPPA was generally applicable: “The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.” Thus, while the Condon Court reaffirmed the vitality of the anticommandeering principle articulated in New York and Printz, the ruling also acknowledged important constraints on this principle.

However this balance is ultimately struck, the Court’s persistent effort to derive the anticommandeering principle from the Tenth Amendment both stems from and makes transparent the Court’s abandonment of the enumerated powers scheme that Amendment was meant to secure. Recognition of at least this last observation was evident in Justice Thomas’s concurring opinion in Printz. Justice Thomas wrote separately “to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers.” Moreover, he doubted whether any of the enumerated powers extended so far as to authorize congressional control of “wholly intra state, point-of-sale transactions,” including “the intrastate transfer of firearms.” If Congress lacked the power to regulate the underlying primary conduct of the individual citizens, then Congress would “surely lack[] the corollary power to impress state law enforcement officers into administering and enforcing such regulations.” In other words, a robust enumerated powers doctrine, which the Tenth Amendment expressly reaffirmed, would obviate the need even to consider whether the Constitution implicitly precluded the Brady Act’s commandeering of state and local CLEOs. Justice Thomas conceded that his understanding of the scope of Congress’s enumerated powers, especially the
power to regulate interstate commerce, clashed with many prior precedents that had “interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise).” But he signaled an abiding readiness to reconsider such precedents, writing that he “continue[d] to believe that we must temper our Commerce Clause jurisprudence and return to an interpretation better rooted in the Clause’s original understanding.” Only time will tell whether Justice Thomas’s views will someday command the support of a majority of the Justices. Unless and until the Court honors the substance as well as the form of the enumerated powers doctrine, however, the Tenth Amendment will either be reduced to a dead letter or stand for some proposition irrelevant to its text, history, and original purpose.

The Reserved Powers and Competing Models of Sovereignty

Questions concerning the extent of “[t]he powers” the Tenth Amendment “reserved to the States ... or to the people,”76 typically arise in the context of a constitutional challenge to an Act of Congress. One would expect as much from an amendment intended to underscore that the Constitution’s enumeration of certain powers presupposed that others (neither enumerated nor “necessary and proper” to the execution of an enumerated power) were deliberately denied to Congress. On rare occasions, however, a case requires the Supreme Court to speak directly to whether a particular power was within those the Tenth Amendment “reserved.” U.S. Term Limits, Inc. v. Thornton (1995) was such a case.

Plaintiffs in Thornton—a group of Arkansas “citizens, residents, taxpayers and registered voters”—challenged the constitutionality of that subpart of Arkansas Constitutional Amendment 73, which, as adopted in 1992, effectively imposed two- and three-term limits on the state’s U.S. senators and representatives, respectively. A bare five-Justice majority, in a lengthy opinion by Justice Stevens, ultimately invalidated amendment 73, reasoning that the enumeration of qualifications for office in Article I, sections 2 and 3, of the U.S. Constitution implicitly prohibited the addition of any further qualifications absent a federal constitutional amendment. Relevant here is the debate between the majority and the dissent, authored by Justice Thomas, as to whether the power to add qualifications to represent a state in the U.S. Congress was among the powers reserved by the Tenth Amendment.

In the dissenters’ view, the Tenth Amendment was of central and ultimately controlling significance, as it defined the terms of their debate with the majority. Writing for himself and the three other dissenters, Justice Thomas asserted that the Tenth Amendment, properly understood, exhibited the truth that each state and the people therein shared all sovereign power neither expressly nor impliedly “delegated to the United States by the Constitution, nor prohibited by it to the States.” Moreover, the federal Constitution did not purport to determine how these residual powers were to be allocated between each state’s government and its denizens. Because, insofar as the federal Constitution was concerned, this matter was left to state constitutions for resolution, state
governments were left free to “exercise all powers that the Constitution does not withhold from them.”78 From these premises, Justice Thomas reasoned that

The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it. These basic principles are enshrined in the Tenth Amendment....79

Justice Thomas ultimately concluded that none of the historical evidence or analysis thereof brought forth in Justice Stevens’s opinion for the majority was sufficient to supplant this default rule as applied to state-law term limits for U.S. senators and representatives.

In his opinion for the Court, Justice Stevens argued mightily that the text of the Qualifications Clause,80 the history of the Philadelphia Convention of 1787, the ensuing ratification debates, state practices during the early republic, and democratic principles fundamental to American government all supported the conclusion that the minimal qualifications set forth in sections 2 and 3 of Article I were exclusive of all others unless and until additions were made to the federal Constitution via the laborious procedure of Article V amendment. At the same time Justice Stevens marshaled these arguments, however, he implicitly acknowledged that the historical record was less than pellucidly clear. Indeed, he refrained from asserting that the evidence was sufficient to surmount the default rule identified by Justice Thomas. Rather, Justice Stevens argued instead that this Tenth Amendment default rule was inapplicable. Stressing one connotation of the word “reserved,” Justice Stevens and his four colleagues in the Term Limits majority read the Tenth Amendment as simply inapposite to powers created by the Constitution itself. Quoting Justice Story’s celebrated “Commentaries on the Constitution of the United States,” Justice Stevens insisted that “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.... No state can say, that it has reserved, what it never possessed.”81 On this theory, the Tenth Amendment’s reservation of powers to the states concerned only those powers the states had enjoyed before the Constitution’s ratification. Accordingly, the Tenth Amendment could not have “reserved” to the states the power to add qualifications to serve in Congress because Congress (at least as we know) did not spring into existence until after ratification of the Constitution in 1789.

Expressly rejecting Justice Story’s gloss on the Tenth Amendment, Justice Thomas attacked that reading as founded on mistaken constitutional theory and an unduly narrow interpretation of constitutional text. As to political theory, Justice Thomas argued that “[t]he Constitution derives its authority” not from the state governments themselves but “instead from the consent of the people of the States.” Because in Thomas’s view the people of the states had been the ultimate source of all legitimate governmental authority, it was
simply ... incoherent to assert that [they] ... could not reserve any powers that they had not previously controlled.” Acting through both the Article VII ratification and the Article V amendment processes the people of the states could, and did, reserve all powers not surrendered in the text of the Constitution. There had never been a time when any governmental powers—save those delegated to the central government by the Constitution or prohibited by it to the states—were outside the control of the people of the states, the ultimate source of all sovereign authority. Hence, in Thomas’s view, there were no exceptions to the Tenth Amendment’s default rule, which resolved ambiguity in the states’ favor.

The Framers’ use of the word “reserved” in the Tenth Amendment was, according to Justice Thomas, entirely consistent with his understanding of the provision’s significance. As he explained:

If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: The people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved “to the States respectively, or to the people.”

Thus, to the dissenters, both constitutional theory and text indicated that the people in each state enjoyed the power to add qualifications to serve in Congress unless the Constitution either expressly or by necessary implication denied them this authority.

This particular discord among the Justices proved decisive. The dissenters conceded that the Constitution could prohibit the power to add qualifications for service in Congress by necessary implication as well as by express prohibition. What ultimately separated the Justices in the majority from those in the dissent was their contrary views about how clear this inference would have to be to justify denying the states power over congressional qualifications. The Justices in the majority, refusing to place a thumb on either side of the scale, found the negative implications of Article I’s Qualifications Clauses, founding-era history regarding congressional qualifications, and deductions from general democratic principles more than sufficient to invalidate the challenged section of the Arkansas Constitution. The dissenters, however, having found the Tenth Amendment on point, demanded a more convincing case in support of the alleged implied limit on state sovereignty.

As complex and engaging as it was, this debate might be dismissed as largely academic, at least outside the somewhat idiosyncratic context of state assertions of authority over federal officials. But as the passion with (not to mention the length at) which the contesting positions in this debate were set forth in the several opinions filed in Term Limits suggests, the Justices seemed to think that the stakes were unusually high, even for the generically momentous arena of Supreme Court constitutional litigation. No doubt some of the judicial intensity can be traced back to the fervor of the public policy debate about term limits in a democratic society. No doubt the Justices, themselves
achievers to a greater or lesser degree on the national political stage, recognized that even seemingly modest changes in the processes by which members of Congress are selected will over time influence considerable and perhaps unforeseeable changes in the fragile and incessantly contested balance of political power. Still, their opinions in Term Limits suggest in addition their shared perception of the extraordinary significance of the theoretical questions underlying the immediate controversy—questions about the scope and meaning of the Tenth Amendment as well as the nature of the interests represented in and served by the U.S. Congress. Professor Nagle has argued that the fundamental difference separating the Justices in the Term Limits majority from those in dissent was the Justices’ differing levels of comfort with the conclusion that the federal Constitution left important matters to resolution by ordinary political processes governed by shifting political majorities. Whereas the majority capped the reserved powers at whatever authority the states enjoyed before ratification, the dissenters viewed “both the reserved powers and the possible qualifications for Congress [as] open sets.” The dissenters’ insistence that the reserved powers were indeed “numerous and indefinite,” as James Madison had contended, “struck an exposed nerve.”

The resonance of this argument goes far beyond the issue of term limits. Its larger significance is the idea that the Constitution leaves important gaps and, thus, that there are dangerous possibilities it cannot protect against. The dissenters’ position, that is, insists that there are limits to constitutional control over politics—that beyond the lighted arena of constitutional interpretation lies an unbounded world of political will.

By reserving the residuary of sovereign authority to the states or the people, the Tenth Amendment promised nothing less than the perpetual preservation of this “unbounded world of political will.” By recoiling from this possibility, the Term Limits majority further eroded the reserved powers and incrementally advanced a seemingly inexorable trend toward centralization.

Quasi-metaphysical debates about which attributes of sovereignty the states retained after the Constitution’s ratification figured even more prominently in the Justices’ division throughout the last decade over doctrines of state sovereign immunity. Even superficial treatment of that complex and unsettled area of the law exceeds the scope of this volume; specifically, the doctrines are far more closely linked to the Eleventh than the Tenth Amendment. But one recent ruling rates review because it prompted a singular debate among the Justices about the proper construction of the Tenth Amendment.

In Alden v. Maine (1999), yet another Tenth Amendment case arising out of the FLSA, Maine probation officers sued their state employer in Maine district court, seeking compensatory and liquidated damages for alleged violations of the FLSA’s overtime provisions. In important ways, the case revisited the scarred terrain of the Term Limits decision, although in this later iteration of that debate Justice Kennedy joined with the Term Limits dissenters to forge a new five-Justice majority. Perhaps for this reason Justice Kennedy wrote for the Court, explaining its decision that Congress lacked power to authorize suit
against a nonconsenting state in that state’s courts. The Eleventh Amendment, which limited the jurisdiction of federal courts in private suits against nonconsenting states, was silent as to the jurisdiction of state courts.88 This silence forced Justice Kennedy to look elsewhere in the Constitution for a principle of state sovereign immunity that would bar Congress from permitting private persons to sue a state in that state’s own courts. He sought to fill the gap at least in part with a rather ambitious reading of the Tenth Amendment. He insisted that provision removed “[a]ny doubt regarding the constitutional role of the States as sovereign entities,” fully entitled to enjoyment of “the dignity and essential attributes inhering in that status.” Building on the Court’s prior derivations from the Tenth Amendment in New York v. United States (1992) and Printz (1997), Justice Kennedy reasoned that

even as to matters within the competence of the National Government, the constitutional design secures the founding generation’s rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people.

The Tenth Amendment evidenced that the states “retain[ed] the dignity, though not the full authority, of sovereignty.” In addition, “[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”89 Hence, for the majority of the Justices, it was but a short step further to the conclusion that the Constitution denied to Congress the power to open a state’s courts, absent the state’s consent, to private suits against it.

Dissenting for himself and the three other Justices who, with Kennedy, comprised the Term Limits majority, Justice Souter accused the Court of reading its own wishes into the Tenth Amendment: “[t]here is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood.”90 The quoted assertion is, of course, beyond contest; as noted above in connection with National League of Cities, neither the word “sovereign” nor “sovereignty” appear in the brief text of the Tenth Amendment. As in Term Limits, however, the debate may turn on the form in which the question is asked. If, as the dissenters in Term Limits maintained, the Tenth Amendment supplied a strong presumption in favor of state power and against a lenient threshold for discovery of implied congressional powers, then perhaps it was Justice Souter, and not the Alden majority, that bore the burden of overcoming silence or ambiguity. From this perspective, the clash between the two inharmonious rulings from the same nine Justices reveals the keenness of their indecision about the weight to be accorded the Tenth Amendment.

A REVIVAL OF THE ENUMERATED POWERS DOCTRINE?

Between 1936 and 1995 the Court upheld every federal statute regulating private conduct that was challenged as beyond Congress’s power under the
Commerce Clause. Perhaps the most socially and legally significant of these were the public accommodations provisions of the monumental Civil Rights Act of 1964.

In the first of two companion cases, Heart of Atlanta Motel, Inc. v. United States (1964), the Court rejected the motel’s claim that Title II of the 1964 Act, which prohibited racial discrimination in places of public accommodation, such as hotels and restaurants, could not consistent with the Constitution be applied to its operations. Although the majority of the motel’s guests were interstate travelers, counsel for the motel argued that its activities were local in nature—that is, the motel offered rooms for rent only in downtown Atlanta and did not itself do business in other states. Justice Clark’s opinion for a unanimous Court reasoned that, for the purposes of establishing congressional power to forbid racial discrimination in lodging, it sufficed that refusal to do business with African Americans had substantially and adversely affected their ability to travel throughout the South. Congress, in the exercise of its power to regulate interstate commerce, could reach any private conduct that “might have a substantial and harmful effect upon that commerce.” So construed, Congress’s Commerce Clause power also extended to the prohibition of racial discrimination by restaurants serving either customers or food that had crossed state lines, and, in Katzenbach v. McClung (1964), the Court unanimously upheld Title II insofar as it was thus applied. The Court acknowledged that the Civil Rights Act of 1964 was enacted for the purpose of achieving racial justice, rather than for the purpose of advancing commerce solely as an end in itself. In fact, the most significant doctrinal teaching of these two rulings was their unambiguous endorsement of the argument that Congress’s motive was immaterial, so long as there existed a rational basis for the perhaps implicit congressional judgment that the object of regulation had a substantial effect on interstate commerce.

As important as the rulings in Heart of Atlanta Motel and McClung may have been, however, they were merely the tip of a very large iceberg consisting of countless post–World War II decisions affirming broad assertions of congressional authority under the Commerce Clause. As one leading commentator has observed, “by the 1980s the Commerce Clause game seemed about over. Case book editors were driven to dream up wild hypotheticals to try to find ways to encourage students to consider whether the commerce power had any practical limits at all.”

But then, for the first time in nearly sixty years, the Supreme Court shocked the legal community by striking down a federal statute on the ground that it was beyond the reach of Congress’s power to regulate interstate commerce. In United States v. Lopez (1995), the Court invalidated the Gun-Free School Zones Act of 1990 (hereinafter § 922(q)), which made it a federal crime (hence triable in federal court) for any unauthorized person “knowingly to possess” a firearm within 1,000 feet of, “a public, parochial, or private school.” One day in March 1992 Alfonso Lopez, Jr., then a senior at Edison High School in San Antonio, Texas, arrived at school carrying concealed on
his person a 0.38-caliber handgun and five bullets. Alerted to the possibility that Lopez would be armed, school authorities confronted Lopez, who admitted possession of the gun. Although that admission initially led to his being charged for a violation of the Texas Penal Code, those charges were subsequently dismissed when federal authorities sought an indictment against Lopez for violating § 922(q). After a federal grand jury returned that indictment and a federal district judge, conducting a bench trial, convicted and sentenced Lopez, the U.S. Court of Appeals for the Fifth Circuit reversed his conviction, holding that § 922(q) exceeded the enumerated powers of Congress. The U.S. Supreme Court granted *certiorari* and, by a bare, five-Justice majority, affirmed the Fifth Circuit’s ruling.

As the two concurring opinions revealed, Chief Justice Rehnquist, who wrote for the majority, faced the daunting challenge of navigating between, on the one hand, the Scylla of Justices Kennedy and O’Connor and, on the other hand, the Charybdis of Justice Thomas. Perhaps even more arduous was the task, which the Chief Justice apparently set for himself, of fashioning an opinion that demonstrated the invalidity of § 922(q) without overruling any of the Court’s prior Commerce Clause rulings. After reviewing the major cases, and clarifying that the Court’s precedents recognized in Congress “the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce,” the Chief Justice identified four ways in which § 922(q) was more constitutionally suspect than any of the federal statutes the Court had previous upheld. First, Chief Justice Rehnquist asserted that, whereas prior rulings had sustained the constitutionality of statutes regulating intrastate economic activity having a substantial effect on interstate commerce, § 922(q) was “a criminal statute that by its terms had nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” Moreover, “Section 922(q) was not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” For this reason, the Chief Justice contended, most of the Court’s modern Commerce Clause rulings were simply inapposite.

The Chief Justice also noted a second defect in § 922(q)—namely, that it lacked any “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce.” Similarly, a third flaw in § 922(q) was the absence of “legislative findings, and indeed even congressional committee findings, regarding [the] effect [of handgun possession near schools] on interstate commerce.” The Chief Justice acknowledged that “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.” Nevertheless, he hinted Congress might have saved § 922(q) had it made appropriate and substantiated factual findings.

Finally, in answering the government’s and the dissent’s arguments in support of the Act, the Chief Justice highlighted a fourth way in which it was...
constitutionally problematic. As a criminal provision addressing a threat to education, § 922(q) invaded regulatory spheres that had historically been the exclusive province of the states. Were the Court to endorse the theories of the government or the dissent, it would be “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”\textsuperscript{100} In a concurring opinion for himself and Justice O’Connor, Justice Kennedy, after confessing hesitancy about the Court’s decision, joined the Court’s opinion, stressing that § 922(q) regulated education and thus constituted an intrusion upon “a [well established] area of traditional state concern.”\textsuperscript{101}

Near the end of his opinion for the Court, the Chief Justice admitted prior precedents had accorded “great deference to congressional action,” thereby taking “long steps down [the] road” toward granting Congress “a general police power of the sort retained by the States.” Although “[t]he broad language in these opinions has suggested the possibility of additional expansion,” that invitation the majority, on this occasion at least, declined. With a paraphrase, though interestingly no citation, of the Tenth Amendment, Chief Justice Rehnquist explained that “to proceed any further … would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated…. This we are unwilling to do.”\textsuperscript{102}

The only Justice who expressly relied upon the Tenth Amendment was Justice Thomas, who joined the Chief Justice’s opinion for the Court but wrote separately to call for reconsideration of the Court’s precedents authorizing Congress to regulate all activity having a substantial effect on interstate commerce. In his view, the substantial effects standard, “if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”\textsuperscript{103} This overbroad construction of the Commerce Clause in turn came “close to turning the Tenth Amendment on its head.” Because the Court’s “case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution”—a proposition inverse to that enshrined in the Tenth Amendment—Justice Thomas believed the Court was obligated to supplant the substantial effects standard with an alternative more consonant with the original understanding of the Commerce Clause.\textsuperscript{104} The fashioning of that standard could await future cases, however, as Justice Thomas found it “easy enough to say that the [Commerce] Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.”\textsuperscript{105}

The dissenting opinions shared a tone of incredulity. It was as though, after nearly six decades of Supreme Court acquiescence in the unwritten settlement of 1937, a majority of the Justices had not only violated one of the accord’s central tenets—that Congress in effect had plenary power under the Commerce Clause—but had also denied the settlement’s very existence. To the dissenting Justices, the Chief Justice’s canny parsing of the post-1937 Commerce Clause cases missed the forest for the trees. In the dissenters’ view, notwithstanding the modern Court’s occasional paean to the virtues of federalism, the fundamental teaching of all those cases taken together was that the
Supreme Court had virtually no role in second-guessing a congressional judgment that a matter fell within the compass of the Commerce Clause. Justice Souter went so far as to suggest that the majority’s ruling might ultimately result in a replay of the, for the Court, ill-fated New Deal era confrontation with Congress. As the author of what might be termed the principal dissent, Justice Breyer laboriously connected the dots between the national economy and the presence of guns at schools: (1) students’ learning can be adversely affected by the fear that distracts them when guns might be present on school grounds; (2) today’s uneducated youth will likely become tomorrow’s unqualified workforce; and finally (3) national economic growth might be impaired by this deficient, homegrown labor pool.

Most telling was Justice Breyer’s failure to answer the Chief Justice’s challenge to “identify any activity that the States may regulate but Congress may not.” Viewed from the perspective of the Tenth Amendment, this failure should alone be deemed fatal to the dissent’s defense of § 922(q). The most narrow, yet still plausible, construction of the Tenth Amendment attributes to it the proposition that some significant regulatory authority was “not delegated” to the federal government and thereby “reserved to” the sovereign people in the various states. But the dissenters’ unspoken rebuttal was that the Court’s prior precedents, when taken together, had already effectively interred the enumerated powers doctrine, at least insofar as judicial enforcement was concerned, the Tenth Amendment to the contrary notwithstanding. So, again, in the dissenters’ eyes the majority’s decision to invalidate § 922(q) appeared radical, as it repudiated the tacit compromise of 1937, which had been necessary to end the “Great Constitutional War.” On this view, the absence of any judicially enforceable limit on Congress’s Commerce Clause authority was simply the pre-Lopez status quo; it was the majority’s assertion that such a limit must be found that was revolutionary.

Worse still, the dissenters argued, the majority not only upset the preexisting legal order but also failed to articulate any intelligible substitute to take its place. Lopez thus “threaten[ed] legal uncertainty in an area of law that, until this case, seemed reasonably well settled.” On this point, Justice Stevens’s succinct, two-paragraph dissent may have delivered the crucial blow. His opinion was really the only dissenting opinion to address the majority on its own terms. The one “additional comment” he appended to his emphatic concurrence in the opinions of Justices Souter and Breyer was that, even on the assumption that Congress’s power under the Commerce Clause was limited to regulation of “commerce” or some “sort of economic enterprise, however broadly one might define those terms,” § 922(q) was nevertheless within the scope of this power because “[g]uns are ... articles of commerce. Their possession is the consequence, either directly or indirectly, of commercial activity.” Indeed, if farmer Filburn’s consumption of his own home-grown wheat could, as the Lopez majority contended, be characterized as “involv[ing] economic activity” sufficiently to bring it within Congress’s Commerce Clause power, at the very least more elaboration than the Chief
Justice provided was required to establish that Alfonso Lopez’s public possession of a 0.38-caliber handgun could not also be so characterized. Guns are mass produced for and sold on interstate and international markets. Whether, as the ill-fated constitutional challenge to the Agricultural Adjustment Act contended, Filburn’s farm could fairly be characterized as a self-contained system isolated from interstate wheat markets, it is impossible to take seriously the prospect of Alfonso Lopez forging the steel for his homemade handgun from raw ore extracted solely from his Texas estate. The point, of course, is not that the latter showing ought to be required before the matter of gun possession near schools should be excluded from the realm of congressional authority (and thus reserved to the states), but rather that, in invalidating § 922(q) while at the same time reaffirming the correctness of Wickard v. Filburn, the Lopez majority embraced fundamentally irreconcilable propositions. As the dissenters claimed, this mixed message introduced hopeless confusion into one of the relatively few areas of constitutional law previously characterized by certainty and clarity. Thus, in lieu of reviving a durable enumerated powers doctrine, the Lopez decision yielded only doctrinal incoherence.

Not surprisingly, Lopez provoked considerable political and academic criticism, although to be sure it had its determined defenders in both quarters as well. In the lower federal courts, however, things continued much like they had before the 1995 ruling. Between 1995 and 1999, the federal intermediate appellate courts rejected every Commerce Clause challenge to a major federal statute. It was as though the U.S. Courts of Appeals uniformly interpreted Lopez as an aberration, properly limited to its particular facts. The Supreme Court in turn side-stepped every call to clarify Lopez’s precedential significance, consistently denying petitions for certiorari in these numerous post-Lopez Commerce Clause cases. But then, after the Court had managed to stay out of the fray for four years, the U.S. Court of Appeals for the Fourth Circuit in effect forced the Court’s hand by invalidating the civil-remedy provision of the Violence Against Women Act (VAWA). Enacted in 1994, VAWA was a relatively recent, politically significant statute. Accordingly, the solicitor general asked the Supreme Court to review the Fourth Circuit ruling holding that VAWA’s civil remedy exceeded Congress’s enumerated powers, and the Court, in keeping with its own tradition of honoring such requests, agreed to hear the case.

The Court affirmed the ruling of the Fourth Circuit and invalidated the challenged VAWA section, but in doing so provided modest, at best, clarification as to the meaning of Lopez. Unlike the Gun-Free School Zones Act struck down in Lopez, VAWA was supported by “a mountain of data assembled by Congress,” all part of the formal legislative record, “showing the effects of violence against women on interstate commerce.” In United States v. Morrison (2000), however, the Court dismissed this evidence as irrelevant. Writing again for the same five Justices who joined the majority in Lopez, Chief Justice Rehnquist reasoned that, even if the legislative record proved that intrastate gender-animated violence has, in the aggregate, a substantial impact on interstate commerce, the civil-remedy provision of VAWA was nevertheless unconstitutional because it
exceeded Congress’s Commerce Clause authority. Specifically, the Chief Justice’s majority opinion stressed the Court’s reluctance to aggregate the effects of individual instances of intrastate, noneconomic activity for the purposes of deciding whether the activity had the requisite substantial effect on interstate commerce. Still, the Chief Justice declined to commit the Court to never aggregating noneconomic activity: “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” At the least, however, none of the Justices in the majority deemed the case for VAWA’s civil remedy as sufficiently compelling to depart from this tradition. Moreover, in the view of the majority, it was clear that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” Accordingly, the Court refused to aggregate the effects of these crimes on interstate commerce for the purpose of providing a foundation for congressional authority.

Like the Chief Justice’s opinion for the Court, the dissenting opinions in *Morrison* closely paralleled their *Lopez* counterparts. The intervening half decade had, however, ripened the dissenters’ initial incredulity into something approaching outrage. For example, in *Morrison*, Justice Souter, in addition to reiterating the arguments found in his *Lopez* dissent stressing the deference owed Congress, also addressed the relevance of the Tenth Amendment. Indeed, his was the only opinion in *Morrison* that deigned to so much as cite it. In his answer to the majority’s suggestion that Congress’s Commerce Clause authority did not encompass activity that had traditionally been left to state regulatory power, Justice Souter properly dismissed the claim as unsupported by the text of either the Constitution in general or the Tenth Amendment in particular. Noting that in 1920 Justice Holmes “more bluntly” characterized a similar argument as seeking solace in “some invisible radiation from the general terms of the Tenth Amendment,” Souter invoked Holmes’s answering admonition that “[w]e must consider what this country has become in deciding what that Amendment has reserved.” While the Tenth Amendment confirmed the existence of significant reserved powers, nothing in the federal Constitution attempted to define those powers. Indeed, the absence of textual support for such an approach, which several early twentieth-century Justices had embraced, ultimately undermined these pre–New Deal judicial efforts to shield the reserved powers from congressional usurpation.

More problematic was Justice Souter’s assertion that the Tenth Amendment, when considered in context, evidenced the Framers’ decision to commit to the political process (that is, Congress as opposed to the Court) the delineation of the outer boundaries of congressional power. As he put it:

The Framers of the Bill of Rights, in turn, may well have [expected] politics [to serve] as the determinant of the federal balance within the broad limits of a power like commerce, _for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties._
It is no small irony (nor should more of a refutation be required than to observe) that this argument, while couched in terms of the allocation of constitutional interpretative authority between Congress and the Court, in the final analysis comes perilously close to the precise contention that Alexander Hamilton, writing as Publius, feared and that the Ninth Amendment was meant to foreclose: namely, that the very existence of specific prohibitions in a bill of rights implied that those powers not thereby denied the federal government must have been implicitly granted to it.123

More persuasively, Justice Souter argued that the majority’s invalidation of the challenged VAWA section could not be reconciled with three landmark Commerce Clause precedents that the majority purported to reaffirm. The Court’s two decisions confirming congressional power to enact the Civil Rights Act of 1964, *Heart of Atlanta Hotel* and *McClung*, established that Congress was free to employ its Commerce Clause authority to achieve moral or social, rather than economic, ends. Hence, the fact that Congress almost certainly enacted VAWA out of a loathing for violence against women rather than for the purpose of clearing impediments to an integrated economy was immaterial to the Commerce Clause issue. Likewise, the majority’s effort to distinguish VAWA from prior constitutionally valid federal laws on the ground that violence against women was “noneconomic” and therefore beyond the scope of *Wickard*’s aggregation principle faltered on the troublesome fact that *Wickard* itself concerned Congress’s power over noncommercial activity (growth of wheat for home consumption).124 Souter stressed that these were not inconsequential inconsistencies. To the contrary, they produced a legal indeterminacy that left the answers to questions about the extent of congressional power very much in the eyes of a few supreme judicial beholders. Souter prophesied that such an unstable legal regime could not long endure.125

In the end, *Morrison* provided only a thin gloss on *Lopez*. Once again, the majority provided precious little guidance to the lower courts about the scope of any revival of federalism. Still, *Morrison* did clarify a few, fundamental issues. First, the outcome indicated that *Lopez* was not a solitary shot across the bow of Congress intended solely to signal the Court’s displeasure with Congress’s insatiable appetite for regulatory turf. To the contrary, the result in *Morrison* seemingly portended a line of High Court rulings flowing from *Lopez* and developing over time real, judicially enforceable boundaries on congressional authority. Second, although the Chief Justice assiduously and maddeningly avoided articulating any “categorical rule,” his assertion in his opinion for the majority that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature” strongly implied that the Clause authorized Congress to reach into a state only insofar as the ultimate object of congressional regulation could, in some sense, be deemed economic. Precisely what was to be deemed economic for these purposes was, however, left largely unresolved.

Nor did the Commerce Clause provide the sole jurisprudential context for the Court’s recent attempts to reinvigorate meaningful limits on congressional
authority. In the time between *Lopez* and *Morrison*, the Supreme Court significantly restricted another enumerated power of Congress—the power “to enforce” the substantive guarantees of the Fourteenth Amendment via “appropriate legislation.” In *City of Boerne v. Flores* (1997), the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA), which as the Act’s title suggests, had been enacted to restore the practice of subjecting to the strictest judicial scrutiny laws having the incidental effect of imposing a substantial burden on the free exercise of religion. The Supreme Court’s 1990 decision in *Employment Division v. Smith* had found this most exacting review to be unnecessary in cases concerning the constitutionality of facially neutral laws. Provoked by *Smith*, which both congressional liberals and conservatives deemed inadequate to the task of protecting minority religions, Congress passed RFRA by overwhelming majorities in both Houses. In doing so, Congress expressly invoked section 5 of the Fourteenth Amendment (section 1 of which made the First Amendment applicable to the states) as the source of its authority to apply the strictures reinvigorated by RFRA to the actions of state and local governments.

When the Act was challenged in federal court as exceeding the enumerated powers of Congress (at least insofar as it applied to the states), RFRA’s defenders articulated two quite distinct theories to justify the statute. First, RFRA could be upheld as Congress’s independent construction of the Free Exercise Clause of the First Amendment. Although this construction conflicted with that of the *Smith* majority, RFRA’s supporters argued that it was certainly plausible as an initial matter. In response, the Court flatly rejected the claim that Congress had any role in interpreting the substantive provisions of the Fourteenth Amendment, asserting that the drafting history and original understanding of the Amendment’s Framers, as well as separation of powers considerations, precluded such a role for Congress.

RFRA’s defenders argued in the alternative that, even if Congress’s section 5 enforcement power did not extend so far as to allow a constitutional difference of opinion between Congress and the Court, RFRA was nevertheless a constitutionally permissible prophylactic rule designed to enforce the Free Exercise Clause as the Court had construed it in *Smith*. In the years between *Smith* and *Flores*, the Court had clarified that the Free Exercise Clause also forbade laws actually enacted for the purpose of harassing persons holding disfavored religious views. By requiring heightened judicial review of all laws that have the effect of substantially burdening religious practice, RFRA would, it was argued, increase the likelihood that the courts would identify and strike down those facially neutral laws enacted for the covert purpose of discouraging or prohibiting disfavored religious exercise. This second justification for RFRA found support in the abundant deference the Court had previously accorded Congress’s exercise of its Fourteenth and Fifteenth Amendment enforcement powers in the voting rights context. Specifically, RFRA’s defenders noted that in 1966 the Court had found that Congress could exercise its enforcement power to prohibit state-imposed literacy tests,
notwithstanding the Court’s decision a mere six years before that the Fourteenth and Fifteenth Amendments did not bar such tests. This time, however, the Court concluded that RFRA was neither “remedial” nor “preventive” but rather was an impermissible “attempt [to enact] a substantive change in constitutional protections”—that is, the protections of the Free Exercise Clause as construed by Smith.

In other words, the Flores Court rejected as a ruse the claim that RFRA was merely a prophylactic rule designed to enforce Smith’s interpretation of the Free Exercise Clause. It could likewise have been said that Congress’s 1965 prohibition of literacy tests was an attempt to reverse the Court’s prior decision permitting them. But in that context the Court sustained the Voting Rights Act of 1965 as an appropriate remedial measure. Flores, therefore, like both Lopez and Morrison, reflected a greater judicial skepticism toward borderline assertions of congressional authority than had prevailed on the Warren Court. Moreover, as in both Lopez and Morrison, the majority opinion in Flores neglected even to mention the Tenth Amendment. In all three cases, however, the Court’s suspicion of congressional authority was apparently rooted in a professed solicitude for the states’ reserved powers.

Nor was Flores an outlier. In five cases in as many years, the Court reaffirmed the teaching of Flores as to the narrowness of Congress’s section 5 authority.

EPILOGUE OR EPITAPH?
The modern Court’s treatment of the Tenth Amendment has, at various times, reflected one or more of three contending currents of thought. For many of the Justices (a majority throughout the greater part of this period), the Tenth Amendment was a dead letter, at least insofar as the judiciary was concerned. Starting in 1976, a fragile majority of Justices attempted to breathe life back into the Amendment by substituting affirmative judicial protection of the States Qua States for judicial enforcement of the enumerated powers scheme. After that doctrine was formally interred a decade latter, a reconfigured majority announced the related albeit narrower prohibition on federal commandeering of state and local governmental officials—a form of federalism that at least nominally survives today. The Rehnquist Court also divided over conflicting notions of state sovereignty in controversies concerning state attempts to impose congressional term limits and state sovereign immunity from suit. However well intentioned, these doctrines are but a trivial substitute for a vital enumerated powers scheme, which would leave substantial regulatory authority in state governments and, accordingly, permit the kind of vigorous competitive federalism envisioned by those who framed and ratified the Constitution. Thus, far greater enthusiasm and hope in some quarters, and anxiety in others, attended the Court’s decisions in Lopez, Morrison, and Flores. These rulings, taken together, seemed to signal a renewed, albeit cautious, judicial solicitude for the project of imposing some meaningful constraints on congressional authority.
Whatever expectations for judicial enforcement of the enumerated powers scheme may have been piqued by those late-twentieth-century rulings, however, were dealt a severe blow by the Court’s decision in Gonzales v. Raich (2005). Angel McClary Raich and Diane Monson sought from a U.S. district court a declaration that the federal Controlled Substances Act (CSA) could not be applied to their cultivation and possession of marijuana for personal medical use, as permitted by the law of their home state, California. In particular, Raich and Monson argued that, so applied, the CSA exceeded the power of Congress to regulate interstate and international commerce.135

For several years before filing suit, Raich and Monson—both of whom suffered from what the Court termed a “variety of serious medical conditions”—had regularly consumed marijuana to treat some of the numerous, severe symptoms they suffered. Their consumption of the drug conformed with both the advice of their licensed, board-certified family physicians and with California’s Compassionate Use Act. As the Court acknowledged, their physicians had exhausted all alternative treatments before concluding that marijuana alone provided effective relief. Moreover Raich’s physician opined that were Raich to cease using marijuana, she would certainly suffer excruciating pain and perhaps death because of precipitous weight loss and wasting syndrome.136 Nor were Raich and Monson’s fears of federal prosecution in the least speculative. In August 2002 federal Drug Enforcement Agents entered Monson’s home and there “seized and destroyed all six of her cannabis plants.” The Supreme Court elected to hear the case after the U.S. Court of Appeals held that Raich and Monson were entitled to a preliminary injunction against federal enforcement because they had “demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress’[s] Commerce Clause authority.”137

The Supreme Court squarely rejected Raich and Monson’s Commerce Clause claim in an opinion by Justice Stevens, in which he was joined by the three other Lopez and Morrison dissenters as well as Justice Kennedy. Justice Stevens conceded at the outset of his opinion for the Court that Raich and Monson’s petition for relief from the CSA was morally, even if not legally, compelling: “The case is made difficult by [plaintiffs’] strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes.” Justice Stevens emphasized, however, that “[t]he question before us ... is not whether it is wise to enforce the statute in these circumstances, [but] rather ... whether Congress’[s] power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.” In his and the majority’s view, that discrete question about the extent of congressional authority was governed by “well-settled law,” which compelled the conclusion that “[t]he CSA [wa]s a valid exercise of federal power, even as applied to the troubling facts of this case.”

After reciting the procedural history of the case, Stevens’s opinion for the Court next set forth the affirmative case for constitutionality, drawing heavily
on the Court’s exceedingly generous post-1937 and pre-\textit{Lopez} Commerce Clause rulings. Of course, under these precedents alone, the case for constitutionality was both obvious and easy. As noted above, before \textit{Lopez}, the Court’s Commerce Clause jurisprudence appeared to permit congressional regulation of virtually any private conduct. The cases had established three related propositions that, taken together, seemingly left nothing outside Congress’s reach. First, the power to regulate interstate commerce included the power to regulate anything substantially affecting interstate commerce. Second, in determining whether an activity substantially affected interstate commerce, individual instances were not to be considered in isolation but instead the effects of the entire class of activities were to be aggregated. Third, courts were to defer to Congress’s often implicit judgment on these questions so long as there existed a rational basis for finding the necessary predicate for congressional authority. It was but quick work for Justice Stevens to demonstrate that even the possession of homegrown marijuana used solely for medicinal purposes in conformity with state law—like anything else in twenty-first-century America’s interconnected, commercial society—fell within the ambit of Congress’s power. More challenging was the task of explaining how this reasoning and conclusion could be squared with the Court’s intervening rulings in \textit{Lopez} and \textit{Morrison}.

Those two decisions appeared to reimpose some, although rather indefinite, constraints on congressional power. If, as \textit{Lopez} and especially \textit{Morrison} suggested, Congress’s authority under the Commerce Clause was limited to “economic” activity, in what way was mere possession of locally grown marijuana for medicinal use, but not possession of a handgun, “economic”? Justice Stevens essentially dismissed this question by resorting to that most versatile of all the weapons in the judicial armory—\textit{ipse dixit}, that is, it’s true because we say so. First, Justice Stevens adopted an extremely broad definition of the term “economics,” which he interpreted to include all “production, distribution, and consumption of commodities.”\footnote{Reserved Powers in the Second Half of the Twentieth Century 209} From this premise, it was but a brief, unobjectionable step to the conclusion that, because “there is an established, and lucrative, interstate market” for illegal marijuana, “prohibiting the intrastate possession . . . of [marijuana] . . . [w]as a rational . . . means of regulating commerce in that product.” Why the Gun-Free School Zones Act’s prohibition on possession of guns near schools could not likewise have been sustained as a rational means of regulating commerce in that product was not explained. (Ironically Stevens had, in his \textit{Lopez} dissent, made this very argument for the constitutionality of that Act.\footnote{Reserved Powers in the Second Half of the Twentieth Century 209})

To be sure, Justice Stevens also stressed that, whereas \textit{Lopez} and \textit{Morrison} had concerned claims that “a particular statute or provision fell outside Congress’s commerce power in its entirety,” Raich and Monson challenged “individual applications of a concededly valid statutory scheme.” Stevens explained that this distinction was “pivotal” because prior rulings established that “where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial,
individual instances of the class.” Unlike the CSA, the statutory provision the Court invalidated in *Lopez* was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” But Justice Stevens hopelessly, although perhaps quite intentionally, intermingled this second basis for distinguishing *Lopez* with the first, far weaker one—that marijuana possession was somehow “economic” but gun possession was not.

Thus, it fell to Justice Scalia, who concurred in the result but not in the majority opinion, to differentiate between these two arguments and provide a perhaps more compelling and certainly more novel elaboration of the stronger one. He stressed that congressional authority over “intrastate activities that are not themselves part of interstate commerce” could not be derived from the Commerce Clause alone. Rather, this authority also depended on the Constitution’s explicit conferral upon Congress of the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the other powers expressly enumerated in Article I, section 8—including, of course, the power to regulate interstate commerce. Justice Scalia insisted that the authority conferred by the Necessary and Proper Clause encompassed intrastate activity even if that activity neither “substantially affected” interstate commerce nor was itself “economic,” so long as governance of that activity was somehow “necessary to make a regulation of interstate commerce effective.” Accordingly, that simple possession was “itself a noneconomic activity [was] immaterial to whether it [could] be prohibited as a necessary part of a larger regulation.” It sufficed that the CSA’s prohibition of marijuana possession was an “appropriate means” of (that it was “reasonable adapted” to) “achieving the legitimate end of eradicating [proscribed narcotics] from interstate commerce.”

As the principal dissent (which was penned by Justice O’Connor and joined in substantial part by the Chief Justice and Justice Thomas) observed, the two problems with Justice Scalia’s analysis were that (1) he, like the majority opinion, failed to distinguish *Lopez* and (2) he assumed without demonstrating the necessity of a comprehensive ban on marijuana possession, however obtained for whatever purpose, as a means to eliminate the illegal interstate market in drugs. As to *Lopez*, the O’Connor dissent argued that the federal prohibition on possession of a gun near a school could have, like the CSA’s prohibition of marijuana possession, been explained as “an appropriate means of effectuating” the related federal criminal prohibition on selling or delivering firearms to a minor.

Justice Scalia rarely leaves an argument unanswered, and this debate proved no exception. But the answer he gave was telling in its inadequacy. Scalia first reiterated the *Lopez* Court’s bald assertion “that the statute at issue there was ‘not an essential part of larger regulation of economic activity.’” His sole effort to substantiate this claim, however, was to pronounce it “difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within
1,000 feet of schools (and nowhere else)." If so, this failure in imagination was unusual even for a lawyer. Central to the lives of most U.S. minors is school attendance; accordingly, it is hardly unimaginable that rigorous sanction of gun possession near schools would, in the aggregate, tend to diminish minors’ demand for such weapons in the interstate marketplace.

Justice O’Connor also pointed to an absence of “evidence that homegrown medicinal marijuana users constitute . . . a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.” In accentuating this failure of proof, Justice O’Connor came dangerously close to embracing a judicial requirement that “Congress . . . make particularized findings in order to legislate.” As Justice Stevens explained in his majority opinion, such “an exacting requirement [would] not only [have been] unprecedented, [but] also impractical.” A close reading of O’Connor’s dissent, however, answers this criticism, as she in fact assiduously avoided imposition of any additional procedural obligations on Congress. Rather, she expressly acknowledged that “[f]acts about substantial effects may be developed in litigation to compensate for the inadequacy of Congress’[s] findings; in part because” Raich came to the Court “from the grant of a preliminary injunction, there ha[d] been no such development” of the factual record. Ultimately, then, the debate between the Justices in the majority and the dissenters reduces to a disagreement about the extent to which the judiciary may or should independently assess disputed questions of legislative fact, in this case, whether prohibition of all intrastate possession of medicinal marijuana was required to carry into effect Congress’s policy of eliminating the illegal interstate market in drugs. For the six Justices sustaining the application of the CSA to Raich and Monson, Congress’s need to reach all intrastate possession was apparent and, thus, needed no substantiation. The dissenters were less credulous and would have required the government to bear the burden of satisfying their “empirical doubt.”

It seems that the nature of the relationship, if any, between intrastate medicinal possession and the illegal interstate market was, in part at least, in the eye of the judicial beholder.

Be that as it may, Justice Thomas persuasively summarized the more general jurisprudential significance of Raich as constituting yet another epitaph for judicial enforcement of the enumerated powers scheme:

Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

In light of the majority’s all-encompassing definition of “economics,”

the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison’s assurance to the
people of New York that the “powers delegated” to the Federal Government are “few and defined,” while those of the States are “numerous and indefinite.” …

One searches the Court’s opinion in vain for any hint of what aspect of American life is reserved to the States.152

The irony, of course, is that the nominally pro-federalism Rehnquist Court (albeit over the Chief Justice’s dissent) endorsed a reading of congressional power so broad as to be virtually unlimited when confronted with a case dividing the American political right-wing’s social conservative and libertarian constituencies. Whether a Court reconfigured by retirements and new appointments will prove any more constant in the limitation of Congress to its enumerated powers, and thereby protective of the reserved powers, only time will tell. The Supreme Court’s rulings over the last century leave little cause for optimism.

NOTES

1. U.S. Const., art. I, § 8, cl. 3.
2. See, e.g., Fry v. United States, 421 U.S. 542, 550 (1975) (Rehnquist, J., dissenting) (“The Tenth Amendment, the Court’s opinion in this case insists, does have meaning; but the critical question is how much meaning is left to it and the basic constitutional principles which it illumines.”); Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) (concluding that a federal statute subjecting state-owned enterprise to regulation constituted “such a serious invasion of state sovereignty protected by the Tenth Amendment that it” was incompatible “with our constitutional federalism” and warning that “[i]f all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment”); compare Perez v. United States, 402 U.S. 146, 158 (1971) (Stewart, J., dissenting) (concluding that a federal criminal loan-sharking statute exceeded the enumerated powers of Congress in part because “[t]he definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments”). See also Charles L. Black, Jr., Perspectives in Constitutional Law 25, 29 (rev. ed., 1970) (questioning whether “the federal system has any legal substance, any core of constitutional right that courts will enforce”) (emphasis added); Edward S. Corwin, “The Passing of Dual Federalism,” 36 Va. L. Rev. 1, 23 (1950) (observing that “today the question faces us whether the constituent States of the System can be saved for any useful purpose, and thereby saved as the vital cells that they have been heretofore of democratic sentiment, impulse, and action”). See generally Philip P. Frickey, “Lawnet: the Case of the Missing (Tenth) Amendment,” 75 Minn. L. Rev. 755, 755 (1991) (satirical parody recounting the author’s ill-fated quest to explain “the mysterious disappearance of the tenth amendment”; “It was there—in the Constitution, I mean—almost from the start. But nobody was ever really sure whether it said anything important, and what happened to it.”).
3. See supra note 2 (citing exemplary dissenting opinions).
4. See, e.g., Fry, 421 U.S. at 551 (Rehnquist, J., dissenting) (noting that the Court’s decisions in NLRB v. Jones & Laughlin Steel Corp. (1937) and United States v. Darby (1941) “free[d] both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause which had previously been used to deny both to the States and to Congress authority to regulate economic affairs”).
6. A similar uneasiness with the demise of the enumerated powers scheme may go part of the way toward explaining Professor Laurence Tribe’s otherwise surprising approval of the Court’s discovery of an implied federalism limit on national power. Compare Laurence H. Tribe, “Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services,” 90 Harv. L. Rev. 1065 (1977), and Laurence H. Tribe, “Contrasting Constitutional Visions: of Real and Unreal Differences,” 22 Harv. C.R.-C.L. L. Rev. 95, 99–100 (1987) (contending that the Ninth Amendment is “a uniquely central text in any attempt to take seriously the process of construing the Constitution”; yet simultaneously arguing that the justification of National League of Cities is not so much the text of the Tenth Amendment as it is “tacit postulates of states’ rights,” and concluding based on similar reasoning that, because implied inherent and inalienable rights presents the best interpretation of the “Constitutional plan as whole,” there should be “the same generous spirit of attention to text and structure” to warrant reading fundamental right into the Ninth Amendment as there is in discovering the rights of states qua states in the Tenth), with Thomas B. McAffee, “The Original Meaning of the Ninth Amendment,” 90 Colum. L. Rev. 1215, 1309 n. 351 (1990) (observing that the tendency to utilize the Ninth and Tenth Amendments, when the underlying arguments are based on structural analysis, “provides an unwitting tribute to the power of constitutional textualism,” considering that “even those who express great skepticism about the constraining power of text and history seem more comfortable thinking that they can point to a text that shelters their position”). Id. at 1311 (contending that a “structural” reading of the Ninth Amendment “offers scant help in justifying fundamental rights, like the modern right of privacy,” and “neither explains nor justifies the modern double-standard of judicial review in individual rights cases”). For a treatment of various arguments drawn from our system of federalism—and particularly of its long-run demise as a means to preventing overarching federal power—to support unenumerated fundamental rights, see Thomas B. McAffee, “The Federal System as Bill of Rights: Original Understandings, Modern Misreadings,” 43 Vill. L. Rev. 17 (1998).


14. Then-Justice Rehnquist once celebrated what he perceived as a commonality between his views and those of the second Justice Harlan on the subject of the First Amendment’s application to the states. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting) (“I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two immediately preceding occupants of my seat on the Court [Justices Jackson and Harlan], but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.”). See also Stephen M. Dane, “Ordered Liberty” and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan, 51 U. Cin. L. Rev. 545 (1982) (describing the second Justice Harlan as an avid devotee of the “state laboratory” view of federalism, a lone dissenter from what he perceived as the Warren Court’s consistent neglect of this value and of the virtues of

15. National League of Cities v. Usery, 426 U.S. 833, 836–37 (1976). The case was first argued before the Supreme Court in April 1975, but was then set down for reargument the following term, probably as one of the many close cases reargued in the wake of Justice Douglas’s disabling stroke. See id. at 840 n. 11; see generally William Cohen, “Justice in the Balance,” 81 Va. L. Rev. 927, 929 (1995) (reviewing John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. (1994)) (noting that “[i]n the ten months before [Douglas retired], the other Justices neutralized his vote by agreeing to have any case in which he cast the deciding vote reargued”).


17. Id. at 842–43 (quotation marks and citations omitted). Here Justice Rehnquist seized on and quoted the casual phrasing of Justice Marshall’s then-still-recent summary rejection (in a footnote) of petitioners’ Tenth Amendment argument in Fry v. United States, 421 U.S. 542 (1975). See also id. at 547 n. 7 (insisting that the Tenth Amendment, though a “truism,” was “not without significance” because “[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”). No doubt Justice Marshall neither foresaw nor desired a Tenth Amendment revival (he subsequently joined Justice Brennan’s dissent in National League of Cities). But it was his offhand sketch of the Tenth Amendment’s meaning that provided Justice Rehnquist with language linking what became the States Qua States doctrine with constitutional text that was seemingly inapposite. See John R. Vile, “Truism, Tautology, or Vital Principle? The Tenth Amendment Since U.S. v. Darby,” 27 Cumb. L. Rev. 445, 447 n. 1 (1996) (quoting Fry, 421 U.S. at 547 n. 7) (noting the irony in the fact that “Marshall’s statement” in Fry “has been used to pave the way for subsequent expansion of the Tenth Amendment”).

18. See, e.g., George D. Brown, “State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon,” 74 Geo. L.J. 363, 373 (1985) (noting that “[a] principal criticism of National League of Cities is the inherent weakness of the decision’s textual basis, notably the heavy reliance on the tenth amendment” and concluding that “reading into the [amendment’s] words a doctrine of sovereignty-based immunity from exercises of the national government’s delegated powers may be stretching the language beyond any reasonable bounds”); Steven G. Gey, “The Myth of State Sovereignty,” 63 Ohio St. L.J. 1601, 1635 (2002) (“It was . . . a mystery where, precisely, in the Constitution the [National League of Cities] Court discovered this new rule of state sovereign immunity from the operation of general federal statutes.”); Rappaport, supra note 12, at 827–30 (explaining why the text of the Tenth Amendment does not support the result in National League of Cities or in subsequent cases purportedly based on the Amendment); Vile, supra note 17, at 486 (noting that “Rehnquist clearly believed that the Tenth Amendment said more than appeared on its face”).

19. To be sure, Justice Rehnquist concluded his statement of the case for constitutional invalidity by pronouncing that “We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, sec. 8, cl. 3.” National League of Cities, 426 U.S. at 852. But as the treatment in the text
demonstrates the whole of Rehnquist’s discussion makes it unmistakably clear that the Court’s ruling was not an effort to enforce the enumerated powers doctrine. Indeed, the very awkwardness of this sole effort to tie the ruling to the limits of Congress’s Article I authority evidences some awareness on Rehnquist’s part of the fundamental tension between the Court’s new States Qua States doctrine and both the literal language and original purpose of the Tenth Amendment. In other words, the States Qua States doctrine, which sought to protect “state sovereignty” by immunizing state governments from at least some forms of federal regulation, promised no constraints on congressional power to regulate private persons (and thus no protection for the reserved powers).

21. Id. at 860, 867 (Brennan, J., dissenting).
22. Id. at 874 (Brennan, J., dissenting); see also id. at 880 (“[T]here is an ominous portent of disruption of our constitutional structure implicit in today’s mischievous decision.”).
23. Id. at 879.
24. Id. at 867, 871–72, & 879.
26. Id. at 876.
29. Id. at 880. Justices White and Marshall joined Justice Brennan’s dissent. Justice Stevens, then the Court’s most junior member, filed a separate dissent, in which he noted that he had “a great deal of sympathy for the views expressed by the [majority],” because he believed the 1974 amendments to the FLSA to be “unwise.” As he explained, “the proposition that regulation of the minimum price of a commodity—even labor—will increase the quantity consumed is not one that I can readily understand.” But of course “[t]hat concern, applie[d] with even greater force to the private sector of the economy where the exclusion of the marginally employable [did] the greatest harm and, in all events, merely reflect[ed] Justice Stevens’s views on a policy issue which had been firmly resolved by the branches of government having power to decide such questions.” Accordingly, because in his view his “disagreement with the wisdom of this legislation [ought] not … affect [his] judgment with respect to its [constitutional] validity,” he (with some apparent reluctance) dissented from the Court’s ruling. Id. at 880–81 (Stevens, J., dissenting).
31. In the interim, Justice O’Connor had replaced Justice Stewart. As both the retiring Justice and his replacement supported the holding of National League of Cities, this appointment left the Court precariously balanced on this issue and made Justice Blackmun’s switch decisive. See also Mark Tushnet, “Why the Supreme Court Overruled National League of Cities,” 47 Vand. L. Rev. 1623, 1626–34 (1994) (discussing the events culminating, first, in the Court’s decision to order a second round of briefing and argument in
Garcia—addressed to the following question: “Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, should be reconsidered?”— and, ultimately, in the creation of a majority in support of expressly overruling National League of Cities).

33. Id. at 546.
34. Here Justice Blackmun relied heavily on Professor Wechsler’s widely celebrated argument that “political safeguards”—such as the representation of states in the composition of the federal government—made judicial scrutiny of alleged congressional intrusions upon the proper domain of state governments not only superfluous but mischievous. See Wechsler, supra note 27, at 543. In the three decades following Professor Wechsler’s publication of his now famous thesis, Professors Choper and La Pierre had revisited, updated, and elaborated it. See Jessie H. Choper, Judicial Review and the National Political Process 175–184 (1980); D. Bruce La Pierre, “The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation,” 60 Wash. U. L.Q. 779 (1982). Justice Blackmun relied on the work of all three scholars. See Garcia, 469 U.S. at 551 n.11.
35. Id. at 547.
36. See Garcia, 469 U.S. at 557–58 (Powell, J., dissenting) (acknowledging “numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled,” but maintaining nonetheless that “[t]here ha[d] been few cases . . . in which the principle of stare decisis and the rationale of recent decisions were ignored as abruptly as we now witness”).
37. See e.g., id. at 559–60 (“Whatever effect the Court’s decision may have in weakening the application of stare decisis, it is likely to be less important than what the Court has done to the Constitution itself.”).
38. Id. at 571.
39. Id. at 567–68 & 570.
40. Id. at 572–73. Justice Rehnquist, in addition to joining the dissents of both Justice Powell and Justice O’Connor, also added a brief dissenting opinion of his own. In that single-paragraph dissent, Justice Rehnquist gave voice to his expectation that the setback reflected in Garcia was merely temporary, as “the principle [of National League of Cities] will, I am confident, in time again command the support of a majority of this Court.” Id. at 579–80 (Rehnquist, J., dissenting).
43. Garcia, 469 U.S. at 581 (O’Connor, J., dissenting) (emphasis in original).
44. Id. at 583 (emphasis added).
45. Id. at 583–84 (emphasis in original).
46. Id. at 584 (internal citation omitted).
47. Id. at 585 (emphasis in original).
48. Id. at 588.
49. Id. at 588–89.
51. Id.
52. Id. at 175.
53. Id. at 157–58, 160.
54. Id. at 156.
55. U.S. Const., amend. I.
57. Id. at 155 & 159.
58. Compare Rappaport, supra note 12, at 827 & n. 29 (concluding that “under the ordinary principles that govern the limits of Congress’s enumerated powers, the law commandeering the state legislature in New York was within Congress’s authority” and rejecting as “untenable” what he viewed as the Court’s “alternative” argument that “the power to commandeer was not within Congress’s enumerated powers”).
60. See id. at 202–03 (White, J., dissenting) (arguing that Justice O’Connor’s reliance on the Court’s prior rulings in Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981), and FERC v. Mississippi, 456 U.S. 742, 761–762 (1982) was misplaced; in his view, the language from Hodel that O’Connor seized upon was “classic dicta,” whereas the cited passage from the FERC case was taken out of context); Id. at 210 (Stevens, J., dissenting) (“Nothing in the history [of the Constitution’s drafting and ratification] suggests that the Federal Government may not . . . impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.”). See also id. at 211 (“The notion that Congress does not have the power to issue ‘a simple command to state governments to implement legislation enacted by Congress,’ is incorrect and unsound.”) (quoting majority opinion).
61. See, e.g., Deborah Jones Merritt, “The Guarantee Clause and State Autonomy: Federalism for a Third Century,” 88 Colum. L. Rev. 1 (1988) (arguing that Article IV, section 4, of the Constitution, properly interpreted, limits the power of the federal government to regulate or commandeer state governments); Rappaport, supra note 12, at 830–48 (arguing that the original understanding of the word “state,” within the meaning of its numerous appearances in the text of the Constitution, limited the power of the federal government to regulate or commandeer state governments).
62. Printz v. United States, 521 U.S. 898, 902–03 (1997). See also id. at 903 (“The Brady Act create[d] two significant alternatives to the . . . scheme” described in the text. “A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, § 922(s)(1)(C), or if state law provides for an instant background check, § 922(s)(1)(D).”)
63. Printz, 521 U.S. at 903 (quoting relevant provision of the Brady Act, then codified at 18 U.S.C. § 922(s)(2)). A separate provision indicated that “any person who knowingly violates [the section . . . amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both.” Printz, 521 U.S. at 904 (quoting 18 U.S.C. § 924(a)(5)).
64. Printz, 521 U.S. at 935.
65. Id. at 905.
66. Id. at 919 (internal quotation marks and citation omitted).
67. Id. at 935–36 (O’Connor, J., concurring).
68. Id. at 941–42 (Stevens, J., dissenting).
69. Id. at 942 n. 2.
71. Id. at 149 (emphasis added).
72. Id. at 151.
73. Id.
74. See generally Erwin Chemerinsky, “Right Result, Wrong Reasons: Reno v. Condon,” 25 Okla. City U. L. Rev. 823, 823–24, & 828–32 (2000) (questioning the Court’s efforts to distinguish Printz and arguing that “the Court missed an important opportunity for changing or at least clarifying the law regarding the Tenth Amendment and federalism”).

75. Printz, 521 U.S. at 936–37 (Thomas, J., concurring) (internal quotation marks and citations omitted). For a fuller discussion of Justice Thomas’s call for a restoration of a meaningful enumerated powers doctrine, see text accompanying notes 103–05, infra.

76. U.S. Const., amend. X.


78. Id. at 848 (“[T]he [Tenth] Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which ‘reserved’ powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.”). Accord Bybee, supra note 8, at 566.

79. Term Limits, 514 U.S. at 848 (Thomas, J., dissenting).


81. Term Limits, 514 U.S. at 802 (majority opinion) (quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 627 (3d ed., 1858)).

82. Id. at 851–52 (Thomas, J., dissenting); see also id. at 856 (acknowledging disagreement with Justice Story); Id. at 868–69 (same).

83. Id. at 853 n. 4 (Thomas, J., dissenting).


88. See U.S. Const., amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

89. Alden v. Maine, 527 U.S. 706, 713–15 (1999) (internal quotation marks and citation omitted); see also id. at 758 (“When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States.”). At least one scholar has argued that an additional source of a federalism-based limitation, supportive of both Alden and the prior decision in Printz, was the “propriety limitation” suggested by the Necessary and Proper Clause. See J. Randy Beck, “The New Jurisprudence of the Necessary and Proper Clause,” 2002 U. Ill. L. Rev. 581, 640 (2002). See also J. Randy Beck, “The Heart of Federalism: Pretext Review of Means-End Relationships,” 36 U.C. Davis L. Rev. 407 (2003).

90. Alden, 527 U.S. at 761 (Souter, J., dissenting).
91. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (summarizing the stipulated facts concerning the motel’s operations).

92. Id. at 258.


94. See Heart of Atlanta Motel, 379 U.S. 257 (“Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.”).


96. United States v. Lopez, 514 U.S. 549, 558–59 (1995) (internal citations omitted). See also id. at 559 (conceding that the Court’s “case law has not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause,” and clarifying that, because a “relatively trivial” impact ought not suffice, “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce”); Id. at 558–59 (acknowledging broad congressional authority over both the “channels” and the “instrumentalities” of interstate commerce, but then swiftly advancing to the conclusion that neither of these two categories were relevant to § 922(q), which therefore could be upheld only if it were deemed a regulation of an activity that substantially affects interstate commerce”).

97. Id. at 559–61 (reviewing cases and concluding that § 922(q) could not, “therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”). The Chief Justice thus dispensed with the so-called aggregation principle established by the Court in Wickard v. Filburn, 317 U.S. 111 (1942).

98. Lopez, 514 U.S. at 562 (emphasis added).

99. Id. at 563 (observing that “to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here”). For criticism by one of the present volume’s authors of judicial reliance in constitutional cases on perceived gaps in the formal legislative record, see A. Christopher Bryant & Timothy J. Simeone, “Remanding to Congress: The Supreme Court’s New ‘On the Record’ Constitutional Review of Federal Statutes,” 86 Cornell L. Rev. 328 (2001). See also William Buzbee & Robert A. Schapiro, “Legislative Record Review,” 54 Stan. L. Rev. 87 (2001) (questioning wisdom and legitimacy of legislative record review); Ruth Colker & James J. Brudney, “Dissing Congress,” 100 Mich. L. Rev. 80 (2001) (same); Philip P. Frickey & Steven S. Smith, “Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,” 111 Yale L.J. 1707 (2002) (same). But see Neal Devins, “Congress as Culprit: How Lawmakers Spurred on the Court’s Anti-Congress Crusade,” 51 Duke L.J. 435, 453 (2001) (asserting that Congress virtually invited Supreme Court invalidation of numerous federal statutes and observing that “in several cases restricting Congress’s Section 5 [of the Fourteenth Amendment] powers, Congress’s factfinding was too limited or nonexistent”).

100. Lopez, 514 U.S. at 564.
101. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Justice Kennedy also observed:

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, compare New York v. United States, 505 U.S. 144 (1992), or to organize its governmental functions in a certain way, compare FERC v. Mississippi, 456 U.S. at 781 (O'Connor, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant.

*Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). To a great extent, the quoted language epitomizes the reasons for the failure (to date, at least) of the Court’s recent efforts to reinvigorate federalism. The Court has elevated matters of etiquette over questions concerning the proper division of authority between the federal government and the states. This inversion had by the time *Lopez* was decided become so entrenched that Justice Kennedy thought it appropriate to assert without explanation, as though it were obvious, that congressional impertinence toward state governments was a more severe “intrusion on state sovereignty” than congressional usurpation of the reserved powers. But the Tenth Amendment stands for the mirror-opposite conclusion and therefore compels profound suspicion of recent judicial efforts to substitute a constitutional etiquette of federal-state relations for the enumerated powers scheme central to the founders’ Constitution.


103. Id. at 584 (Thomas, J., concurring).

104. Id. at 589. See also id. at 601 n. 8 (“Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.”).

105. Id. at 602.

106. See, e.g., id. at 604 (Souter, J., dissenting) (asserting that “[t]he practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint,” which is especially appropriate insofar as congressional regulation under the Commerce Clause is concerned because “[i]n judicial review under the Commerce Clause, [this judicial deference] reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices.”) (internal quotation marks and citations omitted); Id. at 616–17 (Breyer, J., dissenting) (“Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words ‘rational basis’ capture this leeway.”).

107. See id. at 608 (Souter, J., dissenting) (“[It] seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring.”).

108. See id. at 619–23 (Breyer, J., dissenting).

109. See id. at 564 (majority opinion). Justice Breyer did rather tepidly suggest that perhaps some aspects of family life might be beyond congressional reach even under his analysis because “the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions.” Id. at 624 (Breyer, J., dissenting) (emphasis
added). But on this score at least the Chief Justice seemed to have the decisive last word when he observed that Justice Breyer’s “suggested limitations, when viewed in light of the dissent’s expansive analysis, are devoid of substance.” Id. at 565 (majority opinion).

110. See Chapter 5, notes 108–13 and accompanying text.


112. Lopez, 514 U.S. at 630 (Breyer, J., dissenting).

113. Id. at 561 (majority opinion).


115. See Glenn H. Reynolds & Brannon P. Denning, “Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?” 2000 Wis. L. Rev. 369, 385 n. 85, & 396 (2000) (noting that the Fourth Circuit’s 1999 decision invalidating the civil-remedy provision of the Violence Against Women Act was the first U.S. Court of Appeals ruling “to hold a federal statute unconstitutional based on a Lopez challenge” and that previously the Supreme Court had consistently “denied certiorari in cases that would have clarified the scope of Lopez”); see also Brannon P. Denning & Glenn H. Reynolds, “Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts,” 55 Ark. L. Rev. 1253 (2003).


117. Morrison, 529 U.S. at 628–29 (Souter, J., dissenting). Indeed, the Conference Committee Report on VAWA included express, detailed findings, including the determination that

The Court also held that VAWA’s civil-remedy provision was beyond the scope of the authority granted Congress by section 5 of the Fourteenth Amendment. *Morrison*, 529 U.S. at 619–27 (majority opinion).

*Id.* at 613.

See generally Chapter 5. Compare Bybee, supra note 8, at 563 (any effort “to enumerate state powers . . . without reference to the enumerated powers of Congress” is necessarily “doomed from the start”).


See *Morrison*, 529 U.S. at 643 (Souter, J., dissenting) (“It was obvious in *Wickard* that growing wheat for consumption right on the farm was not ‘commerce’ in the common vocabulary, but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially.”) (footnote omitted). Accord, Grant S. Nelson & Robert J. Pushaw, Jr., “Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues,” 85 *Iowa L. Rev.* 1, 121 (1999) (“growing [wheat] for one’s own use without the intent to sell is simply not commerce”).

Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court’s thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam), and *Miller v. California*, 413 U.S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long.” *Morrison*, 529 U.S. at 654–55 (Souter, J., dissenting).

Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The ‘provisions of this article,’ to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress’ power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that the ‘fundamental concept of liberty embodied in [the Fourteenth Amendment’s Due Process Clause] embraces the liberties guaranteed by the First Amendment.’

129. In the years between *Smith* and *Flores* the Court had clarified that the Free Exercise Clause also forbade facially neutral laws that were, in fact, enacted for the purpose of harassing unpopular religious views. See *Church of the Lukumi Babalu, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked as well as overt.").


133. See Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 35–37 & n. 37 (1999) (concluding that, because the “pre-Flores case law teaches that judges should refrain from second-guessing congressional responses to perceived problems of discrimination,” Justice Kennedy’s reliance on gaps in RFRA’s legislative record to distinguish the voting rights cases “may be the Flores majority’s most questionable argument”); id. at 35 (observing that under the pre-Flores, section 5 case law, RFRA “appeared plainly constitutional”); but see Eugene Gressman, “RFRA: A Comedy of Necessary and Proper Errors,” 21 *Cardozo L. Rev.* 507, 519–25 (1999) (defending *Flores* as an application of the Necessary and Proper Clause).

134. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (rejecting the claim that Congress had power under section 5 of the Fourteenth Amendment to enact provisions of the Americans with Disabilities Act authorizing private persons to sue their state employers in federal court); *Morrison*, 529 U.S. 598 (2000) (holding that the civil-remedy provision of the Violence Against Women Act exceeded Congress’s section 5 authority to enforce the Fourteenth Amendment); *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (rejecting the claim that Congress had power under section 5 of the Fourteenth Amendment to enact provisions of the Age Discrimination in Employment Act authorizing private persons to sue their state employers in federal court); *Coll. Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (rejecting the claim that Congress had power under section 5 of the Fourteenth Amendment to enact the Trademark Remedy Clarification Act, which abrogated state sovereign immunity from trademark suits); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (rejecting the claim that Congress had power under section 5 of the Fourteenth Amendment to enact a 1992 amendment to federal patent laws, which expressly abrogated the States’ sovereign immunity from claims of patent infringement); but see Nev. Dep’t of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) (sustaining provisions of the Family Medical Leave Act authorizing suit against state employers as a valid exercise of Congress’s section 5 authority to enforce the Fourteenth Amendment). See also Ellen D. Katz, “Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts,” 101 *Mich. L. Rev.* 2341 (2003) (seeking both (1) to explain the apparent tension between, on the one hand, *Flores* and its progeny and, on the other hand, the Rehnquist Court’s professed commitment to the Voting Rights Act precedents, and (2) to place this tension in historical perspective); Robert C. Post, “The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” 117 *Harv. L. Rev.* 4, 11–41 (2003) (in-depth analysis of *Hibbs*, in particular, but also providing a good overview of the cases linking it back to *Flores*).

135. Raich and Monson also argued that applying the CSA to their conduct violated the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the
doctrine of medical necessity. The Supreme Court expressly declined to reach the substantive due process and medical necessity arguments. Gonzales v. Raich, 125 S. Ct. 2195, 2215 (2005).

136. See Raich, 125 S. Ct. at 2199–2200; Resp’ts Br. at 4–5, Raich (No. 03-1454).
137. Raich, 125 S. Ct. at 2201 (quoting Raich v. Ashcroft, 352 F.3d 1222, 1227 (2003)).
138. Raich, 125 S. Ct. at 2211 (quoting Webster’s Third New International Dictionary 720 (1966)).

139. See Lopez, 514 U.S. at 602–03 (Stevens, J., dissenting) (observing that “[g]uns are ... articles of commerce” and that “[t]heir possession is the consequence, either directly or indirectly, of commercial activity’’); see also Raich, 125 S. Ct. at 2225 (O’Connor, J., dissenting) (“Lopez makes clear that possession is not itself commercial activity.”).

140. Raich, 125 S. Ct. at 2209 (majority opinion) (internal quotation marks and citation omitted).
141. Id. (quoting Lopez, 514 U.S. at 561).
143. Raich, 125 S. Ct. at 2216 (Scalia, J., concurring in the judgment).
144. Id. at 2219.
145. Id. at 2217 & 2219 (internal quotation marks and citations omitted).
147. Raich, 125 S. Ct. at 2219 n. 3 (Scalia, J., concurring in the judgment) (quoting Lopez, 514 U.S. 549, 561 (1995)) (emphasis added by Justice Scalia).

148. To be sure, Scalia also noted that, in Lopez, “the Government [had] not attempt[ed] to justify the statute on the basis of that relationship.” Raich, 125 S. Ct. at 2219 n. 3. Still, it would diminish Lopez to an obscurity to read it as ultimately amounting nothing more than the product of incomplete advocacy in support of the Act therein invalidated.
149. Raich, 125 S. Ct. at 2208 & n. 32 (majority opinion).
150. Id. at 2228 (O’Connor, J., dissenting).
151. Id. at 2233 (Thomas, J., dissenting) (arguing that “Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power” and insisting that “Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.”) (internal citation omitted).
152. Id. at 2236–37 (quoting The Federalist No. 45, at 313 (James Madison) (J. Cooke ed., 1961)).
The Ninth Amendment and Substantive Due Process as Modern Phenomena

In the modern era, the Supreme Court has continued a practice, going back to at least the turn of the twentieth century, of imposing unenumerated fundamental rights as limits on the powers of government. As a general matter, perhaps because this practice was associated with the era in which the Court engaged in the controversial practice of using fundamental rights to limit the power of government to regulate the economy, many modern scholars have been enthusiastic about devising an alternative justification for this practice. On the other hand, although it has flirted with other justifications, the modern Supreme Court has continued to rely on the Due Process Clause to justify its fundamental rights jurisprudence. Because modern constitutional law scholars have widely embraced the view that modern fundamental rights doctrine would have been most appropriately justified by reliance on the Ninth Amendment, both the Ninth Amendment and the Due Process Clause will be treated in what follows.

THE NINTH AMENDMENT AS A SOURCE FOR FINDING FUNDAMENTAL RIGHTS

The Ninth Amendment and Fundamental Rights in the Era before Griswold

The original meaning of the Ninth Amendment was understood and accepted throughout the nineteenth century. The most authoritative of the nineteenth-century commentators, Justice Joseph Story, despite occasional claims to the contrary, clearly and unequivocally read the Ninth Amendment as a guarantee of the limited, enumerated powers scheme set forth in Article I. According to Story, the Ninth Amendment “was introduced to prevent a perverse or ingenious misapplication of the maxim ‘that an affirmation in particular cases implied a negative in all others’ or ‘that a negation in particular cases implies an affirmation in all others.’” Story concluded that the Ninth Amendment
“was undoubtedly suggested by the reasoning” in Federalist No. 84, in which Alexander Hamilton expressed concerns that a bill of rights would state “exceptions to powers which are not granted” and “on this very account, would afford a colorable pretext to claim more than were granted.” More than fifteen years ago, one of the present authors concluded that “Story reads the final text of the Ninth Amendment as a structural provision that secures residual rights preserving the system of limited powers.” That interpretation of Story’s work has never been challenged, let alone criticized. The other leading nineteenth-century commentator, Thomas M. Cooley, agreed that the Ninth Amendment was designed to confront Hamilton’s concern that stating exceptions to power “would afford a tolerable pretext to claim more than were granted.”

In the twentieth century, however, the Supreme Court hesitated to abandon the search for implied fundamental rights limits on government in favor of a complete acceptance of the doctrine of popular sovereignty. At the same time, the Court’s discovery of implied fundamental rights, and its application of the sharpest forms of judicial scrutiny on their behalf, became a source of real controversy throughout the twentieth century. One of the uses of the Ninth Amendment has been to supply a new historical, and even textual, rationale for the practice of finding unenumerated fundamental rights.

Ironically, given his opposition to the practice, one of the important historical sources for this justification was Professor Corwin’s famous article on the “higher law” background of American constitutional law. As we moved away from the New Deal Court crisis, and especially as the Court moved away from its reliance on the Lochner era’s economic substantive due process, scholars began to look for alternative rationales for an expansive judicial role in discovering and defining noneconomic personal rights. It was thus a legal scholar who in 1962 suggested, somewhat prophetically, that “we may be approaching an era where human dignity and liberty will require the protection of rights other than those contained in the first eight amendments.” The same scholar concluded that the litigation brought about by Connecticut’s birth control laws supplied the opportunity “for a reconsideration of basic judicial attitudes toward the individual’s rights in a free society.” And despite the controversy prompted by the modern Court’s reliance on unenumerated fundamental rights, it remains true that legal scholars have been among the most important advocates of an expansive judicial role in finding and enforcing nontextual human rights. Indeed, it is fair to say that it is primarily the work of legal scholars that has brought us the situation in which “the central myth of modern American constitutional history is the idea that the founders of the Constitution equated inalienable natural rights with legal and constitutional rights.”

The Era That Commenced with Griswold

It has been contended that before the Supreme Court decision in Griswold v. Connecticut (1965), there had been a grand total of five law review articles,
one book, and four Supreme Court cases that had addressed the Ninth Amend-
ment.16 Before 1965, the idea that the Ninth Amendment could justify the
Court in finding unenumerated fundamental rights had never been accepted by
a single member of the Supreme Court.17 But with Justice Goldberg endors-
ing the “unenumerated rights” reading of the amendment in a concurring opinion,
and using it to justify the Court’s application of the unenumerated “right of
privacy” as part of the “liberty” protected by the Fourteenth Amendment, as
well as heightened scrutiny of laws impacting on this liberty interest, a new
era of justification of an open-ended judicial role in discovering and securing
fundamental human rights commenced.18

Concurring in the Supreme Court’s decision in Griswold, Justice Goldberg
found, based on “the language and history of the Ninth Amendment,” that
“the concept of liberty protects those personal rights that are fundamental,
and is not confined to the specific terms of the Bill of Rights.”19 According
to Justice Goldberg, the amendment “was proffered to quiet expressed fears
that a bill of specifically enumerated rights could not be sufficiently broad to
cover all essential rights and that the specific mention of certain rights would
be interpreted as a denial that others were protected.”20 In support of this
claim, Goldberg asserted that “Alexander Hamilton was opposed to a bill of
rights on the ground that it was unnecessary because the Federal Government
was a government of delegated powers” that “was not granted the power to
intrude upon fundamentally personal rights.”21

The question obviously raised is whether Hamilton was asserting that the
“delegated powers” were drafted so as not to include authority to intrude on
particular rights of interest or whether he was announcing the much broader
principle that Congress could not, based on the jurisprudential assumptions
underlying American constitutionalism, intrude on what social contract theory
recognized as natural rights. This latter interpretation would be plausible, of
course, only if the Framers expected constitutional interpreters to see these
rights as implicit legal limitations on the powers the people might grant to
government—natural rights that the people already had given to them by God,
or nature, but certainly not by government—and brought with them when they
joined the social contract.22 But we have already seen that one of the Consti-
tution’s key defenders, James Wilson, freely acknowledged that if Congress
had been granted a power “to regulate literary publications,” it would have
been essential “to stipulate that the liberty of the press should be preserved
inviolate.”23 We have no reason to think that Hamilton was contradicting
Wilson,24 and the inclusion in the Bill of Rights of a guarantee of a right to
trial by jury in civil cases reflects that most who ratified the Constitution
accepted Wilson’s basic assumption—that the granting of a general power, to
conduct trials in federal courts, for example, would logically include inciden-
tal congressional power to decide procedural questions, such as whether the
trial would have to be by jury, regardless of its impact on a traditional right.
This is why most recognized the need for additional limitations on congress-
ional authority in a bill of rights.25
In support of his bold claim, Goldberg also quoted Hamilton as asserting that a bill of rights would “contain various exceptions to power which are not granted,” and that this would “afford a colourable pretext to claim more than were granted.” But, of course, the fear that a bill of rights would lead to an evisceration of the enumerated powers scheme—enabling the government to “claim more than were granted”—and thereby adversely affect the rights “retained” by the people, is precisely the interpretation of the Ninth Amendment that Goldberg’s opinion has always been presumed to refute. In addition, Goldberg quoted Madison characterizing as “one of the most plausible arguments I have heard against admission of a bill of rights” the position that “those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.”

But James Madison had previously contended that because of the enumerated powers scheme, “all that are not granted by the constitution are retained; and that the constitution is a bill of powers, the great residuum being the rights of the people.”

Madison had also clarified that Federalists defenders of the Constitution had contended that “a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government.” Madison, moreover, had been on the committee appointed by the Virginia ratifying convention to draft proposed amendments to the Constitution. The proposed amendment that prohibited interpreting the Constitution “to extend the powers of Congress,” and affirmed the legitimacy of construing limits “as making exceptions to the specified powers” or “as inserted merely for greater caution” is the forerunner of the Ninth Amendment. When it was suggested that a new version of the amendment, the one proposed by Congress that referred to rights “reducible [sic] to no definitive certainty,” it was Madison who characterized the proposed distinction, between the original Virginia language and Congress’s proposed amendment, as “fanciful” and asserted that the two different wordings of the amendment would successfully secure the same thing—so long as the Constitution’s drafters had stated the enumerated powers so that one could draw a line “between the powers granted and the rights retained.” Madison’s statement clarifies that to read the Ninth Amendment as a structural guarantee, supplying additional security against misconstruction, secures rights by protecting the enumerated powers scheme, and does not, contrary to the suggestions of Justice Goldberg and various commentators, presume that the clause “is intended to be without effect” (Marbury v. Madison, 1803).

The Modern Era of Fundamental Rights—the Contribution of Scholars

As discussed, one appeal of the Ninth Amendment was that it supplied an alternative rationale, and an alternative text, to the one relied on during the Lochner era. There was, however, a downside as well. Early in the modern fundamental rights era, John Hart Ely objected to the Supreme Court’s
decision in Roe v. Wade (1973) on the ground that the Court had basically ignored the Constitution’s Framers. According to Ely, the Court had created a “super-protected right” that could not be derived from text, history, or even “any general value derivable from the provisions they included.”35 Ely objected that the Constitution “has little to say about contract, less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer.”36

In making the inevitable comparison between Roe and Lochner,37 moreover, Ely pointed out that in the Lochner era the Court found its rationality test not met in various cases based on its conclusion that the state had failed to show (1) empirically that the challenged law actually furthered the legitimate state interest, or (2) that the state’s legislative goals were constitutionally permissible.38 Ultimately, the most serious problem with the rational basis test during the Lochner era is that “they misapplied it.”39 The good news, one might say, is that the Lochner era decisions “did us the favor of sowing the seeds of their own destruction.”40 By contrast, in Roe, “the relative importance of a mother’s opportunity to live the life she has planned and a fetus’s opportunity to live at all, can be labeled neither wrong nor right.”41 With Roe, says Ely, it is as if the Court reasoned “that since Lochnering has so long been standard procedure, ‘just one more’ (in a good cause, of course) can hardly matter.”42

Just two years later, however, Professor Grey answered Ely’s analysis and centered the response on the judicial practice that Grey contended was justified historically and textually in the Ninth Amendment.43 And within a few short years, a number of legal scholars concurred that the founding generation was so deeply committed to the idea of natural and inalienable rights, they drafted the Ninth Amendment to ensure that the written Constitution would not serve as a barrier to the recognition of a gradually unfolding set of rights as, over time, we discovered their significance.44 As the debate over originalism heated up, another large group of scholars contended that the text of the Constitution authorized courts to construe the document as establishing abstract moral norms from which courts might legitimately find rights not specifically named in the text.45 And as the years have passed, the view that the text of the Constitution authorizes the discovery of fundamental rights, whether named in the text or not, has gained new adherents.46

Just as legal scholars effectively generated the Goldberg concurrence, since 1965 a veritable cottage industry of published works has been lending support to the project Justice Goldberg set out in Griswold.47 Indeed, it is accurate to say that the defense of the modern Supreme Court’s role in elaborating unenumerated fundamental rights has been dominated by legal scholars who have been persuaded that this is one of the Court’s most vital tasks.48 Provisions that are “conspicuous for their apparent lack of precise content—the due process clause, the Ninth Amendment, are overwhelmingly the focal points of attention in the constitutional community.”49 The result has been a “reconception of the Constitution” that permits “modern decisions to be
simultaneously connected to and detached from original notions and intentions.”

We thus confront a vision of the Constitution “as expressing ‘broad and abstract principles of political morality’—principles whose ‘scope is breathtaking.’”

Although unwritten constitutionalism remains controversial—both among those who would “limit” the Court to interpreting the written Constitution and among those who perceive the very term, interpretation, as rooted in an unduly restrictive conception of what it means to implement the written Constitution—it remains a popular way to justify the modern Court’s expansive role. Considering that legal scholars were at least acquainted with the Ninth Amendment and the history of its adoption, it is remarkable that Justice Goldberg’s use of the amendment has been treated with such kid gloves. And it is fair to say that enthusiasm for using the amendment to justify an expansive judicial role in developing the idea of unwritten fundamental rights has simply expanded over time. It was legal scholars, first and foremost, who turned acceptance of the unenumerated rights reading of the Ninth Amendment into a litmus test for the Senate’s approval of a president’s nominee for a Supreme Court Justice. And it is now more than ten years since a sophisticated legal scholar asserted, in response to a symposium on the Ninth Amendment in which its meaning, as set forth by Justice Goldberg, had basically gone unchallenged, “the preliminary debate over the meaning of the ninth amendment is essentially over.” It is a testimony to how little we had looked at the history of the ratification of the Constitution that such a statement could have been made.

Defending the Griswold Reliance on the Ninth Amendment

Interestingly, while the most common defense of Justice Goldberg’s view has been based on the assumption that the traditional reading of the Ninth Amendment, emphasizing the limited powers scheme, renders the Ninth Amendment superfluous and utterly redundant of the Tenth, perhaps the next most common defense of the “unenumerated rights” interpretation has been the view that both the Ninth and Tenth Amendments serve the purpose of securing unnamed fundamental rights. Surprisingly enough, although the two interpretations are irreconcilable, at least two commentators have managed to defend both. Although some would find unenumerated fundamental rights to be uniquely secured by the Ninth Amendment, it has become increasingly common for commentators to attribute such a result not only to the Ninth Amendment, but, at least additionally, to the Tenth Amendment, or even the Necessary and Proper Clause.

Rights and Federalism

Yet even when the federal system is understood as it has been traditionally, it is immediately understandable why the Tenth Amendment was the single
provision of the federal Bill of Rights that was proposed by every state ratifying convention that proposed amendments to the federal Constitution. 60 “The Preamble and the Tenth Amendment are perfect bookends, fittingly the alpha and omega of the Founders’ (revised) Constitution.” 61 An important advocate of a federal Bill of Rights, Samuel Adams, suggested that a provision similar to what would be the Tenth Amendment, was “a summary of a bill of rights, which gentlemen are anxious to obtain.” 62 The powers “reserved” by the Tenth Amendment, as well as the rights “retained” by the Ninth, referred to all the rights and interests retained by the people collectively, as well as by the states, that would remain unaffected once Congress had acted consistently with the limited grants of power extended to it by the Constitution. It was this state and collective focus that explains why Patrick Henry, another strong advocate of a federal Bill of Rights, could insist “that a general provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government.” 63

Advocates of the redundancy argument, moreover, have failed to note that the Virginia convention recommended both an amendment that parallels the Tenth Amendment and one that forbid an inference of an intent “to extend the powers of Congress” from the inclusion of limiting provisions. 64 One ought at least to consider why the likes of James Madison and James Wilson, as well as anti-Federalist critics of the proposed Constitution, Patrick Henry and George Mason, all would have supported each of these proposed amendments. Under its traditional interpretation, the Ninth Amendment serves the unique function of safeguarding the system of enumerated powers—and the rights secured thereby—against the threat arguably presented by the enumeration of limitations on national power. It “warns readers not to infer from the mere enumeration of right in the Bill of Rights that implicit federal power in fact exists in a given domain.” 65 So if the government contended that it held a general power to regulate the press as an inference from the First Amendment, or contended that it held a general police power by virtue of the existence of the federal Bill of Rights, the Ninth Amendment would provide a direct refutation.

Even though it was clear that the Tenth Amendment was included to prevent an inference of unlimited federal power from the omission of a provision generally guaranteeing the reservation of all the powers not granted to the federal government, it has been suggested that it should have foreclosed a construction in favor of enlarged power from the enumeration of rights. 66 Even if this were accurate, it would also remain true that “redundancy in legal documents is not particularly odd,” 67 and that “the drafting history of the Bill of Rights explains the presence of both provisions.” 68 In addition, that the concern that gave rise to the Ninth Amendment was not some kind of farfetched claim is illustrated by the actual historical inference of national power: by the Supreme Court, as well as others, rooted in the “sovereignty” suggested by the adoption of the federal Bill of Rights. 69

It is true that the Ninth Amendment, in the form finally adopted, was as ineffective at preventing this result as any other provision, including the
Tenth Amendment. But it is at least noteworthy that the Virginia proposed amendment—the one we argue should be our guide in construing the Ninth Amendment—expressly rejected an inference of enlarged national powers from the inclusion of rights limitations in the Constitution. The deriving of national powers from the inclusion of limits on powers was precisely what the Ninth Amendment was trying to prevent. It is difficult to imagine the Supreme Court making the same argument about deriving federal powers in the face of the language proposed by Virginia for what would become the Ninth Amendment. By contrast, the Tenth Amendment does not speak to the question with near the precision that the language initially proposed by Virginia for the Ninth Amendment would have.

The history of the consideration and ratification of the Tenth Amendment is sufficient to refute the alternative claim that it was intended to secure the unenumerated fundamental rights by tracking the language of the Ninth Amendment. Similarly, a careful review of the text and history of the Necessary and Proper Clause shows that it was intended as a moderate grant of authority to select means to accomplish delegated ends, but it was not thought to generate substantial limits on federal power. One reason the scholarly defense of an unenumerated rights reading of the Ninth Amendment has combined the redundancy argument with a fundamental rights interpretation of the Tenth Amendment and our federal system is that Justice Goldberg manages to slide between these views in his *Griswold* concurrence.

On the one hand, to supplement his own claim that “the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people,” Goldberg contended that “[t]he Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.” This statement seems to be based on the view that the Tenth Amendment secures fundamental rights, and this conclusion would conform with Goldberg’s reliance on scholarly authority that based the unenumerated fundamental rights reading of the Constitution on both the Ninth and Tenth Amendments. Justice Goldberg is equally insistent, however, that in interpreting the Ninth Amendment, “‘real effect should be given to all the words it uses,’” which is the argument that we should not read the amendment as redundant and therefore purposeless. But when the Ninth and Tenth Amendments are both read as fundamental rights guarantees, they are treated as redundant, in that the powers “reserved” and the rights “retained” turn out to be the exactly the same limits on federal power—although, admittedly, on this reading, the Tenth Amendment may serve the supplemental purpose of also preserving to state governments powers not granted to the national government.

What is striking, however, is that, whether the language of the Ninth Amendment refers to affirmative limitations on government, or only to the residuum from the enumerated powers scheme, it could also serve the purpose of avoiding misconstruction—clarifying that it is “the people,” not only state
governments, who will maintain additional, unenumerated limitations against government or that it is “the people,” and not simply the states, who grant and reserve powers. In short, the redundancy argument, popular as it has been, does not preclude either of the main contenders for the proper interpretation of the Ninth Amendment.

**Reverse Preemption**

In addition to the Tenth Amendment “reserved powers” idea, and the notion that individual rights can be protected by looking to see whether a law is sufficiently “necessary and proper,” at least one other scholarly theory linking the federal system to securing fundamental rights has been attempted. Unfortunately, it is both novel and implausible. As defended by Professor Calvin Massey, under this state-grounded theory, the Ninth Amendment would work as a kind of “Reverse Preemption Clause.” On this view, fundamental rights would trump inconsistent acts of Congress, despite the Supremacy Clause, because the inclusion of a right in a state constitution would ensure its status as a right retained by the people and would thereby limit the scope of federal power. This claim that the Ninth Amendment secures state-created rights as affirmative limitations on federal power had not been advanced by a single commentator between 1789 and the 1980s.

As originally set forth in the work of Russell Caplan, upon which Professor Massey relied, the claim that state law was the source of “other[]” rights “retained” by the Ninth Amendment was an attempt to reinforce the close historic link between the Ninth and Tenth Amendments. The thesis posited that the Ninth Amendment took the role of securing the rights, existing under state law, that had been guaranteed by Article II of the Articles of Confederation. Caplan’s article suggested that the rights referred to under state law, that had been guaranteed by Article II of the Articles of Confederation, were the individual right guarantees found within state law, whether constitutional or statutory. For Caplan, Article II was a rights guarantee in exactly the same sense that the Tenth Amendment is a rights guarantee; it secured for the states sovereign power, including the authority to recognize rights in state law, to the extent that federal powers did not preclude the exercise of state authority.

Professor Massey culled from Caplan’s analysis the bare conclusion that the Ninth Amendment was at least in part “an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated.” Contrary to Caplan’s analysis, however, Massey found that the Ninth Amendment’s state law rights trump federal powers in the event of conflict. He rested his conclusion on two assumptions: (1) the textual position that otherwise the unenumerated rights would be disparaged compared with the enumerated rights; and (2) the historical claim that because the anti-Federalists were seeking to limit federal power, they would not have agreed to a provision that did not protect fundamental state law rights against federal power.
In truth, Massey’s state law rights thesis and Caplan’s analysis begin at fundamentally opposed starting points for understanding the project embodied in the Ninth Amendment. Caplan sees the Amendment as an outgrowth of Article II and, therefore, as a complementary provision to the Tenth Amendment’s general reservation of all power not granted to the national government. Massey sees the Amendment as an expansion of the limiting provisions of the first eight amendments and, thus, as complementary to the idea of stating affirmative limitations on powers granted to government. While they may appear at first blush to be similar views, virtually every bit of evidence that would support Caplan’s reading would undermine Massey’s, and vice versa.

Questions about state law rights and the Bill of Rights related to the fear of displacement of state law and the risk of a consolidated national government. Caplan was correct in asserting that the Constitution’s opponents were insistent that there be an article equivalent to Article II of the Articles of Confederation. But it is the Tenth Amendment, not the Ninth, that is the provision called for by this debate. In both the ratification-era debate, as well as in the proposals offered by state ratifying conventions, the demand for a general reservation provision was cast in terms of reserved powers or reserved rights, as well as in terms of “rights, powers, and jurisdiction” (the language of the Articles of Confederation’s Article II). In every case, the reservation of sovereign power would secure rights guaranteed by state law to the extent that the powers granted to the national government did not conflict with them.

The Ninth Amendment protected exactly the same rights, but addressed an entirely different potential threat. Federalist critics feared that a bill of rights could threaten the rights secured structurally by inferring that the federal government was limited only by the specific rights contained in the bill of rights. A related argument was that the inclusion of fundamental rights as to which no power had been granted could itself raise the inference that unintended powers had been granted. The Ninth Amendment secured rights, which were reserved by the Constitution’s enumerated powers scheme, against the danger of an inference of extended national powers from the enumeration of specific clauses that limited the exercise of federal powers, clarifying that such limiting clauses could well be cautionary provisions that did not qualify any power actually granted.

If the goal of the Ninth Amendment was to ensure that state law rights secured by reserved state sovereignty would remain unthreatened, the rights referred to in the Ninth Amendment would not, in any meaningful sense, be disparaged merely by not being included among the affirmative limitations on government that secured individual liberties. No one claims that rights secured by Article I’s enumerated powers, nor the rights the anti-Federalist opponents of the Constitution sought to protect in the Tenth Amendment, are disparaged simply because they flow from the conceded truth that all not granted is reserved—to the states or to the people. Similarly, under the traditional view of the Ninth Amendment, the people’s retained rights would only be disparaged if, contrary to the amendment’s command, interpreters inferred enlarged
federal powers, to the detriment of the retained rights, from the enumeration of specific limitations in the Constitution and Bill of Rights. Nevertheless, these are unenumerated rights of a sort—these rights are general in nature and are not specified or enumerated. Professor Amar is correct, moreover, in asserting that “the federalism roots of the Ninth Amendment, and its links to the unique enumerated power strategy of Article I, help explain why no previous state constitution featured language precisely like the Ninth’s—a fact conveniently ignored by most mainstream accounts.”

Federal Courts and the Ninth Amendment in a post-\textit{Griswold} World

In the years since \textit{Griswold}, the Supreme Court has only rarely taken up the task of seeking to justify its role in the protection of fundamental, unenumerated rights. Perhaps the classic example is the Supreme Court opinion in \textit{Roe v. Wade} (1973). Although the Court’s opinion listed “a number of possible textual sources for the right [of privacy],” Justice Blackmun “did not find it necessary to determine definitively which of these sources was dispositive.” According to the Court,

\begin{quote}
\texttt{[t]his right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. (\textit{Roe}, 410 U.S. at 153.)}
\end{quote}

So even when the situation seemed to present the clearest and most expansive opportunity to elaborate the concept of unenumerated fundamental rights, the Court simply declined to “accept this invitation to dramatically increase the Ninth Amendment’s reach.”

Perhaps the only Supreme Court decision in the post-\textit{Griswold} era in which the Ninth Amendment has played a critical role is one in which substantive due process was simply not an available textual theory. In \textit{Richmond Newspapers, Inc. v. Virginia} (1980), the Court needed a response to the argument that “the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected.” But according to Chief Justice Burger, those who drafted the Bill of Rights “were concerned that some important rights might be thought disparaged because not specifically guaranteed.” He then concluded that it was “even argued that because of this danger no Bill of Rights should be adopted,” for which Hamilton’s treatment in \textit{The Federalist} was cited. But, of course, it was Hamilton who argued that a bill of rights “would contain various exceptions to powers which are not granted; and on this very account, would afford colourable pretext to claim more than were granted.” Even proponents of the unenumerated rights construction of the Ninth Amendment acknowledge that Hamilton did not articulate a fear of losing omitted rights, but only that a
federal Bill of Rights “could be used to justify an unwarranted expansion of federal powers.”

As if the Chief Justice’s reliance on Hamilton were not confusing enough, Richmond Newspapers then quotes Madison’s explanation in a letter to Jefferson that “the rights in question are reserved by the manner in which the federal powers are granted,” which clearly focuses on the enumerated powers scheme rather than unenumerated fundamental rights. The opinion then relies on Madison’s additional justification, again in a letter to Jefferson, for not promoting a bill of rights—his “fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.”

But in the same letter to Jefferson, Madison clarified that even though “there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution,” he had decided to support the inclusion of a bill of rights, “provided it be so framed as not to imply powers not meant to be included in the enumeration.” It is this statement that led to the adoption of the Ninth Amendment and the amendment does not, thankfully, purport to supply a remedy to the problem of rights not being drafted to someone's liking.

As might be expected when the Supreme Court manages to speak from both sides at once, the last thirty-five years of federal case law has embodied more confusion than clarity in establishing the basis of the fundamental rights doctrine. This is one of those areas, in short, in which the federal courts generally seem to have, in the words of Chief Justice Rehnquist, “accomplished the seemingly impossible feat of leaving this area of law more confused than [they] found it.”

The federal Court of Appeals holding in Gibson v. Matthews (6th Cir. 1991) is typical. On the one hand, the Sixth Circuit held, correctly in our view, “that the Ninth Amendment does not confer substantive rights in addition to those conferred by other portions of our governing law.” At the same time, it concluded that the Ninth Amendment “was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution.” This statement is accurate and, if correctly understood, explanatory of the purpose of the Ninth Amendment. And it is based on such a correct understanding that leading modern scholars have concluded that “the Ninth Amendment has not been used as the basis for defining rights of individuals and invalidating either federal or state laws.” But the court’s dictum also trades on a misunderstanding of the language of the amendment and has the potential to mislead.

Today, “fundamental rights” usually refers to weighty interests with the potential to “trump” grants of power; so even if a government entity exercises one of its granted powers, the “fundamental right” may be the source of a limitation on government that invalidates the government action. If the Ninth Amendment’s purpose was to avoid the denial of “fundamental rights,” in this sense, because they were unenumerated, it would be clear that it does
“confer,” or at least recognize or acknowledge, “substantive rights in addition to those conferred by other portions of our governing law.”

Conversely, if the Ninth Amendment was to secure rights held residually by virtue of the grant of enumerated and limited powers, although the *expressio alterius* logic would apply, it would remain true that the amendment does not “confer substantive rights” in addition to those enumerated in the Constitution. It is from the vantage point of perceiving fundamental rights as significant limits on the ordinary scope of enumerated powers that it is an accurate reflection of the historical constitution to assert that a litigant’s claim “cannot prosper unless it is anchored in an enumerated constitutional guaranty” (Hector Vega-Rodriguez v. Puerto Rico Telephone Co., 1st Cir. 1997). And this is why, despite decisions like *Griswold* and *Roe*, federal appellate courts have asserted that “our research has not revealed . . . any Supreme Court case holding that any specific right is protected by the ninth amendment,” and hence Ninth Amendment claims have “no legal significance” (Quilici v. Village of Morton Grove, 7th Cir. 1982).

The same confusing potential is presented by the assertion that the Ninth Amendment “is not a substantive source of constitutional guarantees, but a ‘savings clause’ drafted to avoid the lowering, degrading, or rejecting of any rights not specifically mentioned elsewhere in the Bill of Rights” (Doe v. City of Chicago, 1995). So long as one recognizes that it does not lower, degrade, or reject rights to recognize their true nature as a residuum from the powers granted to the federal government by the Constitution, it is accurate to refer to the Ninth Amendment as a “savings clause.” At the same time, however, this is why it is important to understand the Ninth Amendment as “a rule of interpretation rather than a source of rights.” But if one is contemplating judicial enforcement of unenumerated fundamental rights that would limit the ordinary scope of granted powers, it would become impossible to claim that the Ninth Amendment has never been a “substantive source of constitutional guarantees.”

It is only based on this sort of limited construction that one could justify lower federal court holdings that the Ninth Amendment does not support a claim under 42 U.S.C. § 1983: Strandberg v. City of Helena (791 F.2d 744, 748 (9th Cir. 1986)) (concluding that an alleged violation of the Ninth Amendment will not support a claim under 42 U.S.C. § 1983); accord, Basile v. Elizabethtown Area School Dist. (61 F. Supp. 2d 392, 403 (E.D. Pa. 1999)) (recognizing that a § 1983 claim cannot be premised upon an alleged violation of the Ninth Amendment); Doe v. Episcopal Social Services (1996 U.S. Dist. LEXIS 1278, 1996 WL 51191 (S.D.N.Y. 1996)). It is this construction that also justifies the frequent statements to the effect that the Ninth Amendment does not protect “any specific right”—Williams v. Perry (960 F. Supp. 534, 540 (D. Conn. 1996))—nor supply “particular constitutionally guaranteed freedoms”: Metz v. McKinley (583 F. Supp. 683, 688 n. 4 (S.D. Ga. 1984), aff’d, 747 F.2d 709 (11th Cir. 1984)); accord, Charles v. Brown (495 F. Supp. 862 (N.D. Ala. 1980)). It would also explain why courts have been insistent that the right to privacy “has been recognized as stemming from the Due
Process Clause of the Fourteenth Amendment” rather than from the Ninth Amendment: Doe v. City of Chicago (1995 U.S. Dist. Lexis 14517 (1995), citing Planned Parenthood v. Casey, 505 U.S. 833, 846–53, 112 S. Ct. 2791, 2804–06 (1992)). The only problem is that it also means that the Ninth Amendment has been basically irrelevant to modern cases recognizing unenumerated fundamental rights, notwithstanding that it has been cited in support of judicial holdings.

SUBSTANTIVE DUE PROCESS AS THE SOURCE FOR FINDING FUNDAMENTAL RIGHTS

As we have seen, despite the preferences of legal scholars, the Court was reasonably clear, even in Roe, that it could find the protection of fundamental “liberty” interests in the Due Process Clause of the Fourteenth Amendment. Notwithstanding the Court’s preference for due process “liberty,” however, most commentators have not shared the enthusiasm. Thus, even a modern advocate of unenumerated fundamental rights has concluded that “the very phrase ‘substantive due process’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis.” And another advocate of unenumerated fundamental rights decisionmaking has described substantive due process as “paradoxical, even oxymoronic.” Without so much as an explanation of how the due process fundamental rights construed by the Court could trump other public interests, or in any way connect with the intention to preserve a right to fair process, the Court has essentially abandoned any attempt to explain how the guarantee has come to play the role it does.

Even though substantive due process has been the victim of merciless criticism, not only by critics of the Court’s fundamental rights jurisprudence, but also by advocates of alternative theories for justifying unenumerated fundamental rights, it still remains the most plausible account for finding rights not clearly or explicitly set forth in the text. Indeed, from the beginning, the commitment to requiring compliance with due process of law, and keeping the government within the “law of the land,” had not been limited to requiring compliance with acts of Parliament, but rather included common law and customary conceptions of law. Well before the American Revolution, Lord Coke wrote that granting an economic monopoly “is against liberty and freedom of the subject,” and, consequently, such a grant “was against this great charter [Magna Carta].”

Surprisingly enough, although provisions expressly condemning monopolies were not uncommon in the pre-1787 state constitutions, and Jefferson included an antimonopoly provision on his list of rights that the people should invariably have against government, Madison quite purposely omitted such a provision from his proposed bill of rights. Professor Strong, in fact, suggests that “[a]s conversant with English history as were Jefferson, Richard Henry Lee, Madison, Mason, Wilson and other Founders, it is passing strange that
none appeared to connect monopoly with violation of Due Process."\(^{122}\) Even so, it was antebellum state courts that interpreted due process to restrain "arbitrary deprivations of property,"\(^{123}\) and it was during this period that courts also began to perceive due process as "establishing equal treatment as a constitutional norm," and prohibiting laws "which aided one class of individuals" to the detriment of others.\(^{124}\)

**Due Process, Tradition, and Precedent**

Modern substantive due process could reflect either of two possibilities. First, it could present an honest grappling with text and the recognition that reading due process as a limit on legislative power involved tricky questions for which historic materials do not supply easy and straightforward answers. Under such circumstances, the doctrine of precedent becomes especially important:

However committed we may be to the idea of a fixed and written Constitution, as well as to the idea of objective interpretation, in the final analysis, fallible human beings will implement those ideals. We need not embrace the simplistic slogan that the Constitution means what this Court says it means. Sooner or later, authoritatively adopted judicial decisions may be embraced by the nation as a whole and become a settled part of our constitutional order. What is being recognized is not an unrestrained power to amend the Constitution outside of Article V, but the authority to determine and fix the meaning of the Constitution.\(^{125}\)

Alternatively, substantive due process could present us with unwritten constitutionalism once removed—as though we had a "Life, Liberty, or Property Clause" rather than a Due Process Clause.\(^{126}\) It may be that the doctrine of precedent will justify reading the Due Process Clause as protecting life, liberty, and property against arbitrary deprivations, and as establishing equal treatment as an enforceable constitutional norm. But neither historic evidence nor the doctrine of precedent support empowering courts to engage in the moral analysis required to "discover," and then to impose, natural and inalienable rights and subjecting laws impacting on such rights to the strictest forms of judicial scrutiny. Although the modern Supreme Court has sometimes implied something more, the best reading of its recent cases suggests that the Court itself recognizes that substantive due process embodies a jurisprudence based on the common law tradition, rather than on the assumption that the Court is the best place to look for the moral analysis required to imposed natural and inalienable rights.

It is therefore unsurprising that the Supreme Court Justice most associated with the renewal of the common law heritage of substantive due process is Justice Harlan.\(^{127}\) For some, Harlan’s association with common law decision-making is ground for criticism, because it is acknowledged that "the libertarian growth potential" of Harlan’s constitutional method "seems modest."\(^{128}\)
Professor Ackerman, for example, would look instead to "the model of the independent constitutionalist," and points to Justice Douglas’s attempt "to convince us that, after the New Deal, it is the concept of privacy, not property, that best serves to organize many of the particular concerns the Founders expressed in the Bill of Rights." But the technique of "independent constitutionalism" seems to contemplate "a Supreme Court busily making constitutional changes quite 'independent' of the Constitution and quite as it thinks best." Ultimately, it seems rooted in "the encouragement of judicial flexibility in lieu of amendments (of participation and protection) by decisional fiat—without proposal or ratification pursuant to Article V."

Over the past decade or so Justice Harlan’s common law approach, with its emphasis on tradition, appeared to be replacing the "moral philosophic" approach to discovering and defining due process fundamental rights. While advocates of "independent" constitutionalism emphasize that "one cannot understand the Founders or their great successes without recognizing that they were great gamblers on the power of untested abstractions," the Supreme Court has viewed itself as governed by the proper understanding of the traditions of our law rather than by moral abstractions:

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the right to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

Professor (and now Court of Appeals judge) Michael W. McConnell suggested that the Court’s approach would likely yield a more cautious, incremental analysis of fundamental rights.

The traditionalist approach adopted in *Glucksberg* differs sharply from the moral philosophic approach not just in the substance but in its intellectual style. The moral philosophic approach is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions. For example, the Ninth Circuit’s argument for recognizing a right to assisted suicide was based on the assertion that this right is encompassed within a supposed right of each individual "to make the 'most intimate and personal choices central to personal dignity and autonomy.'" The traditionalist approach, by contrast, is inductive and experiential. Rather than reasoning down from abstract principles, it reasons up from concrete cases and circumstances. It can be seen as the conservative heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory.

And the Court has agreed that its developing approach avoids overgeneralization: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any
and all important, intimate, and personal decisions are so protected...”

Concluding that fundamental rights must be either textually based or be “objectively, ‘deeply rooted in this Nation’s history and tradition,’” the Court clarified that its task is to determine what the people have deemed fundamental, not what the Justices are persuaded should be fundamental.

**Due Process and Anti-Sodomy Legislation**

The issue concerning how the Court should go about finding fundamental rights under the Due Process Clause was raised again in 2003 when the Court ruled in Lawrence v. Texas (2003). In *Lawrence* the Supreme Court overruled Bowers v. Hardwick (1986), and invalidated a Texas anti-sodomy law that prohibited particular sexual conduct between persons of the same sex. Some have read *Lawrence* as establishing either a broad fundamental right of intimate sexual conduct, or as at least recognizing a John Stuart Mill–like presumption in favor of liberty. Although *Lawrence* is a useful and healthy reminder that the Due Process Clause reflects “a tradition that must be conceived as ‘a living thing,’” it should not be read either as establishing a new, expansive fundamental right of intimate sexual conduct or as recognizing such a presumption of liberty as to preclude society from using its police power to promote the cause of society’s moral values.

The Court’s decision in *Lawrence*, as a Due Process Clause holding, “is best seen as a successor to *Griswold v. Connecticut,*” and as involving the “judicial invalidation of a law that had become hopelessly out of touch with existing social convictions.” Just as the Court in *Griswold* invalidated a law “that was ludicrously inconsistent with public convictions in Connecticut and throughout the nation,” *Lawrence* is a part of “a civil rights revolution” that had already succeeded in “delegitimating prejudice against and hatred for homosexuals.” There is room for doubt whether *Lawrence* should even be called a “fundamental rights” decision, or, instead, that it is based on “rational basis” review, precisely because the challenged prohibition on private sexual conduct ran up against the problem of “desuetude, American-style,” in that “enforcement of the relevant law can no longer claim to have strong moral support in the enforcing state or the nation as a whole.” Given that “criminal laws in this field have notoriously been honored in the breach and, almost from the start, have languished without enforcement,” only an exercise of “grossly stereotyped roles,” used to justify treating some individuals “less well than others,” can explain the prosecutions that produced the *Lawrence* case.

As soon as we recognize that the Court’s treatment of the sodomy prohibition was centered on its conclusion that such laws are anachronistic, several features that otherwise seem mysterious, suddenly seem plain enough. For example, the risk of the abusive use of such laws—inevitably a risk for criminal laws that, for a variety of reasons, may be too costly to be consistently enforced—is especially powerful when one realizes that “the very fact of
criminalization, even unaccompanied by any appreciable number of prosecu-
tions, can cast already misunderstood or despised individuals into grossly stereotyped roles."\textsuperscript{147} Such laws, then, are not just anachronistic, but are harmfully so. The Supreme Court’s conclusion that the Texas sodomy statute presented a harmfully anachronistic law, moreover, sheds critical light on the Court’s assertion that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”\textsuperscript{148} A governing majority almost certainly viewed interracial cohabitation,\textsuperscript{149} let alone marriages prohibited by antimiscegenation laws,\textsuperscript{150} as immoral at the time legislative prohibitions were enacted; however, merely invoking a conventional ground for using the police powers of the state does not liberate a state from its duty to refrain from enacting racially discriminatory laws or unacceptably creating “classes” of citizenship in violation of its duty to supply equal protection of the law.

It is when we recognize that the Court viewed the law challenged in \textit{Lawrence} as anachronistic, moreover, that we can understand how it would be that some of the Court’s own holdings, recognizing the limits of critical liberty rights of individuals, have been based on the Court’s willingness to sustain society’s commitment to its moral values.\textsuperscript{151} The Supreme Court has not previously, and should not now, adopt a Millian “harm principle” as a constitutional limit on the police powers of the states. John Hart Ely was on the mark when he suggested that, if there is anything we can be grateful for as to the \textit{Lochner}-era Court, it is that, as to the rational basis test, “they misapplied it.”\textsuperscript{152} It is generally recognized that a central characteristic of \textit{Lochner}-era jurisprudence was the willingness of the Court to conclude that certain legislative “ends” could not be pursued constitutionally.\textsuperscript{153} If the Supreme Court were to, in any case involving an individual’s claimed “liberty” interest, shift the burden of proof to the state to demonstrate a state purpose deemed adequate by the Court to justify the restriction on “liberty,” we would find ourselves thrown back into the \textit{Lochner} era. Perhaps our most respected single-volume treatise on constitutional law said this about \textit{Lawrence}:

Perhaps the most important question left open by \textit{Lawrence} is whether, in 2003, there was a majority of the Justices on the Supreme Court who would be willing to consider all forms of economic and social welfare legislation under a true reasonableness test. If the Court were to make independent judgments as to whether any and every law limiting individual autonomy was reasonably related to a legitimate interest, we would have a complete return to the form of judicial review that was used by the Court during the period from the mid-1890s until 1937.\textsuperscript{154}

The other thing to be aware of is that “\textit{Lawrence}’s words sound in due process, but much of its music involved equal protection.”\textsuperscript{155} Indeed, there is much to be said in support of Professor Sunstein’s view:

Rather than invalidating the Texas statute on grounds of substantive due process, the Court should have invoked the equal protection clause to strike down, as irrational, the
state’s decision to ban homosexual sodomy but not heterosexual sodomy. This approach would have been more cautious than the Court’s own. It would have had the large advantage of making it unnecessary to overrule any precedent. At the same time, an equal protection ruling would have recognized the fact, established by the Court’s opinions, that the equal protection clause does not build on longstanding traditions, but instead rejects them insofar as they attempt to devalue or humiliate certain social groups. The problem in Lawrence is not adequately understood without reference to the social subordination of gays and lesbians, not least through the use of the criminal law.\(^{156}\)

The real theme of the Fourteenth Amendment is equal citizenship, and equality before the law its one undisputable purpose.\(^{157}\) If there were a provision under which any thoughtful constitutional Framer might legitimately have anticipated a clash between the requirements of the constitutional text and the assumptions entertained by many engaged in our constitutional culture, it would be the clause in section 1 requiring, but not really defining, substantively “equal” laws.\(^{158}\) The most straightforward way to justify the Court’s decision in Lawrence, then, would be to see the challenged sodomy statute as creating a “status-based classification of persons undertaken for its own sake,” and therefore as presenting the sort of “animus” that “represent core offenses of the equal protection guarantee.”\(^{159}\)

**NOTES**


3. McAffee, “Original Meaning,” supra note 1, at 1311 n. 358 (citing commentators who misread Story’s work as to the original understanding of the Ninth Amendment).

4. Id. at 1312, quoting 3 Story, supra note 2, at 751–52.

5. 3 Story, supra note 2, at 752.

6. Alexander Hamilton, The Federalist No. 84, at 579 (Jacob E. Cooke ed., 1961). For analysis demonstrating that Hamilton’s argument reflected a concern with preserving the Constitution’s original scheme of enumerated, limited powers, see McAffee, “Original Meaning,” supra note 1, at 1259–65. It is extremely helpful that Story traces the Ninth Amendment, and its protection of additional rights “retained by the people,” to Hamilton’s Federalist No. 84 argument, considering that some modern commentators have contended that Hamilton’s argument presented an independent objection that a bill of rights could generate constructive powers, an objection they see as being unrelated to the Ninth Amendment text’s reference to rights. See, e.g., Randy E. Barnett, “Reconceiving the Ninth Amendment,” 74 Cornell L. Rev. 1, 10 (1988).

7. McAffee, “Original Meaning,” supra note 1, at 1312–13. Story’s conclusion receives powerful confirmation because he saw the danger of inferring additional powers from the enumeration of rights as based on dubious logic, whereas the parties that debated the necessity and merits of a bill of rights were in agreement “that an inference from a listing of rights that rights not enumerated were granted away was not a doubtful one with respect to a government of general legislative powers.” Id. at 1313 n. 364.
8. Thomas M. Cooley, The General Principles of Constitutional Law 86 (3d ed., 1989). For analysis of the recent, somewhat novel, view that the Fourteenth Amendment’s Privileges or Immunities Clause was intended to “incorporate” the state constitutional equivalents of the federal Ninth Amendment, see supra Chapter 4.

9. It is reliance on the doctrine of popular sovereignty that has enabled judges to insist that, in exercising the power of judicial review, courts “are only the administrators of the public will,” and the decision to treat a law as void because it conflicts with the Constitution is only “because the will of the people, which is therein declared, is paramount to that of their representatives, expressed in any law.” Lindsay v. Commissioners, 2 S.C.L. 38, 2 Bay 38, 61–62 (1796). For support for the idea that popular sovereignty is the basis for the exercise of the power of judicial review, see Edward S. Corwin, “The ‘Higher Law’ Background of American Constitutional Law,” 42 Harv. L. Rev. 149 (1928), reprinted in 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 67, 91 (Randy E. Barnett ed., 1989) [hereinafter both volumes cited as The Rights Retained by the People]. Accord, Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding 65–66, 120–27 (2000) [hereinafter cited as Inherent Rights]; Nathan N. Frost, Rachel Beth Klein-Levine, & Thomas B. McAffee, “Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States,” 2004 Utah L. Rev. 333, 342–45 [hereinafter cited as “Courts Over Constitutions Revisited”]; and Thomas B. McAffee, “The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?” 80 Ore. L. Rev. 1245, 1251–1256 (2001) [hereinafter cited as “Should We Have an Unwritten Constitution?”].

10. Corwin, in The Rights Retained by the People, supra note 9, at 67, 70 (finding that the Ninth Amendment takes “the principles of transcendental justice” and translates them “into terms of personal and private rights”). In other works, of course, Corwin clarified that he was opposed to courts basing individual rights decisionmaking on unenumerated principles, whether derived from the Ninth Amendment or from unwritten constitutionalism more generally. See, e.g., Edward S. Corwin, Court Over Constitution: Judicial Review as an Instrument of Popular Government (1938). See, e.g., Frost, Klein-Levine & McAffee, “Courts Over Constitutions Revisited,” supra note 9, at 335 n. 9, 342, 360.


12. Id.

13. It appears that the precise text used to justify an expansive judicial construction of the Constitution has little to do with the controversy, or lack thereof, that is invoked by such decisions. It seems fair to say that “[i]n all the hullabaloo over rights not specifically listed in the Constitution, the Ninth Amendment was largely ignored.” Ellen Alderman & Caroline Kennedy, In Our Defense: The Bill of Rights in Action 317 (1991).

based on Ninth Amendment’s text, and partly on the weight of the “aesthetic fallacy” that contends that we should avoid taking open-ended provisions seriously on grounds that they render the actual listing of rights “almost superfluous”); Charles Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* 3 (1997) [hereinafter cited as *A New Birth of Freedom*] (finding that “as a desperate answer to a desperate need,” the Court had “thought up (I had almost written ‘dreamed up’) as a ground for the protection of substantive rights” a “thing called ‘substantive due process’”; concluding that this “paradoxical, even oxymoronic phrase—‘substantive due process’—had been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution”); Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 2 (1996) [hereinafter cited as *Freedom’s Law*] (contending that “contemporary constitutions declare individual rights against the government in very broad and abstract language” and that judges should “interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”); Bernard H. Siegan, *Economic Liberties and the Constitution* 15, 26–30 (1980) (Ninth Amendment included to avoid disparaging unenumerated rights) [hereinafter cited as *Economic Liberties*]; and Robert C. Post, “Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” 117 *Harv. L. Rev.* 4, 94 n. 440 (2003) (concluding, based on the use of the word “liberty” in the text of Due Process Clause, that the Due Process Clause provides “as much meaningful guidance as does the word ‘equal’ in the Equal Protection Clause”). For additional sources supporting an expansive, open-ended judicial role, see infra note 44.

15. McAfee, “The Fourteenth Amendment,” supra note 1, at 748.

16. See James F. Kelley, “The Uncertain Renaissance of the Ninth Amendment,” 33 *U. Chi. L. Rev.* 814, 814 nn. 2, 5 (1966). For similar general perspective, see Leonard W. Levy, *Origins of the Bill of Rights* 241 (1999) (“For 175 years, from 1791 to 1965, the Ninth Amendment lay dormant, a constitutional curiosity comparable in vitality to the Third Amendment”). For the view that the Ninth Amendment has more frequently been used, but as a justification for an expansive interpretation of the Tenth Amendment and a relatively strict construction of federal powers, see Kurt T. Lash, “The Lost Original Meaning of the Ninth Amendment,” 83 *Tex. L. Rev.* 331 (2004) [hereinafter cited as “Lost Original Meaning”]; Kurt T. Lash, “The Lost Jurisprudence of the Ninth Amendment,” 83 *Tex. L.J.* 597 (2005) [hereinafter cited as “Lost Jurisprudence”]. If Professor Lash’s interpretation, as reflected especially in his article on the lost jurisprudence of the Ninth Amendment, had been uniformly affirmed and applied down to, and including, the present, the standard complaint about the “forgotten” Ninth Amendment—“forgotten” in that it had not been used to develop unenumerated fundamental rights—would be just as accurate as when a twentieth-century book by that title was published.

17. See, e.g., Alderman & Kennedy, supra note 13, at 318 (noting that in *Griswold v. Connecticut* Justice Goldberg “wrote a separate opinion to explain, for the first time by a Supreme Court justice, the special role that the Ninth Amendment must play”) (emphasis added). None of Professor Lash’s historic research or analysis would alter this conclusion. See supra note 16.

18. According to Professor Levy,

Within fifteen years the Ninth Amendment, once the subject of only incidental references, was invoked in more than twelve hundred state and federal cases in the most astonishing variety of matters. After the Court had resuscitated the amendment, litigants found its charms compelling precisely because of its utter lack of specificity with respect to the rights that it protects…. Those who have relied on this amendment for constitutional armament include schoolboys and police officers seeking relief from regulations that govern the length of their hair, citizens eager to preserve the purity of water and air against environmental polluters, and homosexuals claiming a right to be married. The question whether the Ninth Amendment was intended to be a cornucopia of unenumerated rights produce as many answers as there are points of view.
Levy, supra note 16, at 242. For the scholarly view that modern courts have not been receptive enough to claims based on the Ninth Amendment, see infra note 53; and for a treatment suggesting the lower federal courts have generated as much confusion as clarity, see infra notes 108–13 and accompanying text.


20. Id., 381 U.S. at 488–89.

21. Id., 381 U.S. 489 n. 4.


24. For a treatment of Hamilton’s arguments, and their direct connection to the proposal and adoption of the Ninth Amendment, see McAffee, “Original Meaning,” supra note 1, at 1259–65. Wilson’s arguments against a bill of rights were similarly rooted in a positivist perspective on the powers granted to government by the people and the rights retained by that limited grant of power. See supra Chapter 2, notes 20–26 and accompanying texts.

25. The recognition that Congress had power to decide the jury trial question in the absence of a limiting provision was acknowledged by both proponents and opponents of ratification of the Constitution, see McAffee, Inherent Rights, supra note 9, at 97–98. For the mistaken view that only legislation deemed “proper” by reference to the protection of rights deemed fundamental by either history or nature would be within the powers of Congress—and that therefore a law permitting civil trials without a jury would be unconstitutional, see Gary Lawson & Patricia B. Granger, “The Proper Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause,” 43 Duke L.J. 267, 320–21 (1993). Compare Chapter 2, “The Drafting of the Ninth and Tenth Amendments,” at 45 n. 132 and accompanying text (confirming a similar view by Professor Barnett).


27. Griswold, 381 U.S. at 489, quoting 1 Annals of Cong. 439 (Gales and Seaton ed., 1834).


29. Id. If one understands Madison as referring to rights as the residue left to individuals after the enumerated powers are defined, it becomes easy to understand why he wrote to Thomas Jefferson that he could support inclusion of a bill of rights, “provided it be so framed as not to imply powers not meant to be in the enumeration.” James Madison to Thomas Jefferson, in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 614, 615 (1971).

30. 1 Annals of Cong., supra note 28, at col. 452; see supra Chapter 2, notes 33–63 and accompanying text.


33. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 491 (1965); Randy E. Barnett, “Introduction: James Madison’s Ninth Amendment,” in 1 The Rights Retained by the People, supra note 9, at 2 (traditional reading of the Ninth Amendment “denies it any role in the Constitutional structure”).
34. See supra notes 9 to 11 and accompanying text.
35. John Hart Ely, “The Wages of Crying Wolf: A Comment on Roe v. Wade,” 82 Yale L.J. 920, 935–36 (1973). Ely observed, for example, that the protection offered in Roe was “more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.” Id. at 935. The Court’s scrutiny of laws regulating abortion, of course, has changed.
36. Id. at 939.
37. The comparison of the Court’s decision in Roe to the Court’s overreaching during the Lochner era was the objection that needed an answer. As a former law clerk to Chief Justice Warren—and one who was hardly a critic in general of the legacy of the Warren Court—there is no question that this is the aspect of Ely’s analysis, involving as it did a frank admission that in Ely’s view the Court had reached the best “political” solution, that most troubled members of the legal academy. For the same basic point being made, perhaps more emphatically, see Richard Epstein, “Substantive Due Process by Any Other Name: The Abortion Cases,” 1973 Sup. Ct. Rev. 159. Even in 2004, the constitutional law casebook I use poses the question: “Is Roe distinguishable from Lochner?” Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 565 (15th ed., 2004).
38. Id. at 941–43. The Court, said Ely, found that “the goal [the state] had favored was impermissible or the legislation involved did not really promote it.” Id. at 942.
39. Id. at 941.
40. Id. at 942.
41. Id.
42. Id. at 944. In the years that followed, Ely never resolved his doubts and reservations about the Court’s decision in Roe v. Wade, 410 U.S. 113 (1973). In the long run, however, Ely became convinced that the debate over whether the Court’s role should be limited to interpreting the written Constitution rested on what amounted to a “false dichotomy” between granting courts ultimate sovereignty over society’s substantive values and being bound by the beliefs of people who died more than two hundred years ago. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review vii (1980). Ely believed that by limiting itself to a representation-reinforcing role, the Supreme Court could do justice to seemingly open-ended constitutional provisions while leaving to other bodies the task of determining society’s most fundamental substantive values.
43. Thomas C. Grey, “Do We Have an Unwritten Constitution?” 27 Stan. L. Rev. 703, 716 (1975) (“The Ninth Amendment is the textual expression of the idea [of higher law] in the federal Constitution.”)
45. Perhaps the best-known advocate of the view that the Constitution’s text authorizes courts to find rights beyond those specifically named is Ronald Dworkin. See Freedom’s Law, supra note 14. See also Sotirios A. Barber, The Constitution of Judicial Power (1993); Michael S. Moore, “Do We Have an Unwritten Constitution?” 63 S. Cal. L. Rev. 107
Powers Reserved for the People and the States


50. Id.

51. Id. at 78, quoting, Dworkin, Freedom’s Law, supra note 14, at 73. See supra note 14. Illustrative of how dominant the unenumerated rights interpretation has become is that it forms the basis of a general criticism of courts and commentators who seem to look for ways to “stretch” the meaning and application of textual constitutional rights—labeling such an approach as based on the “aesthetic fallacy.” Eisele, Constitutional Self-Government, supra note 14, at 116–17. The notion is that if we rely on an open-ended provision like the Ninth Amendment, “the list of specific rights in the Bill of Rights would become almost superfluous.” Id. at 117. In a sense, Professor Eisele’s argument provides one more example of the potential misuse of the antiredundancy argument, which we have already seen misused to justify an open-ended interpretation of the Ninth Amendment. Eisele’s reliance on the “aesthetic fallacy” suggests that the antiredundancy argument can also be used to accomplish the opposite result. The real problem with relying on the Ninth Amendment, however, is that it grew out of an attempt to avoid the inference that the federal Constitution created a government of “general” legislative powers. Thus, the evidence is overwhelming that even prominent natural law and natural rights advocates, such as James Wilson, believed that American state legislatures held all power, subject only to limitations on those powers supplied by the specific restrictions included in a written bill of rights. The Ninth Amendment should not be construed as an open-ended rights provision, not because to so interpret it renders the Bill of Rights redundant or superfluous, but because the rights it secures are those that exist as a residuum of the granted powers.

52. This use of text, thought to be supported by history, to justify fundamental rights adjudication, although initially extremely popular (McAffee, “Should We Have an Unwritten Constitution?” supra note 9, at 1246 n. 3), became controversial even to advocates of fundamental unenumerated rights, in apparently suggesting that “interpretation” was necessarily historic (and descriptive). See id. at 1248–51. Although hardly as popular as it once was, essentially historically based arguments resting on central texts remain an important source of justification for an open-ended search for fundamental rights. See, e.g., Barnett, Restoring the Lost Constitution, supra note 14, at 5 (referring to “key provisions,” most prominently,
the Ninth Amendment, that have "been either distorted or excised entirely from the judges’ Constitution and ignored," and advocating adoption of a Presumption of Liberty "which can provide a practical way to restore the lost Constitution"; Black, A New Birth of Freedom, supra note 14; Massey, Silent Rights, supra note 46; Randy E. Barnett, "A Ninth Amendment for Today's Constitution," 26 Valp. U.L. Rev. 419, 422 (1991) ("Framers of the Constitution shared a common belief that although the people may delegate certain powers to their agents in government, they still retain their natural rights"); Sherry, supra note 44.

53. This enthusiasm, however, has been accompanied by a growing sense of frustration that "[t]his amendment, unfortunately, has never been seriously utilized in a Court decision." Anthony C. Cicia, "Note, A Wolf in Sheep's Clothing? A Critical Analysis of Justice Harlan's Substantive Due Process Formulation," 64 Fordham L. Rev. 2241, 2283 (1996). To many minds, a consequence is that, despite the provision's potential as a "fruitful source for protection of rights," id. at 2282–83, and notwithstanding that it "is perhaps the best evidence that the Constitution protects certain unenumerated fundamental rights," id. at 2283 n. 295, we have gotten to the point that "judges and commentators generally consider it a meaningless provision." Id. as 2283.

54. McAfee, "Original Meaning," supra note 1, at 1216–17 (concluding that the legal academy "is largely responsible for the ninth amendment’s new respectability, for it is scholars who have provided the evidence and arguments upon which the Senators who participated in the Bork hearings and others have relied in rejecting what John Hart Ely described as the ‘received account’ of the amendment"). See generally Thomas B. McAfee, "The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees—Some Reflections," 7 St. John's J. L. Comm. 211 (1991).

55. Suzanna Sherry, "The Ninth Amendment: Righting an Unwritten Constitution," 64 Chi. Kent L. Rev. 1001, 1001 (1988). See also Randy E. Barnett, "Getting Normative: The Role of Natural Rights in Constitutional Adjudication," 12 Const. Comm. 93, 96 (1995) (concluding that "[i]t has been established beyond any reasonable doubt that adjudication based on natural rights … is excluded neither by ‘textualist’ nor by ‘originalist’ approaches to constitutional interpretation," arguing that "[t]he labored textual and historical arguments that have been presented to the contrary can be persuasive only to those who have not been exposed to the competing interpretations based, in part, on evidence omitted by the skeptics").

56. See supra notes 20–28 and accompanying text. Professor Amar calls this redundancy argument "[t]he obvious counterargument," which is "chanted like a mantra by most mainstream scholars." Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 123 (1998). But he concludes, correctly, that "this obvious counterargument is obviously wrong, and no amount of chanting can save it." Id. As a leading scholar on the doctrine of popular sovereignty—the real basis of the traditional reading of the Ninth Amendment—at the time of the founding, Amar has reason to know. I remember a prominent law school dean viewing the redundancy position as the definitive answer to the Ninth Amendment debate, and his sense of shock when I told him that I was about to publish an article defending the Black and Stewart interpretation. Nevertheless, the issue is addressed in McAfee, Inherent Rights, supra note 9, at 170–72; McAfee, "Original Meaning," supra note 1, at 1299–1304, 1306–07; McAfee, "Critical Guide," supra note 47, at 83–84.

57. See, e.g., David N. Mayer, "The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee," 16 S.I.U. LJ. 313, 317–19 (1992); Randy Barnett, "Unenumerated Rights and the Rule of Law," 14 Harv. J. L. & Pub. Pol'y 615, 637 (1991). For comment on the strangeness of the fact that defenders of the traditional view are criticized both for failing to see the distinct functions the Ninth and Tenth Amendments serve and for failing to see that both provisions serve basically the same function (to preserve unenumerated fundamental rights), see McAfee, "Critical Guide," supra note 47, at 82.
argument that the Ninth Amendment does not serve to protect affirmative limitations on
government, see id. at 84–88.

58. Compare Barnett, supra note 33, at 6 (observing that the “Tenth Amendment does
not speak of rights, of course, but of reserved ‘powers’”), and John Choon Yoo, “Our
Declaratory Ninth Amendment,” 42 Emory L.J., 967, 988 (1993) (Tenth Amendment shows
“that the Framers knew perfectly well how to express themselves when they wanted to
reserve all powers not enumerated,” and there is a need to avoid reading the Ninth Amend-
ment as “mere surplusage”), with Barnett, supra note 57, at 637 (purporting to show that
Madison relied on both the Ninth and Tenth Amendments during the debate over the
national bank bill in 1791, an event suggesting that Madison viewed the two amendments
as complementary), and Yoo, supra, at 986 (contending “that perhaps individual rights find
a better home in the Tenth Amendment, where the text does speak about powers ‘reserved
to the States respectively, or to the people,’ in much the same way Madison did”).

59. Viewing the original structure of federalism as securing fundamental personal rights
has received a steadily growing number of adherents. See, e.g., Massey, Silent Rights, supra
note 46; Gregory Allen, “Ninth Amendment and State Constitutional Rights,” 59 Alb. L.
Rev. 1659 (1996); Lawson & Granger, supra note 25; Vincent Martin Bonventre, “Beyond
the Reemergence—‘Inverse Incorporation’ and Other Prospects for State Constitutional
Sketching an Ethos of Constitutional Liberty,” 1985 Wisc. L. Rev. 1305; Redlich, supra
note 11.

60. Amar, supra note 56, at 123 (“the Tenth was the only one proposed by every one of
the state ratifying conventions that proposed amendments”); McAffee, “Original Mean-
ing,” supra note 1, at 1242 (“[A] provision like the tenth amendment is the only one that
appears in the proposals of every ratifying convention that offered any.”).

61. Amar, supra note 56, at 120.

62. Samuel Adams, “Debates in the Commonwealth of Massachusetts on the Adoption of
the Federal Constitution (Feb. 1, 1788),” in 2 The Debates in the Several State Conven-
tions on the Adoption of the Federal Constitution 130, 131 (J. Elliot ed., 2d ed., 1866)
[hereinafter cited as Elliot’s Debates].

63. Patrick Henry, “Debates in the Convention of the Commonwealth of Virginia on
the Adoption of the Federal Constitution,” in 3 Elliot’s Debates, supra note 62, at 150.
Notice that Henry refers to the “rights” of the states and the people—a reference that belies
the modern tendency to think it obvious that only people have rights, not states, and to think
that states have “powers,” which can never be a way to refer to rights. See supra note 58
(quoting Professor Barnett’s assertion that the “Tenth Amendment does not speak of rights,
of course, but of reserved ‘powers’”); McAffee, “Original Meaning,” supra note 1, at 1239
& n. 94.

64. McAffee, Inherent Rights, supra note 9, at 143. See also McAffee, “Original Mean-
ing,” supra note 1, at 1278–82.

65. Amar, supra note 56, at 124. “Thus, for example, we must not infer from our First
Amendment that Congress was ever given legislative power in the first place to regulate re-
ligion in the states, or to censor speech. (Sadly, some high Federalists in the late 1790s
drew precisely this inference to support the federal Sedition Act of 1798.)” Id.

66. Michael J. Perry, The Constitution in the Courts 65 (1993). But see McAffee, Inher-
ent Rights, supra note 9, at 171–72.

67. Richard S. Kay, “Adherence to the Original Intentions in Constitutional Adjudica-

68. Id. For additional insight into the reasons a not strictly essential provision might
still play a useful role, see Akhil Reed Amar, “Constitutional Redundancies and Clarifying
69. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 535 (1871). In addition to this example, note Professor Amar’s reference to a similar inference of legislative power from the First Amendment in the late 1790s. Amar, supra note 56, at 124 & n. 13. See also Forrest McDonald, The Bill of Rights: Unnecessary and Pernicious, in The Bill of Rights: Government Proscribed 387, 398–400 (Ronald Hoffman & Peter J. Albert eds., 1997) [hereinafter cited as Government Proscribed] (early examples of arguments in favor of enlarged federal powers being based on the explicit statements of limitations in the federal Bill of Rights); Chapter 2, “The Drafting of the Ninth and Tenth Amendments.” note 27.


71. See Chapter 2 supra, notes 115–135 and accompanying text. See also McAffee, “Federal System as Bill of Rights,” supra note 70, at 46–140.


73. Id. at 490 n. 5.

74. Of course the statement is ambiguous. On the one hand, James Wilson once described a bill of rights as “an enumeration of the powers reserved.” James Wilson, “Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787),” in 2 Ratification of the Constitution, supra note 23, at 388. Goldberg could be suggesting that the people retained as fundamental rights all the natural rights they had not “expressly delegated to the Federal Government.” Griswold, 381 U.S. 479, 490 n. 5 (1965) (Goldberg, J., concurring). But when Wilson, Madison, and others argued that the Tenth Amendment was rights-protective, they were relying on the idea that “it follows that all [the powers] that are not granted by the constitution are retained,” and thus “the constitution is a bill of powers, the great residuum being the rights of the people.” James Madison, “Debates in the House of Representatives (June 8, 1789),” in Creating the Bill of Rights: The Documentary Record From the First Federal Congress 83 (Helen E. Veit et al. eds., 1992) [hereinafter cited as Creating the Bill of Rights].

75. See Griswold, 381 U.S. 479, 490 n. 6, citing, Redlich, supra note 11. See also McAffee, Inherent Rights, supra note 9, at 85–88.

76. Id. at 491, quoting Myers v. United States, 272 U.S. 52, 151.

77. Notice, however, that if the language referring to “powers reserved” references individual powers to act, a court would avoid utter redundancy only by separating “powers” reserved to states and “powers” reserved to individuals.

78. The following treatment is based on McAffee, Inherent Rights, supra note 9, at 100–01. See also McAffee, “Federal System as Bill of Rights,” supra note 70, at 140–54; and McAffee, “The Modern Ninth Amendment,” supra note 70, at 373–87.


80. Calvin R. Massey, “The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law,” 1990 Wis. L. Rev. 1229, 1233 (stating that “state citizens have the power through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers”).


82. See id. (“The Articles of Confederation recognized that the country’s fundamental law consisted of the states’ fundamental laws.”)
83. See id. at 262–63 (arguing that the Ninth and Tenth Amendments were each derived from Article II of the Articles of Confederation and “were paired in the final version of the Bill of Rights probably because of their analogous residual purposes”).

84. Massey, Silent Rights, supra note 46, at 121–22.

85. Id. at 124. Massey admits that “[t]his is radical stuff, for it seemingly amounts to a form of reverse preemption.” Id. at 125. In fact, as he acknowledges, if it is to be justified at all, it is only by considering “the alterations over time to the allocations of power between state and federal governments.” Id. Massey would, in other words, justify the judicial imposition of new affirmative limits on government power from the Court’s own unwillingness to read the original grants of power in a restrained fashion.

86. See id. at 124 (underscoring that the Ninth Amendment forbids interpreters to “deny or disparage” other rights retained by the people).

87. Massey, supra note 80, at 1244. Massey concludes that “[g]iven the evident and overriding concern of the Anti-Federalists on this point, it is highly unlikely that the Anti-Federalists would have acceded to an amendment so ill-suited to their purpose.” Id.

88. Caplan, supra note 81, at 245 (stating that “antifederalists pointed out that Article II of the Articles of Confederation had embraced individual as well as state rights, and argued that a bill of rights was necessary to guarantee individuals the same protection under the proposed Constitution”).

89. See, e.g., James Iredell, 4 Elliot’s Debates, supra note 62, at 149 (North Carolina Ratifying Convention) (“A bill of rights, as I conceive, would not only be incongruous, but dangerous”).

90. James Wilson, to use a single example, argued that “a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution.” 2 Ratification of the Constitution, supra note 23, at 391 (Pennsylvania Ratifying Convention, Nov. 28, 1787). For a relatively complete analysis of Wilson’s arguments, see McAfee, “Original Meaning,” supra note 1, at 1249–53.

91. See 2 Schwartz, supra note 29, at 844 (discussing Virginia’s seventeenth proposal). It read: “That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.” Id.

92. See, e.g., Chapter 2 supra, notes 25 & 28 and accompanying text.

93. Amar, supra note 56, at 124.


95. On occasion, the Court has reaffirmed that it has construed “the Due Process Clause of the Fourteenth Amendment to confer a fundamental right to decide whether or not to beget or bear a child.” Bowers v. Hardwick, 478 U.S. 186, 190 (1986). In fact, in Bowers, Justice Blackmun (in dissent) strenuously objected to the Court’s refusal to consider whether the challenged statute ran afoul of the limitations embodied in the Ninth Amendment. Bowers, 478 U.S. 186, 201 (Blackmun, J., dissenting).

96. Alderman & Kennedy, supra note 13, at 322.

97. In Richmond Newspapers, the only personal, individual right of any relevance, the Sixth Amendment right to a “public trial,” had no application inasmuch as it was the individual defendant who most wanted the press and media excluded from having access to the trial—and hence had waived his Sixth Amendment right. To permit the closure of this criminal trial would not, therefore, have denied the criminal defendant any right guaranteed by the Due Process Clause. On the other hand, the Court could easily have, following the lead of concurring Justices Brennan and Marshall, simply found that “the First Amendment, of

98. Richmond Newspapers, 448 U.S. at 579.
99. Id.
100. Id.
101. Alexander Hamilton, The Federalist No. 84, supra note 6, at 579.
102. Id.
103. Barnett, supra note 6, at 10; Barnett, supra note 52, at 420 (linking Hamilton’s Federalist No. 84 argument with the Constitution’s defenders’ contention that there was no necessity for a bill of rights; seeing it as being unrelated to the “danger” argument that led to the Ninth Amendment). See generally McAffee, “Original Meaning,” supra note 1, at 1259–65. Little wonder that the standard summary of modern constitutional law perceives the Richmond Newspapers decision as ultimately “based on an implicit First Amendment right of the public to attend criminal trials.” John E. Nowak & Ronald D. Rotunda, Constitutional Law § 11.7, at 469 n. 10 (7th ed., 2004). The Court’s own treatment of Richmond Newspapers in subsequent cases confirms this interpretation.

104. Richmond Newspapers, 448 U.S. at 579.
106. Letter from James Madison to Thomas Jefferson, in 1 Schwartz, supra note 29, at 615 (Oct. 17, 1788) (emphasis added). Notice that Madison’s emphasis that a bill of rights is arguably misplaced “in such a Constitution” is one more allusion to the Federalist concern that the enumeration of rights would undermine the limited powers scheme and implicitly grant away the people’s reserved rights.

110. Id., quoting Charles v. Brown, 495 F. Supp. 862, 863–64 (N.D. Ala. 1980). The tendency to connect the Ninth Amendment to the expressio alterius canon of construction is linked to Joseph Story’s 1833 commentaries on the Constitution and is related to Alexander Hamilton’s argument as to the danger of including a bill of rights in the federal Constitution. See supra notes 2–7 and accompanying text.
111. That it has been correctly understood by at least some courts is reflected in its citation as a “but see” reference in contrast to Justice Goldberg’s opinion in Griswold v. Connecticut, 381 U.S. 479, 486–99 (concurring), as well as in opposition to Dean Ely’s attempt to defend the unenumerated fundamental rights reading of the Ninth Amendment in his well-known book, Democracy and Distrust: A Theory of Judicial Review 38 (1980). See United States v. Spencer, 160 F.3d 413, 414 (7th Cir. 1998); accord, Hector Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 182 (1st Cir. 1997).
112. Nowak & Rotunda, supra note 103, at 469 n. 10 (collecting cases).
113. Id. at 537.
114. Froehlich v. State of Wisconsin (196 F.3d 800, 801 (7th Cir. 1999) (citing cases).
116. Akhil Reed Amar, “Foreword: The Document and the Doctrine,” 114 Harv. L. Rev. 26, 123 (2000). See also id. at 122–23 (describing recent unenumerated rights case as “invoking the nonmammalian whale of substantive due process, a phantasmagorical beast conjured up by judges without clear textual warrant”). Little wonder that Justice Thomas recently observed that the only reason the Court could not properly reevaluate the whole area of unenumerated fundamental rights was “that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.” Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

117. Black, Jr., A New Birth of Freedom, supra note 14, at 3. See also John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 18 (1980) (contending that because “there is simply no avoiding the fact that the word that follows ‘due’ is ‘process,’” it appears we “need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness’”).


121. Strong, supra note 119, at 47, 50; McAffee, “Federal System as Bill of Rights,” supra note 70, at 116–18.

122. Strong, supra note 119, at 50.

123. Ely, Jr., supra note 119, at 336.

124. Id. at 338.


127. See, e.g., Bruce Ackerman, “The Common Law Constitution of John Marshall Harlan,” 36 N.Y.L. Sch. L. Rev. 5, 10 (1991) (concluding that “Justice Harlan exemplifies the type of judicial character that the common law model places at the center of the constitutional stage”; under common law constitutionalism the idea is to look for “leaders of the bar, masters of good judgment and interstitial adaptation of established norms”).


129. Ackerman, supra note 127, at 24. According to Ackerman, “Douglas’s principal aim was to look upon the particulars in the Bill of Rights as grounded in a more abstract principle expressed by the modern legal idea of privacy.” Id. For more skeptical treatments of the ability of courts to rely on abstract moral principles to determine appropriate limits
on government, see the sources cited at Frost, Klein-Levine & McAfee, “Courts Over Constitutions Revisited,” supra note 9, at 338 n. 20.

130. William Van Alstyne, “The Enduring Example of John Marshall Harlan: ‘Virtue as Practice’ in the Supreme Court,” 36 N.Y.L. Sch. L. Rev. 109, 117 n. 49 (1991). For Professor Van Alstyne, it is clear that Ackerman’s model will operate (as it sometimes already has operated) much in the manner of Hans Christian Andersen and The Emperor’s New Clothes. Within the new parable the Constitution is the Emperor. The Court then tells us from time to time, just how perfect the Emperor looks (he merely looks a bit naked as it were to us). But I surely agree that Justice Harlan can be faulted (if fault it be) for not giving himself as readily as others to this often personally self-gratifying and sometimes even highly rewarding, and thoroughly constructive community fraud. Perhaps, moreover, even as Professor Ackerman implies, some who served with Harlan thought this entirely appropriate, and accordingly declared “Behold!” Justice Harlan did not usually exclaim “Behold.” Rather in his quiet, professional manner, he was more likely to say: “Behold what?”

Id.

131. Id.
132. See, e.g., McConnell, supra note 48, at 672.
133. Ackerman, supra note 127, at 9.
135. McConnell, supra note 48, at 672.
137. Id. at 720–21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).
142. Id.
143. Id. at 30.
144. For useful analysis of why Lawrence is properly read as a fundamental rights case, notwithstanding its sometimes confusing language, see id. at 44–45.
145. Id. at 3–4.
146. Tribe, supra note 140, at 1896.
147. Id.

151. The classic example is the Court’s recognition that obscenity is not expression protected by the free speech clause of the First Amendment. See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) (obscene utterances “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”); Miller v. California, 413 U.S. 15, 24 (1973) (states may continue to limit “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”). See generally Harry M. Clor, Public Morality and Liberal Society (1996).

152. Ely, supra note 35, at 941.

153. It has been argued that “it is the insistence on a general power of courts to determine the appropriate ‘ends’ that government might legitimately and constitutionally pursue that most singularly characterizes an activist judiciary, whether in 1905 or 2004.” Frost, Klein-Levine & McAffee, “Courts Over Constitutions Revisited,” supra note 9, at 387. See generally Gerald Gunther, “The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,” 86 Harv. L. Rev. 1 (1972).


155. Sunstein, supra note 141, at 4. As Professor Tribe observed, “this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy.” Tribe, supra note 124, at 1896. See also Fleming, supra note 122, at 573 (comparing Kennedy’s opinion in Romer v. Evans, which treated the challenged provision “as reflecting unconstitutional animus against a politically unpopular group,” with Lawrence’s “same move,” though grounding “its holding in the Due Process Clause rather than equal protection”); Post, supra note 14, at 97 (’Themes of respect and stigma are at the moral center of the Lawrence opinion, and they are entirely new to substantive due process doctrine.”).

156. Sunstein, supra note 141, at 5.

157. See generally McAffee, “The Fourteenth Amendment,” supra note 1. For additional strong support for the view that equality before the law is at the center of the Fourteenth Amendment, see John Harrison, “Reconstructing the Privileges or Immunities Clause,” 101 Yale L.J. 1385 (1992).

158. As we hope this book has demonstrated, the Constitution does not contain a provision that open-endedly promises to secure “liberty” interests. And it may well be that the “equal laws” requirement was intended to be secured by the Privileges or Immunities Clause, considering in particular that section 2 of the Fourteenth Amendment explicitly recognizes the right of states to deny or “abridge” the right of the freedmen to vote. See Harrison, supra note 141. The evidence is overwhelming, in any event, that the Framers believed that they meaningfully could require “equal laws,” so the Court’s aggressive stand in Lawrence, even when using “heightened” rationality review, Sunstein, supra note 141, at 8, makes a great deal more sense than a similar effort to expand the liberty rights and interests of American citizens.

159. Sunstein, supra note 141, at 8.
CHAPTER 1

The State Legislatures as Holding “General” or “Plenary” Powers


For additional historic support for this conventional way of understanding the state constitutions, see Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution’s Unenumerated Rights 87 (1995); and Thomas Cooley, Constitutional Limitations 104 (6th ed., 1890). For case law support for this view, see Chapter 2 at n. 12; McAffee, Inalienable Rights, supra, at 776–77 nn. 112–114.
CHAPTER 2

The Ratification of the American Constitution


The Bill of Rights

Volumes of works have been published relating to the Bill of Rights, as well as its history. For helpful historical perspective of relevance to the themes of this book, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998); and *The Bill of Rights: Government Proscribed* (Ronald Hoffman and Peter J. Albert eds., 1997). For useful compilations of original materials on which we have relied in understanding the Bill of Rights, see *Creating the Bill of Rights: The Documentary Record of the First Federal Congress* (Helen E. Veit et al. eds., 1991); and Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971).

The Ninth Amendment

This work defends the view that the Ninth Amendment grew quite naturally out of the debate over whether to ratify the proposed federal Constitution. Specifically, the concern, especially among the Federalist proponents of ratification, was that a Bill of Rights might actually prove dangerous, creating an inference of enlarged or extended national powers and thereby defeating the intended effect of the rights-protective structural scheme of limited powers. For works analyzing the ratification debates and reaching the same conclusion, see Thomas B. McAffee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding* (2000); and James H. Huston, “The Bill of Rights and the American Revolutionary Experience,” in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, at 91 (Michael J. Lackey & Ned Haakonssen eds., 1991). For law journal articles supporting this conclusion, see Thomas B. McAffee, “The Original Meaning of the Ninth Amendment,” *90 Colum. L. Rev.* 1215 (1990); Philip A. Hamburger, “The Constitution’s Accommodation of Social Change,” *88 Mich. L. Rev.* 239, 315–17 (1989); Arthur Wilmarth,


The Constitution and Unwritten Principles

A number of modern scholars have documented that some in the founding generation believed that government was limited not only by the terms of the written Constitution, but also by limiting principles derived from concepts of natural rights or justice, or perhaps the British constitution. Some have taken the view that this was the position held by a majority of those who ratified the Constitution—asserting on occasion that a purpose of the Ninth Amendment was to secure unnamed (“unenumerated”) rights. See, e.g., Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004); Charles L. Black, Jr., A New Birth of Freedom: Rights, Named and Unnamed (1997); Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution’s Unenumerated Rights (1995); John Choon Yoo, “Our Declaratory Ninth Amendment,” 42 Emory L.J. 967 (1993); Suzanna Sherry, “The Founders’ Unwritten Constitution,” 54 U. Chi. L. Rev. 1127 (1987); and Thomas C. Grey, “Do We Have an Unwritten Constitution?” 27 Stan. L. Rev. 702 (1975).

For the view that unwritten constitutionalism was not predominant at the time of the founding, see the sources, cited above, related to the history of the Ninth Amendment. For other works relating to the history of invoking unwritten principles in the course of interpreting and implementing the written Constitution, see Steven D. Smith, The Constitution and the Pride of Reason (1998); Leslie F. Goldstein, In Defense of the Text: Democracy and Constitutional Theory (1991); Thomas B. McAffee, “The Federal System as Bill of Rights: Original Understandings, Modern Misreadings,” 43 Vill. L. Rev. 17 (1998); Philip A. Hamburger, “Natural Rights, Natural Law, and American Constitutions,” 102 Yale L.J. 907

**The Necessary and Proper Clause and Individual Rights**


**The Tenth Amendment**

CHAPTER 3


**Federalism and the Sedition Act**


**The Bank of the United States and McCulloch v. Maryland**


with good reason, enormous. For a recent, succinct discussion of the ruling’s historical and precedential significance, which might also serve as gateway to further reading, see Daniel A. Farber, “The Story of McCulloch: Banking on National Power,” 20 Const. Comment. 679 (2004).

CHAPTER 4

It may be helpful to review the selection of this bibliographic essay relating to Chapter 1, and especially The State Legislatures as Holding “General” or “Plenary” Powers.

The “Right” of the People to Amend Their Constitutions


The Fourteenth Amendment

This work was not designed to explore the depths of Fourteenth Amendment doctrine. It only considers the Fourteenth Amendment’s relevance to modern fundamental rights jurisprudence. All the sources relating to the Ninth Amendment, as set forth in connection to Chapter 2, are of some relevance to the issue whether we should be applying fundamental rights to the states. An ultimate question concerns the relationship between “inalienable” or “inherent” rights and the written constitutions, both of the states as well as the federal Constitution. An important question is whether the Declarations of Rights of the state constitutions, which referred to “inherent” and “inalienable” rights, were designed and understood as stating limits on the powers granted to government. For a negative answer, see Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding (2000); and McAffee, “Inalienable Rights, Legal

CHAPTER 5

The Tenth Amendment Before the New Deal

The Modern Debate over “Commerce”


For learned and thorough treatment of the federalism issues presented by regulations of the railroads, see Herbert Hovenkamp, “Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem,” 97 *Yale L.J.* 1017 (1988). The ambiguous relationship between federalism and the treaty power is explored in the following exchange, see Curtis A. Bradley, “The Treaty Power and American Federalism,” 97 *Mich. L. Rev.* 390 (1998) (challenging the “nationalist view” of the treaty power that excepts it from the constraints of federalism); David M. Golove, “Treaty-Making and the Nation: The

New Deal Federalism

The traditional understanding of federalism during the 1930s stressed the revolutionary nature of the “switch” between the cases decided before the announcement of Roosevelt’s court-packing plan and those that came thereafter. Whereas the Supreme Court’s rulings during President Roosevelt’s first term struggled to cabin congressional authority, and thereby preserve the reserved powers, the post-1936 decisions largely abandoned this effort. Moreover, the controlling assumption was that the court-packing crisis not only correlated with but in fact caused this transformation in the Court’s position. While debate continued over both the legitimacy and the consequences of this constitutional revolution, most commentators agreed that Roosevelt’s court-packing plan provoked this swift and dramatic change in the jurisprudence. A relatively recent historical narrative reflecting this view can be found in William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 27 (1995). See also Bruce Ackerman, We the People: Transformations (1998).


**CHAPTER 6**

**The States Qua States Cases**


In Garcia, the Court relied in part on the claim that the structure of the federal government made judicial protection of federalism unnecessary and

**The Anticommandeering Cases**


Several ambitious scholars have profitably addressed the issues common to many or all of the states qua states and/or anticommandeering cases. See, e.g., G. Sidney Buchanan, “The Scope of State Autonomy under the United States Constitution,” 37 *Hous. L. Rev.* 341 (2000); Steven G. Gey, “The Myth of State Sovereignty,” 63 *Ohio St. L.J.* 1601 (2002); Roderick M. Hills, Jr., “The Political Economy of Cooperative Federalism: Why State Autonomy

The Reserved Powers and Competing Models of Sovereignty


A Revival of the Enumerated Powers Doctrine?


The modern federalism cases can be overwhelming, as they bestride so many discrete constitutional (and other legal) issues. Hence, scholarship painting the whole picture with a broad brush is at once singularly difficult and uncommonly valuable. Commendable efforts in this regard include Nagle,
CHAPTER 7

The Ninth Amendment

See the equivalent section under Chapter 2.

Substantive Due Process


A number of modern legal scholars, including a number who support the idea of “unenumerated” fundamental rights, contend that substantive due process is an oxymoron that lacks historical foundations. See Akhil Reed Amar, “Foreword: The Document and the Doctrine,” 114 Harv. L. Rev. 26, 122–23 (2000). Accord, Charles Black, Jr., A New Birth of Freedom: Human

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About the Authors

THOMAS B. McAFFEE is Professor of Law, William S. Boyd School of Law, University of Nevada–Las Vegas. He has taught law since 1982, initially at Southern Illinois University College of Law. He has published numerous articles on constitutional law, constitutional history, and constitutional theory, as well as the book *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding* (Greenwood, 2000).

JAY S. BYBEE is Judge in the U.S. Court of Appeals for the Ninth Circuit. He previously served in government as Assistant Attorney General for the Office of Legal Counsel, as Associate White House Counsel, and as an attorney at the Department of Justice. He was Professor of Law at the William S. Boyd School of Law at the University of Nevada–Las Vegas and at the Paul M. Hebert Law Center at Louisiana State University.

A. CHRISTOPHER BRYANT is Professor of Law, College of Law, University of Cincinnati. He clerked for Judge James L. Buckley of the U.S. Court of Appeals for the D.C. Circuit. After his clerkship, he practiced law, first with the Washington, D.C., law firm Shea and Gardner and then as an assistant in the U.S. Senate Office of Legal Counsel. He also taught for three years at the William S. Boyd School of Law at the University of Nevada–Las Vegas.