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James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment

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Introduction

It has become commonplace to describe the Rehnquist Court as having staged a "federalism revolution."[1] Although the current status of the revolution is in dispute,[2] historical treatment of the Supreme Court's jurisprudence under Chief Justice Rehnquist no doubt will emphasize a resurgence of federalism and limited construction of federal power.[3] Cases like *Gregory v. Ashcroft*,[4] *New York v. United States*,[5] *United States v. Lopez*,[6] *Printz v. United States*,[7] *Alden v. Maine*,[8] and *United States v. Morrison*[9] all share a common rule of interpretation: narrow construction of federal power to interfere with matters believed best left under state control.[10]

The textual hook for this rule of strict construction has been the Tenth Amendment.[11] As Justice O'Connor wrote in the seminal federalism revolution case, *Gregory v. Ashcroft*:

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1 The references are ubiquitous in current literature. *See, e.g.*, Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2 (2004) (describing the Rehnquist Court's "federalism revival"); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 4–5 (2003); Bradley W. Joondeph, Bush v. Gore, *Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1784 (2001); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 651 (2003); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690 (2004). To be sure, not all of these authors agree on the scope or value of the revolution. *See generally* Symposium, *Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court's New Federalism*, 12 WIDENER L.J. 373 (2003) (discussing the federalism of the Rehnquist Court).

2 *See* David G. Savage, *Finite Federalism*, A.B.A. J., July 2004, at 20; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004) ("We have seen neither the revolution that partisans of states' rights might have wished nor the deluge that many nationalists feared."); *see also* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (upholding federal ban on state-authorized medicinal use of marijuana).

3 *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

4 Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

5 New York v. United States, 505 U.S. 144, 149 (1992).

6 United States v. Lopez, 514 U.S. 549, 552 (1995).

7 Printz v. United States, 521 U.S. 898, 935 (1997).

8 Alden v. Maine, 527 U.S. 706, 713 (1999).

9 United States v. Morrison, 529 U.S. 598, 613 (2000).

10 *See supra* notes 4–9 and accompanying text.

11 U.S. CONST. amend. X ("The powers not delegated to the United States by the Consti-

> The Constitution created a Federal Government of limited powers. 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. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:
>
> > The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[12]

In *Gregory*, the Court reasoned that statutes should be construed, whenever possible, to avoid interfering with matters traditionally left to the states.[13] In *United States v. Lopez*, the Court expanded upon *Gregory*'s theoretical approach and crafted a rule of construction limiting the scope of Congress's commerce power for the first time since the New Deal.[14] Returning to "first principles," Rehnquist once again quoted James Madison's assertion in the Federalist Papers that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties."[15] The Tenth Amendment, the Court believed, mandated a rule of construction that preserved this division of federal and state authority.[16] Although prior cases had broadly construed federal commerce power, the *Lopez* Court refused to allow any further expansion lest the division of power called for by the Tenth Amendment disappear altogether.[17]

In a concurrence joined by Justice O'Connor, Justice Kennedy agreed that the Gun Free School Zones Act of 1990[18] violated the proper balance of power between the state and federal government—a balance established by the Tenth Amendment:

> 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. Absent a stronger connection or

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tution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

12 Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (first quotation omitted) (quoting THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

13 *Id.* at 460–61.

14 United States v. Lopez, 514 U.S. 549, 552–59 (1995).

15 *Id.* (quotations omitted).

16 *See id.* at 567–68 (refusing to pile inference upon inference to expand federal powers).

17 *See id.*

18 Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844, *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

> identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.[19]

Justice Thomas also concurred, adding that the Court's construction of federal commerce power came "close to turning the Tenth Amendment on its head," and urging the Court to reexamine its post–New Deal interpretation of the Interstate Commerce Clause.[20]

In *Morrison*, a majority of the Rehnquist Court repeated the Tenth Amendment–based rule of construction that "requires a distinction between what is truly national and what is truly local," and struck down the Violence Against Women Act.[21] In his dissent, Justice Souter attacked the majority's rule of strict construction and argued that the political process should enforce the constraints of the Tenth Amendment, not judicial intervention.[22] According to Souter, the federalism of the majority was based not on the text of the Constitution, "but on what has been termed the *spirit* of the Tenth Amendment."[23]

Souter's criticism—that the federalism jurisprudence of the Rehnquist Court is not based on any reasonable reading of constitutional text—has been repeated by a number of scholars.[24] In fact, the text of the Tenth Amendment says nothing about how to construe federal power, only that all nondelegated powers "are reserved to the states respectively or to the people."[25] Justice O'Connor herself has conceded that the Tenth Amendment suggests rather than demands the Court's federalist rule of construction.[26] Even if it is true that the Tenth Amendment reflects the Founders' commitment to a dual system of government, it is difficult to escape the accusation that the Court's federalism jurisprudence is based on what Justice Oliver Wendell Holmes derisively described as "some invisible radiation from the general terms of the Tenth Amendment."[27]

Even if not demanded by the text of the Tenth Amendment, the federalism jurisprudence of the Rehnquist Court, at least historically, *is* supported

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19 *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

20 *Id.* at 589 (Thomas, J., concurring).

21 United States v. Morrison, 529 U.S. 598, 617–18 (2000) (citations omitted) (invalidating a portion of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902).

22 *Id.* at 648 (Souter, J., dissenting).

23 *Id.* at 648 n.18 (Souter, J., dissenting) (quotations omitted).

24 *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 288–93 (2000); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 899 (1999); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 927–28 (1994).

25 U.S. CONST. amend. X.

26 *See* New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . . Instead, 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."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) ("The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.").

27 Missouri v. Holland, 252 U.S. 416, 434 (1920).

by a rule of construction expressed in the text of the Constitution: the Ninth Amendment.[28] This proposition may seem a startling one, particularly in light of the common libertarian reading of the Ninth.[29] Originally, however, Founders like James Madison viewed the Ninth Amendment, not the Tenth, as a rule limiting the construction of federal power.[30] According to Madison, the Tenth Amendment prohibited the federal government from exercising any "source of power not within the constitution itself."[31] The Ninth Amendment, however, went further and "guard[ed] against a latitude of interpretation" when it came to the construction of enumerated federal power.[32] Although related in their federalist ends, the duties of these two amendments were distinct. The Tenth Amendment established the principle of enumerated power, with all nondelegated power reserved to the states.[33] The Ninth, on the other hand, limited the interpretation of those federal powers that *were* enumerated.[34] In this way, the rule of the Ninth preserved the principle of the Tenth.

Although this historical understanding of the Ninth and Tenth Amendments has long since passed out of memory,[35] early constitutional commentators like St. George Tucker[36] and John Taylor[37] shared the Madisonian reading of these amendments. In *Houston v. Moore*,[38] the first Supreme Court case to include a discussion of the Ninth Amendment, Justice Joseph Story followed Madison's lead and cited the Ninth Amendment as supporting a limited interpretation of federal power in order to preserve the concurrent powers of the states.[39]

Over time, however, courts and commentators came to view the Tenth Amendment as also expressing a rule of narrow, or strict, construction of federal power. By the time of the New Deal, countless state and federal courts had cited the Ninth and Tenth Amendments *in pari materia* as coequal

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28 U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

29 For examples of libertarian readings of the Ninth Amendment, see discussions of the Ninth in RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69 (2004); CALVIN MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); and essays reprinted in 1–2 THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989) (discussing natural or preferred rights).

30 *See, e.g.*, James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in* JAMES MADISON, WRITINGS 480, 489 (Jack N. Rakove ed., 1999).

31 *Id.*

32 *Id.*

33 *See* U.S. CONST. amend. X.

34 *See id.* amend. IX.

35 *See, e.g.*, BENNETT PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1995) (describing the Ninth as having received little historical attention).

36 *See* St. George Tucker, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 140, 140–44 (St. George Tucker ed., Lawbook Exchange reprint ed. 1996) (1803) [hereinafter BLACKSTONE'S COMMENTARIES].

37 *See* JOHN TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 96 (Washington City, Way & Gideon 1823).

38 Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

39 *Id.* at 48–50.

restrictions on the scope of enumerated federal power.[40] In the aftermath of the New Deal revolution, however, the original federalist application of the Ninth Amendment was lost, and when the Rehnquist Court reinvigorated the concept of federalism, the Court embraced the Tenth Amendment as the textual basis for limiting federal power.[41] Over a period of two hundred years, courts and commentators thus transformed the Tenth Amendment from a declaration of principle to an independent rule of construction. This Article explores how that transformation occurred.

Part I explores the drafting and early interpretation of the Tenth Amendment. Originally, Madison envisioned the Tenth Amendment as a declaration of enumerated federal power, with the Ninth Amendment establishing a rule of strict construction of those enumerated powers. Absent a rule controlling the scope of interpreted federal power, the declaration of the Tenth Amendment risked becoming an empty promise. In this way, Madison intended that the Ninth and Tenth Amendments work together, with the principle of the Tenth guarded by the application of the Ninth.

Part II considers how, over time, the Tenth Amendment came to be understood as expressing its own rule of strict construction. James Madison's Tenth Amendment–based argument in his 1800 Report on the Alien and Sedition Acts (also known as Madison's "Report of 1800") helped fuel this transformation.[42] Although fully consistent with his original reading of the Ninth and Tenth Amendments,[43] Madison's Report became a key document in later states' rights advocacy and led to the view that the Tenth Amendment, rather than the Ninth, stood as the primary guardian of limited federal power.

Part III looks at the modern period and traces the gradual emergence of the Ninth and Tenth Amendments as antagonists rather than co-guardians of the principle of federalism. At the time of the New Deal, both the Ninth and Tenth Amendments were reduced to mere "truisms." By the time the Supreme Court decided *Griswold v. Connecticut*[44] in 1965, the historical link between the Ninth and Tenth Amendments had long since been forgotten. The new interpretation of the Ninth presented it as textual support for judicial enforcement of rights against the states. Not surprising, when the Rehnquist Court reinvigorated federalism as a constraint on federal power in the 1990s, the Court ignored the modern "libertarian" Ninth Amendment and relied on the Tenth Amendment alone as support for its rule of strict construction.

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40 The full jurisprudence is presented in Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

41 *See supra* notes 11–12, 16–17 and accompanying text.

42 *See* JAMES MADISON, REPORT ON THE ALIEN AND SEDITION ACTS (1800), *in* WRITINGS, *supra* note 30, at 608.

43 *See* James Madison, Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1786–1870, at 221, 221–22 (Dept. of State ed., 1905) [hereinafter DOCUMENTARY HISTORY].

44 Griswold v. Connecticut, 381 U.S. 479 (1965).

The Article concludes with a brief discussion of the potential consequences of returning both the Ninth and Tenth Amendments to their historic roles.

I. A Brief History of the Tenth Amendment and the Rule of Strict Construction

The historical precursor to the Tenth Amendment was Article II of the Articles of Confederation, which declared that "[e]ach 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."[45]

Because the states had existed for more than a decade under the Articles of Confederation as thirteen independent and sovereign states,[46] the degree to which the proposed Constitution would diminish (or eradicate) state sovereignty was a major issue in the ratification debates. Despite Federalist assurances to the contrary, Anti-Federalists warned of the potential consolidation of the states under a national government with unlimited power.[47] Although a sufficient number of states eventually agreed to ratify the Constitution, a number of them did so with the understanding that the scope of federal power would be strictly limited.[48] Several state conventions included statements of principle along with their notices of ratification declaring their understanding that all nondelegated powers, jurisdictions, and rights were reserved to the states.[49] The New York convention, for example, declared

> that 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.[50]

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45 ARTICLES OF CONFEDERATION art. II (1781).

46 *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969).

47 *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828 (1999) (discussing Anti-Federalist thought).

48 The declarations of understanding and proposed amendments are reproduced in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 29, at 353–59.

49 For a more complete discussion of these statements of principle, see Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 355–58 (2004).

50 Amendments Proposed by the New York Convention (July 26, 1788), *in* 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 29, at 356, 356; *see also* Ratifications—State of New York, *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 327, 329 (Jonathan Elliot ed., William S. Hein & Co. 1996) [hereinafter ELLIOT'S DEBATES] ("Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confi-

Other states, not content to leave the matter to a simple "declaration of principle," ratified the Constitution on the understanding that amendments would be added as soon as was practicable.[51] Several states submitted lists of proposed amendments, all of which included a clause expressly declaring the reserved powers and rights of the states.[52] Virginia's proposal, in essence, went beyond New York's declaration of assumed principle and called for an express constitutional declaration "[t]hat 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."[53]

The Federalists, who advocated the adoption of the Constitution, had no objection to such an amendment. After all, they had argued in the state ratification conventions that the structure of the Constitution *necessarily* implied such a principle of limited enumerated federal power.[54] Accordingly, Madison faced no opposition when he proposed an amendment stating that "the powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."[55]

The absence of opposition in this case, however, does not indicate the presence of enthusiasm. Madison's own remarks in introducing this provision to the House were decidedly tepid:

> I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.[56]

Madison clearly was not convinced of the necessity of such a clause. He and other Federalists originally had resisted adding a Bill of Rights, in part because they believed that the Constitution, fairly construed, already estab-

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dence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration,—We, the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.").

51 *See, e.g.*, Amendments Proposed by the Virginia Convention (June 27, 1788), *in* THE COMPLETE BILL OF RIGHTS 675 (Neil H. Cogan ed., 1997); Ratifications—Rhode Island, *in* 1 ELLIOT'S DEBATES, *supra* note 50, at 334, 335 ("We, the said delegates . . . do, by these presents, assent to and ratify the said Constitution. In full confidence, nevertheless, that . . . the amendments hereafter proposed and undermentioned shall be agreed to and ratified."); *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 31–32 (1999).

52 *See* THE COMPLETE BILL OF RIGHTS, *supra* note 51, at 675 (including state drafts of proposed constitutional amendments).

53 Amendments Proposed by the Virginia Convention, *supra* note 51.

54 *See* THE FEDERALIST NO. 45, *supra* note 12, at 292; MADISON, *supra* note 42, at 609.

55 House of Representatives, Amendments to the Constitution (June 8, 1789), *in* 5 THE FOUNDERS' CONSTITUTION 20, 25–26 (Philip B. Kurland & Ralph Lerner eds., 1987).

56 *Id.* at 28.

lished the principle of limited enumerated federal power.[57] Still, Madison acceded to the demands of the states, if only to head off a second constitutional convention,[58] and dutifully proposed the "superfluous" Tenth Amendment.[59]

In fact, even the most vigorous proponents of states' rights also were less than enthusiastic about the proposed Tenth Amendment. They did not object to Madison's draft or believe the principle unimportant; it was that they believed that the Tenth Amendment was unlikely to have any "real effect";[60] it was already well understood that all nondelegated powers remained with the states.[61] New York, after all, ratified the Constitution on this presumed understanding, even without the addition of the Tenth Amendment.[62] Worse, by adding the final phrase, "or to the people," some objected that the Tenth Amendment would actually *undermine* the principle that all nondelegated powers were reserved to the states.[63]

The problem was not that anyone seriously disputed that the proposed government would be one of enumerated powers. The structure of the Constitution and the enumeration of federal power in Article I, Section 8 seemed to clearly imply that principle.[64] The problem was how to prevent the undue expansion of those powers that *were* enumerated.[65] Federal courts would be empowered to construe the Constitution, and as branches of the federal government, they were believed likely to do so in favor of federal power.[66] Nor

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57 *See* THE FEDERALIST NO. 45, *supra* note 12, at 292–93.

58 *See* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 222–23 (1994).

59 *See* Amendments to the Constitution, *supra* note 55, at 28.

60 *See* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 DOCUMENTARY HISTORY, *supra* note 43, at 222, 223. According to Randolph, "The twelfth [the Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is *delegated*. It accords pretty nearly with what our convention proposed; but being once adopted, it may produce new matter for the cavils of the designing." *Id.*

61 *See, e.g.*, Amendments to the Constitution, *supra* note 55, at 28 (noting the superfluous nature of the proposed amendment).

62 *See supra* note 50 and accompanying text.

63 *See* Entry of Dec. 12, 1789, *in* JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 60, 64 (Richmond, Thomas W. White 1827) [hereinafter VIRGINIA SENATE JOURNAL].

64 *See* U.S. CONST. art. I, § 8.

65 See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 905–07 (1985), for a discussion of Anti-Federalist concerns about judicial interpretation of the proposed Constitution.

66 According to "Brutus":

> The judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. . . . Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation.

BRUTUS NO. 11 (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 420–21 (Herbert J. Storing ed., 1981). See Lash, *supra* note 49, at 351–53, for additional examples of Anti-Federalist concerns.

would the addition of express restrictions on federal power necessarily solve the problem.[67] Indeed, adding such restrictions might even prove dangerous, for the enumeration of certain rights might be construed to allow federal power to extend to all matters except those expressly prohibited.[68] Limiting federal power required a rule preventing unduly broad interpretations of enumerated federal authority, thus ensuring that the people of the individual states would retain significant autonomy over those matters that were best left to local control.[69] A number of state ratifying conventions proposed the addition of such a rule of interpretation—proposals that Madison relied on in drafting his own version of what would become the Ninth Amendment.[70] The Virginia ratifying convention, for example, proposed the following amendment, which Madison himself helped draft:[71]

> 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 may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.[72]

Similarly, Madison's original version of the Ninth Amendment, which he presented to the House, stated:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so 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.[73]

Madison's version of the Ninth Amendment thus echoed the Virginia proposal and satisfied the demands of other state conventions for a provision

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67 *See* Statement of James Iredell (July 29, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 50, at 164, 167.

68 According to James Iredell:

> [I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

Id. (speaking in the North Carolina ratifying convention); *see also* James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* WRITINGS, *supra* note 30, at 437, 448–49.

69 *See* Lash, *supra* note 49, at 353–55 (discussing the possibility of implementing rules of constitutional interpretation).

70 *See, e.g.*, Amendments Proposed by the Virginia Convention, *supra* note 51, at 675; *see also* Letter from James Madison to George Washington (Nov. 20, 1789), *in* 5 DOCUMENTARY HISTORY, *supra* note 43, at 215 (noting that the amendment corresponds to the proposition made by the Virginia convention). See Lash, *supra* note 49, at 358–40, for a complete discussion of these proposals on interpretation of the Constitution.

71 James Madison was a member of the committee that drafted the Virginia proposal, and he later noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. *See* Madison, *supra* note 70.

72 Amendments Proposed by the Virginia Convention, *supra* note 51, at 675.

73 Amendments to the Constitution, *supra* note 55, at 25.

preventing the undue extension of federal power.[74] Madison's version also prevented any implied extension of federal power arising from the addition of specific enumerated rights.

Madison's proposals were referred to a select committee (of which Madison was a member), and when a streamlined version of the Bill of Rights came back to the full House, the Ninth Amendment no longer contained the language limiting the extension of federal power.[75] The deleted language raised concerns in Virginia, where Edmund Randolph feared that his state's call for a provision limiting the construction of federal power had gone unheeded.[76] Madison responded that protecting the retained rights of the people amounted to the same thing as prohibiting the constructive enlargement of federal power.[77] In a letter to George Washington discussing Randolph's concerns about the Ninth Amendment, Madison explained that "[i]f a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended."[78] According to Madison, preserving retained rights amounted to the same thing as prohibiting the undue extension of power.[79] In Madison's view, the final draft of the Ninth Amendment thus continued to express the same principle of limited federal power—only now it expressed this principle as a matter of retained rights.[80] Under the Tenth Amendment, Congress had

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74 *See, e.g.*, Amendments Proposed by the New York Convention, *supra* note 50, at 356; *see also* U.S. CONST. amend. IX.

75 *See* BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1050 (Bernard Schwartz ed., 1971).

76 *See, e.g.*, Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *in* 5 DOCUMENTARY HISTORY, *supra* note 43, at 219.

77 *See* Madison, *supra* note 43, at 221–22.

78 *Id.* at 222.

79 *See id.*

80 *See id.* Later constitutional commentators would agree with Madison that the Ninth both preserved retained rights *and* prevented constructive expansion of federal power. For example, in his *Commentaries on the Constitution*, Joseph Story wrote:

> In regard to another suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favour of other powers, it might be sufficient to say, that such a course of reasoning could never be sustained upon any solid basis; and it could never furnish any just ground of objection, that ingenuity might pervert, or usurpation overleap, the true sense. That objection will equally lie against all powers, whether large or limited, whether national or state, whether in a bill of rights, or in a frame of government. But a conclusive answer is, that such an attempt may be interdicted, (as it has been,) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 720–21 (photo. reprint 1991) (1833). Although a number of commentators have suggested that the "powers" language of the original draft of the Ninth Amendment eventually ended up in the Tenth Amendment, there is no historical evidence to support this proposition, and it seems clearly refuted by Madison's letters and speeches, and later commentators like Joseph Story. *But see* 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 29, at 253–69 (arguing that the Ninth Amendment creates a presumption of liberty that limits federal powers); MASSEY, *supra* note 29 (arguing that the Ninth Amendment limits federal power by providing judicially enforceable unenumerated rights).

no powers but those enumerated.[81] Under the Ninth, Congress and the courts could not construe those enumerated powers in a manner denying or disparaging rights retained by the people.[82]

Madison repeated his power-constraining interpretation of the Ninth and Tenth Amendments while the Bill of Rights remained pending in the critical state of Virginia.[83] In a speech opposing the chartering of a national bank in 1791, Madison argued that only an unduly broad interpretation of federal power would allow Congress to create the Bank of the United States.[84] In their efforts to secure votes in favor of the Constitution, Federalists had assured the state ratifying conventions that the Constitution would not be construed in such a latitudinarian manner,[85] and the ratifying states themselves had issued declarations and proposed amendments which established their understanding that the Constitution would not be so construed.[86] The adoption of the pending Ninth and Tenth Amendments would make this assumed limited construction of federal power an express constitutional mandate:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th. and 12th. the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.[87]

A few months after Madison gave this speech, Virginia voted in favor of the last ten of twelve proposed amendments, and the Bill of Rights became part of the Constitution.[88] This Bill, like the Constitution itself, begins with a preamble:

> THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to pre-

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81 *See* U.S. CONST. amend. X.

82 *See id.* amend. IX.

83 Objections regarding the final version of the Ninth Amendment led Edmund Randolph to halt Virginia's efforts to ratify the Bill of Rights. Anti-Federalists managed to exploit Randolph's initial concerns (which he overcame) and delay ratification of the Bill of Rights for two years. Correspondence between James Madison, Hardin Burnley, and George Washington that discusses the Virginia debate can be found in 5 DOCUMENTARY HISTORY, *supra* note 43, at 219–31; *see also* Entry of Dec. 12, 1789, *supra* note 63, at 61–65 (discussing objections to the Ninth Amendment); Lash, *supra* note 49, at 371–86 (discussing the Virginia debate).

84 *See* Madison, *supra* note 30, at 480, 482–85.

85 *See supra* note 50 and accompanying text.

86 Madison, *supra* note 30, at 488–89; *see also supra* notes 48–53 and accompanying text.

87 Madison, *supra* note 30, at 489. Here, Madison refers to the Ninth and Tenth Amendments as the eleventh and twelfth. Congress originally submitted twelve amendments to the states for ratification; what we now know as the Ninth and Tenth were originally the eleventh and twelfth proposed amendments on the list.

88 *See* JOURNAL OF THE FIRST SESSION OF THE SENATE 73–74 (1789) (entry of Sept. 8); Letter from George Washington to the Senate and House of Representatives (Dec. 30, 1791), *in* 5 DOCUMENTARY HISTORY, *supra* note 43, at 245.

> vent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.[89]

As suggested by the Preamble, the Ninth Amendment acts as a restrictive clause, while the Tenth stands as a declaration of principle.[90] As a restrictive clause, the Ninth *preserves* the principle enshrined in the Tenth. Without such a rule preventing "misconstruction" of the Constitution, the declaratory Tenth Amendment risks becoming an empty promise.[91] Together, however, the two amendments prevent the "misconstruction or abuse" of federal power.

The proper construction of federal power soon became an issue during the debate over the first Bank of the United States. In his opinion opposing the creation of the bank, Thomas Jefferson argued that the "latitude of construction" adopted by the bank's proponents would destroy the principle of enumerated powers declared in the Tenth Amendment:

> I consider the foundation of the Constitution as laid on this ground that all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people. . . . If such a latitude of construction be allowed to [the phrase "necessary and proper"] as to give any non-enumerated power, it will go to every one, for the[r]e is no one which ingenuity may not torture into a *convenience*, *in some way or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. . . . The present is the case of a right remaining exclusively with the states.[92]

Echoing Jefferson's concerns, Attorney General Edmund Randolph observed that, although governments without constitutions might "claim a latitude of power not always easy to . . . determine[ ]," the federal government, as "confessed by Congress, in the twelfth amendment," possessed only enumerated powers.[93] Canvassing the various claimed sources of power for the bank, Randolph concluded:

> [A] similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation. . . . [L]et it be propounded as an eternal question to those who build new powers on this clause, whether the *latitude* of construction

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89 U.S. CONST. Bill of Rights pmbl. The Senate approved the Preamble to the Bill of Rights on Tuesday, September 8, 1789. *See* JOURNAL OF THE FIRST SESSION OF THE SENATE, *supra* note 88, at 73.

90 *See* U.S. CONST. Bill of Rights pmbl.

91 *See supra* notes 30–34 and accompanying text.

92 Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 276–80 (Julian P. Boyd ed., 1974) (quotations omitted).

93 Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), *in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 3, 4 (1999).

which they arrogate will not terminate in an unlimited power in Congress?[94]

Both Jefferson and Randolph read the Tenth Amendment as confirming the establishment of a federal government of enumerated powers, with all nondelegated powers reserved to the states.[95] Unduly latitudinarian constructions of enumerated federal power threatened to undermine this arrangement by creating, in essence, a government of unlimited power. Accordingly, Randolph and Jefferson advocated a rule of strict construction in order to preserve the principle announced by the Tenth Amendment. The rule preserved the principle.

Madison, of course, read the Ninth Amendment to express just such a rule,[96] and early constitutional commentators agreed. In the very first Supreme Court opinion discussing the Ninth Amendment, Justice Joseph Story followed the Madisonian reading of the Ninth and used it to support a limited construction of federal power.[97] In the 1820 case *Houston v. Moore*,[98] Justice Story wrote that federal power to discipline the militia should not be read as exclusive of the concurrent power of individual states to establish their own rules of militia discipline, so long as those rules did not conflict with any federal statute.[99] Story declared that "[i]n all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning."[100]

Madison and Story were not alone in their reading of the Ninth as a federalist rule of interpretation. In his 1803 *View of the Constitution*, St. George Tucker likewise presented the Ninth Amendment as supporting a federalist rule of strict construction of federal power,[101] as did constitutional

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94 *Id.* at 7 (emphasis added).

95 *See, e.g.*, Madison, *supra* note 30, at 480, 482–85; Randolph, *supra* note 93, at 4.

96 *See supra* notes 83–87 and accompanying text; Lash, *supra* note 49, at 392.

97 Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

98 *Id.*

99 *Id.* at 51–52 (Story, J., dissenting).

100 *Id.* at 48–50 (Story, J., dissenting) (following the early convention of referring to the Ninth as the eleventh amendment). Although written in a dissent, Story's description of the Ninth and its protection of the concurrent powers of the states remained influential for over a century. *See* Lash, *supra* note 40, at 613.

101 In his discussion of the proper interpretation of the Constitution, Tucker wrote:

> As [a federal compact] it is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question [citing the Tenth Amendment]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government [citing the Ninth and Tenth Amendments].

Tucker, *supra* note 36, at 151.

commentator John Taylor.[102]

Unlike Madison, Jefferson, and Randolph—who believed that preserving the Tenth required the *addition* of a rule of construction—St. George Tucker believed that the Tenth Amendment *itself* expressed a rule of strict construction.[103] According to Tucker, under the Tenth Amendment, the Constitution "is to be construed strictly, in all cases where the antecedent rights of *state* may be drawn in question."[104] This reading of the Tenth Amendment seems somewhat awkward. The text of the Tenth simply declares that Congress is granted only those powers enumerated in the Constitution.[105] The text says nothing about how broadly those delegated powers are to be construed. Nevertheless, after 1800 and for the next 150 years, courts and commentators cited both the Ninth *and* Tenth Amendments as expressing rules of strict construction of federal power.[106]

This fact may surprise readers accustomed to reading the Ninth and Tenth Amendments in opposition to one another. Since *Griswold v. Connecticut*, the Court has often read the Ninth Amendment as support for its judicial invalidation of state laws, while the Tenth is most commonly associated with "states' rights." Historically, however, the two amendments were read *in pari materia*, both representing a limitation on the power of the federal government to interfere with the states.[107] As late as 1948, the Supreme Court continued to apply both amendments as twin guardians of federalism.[108] In *Bute v. Illinois*,[109] the Supreme Court considered whether allowing a defendant in a noncapital criminal prosecution to represent himself without inquiring into whether he desired or could afford an attorney violated his rights under the Fourteenth Amendment.[110] Because the Sixth Amendment required such an inquiry in federal court, the issue was whether this rule was incorporated against the states.[111] In a five-four decision, Justice Harold Burton rejected the claim and provided an extended analysis of the Ninth and

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102 In *Construction Construed, and Constitutions Vindicated,* political writer John Taylor declared:

> The [Ninth Amendment] prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the [Tenth] reserves *to the states respectively or to the people* the powers not delegated to *the United States*, nor prohibited *to the states*. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.

JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 46 (Richmond, Shepherd & Pollard 1820) (quotations omitted).

103 Tucker, *supra* note 36, at 151.

104 *Id.*

105 *See* U.S. CONST. amend. X.

106 See generally Lash, *supra* note 40, for a comprehensive presentation of this jurisprudence.

107 *See supra* note 40 and accompanying text.

108 *See* Bute v. Illinois, 333 U.S. 640, 650–54 (1948).

109 *Id.*

110 *Id.* at 644.

111 *See id.* at 648–49.

Tenth Amendments and their roles in interpreting the scope of the Fourteenth Amendment's Due Process Clause.[112] According to Justice Burton:

> One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the "Bill of Rights," ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts. None were placed upon the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-existing power of the states over court procedures in state criminal cases.[113]

In *Bute*, Justice Burton linked the Ninth and Tenth Amendments to the need to preserve "Home Rule,"[114] or, as earlier courts had phrased it, the right of a state "to determine for itself its own political machinery and its own domestic policies."[115] Preserving that right required a rule of construction. The Court in *Bute* applied such a rule, noting that the principles underlying the Ninth *and* Tenth Amendments are "material in the instant cases in *interpreting* the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states."[116]

In limiting the scope of the Fourteenth Amendment, the Court's decision in *Bute* echoes similar reasoning in the more recent *Morrison* decision, which narrowly interpreted the reach of Congress's Section 5 powers under the Fourteenth Amendment in order to preserve state autonomy.[117] By the time the Court decided *Morrison*, however, the Ninth Amendment had already disappeared from the debate on federal powers. The Tenth Amendment alone provided the textual hook for the Rehnquist Court's rule of strict construction.[118]

This disappearance of the Ninth presents us with a mystery. Given that it is the Ninth, not the Tenth, which literally expresses a rule of construction, how did the Tenth Amendment come to share an equal role with the Ninth as

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112 *See id.* at 650–54.

113 *Id.* at 650–51 (citations omitted).

114 *Id.* at 652.

115 Hawke v. Smith, 126 N.E. 400, 403 (Ohio 1919) (Wanamaker, J., concurring), *rev'd*, 253 U.S. 221 (1920).

116 *Bute*, 333 U.S. at 653 (emphasis added).

117 United States v. Morrison, 529 U.S. 598, 619–27 (2000).

118 *See id.* at 618 n.8 (citing the Tenth Amendment in support of its limited reading of federal power).

a rule of limited construction of federal power? More directly, how did the Tenth come to *replace* the Ninth Amendment as a limiting rule of construction? Madison's public description of the Ninth and Tenth Amendments compounds this mystery. As Madison drafted both amendments and participated in the congressional debates, one would think Madison's description of the Ninth as the relevant rule of construction would carry particular weight.

Ironically, it appears that Madison himself may have played a key, if unintentional, role in refocusing attention away from the Ninth and onto the Tenth Amendment as the textual basis for a rule of strict construction. In one of the most influential documents Madison ever produced, the Report on the Alien and Sedition Acts (also known as Madison's "Report of 1800"), Madison presented the Tenth Amendment as the central constitutional text for constraining the interpretation of federal power.[119] Although Madison's reliance on the Tenth Amendment in his Report corresponds to his interpretation of the Ninth and Tenth Amendments in his speech on the Bank of the United States, his "Report of 1800" took on a life of its own—as would the Tenth Amendment.

II. The Transformation of the Tenth Amendment

A. The Alien and Sedition Acts

In the aftermath of the so-called XYZ Affair, in which French officials demanded bribes from an American peace delegation,[120] and in the midst of heightening tensions with France, Congress enacted the Alien and Sedition Acts.[121] The Sedition Act made the common-law offense of seditious libel a federal crime, and inflaming an already politically charged atmosphere,[122] Federalist judges enforced the Act against critics of the Adams administration.[123]

Defenders of the Sedition Act came dangerously close to claiming that Congress had an unenumerated power to enforce the common law. The author of the Report of the Minority on the Virginia Resolutions,[124] commonly believed to be John Marshall,[125] argued that there was a "common or unwrit-

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119 MADISON, *supra* note 42, at 608; *see also infra* notes 135–36 and accompanying text.

120 See ALBERT BOWMAN, THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA 306–33 (1974), for a general discussion of the "XYZ Affair" and the Federalist response.

121 The Alien and Sedition Acts were comprised of four statutes: the Alien Act, 8 ANNALS OF CONG. 3744–46 (1798); the Alien Enemies Act, *id.* at 3753–54; the Naturalization Act, *id.* at 3739–42; and the Sedition Act, *id.* at 3776–77.

122 *See* Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1960 (1999).

123 *See* United States v. Callender, 25 F. Cas. 239, 239–40 (C.C.D. Va. 1800) (No. 14,709).

124 *See* ADDRESS OF THE FIFTY-EIGHT FEDERAL MEMBERS OF THE VIRGINIA LEGISLATURE TO THEIR FELLOW-CITIZENS IN JANUARY, 1799 (Augusta, Mn., Peter Edes 1799); *see also* John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 55, at 136.

125 There is a mystery surrounding the author of the Minority Report. *The Founders' Constitution* names John Marshall as the author of the Minority Report. *See* 5 THE FOUNDERS' CONSTITUTION, *supra* note 55, at 136. Recent Marshall biographers, however, disagree. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 601 n.79 (1996). A coauthor

ten law which pervades all America, and which declare[s] libels against government to be a punishable offence."[126] According to the Report, "[t]o contend that there does not exist a power to punish writings coming within the description of this law, would be to assert the inability of our nation to preserve its own peace."[127] Not only was the Free Speech Clause of the First Amendment no barrier to the Sedition Act, but the addition of the First Amendment actually supported the Report's defense of the Sedition Act because "[i]t would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press, if the power itself does not exist."[128] As far as seditious libel and free speech were concerned, the freedom guaranteed by the First Amendment did not extend to such "licentious" acts as libeling the government.[129]

By appearing to embrace the unwritten power to enforce the common law, the defenders of the Sedition Act seemed to reject the principle of enumerated federal power.[130] Although the Ninth Amendment guarded against latitudinarian constructions of delegated powers, it was the *Tenth* Amendment that declared that all nonenumerated powers are reserved to the states.[131] Accordingly, James Madison and Thomas Jefferson raised the hue and cry that Congress had transgressed the boundaries of federal power established by the Tenth Amendment.[132] In his Kentucky Resolutions, Thomas Jefferson wrote

> [t]hat it is true, as a general principle, and is also expressly declared by one of the amendments to the Constitution, 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"; and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states or to the people.[133]

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and I address in depth the question of John Marshall's role in the creation of the Minority Report in an upcoming article. *See* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts* (forthcoming) (on file with the author).

126 Marshall, *supra* note 124, at 137.

127 *Id.* at 136.

128 *Id.* at 137.

129 *See id.* at 138.

130 Although James Madison and other Virginia Republicans accused the Federalists of having embraced unenumerated federal power, John Marshall denied that any Federalist believed the federal government had unenumerated power to enforce the norms of the common law. *See* Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL 23 (Charles T. Cullen ed., 1984). The Minority Report itself can be construed as either arguing in favor of unenumerated power to enforce the common law (see excerpt in text above), or as arguing that enforcing the common-law offense of seditious libel was necessary and proper to advancing its enumerated powers of Article I, Section 8.

131 *See supra* notes 80–82 and accompanying text.

132 *See* Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 55, at 131; James Madison, Virginia Resolutions, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 55, at 136.

133 Jefferson, *supra* note 132, at 131.

In his Virginia Resolutions, Madison called on the states to join with Virginia and Kentucky in declaring "that the acts aforesaid are unconstitutional; and that the necessary and proper measures will be taken *by each*, for cooperating with this state, in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people."[134] Madison defended the positions taken in the Virginia Resolutions in his Report on the Alien and Sedition Acts.[135] In his Report, Madison further explained that Congress's attempt to exercise unenumerated common-law powers violated the constitutional principle that "powers not given to the government, were withheld from it," and that

> if any doubt could have existed on this subject, under the original text of the Constitution, it is removed as far as words could remove it, by the 12th amendment . . . which expressly declares, 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.[136]

Ultimately, the Democratic-Republican Party of Thomas Jefferson and James Madison defeated the Federalists in the election of 1800, due in no small part to popular reaction against the Alien and Sedition Acts.[137] Madison's celebrated "Report of 1800,"[138] which Spencer Roane referred to as the "*Magna Charta*" of the Republicans,[139] became a foundational document for nineteenth-century advocates of states' rights.[140] The Report was so influential that Madison's Tenth Amendment–based argument against the Acts had the effect of eclipsing the Ninth as the core constitutional provision requiring the strict construction of federal power.

B. The Tenth Amendment and Madison's Report of 1800

It is difficult to overstate the influence of Madison's Report of 1800 among states' rights theorists in the decades between Jefferson's election and the Civil War. St. George Tucker referred to Madison's Report numerous times in his 1803 constitutional treatise, *A View of the Constitution of the United States*, repeating in particular Madison's claim that Congress had ex-

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134 Madison, *supra* note 132, at 136.

135 MADISON, *supra* note 42, at 608.

136 *Id.* at 610 (quotations omitted).

137 *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1502–03 (1987). According to Professor Amar, the popular response to the Acts, of which the Virginia and Kentucky Resolutions played a major part, "effectively transformed the national election of 1800 into a popular referendum on these bills." *Id.* at 1502.

138 *See, e.g.*, Stunt v. The Steamboat Ohio, 3 Ohio Dec. Reprint 362, 406 (Ohio D. Ct. 1855), *reprinted in* 4 AMERICAN LAW REGISTER 49, 107 (Norwalk, Ohio, Laning Printing Co. 1897).

139 Spencer Roane, *Hampden Essays*, RICHMOND ENQUIRER, June 11–June 22, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 106, 113 (Gerald Gunther ed., 1969).

140 *See id.*; CORNELL, *supra* note 47, at 245 (stating that the "Report of 1800" "would occupy a central place in the canon of opposition thought," and describing Madison's Report as the "framework" upon which "Anti-Federalist ideas could be . . . directed at Federalists").

ceeded the bounds established by the Tenth Amendment.[141] When Jonathan Elliot compiled the materials for his magisterial 1836 work, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, among the few postadoption sources that he added was "[t]he Report on the Virginia Resolutions, by Mr. Madison."[142] It was not unusual for nineteenth-century courts to refer to what was known as Madison's "celebrated report" in discussing the scope of federal law.[143] In fact, courts in later decades viewed the struggle over the Alien and Sedition Acts and the election of 1800 as a referendum on the proper interpretation of the Constitution.[144] Writing in the 1860s, Judge Bell of the Texas Supreme Court described the event as a titanic struggle over an unduly latitudinarian interpretation of federal power:

> I take it for granted that we will not . . . go back to that latitude of construction, and to the reasoning by which the federalists of 1798 claimed for the congress of the United States the power to exercise a censorship over the press, as a means necessary and proper to carry into effect the power to suppress insurrections. We have been accustomed to read, with the interest that attaches to the drama, the history of the great struggle which elevated Mr. Jefferson to the presidency. It is the first conspicuous landmark in the history of the government of the United States under the constitution. It has always been claimed that the republican party performed a patriotic service in resisting the tendency to a rapid consolidation of powers in the general government, and that their illustrious leader was the faithful sentinel who saw the danger to the constitution, and met it with a noble devotion to the cause of liberty. . . . [A]nd in every step which has been made towards a strict construction of the constitution, the people have hailed the triumph of sound principles and felt renewed confidence in the stability of republican institutions.[145]

States' rights advocates in particular relied on Madison's Report as a critical guide to state autonomy and proper interpretation of the Constitution. Virginia Chief Judge Spencer Roane[146] cited Madison's Report in support of his contention that the Supreme Court had no authority to reverse the decision of Virginia's highest court.[147] When Chief Justice John Marshall up-

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141 *See* Tucker, *supra* note 36, at 287 n.*; *see also id.* at 288, 302–03, 307.

142 *See* 4 ELLIOT'S DEBATES, *supra* note 50, at 546.

143 *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 748–50 (1893) (Field, J., dissenting); Stunt v. The Steamboat Ohio, *supra* note 138, at 107–08; Piqua Bank v. Knoup, 6 Ohio St. 342, 369–72 (1856).

144 *See, e.g.*, Padelford, Fay & Co. v. Mayor of Savannah, 14 Ga. 438, 494–95 (1854) (discussing the battle over the Alien and Sedition Acts as a battle for a rule of strict construction of the Constitution).

145 *Ex parte* Coupland, 26 Tex. 387, 418–19 (1862) (Bell, J., concurring).

146 Roane was one of the most influential states' rights advocates of the early nineteenth century. *See* CORNELL, *supra* note 47, at 280–83; G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 558 (1988) (discussing Roane's "Hampden" essays).

147 *See* Hunter v. Martin, 18 Va. (4 Munf.) 1, 29–31, 50–54 (1814), *rev'd sub nom.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

held the second Bank of the United States in *McCulloch v. Maryland*,[148] Roane published a series of essays critical of the *McCulloch* decision in the *Richmond Enquirer* under the pseudonym "Hampden."[149] Repeatedly referring to the odious precedent of the Alien and Sedition Acts and Madison's "celebrated report" of 1800,[150] Roane argued that Congress and the Supreme Court had once again invaded the reserved powers of the states:

> It has been our happiness to believe, that in the partition of powers between the general and state governments, the former possessed only such as were expressly granted . . . while all residuary powers were retained by the latter. . . . This, it is believed, was done by the constitution, in its original shape; but such were the natural fears and jealousies of our citizens, in relation to this all important subject, that it was deemed necessary to quiet those fears, by the 10th amendment to the constitution.[151]

Tying the hated Sedition Acts to Marshall's opinion in *McCulloch*, Roane argued that "[t]he latitude of construction now favored by the supreme court, is precisely that which brought the memorable sedition act into our code."[152] In a famous paragraph, Roane declared "[t]hat man must be a deplorable idiot who does not see that there is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution."[153]

Only a few years later, John C. Calhoun relied on Madison's Report of 1800 in developing his own theory of interposition against the Tariff of 1828—the so-called Tariff of Abominations.[154] In his *Exposition and Protest*, Calhoun based his strict reading of federal power on the principles of the Tenth Amendment:

> The Powers of the General Government are particularly enumerated and specifically delegated; and all powers not expressly delegated, or which are not necessary and proper to carry into effect those that are so granted, are reserved expressly to the States or the people. The Government is thus positively restricted to the exercise of those general powers that were supposed to act uniformly on all the parts—leaving the residue to the people of the States, by whom

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148 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–09, 425 (1819).

149 *See* Roane, *supra* note 139, at 108.

150 *See id.* at 148 (referring to Madison's "celebrated report of 1799"); *see also id.* at 113, 115–16 ("For truth, perspicuity and moderation, it has never been surpassed. . . . It was the *Magna Charta* on which the republicans settled down, after the great struggle in the year 1799.").

151 *Id.* at 108; *see also id.* at 114–15, 149–50 (asserting that the Tenth Amendment merely declared the principle that residuary powers not granted to the government were reserved to the states and the people, and noting the existence of some judicial decisions that reflected this principle).

152 *Id.* at 134.

153 *Id.* at 110.

154 JOHN C. CALHOUN, EXPOSITION AND PROTEST (1828), *reprinted in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 311, 313–14 (Ross M. Lence, ed., 1992).

> alone, from the very nature of those powers, they can be justly and fairly exercised.[155]

As did all states' rights advocates during this period, Calhoun believed that the Tenth Amendment established a rule of construction limiting the scope of Congress's enumerated powers.[156] Rejecting the idea that the U.S. Supreme Court had the sole power to determine when federal power intruded upon the reserved rights of the states, Calhoun declared that this contention "has been so ably refuted by Mr. Madison, in his Report to the Virginia Legislature in 1800, and the Alien and Sedition Acts, as to supersede the necessity of further comments on the part of the committee."[157]

So influential was Madison's Report of 1800 that in *Smith v. Turner*[158]—one of the "Passenger Cases"—Justice John McKinley treated Madison's Report as equally authoritative a guide to the proper interpretation of the Constitution as the Federalist Papers and the records of the Philadelphia convention.[159] Even those commentators who rejected Madison's limited construction of federal power nevertheless felt constrained to acknowledge Madison's Report, if only to refute it.[160]

As a canonical document in states' rights advocacy, the Report of 1800's use of the Tenth Amendment had the effect of establishing that provision as equal, and often superior, to the Ninth Amendment as an expression of strict construction. The Tenth's explicit reference to the reserved powers of the *states*, moreover, made the Tenth a more rhetorically acceptable provision than the Ninth to those who sought to construe the Constitution as a compact between the federal government and the *states* (and not the undifferentiated American people).[161] Madison's Report of 1800 did not wholly displace the Ninth Amendment as the textual basis for strict construction of federal

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155 *Id.* at 343.

156 JOHN C. CALHOUN, A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (1850), *reprinted in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN, *supra* note 154, at 79, 103 ("It is admitted, that [the Tenth Amendment's] principle object was to prevent the reserved from being drawn within the sphere of the granted powers, by the force of construction—a danger, which, at the time, excited great, and, as experience has proved, just apprehension.").

157 CALHOUN, *supra* note 154, at 346.

158 Smith v. Turner, 48 U.S. (7 How.) 283 (1849).

159 According to McKinley:

> In the face of this fact, the debates in the Convention, certain numbers of the Federalist, together with Mr. Madison's report to the legislature of Virginia in 1799,—eleven years after the adoption of the Constitution,—are relied on . . . . I have been unable to find any thing in the debates of the Convention, in the Federalist, or the report of Mr. Madison, inconsistent with the construction here given.

Id. at 453 (McKinley, J., concurring) (relying on Madison's Report, the Federalist, and the convention debates to ascertain the meaning of the words migration and importation); *see also* State v. Hunt, 20 S.C.L. (2 Hill) 1, 71 (S.C. Ct. App. 1834) ("Mr. Madison, in his report upon the Virginia Resolutions, has remarked upon the various meanings of the word 'States,' shewing the correctness of these views. It is indeed true 'he says,' that the term 'States' is something used in a vague sense, and sometimes in different senses according to the subject to which it is applied.").

160 *See, e.g.*, 1 STORY, *supra* note 80, at 287–88 & n.1.

161 *See* WHITE, *supra* note 146, at 487–94 (discussing compact theory and the role it played in the early nineteenth-century constitutional debate).

power; rather, the Report cemented in popular and professional understanding the Tenth Amendment as a text suggesting, if not demanding, a strict interpretation of enumerated federal power.

C. *The Tenth Amendment and the Marshall Court*

Arguments in favor of the strict construction of federal power presented in St. George Tucker's *Commentaries*, the Virginia and Kentucky Resolutions, and Madison's Report of 1800 were all based on the idea that the Constitution was a compact or agreement between the state and the federal government.[162] Avoiding an interpretation of the Constitution in a manner that potentially eradicated one of the parties to the compact required a narrow construction of those powers that the states had delegated to the federal government.[163]

Following an upsurge of nationalist sentiment in the aftermath of the War of 1812,[164] the second and third decades of the nineteenth century witnessed the further development of a more nationalist interpretation of federal power.[165] Chief Justice John Marshall in particular rejected the compact theory of the Constitution; his broad approach to federal power led him (and, for a time, the Supreme Court) to reject the idea that *any* provision in the Constitution expressed a rule of strict construction.[166] The struggle between broad and narrow conceptions of federal power that occurred during the Marshall Court era had the effect of further obscuring the Ninth as a rule of construction, and further enhancing the role of the Tenth as the central guarantor of state autonomy.

In his 1833 *Commentaries on the Constitution*, Joseph Story ignored his earlier use of the Ninth Amendment in *Houston* as supporting a limited construction of enumerated federal power.[167] Story instead attacked St. George Tucker's rule of strict construction as unsupported by the Constitution, refusing to even acknowledge the role of the Ninth and Tenth Amendments in Tucker's theory.[168] Story addressed the Ninth Amendment in a separate section in his *Commentaries*, presenting the Ninth as no more than a restatement of the Tenth Amendment's principle of enumerated federal power.[169]

Story wrote his *Commentaries* in the waning days of the Marshall Court's nationalist reading of the Constitution. In cases like *McCulloch v. Maryland*, *Cohens v. Virginia*,[170] and *Gibbons v. Ogden*,[171] John Marshall had articulated a strongly nationalist vision of federal power, and rejected the

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162 *See id.*

163 *See* Jefferson, *supra* note 92, at 276–80; MADISON, *supra* note 42, at 608; Randolph, *supra* note 93, at 4; Tucker, *supra* note 36, at 140–44.

164 *See* WHITE, *supra* note 146, at 87.

165 *See id.*

166 *See, e.g.*, Marshall, *supra* note 124, at 136.

167 *See* 1 STORY, *supra* note 80, at 393; 3 *id.* at 751.

168 *See* 1 *id.* at 393–94.

169 *See* 3 *id.* at 751. In fact, Story titles his section on the Ninth Amendment, "Non-Enumerated Power," and his section on the Tenth, "Powers Not Delegated." *Id.*

170 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

171 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

Tenth Amendment as imposing any kind of restrictive rule of interpretation.[172] In *McCulloch*, Marshall said nothing about the Ninth Amendment and rejected the idea that the Tenth Amendment required a strict construction of federal power on the ground that the Tenth used less restrictive language than its counterpart in the Articles of Confederation.[173] In *Gibbons*, Marshall again ignored the Ninth Amendment, despite the references to both Story's opinion in *Houston* and Tucker's analysis in his *Commentaries* at oral arguments before the Court.[174] Marshall instead denied that there was even "one sentence in the constitution" that called for a strict construction of federal power.[175]

The nationalist decisions of the Marshall Court generated enormous public controversy,[176] and the Chief Justice found himself obligated to defend his opinions in a series of newspaper essays.[177] By the late 1820s, having weathered several attempts to cabin the power of the judicial branch,[178] the Supreme Court backed away from its earlier aggressive approach to federal power.[179] By the time Story dedicated his 1833 *Commentaries* to John Marshall, the most influential days of the Marshall Court were behind it, with Story's discussion of cases like *McCulloch*, *Cohen*, and *Gibbons* reading more like a defense of Marshall's jurisprudence than a statement of bedrock law.

The arrival of Justice Taney on the Court in 1836 signaled the rise of a states' rights–oriented interpretation of federal power—a reading that would culminate in *Dred Scott v. Sanford*.[180] The Taney Court rejected Marshall's nationalist interpretations of federal power as reflecting unduly latitudinarian readings of the Constitution. In cases like *Mayor of New York v. Miln*, the Supreme Court moved away from Marshall's suggestion in *Gibbons* that federal commerce power was exclusive of concurrent state authority.[181] As the century progressed, the Court increasingly expanded the scope of exclusive *state* power.[182] Commentators rejected earlier broad readings of federal

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172 *See id.* at 187–88; *Cohens*, 19 U.S. at 381–92, 441–44; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–07 (1819).

173 *See McCulloch*, 17 U.S. (4 Wheat.) at 406 (noting that—unlike the Articles, which reserved all powers not expressly delegated—the Tenth Amendment omits the restrictive term "expressly").

174 *Gibbons*, 22 U.S. (9 Wheat.) at 86.

175 *Id.* at 187–88.

176 *See generally* JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND*, *supra* note 139.

177 *See* John Marshall, *A Friend to the Union*, PHILA. UNION, Apr. 24–28, 1919, *reprinted in* JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND*, *supra* note 139, at 78; John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, June 30–July 15, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND*, *supra* note 139, at 155.

178 *See* DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE SUPREME COURT & POLITICAL CONFLICT, 1809–1835 (1978).

179 *Compare Gibbons*, 22 U.S. (9 Wheat.) at 209–11 (suggesting in dicta that federal commerce power was exclusive of concurrent state authority), *with* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 132–40 (1837) (establishing areas of concurrent state power to regulate commerce).

180 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

181 *Miln*, 36 U.S. (11 Pet.) at 132–40.

182 *See, e.g.*, Kidd v. Pearson, 128 U.S. 1, 26 (1888) (finding that the police power of the state is "as broad and plenary as its taxing power").

power as conflicting with the principles of the Tenth Amendment. For example, in his 1840 critique of Justice Story's *Commentaries*, Abel Upshur wrote:

> The Constitution itself suggests that it should be strictly and not liberally construed. The tenth amendment provides, that "the powers not delegated to the United States, nor prohibited to the States, by the Constitution, are reserved to the States or the people." There was a corresponding provision in the articles of confederation, which doubtless suggested this amendment. It was considered necessary, in order to prevent that latitude of construction which was contended for by one of the great political parties of the country, and much dreaded and strenuously opposed by the other.[183]

In his speech on the Bank of the United States, James Madison wrote that the Ninth Amendment "guarded against a latitude of construction," while the Tenth "excluded every power not within the Constitution itself."[184] Upshur, on the other hand, presented the Tenth Amendment itself as "prevent[ing] that latitude of construction."[185] It is not just that Upshur transformed the Tenth into a rule of construction—St. George Tucker and John Taylor had earlier read the Tenth in a similar manner.[186] Rather, the significance of Upshur's approach is that it *replaced* Madison's original reading of the Ninth.

Nor was Upshur alone in transforming earlier readings of the Ninth into readings of the Tenth. Three years after Upshur's interpretation of the Tenth Amendment, the Michigan Supreme Court took it upon itself to rewrite Joseph Story's opinion in *Moore*, once again replacing the Ninth Amendment with the Tenth.[187] In *Harlan v. People*,[188] Judge Felch cited Story's opinion in *Houston*, but altered the critical passage:

> And it is affirmed, by the same authorities, that a mere grant of power in affirmative terms, does not, *per se*, transfer an exclusive sovereignty on such subjects to the Union. In all cases not falling within either of the classes already mentioned, the states retain either the sole power, or a power which they may exercise concurrently with congress. This results not only from the general principles on which the Union is founded, but is within the letter of the tenth article of the amendments to the constitution, which declares 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."[189]

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183 ABEL P. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT: BEING A REVIEW OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 98 (Lawbook Exchange, Ltd. 1998) (1840).

184 *See* Madison, *supra* note 30, at 489.

185 *See* UPSHUR, *supra* note 183, at 98.

186 *See supra* notes 35–37, 101–04 and accompanying text.

187 *See* Harlan v. People, 1 Doug. 207, 211 (Mich. 1843).

188 *Id.*

189 *Id.*

In this quote from Story's opinion, Felch simply changed "letter and spirit of the *eleventh* amendment"[190] to "the letter of the *tenth*."[191] Felch apparently believed that Story had made a mistake, which he remedied by inserting the clause he believed correctly expressed the rule of strict construction. Felch's rewriting of Story's opinion suggests how strongly the Tenth Amendment had come to be seen as the primary constitutional provision calling for a limited construction of federal power. The Tenth Amendment, not the Ninth, represented the principle of the glorious revolution of 1800. Despite Madison's earlier description of the Ninth as the text that prevented latitudinarian construction of federal power,[192] it was Madison's invocation of the Tenth Amendment in his Report of 1800 that focused the attention of antebellum states' rights theorists on the Tenth as the key constitutional text establishing a rule of strict construction.

III. The Fall and Rise of the Rule of Strict Construction

A. The New Deal and the Tenth Amendment

As noted in the previous Part, courts in the late nineteenth and early twentieth centuries continued to cite both the Ninth and Tenth Amendments as textual support for limited readings of federal power.[193] Still, of the two, the courts seemed to look to the Tenth Amendment as the primary guarantor of state autonomy. Supreme Court cases like *Slaughter-House*[194] and the *Civil Rights Cases*[195] further entrenched the standard view that the Tenth Amendment, on its own, stood for a rule of strict construction of federal power.[196] Nevertheless, because both the Ninth and Tenth Amendments were read as expressing a restricted view of federal power, both clauses met the same fate in the constitutional upheaval known as the New Deal revolution.

1. Resistance to the New Deal

Faced with decades of limited construction of federal commerce power,[197] proponents of progressive legislation began to make claims of federal authority beyond those expressly enumerated in the Constitution. Ac-

190 Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820) (emphasis added).

191 *Harlan*, 1 Doug. at 211 (emphasis added).

192 *See supra* notes 73–80 and accompanying text.

193 The tradition held for both state and federal courts until the New Deal revolution of 1937. *See, e.g.*, United States v. Moore, 129 F. 630, 632–35 (C.C.N.D. Ala. 1904) (giving a limited reading to the Fourteenth Amendment on the ground that unduly broad interpretations of federal authority interfere with state autonomy protected under the Ninth and Tenth Amendments); Darweger v. Staats, 278 N.Y.S. 87, 92 (App. Div. 1935) (Rhodes, J., concurring) (striking down National Industrial Recovery Act provision on the ground that it conflicted with both Ninth and Tenth Amendments). See Lash, *supra* note 40, for a general discussion of this jurisprudence.

194 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

195 The Civil Rights Cases, 109 U.S. 3 (1883).

196 *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) at 79–83; The Civil Rights Cases, 109 U.S. at 10.

197 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) (noting that the "making of goods and the mining of coal are not commerce").

cording to this alternate view, the federal government had a duty to promote the general welfare of the people, and this duty included broad authority to respond to the economic emergency of the Great Depression. The view was not as much an interpretation of an enumerated power, which would raise Ninth Amendment concerns, as it was an assertion of inherent federal power to act in times of emergency—an assertion that raised issues under the Tenth.

In *A.L.A. Schechter Poultry Corp. v. United States*,[198] the government argued that its authority to regulate local labor conditions under the Live Poultry Code "must be viewed in the light of the grave national crisis with which Congress was confronted."[199] Writing for the Court, Chief Justice Hughes rejected this claim to unenumerated "emergency powers" as conflicting with the Tenth Amendment:

> Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment . . . .[200]

Similarly, in *Carter v. Carter Coal Co.*,[201] the government argued in favor of an unenumerated power to regulate local matters for the common good.[202] Once again, the Court rejected the argument on the basis of the Tenth Amendment.[203] Finally, in *United States v. Butler*,[204] the Supreme Court interpreted the Tax and Spending Clause as authorizing nonregulatory pro-

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198 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

199 *Id.* at 528.

200 *Id.* at 528–29 (citations omitted). Hughes was not completely consistent on this point. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442–44 (1934) (arguing that the Constitution should be interpreted in light of public need); *see also* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001) (discussing Hughes's interpretation of the Constitution in *Blaisdell*).

201 Carter v. Carter Coal Co., 298 U.S. 238 (1936).

202 *Id.* at 289–90.

203 According to the Court:

> [T]he proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted.

Id. at 293–94 (quotation omitted).

204 United States v. Butler, 297 U.S. 1 (1936).

grams furthering the general welfare.[205] The Court found, however, that attempts to convert this authority into an unlimited power to *regulate* for the general welfare still violated the Tenth Amendment:

> We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. . . . From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.[206]

Although the Tenth Amendment took center stage during the Supreme Court's standoff with the Roosevelt administration, during this same period the courts commonly cited to both the Ninth and Tenth Amendments as dual limitations on federal power. For example, in *Acme, Inc. v. Besson*,[207] the United States District Court for the District of New Jersey invalidated the wage and hour provisions promulgated under the National Industrial Recovery Act[208] on the ground that "interstate commerce" did not include local manufacturing.[209] Judge Fake based his conclusion on Supreme Court precedent and the interpretive rules demanded by the Ninth and Tenth Amendments:

> There is still another source to which we may refer in sustaining the foregoing definition, and that is the well-known historic fact that the people of the original states were extremely reluctant in granting powers to the federal government and expressly laid down a rule of constitutional construction in the Ninth Amendment, wherein our forefathers said: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And then, further, in the Tenth Amendment, we find this express limitation upon the federal government: "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." In view of the foregoing, we have labored in vain to conclude that it was the intent of the Constitution to pass to the Congress regulatory authority over those local, intimate, and close relationships of persons and property which arise in the processes of

205 *Id.* at 64–66.

206 *Id.* at 68.

207 Acme, Inc. v. Besson, 10 F. Supp. 1 (D.N.J. 1935).

208 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

209 *Acme*, 10 F. Supp. at 6.

> manufacture, even though they may, in the broader sense, affect interstate commerce.[210]

Despite the fact that the Tenth played an independent role in supporting a limited construction of federal power, the original understanding of the Ninth as textual support for a rule of strict construction had not changed. Most often, however, the Ninth and Tenth Amendments were presented in an undifferentiated manner as dual textual supports for a limited reading of federal power. This pairing ensured that both amendments would meet the same end in the dramatic reconfiguration of federal power that occurred at the time of the New Deal.

2. *The Ninth and Tenth as Truisms*

In *United States v. Darby*,[211] the Court declared that it would uphold federal regulation of purely intrastate commerce if Congress reasonably concluded that the activity in question affected interstate commerce.[212] In doing so, the Court rejected the idea that the Tenth Amendment required strict construction of federal power.[213] According to Justice Harlan Stone:

> Our conclusion is unaffected by the Tenth Amendment . . . . The amendment 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.[214]

Although Justice Stone downplayed pre-1937 cases that enforced a very different interpretation of federal power, his description of the Tenth Amendment is literally correct. It is the text of the Ninth, not the Tenth, that establishes a rule of construction. Justice Stone, however, did not address the Ninth Amendment, or the vast number of cases using it along with the Tenth as creating a limiting rule of construction; instead, Stone simply announced the restoration of John Marshall's original vision of federal power.[215] Like

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210 *Id.* (quotations omitted); *see also* United States v. Neuendorf, 8 F. Supp. 403, 406–07 (S.D. Iowa 1934) (extending authority of Congress to regulate all businesses even directly affecting interstate commerce would "emasculate the intent of the Tenth Amendment").

211 United States v. Darby, 312 U.S. 100 (1941).

212 *Id.* at 115, 119.

213 *See id.*

214 *Id.* at 123–24 (citations omitted).

215 *See id.* at 119–21 (holding that Congress may create appropriate legislation to regulate intrastate activities that substantially affect interstate commerce). Bruce Ackerman refers to the New Deal Court's attempt to ground their expansion of federal power in the original meaning of

Marshall, Stone addressed only the Tenth Amendment and ignored the Ninth.

By the time the Supreme Court decided *Wickard v. Filburn*[216] in 1941, not even the Tenth Amendment warranted discussion. Justice Jackson simply followed the lead of *Darby* and assumed the correctness of Chief Justice Marshall's interpretation of federal power—noting that Marshall had "described the Federal commerce power with a breadth never yet exceeded."[217]

Prior to the New Deal, the Ninth and Tenth Amendments generally were read *in pari materia* as establishing a rule of construction limiting the interpretation of federal power.[218] This rule ensured the interpretation of enumerated power in light of the people's retained right to local self-government. Matters such as local commercial activity were presumptively reserved to the states, and the construction of federal power was limited accordingly.[219] After the New Deal, and particularly after decisions such as *Darby* and *Wickard*, the Court uncoupled the determination of the scope of federal power from any consideration of the retained rights of the states.[220] Once the Court established a reasonable link between a legislative act and an enumerated power, Ninth and Tenth Amendment claims necessarily failed.[221]

Already implicit in lower federal court decisions,[222] the Supreme Court expressly adopted this toothless application of the Ninth and Tenth Amendments in *United Public Workers of America v. Mitchell*.[223] In *Mitchell*, a group of federal employees challenged provisions of the Hatch Act[224] that prohibited government workers from engaging in certain political activities.[225] In addition to First and Fifth Amendment claims, the employees claimed the Act was a "deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments."[226] Writing for the Court, Justice Reed ruled that the Ninth and Tenth Amendment claims required no analysis of an independent right, but involved only questions of enumerated federal power, noting that

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the Constitution as the "myth of rediscovery." *See* BRUCE A. ACKERMAN, WE THE PEOPLE 43 (1991).

216 Wickard v. Filburn, 317 U.S. 111 (1942).

217 *Id.* at 120.

218 *See supra* note 40 and accompanying text.

219 *See supra* notes 197–206 and accompanying text.

220 *See infra* notes 222–23 and accompanying text.

221 *See infra* notes 222–23 and accompanying text.

222 *See* Commonwealth & S. Corp. v. SEC, 134 F.2d 747, 753 (3d Cir. 1943) ("In view of our conclusion that the order here complained of is within the commerce power Commonwealth's contention that the order violates the Fifth, Ninth and Tenth amendments *necessarily* fails." (emphasis added)). The scope of federal power is determined independently of the Ninth and Tenth Amendments and, once found, negates any Ninth or Tenth Amendment claim. *See* United States v. City of Chester, 144 F.2d 415, 418–20 (3d Cir. 1944) (noting the plaintiff's Ninth and Tenth Amendment claims, but upholding federal action as falling within Congress's war powers without further mention of the Ninth or Tenth Amendment).

223 United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 95–96 (1947).

224 Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939).

225 *Mitchell*, 330 U.S. at 78–82.

226 *Id.* at 83 n.12.

> [t]he powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[227]

In rejecting the pre-1937 rule of strict construction of federal power, the Supreme Court necessarily reduced both the Ninth and Tenth Amendments to mere truisms. The Court did so by focusing on the text of the Tenth Amendment, which, in fact, does not create a rule of construction,[228] and ignoring the text and original meaning of the Ninth, which does.[229]

It would be almost half a century before the Supreme Court would return to the rule of strict construction. By that time, not only had the historical role played by the Ninth Amendment been forgotten, but courts had begun to cite the Ninth Amendment in support of *expanded* federal oversight of matters previously reserved to the states.[230] When the Court decided *Lopez* in 1995, conventional wisdom read the Ninth Amendment as antithetical to the principles underlying the Tenth. Accordingly, when the Court reinvoked the rule of strict construction, it did so on the basis of the Tenth Amendment alone. At that point, the reversal of the Ninth and the transformation of the Tenth became complete.

B. Griswold v. Connecticut *and the Uncoupling of the Ninth and Tenth Amendments*

Griswold triggered the modern debate over the meaning of the Ninth Amendment. Seemingly unaware of 150 years of federalist-based jurisprudence, Justice Arthur Goldberg declared that the "Court has had little occasion to interpret the Ninth Amendment."[231] Building on Justice Douglas's brief reference to the Ninth Amendment in the opinion of the Court,[232] Goldberg argued that the Ninth Amendment supported the idea that liberty under the Fourteenth Amendment "is not restricted to rights specifically mentioned in the first eight amendments."[233] In support of this reading,

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227 *Id.* at 95–96. The Court went on to uphold the Act, triggering a dissent by Justice Black, who believed the plaintiff's First and Fifth Amendment rights had been violated. *Id.* at 105, 109 (Black, J., dissenting). Black made no mention of either the Ninth or Tenth Amendment in his dissent.

228 *See supra* note 81 and accompanying text.

229 *See supra* note 82 and accompanying text.

230 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discussing the penumbras or zones of privacy formed by specific guarantees of the Bill of Rights).

231 *Id.* at 490 (Goldberg, J., concurring).

232 *Id.* at 484.

233 *Id.* at 493 (Goldberg, J., concurring).

Goldberg relied on his understanding of history, particularly the works of James Madison and Joseph Story.[234]

Although both Madison and Story described the Ninth Amendment as *guarding* state autonomy from federal interference, Goldberg argued that refusing to strike down a state law banning the distribution of contraceptives to married couples because the issue is not expressly mentioned in the Constitution would be "to ignore the Ninth Amendment and to give it no effect whatsoever."[235] Denying that he had turned the Amendment on its head by applying it against the states, Goldberg explained that his reading of the Ninth merely supported an interpretation of the Fourteenth Amendment as protecting more rights than just those listed in the Constitution.[236]

In dissent, Justice Potter Stewart argued that the majority wrongly suggested that the Ninth was more than a mere truism:

> The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.[237]

Stewart's dissent embodies the New Deal vision of the Ninth and Tenth Amendments. To Justice Stewart, the Ninth and Tenth Amendments were unenforceable statements of principle.[238] This understanding had been the general approach to both the Ninth and Tenth Amendments since *Darby* was decided in 1941.[239] Stewart correctly suggested that Madison would have been surprised by Douglas's and Goldberg's use of the Ninth. But Madison also would have been surprised by Stewart's preference that the Ninth not be used at all.

In his dissent, Justice Hugo Black derided Goldberg's "recent discovery" of the Ninth Amendment, thus implicitly agreeing with Goldberg that there had been little previous judicial construction of the clause.[240] Accusing the majority of returning to the discredited jurisprudence of the *Lochner* Court,[241] Black argued that "every student of history knows" the purpose of the Ninth Amendment was "to assure the people that the Constitution in all

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234 *Id.* at 488–90 (Goldberg, J., concurring).

235 *Id.* at 491 (Goldberg, J., concurring).

236 *Id.* at 493 (Goldberg, J., concurring).

237 *Id.* at 529–30 (Stewart, J., dissenting) (quotation omitted).

238 *See id.* (Stewart, J., dissenting).

239 *See supra* notes 211–15, 218–21 and accompanying text.

240 *Griswold*, 381 U.S. at 518 (Black, J., dissenting).

241 *See id.* at 522 (Black, J., dissenting).

its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."[242] Black then noted the irony of using the Ninth to interfere with the right to local self-government:

> [F]or a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.[243]

Despite the historical basis for Black's and Stewart's readings of the Ninth Amendment, Goldberg's concurring opinion ignited a veritable cottage industry of scholarship exploring libertarian readings of the Ninth Amendment.[244] All participants in this discussion, including those scholars opposed to libertarian readings of the Ninth, have assumed that the debate takes place on a jurisprudential *tabula rasa*: that prior to 1965, the Ninth Amendment had rarely been cited and never discussed in any substantive manner. Over time, the original roots of the Ninth Amendment became so obscured that Judge Robert Bork famously declined to give the Ninth any meaning whatsoever.[245] According to Judge Bork, absent any information regarding its original meaning, the Ninth should be viewed no differently than text obscured by an inkblot.[246]

It would be years before Madison's speech on the Bank of the United States would be "discovered,"[247] and even more time would pass before Story's original discussion of the Ninth Amendment would come to light. By that time, the Rehnquist Court's federalism revolution would be in full swing, based entirely on the Tenth Amendment.

Conclusion: Restoring the Original Meaning of the Tenth Amendment

Although the Rehnquist Court has not expressly called into question its earlier high-federalist decisions like *Lopez*, *Morrison*, and *Printz*, the most recent decisions by the Court may signal a reluctance to follow the logic of those decisions to their ultimate end.[248] If so, this development will come as

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242 *Id.* at 520 (Black, J., dissenting).

243 *Id.* (Black, J., dissenting).

244 *See supra* note 29 (listing examples of libertarian analyses of the Ninth Amendment).

245 *See* Testimony of Robert Bork (Sept. 15–16, 1987), *in* 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 29, at 427, 441.

246 *See id.*

247 *See* Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 14–17 (1968). In his 1989 collection of essays on the Ninth Amendment, Randy Barnett reprinted Van Loan's article, which mentions Madison's speech, and wrote his own essay discussing the importance of the speech. *See* 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 29, at 149.

248 *Compare* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363–65, 375 (2001) (holding that the Eleventh Amendment bars application of the Americans with Disabilities Act ("ADA") to state employment decisions), *with* Tennessee v. Lane, 541 U.S. 509, 533 (2004) (holding Title II of the ADA valid as protection of fundamental right of access to the courts). *See also* Savage, *supra* note 2. In one of the final decisions of the Rehnquist Court, a majority upheld congressional power to ban state-authorized use of medicinal marijuana, relying on the

a relief to the many critics of the Rehnquist Court who have argued that its federalist jurisprudence is wholly unjustified as a matter of both text and history.[249] If the Rehnquist majority is losing faith in its own federalist jurisprudence, however, it does so despite the fact that text, original meaning, and historical application all support a limited reading of federal power.

The "work" of the federalist revolution has been accomplished through the application of a rule of strict construction. This rule can be found in Rehnquist Court decisions involving the scope of federal power under the Interstate Commerce Clause,[250] Section 5 of the Fourteenth Amendment,[251] and sovereign immunity doctrine.[252] All three lines of decision have been criticized for their lack of textual or historical roots.[253] Criticism of the Court's use of the Tenth Amendment has already been noted.[254] But similar criticism has been leveled at the Court's Eleventh Amendment jurisprudence.[255] Like its treatment of the Tenth, the Court's expansive reading of Eleventh Amendment sovereign immunity is vulnerable to a purely textual critique.[256] The Eleventh Amendment expressly prohibits federal court jurisdiction in only a small category of cases.[257] Since *Hans v. Louisiana*,[258] however, the Court has read the Amendment to express only one aspect of a broader principle of state immunity from federal court jurisdiction, well beyond those cases mentioned in the Amendment's text.[259] Indeed, the basis for the Court's preserving state immunity from federal court jurisdiction seems quite similar to the basis for the Court's preserving state immunity from congressional legislation: both are based on a presumed limitation of federal authority to interfere with state autonomy.

But it is the Court's application of the Tenth Amendment that is particularly vulnerable to criticism. Unlike the Eleventh Amendment, which in fact expresses a rule of construction,[260] it is hard to escape Justice Stone's observation that "[t]here is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship be-

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reasoning of the New Deal case *Wickard v. Filburn*. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2215 (2005).

249 *See supra* note 24 and accompanying text.

250 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567–68 (1995).

251 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 619–27 (2000).

252 *See, e.g.*, Alden v. Maine, 527 U.S. 706, 733–34, 758–60 (1999).

253 *See supra* note 24 and accompanying text; *infra* note 256 and accompanying text.

254 *See supra* note 24 and accompanying text.

255 *See* NOONAN, *supra* note 3, at 59–61; Chemerinsky, *supra* note 1, at 11–12; Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 443 (2002).

256 *See supra* note 255.

257 *See* U.S. CONST. amend. XI.

258 Hans v. Louisiana, 134 U.S. 1 (1890).

259 *See id.* at 10–11, 15 (denying federal court jurisdiction over a suit brought against a state by a citizen of the same state despite no express Eleventh Amendment bar).

260 *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." (emphasis added)).

tween the national and state governments."[261] Indeed, even at the moment of its adoption, Madison acknowledged that the Tenth Amendment was unnecessary, and the clause was criticized in the state ratification conventions as having no "real effect"—a criticism leveled by those Founders most interested in restricting federal power.[262]

Despite these valid criticisms, however, the federalist rule of construction, which contemporary courts identify with the Tenth Amendment (and occasionally the Eleventh), has both a textual basis and historic application. The accidents of history that led to the rise of the Tenth Amendment and the fall of the Ninth have resulted in the invocation of the right principles in the wrong text. Originally, the Ninth and Tenth Amendments were meant to work together: the Tenth declaring the principle of reserved nonenumerated power, and the Ninth ensuring that the powers reserved to the states would not become a null set through the overly latitudinarian construction of enumerated federal authority. Both principles were thought necessary in order to guarantee the people's retained right to local self-government. In other words, without the Ninth Amendment, the Tenth Amendment does indeed become a mere truism.

Understanding the proper source of this rule of construction and how it became associated with the Tenth Amendment vindicates the jurisprudence of the Tenth even as it refocuses attention back to the Ninth Amendment. Absent this refocusing, the Tenth Amendment and its attendant federalist jurisprudence remain vulnerable to criticism and, ultimately, reversal. In other words, understanding the history of the Ninth and Tenth Amendments is necessary, if only to save the Tenth Amendment from itself. A renewed appreciation of the textual roots of federalism seems particularly relevant as both sides of the political spectrum now have come to embrace the value of state autonomy.[263]

Refocusing the rule of construction back to the Ninth Amendment does not reduce the Tenth to a mere truism. Even in the modern period, there are occasional attempts by the federal government to assert inherent or unenumerated powers. The more radical assertions of power during the New Deal are one example,[264] but so are attempts by the federal executive to seize the tools of industry without congressional authorization.[265] The Tenth Amendment was designed to speak to both of these situations, and it would apply to future attempts by any branch of the federal government to assert powers beyond those enumerated in the Constitution.

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261 United States v. Darby, 312 U.S. 100, 123–24 (1941); *see also* Chemerinsky, *supra* note 1, at 11–12.

262 *See supra* notes 54–59 and accompanying text.

263 *See, e.g.*, Brief for Respondents at 39–45, Ashcroft v. Raich, 543 U.S. 977 (2004) (No. 03-1454) (arguing in support of state authorization of medical marijuana use).

264 *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442–44 (1934) (arguing that the Constitution should be interpreted in light of public need); *see also supra* notes 198–203 and accompanying text (discussing the *Carter Coal* and *Schechter Poultry* decisions).

265 *See* Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 573 (D.D.C.) (discussing whether the President's "broad residuum of power" allowed him to directly seize steel plants), *aff'd*, 343 U.S. 579 (1952).

The Tenth Amendment not only denies unenumerated powers to the federal government, it also forbids placing any unenumerated restrictions on the states. According to the text, "[t]he 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."[266] Just as the first portion of the Tenth Amendment limits the powers of the federal government to no more than those enumerated in the text, the second portion limits restrictions on the states to no more than those enumerated in the text; all other powers are reserved to the states or to the people.

Since 1965, there has been a lively debate regarding whether state law is bound to protect rights beyond those listed in the text of the Constitution. In *Griswold*, Justices Douglas and Goldberg suggested that the Ninth conceivably supported judicial enforcement of nonenumerated rights against the states.[267] But nonenumerated rights against the state are no different from nonenumerated prohibitions on the exercise of state power. For example, the prohibition against any state law impairing the obligation of contracts in Article I, Section 10 expresses an individual right[268] and also constitutes one of the powers "prohibited by [the Constitution] to the states" under the Tenth Amendment.[269] According to the Tenth Amendment, however, the only powers not reserved to the states are those delegated to the federal government or prohibited *by the Constitution* to be exercised by the states.[270] Again, this language means that the Tenth Amendment prevents not only unenumerated federal power, it also forbids unenumerated *restrictions* on state power. Since 1965, of course, such a reading of the Tenth Amendment has been objected to as conflicting with the Ninth Amendment's protection of "other rights."[271] Understanding the historic relationship of the Ninth and Tenth Amendments bars this attempt to make them antagonists and allows for a more complete appreciation (and enforcement) of the Tenth Amendment.

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266 U.S. CONST. amend. X.

267 Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *id.* at 486–87 (Goldberg, J., concurring).

268 *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 654–63 (1819).

269 U.S. CONST. art. I, § 10; *id.* amend. X. There is no other way to make sense of the Tenth's reference to "powers . . . prohibited by [the Constitution] to the states" other than to read it as referring to restrictions on state power such as those listed in Article I.

270 As Justice Baldwin wrote:

> [T]he tenth amendment becomes a dead letter if the constitution does not point to the powers which are "delegated to the United States," or "prohibited to the states," and reserve all other powers "to the states respectively or the people." Any enumeration of powers granted, any specific prohibitions on the states, will not only become wholly unmeaning, if new subjects may be brought within their scope, as means of enforcing the given powers, or the prohibitions on the states extended beyond those which are specified, but the implied powers and implied prohibitions must be more illimitable than those which are express.

HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788, at 195 (1837).

271 *See* U.S. CONST. amend. IX.

Since the adoption of the Bill of Rights, of course, new restrictions on state power have been added to the Constitution, particularly those found in the Fourteenth Amendment. As I have argued elsewhere, there is good reason to believe the Fourteenth Amendment's Privileges or Immunities Clause embraces not only provisions in the first eight amendments, but also common-law rights.[272] Nevertheless, whatever restrictions may have been placed on state power by the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment, these restrictions exist as a matter of textual interpretation, and not judicial incorporation of rights beyond those enumerated in the text of the Constitution.

Limiting restrictions on the states to those listed in the Constitution may seem thin gruel to states' rights advocates who are well aware of how broadly courts can interpret texts like the Due Process Clause. The Tenth Amendment, however, was never intended to stand alone; preventing unduly latitudinarian constructions of federal power is the goal the *Ninth* Amendment originally was meant to accomplish. In this manner, understanding the original meaning and application of both the Ninth and Tenth Amendments reveals two provisions uniquely crafted to work together, each playing its distinct role in preserving constitutional federalism.

It is ironic that Madison's Report of 1800, by playing up the Tenth Amendment, helped fuel a jurisprudence that obscured the textual roots and original structure of federalism under the Ninth and Tenth Amendments. By stretching the scope of the Tenth Amendment beyond textual plausibility, the jurisprudence of federalism remains vulnerable to restriction and reversal. Restoring the Tenth Amendment to its proper place in the arena of constitutional interpretation thus does nothing to endanger federalism. It places federalism on firmer ground.

272 *See* Kurt T. Lash, *Two Movements of a Constitutional Symphony*, 33 U. RICH. L. REV. 485, 598 (1999).