Santa Clara Law Review

Volume 62 | Number 3 Article 2

2022

Federalism by Deception: The Implied Limits on Congressional Power

Fair, Bryan K.

FEDERALISM BY DECEPTION: THE IMPLIED LIMITS ON CONGRESSIONAL POWER

Bryan K. Fair *

The purpose of this Article is to lay bare federalism by deception and the theory of implied limits on federal power. Other scholars have recently noted the rise of anti-federalist viewpoints in modern cases. I go a step further to demonstrate how Supreme Court Justices have embraced anti-federal ideology, but have cited Federalist sources, including Marshall, to announce unenumerated limits on federal legislative power.

TABLE OF CONTENTS

* Thomas E. Skinner Professor of Law, The University of Alabama School of Law. I am grateful to a number of research assistants, especially Dargan Ware, Clint Brown, Jim Sanders, Christine Hamaylian, Joe Barnello, Jordan Shelton, and Kelsey Yates for their excellent work in gathering and summarizing sources for this project. Of course, all the errors are mine. I am also appreciative of Dean Mark Brandon and the Law School Foundation for summer research support. Finally, I am indebted to Patty Lovelady Nelson for her expert editorial assistance during the past 30 years.

I. INTRODUCTION

During this hyper-partisan moment in our national history, one of the most divisive issues involves determining the constitutional limits on federal legislative power. Whether discussing national legislation on climate change, voting rights, police violence, criminal justice reform, sexual violence, wage inequity, educational inequality, pandemic mandates, health disparities or access to health care, the question frequently arises—what are the constitutional limits on Congress to regulate in such areas of national concern? No one contends that Congress has unlimited powers. Instead, the division rests on whether the limits on congressional power are solely those prescribed in the constitutional text or whether they extend to other limits deduced by the Court. This Article investigates the issue as presented in the Supreme Court, historically and today.

A recent illustration of this issue is the continuing litigation by individuals or states attacking the Affordable Care Act on the grounds that Congress exceeded its constitutional authority.[1] Such disputes call to mind earlier federalism debates from the founding generation regarding the nature and scope of the Constitution, which remain contested nearly two and a half centuries later. Although the text of the Constitution declares itself the *supreme* law of the land, across our national history, the Court has not offered a consistent interpretation of the nature of federal legislative power or its limits within our federalist system, leading to significant doctrinal turmoil.

1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 519 (2012). Another example is the judicial assault on key provisions of the Voting Rights Act. *See* Shelby Cty. v. Holder, 570 U.S. 529 (2013).

An early example of this turmoil can be found in the Supreme Court's opinion in *McCulloch v. Maryland*.[2] There, Chief Justice John Marshall, a leading Federalist politician and jurist, asserted vigorously that, under our constitutional system, Congress had broad plenary powers, permitting the Nation's legislature to enact any reasonable law that might aid its accomplishment of any of its enumerated powers.[3] The Marshall Court repudiated any pretense that Maryland had power over the national government, including a power to tax federal property.[4] Indeed, Marshall introduced the Doctrine of Implied Powers, finding no express limits on implied federal legislative powers in the Constitution, as had existed in the Articles of Confederation.[5] Marshall relied on the Constitution's Article I, Section 8, Necessary and Proper Clause to support his theory that Congress had broad implied powers to adopt any reasonable legislation not subject to prescribed constitutional limits.[6] Speaking of the Commerce Clause power, Marshall wrote, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[7] I call this view Marshallian federalism.

Of course, uncertainty about how the new Constitution would impact the states, their representatives, and the people was one of the chief reasons anti-federalists opposed it, preferring smaller regional leagues or confederacies over a larger national Union.[8] On that score, it appeared the Federalists prevailed, with the adoption of the Constitution and the creation of the three branches of the national government. Pursuant to Article I, the federal legislature would be made up of the people's representatives elected from the states, effectively protecting the states from federal overreach.[9] That instrumental structure did not

2. McCulloch v. Maryland, 17 U.S. 316, 316 (1819).
3. *Id.*
4. *See id.* at 391-96.
5. *See id.* at 406-07.
6. *See id.* at 412-14.
7. Gibbons v. Ogden 22 U.S. 1, 196 (1824); *see also* THE FEDERALIST NO. 14, at 61 (James Madison) (Terence Ball ed., 2003) ("[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any."); THE FEDERALIST NO. 23, *supra*, at 106-07 (Alexander Hamilton); THE FEDERALIST NO. 31, *supra*, at 142-43 (Alexander Hamilton) ("A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people.").
8. *See infra* Part II.B. and accompanying notes.
9. U.S. CONST. art. 1, §§ 1-2.

satisfy all opponents of the Constitution, including some on the Court, then and now.[10]

In this Article, I argue that in recent years, Justices have repudiated Marshallian federalism by asserting a series of unenumerated, implied limits on federal legislative power derived from an expansive reading of Tenth Amendment or state sovereignty principles.[11] I call this anti-federal counter-theory the Doctrine of Implied Limits on Federal Power. I illustrate that in several recent cases, including Ne*w York v. United States*,[12] *Printz v. United States*,[13] and *NFIB v. Sebelius*,[14] among others, the Court has quietly announced the Doctrine of Implied Limits, which, *sub silentio*, has displaced Marshall's Doctrine of Implied Powers. Beyond this point, I make one additional claim: the proponents of the theory of implied limits cite Marshall and other Federalists, rather than their anti-federalist ideological heirs. I label that move federalism by deception.

The purpose of this Article is to lay bare federalism by deception and the theory of implied limits on federal power. Other scholars have recently noted the rise of anti-federalist viewpoints in modern cases. I go a step further to demonstrate how Supreme Court Justices have embraced anti-federal ideology, but have cited Federalist sources, including Marshall, to announce unenumerated limits on federal legislative power.

In Part II, I recall the Federalist versus anti-federalist debate over the adoption of the Constitution and its contemporary relevance to the Court's analysis of the limits on federal power.[15] Beyond traditional Federalist writings, I lift anti-federalist writings, not to endorse them, but to allow comparison between the views expressed then and current rationales supporting implied limits on federal legislative power.

In Part III, I excavate the early writings of John Marshall in support of ratification of the Constitution and his declaration of the Doctrine of Implied Powers, illuminating its commanding status in early Supreme Court jurisprudence, especially *McCulloch v. Maryland* and its progeny.[16]

In Part IV, I examine the opinions of several Supreme Court Justices, especially former Associate Justice O'Connor's writing, most

10. *See infra* Part IV.A. and accompanying notes.
11. *See infra* Part IV.B. and accompanying notes.
12. New York v. United States, 505 U.S. 144 (1992).
13. Printz v. United States, 521 U.S. 898 (1997).
14. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
15. *See infra* Part II.A. and accompanying notes.
16. *See infra* Part III.B. and accompanying notes.

notably in *New York v. United States*, in which she and other Justices implied new, unenumerated limits on federal power from the Tenth Amendment and state sovereignty doctrine, sketching the contours of the Doctrine of Implied Limits on Federal Power.[17] Next, I describe the current ideological battleground for these competing theories, examining their application in *Sebelius*. Not only does the Court imply limits on federal power, but it also frequently cites Marshall and other Federalist writings, rather than citing similar anti-federalist writings.

In conclusion, I explain why I reject federalism by deception and why I think Marshallian federalism should regain ascendancy.[18]

II. FEDERALISM AND THE NEW CONSTITUTION

One of the central claims of this Article is that debates between Federalists and anti-federalists, which arose before and during the ratification of the Constitution, have remained unresolved, despite the adoption of the new Constitution nearly twelve score years ago, as well as the expansion of constitutional restrictions on the states following the Civil War. To illustrate this point, I begin with a basic review of the essential arguments of the Federalists and the anti-federalists regarding the new Constitution and the nature of federal power. A second claim is that one can read the Doctrine of Implied Limits on Federal Power through an eighteenth-century anti-federalist understanding of the nature of federal power. In Part IV.B., I argue that in justifying implied limits on federal legislative power, Justice O'Connor and Chief Justice Roberts, among others, express anti-federal concerns and language while citing selected federalist sources. I name that maneuver federalism by deception.

A. What the Federalists Thought

The Federalists supported the adoption of the Constitution for myriad reasons, expressing many of them collectively in a series of letters to the people of New York.[19] First, the Federalists believed that

17. *See infra* Part IV.A.3. and accompanying notes.

18. *See infra* Part IV.3.B. and accompanying notes.

19. Each Federalist Paper opens with "To the People of the State of New York." THE FEDERALIST NO. 1, *supra* note 7, at 4 (Alexander Hamilton) (summarizing the goals of the Federalist Papers as showing: "[t]he utility of the Union to your political prosperity, [t]he insufficiency of the present Confederation to preserve that Union, [t]he necessity of a government at least equally energetic with the one proposed to the attainment of this object, [t]he conformity of the proposed constitution to the true principles of republican government, [i]ts analogy to your own state constitution and lastly, [t]he additional security, which its adoption will afford to the preservation of that species of government, to liberty, and to property"); THE FEDERALIST NO. 85, *supra* note 7, at 431 (Alexander Hamilton) ("A

a larger, united republic was better than smaller divided republics.[20] Second, they believed that man was corrupt and as a result, state governments would always be in conflict.[21] The view of man's corruption may have arisen from the Federalist writers' belief in the Puritan view of the total depravity of man, or from their appeals to the public's belief in the total depravity of man.[22] As one commentator put it, "Publius and his fellow Federalists were defending a design for a new *kind* of republic, the likes of which had never previously existed—an 'enlarged' or 'extended republic.'"[23] James Madison offered a similar justification and need for the new Constitution, stating, "Hence it clearly appears, that the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic—is enjoyed by the Union over the States composing it."[24]

Alexander Hamilton, who led the campaign, with Madison and John Jay, to persuade New York's ratification of the new Constitution, wrote,

> A man must be far gone in Utopian speculations who can seriously doubt, that if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests, as an argument against their existence would be to forget that men are ambitious, vindictive and rapacious.[25]

On the corruptive hostilities among states and their leaders, Hamilton wrote,

---

NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety."); THE FEDERALIST NO. 37, *supra* note 7, at 168 (James Madison) ("[T]he ultimate object of these papers is to determine clearly and fully the merits of this Constitution, and the expediency of adopting it . . . ."); THE FEDERALIST NO. 38, *supra* note 7, at 179 (James Madison).

20. *See supra* note 19 and accompanying notes.

21. *See supra* note 19 and accompanying notes.

22. *See supra* note 19 and accompanying notes.

23. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST: WITH LETTERS OF "BRUTUS," at xxi (Terence Ball ed., 2003).

24. THE FEDERALIST NO. 10, *supra* note 7, at 46 (James Madison) ("[I]t clearly appears, that the same advantage which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic,—is enjoyed by the Union over the States composing it."); THE FEDERALIST NO. 51, *supra* note 7, at 255 (James Madison) ("[T]he larger the society, provided it lie within a practical sphere, the more duly capable it will be of self government.").

25. THE FEDERALIST NO. 6, *supra* note 7, at 19 (Alexander Hamilton).

> The causes of hostility among nations are innumerable. There are some which have a general and almost constant operation upon the collective bodies of society: Of this description are the love of power or the desire of preeminence and dominion—the jealousy of power, or the desire of equality and safety. . . . Men of this class, whether the favourites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage, or personal gratification.[26]

The Federalists feared the corruption of man and believed it caused the states to be in danger of attacking one another, or of attack from the outside, and that the economic prosperity of the nation was in danger.[27] For these reasons, the Federalists supported a strong government that could defend and resolve conflicts among the states.[28] They also favored

---

26. *Id.* at 20.

27. THE FEDERALIST NO. 3, *supra* note 7, at 11-12 (John Jay); THE FEDERALIST NO. 10, *supra* note 7, at 42 (James Madison) ("So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."); THE FEDERALIST NO. 37, *supra* note 7, at 172-73 (James Madison); THE FEDERALIST NO. 51, *supra* note 7, at 252 (James Madison) ("If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself."); THE FEDERALIST NO. 15, *supra* note 7, at 69-70 (Alexander Hamilton); THE FEDERALIST NO. 78, *supra* note 7, at 381 (Alexander Hamilton) ("[C]onstitution and the rights of individuals from the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people themselves, and which . . . have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."); THE FEDERALIST NO. 85, *supra* note 7, at 426-27 (Alexander Hamilton).

28. THE FEDERALIST NO. 6, *supra* note 7, at 19 (Alexander Hamilton) ("I shall now proceed to delineate dangers of a different, and, perhaps, still more alarming kind, those which will in all probability flow from dissensions between the States themselves, and from domestic factions and convulsions."); THE FEDERALIST NO. 7, *supra* note 7, at 25-26, 30 (Alexander Hamilton) ("The probability of incompatible alliances between the different States or confederacies, and different foreign nations, and the effects of this situation upon the peace of the whole, have been sufficiently unfolded . . . ."); THE FEDERALIST NO. 8, *supra* note 7, at 30 (Alexander Hamilton) ("Assuming it therefore as an established truth that the several States, in case of disunion, or such combinations of them as might happen to be formed out of the wreck of the general confederacy, would be subject to those vicissitudes of peace and war, of friendship and enmity with each other, which have fallen to the lot of all neighboring nations not united under one government, let us enter into a concise detail of some of the consequences that would attend such a situation."); THE FEDERALIST NO. 9, *supra* note 7, at 35 (Alexander Hamilton) ("A Firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection."); THE FEDERALIST NO. 25, *supra* note 7, at 115-16 (Alexander Hamilton); THE FEDERALIST NO. 85, *supra* note 7, at 426-27 (Alexander Hamilton).

taxes to support a strong national government.[29] The Federalists thought that the nation was in danger of attack without a unifying Constitution.[30] Hamilton believed that the Constitution "would preserve the liberties won during the American Revolution and serve as a bulwark against interstate anarchy and civil war, and hence against invasion, occupation, and subjugation by foreign powers."[31]

The Federalists wrote that the nation would be more economically prosperous under the Constitution. In their view, "a vigorous national government" and "the natural strength and resources of the country" would allow the United States to beat European economies if the nation could be directed toward a common interest.[32] The Federalists asserted that a national government was necessary to adjudicate the differences among the states, stating that:

> [I]f it be possible at any rate to construct a Federal Government capable of regulating the common concerns and preserving the

29. THE FEDERALIST NO. 12, *supra* note 7, at 53, 56 (Alexander Hamilton); THE FEDERALIST NO. 21, *supra* note 7, at 97 (Alexander Hamilton); THE FEDERALIST NO. 31, *supra* note 7, at 143 (Alexander Hamilton) ("As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies. As theory and practice conspire to prove that the power of procuring revenue is unavailing, when exercised over the States in their collective capacities, the Federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes."); THE FEDERALIST NO. 34, *supra* note 7, at 156-57 (Alexander Hamilton).

30. THE FEDERALIST NO. 4, *supra* note 7, at 14 (John Jay) ("Wisely therefore do [the people] consider Union and a good national Government as necessary to put and keep them *in such a situation* [of peace] as instead of *inviting* war, will tend to repress and discourage it."); THE FEDERALIST NO. 5, *supra* note 7, at 18-19 (John Jay); THE FEDERALIST NO. 6, *supra* note 7, at 19 (Alexander Hamilton); THE FEDERALIST NO. 22, *supra* note 7, at 105 (Alexander Hamilton); THE FEDERALIST NO. 25, *supra* note 7, at 115 (Alexander Hamilton); THE FEDERALIST NO. 26, *supra* note 7, at 124 (Alexander Hamilton).

31. HAMILTON, MADISON & JAY, *supra* note 23, at xviii; THE FEDERALIST NO. 14, *supra* note 7, at 63-64 (James Madison) ("Had no important step been taken by the leaders of the revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment, have been numbered among the melancholy victims of misguided councils, must at best have been labouring under the weight of some of those forms which have crushed the liberties of the rest of mankind. . . . They accomplished a revolution which has no parallel in the annals of human society . . . . They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate."); THE FEDERALIST NO. 39, *supra* note 7, at 181-82 (James Madison); THE FEDERALIST NO. 45, *supra* note 7, at 224 (James Madison); THE FEDERALIST NO. 24, *supra* note 7, at 113-14 (Alexander Hamilton).

32. THE FEDERALIST NO. 11, *supra* note 7, at 49, 51-52 (Alexander Hamilton) ("Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth."); THE FEDERALIST NO. 12, *supra* note 7, at 52 (Alexander Hamilton) ("The effects of union upon the commercial prosperity of the States have been sufficiently delineated. Its tendency to promote the interests of revenue will be the subject of our present enquiry."); THE FEDERALIST NO. 13, *supra* note 7, at 57, 59 (Alexander Hamilton).

> general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution.[33]

B. What the Anti-Federalists Thought About the Constitution

Opponents of the Constitution were equally vigorous in their efforts to persuade the people to reject it, expressing several themes in their widely circulated tracts. They argued that the preservation of individual liberty is the purpose of government.[34] On liberty and government, Patrick Henry said, "You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your Government."[35]

---

33. THE FEDERALIST NO. 16, *supra* note 7, at 73 (Alexander Hamilton); THE FEDERALIST NO. 80, *supra* note 7, at 386, 388-89 (Alexander Hamilton) ("It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes . . . [t]o all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves . . . .").

34. Patrick Henry, *Patrick Henry Speech Before Virginia Ratifying Convention*, TEACHING AM. HIST. (June 5, 1788), https://teachingamericanhistory.org/document/patrick-henry-virginia-ratifying-convention-va/.

35. *Id.* For similar reflections, *see Brutus*, *no. 1*, *in* 1 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981), https://liberalarts.utexas.edu/coretexts/_files/resources/texts/c/1787%20Brutus%201.pdf ("[W]hatever government we adopt, it ought to be a free one; that it should be so framed as to secure the liberty of the citizens of America, and such an one as to admit of a full, fair, and equal representation of the people."); Centinel & Samuel Bryan, *Centinel XI*, TEACHING AM. HIST. (Jan. 16, 1788), https://teachingamericanhistory.org/document/centinel-xi/ ("[T]he new constitution may not only be inadequate as a remedy, but destructive of liberty, and the completion of misery . . . ."); *Cincinnatus VI*, TEACHING AM. HIST. (Dec. 6, 1787), https://teachingamericanhistory.org/document/cincinnatus-vi/ ("I trust, that [the people] will have discernment to discover the parts which are incompatible with their rights and liberties, and spirit to insist upon those parts being amended."); *Letters from The Federal Farmer to The Republican IV*, LEE FAM. DIGITAL ARCHIVE (Oct. 12, 1787), https://leefamilyarchive.org/papers/essays/fedfarmer/04.html ("There are certain rights which we have always held sacred in the United States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured."); *Letters from The Federal Farmer to The Republican IV*, *supra* ("It is not my object to enumerate rights of inconsiderable importance; but there are others, no doubt, which ought to be established as a fundamental part of the national system."); *Letters from The Federal Farmer to The Republican VI*, LEE FAM. DIGITAL ARCHIVE (Dec. 25, 1787), https://leefamilyarchive.org/papers/essays/fedfarmer/06.html ("Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them . . . ."); *Letters from The Federal Farmer to The Republican XVI*, LEE FAM. DIGITAL ARCHIVE (Jan. 20, 1788), https://leefamilyarchive.org/papers/essays/fedfarmer/16.html ("[T]he people especially having began, ought to go through enumerating, and establish particularly all the rights of

A related theme was that the smaller, more local form of government found in the states was more capable of protecting individual liberty.[36] For example, consider Luther Martin's comment that:

> At the separation from the British Empire, the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one: to these

individuals, which can by any possibility come in question in making and executing federal laws."); John DeWitt, *John DeWitt III*, TEACHING AM. HIST. (Nov. 5, 1787) [hereinafter DeWitt, *John DeWitt III*], https://teachingamericanhistory.org/document/john-dewitt-iii/ ("In short, my fellow—citizens, [the proposed Constitution] can be said to be nothing less than a hasty stride to Universal Empire in this Western World, flattering, very flattering to young ambitious minds, but fatal to the liberties of the people."); *An Old Whig IV*, TEACHING AM. HIST. (Oct. 27, 1787), https://teachingamericanhistory.org/document/an-old-whig-iv/ ("[W]e ought carefully to guard ourselves by a Bill of Rights, against the invasion of those liberties which it is essential for us to retain . . . ." (emphasis omitted)).

36. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15 (1981); *see also Brutus*, *no.1*, *supra* note 35 ("[A] free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States."); Cato, *Cato III*, TEACHING AM. HIST. (Oct. 25, 1787) [hereinafter Cato, *Cato III*], https://teachingamericanhistory.org/document/cato-iii/ ("It is natural, says Montesquieu, to a republic to have only a small territory, otherwise it cannot long subsist . . . . In large republics, the public good is sacrificed to a thousand views, in a small one, the interest of the public is easily perceived, better understood, and more within the reach of every citizen; abuses have a less extent, and of course are less protected . . . ." (emphasis omitted)); Centinel & Samuel Bryan, *Centinel III*, TEACHING AM. HIST. (Nov. 8, 1787), https://teachingamericanhistory.org/document/centinel-iii/ ("[A] confederation of small republics, possessing all the powers of internal government, and united in the management of their general and foreign concerns, is the only system of government, by which so extensive a country can be governed consistent with freedom . . . ."); Samuel Bryan, *Centinel V*, TEACHING AM. HIST. (Dec. 4, 1787) [hereinafter Bryan, *Centinel V*], https://teachingamericanhistory.org/document/centinel-v/ ("[O]ne consolidated government, will not answer for so extensive a territory as the United States includes, that slavery would be the necessary fate of the people under such a government . . . ."); Centinel & Samuel Bryan, *Centinel XIV*, TEACHING AM. HIST. (Feb. 5, 1788), https://teachingamericanhistory.org/document/centinel-xiv/ ("[T]he only method by which an extensive continent like America could be connected and united together consistent with the principles of freedom, must be by having a number of strong and energetic state governments for securing and protecting the rights of the individuals forming those governments . . . ."); *Letters from The Federal Farmer to The Republican II*, LEE FAM. DIGITAL ARCHIVE (Oct. 9, 1787), https://leefamilyarchive.org/papers/essays/fedfarmer/02.html ("It is apparently impracticable that [Congress adequately represent the people] in this extensive country—it would be impossible to collect a representation of the parts of the country five, six, and seven hundred miles from the seat of government."); *An Old Whig IV*, *supra* note 35 ("One thing is evident, that no republic of so great a magnitude, ever did, or ever can exist. . . . The continent of North-America can no more be governed by one republic, than the fabled Atlas could support the heavens."); *Letters from The Federal Farmer to The Republican III*, LEE FAM. DIGITAL ARCHIVE (Oct. 10, 1787), https://leefamilyarchive.org/papers/essays/fedfarmer/03.html ("[M]any differences peculiar to Eastern, Middle, and Southern states . . . are not so perceivable among the members of congress, and men of general information in the states, as among the men who would properly form the democratic branch.").

> they look up for the security of their lives, liberties, & properties: to these they must look up—The federal Govt. they formed, to defend the whole agst. foreign nations, in case of war, and to defend the lesser States agst. the ambition of the larger. . . .[37]

The anti-federalists based the above beliefs on three main principles:[38]

1. Only a small republic can enjoy a voluntary attachment of the people to the government and a voluntary obedience to the laws.[39]

2. Only a small republic can secure a genuine responsibility of the government to the people.[40]

---

37. *See* STORING, *supra* note 36.

38. *Id.* at 16.

39. *See Brutus*, *no.1*, *supra* note 35 ("[W]hen a government is to receive its support from the aid of the citizens, it must be so constructed as to have the confidence, respect, and affection of the people."); *Brutus IV*, TEACHING AM. HIST. (Nov. 29, 1787), https://teachingamericanhistory.org/document/brutus-iv/ ("A farther objection against the feebleness of the representation is, that it will not possess the confidence of the people. The execution of the laws in a free government must rest on this confidence, and this must be founded on the good opinion they entertain of the framers of the laws. Every government must be supported, either by the people having such an attachment to it, as to be ready, when called upon, to support it, or by a force at the command of the government, to compel obedience."); *Letters from The Federal Farmer to The Republican II*, *supra* note 36 ("[T]he laws of a free government rest on the confidence of the people, and operate gently—and never can extend their influence very far—if they are executed on free principles, about the centre, where the benefits of the government induce the people to support it voluntarily; yet they must be executed on the principles of fear and force in the extremes . . . ."); *Letters from The Federal Farmer to The Republican III*, *supra* note 36 ("The great object of a free people must be so to form their government and laws, and so to administer them, as to create a confidence in, and respect for the laws; and thereby induce the sensible and virtuous part of the community to declare in favor of the laws, and to support them without an expensive military force.").

40. *See Brutus*, *no.1*, *supra* note 35 ("In so extensive a republic, the great officers of government would soon become above the control of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them."); Centinel & Samuel Bryan, *Centinel VI*, TEACHING AM. HIST. (Dec. 25, 1787) [hereinafter Centinel & Bryan, *Centinel VI*], https://teachingamericanhistory.org/document/centinel-vi/ ("[L]iberty is only to be preserved by a due responsibility in the government . . . ."); *Letters from The Federal Farmer to The Republican VII*, LEE FAM. DIGITAL ARCHIVE (Dec. 31, 1787), https://leefamilyarchive.org/papers/essays/fedfarmer/07.html ("In forming [the legislative] branch, therefore, several important considerations must be attended to. It must possess abilities to discern the situation of the people and of public affairs, a disposition to sympathize with the people, and a capacity and inclination to make laws congenial to their circumstances and condition: it must afford security against interested combinations, corruption and influence; it must possess the confidence, and have the voluntary support of the people."); *Letters from The Federal Farmer to The Republican IX*, LEE FAM. DIGITAL ARCHIVE (Jan. 4, 1788), https://leefamilyarchive.org/papers/essays/fedfarmer/09.html ("Clear it is, by increasing the representation we lessen the prospects of each member of congress being provided for in public offices; we proportionably lessen official influence, and strengthen his prospects of becoming a private citizen, subject to the common burdens, without the compensation of the emoluments of office."); *Letters from The Federal Farmer to The Republican XI*, LEE FAM. DIGITAL ARCHIVE (Jan. 10, 1788), https://leefamilyarchive.org/

3. Only a small republic can form the kind of citizens who will maintain a republican government.[41]

The anti-federalists opposed the Constitution because they feared "that representation in Congress could not possibly be adequate to fulfill its proper mission, which was to keep elected officials responsible to their constituents."[42] They believed "Congress could not represent all the varied interests existing in the United States. Some Men—whether fishermen, farmers of a particular kind, or some other group—effectively would not be represented. These men might vote, but they

papers/essays/fedfarmer/11.html ("The senators will represent sovereignties, which generally have, and always ought to retain, the power of recalling their agents; the principle of responsibility is strongly felt in men who are liable to be recalled and censured for their misconduct . . . .").

41. *See* Samuel Bryan, *Centinel I*, TEACHING AM. HIST. (Oct. 5, 1787) [hereinafter Bryan, *Centinel I*], https://teachingamericanhistory.org/document/centinel-i/ (" 'A republican, or free government, can only exist where the body of the people are virtuous' . . . . The highest responsibility is to be attained, in a simple structure of government, for the great body of the people never steadily attend to the operations of government, and for want of due information are liable to be imposed on . . . ."); Centinel & Bryan, *Centinel VI*, *supra* note 40 ("[L]iberty is only to be preserved . . . by constant attention of the people . . . ."); John DeWitt, *John DeWitt I*, TEACHING AM. HIST. (Oct. 22, 1787), https://teachingamericanhistory.org/document/john-dewitt-i/ ("It is the duty of every one in the Commonwealth to communicate his sentiments to his neighbour, divested of passion, and equally so of prejudices.").

42. *See Brutus IV*, *supra* note 39 ("The number will be so small that but a very few of the most sensible and respectable yeomanry of the country can ever have any knowledge of them: being so far removed from the people, their station will be elevated and important, and they will be considered as ambitious and designing. They will not be viewed by the people as part of themselves, but as a body distinct from them, and having separate interests to pursue; the consequence will be, that a perpetual jealousy will exist in the minds of the people against them; their conduct will be narrowly watched; their measures scrutinized; and their laws opposed, evaded, or reluctantly obeyed."); Brutus, *Brutus XVI*, TEACHING AM. HIST. (Apr. 10, 1788), https://teachingamericanhistory.org/document/brutus-xvi/ ("Men long in office are very apt to feel themselves independent [and] to form and pursue interests separate from those who appointed them. And this is more likely to be the case with the senate, as they will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little of the feelings of the middling class of people."); Cato, *Cato V*, TEACHING AM. HIST. (Nov. 22, 1787) [hereinafter Cato, *Cato V*], https://teachingamericanhistory.org/document/cato-v/ ("It is a very important objection to this government, that the representation consists of so few; too few to resist the influence of corruption, and the temptation to treachery, against which all governments ought to take precautions. . . ."); Cato, *Cato VI*, TEACHING AM. HIST. (Dec. 13, 1787), https://teachingamericanhistory.org/document/cato-vi/ ("[W]hen the senate, so important a branch of the legislature, is so far removed from the people, as to have little or no connexion [sic] with them . . . ."); Dewitt, *John DeWitt III*, *supra* note 35 (stating that the members of the House of Representatives "become strangers to the very people choosing them, they reside at a distance from you, you have no control over them, you cannot observe their conduct, and they have to consult and finally be guided by twelve other States, whose interests are, in all material points, directly opposed to yours"); *Letters from The Federal Farmer to The Republican XI*, *supra* note 40 ("Men elected for several years, several hundred miles distant from their states, possessed of very extensive powers, and the means of paying themselves, will not, probably, be oppressed with a sense of dependance and responsibility.").

would have no chance, given the mathematics of the situation, actually elect someone who would protect their interests."[43] The anti-federalists feared that the change from the Articles of Confederation to the Constitution (particularly the hurried method of adopting the Constitution) would allow for an aristocratic rule, which in turn would suppress individual liberty.[44]

---

43. Bruce Frohnen, *Introduction* to THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES, at xiii, xxvii (Bruce Frohnen ed., Regnery Publ'g 1999); *see also* Bryan, *Centinel I*, *supra* note 41 ("The number of the representatives . . . appears to be too few, either to communicate the requisite information, of the wants, local circumstances and sentiments of so extensive an empire, or to prevent corruption and undue influence, in the exercise of such great powers . . . ."); Cincinnatus, *Cincinnatus IV: To James Wilson, Esquire*, TEACHING AM. HIST. (Nov. 22, 1787) [hereinafter Cincinnatus, *Cincinnatus IV*], https://teachingamericanhistory.org/document/cincinnatus-iv-to-james-wilson-esquire/ ("In point of number therefore and the weight derived from [the House], the representative proposed by the constitution is remarkably feeble."); Cato, *Cato III*, *supra* note 36 ("[T]he dissimilitude of interest, morals, and politics, in almost every one, will receive it as an intuitive truth, that a consolidated republican form of government therein, can never form a perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to you and your posterity, for to these objects it must be directed. This unkindred legislature therefore, composed of interests opposite and dissimilar in their nature, will in its exercise, emphatically be like a house divided against itself." (emphasis omitted)); Cato, *Cato V*, *supra* note 42 ("[T]he number of representatives are too few. . . ."); Cato, *Cato V*, *supra* note 42 ("Another thing [that] may be suggested against the small number of representatives is, that but few of you will have the chance of sharing even in this branch of the legislature; and that the choice will be confined to a very few; the more complete it is, the better will your interests be preserved . . . ."); *Letters from The Federal Farmer to The Republican III*, *supra* note 36 ("As to the organization—the house of representatives, the democrative branch, as it is called, is to consist of 65 members: that is, about one representative for fifty thousand inhabitants . . . . I have no idea that the interests, feelings, and opinions of three or four millions of people, especially touching internal taxation, can be collected in such a house."); *Letters from The Federal Farmer to The Republican VII*, *supra* note 40 ("[T]here ought to be an increase of the numbers of representatives . . . ." (emphasis omitted)); *Letters from The Federal Farmer to The Republican IX*, *supra* note 40 ("How far we ought to increase the representation I will not pretend to say; but that we ought to increase it very considerably, is clear—to double it at least, making full allowances for the state representations: and this we may evidently do, and approach accordingly towards safety and perfection, without encountering any inconveniences."); Richard Henry Lee, *Federal Farmer X*, TEACHING AM. HIST. (Jan. 7, 1788), https://teachingamericanhistory.org/document/federal-farmer-x/ ("I have dwelt much longer than I expected upon the increasing the representation, the democratic interest in the federal system; but I hope the importance of the subject will justify my dwelling upon it.").

44. *See* STORING, *supra* note 36, at 48; *see also* Bryan, *Centinel I*, *supra* note 41 ("From this investigation into the organization of this government, it appears that it is devoid of all responsibility or accountability to the great body of the people, and that so far from being a regular balanced government, it would be in practice a permanent ARISTOCRACY."); Cato, *Cato V*, *supra* note 42 ("[T]he mode in which they are appointed and their duration, will lead to the establishment of an aristocracy . . . ."); Centinel & Samuel Bryan, *Centinel II*, TEACHING AM. HIST. (Oct. 24, 1787) [hereinafter Centinel & Bryan, *Centinel II*], https://teachingamericanhistory.org/document/centinel-ii/ ("The injunction of secrecy imposed on the members of the late Convention during their deliberations, was obviously

Many other concerns animated anti-federalist writings, including the efficiency of the existing government and the fear of a national standing army, but they are beyond the scope of this Article.[45] Perhaps most relevant to this Article, the anti-federalists were cautious of the Constitution's "broad grants of power taken together with the 'supremacy' and 'the necessary and proper' clauses," because these "amounted to an unlimited grant of power to the general government to do whatever it might choose to do."[46]

---

dictated by the genius of Aristocracy; it was deemed impolitic to unfold the principles of the intended government to the people, as this would have frustrated the object in view."); Centinel & Bryan, *Centinel II*, *supra* ("In my first number, I stated that [the Senate] would be a very unequal representation of the several states . . . and that possessing a considerable share in the executive as well as legislative, it would become a permanent aristocracy, and swallow up the other orders in the government." (emphasis omitted)); Cincinnatus, *Cincinnatus IV*, *supra* note 43 ("[T]he most exceptionable part of the Constitution the senate. In this . . . 'perhaps there never was a charge made with less reason, than that which predicts the institution of a baneful aristocracy in the Foederal Senate.' "); Cincinnatus, *Cincinnatus IV*, *supra* note 43 ("[T]he senate . . . must necessarily produce a baneful aristocracy, by which the democratic rights of the people will be overwhelmed."); *Cincinnatus V: To James Wilson, Esquire*, *New York Journal*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION (John P. Kaminski et al. eds., 2009), https://csac.history.wisc.edu/wp-content/uploads/sites/281/2017/07/Cincinnatus_V.pdf ("[P]ower is to be vested in an aristocratic senate . . . ."); DeWitt, *John DeWitt III*, *supra* note 35 ("Upon an attentive examination you can pronounce [the Constitution] nothing less, than a government which in a few years, will degenerate to a complete Aristocracy, armed with powers unnecessary in any case to bestow, and which in its vortex swallows up every other Government upon the Continent."); JOHN DEWITT, ESSAY IV (1787), *reprinted in* THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES, 507 (Bruce Frohnen ed., 1999) ("[T]here cannot remain a doubt in the mind of any reflecting man, that it is a System purely Aristocratical, calculated to find employment for men of ambition, and to furnish means of sporting with the sacred principles of human nature."); Lee, *supra* note 43 ("I conceive the position to be undeniable, that the federal government will be principally in the hands of the natural aristocracy, and the state governments principally in the hands of the democracy, the representatives of the body of the people.").

45. *See* STORING, *supra* note 36, at 28; *see also Essay by* A Farmer, aka Colonel Thomas Cogswell, Chief Justice of the New Hampshire Court of Common Pleas (1788), *in* 4 The Complete Anti-Federalist 207 (Herbert J. Storing ed., 1981) ("Standing armies are dangerous *in time of peace to the liberties of a free people,* provided they are kept and voted their continuance yearly, they soon get ingrafted into the Constitution, therefore they ought not to be kept up, on any pretext whatsoever, any longer than till the enemy are driven from our door."); *Essay by* A Farmer, aka Colonel Thomas Cogswell, Chief Justice of the New Hampshire Court of Common Pleas (1788), *in* 4 The Complete Anti-Federalist 207 (Herbert J. Storing ed., 1981) ("An army either in peace or war, is like the locust and caterpillers [sic] of Egypt; they bear down all before them—and many times, by designing men, have been used as an engine to destroy the liberties of people, and reduce them to slavery.").

46. *See* STORING, *supra* note 36, at 28; *see also* Brutus, *Brutus VI*, TEACHING AM. HIST. (Dec. 27, 1787), https://teachingamericanhistory.org/document/brutus-vi/ ("Upon the whole, I conceive, that there cannot be a clearer position than this, that the state governments ought to have an uncontroulable power to raise a revenue, adequate to the exigencies of their governments; and, I presume, no such power is left them by this constitution."); Centinel & Bryan, *Centinel II*, *supra* note 44 ("From the foregoing illustration of the powers proposed to

These varied sources recall for the reader the myriad viewpoints on ratification of the Constitution, as well as the fear of sweeping new federal powers under it.[47] The anti-federalists thought the new Constitution would put at risk individual liberties. They believed smaller, more local government would better protect liberty. They asserted that the nation was too large for one government to manage the peculiar regional differences within the country. They feared that the national government would not maintain a voluntary attachment with the people and maintain its responsibility to the citizens. They argued that national officers would act as though they were above the people, and they would aggrandize power and abuse local interests. Those viewpoints and that fear of broad federal power remained contested,

be devolved to Congress, it is evident, that the general government would necessarily annihilate the particular governments, and that the security of the personal rights of the people by the state constitutions is superseded and destroyed; hence results the necessity of such security being provided for by a bill of rights to be inserted in the new plan of federal government."); Bryan, *Centinel V*, *supra* note 36 ("Whatever law-congress may deem necessary and proper for carrying into execution any of the powers vested in them, may be enacted; and by virtue of this clause, they may controul and abrogate any and every of the laws of the state governments, on the allegation that they interfere with the execution of any of their powers, and yet these law will 'be made in pursuance of the constitution,' and of course will 'be the supreme law of the land . . . .' "); Cincinnatus, *Cincinnatus II: To James Wilson, Esquire*, TEACHING AM. HIST. (Nov. 8, 1787), https://teachingamericanhistory.org/document/cincinnatus-ii-to-james-wilson-esquire/ ("Thus this new system, with one sweeping clause, bears down every constitution in the union, and establishes its arbitrary doctrines, supreme and paramount to all the bills and declarations of rights, in which we vainly put our trust, and on which we rested the security of our often declared, unalienable liberties."); Richard Henry Lee, *Federal Farmer XVII*, TEACHING AM. HIST. (Jan. 23, 1788), https://teachingamericanhistory.org/document/federal-farmer-xvii/ ("A government possessed of more power than its constituent parts will justify, will not only probably abuse it, but be unequal to bear its own burden; it may as soon be destroyed by the pressure of power, as languish and perish for want of it."); John DeWitt, *John DeWitt II*, TEACHING AM. HIST. (Oct. 27, 1787), https://teachingamericanhistory.org/document/john-dewitt-ii/ ("That insatiable thirst for unconditional controul over our fellow-creatures, and the facility of sounds to convey essentially different ideas, produced the first Bill of Rights ever prefixed to a Frame of Government."); *An Old Whig I*, TEACHING. AM. HIST. (Oct. 12, 1787), https://teachingamericanhistory.org/document/an-old-whig-i/ ("The great, and the wise, and the mighty will be in possession of places and offices; they will oppose all changes in favor of liberty; they will steadily pursue the acquisition of more and more power to themselves and their adherents."); *An Old Whig II*, TEACHING. AM. HIST. (Oct. 17, 1787), https://teachingamericanhistory.org/document/an-old-whig-ii/ ("[I]f I am right in my opinion, the new constitution vests Congress with such unlimited powers as ought never to be entrusted to any men or body of men."); *An Old Whig II*, *supra* ("My object is to consider that undefined, unbounded, and immense power which is comprised in the [Necessary and Proper Clause] . . . . What limits are there to their authority?—I fear none at all [outside of force] . . . . [W]ho can overrule their pretensions?-No one; unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgements." (emphasis omitted)).

47. *See supra* notes 33-45 and accompanying text.

despite ratification. A central claim of this Article is that one finds many echoes of anti-federalist concerns in recent Supreme Court opinions, but those writing for the Court do not cite their ideological heirs. It is to the question of the nature of the limits of federal legislative power that we turn to in the next two parts of this Article.

III. MARSHALL AND THE CONSTITUTIONAL LIMITS ON FEDERAL POWER

Long before John Marshall was appointed Chief Justice of the Supreme Court and before he wrote landmark opinions in *Marbury v. Madison*,[48] *McCulloch v. Maryland*,[49] and *Gibbons v. Ogden*,[50] he had published many of his views on the new Constitution. Marshall's extensive papers confirm that he was an unapologetic friend of the new Constitution and an advocate for increased federal power.[51] Among Marshall's papers, one finds speeches, personal correspondence, and published writings calling out the anti-federal spirit in Virginia and elsewhere.[52] Here, the focus is on Marshall's speeches during the Virginia Ratifying Convention and related correspondence, then on Marshall's leading judicial opinions on the nature of federal power.

A. Marshall's Speeches and Correspondence

During the Virginia Ratifying Convention, Marshall made a series of speeches and wrote correspondence to colleagues from which it is clear that he was a critic of the Articles of Confederation and a fierce advocate for increased federal power set forth in the Constitution.[53] Excerpts of those speeches and writings are set out here to illuminate Marshall's views on the Constitution and the nature of federal powers. They also make it easier for the reader to distinguish Marshallian federalism from the anti-federalist views of more recent Justices examined in Parts IV and V of this Article. Occasionally, emphasis is added to highlight key aspects of Marshallian federalism.

---

48. Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding it was the province and duty of the judicial department to declare what the Constitution means and that the original jurisdiction of the Court could not be altered by statute).

49. McCulloch v. Maryland, 17 U.S. 316 (1819).

50. Gibbons v. Ogden, 22 U.S. 1 (1824).

51. *See* 1 THE PAPERS OF JOHN MARSHALL 1775-1788 (Charles F. Hobson ed., Univ. of Va. Press digital ed. 2014). While the collection contains many documents, only a small minority pertain to information regarding Marshall's views on federalism—or his political ideology at large: speeches during the Virginia Ratifying Convention and the *Friend of the Constitution* essays.

52. *See id.*

53. *See id.*

June 10, 1788 Speech[54]

> The Confederation has nominal powers, but no means to carry them into effect. If a system of Government were devised by more than human intelligence, it would not be effectual if the means were not adequate to the power. All delegated powers are liable to be abused. Arguments drawn from this source go in direct opposition to every Government, and in recommendation of anarchy. The friends of the Constitution are as tenacious of liberty as its enemies. They wish to give no power that will endanger it. They wish to give the Government powers to secure and protect it. Our enquiry here must be, whether the power of taxation be necessary to perform the objects of the Constitution, and whether it be safe and as well guarded as human wisdom can do it.[55]

- The objects of the national government:[56]
  - To protect the United States
  - Promote the general welfare
  - Protection in time of war
- "The prosperity and happiness of the people depend on the performance of these great and important duties of the General Government."[57]
- Only the national government, not a singular State, can perform these duties.[58]
- If we do not give the power to tax to the national government now, we will do so with "an unsparing hand" when the dangers of war arrive.[59]
- "We are told, that the Confederation carried us through the war. Had not the enthusiasm of liberty inspired us with unanimity, that system would never have carried us through it. It would have been much sooner terminated had that Government been possessed of due energy. The inability of Congress, and the failure of the States to comply with the Constitutional requisitions, rendered our resistance less efficient than it might have been. The weakness of that Government caused troops to be against us which ought to be on our side, and prevented all the

54. John Marshall, Speech in the Virginia Ratifying Convention (June 10, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL 1775-1788, *supra* note 51, at 256–270.

55. *Id.* at 260.

56. *Id.* at 260–61.

57. *Id.* at 261.

58. *Id.*

59. *Id.* at 262.

resources of the community from being called at once into action. The extreme readiness of the people to make their utmost exertions to ward off the pressing danger, supplied the place of requisitions. When they came solely to be depended on, their inutility was fully discovered."[60]

- "I shall not go to the various checks of the Government, but examine whether the immediate representation of the people be well constructed. I conceive its organization to be sufficiently satisfactory to the warmest friend of freedom."[61]
- "If any thing be necessary, it must be so, to call forth the strength of the Union, when we may be attacked, or when the general purposes of America require it."[62]
- I think the virtue and talents of the members of the General Government will tend to the security, instead of the destruction of our liberty. I think that the power of direct taxation is essential to the existence of the General Government, and that it is safe to grant it. If this power be not necessary, and as safe from abuse as any delegated power can possibly be, then I say, that the plan before you is unnecessary; for it imports not what system we have, unless it have the power of protecting us in time of peace and war.[63]

June 20, 1788 Speech[64]

Has the Government of the United States power to make laws on every subject?—Does he understand it so?—Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same State? Can they go beyond the delegated powers? *If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void*.[65]

60. Marshall, *supra* note 54, at 262.

61. *Id.* at 264.

62. *Id.* at 269.

63. *Id.* at 270.

64. John Marshall, Speech in the Virginia Ratifying Convention (June 20, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL 1775–1788, *supra* note 51, at 275-84.

65. *Id.* at 276-77 (emphasis added to note that C. J. Roberts referred to this statement in *Sebelius*).

"The Federal Government has no other motive, and has every reason of doing right, which the Members of our State Legislature have."[66]

> Letter to Augustine Davis dated October 16, 1793[67]
>
> Remember my countrymen, that the government of the United States is created by yourselves, that those who fill its great departments are chosen by yourselves, that they are your friends, and not your enemies, that their measures must be intended to benefit, and not to injure you.[68]

> Letter to Augustine Davis dated November 20, 1793[69]
>
> The two great revolutions of 1776 and 1788 are spoken of as cases where an appeal was made to the people, and the subjects proposed to them deliberately discussed, and I think wisely decided on. By whom were those appeals made? By whom were they prosecuted? By whom and by what were they or could they be supported? What interests or what motives did or could lead us to either important crisis and conduct us through it? The first was the united voice and united strength of America, appealing to the supreme director of all human affairs against foreign oppression. The second was the deliberate consultation of the people of America among themselves, unimpelled by foreigners, unsupported by foreign influence, foreign interests, or foreign force, on a subject uninteresting to them, but all important to us. It was the deliberate exercise of American wisdom, for the purpose of correcting those defects which experience had marked in our ancient system. In this there was and can be no danger while we exclude foreign influence. In such a case, whatever difference of opinion might prevail, there can be but one party, and that is the people of America; there can be but one object, and that is the happiness of our common country; there can be but one power exerted to produce or conduct us through the crisis, and that is the power of reason exerted in and on the American mind.[70]

66. *Id.* at 285.

67. John Marshall, Letter to Augustine Davis (Oct. 16 1793), *in* 2 THE PAPERS OF JOHN MARSHALL 1788-1795, at 221-28 (Charles F. Hobson ed., Univ. of Va. Press digital ed. 2014).

68. *Id.* at 228.

69. John Marshall, Letter to Augustine Davis (Nov. 20, 1793), *in* 2 THE PAPERS OF JOHN MARSHALL 1788-1795, *supra* note 67, at 238-47.

70. *Id.* at 246.

To a Freeholder printed in the *Virginia Herald* dated September 20, 1798[71]

"I consider that constitution as the rock of our political salvation, which has preserved us from misery, division and civil wars;—and which will yet preserve us if we value it rightly and support it firmly."[72]

Letter to Timothy Pickering (U.S. Secretary of State) dated October 15, 1798[73]

"In consequence of this the whole malignancy of Antifederalism, not only in the district where it unfortunately is but too abundant, but throughout the state, has become uncommonly active & considers itself as peculiarly interested in the reelection of the old member."[74]

Letter to St. George Tucker dated November 27, 1800[75]

> My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation. That on our revolution the preexisting law of each state remained so far as it was not changed either expressly or necessarily by the nature of the governments which we adopted.
>
> That on adopting the existing constitution of the United States the common & statute law of each state remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government.[76]

As a Federalist, Marshall believed a larger republic was better for national defense and to adjudicate and resolve conflicts within and among the states. Marshall's speech indicates that he thought it would best advance common national interests, tranquility, and peace. He understood that, at times, state leaders might act against national interests. He argued that the national government would best promote economic prosperity. For these and other reasons, he supported the new Constitution and its expansion of federal powers.

---

71. John Marshall, Letter to a Freeholder (Sept. 20, 1798), *in* 3 THE PAPERS OF JOHN MARSHALL 1796-1798, at 503-06 (Charles F. Hobson ed., Univ. of Va. Press digital ed. 2014).

72. *Id.* at 504.

73. John Marshall, Letter to Timothy Pickering (Oct. 15, 1798), *in* 3 THE PAPERS OF JOHN MARSHALL 1796-1798, *supra* note 71, at 516-17.

74. *Id.* at 516.

75. John Marshall, Letter to St. George Tucker (Nov. 27, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL 1800-1807, at 23-24 (Charles F. Hobson ed., Univ. of Va. Press digital ed. 2014).

76. *Id.* at 24.

B. Marshall, the Supreme Court and Expansive Federal Power

In *Marbury v. Madison*,[77] the landmark case which the Supreme Court might have dismissed quickly solely on jurisdictional grounds, with little elaboration, Chief Justice Marshall took the occasion to explicate an expansive federal judicial review power, declaring that when reviewing conflicts between the political branches and the provisions of the Constitution, "[i]t is emphatically the province and duty of the judicial department to declare what the law is."[78] Even though such an expansive judicial review power is not obvious from the text of the Constitution, it is today an unquestioned cornerstone of American constitutional law. Thereafter, Marshall used the same federalist interpretive brush to declare the broad nature of federal legislative power and to announce the Doctrine of Implied Powers in *McCulloch v. Maryland*.[79]

McCulloch arose when President Madison allowed the charter of the First Bank of the United States to expire in 1811.[80] The War of 1812 showed the need for such a bank, and Madison supported the creation of the Second Bank in 1816.[81] Many states, however, opposed the new bank and began passing laws taxing the federal bank by requiring notes to be printed on stamped paper bought from the state.[82] Maryland attempted to enforce its law against McCulloch, a cashier at the Baltimore branch of the Bank of the United States ("the Bank"), and fine him for distributing bank notes without the requisite stamps.[83] The Maryland courts ruled in favor of the state, and the case was appealed to the Supreme Court.[84]

77. Marbury v. Madison, 5 U.S. 137 (1803).

78. *Id.* at 177 ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

79. McCulloch v. Maryland, 17 U.S. 316 (1819).

80. *First Bank of United States Chartered*, LIBR. OF CONG., https://guides.loc.gov/this-month-in-business-history/february/first-bank-united-states-chartered (last visited Sep. 17, 2022); The chartering of the First Bank was debated at length by Hamilton and Jefferson. Many of the arguments advanced in *McCulloch* borrow from those put forth at that time. *See Jefferson's Opinion on the Constitutionality of a National Bank: 1791*, YALE L. SCH.: THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/bank-tj.asp (last visited Feb. 21, 2022) (citing ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Paul Leicester Ford ed., Henry Holt & Company 1898)).

81. Andrew T. Hill, *The Second Bank of the United States 1816-1841*, FED. RSRV. HIST. (Dec. 5, 2015), https://www.federalreservehistory.org/essays/second-bank-of-the-us.

82. *See* McCulloch v. Maryland, 17 U.S. 316, 320-21 (1819).

83. *Id.* at 318-19.

84. *Id.* at 317.

1. Marshall on the Nature of Federal Powers

Counsel for Maryland made two main arguments.[85] First, Congress was limited to its enumerated powers and there was no power to charter a bank.[86] Second, they argued that Maryland had the power to tax the federal bank notes.[87] The Marshall Court rejected both arguments.[88] In unequivocal language, Marshall explained that federal legislative power had no limits except those set out in the Constitution:

> If any one proposition could command the universal assent of mankind, we might expect it would be this-*that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.* But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'[89]
>
> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. *But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and*

85. *Id.* at 405-06.
86. *Id.*
87. *Id.*
88. *McCulloch*, 17 U.S. at 405-06.
89. *Id.* (emphasis added).

> *adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments.* A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Then, *we must never forget that it is a constitution we are expounding*.[90]
>
> *We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional*.[91]

2. The Arguments in McCulloch v. Maryland

Daniel Webster argued the case for McCulloch along with William Pinkney and Attorney General William Wirt.[92] Both Webster and Wirt began by arguing that the Bank's constitutionality should not be considered an open question.[93] Webster argued that it had been decided by the First Congress and cited Hamilton: "The arguments drawn from the constitution in favour of this power, were stated, and exhausted, in that discussion. They were exhibited, with characteristic perspicuity and force, by the first Secretary of the Treasury, in his report to the President

90. *Id.* at 406-07 (emphasis added).

91. *Id.* at 421 (emphasis added).

92. *Id.* at 322; *McCulloch v. Maryland*, OYEZ, https://www.oyez.org/cases/1789-1850/17us316 (last visited Feb. 23, 2022).

93. Summary of Oral Argument at 322, McCulloch v. Maryland, 17 U.S. 316 (1819), *reprinted in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 108 (Philip B. Kurland & Gerhard Casper eds., 1978).

of the United States."[94] The enactment of the Bank by the first Congress, and subsequent legislative, executive, and judicial acceptance of this act, should allow it to stand, "unless its repugnancy with the constitution were plain and manifest."[95] Marshall tracked this language fairly closely when he stated that a "bold and daring usurpation" of the Constitution would not be suffered, but that historical decisions by the legislature "ought not to be lightly disregarded."[96]

Luther Martin, Joseph Hopkinson, and Walter Jones represented Maryland.[97] On the question of the longstanding acceptance of the Bank, Jones simply argued that its constitutionality had not been tried before the Court.[98] Hopkinson sidestepped this question, arguing that it had long "divided the opinions of the first men of our country."[99] He argued that even if it had been constitutional in 1791, the Bank was no longer constitutional because it was no longer necessary due to the expansion of private banks in the country.[100] In other words, Hopkinson jumped directly to the Necessary and Proper Clause and his reading of it matched that of Jefferson: Congress may only create a Bank if doing so is indispensably necessary to carrying out its delegated powers.[101] He used Hamilton's policy arguments in favor of the Bank to argue that it had been much more necessary in 1791, but was no longer needed.[102]

In addition to the historical argument mentioned above, Webster presented a justification for the Bank that did not rely on the Necessary and Proper Clause, saying: "Even without the aid of the general clause in the constitution, empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted."[103]

There is some evidence that counsel for Maryland conceded that some powers can be implied from the grants of powers themselves, such as the power to coin money implies that to create a mint.[104] However, that did not mean that Congress had a choice of any legitimate means; rather Walter Jones argued that "[t]here is an obvious distinction

94. *McCulloch*, 17 U.S. at 323.
95. *Id.* at 323.
96. *Id.* at 401.
97. *McCulloch*, 17 U.S. at 330; *see also McCulloch v. Maryland*, *supra* note 92 (indicating which counsel argued for Maryland).
98. *See McCulloch*, 17 U.S. at 331.
99. *Id.* at 331.
100. *Id.* at 332-33.
101. *Id.* at 331.
102. *Id.* at 332-33.
103. *Id.* at 323-24.
104. *McCulloch*, 17 U.S. at 365.

between those means which are incidental to the particular power, which follow as a corollary from it and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity."[105]

On the other hand, Luther Martin argued for Maryland that the grants of power themselves demonstrate that the Framers intended to "leave nothing to implication."[106] For example, the power to declare war might fairly imply the power to raise armies, maintain a Navy, and raise revenue to prosecute the war, but the Constitution removes those powers from the realm of implication with specific grants.[107]

A close examination of *McCulloch* suggests that Marshall agreed with Webster's (and Hamilton's) expansive reading of the federal power. Marshall began by acknowledging Webster's argument that the question involved here had been long-discussed and had been resolved in the affirmative by the legislature on more than one occasion.[108] Marshall devoted two-thirds of his opinion to the question of Congress' power to create the Bank, indicating that the scope of national legislative power was the important question for him.[109] In addressing the idea that the government is one of enumerated powers, Marshall also referred to the Supremacy Clause of the Constitution.[110] He argued that "the government of the Union, though limited in its powers, is supreme within its sphere of action," and later that it is not necessary to prove this point because the Constitution declares it in the plain language of the Supremacy Clause.[111]

Marshall contrasted the Tenth Amendment of the Constitution with a similar provision found in the Articles of Confederation, noting that the former omitted the word "expressly" in describing powers granted to the central government.[112] He believed it to be an intentional omission, arguing that the "embarrassments" of the Articles caused the Framers to change the wording of the provision.[113] Marshall did not find any compelling argument for the state in the fact that the government is one of delegated powers.[114]

105. *Id.*
106. *Id.* at 373.
107. *Id.*
108. *Id.* at 401.
109. *See id.* at 401-25.
110. *McCulloch*, 17 U.S. at 405-06.
111. *Id.*
112. *Id.* at 406-07.
113. *Id.*
114. *Id.*

Marshall next turned to the central question: do the granted powers in the Constitution carry other implied powers with them? In order to answer this question, he first made the structural argument that a constitution cannot specify in detail all the powers it grants without assuming the complexity of a legal code.[115] Marshall noted, "[w]e must never forget that it is a constitution we are expounding."[116] Marshall read the great outlines of the Constitution to include implied powers. He thought that a government entrusted with such powers must also be entrusted with ample means to execute them.[117]

Embracing the views of Webster and Hamilton, Marshall believed that the choice of means in executing the granted powers lay with the legislature, thus rejecting Martin's contention that the Constitution's mention of some means precludes Congress from using others.[118] Marshall then demonstrated that the creation of a corporation did not represent an end in itself, but was simply a means.[119] Since Congress must have a choice of means to carry its granted powers into effect, Congress should have the power to erect a corporation.[120] The burden of proving a corporation was somehow different from other means lay with Maryland, and it failed to meet its burden.[121] Marshall concluded, "No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."[122] Thus, even before Marshall turned his analysis to the Necessary and Proper Clause, I would argue that he had decided the question of implied federal legislative powers. That is, through general reasoning about the nature of the Constitution and of federal power, the Court would likely have supported Congress' power to enact the Bank Act.

Even if the Court's discussion of the Necessary and Proper Clause was not essential to the Court's holding, that discussion illustrates that Marshall believed the Clause further supported the constitutionality of the Bank Act. Marshall stated that, "[T]he constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general

115. *Id.* at 407.
116. *McCulloch*, 17 U.S. at 407.
117. *Id.* at 407-08.
118. *Id.* at 408; Transcript of Oral Argument, McCulloch v. Maryland, 17 U.S. 316 (1819), 1819 U.S. LEXIS 320, at 79-80.
119. *McCulloch*, 17 U.S. at 409.
120. *Id.*
121. *Id.* at 409-10.
122. *Id.* at 411.

reasoning."[123] Marshall rejected arguments by Maryland that the Clause should be read as a restriction of federal power.[124] For Marshall, such a reading would "almost annihilate this useful and necessary right of the legislature to select its means."[125]

Marshall set forth two reasons why "necessary" should be read expansively.[126] First, Article I of the Constitution contains a list of powers granted to the Congress and a list of things it may not do; the Necessary and Proper Clause is grouped with the former rather than with the latter. In Marshall's words, it is placed among the powers, rather than among the limitations on power.[127] Second, Marshall argued that the Clause itself "purports" to enlarge the powers of Congress and to be an additional grant, rather than a limitation.[128] If the Framers had meant to use those words to diminish congressional power, they would have made this very clear, because, as Marshall argued, the Constitution "would be endangered by its strength, not by its weakness."[129]

Marshall concluded:

> The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.[130]

Marshall held that the Necessary and Proper Clause could not restrict the power of Congress, and that, in fact, necessity is simply not an issue for the courts; it should be debated in Congress, if anywhere.[131] The remainder of Marshall's *McCulloch* opinion concerned the right of the Bank to establish a branch in Maryland, and the state's ability to tax it; however, that is not central to this Article.[132]

What is relevant is the substantial criticism leveled against the *McCulloch* opinion and Marshall's published essays defending *McCulloch.* Marshall wrote a series of *A Friend of the*

123. *Id.*
124. *Id.* at 412.
125. *McCulloch*, 17 U.S. at 419.
126. *Id.* at 419-20.
127. *Id.* at 419.
128. *Id.* at 420.
129. *Id.* at 420.
130. *Id.*
131. *See McCulloch*, 17 U.S. at 421-23.
132. *See id.* The vigorous anti-federalist response to the *McCulloch* opinion is beyond the scope of this Article, but see for reference R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland*, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 876 (2000).

Union/Constitution essays defending *McCulloch* and his views on the nature of federal legislative power.[133] Marshall's speeches,

133. John Marshall, *Marshall's "A Friend of the Constitution" Essays*, *in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 155, 155-214 (Gerald Gunther ed., 1969). *See generally* 1 THE PAPERS OF JOHN MARSHALL 1775-1788, *supra* note 51. While the collection contains many documents, only a small minority pertain to information regarding Marshall's views on federalism—or his political ideology at large: speeches during the Virginia Ratifying Convention and the *Friend of the Constitution* essays.

Editorial Note on Essays Defending *McCulloch v. Maryland:*

Although the Chief Justice provided sufficient clues in his correspondence, for years biographers and other scholars had failed to uncover the full dimensions of Marshall's counterattack. Then in 1969 Professor Gerald Gunther published the results of his research in preparing a history of the Marshall Court. Gunther was the first to make the connection between Marshall's comments in letters to Bushrod Washington and Joseph Story and the publication of a dozen essays (now known to have been written by Marshall) in an Alexandria, Virginia, newspaper. Previous to Gunther's discoveries, Marshall was thought to have written only two pieces in defense of McCulloch, the two numbers of "A Friend to the Union," published in the Philadelphia Union in April 1819.

This publication was so hopelessly botched, however, that the Chief Justice arranged to have the essays reprinted in Alexandria. *See also*, John Marshall's Defense of *McCulloch v. Maryland* 190-191, (G. Gunther ed. 1969). Gunther's research in the files of the Gazette and Alexandria Daily Advertiser unearthed not only the reprinting of "A Friend to the Union" (now divided into three numbers instead of two) but also nine previously unknown essays written by Marshall under the nom de plume "A Friend of the Constitution."

- Throughout April Ritchie directed a steady barrage of articles and editorials opposing the bank opinion. Marshall began writing "A Friend to the Union" soon after reading Amphictyon's critique, motivated by his growing apprehension that the animosity generated by McCulloch was merely the entering wedge of a broader assault on the Constitution and the Union itself, aimed at the government's "weakest department," the federal judiciary. His overriding fear was that the unleashing of the "antifederal spirit of Virginia," which had been agitating with increasing fury since Martin v. Hunter's Lessee in 1816, would produce defiant resolutions by the Virginia General Assembly similar to those of 1798 and 1799. The consequence might be the emasculation of the Supreme Court and other measures that would effectively dismantle the federal government. If the principles of "the democracy in Virginia" prevailed, he fretted, "the constitution would be converted into the old confederation." Indeed, Hampden would soon confirm Marshall's suspicions by claiming that the present general government was "as much a federal government, or a 'league,' as was the former confederation."
- The essential charge against McCulloch was that it manifested a sinister design to overthrow the Constitution, prostrate the rights of the states and the people, and establish a consolidated general government of unlimited powers—confirming the worst fears voiced by Anti-federalists in 1788 and Republicans in the crisis of 1798 and 1799. This "warfare" against the states and people, heretofore carried on with varying success in Congress, was now to be directed by the "bolder" hands of the federal judiciary, who "by a judicial coup de main" would "give a general letter of attorney to the future legislators of the union" and "tread under foot" all constitutional limits upon federal legislative powers. Like John Hampden, the celebrated seventeenth-century opponent of arbitrary monarchical power, and the American patriots who resisted the claims of Parliament, Roane would take his stand as "a freeman" at this present "crisis," which "portends destruction to the liberties of the American people." As Marshall feared, resolutions condemning the bank decision were introduced in the House of Delegates, the first of which

correspondences and judicial opinions reflected an unequivocal support for the constitution and for broad federal legislative powers. Thus, as this article will later illustrate, it is more than irony when recent Justices cite Marshall in support of anti-federalist views.

C. Applying the Doctrine of Implied Powers

After vigorously defending *McCulloch*, Marshall and other Justices applied the Doctrine of Implied Powers, especially in cases interpreting the nature of the scope of the Commerce Clause, such as *Gibbons v. Ogden*[134] and its progeny. The Court there read the Congress' commerce power expansively: "The words of the constitution are, 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' "[135]

We are now arrived at the inquiry—What is this power?

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. *If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be*

---

instructed the state's senators and representatives in Congress to procure a constitutional amendment creating a separate tribunal for deciding all questions involving a conflict between the powers of the federal and state governments. Another instructed them "to resist on every occasion" legislation that attempted to exercise any power not "expressly given" to the national government or that was not "necessary and proper," which phrase was to be construed in the more restricted sense approved by the state legislature. Following the precedent of 1798 and 1799, a third resolution requested the governor to transmit copies of these resolutions to each of the other states. The first resolution was eventually dropped and replaced by one urging a "declaratory amendment" prohibiting Congress from incorporating a bank anywhere except in the District of Columbia. As amended, these resolutions were adopted by a large majority in the House of Delegates. The Senate, however, "contrary to every expectation," declined to take up the resolutions, reportedly for lack of time "to consider and digest" them. "It is with the profoundest regret we have to give this information," wrote the disappointed editor of the Enquirer.

134. Gibbons v. Ogden, 22 U.S. 1 (1824). This case concerned a dispute between steamboat operators, one of whom had an exclusive license from the state of New York, while the other had a license from the federal government. There were several questions before the Court, including whether Congress could pass laws on this subject, to what extent States may also regulate, and what happens when the regulations come into conflict with one another. The author reads Gibbons to define the federal commerce power broadly, consistent with the Doctrine of Implied Powers.

135. *Id.* at 226.

> *in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.* The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[136]

As Marshall had done in *Marbury* for federal judicial review, and in *McCulloch* for the nature of federal legislative power, Marshall's *Gibbons* analysis gave an expansive reading of federal legislative power pursuant to the Commerce Clause.[137] That view would predominate throughout much of the nineteenth and twentieth centuries until new, unenumerated implied limits on federal legislative power were declared by the Court.

Ultimately, Marshall correctly predicted that the scope of the federal legislative power would continue to be challenged. "[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist."[138] Since *McCulloch*, the Supreme Court has inconsistently described the nature of limits on federal legislative power.

IV. THE DOCTRINE OF IMPLIED LIMITS ON FEDERAL LEGISLATIVE POWER

In a series of cases decided over the past half-century, the Court has announced unenumerated, implied limits on federal legislative power, reversing Marshallian federalism and declaring that Congress may act only if the Constitution first grants it the authority to act. According to this view, Congress' powers are written, enumerated, and limited. All others are reserved to the states respectively, or to the people.[139] The Court demonstrated its reversal of Marshallian federalism through its decisions in a string of Tenth Amendment cases, as well as its more recent decision in *NFIB v. Sebelius*.

136. *Id.* at 196-97 (emphasis added).

137. *See id.* at 1.

138. McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

139. U.S. CONST. amend. X; Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012).

A. The Anti-Federal Tenth Amendment

Between 1937 and the 1990s there was only one case where a federal law was struck down as exceeding Congress' Commerce Clause power. In *National League of Cities v. Usery*,[140] the Court held that the application of minimum wage requirements of the Fair Labor Standards Act to state and municipal employees was unconstitutional.[141] The Court wrote that "Congress may not exercise its power to regulate commerce so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[142] That departure from precedent was short-lived and expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.[143]

1. Garcia v. San Antonio

In *Garcia*, Justice Blackmun, writing for the majority, criticized previous attempts "to draw the boundaries of state regulatory immunity in terms of 'traditional governmental functions' is not only unworkable but is also inconsistent with established principles of federalism . . . ."[144] The Court itself had had trouble defining the scope of "governmental functions" deemed protected and doubted whether the Court would ever be able to develop a workable standard:[145]

> The problem is that neither the governmental/propriety distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems [it] to be. Any rule of state immunity . . . inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which one it dislikes. . . . [T]he States cannot serve as laboratories for social and economic experiment . . . .
>
> . . . .

140. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).
141. *Id.* at 855.
142. *See id.*
143. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
144. *Id.* at 531.
145. *See id.* at 540.

> . . . If there are to be limits on the Federal Government's power to interfere with state functions – as undoubtedly there are – we must look elsewhere to find them.[146]

Next, the Court addressed the nature of the limits on federal power: "The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."[147] Unfortunately, the language of the Commerce Clause itself does not provide any specific limitation on Congress's actions in dealing with the States. "What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations."[148]

The *Garcia* majority did not dispute that states retain some sovereignty.[149] Instead, they argued that the sovereignty of the states is limited by the Constitution itself.[150] While the majority conceded that "[t]he States unquestionably do 'retain a significant measure of sovereign authority,' " the majority reasoned that they do so "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[151] Except for a few rare exceptions, "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."[152] "[T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies."[153]

The majority continued, "When we look for the States' 'residuary and inviolable sovereignty,' in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges."[154] "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government . . . ."[155] The Framers gave the states a role in the selection both of the Executive and

146. *Id.* at 545-47.
147. *Id.* at 547.
148. *Id.*
149. *Garcia*, 469 U.S. at 549.
150. *Id.* at 549.
151. *Id.*
152. *Id.* at 550.
153. *Id.*
154. *Id.* (citation omitted).
155. *Garcia*, 469 U.S. at 550.

Legislative branches of the federal government.[156] Citing Madison, the Court concluded that the federal government is supposed to "partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. . . . [T]he residuary sovereignty of the States [is] implied *and secured* by that principle of representation . . . ."[157] The states' interests are protected not by judicially created limitations on federal power, but by the structure of the federal system.[158] "Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"[159] The political process ensures that laws that unduly burden the states will not be enacted.[160]

Justice Powell, Chief Justice Rehnquist, and Justice O'Connor had a different opinion about the nature of power reserved to the states and criticized the Court's abrupt reversal of *National League of Cities*:

> In the present cases, the five Justices, who compose the majority today participated in *National League of Cities* and the cases reaffirming it. The stability of judicial decision, and with it respect for the authority for this Court, are not served by the precipitate overruling of multiple precedents that we witness in these cases.
>
> Whatever effect the Court's decision may have in weakening the application of *stare decisis*, it is likely to be less important than what the Court has done to the Constitution itself.[161]

The dissenters continued, "[d]espite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."[162] The majority was concerned with *National League of Cities* because it "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes,"[163] however, Justice Powell noted:

> [T]hat it does not seem to have occurred to the Court that *it*—an unelected majority of five Justices—today rejects almost 200 years

156. *Id.* at 551; *see* U.S. CONST. art. I, § 2; *see also* U.S. CONST. art. II, § 1.

157. *Garcia*, 469 U.S. at 551-52 (citing THE FEDERALIST NO. 46, at 332 (James Madison) (B. Wright ed., 1961); THE FEDERALIST NO. 62, *supra* note 7, at 408 (James Madison)).

158. *Garcia*, 469 U.S. at 552.

159. *Id.* at 554.

160. *Id.* at 556.

161. *Id.* at 559-60 (Powell, J., dissenting) (footnotes omitted).

162. *Id.* 560.

163. *Id.*

> of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.[164]

In the *Garcia* dissent, there are significant echoes of anti-federalist thought on opposition to the Constitution and about the primary role of the states in our federal system: *Garcia* does not explain how "the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty."[165] Also, although members of Congress are elected from the states, once elected, they become members of the federal government, implying those representatives no longer represent the interests of the state.[166] Again, that sentiment arose in the anti-federalist writings. Likewise, even though the states participate in the election of the President, this is hardly a reason to view the President "as a representative of the States' interest against federal encroachment."[167] For the dissenters, nothing in the electoral process prevents Congress from invoking unlimited powers under the Commerce Clause.[168] "The States' role in our system of government is a matter of constitutional law, not of legislative grace."[169] Anti-federalists feared that national officers would aggrandize and abuse their powers at the expense of locals.[170] "More troubling than the logical infirmities in the Court's reasoning is the result of its holding . . . that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power."[171]

The dissenters argued that the Tenth Amendment was adopted specifically to ensure the role of the states.[172] They conceded that opponents to the Constitution feared that the national government would become too powerful and eventually eliminate the states as political entities.[173] This concern resulted in the Bill of Rights, including a provision reserving powers to the states.[174] "[H]istory, which the Court

164. *Garcia*, 469 U.S. at 560-61 (Powell, J., dissenting).
165. *Id.* at 564.
166. *Id.* at 564-65.
167. *Id.* at 565.
168. *Id.*
169. *Id.* at 567.
170. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting).
171. *Id.*
172. *Id.* at 568.
173. *Id.*
174. *Id.*

simply ignores, documents the integral role of the Tenth Amendment in our constitutional theory."[175] "[B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties."[176]

The dissenters thought federal commerce power was limited; the states retained power to regulate that commerce not within the federal sphere.[177] Yet, that interpretation was not the prevailing view of the commerce power for significant portions of the Court's history. The language of the Clause focuses on activities that only the federal government could regulate: commerce with foreign nations and Indian tribes and among the several states.[178]

> [T]his Court has construed the Commerce Clause to accommodate unanticipated changes over the past two centuries. As these changes have occurred, the Court has had to decide whether the Federal Government has exceeded its authority by regulating activities beyond the capability of a single State to regulate or beyond legitimate federal interests that outweighed the authority and interests of the States.[179]

The dissenters argued that the Court's opinion in *National League of Cities* was faithful to the historical understanding of federalism.[180]

Powell's dissent was blistering, invoking broad principles of state sovereignty: The majority in *Garcia* failed to recognize the broad, yet specific, areas of sovereignty that the Framers intended the states to hold.[181] *Garcia* adopts an unprecedented view that "Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action."[182] Activities mentioned in *National League of Cities*, like fire prevention, police protection, sanitation, and public health, are remote from any normal concept of interstate commerce, yet *Garcia* allowed the federal government to exercise its control over those areas under the guise of the Commerce Clause.[183]

---

175. *Id.* at 570.
176. *Garcia*, 469 U.S. at 572 (Powell, J., dissenting).
177. *See id.*
178. *Id.*
179. *Id.* at 573.
180. *Id.*
181. *See id.* at 573.
182. *Garcia*, 469 U.S. at 575 (Powell, J., dissenting).
183. *See id.*

Chief Justice Rehnquist dissented separately to point out that *National League of Cities* recognized that Congress "could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to 'the States' separate and independent existence."[184] Rehnquist distinguished Powell and O'Connor's view from Justice Blackmun's, when he spoke of a type of balancing approach where federal power would not be outlawed in areas "where the federal interest is demonstrably greater . . . ."[185]

Justice O'Connor also dissented to articulate her views on federalism and state sovereignty, "to note [] fundamental disagreement with the majority's views of federalism and the duty of this Court."[186] O'Connor argued that there was "more to federalism than the nature of the constraints that can be imposed on the States in 'the realm of authority left open to them by the Constitution.' " [187]

For O'Connor, the central issue of federalism is instead whether any realm is left open to the state—whether any area remains in which a state may act free of federal interference.[188] "The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."[189] Here, Justice O'Connor does not cite constitutional authority for this limit on federal power.[190] It is an unenumerated, implied limitation based on her interpretation of what the Framers envisioned. For O'Connor, the Framers envisioned a national government able to solve national problems, but also intended a Republic whose vitality was assured by the balance of power between the federal government and the states.[191] O'Connor concluded that the Court's expansive reading of federal commerce power had displaced traditional federalism.[192]

Justice O'Connor relied on the Tenth Amendment, which provides that the powers not delegated to the United States by the Constitution are reserved to the States and those powers delegated were intended to be "few and defined."[193] But, it is clear that the Constitution, in fact, delegates commerce powers to Congress, which should then make the

184. *Id.* at 579 (Rehnquist, C.J., dissenting).
185. *Id.* at 580.
186. *Id.* at 580 (O'Connor, J., dissenting).
187. *Id.*
188. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting).
189. *Id.*
190. *Id.*
191. *Id.*
192. *See id.* at 582.
193. *Id.* at 582.

Tenth Amendment wholly inapplicable. To avoid this delegated power hurdle, O'Connor implies from the Tenth Amendment state sovereignty principles and unwritten limits on Congress's delegated powers. "Because virtually every *state* activity, like virtually every activity of a private individual, arguably 'affects' interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers."[194]

Here, Justice O'Connor took direct aim at Marshall's reasoning in *McCulloch*, noting that the spirit of the Constitution includes the Tenth Amendment where the states retain their balance of power.[195] "It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution."[196] In a sense, Justice O'Connor reasoned that there are limits on federal legislative power that arise from the spirit of the Constitution, not its text. Thus, Congress' commerce power, while broad, cannot be exercised without concerns for state autonomy.[197]

2. Gregory v. Ashcroft

After *Garcia*, Justice O'Connor and other Justices slowly expanded the implied limits doctrine, protecting the states as free from federal intrusion. In *Gregory v. Ashcroft*, the Court did not use the Tenth Amendment to invalidate the federal law, but instead used it to frame a rule of construction.[198] The Court held that a federal law imposing a substantial burden on a state government would only be applied if Congress clearly indicated that it wanted the law to apply to state governments.[199]

Justice O'Connor began by stating that the Constitution "establishes a system of dual sovereignty between the States and the Federal Government."[200] The Framers included the Tenth Amendment to indicate their intention to create a federal government of limited powers.[201] Citing James Madison, she wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to the objects which, in the ordinary

194. *Garcia*, 469 U.S. at 584 (O'Connor, J., dissenting).
195. *See id.* at 585.
196. *Id.*
197. *Id.*
198. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).
199. *Id.* at 473.
200. *Id.* at 457.
201. *Id.*

> course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[202]

What seemed lost on O'Connor and the majority is the fundamental transformation of the federalism balance following the Civil War and the enactment of the Fourteenth Amendment. She wrote: "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'"[203] Of course, this view was a central claim of the anti-federalists. Just as the separation and independence of the branches of the federal government prevent an accumulation of excessive power, separation and independence between the states and the federal government will reduce the risk of abuse on either front.[204] It was that abuse by the Confederate states that led to new federalist restrictions on state governments and a fundamentally different balance of power between the national government and the states following the ratification of the post-Civil War Amendments.

Notwithstanding her dual sovereignty argument, Justice O'Connor acknowledged that "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause."[205] "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States."[206] Despite recognizing Congress' power, the majority was skeptical that Congress had the power to override a state constitutional provision through which the people of Missouri had established a qualification for those who sit as their judges.[207] "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers."[208]

Before the Court can allow Congress to upset the constitutional balance of federal and state powers, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance."[209]

---

202. *Id.* at 458 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

203. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

204. *Ashcroft*, 501 U.S. at 458.

205. *Id.* at 460.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985).

> Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States . . . . "In traditionally sensitive areas, such a legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue the critical matters involved in the judicial decision."[210]

The Court determined that absent a clear intent from Congress, it would not apply the federal age discrimination act to state judges.[211] This rule of construction functioned as an unenumerated, implied limit on federal legislative power.

3. New York v. United States

In *New York v. United States*, Justice O'Connor used the decision to identify additional unenumerated limits on federal legislative power.[212] Without directly claiming to overrule *Garcia*, the Court held that Congress could regulate the disposal of radioactive waste under the Commerce Clause, but that it could not do so with its "take title" provision.[213] Justice O'Connor stated that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste within their borders, the Constitution does not confer upon Congress the ability to simply compel the States to do so."[214]

As in previous cases, the Court had to determine the constitutional line between federal and state power.[215] Here, O'Connor deployed the Tenth Amendment directly: if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is a power that the Constitution has not conferred on Congress.[216] Under this reasoning, an incident of state sovereignty serves to limit federal legislative power under Article I.[217]

O'Connor's opinion is confusing because she indicates that it is clear that "[r]egulation of the resulting interstate market in waste disposal is therefore well within Congress's authority under the Commerce Clause."[218] If that is correct, the Tenth Amendment and

210. *Ashcroft*, 501 U.S. at 461 (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989)).
211. *Id.* at 473.
212. *See* New York v. United States, 505 U.S. 144 (1992).
213. *See id.*
214. *Id.* at 149.
215. *See id.* at 155.
216. *Id.* at 156.
217. *See id.* at 157.
218. *New York*, 505 U.S. at 160.

implied principles of sovereignty should have had no application. If Congress has power, in its sphere, it is plenary and exercisable to the utmost extent. Yet, O'Connor sidestepped that logic to reframe the state's argument, declaring that the Tenth Amendment implicitly limits the power of Congress to regulate in the way it has chosen.[219] Thus, even if Congress has regulatory power, it may not use the states as implements of regulation.[220]

Justice O'Connor then announced the anti-commandeering principle: "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' "[221] "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[222]

The Court noted that pursuant to its spending power, "Congress may attach conditions on the receipt of federal funds,"[223] or may offer States the choice of regulating an activity according to federal standards or having state law pre-empted.[224] "By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply."[225] But to allow the federal government to dictate how states regulate would cause local and state officials to bear the brunt of public disapproval, insulating federal officials from the electoral ramifications of their decisions.[226] It is not at all clear why members of Congress would be shielded from review. Members must seek re-election. Even more, the textual source for the anti-commandeering principle is not clear. It appears the Court simply implied an unenumerated limit, deriving it from general principles of state sovereignty.

The Court did not invalidate the Low-Level Radioactive Waste Policy in its entirety as a command to regulate.[227] It sustained the

219. *Id.*
220. *Id.* at 161.
221. *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (upholding the Surface Mining Control and Reclamation Act because it did *not* "commandeer" the states into regulating mining)).
222. *Id.* at 162.
223. *Id.* at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
224. *New York*, 505 U.S. at 167.
225. *Id.* at 168.
226. *Id.* at 169.
227. *See id.* at 170.

monetary and access incentives as permissible federal action.[228] For the Court, the "take title" provision crossed the line from encouragement to coercion.[229]

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the State a choice between the two.[230]

"A choice between two unconstitutionally coercive regulatory techniques is no choice at all."[231] "Whether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our government established by the Constitution."[232] Again, O'Connor did not argue an explicit textual limit on federal power. She concluded that the provision was inconsistent with the federal structure established by the Constitution. I am convinced Chief Justice Marshall would have disagreed and rejected such implied, unenumerated limits on federal legislative power.

Justice O'Connor concluded that, "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[233] She continued:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt the suggested regulatory schemes.[234]

228. *Id.* at 170-74.
229. *Id.* at 174-75.
230. *New York*, 505 U.S. at 176.
231. *Id.*
232. *Id.* at 177.
233. *Id.* at 178.
234. *Id.* at 188 (citation omitted).

Justice White, Justice Blackmun, and Justice Stevens, would have upheld the take title provision as well as the other federal incentives.[235] Justice White argued that the majority mischaracterized factually how Congress became involved in the waste controversy.[236] Congress did not act unilaterally against the States, but instead was asked by the States to intervene: "To read the Court's version of events . . . one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem."[237] But actually, the Act "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached."[238] "The distinction is key, and the Court's failure to properly characterize this legislation ultimately affects its analysis of the take title provision's constitutionality."[239] For the dissenters, "these statutes are best understood as products of collective state action, rather than as impositions placed on States by the Federal Government."[240]

Justice White was also concerned that New York was seeking to benefit from the Act at the same time it was refusing to comply with some of its provisions.[241] While making plans to build its own waste site, New York continued to take advantage of the import concessions made by the United States by exporting its waste for the full seven-year extension period.[242] "By gaining these benefits and complying with certain of the 1985 Act's deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangement . . . ."[243] Under the theory of the majority, state sovereignty principles protected New York's choice to go it alone. But the state could not go it alone because it could not persuade its residents to accept a low-level radioactive waste site, and New York wanted to continue to send such waste to other states.[244] Must other states accept New York's waste, even when New York refuses to join and comply with a compact? The dissenters concluded no based on the reasoning of *Garcia*.

The *Garcia* Court stated the proper inquiry:

---

235. *See id.* at 189 (White, J., dissenting).
236. *New York*, 505 U.S. at 189 (White, J., dissenting).
237. *Id.*
238. *Id.* at 189-90.
239. *Id.* at 194.
240. *Id.* at 196.
241. *See id.* at 198-99.
242. *New York*, 505 U.S. at 198 (White, J., dissenting).
243. *Id.* at 198.
244. *Id.* at 199-200.

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."[245]

In *New York*, the political process did not fail. The Governors' Association requested federal assistance with a thorny issue of concern to the nation, how to manage growing amounts of low-level radioactive waste. The national government responded with compromise and accommodation, only to be told by the Court that it had exceeded its federal powers.

4. Printz v. United States

The next significant case to embrace the doctrine of implied limits on federal legislative power was *Printz v. United States*, where Justice Scalia, writing for the majority, held that the Brady Handgun Violence Prevention Act was an unconstitutional commandeering of state executive officials to implement a federal mandate.[246] While the Government contended some of the earliest enacted statutes required the participation of state officials in implementation of federal laws,[247] Justice Scalia rejected the Government's position, concluding that such early laws establish, at most, "that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions . . . ."[248]

The majority found that the complete lack of statutes imposing obligations on the States' executive suggests an "assumed *absence* of such power."[249] "Not only do the enactments of the early Congresses . . . contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication

245. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985); *see also New York*, 505 U.S. at 211 (Stevens, J., concurring in part, dissenting in part) ("The notion that Congress does not have the power to issue 'a simple command to state governments to implement legislation enacted by Congress' is incorrect and unsound. There is no such limitation in the Constitution.").

246. Printz v. United States, 521 U.S. 898, 935 (1997). The Act required that local law enforcement officials to participate in the administration of federal gun registration and background check policies. *Id.* at 904.

247. *Id.* at 905.

248. *Id.* at 907.

249. *Id.* at 907-08.

of precisely the opposite assumption."[250] The majority suggested that Congress might have the power to make recommendations to the states, but not commands.[251]

Here, Justice Scalia echoed Justice O'Connor's views from *Garcia*, *Ashcroft*, and *New York*: "Although the States surrendered many of their powers to the new Federal Government, they retained a 'residuary and inviolable sovereignty.' "[252]

> Residual state sovereignty was also implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones . . . expressed by the Tenth Amendment's assertion that 'the powers not delegated to the United States . . . are reserved to the States respectively, or to the people.[253]

In *Printz*, the Court went even further, suggesting that the Brady Act violated not only federalism principles of state sovereignty and the Tenth Amendment, but also extended Congressional power over the states and shifted the balance of power among the three branches of the national government. First, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[254] "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[255] Second, it would also disturb the separation and balance of powers between the three branches of the federal government itself.[256] "The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed' personally and through officers whom he appoints."[257] Yet, the Brady Act effectively transfers this presidential responsibility to thousands of chief law enforcement officers.[258] Of course, the logic of the majority's opinion invites the executive branch to expand and hire thousands of additional federal officers. Such a result would not diminish federal power or protect state sovereignty. It would simply create a larger federal bureaucracy, a fact not lost on the dissenters.[259]

---

250. *Id.* at 909.
251. *Printz*, 521 U.S. at 909.
252. *Id.* at 918-19.
253. *Id.* at 919.
254. *Id.* at 920 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).
255. *Id.* at 922.
256. *Id.*
257. *Printz*, 521 U.S. at 922 (citation omitted).
258. *Id.*
259. *See infra* notes 266-78 and accompanying text.

According to the majority, the dissent's view was that the Commerce Clause, taken with the power to "make all laws which shall be necessary and proper," conclusively established the Brady Act's constitutional validity.[260] However, Justice Scalia, citing *The Federalist* No. 33, argued:

> What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principles of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserve[s] to be treated as such."[261]

Again, the Court's opinion tracked the views of Justice O'Connor regarding the spirit of the Constitution. Implied principles of state sovereignty limit the scope of the Commerce power and the Necessary and Proper Clause. Yet, Chief Justice Marshall acknowledged no such implied limits on federal legislative authority. He only recognized those set out in the Constitution. There is no doubt that Marshall was a Federalist. The views expressed by Justice Scalia were more consistent with what Marshall called the anti-federal spirit.

Justice O'Connor, concurring, wrote that the Brady Act violated the Tenth Amendment to the extent that it "forces States and local law enforcement officers to perform background checks on prospective handgun owners . . . ."[262] For O'Connor, Congress could invite state and local officials to participate voluntarily, or Congress could amend the interim program to provide for its continuance on a contractual basis, as it does with a number of other federal programs.[263]

Justice Thomas wrote separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution the federal government is one of enumerated, hence limited, powers.[264] Thomas argued that the Government's authority under the Commerce Clause did not extend to the regulation of wholly intrastate transactions and therefore, Congress lacked the power to impress state law enforcement officers into administering and enforcing such regulations.[265] Additionally, Thomas asserted that "the Constitution . . .

260. *Printz*, 521 U.S. at 923 (quoting U.S. CONST. art. I, § 8).
261. *Id.* at 923-24 (footnote omitted).
262. *Id.* at 935-36 (O'Connor, J., concurring).
263. *Id.*
264. *Id.* at 936 (Thomas, J., concurring).
265. *Id.* at 937.

places whole areas outside the reach of Congress' regulatory authority,"[266] implicitly rejecting the Court's holding in *Garcia*.

Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, dissented: "When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens."[267] The dissenters believed that the Commerce Clause, coupled with the Necessary and Proper Clause, permitted the temporary enlistment of local law enforcement officers necessary to end the "epidemic of gun violence."[268] For the dissenters, "the Tenth Amendment imposes no restriction on the exercise of delegated powers"; the language of the Tenth Amendment plainly refers to only powers *not* delegated to Congress.[269]

The dissenters noted the perverse logic of the majority's state sovereignty/states' rights argument:

> [T]he majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.[270]

The dissenters argued that the majority's reasoning contradicted the Court's analysis in *New York*.[271] "That decision squarely approved of cooperative federalism programs, designed at the national level but implemented principally by state governments. *New York* disapproved of a particular *method* of putting such programs into place, not the *existence* of federal programs implemented locally."[272] The dissenters contested how the majority relied on the anti-commandeering principle to argue "the Federal Government may not compel the States to enact or *administer* a federal regulatory program."[273] According to the dissent, that language was merely dictum and wholly unnecessary to the holding in that case.[274]

---

266. *Printz*, 521 U.S. at 937 (Thomas, J., concurring).
267. *Id.* at 939 (Stevens, J., dissenting).
268. *Id.* at 940-41.
269. *Id.* at 941-42.
270. *Id.* at 959.
271. *Id.* at 960.
272. *Printz*, 521 U.S. at 960 (Stevens, J., dissenting).
273. *Id.* at 963 (emphasis added).
274. *Id.*

What emerges from the above-referenced opinions is a sharp division within the Court about the nature of federal power and how such power is affected by competing understandings of state sovereignty principles. That division mirrors the views set out by Federalists and anti-federalists two-plus centuries ago. However, those Justices who have championed implied limits on federal legislative power do not link their concerns with their anti-federalist ancestors. Instead, they cite sparingly to a Federalist, notwithstanding the fact that their arguments track much more closely those who opposed the Constitution.

B. NFIB v. Sebelius *and Its Anti-Federal Implications*

1. NFIB v. Sebelius

In S*ebelius*, the Court once again invoked implied, unenumerated limits on federal legislative power with regard to the individual mandate and the Medicaid expansion requirements found in the Patient Protection and Affordable Care Act (ACA).[275] Chief Justice Roberts asserted that the Court must "determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess."[276]

In turn, the Court reviewed the nature of Congressional power under the Commerce Clause and the Necessary and Proper Clause, as well as under the Spending and Taxing Clauses.[277] In sum, the Court upheld the individual mandate pursuant to Congress' Taxing Power, but not under its Commerce Clause power or Necessary and Proper Clause powers.[278] As for the Medicaid expansion provision, the Court held that Congress could use its power under the Spending Clause to encourage states to adopt the new coverage standards; but Congress could not threaten or coerce the states by the withdrawal of all previously allocated funds for Medicaid, effectively setting new limits on Congress' Spending power.[279]

Here, the focus of the analysis is not on the Court's holdings, but rather on what Roberts wrote about our federalist system and the nature of federal legislative power, and the contrast between Roberts' views and those presented by Chief Justice Marshall two centuries earlier. Despite a generic nod to Marshall's opinions in *McCulloch* and

275. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
276. *Id.* at 534.
277. *See generally Sebelius*, 567 U.S. at 519 (2012).
278. *Id.* at 560, 588.
279. *Id.* at 588.

Gibbons[280] and one specific line from one of Marshall's *A Friend of the Constitution* letters in defense of *McCulloch*,[281] Roberts did not embrace Marshall's expansive views of federalism, federal legislative powers, or Marshall's doctrine of implied powers. Indeed, Roberts' framing principles read more like an anti-federal guidebook, borrowing heavily from the anti-federalist perspectives from the late Eighteenth Century, and from Justice O'Connor's views in *New York* and related cases.

2. The Silent Repudiation of Marshallian Federalism

The central question for the Court was whether Congress had the power under the Constitution to enact the challenged ACA provisions. To answer that question, Roberts wrote that, "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."[282] He then referenced Chief Justice Marshall and *McCulloch*,[283] as if Marshall's opinion is in accord with the Court's conclusions in *Sebelius*. Of course, the two opinions are not aligned. There is zero chance that Marshall would have joined the majority in *Sebelius*.

Roberts continued, citing another Marshall opinion,

> The Federal Government "is acknowledged by all to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated."[284]

By ignoring the Court's holdings and rationales and instead drawing selectively from dicta, Roberts gave his readers the impression that he was following Marshallian federalism. That is misleading at best. It is deceptive at worst.

Roberts' anti-federal spirit is unmistakable. In his view, the federal government can exercise only the powers granted to it.[285] And, if no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express limits in the Bill of Rights or elsewhere in the Constitution.[286] For Roberts, this principle was affirmed in the Tenth Amendment: "The powers not

280. *See id.* at 533-35.
281. *Id.* at 538.
282. *Sebelius*, 567 U.S. at 533.
283. *Id.* at 534 (citing McCulloch v. Maryland, 17 U.S. 316, 405 (1819)).
284. *Id.* (citation omitted).
285. *Id.* at 534-35.
286. *Id.* at 535.

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."[287] One obvious obstacle to Roberts' implying such a limit from the Tenth Amendment is its text. The Tenth Amendment has no textual application to delegated powers, unless the Court declares an unenumerated application and limitation.

For Roberts, then, the federal government must show that a constitutional grant of power authorizes each of its actions.[288] The Chief Justice indicated it does not work the same way for the states, "because the Constitution is not the source of their power."[289] The states can and do perform many vital functions of modern government under their general police powers, powers not possessed by the federal government.[290] But there is nothing in the Constitution suggesting the national government does not have police powers, for example, during a global pandemic. Indeed, the Court could just as plausibly read Congress' Article I powers to include them. Additionally, Roberts omits discussing all the ways the Constitution expressly restricts the states.

Next, Roberts turned to state sovereignty principles, explaining:

> "State sovereignty is not just an end in itself: Rather, federalism secures to the citizens the liberties that derive from the diffusion of sovereign power." Because the police power is controlled by 50 different states instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy.[291]

Thus, "[t]he independent power of the States also serves as a check on the power of the Federal Government . . . ."[292] In such principles, I hear echoes of anti-federalism, not Marshallian federalism.

The *Sebelius* Court proceeded to evaluate several of Congress' delegated powers, reading each carefully to "avoid creating a general federal authority akin to the States' police powers."[293] Such a reading is possible only through a lens grounded on implied limits on delegated federal power, not textual ones.

---

287. *Id.* (citing U.S. CONST. amend. X).
288. *Sebelius*, 567 U.S. at 535.
289. *Id.*
290. *Id.* at 535-36 (citing United States v. Morrison, 529 U.S 598, 618-19 (2000)).
291. *Id.* at 536 (citation omitted).
292. *Id.*
293. *Id.* at 536-37.

3. The Anti-Federal Spirit of the Doctrine of Implied Limits

Roberts concluded with a reminder that there can be no question that it is the responsibility of the Court to enforce the limits on federal power by striking down acts of Congress that transgress the limits the Constitution carefully constructed.[294] But this admonition is misleading. In *Marbury*, the Court found that Congress had no statutory power to alter an express provision of the Constitution regarding the Court's original jurisdiction.[295] On the contrary, in *Sebelius*, the Court identified no textual provisions violated by Congress' enactment of the ACA.[296]

Applying the above guiding principles, the Court concluded that Congress had exceeded its Commerce Clause powers, but that Congress had authority under its taxing power to enact the individual mandate, and under its spending power to enact part of the Medicaid expansion provisions, but to threaten withdrawal of all previously allocated Medicaid funding.[297] In reaching its decision, the Court implied unenumerated limits on delegated federal legislative powers, reading state power and state sovereignty as independent and paramount to federal power.[298] That is the type of argument and analysis that Maryland presented in *McCulloch*, which Chief Justice Marshall flatly rejected.[299] Similar arguments were made by the government in *Garcia*, but were rejected by the Court as unsound and unworkable.[300]

Even though the Tenth Amendment by its text is not a limit on delegated federal powers, the *Sebelius* Court uses it, as Justice O'Connor did in *New York v. United States*, to derive an expansive state sovereignty doctrine that implicitly limits enumerated federal powers. Under that view, federal powers are not plenary.[301] They are not exercisable to their utmost extent. Federal powers are limited by unenumerated principles beyond those express restraints set forth in the Constitution.[302]

There are two principal objections to this analysis. First, it is a disguised repudiation of Marshallian federalism, including his doctrine of implied powers. Second, it is grounded more on anti-federalist thought than on federalist thought and principles.

---

294. *Sebelius*, 567 U.S. at 538 (citing Marbury v. Madison, 5 U.S. 137, 175-76 (1803).
295. *See supra* text accompanying notes 77-78.
296. *See supra* text accompanying notes 276-94.
297. *Sebelius*, 567 U.S. at 588.
298. *Id.*
299. *See* McCulloch v. Maryland, 17 U.S. 316, 406 (1819).
300. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).
301. *Sebelius*, 567 U.S. at 536.
302. *Id.* at 535.

The Court is free to re-map the meaning of federalism, but it should do so openly, acknowledging its rejection of Marshall's views on federalism. The Court should explain why Marshall was wrong in cases like *McCulloch* and *Gibbons*, and why other Justices were wrong in subsequent opinions that adopted Marshall's reasoning, such as *Wickard v. Filburn*,[303] *Heart of Atlanta*,[304] *Katzenbach*,[305] *Garcia*,[306] and *Gonzales*,[307] all upholding an expansive view of delegated federal legislative power.

Second, the Court should hold itself accountable, explaining to its audience that its view that smaller, more local governmental power is better and was regularly articulated by anti-federalists two centuries ago. It was not the view of Federalists. It is misleading for the Court to cite Marshall to imply he would have agreed with the Court's views, for example, in *Sebelius*.[308]

Likewise, construing the Constitution to create implied limits on delegated federal powers beyond those set out in the text is not fundamentally different from reading the Due Process Clause to embrace unenumerated rights as in *Lochner v. New York*,[309] a move frequently criticized by many of the Justices who have championed the doctrine of implied limits on delegated federal powers.[310]

V. CONCLUSION

Access to health care has been a significant national concern for the past three decades. As a policy matter, reasonable people might disagree about whether health insurance, or more broadly, access to affordable health care, should be available to all Americans. I support universal health insurance. Indeed, I happen to think that no member of the national government should receive better government-provided health insurance than any other American. That means no special COVID cocktail treatments for them, while other Americans languish from health disparities and die. But, my views are not controlling on such a policy question, debated and resolved within the national legislature. Yet, I am not convinced that it is the province of the Supreme Court to interject itself into such a policy debate by announcing implied,

303. Wickard v. Filburn, 317 U.S. 111 (1942).
304. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
305. Katzenbach v. McClung, 379 U.S. 294 (1964).
306. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
307. Gonzales v. Raich, 545 U.S. 1 (2005).
308. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
309. Lochner v. New York, 198 U.S. 45 (1905).
310. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

unenumerated limits on federal legislative power. It is not the duty of the Court to give the Constitution an anti-federal reading. Doing so is inconsistent with *Marbury v. Madison*'s federalist assertion of judicial review. Surely Chief Justice Roberts does not intend to undermine *Marbury*. Yet, *McCulloch* and *Gibbons* were certainly cut from the same broad federalist cloth.

Moreover, an anti-federal reading of federal legislative power has broad implications for significant areas of national policy and regulation, including climate change, voter suppression, policing violence, criminal justice, sexual violence, income inequality and poverty, educational equity, foreign threats, pandemic mandates, and access to affordable health care, among others. No state has the ability or the authority to address such areas for the whole nation. The Constitution vests such power in the elected national legislature. Absent specific textual limits on federal legislative power, it is neither the province nor duty of the Court to read Article I through an anti-federal lens. The states are protected in our federal system by its structure, not by reading state sovereignty principles so broadly as to demean the powers of a co-equal branch of the national government or by turning upside down the powers of the national government relative to the states. Members of the Court must never forget it is a federalist Constitution they are expounding.