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# A Truism with Attitude: The Tenth Amendment in Constitutional Context

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ARTICLES

# A TRUISM WITH ATTITUDE: THE TENTH AMENDMENT IN CONSTITUTIONAL CONTEXT

*Gary Lawson**


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## Introduction

The Tenth Amendment is caught in a crossfire hurricane. From one direction, it is dismissed as "but a truism"[1] with no significant constitutional function. From another direction, its unassuming language—"The powers not delegated to the United States by the

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* Professor of Law, Boston University School of Law. I am grateful to Steven G. Calabresi, Patricia B.G. Lawson, and Guy Seidman for helping to generate some of the ideas that led to this Article, to the participants at a workshop at Boston University School of Law for comments, and to the Abraham and Lillian Benton Fund for support.

1 United States v. Darby, 312 U.S. 100, 124 (1941).

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"[2]—has inspired Byzantine doctrines concerning such matters as federal commandeering of state institutions,[3] conditions on federal spending programs implemented by states,[4] and federal regulation of state governmental institutions.[5] The Tenth Amendment thus appears to be either the constitutional equivalent of a skin tag or a tumorous font of emanations and penumbras that would make even William O. Douglas wince.

As a matter of original meaning, both characterizations of the Tenth Amendment are actually correct. The Tenth Amendment is indeed "but a truism" that does not change the legal landscape. No federal law that was constitutional on December 14, 1791, suddenly became unconstitutional the next day when the Tenth Amendment was ratified. On the other hand, almost all of the federal laws that have been invalidated or seriously questioned in the name of the Tenth Amendment over the past two centuries *really were* at least arguably unconstitutional. The Tenth Amendment is a truism with attitude.

The key to understanding the Tenth Amendment is found in the company that it keeps. The Tenth Amendment was part of a package of twelve amendments submitted by the First Congress to the states for ratification, the last ten of which were ratified in 1791.[6] Contrary to the thrust of much of modern constitutional doctrine, the Bill of Rights *as a whole* is largely "but a truism" that did not significantly change the legal landscape upon ratification any more than did the Tenth Amendment. Outside of federal territories and the District of

2 U.S. CONST. amend. X.

3 *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 174–75 (1992).

4 *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 205 (1987); Guillen v. Pierce County, 31 P.3d 628, 731–34 (Wash. 2001), *rev'd in part*, 537 U.S. 129 (2003).

5 *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985); Nat'l League of Cities v. Usery, 426 U.S. 833, 841–42 (1976), *overruled by Garcia*, 469 U.S. at 531.

6 Two of the proposed amendments—the original First and Second Amendments—failed to secure the necessary three-fourths majority of the states for ratification. For the story of the two failed amendments, see AKHIL REED AMAR, THE BILL OF RIGHTS 8–19 (1998). Two centuries later, one of the original failed amendments finally secured the necessary ratification votes and now stands as the Twenty-Seventh Amendment. *See* U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

Columbia,[7] most laws that violate Bill of Rights provisions such as the First Amendment *were unconstitutional even before ratification of the Bill of Rights* because they exceed the enumerated powers of Congress. The primary function of the Bill of Rights, including the Tenth Amendment, as originally understood[8] is to emphasize, clarify, and amplify restrictions on federal power contained in the Constitution of 1787. That does not make the various Bill of Rights provisions unimportant. But it does suggest that the meaning of the Bill of Rights, including the Tenth Amendment, is to be found primarily in the text, structure, and history of the Constitution of 1787 rather than in the specific wording of the amendments. It also suggests that there is no sharp interpretative break between the Tenth Amendment and the rest of the Bill of Rights. The Tenth Amendment must draw upon background norms contained in the original Constitution in order to have content, but the same is true of its nine siblings.

The Tenth Amendment needs a healthy dose of equal protection: it needs to be read and understood as the full constitutional equivalent of the nine simultaneously ratified amendments that accompanied it. Accordingly, Part I of this Article defines the constitutional role of the Bill of Rights as an integrated whole. Central to that role, and ultimately central to the meaning of the Tenth Amendment, is the provision at the end of Article I, Section 8 that empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[9] This "sweeping clause, as it has been affectedly called"[10] is one of the Constitution's most important guardians of limited government. The Bill of Rights was effectively redundant primarily because federal laws abridging the rights and freedoms enumerated in the Bill of Rights are not in fact "neces-

7 For the role of the Bill of Rights in federal territories, see *infra* notes 90–92 and accompanying text.

8 This Article seeks to identify original constitutional meaning, not to describe actual constitutional practices that have evolved over the past two centuries, to predict future case outcomes, or to prescribe rules of decision for modern actors. It is thus a species of what Cynthia Farina once termed "legal archaeology." *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 n.8 (1994).

9 U.S. CONST. art. I, § 8, cl. 18.

10 THE FEDERALIST NO. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although the label "the Sweeping Clause" was used by the Antifederalists as a pejorative, the term was adopted by the Constitution's defenders and was the standard label for the Clause throughout the founding era. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 443 DUKE L.J. 267, 270 (1993).

sary and proper for carrying into Execution" federal powers. The Bill of Rights, including the Tenth Amendment, in large measure simply reformulates the restrictions on federal power built into the Sweeping Clause. Laws therefore violate the Tenth Amendment when they interfere with the federalist structure of government in such a manner and to such an extent that they are not "necessary and proper for carrying into Execution" national power.[11] Because the meaning of the Tenth Amendment is parasitic on the meaning of the Sweeping Clause, the Tenth Amendment is indeed "but a truism." The same can generally be said, however, for the rest of the Bill of Rights. Modern law and scholarship sometimes try to distinguish the first eight (or perhaps nine) amendments from the Tenth Amendment on the ground that the former "prohibit[] the enactment of a category of laws that would otherwise be authorized" while the latter "impose[s] no restriction on the exercise of delegated powers."[12] This is true to a limited extent, but when taken too far it fundamentally misunderstands the original meaning of the first nine amendments, which principally restate rather than create limitations on federal power in the same fashion as does the Tenth Amendment. Thus, to call the Tenth Amendment "but a truism" is not to brand it an outlier or to consign it to constitutional irrelevance—unless one is prepared to make the same characterization of the nine amendments that precede it.

11 Technically, the "necessary and proper" requirement applies only to laws enacted by Congress under the Sweeping Clause, not to actions taken by the President or the federal courts pursuant to their own constitutionally enumerated powers. But the executive and judicial powers are both internally constrained by considerations very similar to those contained in the Sweeping Clause by virtue of the "principle of reasonableness" that accompanied eighteenth-century delegations of governmental power. For a detailed discussion of the principle of reasonableness and its relationship to the "necessary and proper" requirement in the Sweeping Clause, see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 48–54. This is significant because every Bill of Rights provision except the First Amendment by its terms potentially applies to executive and judicial action. *See id.* at 18 n.55. Although this Article focuses on how Bill of Rights provisions largely replicate principles in the Sweeping Clause, for the same reasons they also largely replicate principles in the Article II and Article III Vesting Clauses. *See* U.S. CONST. art. II, § 1, cl. 1; *id.* art. III, § 1. As for congressional exercises of power that do not involve the Sweeping Clause: outside of federal territories, it is close to a null set. *See infra* note 92.

12 Printz v. United States, 521 U.S. 898, 941 (1997) (Stevens, J., dissenting); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 858 (1976) (Brennan, J., dissenting) (noting that while the commerce power may not infringe First Amendment liberties, there is no restraint on such power based on state sovereignty), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 661 (5th ed. 2006).

It is sensible to employ emphasizing, clarifying, and amplifying provisions when emphasis, clarification, and amplification are needed. But there is a danger that constitutional provisions correctly invoked for emphasis or clarity may take on a life of their own and extend beyond their proper scope. To determine whether this threat has been realized with respect to the Tenth Amendment, Part II of this Article briefly applies the original meaning of the Tenth Amendment (and the constitutional principles which it reflects) to the most important doctrinal areas in which the Amendment has been invoked. As it happens, the original principles of limited federal power and state sovereignty that are constitutionally expressed in the Tenth Amendment generate something reasonably close to the doctrines that have evolved in the Amendment's name. To be sure, those doctrines could legitimately have evolved entirely without reference to the Tenth Amendment, but by the same token a good portion of, for example, First Amendment doctrine could legitimately have evolved entirely without reference to the First Amendment.[13] Once the Tenth Amendment is understood to carry other provisions of the Bill of Rights in its interpretative wake—and vice versa—it becomes much easier to appreciate its appropriate constitutional role as a restraint on the extent to which federal activity unduly constrains the prerogatives of the states or the people.

## I. The Bill of Rights in Constitutional Context

### A. *What a Difference(?) a Day Makes*

On December 14, 1791, the Constitution consisted solely of the original, unamended text. Suppose that on that date, Congress enacted a hypothetical statute that required the states either to adopt a legislative plan to dispose of horse dung found on road construction sites or to have their roadwork agencies take title to the dung and assume any tort liability that results from it. Assume that the same bill also provided federal money for state road construction on the condition that the states receiving federal funds limit marriages to unions of one man and one woman and set minimum wage and maximum hour rules for all state employees. One day later, on December 15, 1791, the Tenth Amendment was ratified.

Under modern doctrine, at least three facets of this hypothetical federal statute would face serious constitutional problems once the

13 To the extent that some portion of First Amendment doctrine (or any other doctrine) could not legitimately have evolved in that fashion, it is, by virtue of that fact, inconsistent with the Constitution's original meaning.

Tenth Amendment was up and running on December 15, 1791.[14] The requirement that states either pass certain laws or take title to refuse would implicate the modern Court's "anticommandeering" principle, which holds that Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,"[15] nor may Congress offer states "a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress,"[16] nor may Congress compel states, through their executive actors, to administer federal programs.[17] The nongermane definition-of-marriage condition on the receipt of road funds would face invalidation under the Supreme Court's "conditional spending" doctrine because, according to the Court, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[18] And while the minimum wage/maximum hour regulation in the hypothetical statute of 1791 would survive scrutiny under the law as it stands in mid-2008,[19] a one-vote swing on the Supreme Court that returns doctrine to its 1976–1984 status would invalidate that provision as well, at least with respect to state employees whose activity implicates "traditional aspects of state sovereignty."[20] If one transplants modern doctrine back to the eighteenth century, the Tenth Amendment would appear to be primed to do some serious work in this case.

But what did the legal world look like on December 14, 1791, before the Tenth Amendment took effect? Was the hypothetical federal statute constitutional on its date of enactment when there was no Tenth Amendment but unconstitutional upon ratification of the Tenth Amendment? If the Tenth Amendment is "but a truism," the constitutional result would have to be the same on December 14, 1791, and December 15, 1791: either the statute was unconstitutional both upon and after enactment, or it was constitutional upon enact-

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14 In addition to the problems noted in the text, there would be a serious question as to whether Congress had the constitutional authority to appropriate money for state road construction in the first instance, but that is a topic for another time.

15 Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981). To be sure, *Virginia Surface Mining* did not itself establish my anticommandeering principle, but its language foreshadowed subsequent holdings.

16 New York v. United States, 505 U.S. 144, 175 (1992).

17 *See Printz*, 521 U.S. at 933 (majority opinion).

18 South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

19 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556–57 (1985).

20 Nat'l League of Cities v. Usery, 426 U.S. 833, 849 (1976), *overruled by Garcia*, 469 U.S. at 531.

ment, stayed constitutional after ratification of the Tenth Amendment, and the modern doctrine saying otherwise simply misunderstands the "truism" that is the Tenth Amendment. In other words, if some part of this law is invalid under the Tenth Amendment, is it because of something that happened on December 15, 1791, when the Tenth Amendment was ratified or because of something that happened on June 21, 1788, when the Constitution itself was ratified?

### B. *The Original Meaning of the Bill of Rights*

Before definitively deciding how to handle the foregoing hypothetical statute, let us first take a lengthy but necessary detour through another example involving other portions of the Bill of Rights. Suppose that on December 14, 1791, Congress passed a statute forbidding the publication of any pamphlets that were deemed by a government censorship board to be unduly critical of Congress. In order to enforce the statute and effectively ferret out offending material, courts were authorized to issue to Treasury Department agents general warrants to seize and search shipments of goods without particularized cause or identification. Finally, the statute specified that charges brought under the statute, including charges implicating the death penalty, shall be by information rather than indictment, and trials of offenses under the statute shall be by judges without juries.

On December 15, 1791, this statute would be flagrantly unconstitutional on at least four separate grounds (criminal procedure mavens could surely find more). First, it would violate the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[21] Second, it would violate the Fourth Amendment's rule that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[22] Third, the provision bypassing grand jury indictment would contravene the Fifth Amendment's command that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[23] And fourth, the provision for mandatory bench trials would contradict the Sixth Amendment's injunction that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

21 U.S. CONST. amend. I.

22 *Id.* amend. IV.

23 *Id.* amend. V.

the crime shall have been committed."[24] The Bill of Rights would lay waste to this statute.

But is the statute unconstitutional *only* because of the Bill of Rights? Was the statute constitutional on December 14, 1791, before the Bill of Rights ever existed? The Federalist supporters of the Constitution in the late eighteenth century uniformly would have said "no" to both questions.

Consider the provision restricting the publication of antigovernment pamphlets. During the ratification debates, when opponents of the Constitution raised the specter of precisely such laws—and the absence of a Bill of Rights to prevent them—as a reason to vote down the proposed Constitution, the Federalists countered that any such laws would be unconstitutional *even without* a Bill of Rights or a First Amendment because of the fundamental principle of enumerated federal powers. Unlike "normal" governments, which were presumptively omnipotent unless specifically limited by fundamental charters or background norms, the new national government created by the Constitution was a government of limited and enumerated powers.[25] It could only act pursuant to specific (which does not necessarily mean express) constitutional authorization. And a parade of Federalist heavyweights were quick to point out that the Federal Constitution does not enumerate any power that would permit Congress to restrict the liberties ultimately identified in the First Amendment. As Hugh Williamson memorably put it in a ratification-era letter, "[E]xamine the Plan [of the Constitution], and you will find that the Liberty of the Press and the laws of Mahomet are equally affected by it."[26] James Wilson added during the Pennsylvania ratifying convention,

> It is very true, sir, that this Constitution says nothing with regard to that subject [of the press], nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.[27]

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24 *Id.* amend. VI.

25 *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 789–90 (1995).

26 Hugh Williamson, *Remarks on the New Plan of Government*, ST. GAZETTE N.C., 1788, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 395, 398 (Paul Leicester Ford ed., Burt Franklin 1970) (1892).

27 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (photo. reprint 1996) (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES] (statement of James Wilson at the Pennsylvania ratifying convention on December 1, 1787).

Similar statements during the ratification debates came from such notables as Oliver Ellsworth,[28] James Iredell,[29] Charles Cotesworth Pinckney,[30] Edmund Randolph,[31] and Roger Sherman.[32] The same response was made to claims by Antifederalists that freedom of religion, freedom from general warrants, and rights to jury trial were in danger without a Bill of Rights to safeguard them. As Edmund Randolph put it, "No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion"[33]—and he was seconded (and more) during the ratification debates by, inter alia, Iredell,[34] Richard Spaight,[35] and Wilson.[36] Randolph made the same point with respect to general warrants:

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28 *See* Oliver Ellsworth, *Landholder VI*, CONN. COURANT, Dec. 10, 1787, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 398, 401 (John P. Kaminski & Gaspare J. Saladino eds., 1983) ("*There is no declaration of any kind to preserve the liberty of the press*, &c. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either . . . .").

29 *See* JAMES IREDELL, OBSERVATIONS ON GEORGE MASON'S OBJECTIONS TO THE FEDERAL CONSTITUTION, *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 333, 361 (Paul Leicester Ford ed., B. Franklin 1971) (1888) ("If the Congress should exercise any other power over the press than [the copyright power] . . . they will do it without any warrant from this constitution . . . .").

30 *See* 4 ELLIOT'S DEBATES, *supra* note 27, at 315 (statement of Charles Cotesworth Pinckney at the South Carolina ratifying convention on January 18, 1788) ("The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press.").

31 *See* 3 *id.* at 203 (statement of Edmund Randoph at the Virginia ratifying convention) ("Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger.").

32 *See* Roger Sherman, *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 524, 525 (Merrill Jensen ed., 1978) ("The liberty of the press can be in no danger, because that is not put under the direction of the new government.").

33 3 ELLIOT'S DEBATES, *supra* note 27, at 469 (statement of Edmund Randolph at the Virginia ratifying convention on June 15, 1788).

34 *See* 4 *id.* at 194 (statement of James Iredell at the North Carolina ratifying convention on July 30, 1788) ("Is there any power given to Congress in matters of religion? . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution . . . .").

35 *See id.* at 208 (statement of Richard D. Spaight at the North Carolina ratifying convention on July 30, 1788) ("As to the subject of religion, . . . [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation.").

36 *See* 2 *id.* at 455 (statement of James Wilson at the Pennsylvania ratifying convention on December 4, 1787) ("[W]e are told that there is no security for the rights

> The honorable gentleman says there is no restraint on the power of issuing general warrants. If I be tedious in asking where is that power, you will ascribe it to him who has put me to the necessity of asking. They have no such power given them: if they have, where is it?[37]

Hamilton extended the argument to jury trials,[38] and "An Impartial Citizen" denied that the Constitution gave Congress the enumerated power to impose cruel and unusual punishments.[39] The Federalists' consistent line was that the original, unamended Constitution, by virtue of the structure of enumerated powers, already prohibited virtually any law that would run afoul of what ultimately became the Bill of Rights.

The Constitution, of course, does not necessarily mean what the Federalists said it meant. Original constitutional meaning does not lie within the heads of specific, historically concrete individuals. The meaning of a collectively produced document such as the Constitution lies, rather, in how a hypothetical reasonable observer would have understood it at the time of its promulgation.[40] The subjective beliefs of individuals—even individuals as intimately involved in the drafting and ratification process as the all-star roster of Federalists noted above—are *relevant* to that inquiry but not *decisive* for it. The most persuasive arguments for original constitutional meaning are textual, intratextual, and structural arguments. Accordingly, one must ask whether the Federalists were *right* about the effect of the pre–Bill of Rights Constitution, and if so, what that tells us about the meaning of the Tenth Amendment.

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of conscience. I ask the honorable gentleman, what part of this system puts it in the power of Congress to attack those rights?"). Additional sources for the same point, during and after the ratification debates, can be found in Jim Allison & Susan Batte, No Power to Congress over Religion: The "Elastic Clause" and the First Amendment, http://candst.tripod.com/nopower.htm (last visited Nov. 19, 2007).

37 3 ELLIOT'S DEBATES, *supra* note 27, at 600 (statement of Edmund Randolph at the Virginia ratifying convention on June 24, 1788).

38 THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 10, at 183–84 ("It would be . . . absurd . . . to believe that a right to enact *laws necessary and proper* for the imposition of and collection of taxes, would involve that of . . . abolishing the trial by jury in cases relating to it.").

39 *See* An Impartial Citizen V, *On the Federal Constitution*, PETERSBURG VA. GAZETTE, Feb. 28, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 428, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

40 For elaborations of this interpretative methodology from somewhat different perspectives, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–59 (1994); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 70–73 (2006).

The Federalists clearly were right that the Constitution does not contain any clauses expressly authorizing restrictions on the press or religion, grants of general warrants, abolition of grand or petit juries, and the like. The Constitution's grants of power to Congress include a Bankruptcy Clause,[41] a Postal Roads Clause,[42] and even a Copyright Clause[43] which specifically authorizes a very narrow and precise kind of speech regulation, but there is no "Warrant Clause," "Bench Trial Clause," or generalized "Speech or Religion Clause" among the congressional grants of power. The existence of a power-granting provision targeted specifically at a certain kind of speech—and the clear effect of the Copyright Clause is to permit Congress to punish speech that violates a valid copyright law—strongly suggests that the Federalists were right about the absence of a more general congressional power to regulate speech.[44] By the same token, the specificity of the enumerated grants of power in Article I, Section 8 also validates the Federalists' broader claims about the lack of federal power to regulate religion, issue general warrants, abolish jury trials, or violate other background rights.

Although some Antifederalists challenged the very concept of enumerated powers,[45] a more common argument against ratification of the Constitution located threats to liberty primarily in the Sweeping Clause (as the founding generation called it) at the end of Article I, Section 8, which grants Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."[46] Although there is no constitutional provision specifically authorizing censorship of antigovernment pamphlets, couldn't a corrupt Congress argue that such censorship laws were "necessary and proper" for carrying into execution government policies that were

41 U.S. CONST. art. I, § 8, cl. 4 (giving Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States").

42 *Id.* art. I, § 8, cl. 7 (authorizing Congress "[t]o establish Post Offices and post Roads").

43 *Id.* art. I, § 8, cl. 8 (authorizing Congress to secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

44 Federalists such as Iredell and Williamson expressly pointed to the Copyright Clause as evidence that Congress' power over speech was specific rather than general. *See* IREDELL, *supra* note 29, at 361; Williamson, *supra* note 26, at 551.

45 Some Antifederalists doubted that limited government was even a conceptual possibility. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 27, at 398 (statement of Thomas Tredwell at the New York ratifying convention on July 1, 1788).

46 U.S. CONST. art. I, § 8, cl. 18.

directly authorized by the Constitution? If, for example, Congress had passed an unpopular tariff act pursuant to its undoubted power to "lay and collect Taxes, Duties, Imposts and Excises,"[47] couldn't it reason that strong criticism of the law would reduce compliance, so that stifling of criticism was "necessary and proper for carrying into Execution" this particular exercise of the taxing power? Similarly, couldn't one regard general warrants and bench trials as "necessary and proper" means for enforcing the law? Such fears about the possible scope of the Sweeping Clause largely drove the push for a Bill of Rights.

Corrupt Congresses not only *could* make such arguments but in fact *did* make such arguments during the episodes surrounding the Alien and Sedition Acts.[48] But as James Madison was quick to point out in his *Report on the Virginia Resolutions*, those arguments were constitutionally wrong.[49] The Sweeping Clause of Article I simply does not authorize the kinds of liberty-infringing laws to which the Antifederalists properly objected. A demonstration of this point risks taking us far afield, but because the meaning of the Sweeping Clause effectively determines the meaning of the Tenth Amendment, a brief summary of at least the argument's conclusions is necessary.[50]

### C. *The Sweep of the Sweeping Clause*

Four features of the Sweeping Clause significantly limit the power that it grants to Congress.[51] First, the Sweeping Clause does not authorize Congress to judge the extent of its own powers. The Sweeping Clause only authorizes laws that "shall be" necessary and proper for carrying into execution federal powers, not laws that "Congress

47 *Id.* art. I, § 8, cl. 1.

48 *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 178–83 (2001).

49 *See* JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 27, at 546, 571–72.

50 For the lengthy arguments that generate these conclusions, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 196–204 (2003); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 247 (2005); Lawson & Granger, *supra* note 10, at 326–34.

51 It is important to emphasize that the Sweeping Clause is not an affirmative *limitation* on Congress in the fashion of the provisions in Article I, Section 9. Rather, the Sweeping Clause is a *grant* of power to Congress. But as with any grant of power, the scope of the grant is fixed by its terms. The Sweeping Clause is a limited rather than unlimited grant of power. Whenever Congress must invoke the Sweeping Clause as a constitutional authorization for its actions, it is only authorized to act in accordance with the limitations built into the power grant.

shall regard as" necessary and proper. There are indeed constitutional provisions whose meanings quite explicitly depend on the subjective beliefs of governmental actors, but the Sweeping Clause is not one of them.[52] In order to be constitutionally valid, a law enacted pursuant to the Sweeping Clause must actually be necessary and proper for carrying into execution federal power.

Second, laws enacted pursuant to the Sweeping Clause must be "for carrying into Execution" some other enumerated federal power. The Sweeping Clause can never be invoked as a freestanding power; its use must always be tied to the implementation of some independently granted federal power. The only questions are *how closely* the use of the Sweeping Clause (the means) must be tied to the power being implemented (the ends) and whether there are substantive constraints on the choice of means apart from the strength of the means-ends causal connection.

That leads directly to the third and fourth limitations built into the Sweeping Clause: any laws enacted by Congress to implement federal powers must be "necessary and proper" for that purpose. The lengthy shadow of *McCulloch v. Maryland*[53] often leads modern observers to give short shrift to the constitutional requirement that laws enacted pursuant to the Sweeping Clause be "necessary and proper" for effectuating federal powers, but that is a grave mistake both as a matter of original meaning and as a matter of case analysis. Chief Justice Marshall may or may not have been right in his ultimate conclusion that an incorporated national bank was "necessary and proper for carrying into Execution" federal powers,[54] but he certainly did not give the matter short shrift.[55] Nor could he reasonably have done so. The words "necessary" and "proper" each have substantial and independent[56] constitutional significance.

Alexander Hamilton insisted that a law was "necessary" under the Sweeping Clause if it "'might be conceived to be conducive'" to achieving legislative ends,[57] a position reflected in the preamble to

52 *See* Lawson & Granger, *supra* note 10, at 276–85.

53 17 U.S. (4 Wheat.) 316 (1819).

54 U.S. CONST. art. 1, § 8; *see McCulloch*, 17 U.S. (4 Wheat.) at 401–25.

55 For an informative and modestly revisionist account of *McCulloch*, see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 812–19 (1996).

56 For an extensive demonstration that the words "necessary" and "proper" impose independent rather than redundant requirements in the Sweeping Clause, see Lawson, *supra* note 50, at 249–55.

57 *See* 2 ANNALS OF CONG. 1848 (1791) (statement of James Madison quoting the preamble to the bill for a Bank of the United States). Hamilton elsewhere said that the word "necessary" means merely "that the interests of the government or person require, *or will be promoted by*, the doing of this or that thing." Alexander Hamilton,

the bill for the First Bank of the United States. Although this "rational basis" understanding of constitutional necessity has effectively prevailed as a matter of doctrine,[58] it flies in the face of overwhelming textual and intratextual evidence to the contrary as a matter of original meaning. Textually, the leading eighteenth-century dictionary defined "necessary" as "1. Needful; indispensably requisite. . . . 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence."[59] This is hardly consistent with Hamilton's interpretation.[60] Intratextually, the Constitution uses the word "needful" when it means a looser means-ends connection and "necessary" when it means something stronger.[61] But neither can "necessary" mean the strict standard of indispensability urged by Thomas Jefferson in 1791[62] and the State of Maryland in 1819.[63] While this position, unlike Hamilton's, is at least linguistically plausible, it is intratextually unsustainable. As Chief Justice Marshall sagely observed, the Jeffersonian view cannot account for the constitutional distinction between "necessary" and "absolutely necessary" laws.[64] It was left to James Madison to produce a "Madisonian compromise" between the extreme positions of Hamilton and Jefferson. As Madison elegantly put it, constitutional necessity entails "a definite connection between means and ends" that links executory laws and executed power "by some obvious and precise affinity."[65] If there is a verbal formulation for the meaning of the word "necessary" in the Sweeping Clause that better fits the available linguistic and intratextual evidence, I have not seen it.

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Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 102 (Harold C. Syrett ed., 1965).

58 *See* Sabri v. United States, 541 U.S. 600, 605 (2004) (stating that executory laws are constitutional when they achieve legitimate ends "by rational means").

59 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprint 1979) (1755). The dictionary is not paginated.

60 Nor was eighteenth-century usage consistent with Hamilton's understanding. *See* Lawson, *supra* note 50, at 245 n.56.

61 *See id.* at 245–46.

62 Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974) (asserting that laws are necessary only when they are "means without which the grant of power would be nugatory").

63 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 367 (1819) (defining necessary as "indispensably requisite").

64 *See id.* at 414–15.

65 Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 448 (Gaillard Hunt ed., 1908). For an account of the debate between the Hamiltonian and Jeffersonian understandings of "necessary," and a defense of the "Madisonian compromise," see Lawson, *supra* note 50, at 242–48.

For a law to be "proper" under the Sweeping Clause, it must

> conform to the "proper" allocation of authority within the federal government; . . . be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and . . . be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights.[66]

In other words, "proper" laws must respect background norms of separation of powers, federalism, and individual rights. The argument for this rather potent understanding of constitutional propriety is far too intricate to summarize in this Article,[67] but in brief: the eighteenth-century dictionary definition of "proper" was "1. Peculiar; not belonging to more; not common. . . . 2. Noting an individual. . . . 3. One's own . . . . 4. Natural; original."[68] In the context of the Sweeping Clause, this would most naturally mean that executory laws are "proper" when they represent power that distinctly and peculiarly belongs to the Congress of limited and enumerated powers established by the Constitution.

Four structural considerations confirm this understanding. First, the word "proper" adds to rather than replicates the limitations on federal power imposed by the word "necessary." The Constitution is freely redundant when it comes to *provisions* but not when it comes to *terms within provisions*, where the familiar legal convention against reading terms to be surplusage comes into play.[69] Second, the qualifier "proper" does not appear in the clauses of the Constitution that empower Congress to act as a general government with respect to the District of Columbia and federal enclaves[70] and federal territory.[71] This means that a "proper" law is one that is distinctively appropriate to a limited rather than general government and therefore must be consistent with the overall structure of limited government established by the rest of the document. Third, the phrase "necessary and proper" did not appear in any of the state constitutions that preceded the Federal Constitution, further suggesting that the phrase is dis-

66 Lawson & Granger, *supra* note 10, at 297.

67 For an extended defense of this interpretation of the word "proper," see Lawson, *supra* note 50, at 249–63; Lawson & Granger, *supra* note 10, at 289–326.

68 JOHNSON, *supra* note 59.

69 *See* Lawson, *supra* note 50, at 251–53.

70 U.S. CONST. art. I, § 8, cl. 17 (empowering Congress "[t]o exercise exclusive Legislation in all Cases whatsoever" over the nation's capital and federal enclaves).

71 *Id.* art. IV, § 3, cl. 2 (empowering Congress to make "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

tinctly associated with limited government and therefore must be construed in light of the structure of a limited government. Fourth, and perhaps most persuasively, an understanding of "necessary and proper" in which necessity refers to causal relations and propriety refers to substantive criteria such as proportionality and respect for background norms brings the Sweeping Clause into perfect harmony with the *principle of reasonableness*, which was one of the most fundamental eighteenth-century administrative law principles governing delegated power.[72] When fully fleshed out, these considerations are sufficient to give the requirement of propriety in the Sweeping Clause real substantive bite.

Given this understanding of Congress' power under the Sweeping Clause, the Federalists were correct that Antifederalist concerns about the meaning of the Constitution were overstated.[73] The kinds of laws regulating speech or religion, authorizing general warrants, or abolishing jury trials to which they (rightly) objected would likely fail a Madisonian test of necessity and would unconditionally fail a test of propriety. Madison made precisely this point when objecting to provisions of the Alien and Sedition Acts,[74] and he was right as a matter of original constitutional meaning.

The consequence of this understanding of Article I, Section 8 is that federal laws abridging the freedom of speech or religion, authorizing general warrants, taking private property without just compensation, and violating rights to grand and petit juries were unconstitutional *from the moment that the Constitution was ratified.* Many of these laws were unnecessary, and all of them were improper. The Bill of Rights emphasized and amplified their unconstitutionality but did not create it.[75] As far as these laws were concerned, December 15, 1791, was effectively a nonevent.

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72 *See* Lawson, *supra* note 50, at 257–59. It would take a book to flesh out the relationship between the principle of reasonableness and the Sweeping Clause—and between the principle of reasonableness and other antecedents of the Constitution's "necessary and proper" language such as the private law of agency. *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 284 (2004). If all goes well, such a book just might appear in the not-too-distant future.

73 That emphatically does not mean that Antifederalist fears of *oppression* were overstated, but merely that their concern that such oppression would be validated by the Constitution was overstated. Constitutional meaning, after all, bears a decidedly contingent relationship to constitutional action.

74 *See* 4 ELLIOT'S DEBATES, *supra* note 27, at 579 (James Madison's Report on the Virginia Resolutions).

75 For a brief foreshadowing of this point, see Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 513 (1999).

### D. *The Rewards of Redundancy*

If the foregoing account of the Sweeping Clause is correct, then what, from the standpoint of original meaning, is the purpose and effect of the Bill of Rights? Why bother including a First Amendment or a Fourth Amendment if they did not render unconstitutional something that would have been constitutional without them? A full response to this question requires one final detour—this time into the separation of powers—before we circle back to spell out the original meaning of the Tenth Amendment.

Consider for a moment the purpose and effect of one of the seemingly strangest clauses in the original Constitution: the Opinions Clause, which states that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[76] The first sentence of Article II declares that "[t]he executive Power shall be vested in a President of the United States of America."[77] This Vesting Clause places *all* of the federal executive power in the person of the President, which means that any subordinate official, including "the principal Officer in each of the executive Departments," can only exercise executive power under the control and supervision of the President in whom that power ultimately resides.[78] Surely that supervisory power includes the power to ask subordinates to draft memos pertaining to their executive duties, so why would a relatively brief Constitution include such a mundane and obviously redundant provision as the Opinions Clause?

The answer is instructive. Apart from the presidency and the vice presidency, which are created directly by the Constitution,[79] all executive offices result from statutes.[80] The Constitution *contemplates* the existence of "principal Officer[s] in each of the executive Departments," but it does not of its own force *create* either the officers or the

76 U.S. CONST. art. II, § 2, cl. 1.

77 *Id.* art. II, § 1, cl. 1.

78 The Vesting Clause of Article II, like the Vesting Clause of Article III, is a grant of power to the President rather than a mere designation of office. *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1389–91 (1994); Lawson & Seidman, *supra* note 11, at 22–43. Many separation of powers scholars will likely cringe at the thought that such a fundamental and hotly contested matter as the source of presidential power could be dismissed with but a cheeky footnote, but that is just too bad. The question simply is not a close one from the standpoint of original meaning.

79 U.S. CONST. art. II, § 1.

80 *Id.* art. I, § 8, cl. 18; *id.* art. II, § 1, cl. 1; Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1787–88 (2006).

departments. Congress must do so. And because there is no specific "executive officers and departments clause," the authority to create the offices and institutions of the executive department must stem from the Sweeping Clause: Congress can create offices and departments when it is "necessary and proper for carrying into Execution" federal powers. Congressional statutes create the offices, define the powers of the offices, and set the salaries and other benefits of the offices. One can readily imagine Congress arguing that because, for example, the Secretary of State exists only because of congressional statutes, Congress can therefore require the Secretary of State to prepare reports that are given *only to Congress and not to the President.* Congress, in other words, might be tempted to create presidential subordinates who are effectively answerable to Congress rather than the President by cutting off presidential access to his or her own staff. As a matter of original meaning, the statute would be unconstitutional. The Constitution vests the executive power directly in the President, so it can never be "necessary and proper" for Congress to prevent the President from exercising that power by limiting the President's ability to supervise subordinates. But that does not mean that Congress won't try it—no more than an absence of constitutional authority to restrict freedom of speech will prevent a rogue Congress from enacting the Alien and Sedition Acts. And given that Congress has the power to impeach and remove Presidents,[81] which significantly raises the stakes of conflicts between Congress and the President, it is not unreasonable to include in the Constitution a clause that makes it too clear even for bad argument that the President must have a free flow of communication with top subordinates. The Opinions Clause does not add some new restriction on Congress that would not have existed in its absence, but it instead clarifies and amplifies what is already contained elsewhere in the Constitution in order to minimize the risk of interdepartmental conflict in a predictably recurring context that might threaten to escalate into a national crisis.

The same considerations explain the Commander in Chief Clause, which declares the President to be "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[82] Surely the vesting of the "executive Power" in the President includes the ability to command the military; that is the very essence of execu-

81 U.S. CONST. art I, §§ 2–3.

82 *Id.* art. II, § 2, cl. 1.

tive power.[83] But while Congress is not directly granted any power in Article I to control troop movements, it is granted a wide range of other military powers, including the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,"[84] "[t]o raise and support Armies,"[85] "[t]o provide and maintain a Navy,"[86] "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[87] "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[88] and "[t]o provide for organizing, arming, and disciplining, the Militia."[89] Could Congress claim that in order to carry into effect these other powers, it is "necessary and proper" for it to direct troop movements as well? Such an argument would be constitutional error even in the absence of an express Commander in Chief Clause, but one can easily imagine Congress making such an argument and thereby precipitating a constitutional crisis at the worst possible moment. There is nothing strange about trying to take that issue completely off of the table so that Congress does not even consider making a dubious argument for control of troop movements at a time when legal wrangling could prove very costly. Consequently, if Congress tries to control troop movements, one could correctly say either that it is violating the Commander in Chief Clause, that it is violating the Article II Vesting Clause, or that it is exceeding its enumerated powers under Article I, Section 8.

Thus, there is considerable constitutional value in provisions that do not actually change the legal landscape by creating new rights and obligations but simply emphasize, clarify, and amplify rights and obligations already contained in the Constitution. There is value, in other words, in truisms.

The Bill of Rights is much like the Opinions Clause or the Commander in Chief Clause. Congressional laws forbidding criticism of the government were unconstitutional before the First Amendment was ratified. In that sense, the First Amendment, for example, did not create enforceable rights of free speech that did not exist in its absence. The First Amendment, as did the other provisions of the Bill of Rights, simply declared something that was already true of the

83 Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, 55 (1998).

84 U.S. CONST. art. I, § 8, cl. 11.

85 *Id.* art. I, § 8, cl. 12.

86 *Id.* art. I, § 8, cl. 13.

87 *Id.* art. I, § 8, cl. 14.

88 *Id.* art. I, § 8, cl. 15.

89 *Id.* art. I, § 8, cl. 16.

unamended Constitution. That does not make those provisions meaningless. Just as there is value in an Opinions Clause and a Commander in Chief Clause that do not actually "change" the Constitution, there can be value in provisions that clarify but do not alter the law. If the Federalists were right about the original design of the Constitution and the proper construction of the Sweeping Clause—and they were—then the entire Bill of Rights is primarily an exercise in clarification.

To be sure, there are two important respects in which the Bill of Rights did, intentionally or not, make substantive changes in the legal landscape. First, when Congress legislates for federal territories or the District of Columbia, it does so pursuant to specific grants of power which constitute Congress as a *general* rather than *limited* government in those contexts.[90] In other words, when Congress enacts laws governing territories or the District, it *does not* need to find authorization for those laws in the specific subject-matter enumerations in Article I, Section 8 or the Sweeping Clause. It has general legislative authority, equivalent to a state government, by virtue of targeted enumerations that create such general authority within limited spheres.[91] If the reason why laws abridging speech, authorizing general warrants, and abolishing jury trial were unconstitutional before December 15, 1791, is that such laws would not be "necessary and proper for carrying into Execution" federal powers, then such reasoning would not apply to territories and the District because Congress would not need to invoke the Sweeping Clause as justification for any laws in that setting.[92] There is no "necessary and proper" requirement in either the District

90 *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 189–91 (2004).

91 U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.

92 Can there be cases in which Congress, outside of federally owned territory, is able to legislate without reference to the Sweeping Clause and thus could validly have threatened the freedoms protected by the Bill of Rights prior to December 15, 1791—for example, by legislating directly under the Commerce Clause or the Taxing Clause? The answer is "yes in theory" but "no in practice." All laws dealing with the funding, implementation, and enforcement of (including the prescription of penalties for violating) a statutory scheme are laws that must be enacted under the Sweeping Clause. It is generally those implementational laws rather than the regulation itself that pose the danger to liberty. Even where the regulation itself is the source of danger, it would not be "proper" to implement the regulation if the result was to violate the background rights of the people. For example, it is possible to imagine direct exercises of the commerce power that are so self-contained that they require no use of the Sweeping Clause, but it is very difficult to do. For a discussion of one of the relatively rare examples, see Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 206–10 (2001).

Clause or the Territories Clause and accordingly there is no textual hook on which to hang any limitations on congressional power. The Bill of Rights, however, is phrased generally enough to apply to *all* exercises of congressional power, including exercises grounded in the District Clause or Territories Clause. Accordingly, the Bill of Rights added new law to the Constitution by limiting to some degree Congress' ability to legislate in federal territory.

Second, it is theoretically possible that the specification of norms in the Bill of Rights might have broadened to some degree the limitations on governmental action contained in the original Constitution. This could happen if the articulation of the norm in a specific amendment does not track precisely the form that the norm would have taken in the absence of express articulation.

In principle, the Bill of Rights could express norms either more broadly or more narrowly than the norms contained within the "necessary and proper" requirement of the Sweeping Clause (or the principle of reasonableness implicit in the Article II and Article III Vesting Clauses[93]). If the norm as articulated in the Bill of Rights is narrower than the norm in the original Constitution, it would not change the pre–Bill of Rights law. To reason otherwise would be to treat the Bill of Rights at least partially as a grant of power to the national government, and that is an utterly implausible construction. For example, the Seventh Amendment guarantees a right to a civil jury in common law actions "where the value in controversy shall exceed twenty dollars."[94] The civil jury was one of the rights most cherished in 1787, and prior to December 15, 1791, it surely, as Hamilton noted,[95] would not have been "necessary and proper" for Congress to try to restrict it—or at the very least to restrict it more than did the state in which the relevant federal trial was held.[96] But did the "necessary and proper" language in the Sweeping Clause incorporate a below-twenty-dollar exception to this civil jury trial right? I am no expert on civil juries and would not want to venture a guess here.[97] If the answer is no, however, then the Seventh Amendment could not have added

93 U.S. CONST. art. II, § 1, cl. 1; *id.* art. III, § 1.

94 *Id.* amend. VII.

95 *See supra* note 38 and accompanying text.

96 For the proposition that the Seventh Amendment requires federal adherence to state civil jury practices, see AMAR, *supra* note 6, at 88–93. I am in no position to affirm or deny the proposition, though it is the sort of proposition about which I would be very hesitant to bet against Professor Amar.

97 Nor does it seem that experts have much to say about the twenty-dollar limit and its origins. *See* Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1665–66 (2005).

such an exception, because the Seventh Amendment is not a grant of power to Congress.

Could it be the case that prior to December 15, 1791, it would have been permissible for Congress to limit civil jury rights in at least some cases where the amount in controversy was higher than twenty dollars? If so, then ratification of the Seventh Amendment would forbid at least some laws outside of federal territories or the District of Columbia that had previously been permitted, so that even outside of the territories, the Seventh Amendment might not function entirely as a truism (with or without attitude).

The Sixth Amendment even more likely changes some of the legal rules within the states.[98] The text of Article III provides that criminal trials "shall be held in the State where the said Crimes shall have been committed."[99] The Sixth Amendment specifies that criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury of the State *and district* wherein the crime shall have been committed."[100] The Sixth Amendment thus requires an additional element of locality, which narrows the range of laws that Congress could lawfully pass. It is perhaps conceivable that the Sweeping Clause contained this vicinage requirement from the start, and that Article III was merely emphasizing one aspect of this requirement, but that seems like an odd reading of Article III, which (unlike Article II) does not appear to contain a lot of redundant provisions.

Thus, there can probably be circumstances in which some of the first eight provisions of the Bill of Rights can do what the Tenth Amendment cannot: invalidate congressional laws outside of federal territories that would not have been invalid before ratification of the Bill of Rights. Thus, I do not want to be understood to say that the Bill of Rights was, outside of the territories, entirely an emphasizing, clarifying, and amplifying instrument. My point is only that the Bill of Rights served that function most of the time, and that the instances in which it operates to limit the power of Congress in the states are relatively few and far between. The Tenth Amendment and its nine siblings are not identical dectuplets, but the similarities among them are far more striking than the differences.

Therefore, one cannot say that the Bill of Rights in its entirety is *only* a truism. But one can say that the Bill of Rights in its entirety is

98 I am profoundly grateful to David Rossman for bringing this example to my attention.

99 U.S. CONST. art. III, § 2, cl. 3.

100 *Id.* amend. VI (emphasis added).

*primarily* a truism. It is certainly a truism in the vast majority of applications for which it is invoked.

If Congress tries to outlaw publication of pamphlets critical of the government, the most basic constitutional problem with that statute is the absence of any congressional power to enact it.[101] The First Amendment ("Congress shall make no law") emphasizes, clarifies, and amplifies that absence. There may, however, be circumstances in which it is more convenient—easier, clearer, and simpler—to invoke the First Amendment as the ground for invalidation of the law rather than to go "beneath" the First Amendment to the scheme of enumerated powers. In that respect, it makes good sense to speak of laws that violate the First Amendment, and even to speak of a broader First Amendment doctrine which describes the set of laws concerning speech and religion that exceed the enumerated powers of Congress. Even though it would be conceptually possible to reach precisely the same results (legislation concerning territories and the occasional exercise of congressional power sans the Sweeping Clause aside) without mentioning the First Amendment, the existence of a First Amendment can add conceptual clarity to the inquiry and can focus attention on instances of federal overreaching that might otherwise escape notice. That is precisely the original function of the Bill of Rights, and it is not a function to dismiss lightly.

### E. *The "Proper" Understanding of the Tenth Amendment*

We can now understand the constitutional role and meaning of the Tenth Amendment. The original unamended Constitution embodied the principle of enumerated federal powers. Had the Tenth Amendment never been ratified, it still would have been true that federal institutions could only exercise powers that were actually granted by the Constitution and could not properly rely upon generalized assumptions about powers exercised by other governments throughout the world. The fact that most governments, or even all other governments, have a certain power would *not* entitle the federal government to exercise that power. The Tenth Amendment does not create this principle, but it confirms, clarifies, and amplifies it.

The Tenth Amendment reflects some other principles as well. The principle of limited federal power coexists with a principle of (as far as the Federal Constitution is concerned) unlimited state power.[102]

101 At least this is true when Congress is not legislating for federally owned territory.

102 State power can, of course, be limited by state constitutions, or conceivably even by natural law, whether or not it is limited by the Federal Constitution.

The Constitution of 1787 specifically limits states in a number of ways, most notably the enumerated restrictions in Article I, Section 10,[103] but the default rule is that constitutional provisions refer only to federal institutions unless they specifically say otherwise.[104] Because the Constitution limits states in specific ways, other federal limitations on states are potentially inconsistent with the constitutional design and thus might fail to be "necessary and proper."

An example from the realm of separation of powers is instructive. The Appointments Clause provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[105]

Congress and one of its constituent parts (the Senate) are given specific roles in the process for appointing federal officers.[106] Congress cannot give itself additional roles via the Sweeping Clause. Those other roles would be inconsistent with the constitutional design and thus fail to be "necessary and proper." Specifically, Congress could not, under the guise of the Sweeping Clause, try to give appointment power to the president pro tempore of the Senate or the Speaker of the House.[107] Congress cannot alter the design of the appointments process even though the Constitution of 1787 does not contain a specific "Separation of Powers Clause." The absence of such a clause does not mean that separation of powers principles are not real, nor does it mean that such principles cannot find textual expression in the Sweeping Clause's requirements of necessity and propriety.

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103 U.S. CONST. art. I, § 10.

104 That is how, for example, the Article II Vesting Clause can grant the President "executive Power" without making the President the chief executive of Oregon.

105 U.S. CONST. art. II, § 2, cl. 2. Note that Congress may alter the baseline rule for the appointment of inferior officers "as they *think* proper," *id.* (emphasis added), in contrast to the Sweeping Clause's authorization of laws which "*shall be* necessary and proper," *id.* art. I, § 8, cl. 18 (emphasis added).

106 Under the Appointments Clause, Congress may determine which inferior officers can be appointed without Senate confirmation but has no other direct role in the appointment process. The Senate has the advice and consent power but no other role.

107 *See* Buckley v. Valeo, 424 U.S. 1, 118–19, 124–37 (1976) (per curiam) (holding that Congress cannot grant itself, the Speaker of the House, or the President Pro Tempore of the Senate a role in the federal appointments process that is not spelled out in the Appointments Clause).

By the same token, the absence of a specific "Federalism Clause" in the Constitution does not give Congress license to alter the constitutional design of federalism, and it does not mean that substantive principles of federalism cannot legitimately be located in the Sweeping Clause. Just as the First Amendment restates limitations on the federal government's power of speech and religion contained in the original Constitution, the Fourth Amendment restates limitations on the federal government's law enforcement powers contained in the original Constitution, and the Sixth Amendment restates limitations on federal power with respect to criminal juries contained in the original Constitution, the Tenth Amendment restates limitations on the federal government's power to regulate states contained in the original Constitution. These limitations, based on the structure of American constitutional government, are not, as a 5–4 majority of the Supreme Court once described them, "freestanding conceptions of state sovereignty."[108] They are conceptions of state sovereignty that are *textually embodied in the Sweeping Clause* and then *textually restated in the Tenth Amendment.* Whenever Congress tries to implement federal power in a fashion that implicates state governance or state institutions, one must always ask whether the law is "necessary and proper for carrying into Execution" federal power—and as a matter of original meaning the phrase "necessary and proper" carries serious bite. That is a *textual* inquiry, to the same extent that it is a textual inquiry to determine whether a particular executive employee is an "Officer[] of the United States" subject to the Appointments Clause.[109] There is no definition of an "Officer[]" provided in the Constitution, nor does the text, structure, or history of the document provide crisp guidelines for determining whether any specific person who receives a government paycheck rises to the level of an "Officer[]." But surely that does not mean that one is illegitimately resorting to "freestanding conceptions of federal officer-dom" by deciding, for instance, that a commissioner of the Federal Election Commission is an officer[110] while an administrative law judge for the Federal Deposit Insurance Corporation is not.[111] It may be a difficult inquiry, and one might even reach questionable results on occasion,[112] but the inquiry is mandated by the constitutional text. Similarly, there is nothing "freestanding" about principles of federalism that are textually embodied in the

108 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).

109 U.S. CONST. art. II, § 2, cl. 2.

110 *See Buckley*, 424 U.S. at 126.

111 *See* Landry v. FDIC, 204 F.3d 1125, 1134 (D.C. Cir. 2000).

112 It is far from obvious, for instance, that an administrative law judge is not actually an "Officer[] of the United States." *See id.* at 1140–43 (Randolph, J., concurring).

requirement that federal laws be "necessary and proper." And those same principles do not become "freestanding" when they are then reflected in the Tenth Amendment.

The value of expressing those principles in a separate amendment is the same as the value of expressing principles of free speech in the First Amendment. One could develop a body of federalism doctrine entirely under the Sweeping Clause and other principles embedded in the constitutional text, as indeed has happened with the separation of powers. But expressing those principles in a separate provision such as the Tenth Amendment provides clarity and may help focus attention on instances of federal overreaching that might otherwise escape notice. Norms can function without verbal expression, but norms sometimes function better when made concrete.

To a very modest extent, modern law has recognized that the Sweeping Clause textually incorporates principles of federalism that are reflected in the Tenth Amendment. In *Printz v. United States*,[113] the Supreme Court held that Congress could not compel state law enforcement officials to conduct federally prescribed background checks on gun purchasers.[114] In response to the claim that such a law could be justified under the Sweeping Clause, the Court explained that "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'"[115] More controversially, the Court has also understood the constitutional requirement of propriety to limit the extent to which states can be sued under federal law.[116] The idea that federal law must conform to a "proper" structure of federalism is neither as revolutionary nor as ungrounded in practice as it might seem.

From the standpoint of original meaning, however, the central question is not what the courts have held but what the Constitution prescribes—and it prescribes what can broadly be called federalism limitations on Congress. The secondary question is thus not *whether* the Tenth Amendment contains substantive principles of federalism but *what those principles look like.* In other words, what is the "proper" distribution of state and federal powers that is reflected in the Tenth Amendment? Full consideration of a theory of constitutional federalism is best left to other times and other authors, but the best way to

113 521 U.S. 898 (1997).

114 *Id.* at 922.

115 *Id.* at 923–24 (quoting U.S. CONST. art. I, § 8, cl. 18).

116 *See* Alden v. Maine, 527 U.S. 706, 732–33 (1999). I have no decided view on whether this particular line of authority is correct.

flesh out the broad contours of the Tenth Amendment is to look at some concrete problems on which it has been brought to bear.

## II. THE TENTH AMENDMENT IN CONSTITUTIONAL CONTEXT

There are risks as well as benefits to including clarifying or amplifying provisions in a constitution. The obvious benefits are the increased likelihood that constitutional principles will be respected and the minimization of conflict in areas where the costs of conflict are potentially high. The corresponding risk is that the clarifying or amplifying provisions will take on a life of their own that is not connected to their original meaning or function. There is a good argument that those risks have been realized with many provisions of the Bill of Rights. It is, for example, doubtful that the set of laws affecting speech that would not be "necessary and proper for carrying into Execution" federal power maps precisely onto the set of laws invalidated under modern First Amendment doctrine. Because doctrine regarding speech has developed under the rubric of the First Amendment rather than (as the Federalists would have preferred) as a search for enumerated federal powers, the contours of that doctrine are no doubt quite different than those that would have resulted from a different analytical framework.

The Tenth Amendment offers the same benefits and risks. There is value in clarifying the limited scope of federal power and the residual role of the states, but there is also a risk that expressing those principles in a distinct clause will give rise to doctrinal developments that might be far removed from the original constitutional principles that were sought to be clarified or amplified by the Tenth Amendment. Has this in fact happened, or has Tenth Amendment doctrine more or less accurately reflected the constitutional world created by the pre–December 15, 1791, Constitution?

For the most part, laws that have been questioned or invalidated under the Tenth Amendment have at least arguably exceeded the enumerated powers of Congress under the original Constitution, including the enumerated power to "make all Laws which shall be necessary and proper for carrying into Execution" federal powers. Some of those laws present very close and difficult constitutional questions, and they have appropriately resulted in very close and difficult constitutional cases. This Article can make only the briefest survey of this point, but it will be enough to show that the Tenth Amendment has been, from the standpoint of original constitutional design, more of a success than a failure.

### A. *Commandeering*

On at least two occasions, the Supreme Court has held that Congress violated the Tenth Amendment by "commandeering" state legislative or executive institutions. Following the principle that Congress cannot "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,"[117] the Court held in *New York v. United States*[118] that Congress could not force states to choose between making legislative provision for the disposal of nuclear waste within their borders or taking title to (and thereby assuming corresponding liability for) the waste.[119] And in *Printz*, the Court held that Congress could not force state law enforcement officials to implement and monitor federally mandated background checks on gun purchasers.[120] On the other hand, settled case law establishes that Congress has the power to compel state *courts* to adjudicate claims arising under federal law;[121] the modern Tenth Amendment "anticommandeering" principle is limited to state legislatures and executives.

While it would take a separate article to outline the precise contours of a correct anticommandeering doctrine, the general outline of the modern approach accurately reflects the pre–Tenth Amendment Constitution. There is no express provision in the Constitution authorizing Congress to direct the activities of state legislative or executive officials, so any such federal power must stem from the Sweeping Clause. But while Congress might on some occasions be able to make good arguments that conscripting state officials for federal ends might be "necessary" for effectuating federal powers, it is hard to see how such actions could ever be "proper." The Court in *Printz* specifically recognized the crucial role in this inquiry played by the propriety requirement of the Sweeping Clause,[122] and a close look at the constitutional structure will demonstrate that the Court was right.

The Constitution on some occasions requires congressional consent before states may act,[123] and on other occasions it specifically pro-

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117 Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

118 505 U.S. 144 (1992).

119 *See id.* at 174–77.

120 *See Printz*, 521 U.S. at 918–28.

121 *See* Testa v. Katt, 330 U.S. 386, 389–94 (1947).

122 *See Printz*, 521 U.S. at 923–24.

123 *See, e.g.*, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

vides that state legislative action will be subject to the "Revision and Controul" of Congress.[124] But nowhere does the Constitution specifically authorize Congress to designate state legislative or executive officials as unwilling partners in federal programs. That is especially significant because the Constitution *does* expressly authorize Congress to commandeer state *judicial* institutions. The Tribunals Clause authorizes Congress to "constitute Tribunals inferior to the supreme Court."[125] This provision both permits Congress to create distinct federal courts and to designate preexisting state courts as part of the federal judicial hierarchy subject to the control and direction of the Supreme Court.[126] The practice of designating state courts as federal institutions was familiar from the Articles of Confederation.[127] There is no comparable constitutional provision authorizing Congress to "constitute Executives inferior to the President" or to "constitute Legislatures inferior to Congress." It would do considerable violence to the constitutional structure, and therefore be improper under the Sweeping Clause, for Congress to try to do with state executive and legislative officials what the Constitution carefully permits Congress to do with state *judicial* officials.

Professor Saikrishna Prakash has argued that commandeering of state legislatures is constitutionally forbidden but commandeering of state executive and judicial institutions is permissible.[128] His argument is based on the historical and conceptual linkages between executive and judicial officers, and his starting point is correct: the eighteenth-century conceptual line between executive and judicial officers was thin at best.[129] The Constitution, however, does unam-

124 *See id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws . . . and all such Laws *shall be subject to the Revision and Controul of the Congress.*" (emphasis added)).

125 *Id.* art. I, § 8, cl. 9.

126 For a fuller account of Congress' power to "commandeer" state courts under the Tribunals Clause, see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1028–29 (2007).

127 *See* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1525–26 (2005).

128 *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2033 (1993) ("[T]he Constitution abandoned the idea of instructing legislatures on how to legislate. Instead, the Constitution empowers the federal government to 'requisition' directly the assistance of state executives and courts.").

129 *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 103–05 (1995).

biguously try to distinguish executive from judicial institutions,[130] and by making specific provision for the "commandeering" of state judicial but not executive institutions, it rules out Professor Prakash's abstract argument, however theoretically appealing it might be.

The Tenth Amendment doctrine that limits Congress' ability to commandeer state legislatures and executives while permitting Congress to commandeer state judicial institutions thus provides the proper structure for constitutional analysis. Careful study would be needed to determine the precise contours of those limits and permissions (can Congress *never* enlist state legislative or executive officials but *always* conscript state judges?), but Tenth Amendment doctrine at least points in the right direction.

### B. *Spending Conditions*

Congress seldom directly tries to tell state legislative and executive officials what to do. More commonly, it seeks to "bribe" them by offering federal money with conditions: states do not have to take the money, but if they do, they must comply with the applicable federal directives. Although the Supreme Court has never invalidated a federal spending condition imposed on the states, it has indicated that federal spending conditions can be invalid if they are unclear or ambiguous, if they amount to coercion of state institutions (a form of back-door commandeering), or if they are unrelated to appropriate federal objectives.[131] In 2001, a state supreme court invalidated a federal spending provision that regulated the use of evidence in state court proceedings;[132] the Supreme Court reversed the decision on other grounds without addressing the issues posed by the conditional spending provision.[133]

130 *Compare* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."), *with id.* art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one supreme Court . . . .").

131 *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987). For thoughtful studies of the issues raised by conditional spending, see Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 469–85 (2003); Lynn A. Baker, Lochner*'s Legacy for Modern Federalism:* Pierce County v. Guillen *as a Case Study*, 85 B.U. L. REV. 727, 739–50 (2005).

132 *See* Guillen v. Pierce County, 31 P.3d 628, 655 (Wash. 2001) ("Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials . . . simply because such collections *also* serve federal purposes."), *rev'd in part*, 537 U.S. 129 (2003).

133 *See Guillen*, 537 U.S. at 146–48.

On the surface, federal spending conditions would seem to have little to do with the Tenth Amendment: the federal government has the undoubted constitutional power to spend money, so why would anyone think that the unpromising language of the Tenth Amendment constrains that power in any way? Again, however, modern Tenth Amendment doctrine points in the right direction, though the constitutional constraints on Congress's spending power are actually far broader than current law contemplates.

Perhaps surprisingly, there is no express "Spending Clause" in the federal Constitution. No sane person has ever doubted that the Constitution somewhere confers on Congress the power to spend, but the location of the power matters, because the source of the power determines its scope. Ever since 1936, the provision almost universally identified as the Constitution's Spending Clause is Article I, Section 8, Clause 1, which gives Congress "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[134] This provision does not appear to place any limits on conditional spending, but that is not surprising, as the provision does not address spending at all. This provision is a Taxing Clause, not a Spending Clause. Textually, grammatically, structurally, and historically, it grants not one whit of power to spend money.[135] It authorizes Congress to *raise* money and specifies the purposes for which money may be raised but says nothing about how that money shall be spent. The Taxing Clause takes for granted the conclusion that there must be a Spending Clause of some sort elsewhere in the Constitution—why tax if you cannot spend?—but is not itself a Spending Clause. The point is actually obvious upon cursory analysis,[136] and the modern "Spending Clause" doctrine is accordingly something of an embarrassment.

134 U.S. CONST. art. I, § 8, cl. 1. The identification of this provision as the Spending Clause is characteristically traced to *United States v. Butler*, 297 U.S. 1, 65 (1936).

135 *See* Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and the Constitution of Leviathan*, 2003–2004 CATO SUP. CT. REV. 119, 133–39; Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 136–40 (1999).

136 If the power to spend is inferred from the power to tax and is therefore traceable to Article I, Section 8, Clause 1, does that mean that there is no constitutional power to spend money that is raised from land sales or borrowing? After all, "the spending allusion in the Taxing Clause does not even colorably reach borrowed sums." David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 222 (1995). Of course Congress has the power to spend money raised through property sales or borrowing—which simply proves that the power to spend cannot be inferred from the Taxing Clause. *Id.*

From the standpoint of original meaning, the Constitution's "Spending Clause" is actually the Sweeping Clause.[137] Appropriations laws are a classic example of laws "for carrying into Execution" federal powers; very few federal powers can be executed without funding of some sort. Accordingly, Congress has ample constitutional power to fund federal activities. But the Sweeping Clause imposes two limitations on federal spending that are relevant to federalism. First, because the Sweeping Clause only authorizes laws that are necessary and proper "*for carrying into Execution*" enumerated federal powers, any spending laws enacted by Congress must actually implement federal powers. If a spending condition is unrelated to the exercise or execution of otherwise enumerated federal powers, it exceeds Congress' authority. A fair percentage of modern conditional spending bills implicate this concern. If Congress has, for example, no constitutional power to define marriage, it has no constitutional power to condition a state's receipt of federal money on the state's definition of marriage because the condition does not "carry[] into Execution" any federal power. The requirement in modern case law that spending conditions be related to legitimate federal ends is thus a special case of the more general principle that *all* federal spending, whether conditional or unconditional, must be related to legitimate federal ends.

In addition to being "for carrying into Execution" federal ends, all spending bills must be "necessary and proper" means for implementing federal powers. This limitation is the appropriate source for the "germaneness" requirement in modern spending law. Even if Congress has the constitutional power to act in a certain fashion, so that specific spending measures could in principle be "for carrying into Execution" some legitimate federal end, any spending measure must be "necessary and proper" for that purpose. If a spending condition is truly nongermane to the federal program to which it is attached, it is extremely difficult to see how any such measure could be "necessary," even understanding "necessary" in the modest Madisonian rather than the strict Jeffersonian sense.[138] At the very least, the

137 Professor David Engdahl has sought to locate the federal spending power in the clause authorizing Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2; *see* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 51–52 (1994). The claim is more plausible than it might seem at first glance, but it runs afoul of structural considerations: it is inconceivable that something as crucial as the power to appropriate funds would be buried in the bowels of Article IV rather than placed with all of the other financial powers of the federal government in Article I. *See* LAWSON & SEIDMAN, *supra* note 90, at 28–30.

138 *See supra* notes 57–65 and accompanying text.

terms of the Sweeping Clause would call for a careful assessment of the means-ends connection in any conditional spending bill—which is precisely what a moderately beefed-up version of current law would require.

The anticoercion principle in spending jurisprudence can also be seen as a special case of a more general anticommandeering principle, though here the connection to underlying constitutional norms is less direct. If the Sweeping Clause does not permit direct conscription of state legislative or executive officials because any such law would not be "necessary and proper," it is not a large stretch (though it may be a small one) to make the same claim with respect to conditional spending laws in circumstances that permit the states little realistic choice but to take the money and conditions. It is a big task, of course, to identify circumstances in which what looks like a voluntary transaction in fact takes place against a backdrop of federal usurpation of taxing and spending authority so large that it effectively denies states realistic choices, but happily that is a task that some people wiser than I are willing to undertake.[139] The only present concern is the validity of the general anticoercion principle reflected in modern Tenth Amendment law, and that principle—however difficult its application in specific cases—is fundamentally sound whenever the line between conditions and commandeering is sufficiently blurred.

### C. *Regulation of State Affairs*

In 1976, the Supreme Court sent shockwaves through the constitutional world by holding unconstitutional Congress' extension of federal minimum wage and maximum hour laws to state employees.[140] The case was expressly decided under the rubric of the Commerce Clause[141]—the Court held for the first time in forty years that a federal statute exceeded Congress' authority to regulate commerce among the several states—but the Tenth Amendment loomed large as

139 *See generally* Baker & Berman, *supra* note 131, at 469–85 (maintaining that *Dole* is an ineffective test for the congressional spending power); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 1–48 (2001) ("[A]ny given conditional governmental offer is (presumptively) unconstitutional if it is coercive, and that coercion has a coherent meaning supplied by bedrock constitutional logic that transcends the particularities that govern a specific region of constitutional law.").

140 *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

141 U.S. CONST. art. I, § 8, cl. 3.

a shadow.[142] Nine years later, the Court reversed its decision and upheld such federal legislative power over state operations.[143] Both decisions were 5–4, and it is not inconceivable that the pendulum could swing in either direction in the foreseeable future. Does the Tenth Amendment, properly understood as a mere truism, have anything to say about this issue?

The prescription of minimum wages or maximum hours cannot plausibly be characterized as a regulation of commerce. Indeed, when read carefully, the seminal New Deal decision that originally upheld federal power to pass such laws did not uphold those laws as regulations of commerce but rather as measures "necessary and proper for carrying into Execution" the commerce power.[144] If there is a constitutional source for the federal power to prescribe minimum wages and maximum hours, it is the Sweeping Clause.

Assuming for the sake of argument (and this assumption is not likely to be seriously challenged in the modern legal world) that the Sweeping Clause authorizes minimum wage and maximum hour laws in general, is there something unique about state employees that might change the analysis when state institutions are concerned? The answer is "possibly." Part of what it means for a law under the Sweeping Clause to be "proper" is to be consistent with background principles of federalism, separation of powers, and individual rights. Far from being a "free floating abstraction," the basic principle of federalism is textually grounded in the very provision that Congress must employ to enact laws regulating state employment practices.

The trick is to identify the contours of those principles. Because the word "proper" in the Sweeping Clause does not provide much of a guide, it is tempting to say that the inquiry should not even be undertaken because it is too open-ended. But this imposes on the Constitution a normative vision of what a Constitution must say that may or may not correspond to what the Constitution of 1787 actually says. Constitutions can be very specific, very general, or something in between. Different provisions of a Constitution may follow different models of specificity. The actual (as opposed to ideal) degree of specificity or generality of any particular constitutional provision cannot be determined in advance by abstract reasoning; it is, as economists are fond of saying, an empirical question. If the Constitution chooses

142 *See Usery*, 426 U.S. at 842–43, 855. Subsequent opinions describing (and attempting to resuscitate) *Usery* stressed the Tenth Amendment more than did the original opinion. *See Garcia*, 469 U.S. at 560–61, 567, 570, 573–74 (Powell, J., dissenting).

143 *See Garcia*, 469 U.S. at 557 (majority opinion).

144 *See* United States v. Darby, 312 U.S. 100, 118–19 (1941).

to implement a system of separation of powers through a combination of relatively specific structural provisions such as prohibitions on reductions of presidential or judicial salaries,[145] relatively general structural provisions such as the executive and judicial Vesting Clauses, and an open-ended "catch-all" provision that requires executory laws to be "necessary and proper for carrying into Execution" federal powers, that is the Constitution's business. The difficulty in some, or even many, cases of determining whether a particular congressional innovation is "necessary and proper" may mean that the Constitution was poorly drafted, but it does not relieve one of the obligation to conduct the inquiry if one is actually trying to interpret and apply the Constitution as it exists. Similarly, if the Constitution contains a general rather than specific injunction regarding federalism, it is no less of a constitutional injunction for being general.

So, does Congress violate the Constitution by prescribing minimum wage and maximum hour rules for state employees? I haven't the foggiest idea. Five Justices in *National League of Cities v. Usery*[146] thought that such laws intruded so deeply into basic decisions regarding the structure and operation of state institutions that they exceeded Congress' power, while four Justices in the same case thought that such laws were no different from numerous general laws that routinely bind states as well as individuals. It is quite possible that a full answer to this question would require detailed knowledge of history, political science, management theory, and economics. I do not have degrees in any of these fields; indeed, it is debatable whether I have a degree in law.[147] It is enormously difficult to determine the extent to which Congress can regulate state governmental processes—which proves nothing more than that hard cases are hard.

Careful analysis may or may not ultimately show that such laws run afoul of the principle embodied in the original Constitution and reflected in the Tenth Amendment, but careful analysis is most assuredly called for. The scope of federal power in this regard is a legitimate question, and Tenth Amendment jurisprudence is right to ask it

145 U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected . . . ."); *id.* art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall . . . at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). Of course, difficult questions can arise about what counts as compensation and when it has been reduced—which only proves that specificity is always relative.

146 426 U.S. 833.

147 J.D. 1983, Yale Law(?) School.

and to take it seriously enough to generate 5–4 decisions. Indeed, a string of 5–4 decisions going in different directions may well be the most appropriate answer.

## CONCLUSION

The most distinctive constitutional feature of the Tenth Amendment is its lack of distinctiveness. The Tenth Amendment should not apologize for invalidating federal laws even though it is "but a truism." Other constitutional provisions, such as the First Amendment, do it all of the time without evident embarrassment. Nor should it apologize for asking whether direct or indirect federal regulation of state institutions is "proper." Similar questions are, and must be, asked every day regarding the separation of powers. Nor should it apologize for leaving constitutional interpreters with extremely difficult, and perhaps even unresolvable, questions. That is simply one of the risks of the trade. The Tenth Amendment talks the talk, and it should proudly walk the walk.