

William & Mary Law Review

Volume 47 (2005-2006)

Issue 4 *Institute of Bill of Rights Symposium: St. George Tucker and His Influence on American Law*

Article 8

February 2006

"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power

Kurt T. Lash

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 Wm. & Mary L. Rev. 1343 (2006), <https://scholarship.law.wm.edu/wmlr/vol47/iss4/8>

Copyright c 2006 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

"TUCKER'S RULE": ST. GEORGE TUCKER AND THE LIMITED CONSTRUCTION OF FEDERAL POWER

KURT T. LASH*

When Joseph Story published his *Commentaries on the Constitution* in 1833, he dedicated the work "To the Honorable John Marshall," whose "expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory."¹ Throughout the *Commentaries*, Story generously quoted Chief Justice Marshall's great nationalist opinions in *McCulloch v. Maryland*,² *Gibbons v. Ogden*,³ and *Cohens v. Virginia*⁴ and used them to construct a thoroughly nationalist reading of the federal Constitution.⁵ Along the way, Story seemingly dismantled prior states' rights interpretations of federal power, particularly St. George Tucker's theory of strict construction from his *View of the Constitution of the United States*.⁶ In writing his *Commentaries*, Story sought to put the final nail in the coffin of the older "compact

* Professor and W. Joseph Ford Fellow, Loyola Law School, Los Angeles. I would like to thank my fellow presenters at the St. George Tucker Symposium held at The College of William and Mary Marshall-Wythe School of Law for their insightful comments. I am particularly indebted to Michael Kent Curtis and Saul Cornell for their encouraging comments and suggestions.

1. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, at iii (Lawbook Exch. 2001) (1833).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. 22 U.S. (9 Wheat.) 1 (1824).

4. 19 U.S. (6 Wheat.) 264 (1821).

5. See H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1301 (1985) (book review) ("The *Commentaries* were a massive attempt to prove that the doctrines—nationalism, expansive construction of federal power, and judicial supremacy—for which Story stood and which Jefferson had opposed were in fact the logical conclusions of a truly republican faith.").

6. St. George Tucker, *View of the Constitution of the United States*, in 1 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* ed. app. at 151 (St. George Tucker ed., Lawbook Exch. 1996) (1803) [hereinafter Tucker, *View of the Constitution*].

theory" of the Constitution.⁷ Under compact theory, which viewed the document as emanating from the several states instead of a unitary "People" of the United States, any grant of power to the federal government should be narrowly construed to preserve the independence of the sovereign states.⁸ As an alternative theory, Story cited Chief Justice Marshall's "forcibly stated" opinion in *McCulloch*⁹ and his own reasoning in *Martin v. Hunter's Lessee*,¹⁰ which declared "[t]he constitution of the United States ... was ordained and established, not by the *states* in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States."¹¹ Instead of strict construction, Story's reading of the Constitution called for a broad construction of federal powers in order to best serve the (national) purposes of the sovereign people of the United States.¹²

Story's *Commentaries* has been celebrated as among the most scholarly and influential of the constitutional treatises emerging from nineteenth-century America. In his magisterial *The Marshall Court and Cultural Change*, G. Edward White devoted substantial attention to Story's *Commentaries* and his dismantling of the Jeffersonian compact theory of constitutional interpretation.¹³ According to Nowak and Rotunda in their introduction to the abridged version of the *Commentaries*, "[t]he passage of time has vindicated Story's view regarding the basic role of the Constitution."¹⁴ In fact, most scholars today treat Story's work as an

7. See 1 STORY, *supra* note 1, at 279-343.

8. See G. EDWARD WHITE, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 487-90 (1988) (discussing nineteenth-century compact theory); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 927-35 (1985) (describing compact theory and its historical basis).

9. 1 STORY, *supra* note 1, at 400 n.2.

10. 14 U.S. (1 Wheat.) 304, 324 (1816).

11. 1 STORY, *supra* note 1, at 400 (quoting *Martin*, 14 U.S. (1 Wheat.) at 324); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) ("The government of the Union ... is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

12. 1 STORY, *supra* note 1, at 406-07.

13. See WHITE, *supra* note 8, at 95-156.

14. Ronald D. Rotunda & John E. Nowak, *Introduction to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION*, at xiv (Carolina Academic Press abr. ed. 1987) (1833).

exemplary and prescient source of early constitutional understanding. As R. Kent Newmyer asserted, Story's *Commentaries* "were on the winning side of history."¹⁵

Given the traditional status accorded to his treatise on the Constitution, it may come as a surprise to learn that his efforts to bury strict construction and establish a wholly nationalist reading of the Constitution ended in failure. Even as he wrote, the jurisprudence of the Marshall Court was under fire, at one point compelling the Chief Justice to publicly defend his opinions in a series of anonymous essays.¹⁶ Marshall's attempts to deepen the nationalist reading of the Constitution first articulated in *McCulloch*, *Cohens v. Virginia*, and *Gibbons v. Ogden*, however, caused a backlash in state assemblies, who responded by proposing constitutional amendments to cabin the seemingly unchecked power of the Supreme Court.¹⁷ By the time Story wrote his *Commentaries*,¹⁸ the country was embroiled in a full-blown state nullification crisis, and the Supreme Court had begun backing away from its earlier expansionist reading of federal power.¹⁹ Within a few years, Story would find himself a lone dissenter, futilely invoking the ghost of John Marshall as the majority of the Court moved toward a more federalist vision of federal power and state autonomy.²⁰ Although Justice Story would receive a final opportunity to reassert a nationalist vision of the Constitution prior to the Civil War,²¹ the

15. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 195 (1985).

16. See John Marshall, *A Friend to the Union*, PHILA. UNION, Apr. 24-28, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 78-105 (Gerald Gunther ed., 1969); John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, June 30-July 15, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra*, at 155-214.

17. See DWIGHT WILEY JESSUP, *REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809-1835*, at 194-261 (1987).

18. For reaction to the publication of Story's *Commentaries*, see Powell, *supra* note 5, at 1285. Story knew that his defense of the Marshall Court would be controversial. See WHITE, *supra* note 8, at 100.

19. See, e.g., *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251-52 (1829); see also *infra* notes 221-45 and accompanying text.

20. See *Miln*, 36 U.S. (11 Pet.) at 139, 153-54.

21. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 624-25 (1842) (rejecting as unconstitutional state legislation that interfered with a slave owner's right of ownership).

future of nineteenth-century constitutional law belonged to the federalist rule of strict construction. Marshallian nationalism would all but disappear from constitutional jurisprudence for the next one hundred years, surpassed by the state-protective theory of constitutional interpretation.²²

Today, the opinions of the Supreme Court echo the theory of strict construction first presented in works like St. George Tucker's *View of the Constitution* and James Madison's *Report on the Alien and Sedition Acts*. Cases like *Gregory v. Ashcroft*,²³ *New York v. United States*,²⁴ *United States v. Lopez*,²⁵ *Printz v. United States*,²⁶ *Alden v. Maine*,²⁷ and *United States v. Morrison*²⁸ all share a common rule of interpretation: federal power must be narrowly construed in order to prevent undue interference with matters best left under state control. In the words of St. George Tucker, the Constitution "is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question."²⁹

22. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *The Civil Rights Cases*, 109 U.S. 3 (1883); *The Slaughter-House Cases*, 83 U.S. 36 (1873); *Miln*, 36 U.S. (11 Pet.) at 102; *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Willson*, 27 U.S. (2 Pet.) at 245. Other constitutional historians have noticed how Marshall's approach to the Constitution seems to fit the modern era better than it fit its own. See, e.g., Powell, *supra* note 5, at 1314 ("The constitutional vision presented in [Story's] *Commentaries* is a curiously modern one").

23. 501 U.S. 452, 463 (1991) (upholding a state's right to establish age limits for state judges).

24. 505 U.S. 144, 166-69 (1992) (overturning a portion of a 1985 congressional waste act because it was inconsistent with the Constitution's distribution of power between the states and the federal government).

25. 514 U.S. 549, 561 (1995) (overturning the Gun Free School Zones Act because it exceeded Congress's Commerce Clause authority).

26. 521 U.S. 898, 928 (1997) (overturning background-check requirement of the Brady Act because it intruded on state sovereignty).

27. 527 U.S. 706, 712-13 (1999) (holding that Congress may not force state courts to hear cases from which they are immune under the Eleventh Amendment).

28. 529 U.S. 598, 607-13 (2000) (holding that the Commerce Clause does not govern gender-motivated crimes of violence).

29. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 151. Neither has Tucker's compact theory of the Constitution disappeared from view. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 850 n.2 (1995) (Thomas, J., dissenting) (arguing that states may not alter congressional qualifications set forth in the Constitution); see also David Thomas König, *St. George Tucker and the Limits of States' Rights Constitutionalism: Understanding the Federal Compact in the Early Republic*, 47 WM. & MARY L. REV. 1279 (2006) (reevaluating the conventional portrayal of Tucker's understanding of the federal compact). Although the most

While the Supreme Court's current narrow construction of federal power appears to be built on the Tenth Amendment,³⁰ its approach goes well beyond that Amendment's simple declaration that all powers not delegated are reserved. The fact that all nondelegated powers are reserved tells us nothing about how broadly to interpret those powers that *are* delegated.³¹ The apparent lack of textual justification for the Rehnquist Court's rule of narrow construction has provided fodder for critics of the Court's federalism jurisprudence.³² Even Justice O'Connor conceded that the Tenth Amendment more *suggests* than demands the Court's federalist rule of construction.³³ Her concession seems to vindicate Justice Oliver

recent decisions of the Court might seem to limit the potential impact of cases like *Morrison* and *Lopez*, the Court continues to follow the principle of limited federal power articulated in those cases. See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2209-16 (2005) (upholding federal power to prohibit state-authorized noncommercial use of marijuana for medicinal purposes); *Tennessee v. Lane*, 124 S. Ct. 1978, 1984-92 (2004) (upholding federal power to require states to provide handicapped access to state courts).

30. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). According to Justice O'Connor in the seminal "Federalism Revolution" case, *Gregory v. Ashcroft*, 501 U.S. 452 (1991),

[t]he Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Id. at 457-58 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

31. As the Supreme Court noted in *United States v. Darby*, 312 U.S. 100, 124 (1941), "[t]he amendment states but a truism that all is retained which has not been surrendered."

32. See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 151-52 (2002); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 287-93 (2000); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 850-51 (1999); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 903-09 (1994).

33. See *New York v. United States*, 505 U.S. 144, 156-57 (1992) (O'Connor, J.)

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself.... Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Wendell Holmes's derisive comment that limiting federal power to preserve state autonomy seems to be based on "some invisible radiation from the general terms of the Tenth Amendment."³⁴

St. George Tucker, however, would have vigorously rejected this criticism.³⁵ To him, strict construction provided not only the best reading of a document that owed its very existence to the people of the several states; such a reading was positively demanded by its text.³⁶ Any reading of federal power that unduly interfered with local self-government violated the people's retained rights as declared by the Necessary and Proper Clause, as well as the Ninth and Tenth Amendments.³⁷ Tucker shared this federalist reading of the Ninth and Tenth Amendments with both the amendments' author, James Madison, and Supreme Court Justice Joseph Story.³⁸

Although the original federalist understanding of the Ninth Amendment has been forgotten (until recently),³⁹ it played a key role in St. George Tucker's explanation of why the Constitution demands strict construction of federal power. Often associated today with attempts to deny individual rights, political players in Tucker's day asserted the rule of strict construction to oppose the Alien and Sedition Acts and, as the national struggle over slavery deepened, the Fugitive Slave Act (albeit unsuccessfully).⁴⁰ In fact, throughout the nineteenth and early twentieth century, the Ninth and Tenth Amendments jointly served to preserve the people's retained right

Id.; see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) ("The spirit of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.").

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

35. See *infra* Part II.A.

36. See *infra* Part II.A.

37. See *infra* Part II.A.

38. See *infra* Part II.A.

39. For a discussion of newly uncovered historical evidence regarding the Ninth Amendment, see Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) [hereinafter Lash, *Lost Jurisprudence*] and Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) [hereinafter Lash, *Original Meaning*].

40. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 600-02 (1842) (reproducing the argument of Pennsylvania's Attorney General, Ovid F. Johnson, who claimed that in the context of slavery the Ninth and Tenth Amendments called for a limited reading of federal power that preserved the retained powers of the states).

to local self-government.⁴¹ Although the rule of strict construction lost judicial support during the New Deal, it reappeared in the federalist jurisprudence of the Rehnquist Court.⁴² Most recently, federal courts have strictly construed federal power in order to preserve the right of Californians to authorize medicinal use of marijuana⁴³ and the right to physician-assisted suicide.⁴⁴ Thus, the time seems ripe for a reassessment of the textual and historical roots of the rule of strict construction and its first scholarly articulation in St. George Tucker's *View of the Constitution*.

I begin by exploring the textual roots of Tucker's rule, focusing on the drafting, adoption, and early application of the Ninth and Tenth Amendments. Next, I discuss the most serious challenges to Tucker's rule: John Marshall's nationalist reading of the Constitution and Joseph Story's *Commentaries on the Constitution*. The penultimate section looks at the rollback of Marshallian nationalism and the restoration of the rule of strict construction that occurred when Chief Justice Taney took the reins of the Supreme Court. The Article concludes with an acknowledgment of the remarkable longevity of Tucker's Rule.

I. THE RULE OF STRICT CONSTRUCTION

In the appendix to his edition of Blackstone's *Commentaries*, St. George Tucker added a series of essays on American constitutional law.⁴⁵ There, he confronted one of the critical constitutional issues in the first republic—the proper rules of constitutional interpretation.⁴⁶ Nationalists, like Alexander Hamilton, read the Constitution as emanating from a unitary mass known as the People of the

41. See *infra* text accompanying notes 240-47.

42. See *infra* text accompanying notes 248-52.

43. *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2003), *rev'd sub nom.*, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

44. *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004), *aff'd sub nom.*, *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

45. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Lawbook Exch. 1996) (1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

46. See, e.g., Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 140 (analyzing the proper rules for interpreting the U.S. Constitution).

United States.⁴⁷ Tucker, on the other hand, saw the Constitution as a compact entered into by the independent sovereign people of the several states.⁴⁸ On this singular distinction turned the issue of how to construe delegated federal power. As independent sovereigns, any agreements entered into by the states should be read with the presumption that the states retained their sovereign powers in all matters not expressly delegated to the federal government. To Tucker, the Constitution itself affirmatively established this presumption and the rule of strict construction through the adoption of the Ninth and Tenth Amendments.

Whether this original compact be considered as merely federal, or social, and national, it is that instrument by which *power is created* on the one hand, and *obedience exacted* on the other. As federal it is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn into question [citing the Tenth Amendment]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government [citing the Ninth and Tenth Amendments].⁴⁹

Tucker believed the Ninth and Tenth Amendments worked together as co-guardians of a federalism-based concept of popular sovereignty.⁵⁰ The Tenth Amendment guarded the people(s) of the

47. See Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 642 n.126 (1999).

48. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 151.

49. *Id.* ed. app. at 151. Tucker also believed the Necessary and Proper Clause called for a limited reading of federal power. See *Woodson v. Randolph* (Va. Gen. Ct. 1800) (Tucker, J.) (unpublished opinion on file at the Huntington Research Library, Randolph-Tucker Family Papers, Part I, mssBR Box 6 (26b)); see also Charles F. Hobson, *St. George Tucker's Law Papers*, 47 WM. & MARY L. REV. 1245, 1275-76 & n.217 (2006) (describing Tucker's unpublished minority opinion, which gave an expansive reading of the powers reserved to the states); *infra* note 155.

50. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 441-42 (2004).

several states by ensuring federal power had none but delegated powers.⁵¹ The Ninth Amendment ensured that the powers that *were* delegated would not be construed to extend to matters the people left to independent state control.⁵² Together, the amendments guaranteed "that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."⁵³

Tucker was not the first to describe the Ninth and Tenth Amendments as dual guardians of a federalist Constitution. Despite the pervasive modern view of the Ninth as an expression of unenumerated individual rights,⁵⁴ both the Ninth and Tenth Amendments have their roots in the state ratification conventions, which called for provisions expressly limiting the construction of federal power to preserve the autonomy of the states.⁵⁵ To

51. Lash, *Original Meaning*, *supra* note 39, at 398-99.

52. *Id.*

53. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 154.

54. See CALVIN R. MASSEY, *SILENT RIGHTS* 213 (1995) ("The Ninth Amendment provides the best textual justification for recognition of unenumerated rights."); Randy E. Barnett, *Introduction to THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 41 (Randy Barnett ed., 1989) [hereinafter *THE RIGHTS RETAINED BY THE PEOPLE*] ("[T]he Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty.... [T]he unenumerated rights of the Ninth Amendment that protect individual liberty operate identically to enumerated rights."); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145, 162-67 (Neil L. York ed., 1988); John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 141, 150 (John Kukla ed., 1987) ("[T]he Ninth Amendment stands as a silent sentinel guarding liberties not otherwise named in the Constitution."); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 *CHI.-KENT L. REV.* 239, 240 (1988) ("[T]he amendment announces that there are valid claims of constitutional right which are not explicitly manifest in the liberty-bearing provisions of the Constitution but which enjoy the same status as do those made explicit in the text."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1166 (1987) ("[B]oth the ninth amendment itself and the debates over other amendments confirm that the founding generation envisioned natural rights beyond those protected by the first eight amendments.... [T]he framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law.").

55. For a comprehensive account of newly discovered historical evidence regarding the federalist roots of the Ninth Amendment, see Lash, *Original Meaning*, *supra* note 39, and Lash, *Lost Jurisprudence*, *supra* note 39.

appreciate the full import of Tucker's textually mandated Rule of Construction then, we must revisit the Founding.

*A. The Origins of the Rule of Strict Construction*⁵⁶

Given that the thirteen "[f]ree and [i]ndependent"⁵⁷ states had existed for more than a decade under the Articles of Confederation, a major issue in the ratification debates inevitably concerned the degree to which the proposed Constitution would diminish (or eradicate) the autonomy of the states.⁵⁸ Despite Federalist assurances to the contrary, Anti-Federalists warned against the potential consolidation of the states under a national government with unlimited power.⁵⁹

Although a sufficient number of states eventually ratified the Constitution, a number of them did so with the understanding that the scope of federal power would be strictly limited.⁶⁰ Several state conventions included statements of principle along with their notice of ratification declaring their understanding that all nondelegated powers were reserved to the states.⁶¹ The New York Convention's proposed amendments, for example, declared:

[T]hat every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not

56. Some of the material in this section derives from Kurt T. Lash, *Madison's "Celebrated Report" of 1800: Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165 (2006).

57. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 356 (1969) (describing how the states "jealously guarded their independence and sovereignty").

58. See WOOD, *supra* note 57, at 532-36.

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

60. See, e.g., Amendments to the United States Constitution Proposed by State Ratification Conventions: Massachusetts, *reprinted in* THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 54, at 353.

61. See, e.g., *id.* at 379-438. This principle was originally declared in the Articles of Confederation. U.S. ARTICLES OF CONFEDERATION OF 1781, art. II.

imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.⁶²

Other states, not content with a declaration of assumed principles, ratified the Constitution on the condition that specific amendments be added as quickly as practicable.⁶³ Several states submitted lists of proposed amendments, all of which included a clause expressly declaring the reserved powers and rights of the states. Virginia's proposal, for example, declared, "[t]hat each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the [Federal] Government."⁶⁴

The Federalists who advocated the adoption of the Constitution had no objection to adding such an amendment. After all, in the state ratification conventions, they had argued that the structure of the Constitution *necessarily* implied a principle of limited enumerated federal power.⁶⁵ Madison himself had written in *Federalist No.*

62. Amendments to the United States Constitution Proposed by State Ratifying Conventions: New York (July 26, 1788), in *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 54, at 356; see also 1 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 329 (Wash., D.C. 1836).

Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration,—We, the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.

Id.

63. See, e.g., Amendments Proposed to the Constitution by the Virginia Convention (June 27, 1788), in 3 ELLIOT, *supra* note 62, at 661.

64. Amendments Proposed by the Virginia Convention (June 27, 1788), reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 675 (Neil H. Cogan ed., 1997) [hereinafter *THE COMPLETE BILL OF RIGHTS*]. James Madison was a member of the committee that drafted the Virginia proposal, and he later noted the role the Virginia proposal played in his draft of the Bill of Rights. Letter from James Madison to George Washington (Nov. 20, 1789), in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1185 (Bernard Schwartz ed., 1971) [hereinafter *BILL OF RIGHTS*].

65. See, e.g., Remarks of James Madison at the Virginia Convention (June 4 & 11, 1788), 3 ELLIOT, *supra* note 62, at 34-35, 258-59.

45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."⁶⁶ Consequently, no opposition arose when Madison proposed an amendment declaring that "[t]he powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."⁶⁷ Madison's remarks after introducing the provision to the House appear sedate—if not tepid:

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.⁶⁸

Madison clearly considered the clause less than essential to the Constitution. In fact, even the most vigorous proponents of states' rights lacked enthusiasm for the proposed Tenth Amendment. They did not object to Madison's draft, nor did they believe the principle was unimportant. It was just, as Edmund Randolph put it, the Tenth Amendment seemed unlikely to have any "real effect."⁶⁹ Everyone already assumed all nondelegated powers remained with

66. THE FEDERALIST NO. 45 (James Madison), *supra* note 30, at 292.

67. Amendments to the Constitution Proposed by the House of Representatives (June 8, 1789), reprinted in 5 THE FOUNDERS' CONSTITUTION 26 (Philip B. Kurland & Ralph Lerner eds., 1987).

68. *Id.* at 28.

69. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 223 (Fred B. Rothman 1999) (1894) [hereinafter DOCUMENTARY HISTORY]. According to Randolph,

[t]he twelfth [now Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is delegated. It accords pretty nearly with what our convention proposed; but being once adopted, it may produce new matter for the cavils of the designing.

Id.

the states as evidenced by the presumed understanding of state ratifying conventions like New York.⁷⁰

The problem was not whether the proposed government constituted one of enumerated powers, but how to prevent the undue expansion of those powers.⁷¹ Federal courts, as branches of the federal government, would likely construe Congress's enumerated powers in favor of federal authority.⁷² The Necessary and Proper Clause, while it might suggest a limitation on federal power to means actually "necessary" to accomplish an enumerated end, could just as easily be read to expand the range of federal power.⁷³ Nor would the addition of express restrictions on federal power necessarily solve the problem. Indeed, adding such restrictions could compound the problem since enumerating certain rights might be construed to allow federal power to extend to all matters except those expressly prohibited.⁷⁴ What the Constitution needed was a

70. Amendments to the United States Constitution Proposed by State Ratifying Conventions: New York (July 26, 1788), in *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 54, at 356. Adding the final phrase "or to the people" raised objections that the Tenth Amendment actually *undermined* the principle that all nondelegated powers were reserved to the states. Entry of Dec. 12, 1789, Journal of the Senate of the Commonwealth of Virginia 50, 64 (Richmond 1828).

71. For a discussion of Anti-Federalist concerns about judicial interpretation of the proposed Constitution, see Powell, *supra* note 8, at 905-07 (1985).

72. For example, according to "Brutus":

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

Brutus XI (Jan. 31, 1788), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST* 417, 420-21 (Herbert J. Storing ed., 1981); *see also* Lash, *Original Meaning*, *supra* note 39, at 351-55 (discussing "antifederalist fears regarding the potentially destructive power of the proposed federal courts").

73. *See* Brutus V (Dec. 13, 1787), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 72, at 389.

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

rule preventing unduly broad construction of enumerated federal authority—a means of ensuring that the people of the individual states would retain significant autonomy over those matters thought best left to local control.

A number of state ratifying conventions provided proposals of just such a rule of interpretation—proposals which Madison relied on when he drafted his own version of the Ninth Amendment.⁷⁵ The Virginia ratifying convention, for example, proposed the following amendment (which Madison himself helped draft):⁷⁶

That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.⁷⁷

Compare this with the original version of the Ninth Amendment that Madison presented to the House of Representatives:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁷⁸

contained in it.

Statement of James Iredell (July 29, 1788), in 4 ELLIOT, *supra* note 62, at 167; see also James Madison, Speech in Congress Proposing Constitutional Amendments, in WRITINGS 448-49 (Jack N. Rakove ed., 1999) (rejecting the notion that a Bill of Rights would endow the Federal government with all powers not therein enumerated). In response, the Anti-Federalists pointed out that the Constitution already contained a list of specific restrictions on federal power in Article I, Section 9—thus making the proposed Constitution dangerous according to the Federalists' own argument. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28-30 (1999).

75. See, e.g., Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983), reprinted in THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 54, at 276.

76. See *supra* note 64.

77. Amendments Proposed by the Virginia Convention (June 27, 1788), *supra* note 64, at 675.

78. Amendments to the Constitution Proposed by the House of Representatives (June 8, 1789), *supra* note 67, at 25.

Madison's version of the Ninth Amendment echoed the Virginia proposal⁷⁹ and satisfied the calls by other state conventions for a provision preventing the undue extension of federal power.⁸⁰ It also prevented any implied extension of federal power arising from the addition of specific enumerated rights—including those in Article I, Section 9.⁸¹

The House referred Madison's proposals to a Select Committee (which, once again, included Madison)⁸² who deleted the language expressly limiting the extension of federal power.⁸³ This alteration raised concerns in Virginia, where Edmund Randolph feared his state's call for a provision limiting the construction of federal power had gone unheeded.⁸⁴ Madison, however, believed the alteration in language had not altered the substantive meaning of the clause, for protecting the retained rights of the people in effect prohibited the constructive enlargement of federal power. In a letter to George Washington discussing Randolph's concerns about the Ninth Amendment, Madison explained, "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended."⁸⁵

According to Madison, the final draft of the Ninth Amendment still expressed the original draft's principle of limited federal power—only now expressed in the language of retained rights.⁸⁶

79. Caplan, *supra* note 75, at 276.

80. *See, e.g.*, Amendments to the United States Constitution Proposed by State Ratification Conventions: New York, *supra* note 62, at 356.

81. *See, e.g.*, Caplan, *supra* note 75, at 276-77.

82. *Id.* at 279-80.

83. The language added to the Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

84. *See, e.g.*, Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 69, at 219.

85. Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 69, at 222.

86. Later constitutional commentators would agree with Madison that the Ninth both preserved retained rights and prevented constructive expansion of federal power. For example, in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Joseph Story wrote:

In regard to another suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say, that such a course of reasoning could never

In this way, the Ninth acted as a key companion to the Tenth Amendment. Under the Tenth, Congress had only enumerated powers. Under the Ninth, those enumerated powers could not be construed in a manner denying or disparaging rights retained by the people.⁸⁷

Madison publicly reaffirmed his power-constraining interpretation of the Ninth and Tenth Amendments while the Bill of Rights remained pending in the critical state of Virginia.⁸⁸ In a speech before the House of Representatives opposing the Bank of the United States, Madison argued that only an unduly broad interpretation of federal power would allow Congress to charter a national bank.⁸⁹ Recounting the effort to ratify the Constitution, Madison reminded the House that Federalists had assured the state ratifying conventions that the Constitution would not be construed in such a latitudinarian manner. The state conventions, in turn, had embraced this assurance through declarations and proposed explanatory amendments.⁹⁰ If this well-known recent history were not enough, Madison suggested the House simply refer to the rules of interpretation declared by the pending Ninth and Tenth Amendments (referred to as the "Eleventh" and "Twelfth"⁹¹):

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

2 STORY, *supra* note 1, at 659 (citing U.S. CONST. amend. IX).

87. See Lash, *Original Meaning*, *supra* note 39, at 398-99.

88. Objections regarding the final version of the Ninth Amendment led Edmund Randolph to halt Virginia's efforts to ratify the Bill of Rights. Anti-Federalists managed to exploit Randolph's initial concerns (which he overcame) and delay ratification of the Bill of Rights for two years. See 5 DOCUMENTARY HISTORY, *supra* note 69, at 219-31 (1894) (containing the correspondence among James Madison, Hardin Burnley, and George Washington discussing the Virginia debate).

89. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in WRITINGS, *supra* note 74, at 480-90.

90. *Id.* at 488-89.

91. This reflects an early convention whereby the first eight amendments were referred to according to their place on an original list of twelve proposed amendments. What we know as the Ninth and Tenth Amendments were the eleventh and twelfth on the list. See, e.g., Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY

The explanatory amendments proposed by Congress themselves, at least, would be good authority with [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for.... He read several of the articles proposed, remarking particularly on the 11th. and 12th. the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.⁹²

A few months after Madison gave his Bank speech, Virginia voted in favor of the last ten of twelve proposed amendments and the Bill of Rights became part of our Constitution.⁹³ Although no evidence suggests Madison's speech tipped the scale in favor of ratification, the Virginia Assembly was entitled to rely on Madison's public explanation of the Federalist nature of the Ninth and Tenth Amendments.⁹⁴ Madison's speech remained well known for years. Newspapers reprinted it decades later along with the accolade of "the most luminous exposition" on the Bank question the writer had

HISTORY, *supra* note 69, at 222-23.

92. Madison, *supra* note 89, at 489.

93. See Letters to George Washington Announcing the Ratification of the Amendments by the Virginia General Assembly, in 2 BILL OF RIGHTS, *supra* note 64, at 1201-02.

94. Although Madison failed to stop the passage of the first Bank bill, his speech continued to resonate with advocates of limited federal power. The *Richmond Enquirer* reprinted the speech in its entirety when the charter was up for renewal in 1810. ENQUIRER (Richmond), Jan. 4, 1810, at 4. When Vice President George Clinton cast the tiebreaking vote in the Senate against renewing the Bank's charter, he explained that "[t]he power to create corporations is not expressly granted; it is a high attribute of sovereignty and in its nature not accessorial or derivative by implication, but primary and independent." 22 ANNALS OF CONG. 346 (1811) (statement of George Clinton, Vice President of the United States). Thus, if such power was found to be necessary, the Constitution ought to be amended to allow it. This argument, of course, is expressly laid out in Madison's 1791 speech on the topic. Madison, *supra* note 89, at 480-90. Following the Supreme Court's decision upholding the Second Bank of the United States in *McCulloch v. Maryland*, St. George Tucker added a note to his revised edition of Blackstone's *Commentaries* acknowledging the decision, but directing his readers to Madison's speech. See *infra* note 98; see also Spencer Roane, Letters to the Editor from Hampden, ENQUIRER (Richmond), June 15 & 18, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 123, 133 (repeating Clinton's argument that incidental powers must be subordinate to enumerated ends, and later referring to Madison's "celebrated speech against the first bank law").

ever seen.⁹⁵ St. George Tucker himself planned to add a reference to it in the 1820s revised edition of his *View on the Constitution*.⁹⁶

In his Bank speech, Madison presented the Ninth Amendment as a rule of construction that preserves the principle enshrined in the Tenth.⁹⁷ In fact, without such a rule against "misconstruction," the declaratory Tenth Amendment threatened to become an empty promise—as other Founders recognized. Thomas Jefferson, in his own opposition to the Bank charter, argued that the "latitude of construction" adopted by the Bank's proponents would destroy the principle of enumerated powers declared in the Tenth Amendment:

I consider the foundation of the Constitution as laid on this ground that "all powers not delegated to the U.S. by the

95. Letters to the Editor, *ENQUIRER* (Richmond), Jan. 4, 1810, at 4. The prefatory note reads:

Sir,

I enclose you a paper containing Mr. Madison's speech on the original establishment of the Bank of the United States.—Without debating much on the general policy of the Banking system, as it affects the commerce and wealth of our country, it goes at once into an investigation of the subject, on the broad and important basis of its Constitutionality. As such, it is the most luminous exposition which I have ever seen; & as the subject will probably be again agitated, during the present session of Congress, it may not be improper, at this time, to re-publish this speech. It will show the light in which this matter was seen nineteen years ago, and in which it ought to be reviewed at this day, since the Constitution is *still* silent, as it relates to the power of granting charters of incorporation.

Id.

96. See St. George Tucker, Notes for Revised Version of 1 Tucker's *Blackstone* (n.d.), in *View of the Constitution*, *supra* note 6, ed. app. at 287 (handwritten notes on facing pages of Tucker's personal copy of Tucker's *Blackstone*, located at the Earl Gregg Swem Library at The College of William and Mary). The following was to be added as note * to his discussion of the Necessary and Proper Clause:

+ See also, the late President Madison's Speech in Congress in February 1791 against the Bill for establishing a Bank, published in the *Richmond Enquirer*, vol. 6: no:73. January 4, 1810. But the question on the right of Congress to establish a Bank, with branches in the several states is put at rest, by the Decision of the Supreme Court of the United States, *unanimously*, in the case of *McCulloch vs the State of Maryland* March 1819. "That the Act to incorporate the Bank of the U.S. is a law made in pursuance of the Constitution, and is a part of the supreme law of the land." and also, "That the Law passed by the Legislature of Maryland, imposing a Tax on the Bank of the U.S. is unconstitutional and void."

Id.

97. Madison, *supra* note 89, at 489.

Constitution, not prohibited by it to the states, are reserved to the states or to the people...." If such a latitude of construction be allowed to [the phrase "necessary and proper"] as to give any non-enumerated power, it will go to every one, for these [sic] is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed.... The present is the case of a right remaining exclusively with the states...."⁹⁸

Echoing Jefferson's concerns, Attorney General Edmund Randolph observed that, although governments without constitutions might "claim a latitude of power not always easy to ... determine[]," the federal government remained one of enumerated power as "confessed by Congress, in the twelfth amendment."⁹⁹ Canvassing the various claimed sources of power for the Bank, Randolph concluded:

[A] similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation.... [L]et it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction which they arrogate will not terminate in an unlimited power in Congress?¹⁰⁰

Both Jefferson and Randolph read the Tenth Amendment as establishing a federal government of enumerated powers with all nondelegated powers reserved to the states. Unduly latitudinarian construction of enumerated federal power, however, promised to undermine this arrangement by creating a government of essentially unlimited (though enumerated) power. Accordingly, Randolph and Jefferson advocated a rule of strict construction to preserve the principle announced by the Tenth Amendment. The rule preserves the principle.

98. THOMAS JEFFERSON, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), reprinted in 19 THE PAPERS OF THOMAS JEFFERSON 275, 276-80 (Julian P. Boyd ed., 1974) (emphasis omitted).

99. Letter from Edmund Randolph to George Washington (Feb. 12, 1791), in H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 4 (1999) (discussing the constitutionality of the Bank Bill).

100. *Id.* at 7.

Madison, of course, read the Ninth Amendment as expressing just such a rule, and other early constitutional commentators agreed.¹⁰¹ In the very first Supreme Court opinion discussing the Ninth Amendment, Justice Story followed the Madisonian reading of the Ninth and used it to support a limited construction of federal power. In the 1820 case *Houston v. Moore*,¹⁰² Justice Story wrote that the federal power to discipline the militia should not be read as exclusive, so long as state rules on militia discipline did not conflict with any federal statute.¹⁰³ Following the early convention of referring to the Ninth as the "eleventh" amendment,¹⁰⁴ Story declared "[i]n all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning."¹⁰⁵

In his 1803 *View of the Constitution*, St. George Tucker also presented the Ninth Amendment as supporting a federalist rule of strict construction.¹⁰⁶ Constitutional commentator John Taylor did likewise.¹⁰⁷ In fact, bench and bar for the next one hundred and fifty years cited the Ninth and Tenth Amendments as dual guardians of federalism.¹⁰⁸

101. See, e.g., Lash, *Original Meaning*, *supra* note 39, at 398-99.

102. 18 U.S. (5 Wheat.) 1 (1820).

103. *Id.* at 51-52 (Story, J., dissenting).

104. The Ninth and Tenth Amendments were eleventh and twelfth on the list submitted to the states for ratification. See *supra* note 91.

105. *Houston*, 18 U.S. (5 Wheat.) at 49.

106. See Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 307-08.

107. In his *Construction Construed and Constitutions Vindicated*, political writer John Taylor declared:

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

JOHN TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 46 (Da Capo Press 1970) (1820).

108. The jurisprudence is presented in Lash, *Lost Jurisprudence*, *supra* note 39.

*B. The Rise of the Tenth Amendment*¹⁰⁹

Not long after their mutual adoption, the Tenth Amendment overshadowed the Ninth as an expression of limited federal power. Although it began as a federalist rule of construction, the Ninth played second fiddle to the Tenth as a constitutional expression of retained states' rights throughout the nineteenth century.¹¹⁰ Tucker's *Commentaries* cite both clauses in support of a rule of strict construction, but Tucker himself often focused on the Tenth as the primary expression of retained state autonomy.¹¹¹ Part of understanding the history of Tucker's rule of strict construction then, involves understanding how the Tenth—a clause originally dismissed as having "little effect"—became the primary expression of limited federal power. Ironically, even though Madison believed the Ninth Amendment served as a rule of strict construction, it appears that his own 1800 Report on the Alien and Sedition Acts established the Tenth Amendment as the central constitutional text supporting a limited reading of federal power.¹¹²

Enacted in the midst of growing tensions with France,¹¹³ the Sedition Act made the common law offense of seditious libel a federal crime,¹¹⁴ and, in a move sure to inflame an already politically charged atmosphere,¹¹⁵ Federalist judges enforced the Act against critics of the Adams administration.¹¹⁶ Using the protected forums of the state assemblies, Thomas Jefferson and James Madison drafted and arranged for the presentation of the Kentucky and Virginia Resolutions that declared that the Alien and Sedition

109. A more comprehensive discussion of the material in this Section can be found in Lash, *supra* note 56.

110. See, e.g., *infra* notes 113-29 and accompanying text.

111. See *infra* Part II.A.

112. See *infra* notes 113-29 and accompanying text.

113. The Alien and Sedition Acts were composed of four statutes: the Alien Act, the Alien Enemies Act, the Naturalization Act, and the Sedition Act. The texts of these Acts are located in 9 ANNALS OF CONG. 3739-42, 3744-46, 3753-54, 3776-77 (1798). For a general discussion of the "XYZ Affair" and the Federalist response, see ALBERT HALL BOWMAN, *THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA* 306-33 (1974).

114. William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 329-30 (2004) (describing the Sedition Act).

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

116. See, e.g., *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

Acts were an unconstitutional exercise of federal power.¹¹⁷ The Resolutions proved controversial, prompting Madison to write his *Report on the Alien and Sedition Acts*—essentially a defense of the doctrines articulated in his Virginia Resolutions.¹¹⁸ There, Madison explained that Congress's attempt to exercise unenumerated common law powers violated the constitutional principle that

powers not given to the government, were withheld from it; and that if any doubt could have existed on this subject, under the original text of the Constitution, it is removed as far as words could remove it, by the 12th amendment ... which expressly declares, "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."¹¹⁹

Ultimately, the Democratic-Republican Party of Jefferson and Madison defeated the Federalists in the election of 1800, due in no small part to popular reaction against the Sedition Act.¹²⁰ Madison's *Report of 1800*,¹²¹ which Spencer Roane referred to as the *Magna Charta* of the Republicans,¹²² became a foundational document for nineteenth-century advocates of states' rights.¹²³ The Report proved so influential that its Tenth Amendment-based argument against

117. See Thomas Jefferson, Kentucky Resolutions (Nov. 1798), reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 67, at 131-35; James Madison, Virginia Resolutions, reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 67, at 135-36.

118. JAMES MADISON, *Report on the Alien and Sedition Acts*, reprinted in WRITINGS, *supra* note 74, at 608.

119. *Id.* at 610. According to John Marshall, Madison and the opponents of the Sedition Act had mischaracterized the arguments in support of federal power. See Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in 6 THE PAPERS OF JOHN MARSHALL 23 (Charles F. Hobson ed., 1990).

120. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1500-03 (1987). According to Professor Amar, the popular response to the Acts, of which the Virginia and Kentucky Resolutions were a major part, "effectively transformed the national election of 1800 into a popular referendum on these bills." *Id.* at 1502.

121. See, e.g., *Stunt v. The Steamboat Ohio*, 3 Ohio Dec. Reprint 362 (1855), available at 1855 WL 3878, at *36-37.

122. Spencer Roane, *Letter to the Editor from Hampden*, ENQUIRER (Richmond), June 11, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 113.

123. See CORNELL, *supra* note 59, at 245 (explaining how the *Report of 1800* "would occupy a central place in the canon of opposition thought," and describing Madison's report as the "framework" upon which Anti-Federalist ideas could be directed at Federalists).

the Acts effectively eclipsed the Ninth Amendment as the core constitutional provision requiring the strict construction of federal power.

It is difficult to overstate the influence of Madison's *Report of 1800* among states' rights theorists in the decades between Jefferson's election and the Civil War.¹²⁴ St. George Tucker referred to it numerous times in his 1803 constitutional treatise, *A View of the Constitution of the United States*, repeating in particular Madison's claim that Congress had exceeded the bounds established by the Tenth Amendment.¹²⁵ The state legislatures that resisted the nationalist doctrine of *McCulloch v. Maryland* quoted it in their remonstrances as the "true text-book of republican principles."¹²⁶ When Jonathan Elliot compiled materials for his magisterial 1836 work, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, he included "Madison's Report on the Virginia Resolutions," among his few post-adoption sources.¹²⁷ As Chief Justice Marshall wrote Justice Story in 1833, Madison's Report along with the Virginia and Kentucky Resolutions "constitute the creed of every politician, who hopes to rise in Virginia; and to question them ... is deemed political sacrilege."¹²⁸

As a canonical document to Republican advocates of states' rights, Madison's Report established the Tenth Amendment as the key text justifying a strict reading of federal power. Moreover, the Tenth Amendment's explicit reference to the reserved powers of the *states* made it more rhetorically acceptable than the Ninth to those who viewed the Constitution as a compact between the federal government and the individual states (and not as emanating from the

124. In a separate article, I develop more fully Madison's *Report of 1800* and its effect on Tenth Amendment jurisprudence. See Lash, *supra* note 56.

125. See Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 287; see also *id.* ed. app. at 288, 302-03, 307 (describing the proper bounds of the Tenth Amendment and rejecting the Madisonian view).

126. See, e.g., Report of the Joint Committee of the General Assembly of the Ohio Legislature on the Bank of the United States, 37 ANNALS OF CONG. 1685, 1693 (1820).

127. 4 ELLIOT, *supra* note 62, at 546; see also THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99; WITH JEFFERSON'S ORIGINAL DRAUGHT THEREOF. ALSO, MADISON'S REPORT, CALHOUN'S ADDRESS, RESOLUTIONS OF THE SEVERAL STATES IN RELATION TO STATE RIGHTS. WITH OTHER DOCUMENTS IN SUPPORT OF THE JEFFERSONIAN DOCTRINES OF '98 (Jonathan Elliot, ed., 1832).

128. Letter from Marshall to Story (July 31, 1833), in 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: THE BUILDING OF THE NATION, 1815-1835, at 577 (1919).

undifferentiated American people).¹²⁹ Madison's Report, however, did not wholly displace the Ninth Amendment as the textual basis for strict construction of federal power.¹³⁰ Instead, it cemented the Tenth in popular and professional understanding as a text suggesting, if not demanding, the strict interpretation of enumerated federal power. St. George Tucker wrote his *View of the Constitution* in 1803, only three years after Madison wrote his Report. Not surprisingly, Tucker rooted his rule of strict construction in both the Ninth and Tenth Amendments.

II. TUCKER'S RULE AND MARSHALL'S NATIONALISM

A. Tucker's Rule of Construction

The first volume of Tucker's *Blackstone* presents the nature of English law followed by an appendix with essays on the American Constitution.¹³¹ Beginning with the key concept of sovereignty, Tucker's opening essay on American constitutional law distinguishes the parliamentary sovereignty of England with the popular sovereignty of the American people.¹³² Later, in his discussion of the history of Virginia, Tucker recalls how the colonial assemblies

129. For a discussion of compact theory and the role it played in early-nineteenth-century constitutional debate, see WHITE, *supra* note 8, at 487-94.

130. See the many, many cases citing the Ninth Amendment as a federalist rule of construction in Lash, *Lost Jurisprudence*, *supra* note 39.

131. 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 45.

132. According to Tucker:

[T]he American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers.... The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to unite in the same social bonds This memorable precedent ... led the way to that instrument, by which the union of the confederated states has since been completed, and in which, as we shall hereafter endeavor to sh[ow], the sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority among us, is derived; to wit, the PEOPLE.

St. George Tucker, *Of Sovereignty and Legislature*, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 45, ed. app. at 4 [hereinafter Tucker, *Sovereignty and Legislature*].

defied the crown by continuing to meet after the order to disband, and, by virtue of this very illegality, came to be viewed as conventions of the *people themselves*.¹³³ This American colonial experience, as Gordon Wood explained, gave rise to a distinction between the people and the ordinary operations of government.¹³⁴ According to Tucker,

[a] distinction ... which certainly does exist between the indefinite and unlimited power of the people, in whom the sovereignty of these states, ultimately, substantially, and unquestionably resides, and the definite powers of the congress and state legislatures, which are severally limited to certain and determinate objects, being no more than emanations from the former, where, and *where only*, that legislative essence which constitutes sovereignty can be found.¹³⁵

Tucker premised his entire approach to the Constitution on these opening declarations of popular sovereignty. Following the reasoning of Madison's *Report of 1800*, Tucker presented the Constitution as a compact between the sovereign *people(s)* of the several states.¹³⁶ Since the ratification of the proposed Constitution exceeded the power of the individual state governments due to state constitutional restrictions,

a convention was therefore summoned, in every state by the authority of their respective legislatures, to consider of the propriety of adopting the proposed plan; and their assent made it binding in each state; ... Here then are all the features of an original compact, not only between the body politic of each state, but also between the people of those states in their highest sovereign capacity.¹³⁷

133. St. George Tucker, *Of the Several Forms of Government*, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 45, ed. app. at 36-37 [hereinafter Tucker, *Several Forms of Government*].

134. See WOOD, *supra* note 57, at 18-28.

135. Tucker, *Sovereignty and Legislature*, *supra* note 132, ed. app. at 5-6.

136. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 151.

137. *Id.* ed. app. at 150-51; see also Letter from Madison to Thomas Jefferson (Dec. 29, 1798), in WRITINGS, *supra* note 74, at 591 (distinguishing between the power of the state legislature and the superior power of the people of the state).

Tucker believed the Constitution represented a compact between independent sovereigns—sovereigns whose independence survived ratification.¹³⁸ Echoing the understanding of the state ratification conventions,¹³⁹ Tucker declared that “state governments ... retain every power, jurisdiction, and right not delegated to the United States.”¹⁴⁰ Moreover, in interpreting those powers delegated to the United States, the independent people(s) should not be presumed to have surrendered any aspect of their independence absent express written consent.

For, no free nation can be bound by any law but [its] own will; and where that will is manifested by any written document, ... only according as that will is expressed *in* the instrument by which it binds itself. And as every nation is bound to preserve itself, or, in other words, [its] independence; so no interpretation whereby [its] destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the *most express terms*, given [its] consent to such an interpretation.¹⁴¹

Even after the state ratification debates, the critical issue still remained how to interpret the powers expressly enumerated in the

138. St. George Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 141 (“It is a compact; by which it is distinguished from a charter, or grant.”). Tucker believed that the Articles of Confederation themselves continued to operate to the extent they were not modified by the Constitution. See *Woodson v. Randolph* (Va. Gen. Ct. 1799) (Tucker, J.) (unpublished opinion on file at the Huntington Research Library, Randolph-Tucker Family Papers, Part I, mssBR Box 6 (26 b)). The opinion explains:

The Articles of Confederation have never been *rescinded* by the United States; they have been amended, by enlarging the powers of the federal Government, and by changing its structure; but they have not been *rescinded* or *annulled*. Everything therein contained, which is not altered by the subsequent Act of the States, therefore remains in full force.

Id.

139. See Amendments to the United States Constitution Proposed by State Ratifying Conventions: New York (July 26, 1788), *supra* note 62, at 356.

140. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 141-42.

141. St. George Tucker, *Of the Unwritten, or Common Law, of England; And It's Introduction into, and Authority Within the United American States*, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 45, ed. app. at 36-37 [hereinafter Tucker, *Authority of English Common Law*]; see also Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 143 (“[I]t is a ... maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner whatever but by their own voluntary consent....”).

Constitution. Here, Tucker relied on the Constitution itself as having established the proper rules of interpretation. First, Tucker conceded that certain aspects of the Constitution, such as the federal government's power to act on individual citizens and not just states as a collective body, could suggest that it consolidated the separate peoples of the states into a unitary people of the United States, thus "chang[ing] the nature of the union, from a confederacy, to a consolidation of the states."¹⁴² Under a "consolidation" view of the Constitution, federal power would be broadly construed to allow the attainment of ends previously attributed to state governments—namely, "procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness."¹⁴³

Tucker then pointed out that the Federalists denied just such a reading of federal power in the ratification debates. "[F]riends and supporters of the constitution" dismissed the idea that ratifying the Constitution would consolidate the states.¹⁴⁴ To emphasize his point, Tucker quoted extensively from the Federalist Papers and Madison's explanation that "[t]he proposed constitution ... is in strictness neither a national nor a federal constitution, but a composition of both."¹⁴⁵ According to Tucker, this Madisonian balance between federal and state autonomy had particular implications for the proper interpretation of federal power. This requires an interpretation of federal power that preserves the prerogatives of both state and federal governments, an interpretive mandate declared by the Ninth and Tenth Amendments.¹⁴⁶

Although federal power extends to the individual, all such power should be interpreted with the individual's antecedent obligations to the *state* in mind. Tucker feared that federal law would either conflict with state law (in which case the individual would be unjustifiably bound to obey federal law under the Supremacy Clause), or force the individual to contend with dual obligations on a matter meant to be left under local control.¹⁴⁷ To Tucker, the

142. Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 144-45.

143. *Id.* ed. app. at 144.

144. *Id.* ed. app. at 146.

145. *Id.* ed. app. at 149.

146. See *supra* notes 106-08 and accompanying text.

147. For example, matters involving municipal law, as Tucker explained in his next section.

retained rights of the people included construing federal power to maintain the proper spheres of federal and state authority.¹⁴⁸ The rule of construction guarding this right found textual expression in the Ninth and Tenth Amendments:

Accordingly we find the structure of the government, its several powers and jurisdictions, and the concessions of the several states, generally, pretty accurately defined, and limited. But to guard against encroachments on the powers of the several states, in their politic character, and of the people, both in their individual and sovereign capacity, an amendatory article was added, immediately after the government was organized, declaring; that the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people. [citing the Tenth Amendment]. And, still further, to guard the people against *constructive* usurpations and encroachments on their rights, another article declares; that the enumeration of certain rights in the constitution, shall not be construed to deny, or disparage, others retained by the people. [citing the Ninth Amendment]. The sum of all which appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.¹⁴⁹

Tucker's rule mirrors Madison's reading of the Ninth and Tenth Amendments.¹⁵⁰ The Tenth Amendment, by reserving to the states all nondelegated powers, limits the federal government to those powers expressly enumerated in the Constitution. The Ninth Amendment, on the other hand, guards against "constructive usurpations" or unduly broad interpretations of enumerated federal power. Both amendments guard the rights of the people, whether viewed as a matter of individual liberty or as the collective sovereign right of the people to retain certain matters under the control of local government.¹⁵¹ As Madison insisted in his speech on the

Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 151.

148. *Id.* ed. app. at 154.

149. *Id.* (emphasis added).

150. Lash, *Original Meaning*, *supra* note 39, at 398-99.

151. According to G. Edward White, Tucker believed that "the inalienable rights of man

Bank controversy,¹⁵² and again in his *Report of 1800*,¹⁵³ preventing the undue expansion of federal power was a matter of right since limiting the construction of federal power by definition (necessarily) preserves the retained rights of the people.¹⁵⁴ As a state judge, Tucker willingly enforced this right through the power of judicial review and, on one remarkable occasion four years prior to *Marbury v. Madison*, declared it the province and duty of state courts to invalidate federal legislation in conflict with powers reserved to the states under the Tenth Amendment.¹⁵⁵

Tucker's rule of strict construction of federal power proved influential. His treatise on the Constitution, the first of its kind, became a cited authority in state and federal courts throughout the country in the early decades of the nineteenth century.¹⁵⁶ The rule not only ran counter to broad articulations of federal power such as Alexander Hamilton's defense of the first Bank of the United

preserved in the social compact were associated with the sovereign rights of the states preserved in the federal compact: liberty and state autonomy were linked." WHITE, *supra* note 8, at 489.

152. See *supra* notes 89-95 and accompanying text.

153. See *supra* notes 117-24 and accompanying text.

154. Thus, the rule was negative in its operation: all constructions of the rights enumerated in the Constitution that result in denial or disparagement of other rights are forbidden. U.S. CONST. amend. IX.

155. See *Woodson v. Randolph* (Va. Gen. Ct. 1800) (Tucker, J.) (unpublished opinion on file at the Huntington Research Library, Randolph-Tucker Family Papers, Part I, mssBR Box 6 (26b)). In *Woodson*, Tucker narrowly construed a federal tax on legal papers that prohibited introducing into evidence in "any Court" any paper lacking a stamp indicating that the tax had been paid. *Id.* at 472-76. According to Tucker, the law could not be applied to evidence introduced in state court without violating the Tenth Amendment. Accordingly, he narrowly construed the scope of the statute to not apply to state courts. *Id.* Tucker also declared that he was willing to invalidate the federal law if his limited construction law was unreasonable. *Id.* at 474. In order to justify the power of state courts to invalidate laws that conflict with the Constitution, Tucker wrote an extended dissertation on the reserved powers of the states and the coequal power of the courts to enforce the limits of the Constitution. *Id.* at 465-72. Anticipating a number of arguments that John Marshall would use in *Marbury v. Madison*, Tucker's opinion stands as the first extended discussion and justification of the power of judicial review by any judge, state or federal, prior to *Marbury*.

Tucker's opinion was not reported (since there were no state reporters at the time) and it has been completely unknown prior to this symposium. In preparing our articles for this conference, Professor Charles Hobson and I both independently discovered the unreported opinion; he in the Earl Gregg Swem Library at The College of William and Mary, and I in the Randolph-Tucker collection at the Huntington Research Library. For Hobson's discussion of this interesting case, see Hobson, *supra* note 49, at 1275-76.

156. See, e.g., *Garland v. Harrison*, 35 Va. (3 Leigh) 368, 387 (1837); *Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 125 (1805).

States,¹⁵⁷ it also ran head-on into the views of a Supreme Court Chief Justice who sought to enshrine Hamilton's nationalist views as the law of the land.

B. The Nationalism of John Marshall

1. McCulloch v. Maryland

Despite Hamilton's successful advocacy on behalf of the first Bank of the United States, the institution remained controversial and Congress allowed the Bank's charter to lapse in 1811.¹⁵⁸ When Congress voted to establish the second Bank in 1815, now President Madison vetoed the bill but demurred on the subject of the Bank's constitutionality.¹⁵⁹ When the Bank bill came up again in 1816, however, he reluctantly agreed to sign it.¹⁶⁰ In protest, the Maryland

157. Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), reprinted in 3 THE FOUNDERS' CONSTITUTION, *supra* note 67, at 247-48.

158. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1474 (2001).

159. *See id.*

160. *See id.* Despite doing so, Madison never relinquished his doubts about the method of interpretation required to justify federal power to charter the Bank. *See* Letter from James Madison to Mr. Ingersoll (June 25, 1831), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1829-1836, at 183 (Phila., J.B. Lippincott 1865). Madison acquiesced on the basis of the Bank's usefulness and deference to past precedent. *Id.* at 186 ("A veto from the Executive, under these circumstances, with an admission of the expediency and almost necessity of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."). In fact, as Madison's notes on *McCulloch* in his *Detached Memoranda* indicate, his views never changed regarding the erroneous methods of constitutional interpretation required to justify the Bank:

Force of precedents in case of the Bank—& in expounding the Constn. equal division of Senate, when the Bill negatived by V.P. not occasioned by unconstitutionality but inexpediency of the Bill. reasoning of Supreme Ct—founded on erroneous views &—1. as to the ratification of Const: by people if meant people collectively & not by States. 2. imputing concurrence of those formerly opposed to change of opinion, instead of precedents superseding opinion. 3. endeavoring to retain right of Court to pronounce on the consty of law after making Legisl omnipotent as to the expediency of means. 4. expounding power of Congs—as if no other Sovereignty existed in the States supplemental to the enumerated powers of Congs—5. making the Judy-exclusive expositor of the Constitutionality of laws: the co-ordinate authorities Legisl—& Execut—being equally expositors within the scope of their functions.

JAMES MADISON, *Detached Memoranda*, reprinted in WRITINGS, *supra* note 74, at 756.

Assembly in 1818 enacted an annual tax of \$15,000 on any bank not chartered by the state.¹⁶¹ When cashier James William McCulloch refused to pay the tax, he was sued in state court and fined.¹⁶² Ultimately, the case landed before the Supreme Court where Chief Justice Marshall ruled in favor of the federal government in *McCulloch v. Maryland*.¹⁶³

Although in 1791 Madison argued that both the Ninth and Tenth Amendments prevented the charter,¹⁶⁴ the Bank's opponents in *McCulloch* followed the traditional post-1800 states' rights theory and focused on the Tenth Amendment as precluding federal intrusion into matters properly regulated by the states.¹⁶⁵ In his opinion, Marshall said nothing about the Ninth Amendment and mentioned the Tenth simply to support the idea that Congress has both express and implied powers.¹⁶⁶ Rather than restricting the powers of Congress, Marshall blandly explained that the Tenth Amendment "was framed for the purpose of quieting the excessive jealousies which had been excited."¹⁶⁷

Marshall correctly concluded that the Tenth Amendment does not forbid Congress from exercising implied power,¹⁶⁸ and neither Maryland's attorney nor any other strict constructionist at the time asserted otherwise.¹⁶⁹ The critical issue, however, involved whether

161. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317-21 (1819).

162. *Id.* at 317-19.

163. *Id.* at 316.

164. See *supra* notes 89-95 and accompanying text.

165. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 372-74.

166. *Id.* at 406. This same argument regarding the Tenth Amendment was made in defense of the Alien and Sedition Acts. See *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 67, at 136, 137. The editors of the FOUNDERS' CONSTITUTION attribute the *Minority Report* to John Marshall. *Id.* at 136.

167. *McCulloch*, 17 U.S. (4 Wheat.) at 406.

168. As Justice Story put it in section 1901 of his *Commentaries*:

It is plain, therefore, that it could not have been the intention of the framers of [the Tenth Amendment] to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those, which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated, (not all powers not expressly delegated,) and not prohibited, are reserved.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 67, at 406, 406-07.

169. For years, opponents had objected to the Bank not because Congress lacked implied

the Constitution placed any *limits* on the range of implied means to advance enumerated ends. To theorists like Tucker, the proper construction of federal power began by recognizing that the Constitution represented a compact between the sovereign people of the several states.¹⁷⁰ Thus, federal power (while concededly supreme) ought to be construed bearing in mind the residual sovereignty of these several "peoples."¹⁷¹ Marshall, however, declined to confront the issue of independent sovereign people(s), and instead presented the issue as a choice between state sovereignty and popular sovereignty:

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as an act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.¹⁷²

powers, but because those powers could not be stretched to include such an important power as a bank charter. For instance, in his original speech on the Bank of the United States, Madison argued that implied powers existed, but that they must be subordinate to express powers. See Madison, *supra* note 89, at 480, 489. No great and important power should be included among Congress's implied powers, but instead required a separate and express enumeration. *Id.* at 490. Stretching implied powers to include great and important powers like chartering a bank would violate promises made to the state conventions like those in Virginia and New York and would thwart the express restrictions of the Ninth and Tenth Amendments. *Id.* at 489. This same argument about "subordinate" incidental powers convinced Vice President George Clinton to cast his tiebreaking vote against renewing the Bank's original charter. See 22 ANNALS OF CONG. 346 (1811). Judge Spencer Roane repeated the same argument in his essays criticizing Marshall's opinion in *McCulloch*. See Spencer Roane, Letter to the Editor from Hampden, ENQUIRER (Richmond), June 15, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 16, at 123 (arguing that incidental powers must be subordinate to the enumerated end). In his argument before the Court in *McCulloch*, Maryland's attorney general, Luther Martin, essentially recapitulated Madison's original argument, including Madison's reminder about the understanding of the state conventions and the prohibition on construing a great and important power as an implied power. See *McCulloch*, 17 U.S. (4 Wheat.) at 373-74.

170. See, e.g., Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 150-51.

171. In his *Detached Memoranda*, Madison criticized Marshall for "expounding [the] power of Cong[ress]—as if no other Sovereignty existed in the States supplemental to the enumerated powers of Cong[ress]." MADISON, *supra* note 160, at 756.

172. *McCulloch*, 17 U.S. (4 Wheat.) at 402.

The Chief Justice disposed of this straw man with ease: "The government of the Union ... is, emphatically, and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."¹⁷³ As Madison later pointed out, Marshall's declaration is conspicuously ambiguous—did "the people" retain a separate state-specific identity, or had the adoption of the Constitution consolidated them into a unitary mass?¹⁷⁴ Despite his denial of consolidation,¹⁷⁵ Marshall proceeded under the assumption that America consisted of but one national people who happened to *live* in different states.¹⁷⁶ As a result, the Constitution should be construed to advance the national purposes of that unitary people. As Marshall put it, "[t]he government proceeds directly from the people.... It is the government of all; its powers are delegated by all; it represents all, and acts for all."¹⁷⁷ Of all the contentions in *McCulloch*, Marshall's assertion that federal power came by way of a grant from a unitary people, and not from the people of the several states, evoked the quickest, and loudest, objection.¹⁷⁸

When Marshall finally turned to the proper rule for construing the scope of federal power, he argued for a broad construction of the Constitution that authorized any nonprohibited means related to an enumerated end. According to Marshall:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹⁷⁹

173. *Id.* at 404-05.

174. See MADISON, *supra* note 160, at 756.

175. *McCulloch*, 17 U.S. (4 Wheat.) at 403 ("No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.").

176. *Id.* ("Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.").

177. *Id.* at 403, 405.

178. See Amphictyon, Letter to the Editor, ENQUIRER (Richmond), Mar. 30, 1819, reprinted in MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 55-57; see also MADISON, *supra* note 160, at 756 (rejecting Marshall's unitary people theory as erroneous).

179. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

Determining which available means was necessary and proper was a matter for the political branches, not the courts.¹⁸⁰ Anticipating objections that such a broad reading of federal power might seem to grant Congress unlimited discretion to determine the scope of its own power, Marshall added a caveat:

Should Congress, in the exercise of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.¹⁸¹

Remarkably, Marshall urged that his broad reading of federal power was implied by the enumerated *restrictions* on federal power placed in the Constitution. "Why else," Marshall rhetorically asked, "were some of the limitations found in the ninth section of the [first article] introduced?"¹⁸² Despite the fact that the Ninth Amendment was added to *prevent* reading the enumerated restrictions as suggesting otherwise unlimited federal power, Marshall appears to have done exactly that. The construction feared by Anti-Federalists and supposedly prevented by the Ninth and Tenth Amendments had seemingly come to pass.

2. Response to Marshall's "Latitudinarian" Interpretation of Federal Power

Criticism of Marshall's opinion was swift and voluminous. Ardent Republican John Taylor, who delivered Madison's Virginia Resolutions,¹⁸³ ridiculed Marshall's opinion in his colorfully titled book, *Construction Construed and Constitutions Vindicated*.¹⁸⁴ "As

180. See *id.* at 423 ("[T]o undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.").

181. *Id.* at 423.

182. *Id.* at 407.

183. See F. Thornton Miller, *Foreword* to JOHN TAYLOR, *TYRANNY UNMASKED*, at xiii (F. Thornton Miller ed., Liberty Fund 1992) (1822).

184. TAYLOR, *supra* note 107.

ends may be made to beget means, so means may be made to beget ends, until the co-habitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people"¹⁸⁵ To Taylor, Marshall had violated the proper rule of construction presented by the Ninth and Tenth Amendments:

The [ninth] amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the [tenth] "reserves *to the states respectively or to the people* the powers not delegated to *the United States*, nor prohibited *to the states*." The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.¹⁸⁶

Other critics echoed Taylor's criticism of *McCulloch*. The editor of the *Richmond Enquirer*, Thomas Richie, published a series of pseudonymous papers written by "Amphictyon" and "Hampden," both of whom castigated Marshall's broad interpretation of federal power.¹⁸⁷ In his essays, Amphictyon accused the Chief Justice of

185. *Id.* at 84.

186. *Id.* at 46. Taylor goes on:

In one other view, highly gratifying, these two amendments correspond with the construction I contend for. Several previous amendments had stipulated for personal or individual rights, as the government of the union was invested with a limited power of acting upon persons; these stipulate for political conventional rights. But different modes are pursued. By the first, certain specified aggressions are forbidden; by the second, all the rights and powers not delegated are reserved. The first mode is imperfect, as the specified aggressions may be avoided, and yet oppression might be practised in other forms. By the second, specification is transferred to the government of the union; and the states, instead of being the grantees of limited rights, which might have been an acknowledgement of subordination, are the grantors of limited powers; and retain a supremacy which might otherwise have been tacitly conceded.... Thus the powers reserved are only exposed to specified deductions, whilst those delegated are limited, with an injunction that the enumeration of certain rights shall not be construed to disparage those retained though not specified, by not having been parted with. The states, instead of receiving, bestowed powers; and in confirmation of their authority, reserved every right they had not conceded, whether it is particularly enumerated, or tacitly retained. Among the former, are certain modes by which they can amend the constitution; among the latter, is the original right by which they created it.

Id. at 48-49.

187. The essays are reproduced in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 52-77, 106-54.

having adopted a "liberal and latitudinous construction" of the Necessary and Proper Clause:¹⁸⁸ "[S]o wide is the latitude given to the words 'general welfare,' in one of these clauses, and to the word 'necessary' in the other, that it will, (if the construction be persisted in) really become a government of almost unlimited powers."¹⁸⁹ This, argued Amphictyon, conflicted with the proper vision of federal power because "[t]he government of the U.S. is one of specified and limited powers.... The state governments have all residuary power; every thing necessary for the protection of the lives, liberty and property of individuals is left subject to their control...."¹⁹⁰ This "residuary power was left in possession of the states for wise purposes. It is necessary that the laws which regulate the daily transactions of men should have a regard to their interests, their feelings, even their prejudices."¹⁹¹ If the rule of *McCulloch* prevailed, the judiciary would lack the ability to control federal expansion into the powers reserved to the states. Scoffing at Marshall's claim that the Court had the "painful duty" to invalidate mere pretextual assertions of enumerated power,¹⁹² Amphictyon wrote, "[t]he latitude of their construction will render it unnecessary for them to discharge a duty so 'painful' to their feelings."¹⁹³

3. *Gibbons v. Ogden*

Five years later, litigants continued to press the strict construction views of St. George Tucker and the federalist reading of the Ninth and Tenth Amendments when the Marshall Court considered what would be its second major congressional powers decision, *Gibbons v. Ogden*.¹⁹⁴ *Gibbons* involved a dispute over New York's

188. See A Virginian's "Amphictyon" Essays (Mar. 30, 1819), reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 53. Editor Gerald Gunther suggests that the "Amphictyon" essays were "probably written by Judge William Brockenbough." JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 16, at 1. The "Hampden" essays were written by Spencer Roane. *Id.* at 106.

189. A Virginian's "Amphictyon" Essays (Mar. 30, 1819), *supra* note 188, at 65.

190. *Id.* at 70.

191. *Id.* at 71.

192. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

193. A Virginian's "Amphictyon" Essays (Mar. 30, 1819), *supra* note 188, at 75. The criticism was serious enough to prompt John Marshall to write his own anonymous defense of *McCulloch*. See JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND at 155.

194. 22 U.S. (9 Wheat.) 1 (1824).

grant of a steam navigation monopoly to Robert Fulton and Robert Livingston.¹⁹⁵ While the New York courts had previously upheld the monopoly in cases such as *Livingston v. Van Ingen*,¹⁹⁶ the monopoly now faced a challenge on the ground that it interfered with Congress's exclusive power to regulate interstate commerce.¹⁹⁷ Thomas A. Emmet¹⁹⁸ represented Fulton and Livingston and their assignee, Aaron Ogden. In his lengthy argument before the Court, Emmet claimed that states retained concurrent power to regulate commerce except in cases involving a direct conflict between state and federal regulation,¹⁹⁹ and cited Tucker's Ninth and Tenth Amendment-based rule of strict construction,²⁰⁰ as well as Justice Story's opinion in *Houston v. Moore*.²⁰¹ On this point, Emmet quoted Justice Story's reference to the "11th Amendment" in *Houston*.²⁰²

In striking down the state monopoly, Chief Justice Marshall declined to address either the Ninth or the Tenth Amendment. He also rejected the argument that Congress lacked power to grant Gibbons a coasting license, and went on to rule that the state monopoly was in direct conflict with the federal license and

195. *Id.* at 1-2.

196. 9 Johns. 507, 560-61 (N.Y. Sup. Ct. 1812).

197. *Gibbons*, 22 U.S. (9 Wheat.) at 17.

198. Emmet's name is misspelled in the U.S. Reports. See *id.* at 79.

199. *Id.* at 130-31. Emmet made a similar argument in *North River Steamboat Co. v. Livingston*:

What, then is this trade which Congress can regulate? It is that carried on from within the geographical limits of one State to within those of another. It has no relation to the trade or contracts between individuals. How can Congress regulate the trade and intercourse between man and man, even though they should reside in different States or countries? Its regulations can only act on commerce as a mass, carried on between two States or nations. This trade, thus defined, together with foreign trade, is all that it belongs to Congress to regulate; the rest remains to the States, under the denomination of internal trade, and which it is not therefore necessary to define. It includes all that is not taken by the Constitution out of the general mass of commerce. It belongs to the States individually: not because the Constitution has given it to them,—for that instrument gives nothing whatsoever to the States,—but because it appertains to sovereign power, and has not been delegated to Congress; and the grants of power which are made to Congress, so far as they may interfere with the rights of States, are to receive the strictest construction.

1 Hopk. Ch. 149, 190-91 (N.Y. Ch. 1824) (citing Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 154).

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

201. *Id.*

202. *Id.* at 130-31.

therefore invalid under the Supremacy Clause.²⁰³ As far as Emmet's call for strict construction, Marshall dismissed Tucker's rule as if it had no basis at all:

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule.²⁰⁴

203. *Id.* at 239-40. Justice Story was on the Court at the time of *Gibbons*, but wrote no opinion. See Jim Chen, *Judicial Epochs in Supreme Court History: Sifting Through the Fossil Record for Stitches in Time and Switches in Nine*, 47 ST. LOUIS U. L.J. 677, 705 (2003). Even if Story still held the views he announced in *Houston*, he would have agreed with the result in *Gibbons*; Story believed that the federal commerce power was exclusive. See David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 476.

204. *Gibbons*, 22 U.S. (9 Wheat.) at 187-88. Although by this time Marshall had abandoned his anonymous pamphleteering, he could not resist taking a final shot at his detractors:

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

Id. at 222. Given the use of Tucker's works by Ogden's counsel, this passage might seem directed at Tucker himself. See *id.* at 86. Tucker and Marshall, however, were lifelong friends. John V. Orth, *John Marshall and the Rule of Law*, 49 S.C. L. REV. 633, 635-36 n.10 (1998) (book review). Thus, the passage is more likely targeted toward essayists like Spencer Roane and John Taylor of Caroline whose attacks on *McCulloch* probably still rankled the Chief Justice. See *supra* notes 183-93 and accompanying text.

In his earlier opinion in *McCulloch v. Maryland*, Marshall simply ignored the Ninth Amendment despite its key role in Madison's original speech against the Bank of the United States and despite the continued influence of the speech at the time.²⁰⁵ In *Gibbons*, Marshall again ignored the Ninth, despite Emmet's express reliance on it and his quotation of Justice Story's Ninth Amendment-based reasoning in *Houston*.²⁰⁶ Instead, Marshall announced that Congress's power to regulate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."²⁰⁷

What *McCulloch* implied, *Gibbons* made express: the powers of the federal government had no constructive limits beyond those expressly "prescribed in the constitution."²⁰⁸ The conflict between Marshall's rule of construction and the language and purpose of the Ninth Amendment is striking. The Ninth expressly *prohibits* construing enumerated restrictions on federal power as exhaustive,²⁰⁹ but Marshall read them in precisely that way. In fact, Marshall never once referred to the Ninth Amendment or relied on the Tenth during his entire tenure on the Supreme Court. The nationalism of the Chief Justice left no room for federalist limitations on congressional power. Marshall's nationalism, however, lasted no longer than the Marshall Court itself.

205. See *supra* notes 89-94 and accompanying text; see also Lash, *Original Meaning*, *supra* note 39, at 415-16 & n.405.

206. *Houston* was an opinion Marshall most likely joined. See *supra* note 201 and accompanying text.

207. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

208. *Id.* at 196-97.

209. U.S. CONST. amend. IX.

III. THE ROLLBACK OF MARSHALL'S NATIONALISM AND THE RESTORATION OF TUCKER'S RULE

A. *Defending Marshall: Story's Commentaries on the Constitution*²¹⁰

Joseph Story published his *Commentaries on the Constitution* in the midst of the Nullification Crisis.²¹¹ As his opening tribute to John Marshall suggests,²¹² Story devoted his work to reestablishing the constitutional basis of the Marshall Court's nationalist reading of federal authority. In addition to refuting states' rights theories such as those advanced by Madison and Jefferson in their Virginia and Kentucky Resolutions,²¹³ Story spent considerable time attacking Tucker's rule of strict construction.²¹⁴ Tucker had based his arguments on the writings of Emerich de Vattel and the Ninth and Tenth Amendments.²¹⁵ Story strongly criticized Tucker's reliance on Vattel and the Tenth Amendment²¹⁶ but said nothing about Tucker's reliance on the Ninth. Instead, Story treated Tucker's rule of strict construction in the same way Marshall had, as if it were based on nothing at all.²¹⁷

As the proper alternative to Tucker's rule, Story presented Chief Justice Marshall's formulation of federal power. After quoting Marshall's statement in *Gibbons* that not a single sentence in the

210. Some portions of the following subpart also appear in Lash, *Lost Jurisprudence*, *supra* note 39, at 632-33.

211. For a fine discussion of the Nullification Crisis and the publication of Story's *Commentaries*, see 4 BEVERIDGE, *supra* note 128, at 518-80.

212. See *supra* note 1 and accompanying text.

213. See, e.g., 1 STORY, *supra* note 1, at 287 n.1, 289 n.1.

214. The criticism is implicit throughout the first volume, but see especially, *id.* at 393-407.

215. See Tucker, *View of the Constitution*, *supra* note 6, ed. app. at 151.

216. See 1 STORY, *supra* note 1, at 393.

217. See *id.* at 396.

When it is said, that the constitution of the United States should be construed strictly, viewed as a social compact, whenever it touches the rights of property, or of personal security, or liberty, the rule is equally applicable to the state constitutions in the like cases. The principle, upon which this interpretation rests, *if it has any foundation*, must be, that the people ought not to be presumed to yield up their rights of property or liberty, beyond what is the clear sense of the language and the objects of the constitution.

Id. (emphasis added).

Constitution suggests a limited reading of federal power,²¹⁸ Story's *Commentaries* adopts Marshall's reasoning in *McCulloch*, construing the enumerated restrictions of Article I, Section 9 as suggesting an otherwise broad degree of federal power—once again ignoring the obvious conflict with the Ninth Amendment.²¹⁹ Story even devoted an entire chapter to constitutional "Rules of Interpretation" that fails to acknowledge the existence of a clause in the Bill of Rights expressly *declaring* a rule of interpretation.²²⁰

Justice Story had good reason for his emphatic defense of the Marshall Court's broad reading of federal power. When Story published his *Commentaries*, Marshallian nationalism had lost significant legal ground.²²¹ In *Gibbons*, Marshall intimated that federal power to regulate interstate commerce was exclusive.²²² By 1829, however, in *Willson v. Black Bird Creek Marsh Co.*,²²³ the Marshall Court upheld state power to construct a dam across a navigable stream, an obstruction clearly falling within federal authority under the reasoning of *Gibbons*.²²⁴ If *Willson* revealed a crack in the dam (as it were) of Marshall's expansive view of federal

218. *Id.* at 401-02.

219. *Id.* at 413-15. For a discussion of how Marshall's approach in *McCulloch* conflicts with the Ninth Amendment, see Lash, *Original Meaning*, *supra* note 39, at 417-22.

220. When addressing the concurrent powers of state governments, Story quotes his earlier language from *Houston*—but with the reference to the Ninth Amendment *edited out*. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 51-52 (1820) (Story, J., dissenting).

221. Indeed, some have argued that the nationalist decisions themselves triggered a backlash of states' rights activism. See Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1144 (2001).

[I]t is clear that nationalist decisions such as *McCulloch* and *Gibbons* had little concrete effect, given that Congress did not take up the Court's broad invitation to exercise national power until well after the Civil War, at which point the invitation was partially withdrawn. While measuring the intangible consequences of Supreme Court decisions is more difficult, it is entirely possible that rulings like *McCulloch* were more important for mobilizing states' rights opposition to the Marshall Court than for educating public opinion in support of the Court's nationalism.

Id.

222. See *supra* notes 190-209 and accompanying text.

223. 27 U.S. (2 Pet.) 245 (1829).

224. See JESSUP, *supra* note 17, at 324. Other scholars have also noted the seeming retreat of the Marshall Court in its later years. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 175 (2004).

power, then the dam broke in 1837 when the new Taney Court decided a trio of cases,²²⁵ particularly *Mayor of New York v. Miln*.²²⁶

In *Gibbons v. Ogden*, Marshall concluded that the meaning of "commerce" included the carriage of passengers and further suggested that federal commercial power not only reached a local level, but might well be exclusive (apart from a few exceptions).²²⁷ By the time of *Miln*, decided shortly after Chief Justice Marshall died, a new majority of the Supreme Court upheld a state's power to demand that the master of a vessel provide data concerning transatlantic passengers. In his opinion, Justice Barbour embraced the theory of independent state power, and he restored Tucker's view that municipal law fell wholly outside the reach of federal authority:

[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States.... That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.²²⁸

225. See *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257 (1837); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). David Currie writes:

The new day dawned with a bang in 1837, when the three big cases so long postponed were finally decided: *New York v. Miln*, *Briscoe v. Bank of Kentucky*, and *Charles River Bridge v. Warren Bridge*. Each concerned limitations on state power; in each the Court upheld state authority; in each Story wrote an impassioned dissent lamenting the dismantling of all that Marshall had built.

Currie, *supra* note 203, at 473.

226. 36 U.S. (11 Pet.) 102 (1837). According to Dwight Jessup, "[a]lthough the political response [to cases like *Gibbons* and *Cohens*] failed to restrict or modify the official power and structure of the federal judiciary, it succeeded in frightening an activist, nationalist Court into restraining its judgments and consciously moving to consolidate its position." JESSUP, *supra* note 17, at 431.

227. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) ("There is great force in this argument [that federal power to regulate interstate commerce is exclusive], and the Court is not satisfied that it has been refuted."). For more on *Gibbons*, see *supra* Part II.B.3 and accompanying text.

228. *Miln*, 36 U.S. (11 Pet.) at 139.

Justice Barbour's description of state authority in *Miln* is the exact opposite of Marshall's assertion in *Gibbons* that Congress's power to regulate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."²²⁹ Justice Story clearly perceived the contradiction, but could only weakly invoke the name of the late Chief Justice in his dissent:

I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons v. Ogden*....²³⁰

Miln was one of a series of opinions decided in early 1837,²³¹ all of which took a decidedly more protective view of state autonomy than the prior opinions of Marshall.²³² In *Charles River Bridge v. Warren Bridge*,²³³ the Court rejected a broad reading of the Impairment of Contracts Clause and upheld the state's right to build a new bridge across the Charles River. Writing for the Court, Chief Justice Taney declared, "We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."²³⁴ The Supreme Court decided both *Miln* and *Charles River Bridge* on the assumption that the Constitution left certain local matters completely off-limits to the federal govern-

229. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

230. *Miln*, 36 U.S. (11 Pet.) at 161 (Story, J., dissenting). In his concurrence, Justice Smith Thompson reminded Justice Story of his earlier opinion in *Houston v. Moore* and quoted Story's earlier Ninth Amendment-based rule of construction as representing the proper approach to determining the scope of federal power. *Id.* at 150-51 (Thompson, J., concurring).

231. For a discussion of the Taney Court's landmark decisions in 1837, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS: 1789-1888*, at 204 (1985), which discusses "The Three Bombshells of 1837."

232. See *Miln*, 36 U.S. (11 Pet.) at 102; *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257 (1837); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

233. 36 U.S. (11 Pet.) at 420.

234. *Id.* at 552.

ment—and both enumerated powers and restrictions should be construed accordingly. In his 1837 treatise, *A General View of the Origin and Nature of the Constitution*, Justice Henry Baldwin concluded with his concurring opinions in the Court's pro-states' rights decisions of 1837.²³⁵ Writing about the *Miln* case, Baldwin observed:

[The states] little thought that in the grant of a power to regulate commerce with foreign nations and among the states, they also granted as a means, the regulation of internal police; they little feared that the powers which were cautiously reserved to themselves by an amendment, could be taken from them by construction.... [T]he tenth amendment becomes a dead letter if the constitution does not point to the powers which are "delegated to the United States," or "prohibited to the states," and reserve all other powers "to the states respectively or to the people."²³⁶

To Baldwin, the Tenth Amendment risked becoming an empty promise unless the Court limited the construction of federal power.²³⁷ In this, Baldwin echoed the warnings of the state ratification conventions, the speeches of Madison, and the writings of St. George Tucker. In his concurring opinion in *Miln*, Justice Thompson found such a rule in the Ninth Amendment, and quoted Story's own words in *Houston v. Moore*:

[Concurrent state power] is fully recognised by the whole Court, in the case of *Houston v. Moore*.... Mr. Justice Story, who also dissented from the result of the judgment, is still more full and explicit on this point. The constitution, says he, containing a grant of powers in many instances similar to those already existing in the state governments; and some of these being of vital importance also to state authority and state legislation, it

235. HENRY BALDWIN, *A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788. AND THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES. TOGETHER WITH OPINIONS IN THE CASES DECIDED AT JANUARY TERM, 1837, ARISING ON THE RESTRAINTS ON THE POWERS OF THE STATES* (Phila., John C. Clark 1837).

236. *Id.* at 195.

237. *Id.*

is not to be admitted that a mere grant of such powers, in affirmative terms, to congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states; unless [citing exceptions].... In all other cases, not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with congress; not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principle of reasoning.²³⁸

The Taney Court, thus, restored Tucker's rule of strict construction. Witnessing the end of Marshall's nationalist interpretation of the Constitution, Justice Story could only pen dissents and lament in his letters: "I am the last of the old race of Judges. I stand their solitary representative, with a pained heart, and a subdued confidence. Do you remember the story of the last dinner of a club, who dined once a year? I am in the predicament of the last survivor."²³⁹

Cases like *Miln* and *Charles River* replaced Marshall's unbridled construction of federal power with the stricter interpretation suggested by the Ninth Amendment (according to Justice Thompson) and preserving the principles of the Tenth (according to Justice Baldwin). Despite a few notable exceptions,²⁴⁰ the Supreme Court strictly construed the powers of the federal government for the remainder of the nineteenth century and into the twentieth century in order to preserve the reserved powers and rights of the states.²⁴¹ In the years leading up to the Civil War, both abolitionists²⁴² and

238. *Miln*, 36 U.S. (11 Pet.) at 150-51 (Thompson, J., concurring).

239. Letter from Joseph Story to Harriet Martineau (Apr. 7, 1837), in 2 JOSEPH STORY, LIFE AND LETTERS OF JOSEPH STORY 277 (William W. Story ed., 1851).

240. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

241. See, e.g., *Carter v. Carter Coal*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Hans v. Louisiana*, 134 U.S. 1 (1890); *The Civil Rights Cases*, 109 U.S. 3 (1883); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

242. See, e.g., SALMON PORTLAND CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT 106 (Books for Libraries Press 1971) (1847) (arguing that the federal Fugitive Slave Act was

pro-slavery advocates²⁴³ invoked the principles of strict construction. Tucker's rule of strict construction emerged unscathed following the Civil War in an opinion by abolitionist Justice Salmon P. Chase²⁴⁴ and became entrenched by the Supreme Court in the *Slaughter-House Cases*.²⁴⁵ State and federal courts went on to apply Tucker's rule for the remainder of the nineteenth century and well into the twentieth.²⁴⁶ Although sometimes cited as a freestanding rule and other times linked to the Tenth Amendment, countless courts rooted the rule of strict construction in the texts of the Ninth and Tenth Amendments.²⁴⁷

unconstitutional on the grounds that legislation regarding escaping servants was a matter reserved to the states under the Tenth Amendment). According to Chase, "The provision [regarding escaped slaves] is, undoubtedly, in restraint of liberty, and it is to be construed strictly." *Id.* at 98; see also *Prigg*, 41 U.S. (16 Pet.) at 600-02 (recounting Pennsylvania Attorney General Ovid F. Johnson's argument that the Ninth and Tenth Amendment call for a limited reading of federal power that preserves the retained powers of the states).

243. See CONG. GLOBE, 36th Cong., 2d Sess. 212-17 (1860) (reporting Judah P. Benjamin's speech in Congress citing the Ninth and Tenth Amendments in support of slave state secession).

244. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614 (1870). In *Hepburn*, Chief Justice Chase held that the Tenth Amendment was intended "to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated." *Id.* Stretching federal power to conduct war to include the power to issue legal tender, wrote Chase, "prove[s] too much":

It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Id. at 617. Chase further rejected the idea that the Constitution leaves it to Congress to determine whether a particular action is sufficiently related to an enumerated end. According to Chase:

[This] would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.

Id. at 618.

245. 83 U.S. (16 Wall.) at 36.

246. For a comprehensive look at this case law, see Lash, *Lost Jurisprudence*, *supra* note 39.

247. There are many cases. See, e.g., *George v. Bailey*, 274 F. 639, 640-41 (W.D.N.C. 1921), *rev'd* 259 U.S. 16 (1922). For a general discussion of the cases, see Lash, *Lost Jurisprudence*, *supra* note 39. The Supreme Court continued to rely on the Ninth and Tenth Amendments in support of a rule of strict construction well into the twentieth century. See, e.g., *Bute v.*

It was not until the New Deal reduced both the Ninth and Tenth Amendments to mere "truisms" that the rule of strict construction lost judicial support.²⁴⁸ But even this modern revival of Marshallian nationalism proved temporary. Since its decision in *United States v. Lopez*,²⁴⁹ the current Supreme Court has rejected the idea that federal power has no limits except those expressly listed in the Constitution.²⁵⁰ This so-called (and perhaps waning)²⁵¹ federalism revolution has as its premise the idea that enumerated federal power must be construed in a manner that preserves a distinction between national and local jurisdiction—a distinction enforceable in federal court as a right of the people.²⁵²

CONCLUSION

Despite the prominent place of *McCulloch v. Maryland*²⁵³ and *Gibbons v. Ogden*²⁵⁴ in constitutional law courses, by the end of the semester students find themselves studying opinions like *United States v. Morrison*²⁵⁵ and *Printz v. United States*,²⁵⁶ which apply an interpretive approach more in keeping with St. George Tucker's rule of strict construction than with the nationalist vision of John Marshall and Joseph Story. Although federalist strict construction has been criticized for its lack of textual roots and its undermining of individual rights, the former criticism is false and the latter is critically incomplete. Tucker grounded his rule in the texts of the Ninth and Tenth Amendments and, in doing so, echoed James Madison's explanation (and application) of those same amendments.

Nor can strict construction be dismissed as nothing but the handmaiden of slavery and an obstruction to judicial protection of

Illinois, 333 U.S. 640, 650-53 (1948).

248. See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941) ("[The Tenth] amendment states but a truism that all is retained which has not been surrendered.").

249. *United States v. Lopez*, 514 U.S. 549, 556-57 (1995).

250. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607-08 (2000); *Alden v. Maine*, 527 U.S. 706, 731-35 (1999); *Printz v. United States*, 521 U.S. 898, 904-33 (1997).

251. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (upholding the power of the federal government to override state laws permitting noncommercial medical use of marijuana).

252. See *supra* note 30.

253. 17 U.S. (4 Wheat.) 316 (1819).

254. 22 U.S. (9 Wheat.) 1 (1824).

255. 529 U.S. 598 (2000).

256. 521 U.S. 898 (1997).

individual rights. True, defenders of slavery and racial segregation invoked strict construction. But that same rule of interpretation played a key role in the struggle against the Alien and Sedition Acts, and later became a central plank in the abolitionist Republican Party Platform of 1860.²⁵⁷ Although local autonomy may limit federal power to pass legislation like The Religious Freedom Restoration Act²⁵⁸ and the Violence Against Women Act,²⁵⁹ a vigorous application of the same rule would protect the right of California citizens to authorize medicinal use of marijuana²⁶⁰ and the right of Oregon residents to authorize physician assisted suicide.

In all these cases, the rule supports the same principle: Strict construction of federal power preserves the people's retained right to control certain matters at a local level. It protects the political right to local self-government. As St. George Tucker reminded us long ago, this dispersed delegation of power flows from the people's sovereign right to structure their government as they see fit. Although one can debate the normative value of federalism, or the effect of constitutional amendments on the federalist nature of the original compact,²⁶¹ Professor Tucker reminds us that one can

257. According to Garrett Epps,

Lincoln was not unusual among Republicans in expressing fear for free-state sovereignty against the federalized Slave Power behemoth. William E. Gienapp notes that Gideon Welles, a prominent Connecticut Democrat who became a Republican stalwart and later a member of Lincoln's Cabinet, abandoned his original party out of "states' rights conservatism" in 1856, and proclaimed that Republicans must stand for "the rights of man, the rights of the state, a strict construction of the constitution, opposition to the nationality and extension of slavery, and to the aggressive measures and unauthorized assumption of powers by the federal government." The Republican Party's national platform in 1860 demanded that "the Federal Constitution, the Rights of the States, and the Union of the States, must and shall be preserved." The platform went on to guarantee "the maintenance, inviolate, of the Rights of the States, and especially of the right of each State to order and control its own domestic institutions according to its own judgment exclusively."

Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, LAW & CONTEMP. PROBS. Summer 2004, at 175, 199-200 (quoting WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1866, at 276 n.10 (1982); National Republican Platform, Adopted by the Chicago Convention (May 17, 1860), in 2 THE AMERICAN PARTY BATTLE, ELECTION CAMPAIGN PAMPHLETS, 1826-1876, at 121-22 (Joel H. Silvey ed., 1999)).

258. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

259. *Morrison*, 529 U.S. at 598.

260. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003), *rev'd sub nom. Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

261. Professors Michael Kent Curtis and Akhil Amar have both done important work

embrace federalism without sacrificing a broad vision of personal freedom.²⁶² The ideal of local self-government is attractive to *any* localized political movement, a fact that probably explains the longevity of the rule of strict construction. This rule—Tucker's rule—survived the Adams administration, the Marshall Court, the Civil War, and the New Deal.²⁶³ This is a remarkable feat and a testament to the prescient wisdom of Professor Tucker.

suggesting a restructuring of the original (federalist) Bill of Rights which occurred through the adoption of the Fourteenth Amendment. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 357-83 (2000); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

262. See Tucker, *On the State of Slavery in Virginia*, in 2 TUCKER, *BLACKSTONE'S COMMENTARIES*, *supra* note 45, ed. app. at 31-85.

263. Reconciling the Ninth Amendment and the New Deal requires a constitutional theory of the New Deal, as well as a theory of *stare decisis* to the degree that New Deal landmark cases like *Wickard v. Filburn*, 317 U.S. 111 (1942), are in tension with the restrictions of the Ninth and Tenth Amendments. Bruce Ackerman has done important theoretical work on the New Deal, see 2 BRUCE A. ACKERMAN, *WE THE PEOPLE* (1998), but beyond his efforts, there remains a dearth of constitutional analysis regarding how to reconcile the New Deal with the economic rights of Reconstruction, much less with the federalism constraints of the Founding. But see Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459 (2001).