

The Sum of All Delegated Power: A Response to Richard Primus, *The Limits of Enumeration*

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In his provocative article, *The Limits of Enumeration*,¹ Richard Primus rejects what he calls the “internal-limits canon” and challenges the assumption that the powers of Congress do not add up to a general police power, such that “there are things Congress cannot do, even without reference to affirmative prohibitions like those in the Bill of Rights.”² Primus does not claim that federal power actually does amount to a general police power, only that it might.³ His principal claim is that nothing in the theoretical nature of enumerated power requires an a priori limit on the aggregate scope of delegated authority. As result, the modern Supreme Court is wrong to limit its interpretation of government power in order to maintain a distinction between “what is truly national and what is truly local.”⁴

If we are talking about enumeration in general, then Primus is right: logic does not require that all enumerations of delegated authority exclude at least some other possible delegated authority.⁵ If we are talking about our actual Constitution, however, he is wrong. Whatever else is uncertain about the scope of delegated power, the constitutional text, reasonably interpreted, communicates that the sum of all actual delegated federal power amounts to something

1. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

2. *Id.* at 578.

3. *Id.* at 583 (“My argument takes no position on whether the Constitution authorizes Congress to do whatever a national government with a police power could do.”).

4. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); see also *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (repeating the *Lopez* formulation that “[t]he Constitution requires a distinction between what is truly national and what is truly local”).

5. I say *may* be possible because Primus has presented hypothetical examples involving something other than a system of enumerated government power (for example, three flavors of ice cream in a refrigerator). The constraints of language might prevent a finite enumeration of non-general governmental powers from plausibly encompassing an unlimited degree of governmental authority.

less than all possible delegated power. If a theory of federal power allows federal regulation of every possible subject, that theory cannot be correct. This fundamental truth about the limited scope of delegated powers of the American government is canonical for good reason: no other interpretation of the meaning of the Constitution is reasonable.

Although my general comments are critical, *The Limits of Enumeration* presents a bracing and sophisticated challenge to the traditional idea of a national government with only partially delegated powers. Whether ultimately persuasive or not, Primus rightly calls upon scholars and courts to investigate more deeply and articulate more clearly the theoretical, historical, and textual roots of a doctrine long taken for granted but never fully explained. In so doing, Primus illuminates the way to a more robust and theoretically coherent approach to American federalism.

1. PRELIMINARIES: THE INTERNAL-LIMITS CANON AND THEORIES OF INFINITE POWER

Primus begins by distinguishing what he calls the “enumeration principle” from the “internal-limits canon.”⁶ The former involves the commonly accepted idea that we have a government of limited delegated power, while the latter involves the additional common assumption that delegated federal power “must be construed as collectively less extensive than a police power.”⁷ Primus concedes that federal power is limited by “external” legal constraints such as those listed in the Bill of Rights and the non-legal constraints of the political process.⁸ He rejects, however, the Supreme Court’s assertion that delegated powers must be “internally” interpreted in order to amount to something less than a federal police power.⁹ Put another way, Primus rejects the idea that enumerated federal authority by its very nature must have legally enforceable limits beyond those expressly listed in the Constitution.

6. Primus, *supra* note 1, at 578, 591.

7. *Id.* at 581. Primus sometimes describes this approach as claiming federal power amounts to “less than a police power,” *id.* at 620, or that the federal government has “less than a general grant of regulatory authority,” *id.* at 625. Without deciding whether the best understanding of these terms all amount to the same thing, I proceed on the assumption that Primus is attacking the claim that the list of delegated authority in the federal Constitution must amount to something less than all possible delegated authority.

8. *Id.* at 528 (“[S]o long as external limits and process limits do the work of preserving state decision making and protecting individual rights, the system remains faithful to its Founding design.”).

9. See, e.g., *Lopez*, 514 U.S. at 567-68 (requiring federal power to be interpreted in a manner that maintains “a distinction between what is truly national and what is truly local”).

To introduce his idea, Primus presents a number of hypothetical enumerated delegations of authority that under certain circumstances effectively delegate all possible power over a particular subject. The hypothetical delegations are severely constrained in scope—they involve, for example, giving people choices between three available ice cream flavors, three kinds of milk, and three available showers—but they establish his basic theoretical point: sometimes, a list of specific actions authorizes every possible action (all *possible* power) available to an agent. Primus is right: we should not assume that *every list* of enumerated authority necessarily delegates something less than all possible authority.

In many contexts, however, lists (enumerations) give rise to an inference that some possible choices *have* been left off the list. Take a simple example. Alice tells Ben, “Both you and Charlie need to eat when the two of you get home. You may have the leftover casserole, the broccoli, and the cheese squares.” Alice did not explicitly say, “You may have only some, but not all of the food in the fridge,” but Ben would understand that to be part of Alice’s message. The technical term for this type of inference is “implicature.”¹⁰ Implicatures are valid inferences about what has been communicated.

To my knowledge, no scholar has ever denied the *possible* existence of an enumerated list that under certain circumstances exhausts all available alternatives. As a matter of logical possibility, such a list may well exist. The critical issue, however, is whether it is possible that the *particular* list of enumerated authorities in the Constitution delegates all possible power. Chief Justice John Marshall’s famous dictum in *Gibbons v. Ogden* that “the enumeration presupposes something not enumerated” was not about every possible enumeration, but about one particular enumeration.¹¹ Since, as Primus concedes, some enumerations should be read as embracing the “internal-limits canon,”¹² the im-

10. See Wayne Davis, *Implicature*, STAN. ENCYC. PHIL. (2014), <http://plato.stanford.edu/entries/implicature> [<http://perma.cc/5R93-SXJF>]; see also Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 698 (describing implicatures as “meanings that a speaker deliberately attempts to communicate by implication”); Andrei A. Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83 (Andrei A. Marmor & Scott Soames eds., 2011) (focusing on implicatures as a linguistic method in the law).

11. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (“[T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated”); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 556 (1995) (discussing the Committee of Detail’s “lengthy enumeration of specific powers” and concluding that “[t]he mere fact of an enumeration of powers makes it clear that the federal government’s powers are meant to be limited” (emphasis added)).

12. Primus, *supra* note 1, at 624 (noting that “fidelity to the Founders might require maintaining internal limits” if “there [were] an original commitment to the [internal-limits through

portant question is whether scholars and judges have justifiably applied the internal-limits canon to the enumeration contained in the Constitution.

Primus thinks not. Because there is no theoretical requirement that enumerated powers receive internally limited constructions, Primus claims that the canon's advocates must justify its application to the case of delegated federal power. Turning to what he claims are the "traditional sources of constitutional authority" upon which the canon's advocates rely, Primus concludes that neither the pragmatic values of federalism (properly conceived), nor "fidelity to the Founding," nor the text of the Constitution justify continued adherence to the canon.¹³ Unfortunately, Primus relies on an anachronistic account of federalism, an outdated and erroneous originalist account of the Founding, and a critically incomplete account of constitutional text.

II. THEORIES OF FEDERALISM

A. *Local Preference Federalism vs. Dual Sovereignty Federalism*

Primus's first argument involves the meaning and proper advancement of the goals of federalism. According to Primus, federalism, properly understood, can be maintained in a manner faithful both to the Founders' design and to the actual text without the need to enforce the internal-limits canon. Evaluating this claim requires unpacking Primus's definition of federalism and determining whether he is correct about the theory's non-essential relationship to the canon. In fact, Primus has adopted a version of federalism quite unlike the version courts have traditionally relied upon as one of the "traditional sources of constitutional authority" supporting the internal-limits canon. As we shall see, preserving federalism as long defined and enforced by American courts requires an internally constrained construction of federal power.

Among the many theories that go by the name of federalism, two versions are most commonly associated with discussions of American constitutional

enumeration] strategy as such, independent of its usefulness for achieving a set of goals"); see also *id.* at 625 ("But *unless* the Founders were committed to overall internal limits as a matter of value rather than as a means to an end, fidelity does not require that internal limits be the mechanism limiting Congress any more than fidelity to Charles requires Charlotte's marrying someone she met in college to be the mechanism by which she attains financial security. The question, then, is whether we should understand the Founders as committed to internal limits as a value-based matter rather than a strategic one." (emphasis added)).

13. *Id.* at 582 ("In sum, internal limits are not mandated by the text of the Constitution, not required by fidelity to the Founding, and neither necessary nor materially helpful for promoting federalism.").

law.¹⁴ The first refers to any system of government that values the principles of devolution or subsidiarity—a preference for allowing decisions to be made at the lowest level of effective government.¹⁵ This version of federalism is not unique to the United States, and it does not require many of the aspects that currently characterize American federalism, such as the doctrine of state sovereign immunity.¹⁶ A second and quite different version of federalism refers to a system of dual sovereignty in which both national and state-level governments retain a degree of judicially enforceable sovereign independence.¹⁷

When Primus talks about federalism, he is referring to the first version: federalism as subsidiarity or devolved decision making. As he puts it, “‘federalism’ is a reasonable label for a system in which local decision makers are selected by local constituents rather than by the central government and have the authority to raise and spend revenue independently of that central government.”¹⁸ Under Primus’s version of federalism, “practical” political decision making at a national level determines whether a particular subject may be regulated at a lo-

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14. Although one can identify innumerable strains of federalism, those most relevant to American constitutionalism are (1) those that promote the principles of “devolution” or subsidiarity and (2) those that formally separate central and local governments and mandate autonomous sovereign spheres of regulatory authority. See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891–93 (2014) [hereinafter Gerken, *Federalism as the New Nationalism*] (comparing what she calls the “nationalist school of federalism” and its link to the principle of “devolution” with more “conventional” views of federalism that stress state “sovereignty and autonomy”); Heather K. Gerken, *The Supreme Court 2009 Term—Forward: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6–7 (2010) [hereinafter Gerken, *Federalism All the Way Down*] (noting that, when it comes to discussions of federalism, “[t]he core divide between scholars and the Supreme Court centers on sovereignty”).
 15. See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994) (defining subsidiarity as “[t]he notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved”).
 16. See *id.* (noting that federalism as subsidiarity “can be applied in any polity in which governmental authority is lodged at different vertical levels” (emphasis added)).
 17. Primus himself recognizes the distinction between these two approaches when he compares the Supreme Court’s early embrace of “dual federalism” with its later, more nationalist understanding of federal power. See Primus, *supra* note 1, at 602. Other scholars use different terms for the same general distinction. Heather Gerken, for example, distinguishes “conventional federalism” involving “traditional trappings of sovereignty and separate spheres” from a more modern “nationalist” form of federalism based on principles of subsidiarity. See Gerken, *Federalism as the New Nationalism*, *supra* note 14, at 1889–91. Although Primus claims that “‘dual federalism’ gave way to other conceptions,” he cites to contemporary scholars and not to Supreme Court decisions. Primus, *supra* note 1, at 602 (footnote omitted).
 18. Primus, *supra* note 1, at 596 n.78. Although Primus begins by claiming local decision making is but “one side” of federalism, see *id.* at 596, the remainder of his essay focuses on this “subsidiarity” aspect of theoretical federalism.

cal level.¹⁹ Cooperative federalism (or, better, nationally permitted local decision making) is valued, but not legally required.²⁰ The only legal constraints on national power according to this version of federalism are those “external” constraints expressly enumerated in a constitution.²¹ This kind of “local preference federalism” is not unique to the United States. Indeed, this form of federalism does not appear to require the *existence* of states as such, much less require the protection of state sovereign independence.²² It does, however, value the benefits of local decision making that Primus believes promotes “human flourishing.”²³

Local preference federalism is a perfectly defensible form of federalism.²⁴ It is not, however, the version of federalism that informed the adoption of the U.S. Constitution and that continues to inform the jurisprudence of the U.S. Supreme Court. American federalism as traditionally understood involves judicial enforcement of the original decision to divide the sovereign powers of state and national government. It is not simply a theory of local decision making (though that’s part of it); it is a theory of dual sovereignty that involves a constitutionally entrenched commitment to a national government with only partially delegated power.²⁵ Primus may be right that *his* preferred form of federalism can be furthered without the internal-limits canon. If, however, he truly wishes to address the “*traditional* sources of constitutional authority,” then he must confront the interpretive commitments of dual sovereignty federalism.²⁶

19. *Id.* at 604-08.

20. *Id.* at 606-07.

21. *Id.* at 604-05.

22. *See id.* at 596 n.78 (noting that his theory of federalism simply involves “a system in which local decision makers are selected by local constituents rather than by the central government and have the authority to raise and spend revenue independently of that central government”).

23. *Id.* at 587.

24. *See, e.g.,* Gerken, *Federalism as the New Nationalism*, *supra* note 14, at 1889-90 (advocating a “nationalist school of federalism” promoting the values of “devolution”); *see also* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 181 n.238 (2010) (“The theory of collective action federalism, whether or not it is used in judicial review, is similar in important respects to the European principle of ‘subsidiarity.’”).

25. Primus himself appears to recognize this when he speaks of a prior “era of dual federalism.” Primus, *supra* note 1, at 602, 609.

26. Although this section distinguishes federalism as *no more than* subsidiarity from federalism as entrenched dual sovereignty, the two approaches are not mutually exclusive. American federalism can be viewed as the people’s chosen (and entrenched) means of advancing many of the values associated with subsidiarity. The people’s particular choice, however, reflects additional considerations, such as the need to identify a form that would also protect the sovereign independence of the people in the states.

B. *Federalism as Retained Sovereignty*

Federalism as a doctrine of divided sovereignty and retained state sovereign power is one of the most deeply rooted doctrines in American constitutional jurisprudence. As James Madison wrote in Federalist 39, “the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”²⁷ Although briefly challenged by one Justice in *Chisholm v. Georgia*²⁸ (a decision quickly overruled by popular demand²⁹), the concept that states retained both sovereignty and remnant powers under the federal Constitution informs some of the Supreme Court’s most foundational opinions. In *McCulloch v. Maryland*, for example, Chief Justice John Marshall asserted that “[i]n America, the *powers of sovereignty are divided* between the government of the Union, and those of the states. They are each *sovereign*, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.”³⁰ A year later, Justice (and constitutional treatise writer) Joseph Story echoed the idea that the Constitution had divided power between a national government and the still-sovereign states:

The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter.³¹

The Supreme Court’s jurisprudence of constitutional federalism as dual sovereignty survived the Civil War. Indeed, according to the Court, it had been the seceding southern states that had failed to appreciate the indestructibly “dual” nature of the federal Constitution. As Chief Justice Salmon P. Chase wrote in 1868:

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27. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).
28. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.). For a discussion of the idiosyncratic nature of Wilson’s views, see Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1633 (2009).
29. See U.S. CONST. amend. XI. For a discussion of the Eleventh Amendment as restoring the original understanding of Article III, see Lash, *supra* note 28.
30. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) (emphasis added).
31. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 48 (1820) (Story, J., dissenting); see also KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 198-206 (2009) (discussing *Houston v. Moore* and its significance as an early example of a federalist reading of the Ninth Amendment).

[T]he perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.³²

Although the New Deal Court vastly expanded the interpreted scope of federal power, that same Court retained the traditional conception of federalism as preserving the sovereign independence of the states. In *Erie v. Tompkins*, Justice Louis Brandeis wrote that the Constitution “recognizes and preserves the autonomy and independence of the states.”³³ Two years later, the Court explained that, “[c]onsistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States’ determination of local social policy”³⁴ and reiterated that, “[i]n the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide.”³⁵

Dual sovereignty federalism and its commitment to retained (non-delegated) state power threads its way through some of the most state-constraining decisions of the Civil Rights Era. In contrast to those scholars who have (perhaps optimistically) written about the “passing of dual federalism,”³⁶ the modern Supreme Court continues to stress the deeply rooted and *dual* nature of American federalism. Consider, for example, Chief Justice Earl Warren’s description of American federalism in *Reynolds v. Sims*:

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in estab-

32. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

33. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (favorably quoting Justice Field’s description of the “constitution of the United States, which recognizes and preserves the autonomy and independence of the states” (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 400 (1893) (Field, J., dissenting))).

34. *Avery v. Alabama* 308 U.S. 444, 447 (1940).

35. *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

36. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

lishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together ‘to form a more perfect Union.’ But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government.³⁷

More recently, in *Garcia v. San Antonio Metropolitan Transit Authority*, Justice Blackmun conceded that “[t]he States ‘unquestionably do retain a significant measure of sovereign authority.’”³⁸ In *Gregory v. Ashcroft*, Justice O’Connor explained that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”³⁹ In *Geier v. American Honda Motor Co.* Justice Stevens defined federalism as “respect for ‘the constitutional role of the States as sovereign entities.’”⁴⁰ Finally, in *NFIB v. Sebelius*, Chief Justice Roberts declared that “[s]tate sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”⁴¹

These are just a few examples out of hundreds of similar opinions handed down over the course of more than two centuries.⁴² They do not present American federalism as merely one example of a global theory of preferred local decision making. Instead, these cases describe American federalism as a system arising from the “unique historical circumstances” of the U.S. founding, one in which states delegated no more than *some* power to a national government while preserving both the independent sovereign existence and the remnant powers of the people in the states.⁴³ Unlike local preference federalism, dual

37. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964).

38. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

39. 501 U.S. 452, 457 (1991).

40. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 887 (2000) (“‘This is a case about federalism’ . . . that is, about respect for ‘the constitutional role of the States as sovereign entities.’” (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); *Alden v. Maine*, 527 U.S. 706, 714 (1999))).

41. 132 S.Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

42. In addition to the cited cases, one must also add the most obvious group of state sovereignty cases: those involving the Supreme Court’s enforcement of state sovereign immunity. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Hans v. Louisiana*, 134 U.S. 1 (1890). Notice, though, how easily the point can be established even without these cases.

43. Other federalism scholars have recognized the link between retained state sovereignty and the traditional understanding of American federalism, even as they deplore its existence. *See, e.g.*, Gerken, *Federalism All the Way Down*, *supra* note 14, at 6-8 (deploring the fact that the

sovereignty federalism demands the maintenance of a system whereby “separate and distinct governmental entities [] have delegated some, *but not all*, of their formerly held powers to the single national government.”⁴⁴ Although some contemporary scholars (and, perhaps, some Justices) disfavor this uniquely American form of federalism, it has never been abandoned by a majority of the Supreme Court. Preserving this particular conception of federalism requires an internal-limits construction of everything from Article III (in order to preserve the sovereign status of the states) to the Commerce Clause (in order to prevent federal commandeering of the sovereign state legislatures). Dual sovereignty federalism, in other words, requires an internally limited construction of delegated federal power.

III. THE “FOUNDERS’ DESIGN” AND PUBLIC-MEANING ORIGINALISM

Of course, one might concede that the federalism of the Supreme Court is quite different from the federalism of Richard Primus but still criticize the former as failing to capture the original meaning of the Constitution’s text. Primus comes close to making this claim when he asserts that the public who originally considered the proposed Constitution did not trust Federalist claims about the limiting effect of enumerated federal power.⁴⁵ Rather than couching his point in terms of original textual meaning, however, Primus frames his historical discussion as an effort to discern and maintain “fidelity” with the “Founders’ design,” the Founders’ “strategy,” or the “intentions of the Founders.”⁴⁶ Although these seem like originalist arguments, few originalist scholars actually believe that we should follow the original intentions of the Founders, much less their “strategies” or “designs.”⁴⁷ Rather, most originalists today believe that courts should be constrained by the original public meaning of the

Supreme Court’s federalism jurisprudence “consistently invokes sovereignty” and that “constitutional theory remains rooted in a sovereignty account”).

44. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964) (emphasis added).

45. See Primus, *supra* note 1, at 617.

46. *Id.* at 628 (“[S]o long as external limits and process limits do the work of preserving state decision making and protecting individual rights, the system remains faithful to its Founding design. To say otherwise—to insist that the enumeration do meaningful work even when other mechanisms get the job done—is to mistake the object of constitutional fidelity.”); see also *id.* at 629 (claiming that the “traditional view” that Article I and the Tenth Amendment require the internal-limits canon is based on an erroneous “preconception that internal limits are necessary for maintaining federalism, for respecting the intentions of the Founders, or for some combination of the two”).

47. See Lawrence Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 462–63 (2013) (discussing the history of originalist theory).

text.⁴⁸ Originalist Supreme Court Justices have moved in this direction as well.⁴⁹ For this reason, much of Primus’s discussion of constitutional fidelity to the Founders’ designs, strategies, and intentions seems out of place given the theoretical commitments of contemporary originalism.⁵⁰

In the interest of making Primus’s argument as relevant as possible to contemporary constitutional debate, however, let us presume that his references to the Founders’ designs, intentions, and strategies are meant to inform our understanding of the original meaning of the text. After all, most originalists believe that the intentions and expectations of the Framers are at least *relevant* to determining the most likely original meaning of the text. Even so reconceived, however, Primus’s historical argument is contradicted by abundant historical evidence indicating that the public originally understood that a constitution of enumerated powers *in fact* delegated no more than a portion of sovereign regulatory power.

A. Context and Constitutional Meaning

Words convey different meanings depending upon the context in which they are communicated.⁵¹ “You’re going to be in charge of transportation” con-

48. *Id.* at 463.

49. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009).

50. It is not altogether clear that Primus understands the current distinction that originalist scholars make between original textual meaning and the Framers’ intent. Consider how Primus moves back and forth between “Founders’ design,” “Founders['] expect[at]ions,” “original meanings” and “Founders’ ideas” in the following paragraph:

It does not follow, though, that fidelity to the Founders’ design requires modern decision makers to identify consequential internal limits on Congress’s powers, because the relevant question is not whether the Founders expected internal limits to do that work. It is whether that expectation creates obligations today. This question is not simply a recapitulation of a more general question about the authority of original meanings, though there are points of contact between the present concern and that larger debate. Even if original meanings can bind later generations, the Founders’ ideas about limiting congressional power could be vindicated in the ways that matter even if internal limits turned out to impose no constraints on modern federal legislation.

Primus, *supra* note 1, at 620-21.

51. As Lawrence Solum explains,

For public-meaning originalism, the aim is to recover the full communicative content of the Constitution – the linguistic meaning as enriched by the publicly available context of constitutional communication. Constitutional implicatures arise from the publicly available context of constitutional communication.

Lawrence Solum, *Originalism and the Unwritten Constitution*, 2013 ILL. L. REV. 1935, 1956; see also sources cited *supra* note 11.

veys a very different meaning if the President says it to a member of his social events staff than if he says the same words to a prospective cabinet member. In the case of the federal Constitution, the original meaning of textually enumerated federal powers cannot be determined apart from the context in which they were communicated to the state assemblies for ratification. The enumerated powers of the federal government were not presented and voted on individually in an historical vacuum; they were embedded in a proposed federal Constitution and submitted to assemblies convened in states with longstanding constitutions of their own. Understanding this historical context illuminates why the text of the proposed Constitution communicated the creation of a government with only partially delegated power.

The American Revolution transformed the English colonies into “free and independent states,” each enjoying all the rights of an individual sovereign nation.⁵² According to the Articles of Confederation, each state “retain[ed] its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which [was] not by [the] Confederation expressly delegated to the United States, in Congress assembled.”⁵³ The charters and constitutions of the states did not attempt to enumerate the innumerable (or, as Madison put it, the “indefinite”⁵⁴) powers of a sovereign government.

In response to concerns that the proposed Constitution would erase the sovereign status of the people in the several states, Federalist advocates assured the ratifiers that this would not be the case. James Madison, for example, explained that the partial delegation of authority to the federal government left the states “a residuary and inviolable sovereignty.”⁵⁵ Since the states had delegated away only a portion of their otherwise general sovereign authority, this meant that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined” while “[t]hose *which are to remain in the State governments* are numerous and indefinite.”⁵⁶ No less a nationalist than Alexander Hamilton agreed: “[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.”⁵⁷

52. See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776); see also Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1577 (2002) (noting that although the states had conceded a degree of foreign relations power to the national Congress, they remained “sovereign and independent States”).

53. ARTICLES OF CONFEDERATION of 1781, art. II.

54. THE FEDERALIST NO. 45, *supra* note 27, at 292 (James Madison).

55. THE FEDERALIST NO. 39, *supra* note 27, at 245 (James Madison).

56. THE FEDERALIST NO. 45, *supra* note 27, at 292 (James Madison) (emphasis added).

57. THE FEDERALIST NO. 32, *supra* note 27, at 198 (Alexander Hamilton).

Both Madison and Hamilton stressed the link between partial delegation and retained state sovereignty. Had the states delegated away authority that even *theoretically* extended to every possible subject of legitimate regulation, they would have abrogated their own *sovereign* independence from the moment of ratification. Total consolidation of regulatory authority would never occur, Federalists explained, because the federal government received only a portion of sovereign power – those powers actually enumerated in the Constitution.

According to the Constitution's advocates, the act of defining or "enumerating" power was more than just a "strategy" to promote local decision making. A document enumerating a list of powers to be transferred from one sovereign to another communicated an act of partially delegated power. This is what distinguished the proposed federal Constitution from the existing state constitutions: the latter conferred general and undefined powers of legislative authority, while the former would convey only those powers particularly granted.

Understanding this point requires seeing the text of the Constitution as the Founders did – not as a document standing in theoretical isolation, but instead as a text embedded in a particular historical context and adopted alongside preexisting state constitutions. Had the Constitution been adopted in legal isolation, and not in the context of pre-existing states with their own constitutions of general legislative authority, it might have been possible to understand the document as permitting "all appropriate" legislation regardless of the subject. Instead, the Constitution, with its strategy of enumerating specific powers, was proposed in a context that included well-known state constitutions of general and undefined legislative power. Presented in *this* context, the document communicated the creation of a government with only partially delegated authority.

Time and again, the Constitution's proponents highlighted the difference between state constitutions of unenumerated general power and the proposed federal Constitution's limited enumerated powers. As James Wilson explained,

It will be proper . . . to mark the leading discrimination between the state constitutions, and the constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of

the proposition prevails, and everything which is not given, is reserved.⁵⁸

Charles Pinckney emphasized this same point in his 1788 speech to the South Carolina House of Representatives:

The distinction which has been taken between the nature of a federal and state government appeared to be conclusive—that in the former, no powers could be executed, or assumed, but such as were expressly delegated; that in the latter, the indefinite power was given to the government, except on points that were by express compact reserved to the people.⁵⁹

Likewise, James Iredell explained the limited nature of federal power by comparing the defined and enumerated powers of the federal government with the undefined general powers of the states:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.⁶⁰

58. See James Wilson, State House Yard Speech (October 6, 1787), in 1 COLLECTED WORKS OF JAMES WILSON 171-72 (Kermit L. Hall & Mark David Hall eds., 2007).

59. Charles Pinckney, Speech Before the South Carolina House of Representatives (Jan. 16, 1788), in 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 259-60 (Jonathan Elliot ed., 1891) [hereinafter ELLIOT'S DEBATES].

Early decisions by the Supreme Court relied on this same contextual understanding of the Constitution. According to Justice Chase in *Calder v. Bull*:

The several State Legislatures *retain* all the powers of legislation, delegated to them by the State Constitutions; which are not expressly taken away by the Constitution of the United States . . . All the powers delegated by the people of the United States to the Federal Government are *defined*, and no constructive powers can be exercised by it, and all the powers that remain in the State Governments are *indefinite*.

3 U.S. (3 Dall.) 386, 387 (1798) (emphasis added).

60. James Iredell, Speech Before the North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 59, at 149.

As Iredell's statement illustrates, the distinction between enumerated or defined federal power and indefinite state power informed the Framers' original decision not to include a bill of rights in the federal Constitution. Lists of enumerated rights were required if a constitution created a government of otherwise unlimited general power. The proposed federal Constitution was not such a document and therefore needed no bill of rights. Worse, adding a list of enumerated rights might raise the erroneous presumption of otherwise unlimited general power (as was the case with state constitutions). As James Wilson explained,

A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.⁶¹

"Publius" echoed the same argument in *The Federalist*:

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?⁶²

61. James Wilson, Speech in the Pennsylvania Convention (Oct. 28, 1787), in 2 ELLIOT'S DEBATES, *supra* note 59, at 436. Wilson continues:

On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.

Id. at 436-37.

62. See THE FEDERALIST NO. 84, *supra* note 27, at 513 (Alexander Hamilton); see also James Madison, Remarks at the Virginia Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 59, at 620 ("If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government?"). James Iredell echoed these concerns during the North Carolina Convention:

But when it is evident that the exercise of any power not given up would be a usurpation, 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 im-

As written, the proposed Constitution communicated the existence of only partially delegated powers because the text specifically enumerated delegated federal power *and* because the document was presented in a context of state constitutions of undefined and general legislative power. Primus therefore correctly characterizes the use of enumerated powers as a “strategy.”⁶³ He mistakes, however, both the purpose and effect of the strategy. Primus presumes that enumeration was designed to accomplish nothing more than preserving a degree of local decision making. We know, however, that the Founders promised (and key state ratifiers insisted upon) a Constitution that preserved a degree of sovereign state autonomy. The strategy of textual enumeration had both the purpose and the communicative effect of creating a national government with only partially delegated powers while reserving all non-delegated powers to the still-sovereign people in the several states.⁶⁴ In other words, the principle of only partially delegated power emerges not from the subjective expectations of the Founders, but from a text utilizing the strategy of enumerating certain delegated powers communicated and adopted in a particular historical context.⁶⁵

paired by the government without usurpation; and it would be impossible to enumerate every one.

James Iredell, Remarks at the North Carolina Convention (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 59, at 167.

63. See Primus, *supra* note 1, at 582, 587. Primus believes that enumeration was a strategy rather than a “principle,” or, put another way, as a means and not an end. I am not aware of any scholar who would dispute this. The issue involves the *communicative effect* of the strategy or the manner in which the choice of enumeration affects our reading of federal power.
64. Primus states that the Tenth Amendment “speaks of ‘powers not delegated by the Constitution to the United States,’ which *implies* that there are such powers.” See Primus, *supra* note 1, at 629 (emphasis added). The full wording of the Amendment, however, declares that “The powers not delegated to the United States . . . are reserved to the States respectively, or to the people.” U.S. CONST. amend. X (emphasis added). This can be read as a *direct reference* to an existing category of non-delegated powers.
65. American courts understood from the very beginning that defined powers are partial and retained powers are indefinite. Here, for example, is Justice Samuel Chase’s description of state and federal power in *Calder v. Bull*:

It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not expressly taken away by the Constitution of the United States. . . . All the powers delegated by the people of the United States to the Federal Government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the State Governments are indefinite.

3 U.S. (3 Dall.) 386, 387 (1798) (emphasis omitted).

IV. PRIMUS AND THE ORIGINAL OMISSION OF A BILL OF RIGHTS

Primus concedes that the Founders explained their original omission of a bill of rights by insisting that the enumeration principle would ensure a government of only limited power. But Primus insists that that the public did not believe the Federalists' claims about the internally limiting principle of enumerated power and therefore insisted on the addition of external constraints in the form of a bill of rights.⁶⁶ Because the Federalists ultimately agreed to add a list of retained rights following the ratification of the Constitution, Primus concludes that "the Founding generation" did not believe that "enumeration would be sufficient for limiting Congress."⁶⁷ If Primus is right, this both removes one of the pillars of "traditional authority" upon which advocates of the internal-limits canon rely and allows contemporary courts to abandon the internal limits canon without abandoning "fidelity" to the Founders' design. Primus's argument, however, rests on an erroneous and incomplete understanding of the Founding-era debate over the original omission of a bill of rights. A complete account of that debate and its ultimate resolution strongly supports an internal-limits reading of federal power.

As Primus notes, the Federalist justification for omitting a bill of rights relied on the principle of limited enumerated power.⁶⁸ The original Constitution communicated such a principle, Federalists insisted, because the document enumerated federal power. Primus is right that calls for a bill of rights continued anyway, but he is wrong to suggest that this was because the public did not believe a document that enumerated specific powers communicated only partially delegated power. The Federalist argument failed because critics *accepted* the Federalist theory that adding a list of enumerated rights could be read as dangerously undermining the non-negotiable principle of partially delegated power.

Historians have long noted how the Federalists' justification for omitting a bill of rights quickly backfired. When James Wilson claimed that adding a list of enumerated rights would dangerously call into question the principle of enumerated power, Anti-Federalists immediately pointed out that the Consti-

66. Primus, *supra* note 1, at 617. ("[N]o matter what the Convention delegates may have thought, the broader public decisively rejected the idea that the enumeration would limit Congress well enough to make a Bill of Rights unnecessary. Yes, people like Hamilton, Madison, and Wilson defended their work with that argument. But they utterly failed to persuade the public." (citation omitted)).

67. *Id.* at 618.

68. *Id.* at 617.

tution as drafted *already contained* a list of enumerated rights.⁶⁹ For example, Article I, Section 9 listed a number of rights, including the privilege of the writ of habeas corpus.⁷⁰ If Federalists were correct about the dangerous implications of enumerated rights, then the document as drafted *already was* dangerous.⁷¹ As historian Leonard Levy writes, the effect of turning the Federalists' own argument against them was "devastating."⁷² Critics of the Constitution did not question the promised principle of limited enumerated power; they simply demanded its express preservation. As "A Democratic Federalist" wrote in response to James Wilson's claims of limited enumerated power, "if this doctrine is true, and since it is the only security that we are to have for our natural rights, it ought at least to have been clearly expressed in the plan of government."⁷³

Federalists would have either to risk the rejection of the proposed Constitution or promise the addition of amendments that would clarify the continued operation of the enumerated powers principle.⁷⁴ The Federalists, of course, chose the latter.⁷⁵ The choice worked: key state conventions accepted the Fed-

69. See, e.g., Pennsylvania Ratifying Convention, Nov. 28, 1787 (remarks of Robert Whitehall), in 2 DOCUMENTARY HISTORY OF RATIFICATION OF THE CONSTITUTION 398 (John P. Kaminski et al. eds., 1993).

70. U.S. CONST. art. I, § 9, cl. 2.

71. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 81 (2010) (discussing Anti-Federalists responses to Wilson's point about limited enumerated power); see also HERBERT J. STORING, 1 THE COMPLETE ANTI-FEDERALIST 66 (1981) (same).

72. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28-30 (1999).

73. A Democratic Federalist, in 1 THE FOUNDERS' CONSTITUTION 45 (Philip B. Kurland and Ralph Lerner eds., 1987).

74. Of course, some Anti-Federalists were unalterably opposed to the federal constitution, regardless of amendments. See LEVY, *supra* note 72, at 42 (discussing the efforts of some Anti-Federalists to "sabotage the Bill of Rights"). Others, however, were open to favoring the Constitution, provided that certain safeguards were put in place. For example, Virginia Governor Edmund Randolph rejected the exaggerated Anti-Federalist claim that the Constitution granted Congress general police powers. Edmund Randolph, Debate in the Virginia Convention (June 17, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1348 (John P. Kaminski et al. eds., 1993) [hereinafter Randolph, Debate in the Virginia Convention] ("Is it not then fairly deducible, that [the federal government] has no power but what is expressly given it?"). Randolph nevertheless remained convinced that provisions like the Necessary and Proper Clause opened the door to dangerous (if erroneous) interpretations of enumerated federal authority. According to Randolph, the so-called "sweepings clause" was "ambiguous, and that ambiguity may injure the States. My fear is, that it will by gradual accessions gather to a dangerous length." *Id.* at 1353. Rather than rejecting the Constitution, however, Randolph suggested that such ambiguities be resolved either by public declarations or through the addition of amendments to the Constitution. See *id.* at 1354.

75. LEVY, *supra* note 72, at 31.

eralists' promise and submitted proposed amendments along with their notice of ratification.⁷⁶

True to their word, Federalists in the First Congress debated and adopted a set of proposed amendments, including the two that became our Ninth and Tenth Amendments:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.⁷⁷

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.⁷⁸

The Ninth Amendment in particular prevents the addition of enumerated rights from impliedly undermining the general principle of limited enumerated power. As James Madison explained when introducing the Amendment to the House of Representatives,

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the original draft of the Ninth Amendment].⁷⁹

The Tenth Amendment likewise confirms the promised creation of a document containing only partially delegated sovereign power. Not only does the text refer to a set of powers not delegated to the national government, it also

76. *Id.*

77. U.S. CONST. amend. IX.

78. U.S. CONST. amend. X.

79. 1 ANNALS OF CONG. 456 (Joseph Gales ed., 1834). In the notes for his speech introducing the Bill of Rights, Madison wrote that the Ninth Amendment addressed the concern that adding a list of enumerated rights might “dispar[a]ge other rights—or constructively enlarge” federal power. See James Madison, Notes for Amendments Speech (1789), in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 65 (Randy E. Barnett ed., 1989). Madison later explained to the House of Representatives referred to the Ninth Amendment as “guarding against a latitude of interpretation” of enumerated federal power. See JAMES MADISON, WRITINGS 489 (Jack N. Rakove ed., 1999).

declares that all non-delegated powers are reserved to the states *or to the people*—a key acknowledgment of the sovereign people in the several states.⁸⁰ This text does not illustrate the abandonment (or rejection) of the internal-limits canon. Instead, the Tenth Amendment confirms a principle already communicated by a document employing the strategy of enumerated powers. As James Madison explained to the House of Representatives in his speech introducing the proposed Bill of Rights:

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.⁸¹

The Ninth and Tenth Amendments clarify that the Constitution, properly read, grants the federal government but a portion of sovereign power (despite the enumeration of certain rights) and preserves *the* non-delegated powers and rights to the sovereign people in the several states. In sum, the debate over the original omission of a bill of rights does not call into question the principle of enumerated power. Rather, it illustrates how the Founders ensured its preservation.⁸²

80. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64, 119 (1998).

81. Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* WRITINGS, *supra* note 79, at 451.

82. As the document presenting the proposed Bill of Rights to the states declared,
The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added*; and as extending the ground of public confidence in the government, will best insure the beneficent ends of its institution.

See Proposed Amendments and Ratification 1789 *in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 73, at 40.

V. ORIGINALISM, DUAL SOVEREIGNTY FEDERALISM, AND CONSTITUTIONAL TEXT

Primus argues that, absent a need to support American federalism (properly understood) or to maintain fidelity with the Founders' design, there is no good reason to read texts such as the Tenth Amendment to require judicial enforcement of the internal-limits canon. I have claimed above that Primus has not accurately identified historical American federalism and that his arguments regarding the Founders' intent, even if reconceived as claims about original public meaning, fail to recognize the manner in which the amended Constitution communicated the principle of limited federal power. If I am right, then these "traditional sources of constitutional authority" continue to support reading the Constitution in general and the Tenth Amendment in particular as supporting the internal-limits canon. In this way, Primus's argument turns against itself. Primus is nevertheless right to challenge the current Supreme Court's federalism jurisprudence. The Court has never adequately explained how the *text* of the Constitution requires the embrace of the internal-limits canon. In this final Part, I consider how a renewed appreciation for the historical meaning of the Ninth and Tenth Amendments provides an adequate textual basis for judicial enforcement of dual sovereignty federalism and the principle of limited federal power.

A. *The Tenth Amendment: Text and Context*

Having canvassed the original understanding of enumerated federal power, we are in a position to reevaluate the original meaning of the Ninth and Tenth Amendments. When viewed in the context in which they were adopted, these texts expressly support the two fundamental principles of American federalism: retained sovereignty and limited national power.

To begin with, the Constitution itself originally communicated limited enumerated power. As explained in Part III, a document enumerating power presented in the context of state constitutions of unenumerated general powers necessarily communicates the creation of a government of limited and only partially delegated power. This is not a formulation of Framers' intent or "Founders' design." It is an empirically based claim about the original meaning of a text written like the proposed Constitution. The addition of the Tenth Amendment did nothing to change this original meaning, any more than the addition of the Necessary and Proper Clause changed the necessarily implied scope of the enumerated powers.⁸³ As Madison explained to the House of Rep-

83. See *McCulloch v. Maryland*, 17 U.S. 316, 409 (1819) ("It is not denied, that the powers given to the government imply the ordinary means of execution.").

representatives, the Tenth Amendment could be viewed as superfluous since it merely stated “more precisely” a principle already communicated by the original Constitution: the government having been delegated only a portion of sovereign power, the remaining powers necessarily were reserved to the people in the several states.⁸⁴

But how, exactly, does the text of the Tenth Amendment communicate this principle “more precisely”? The actual text of the Tenth Amendment appears to say very little: “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 the New Deal Court in *United States v. Darby*, the text states only the “truism that all is retained which has not been surrendered.”⁸⁵ This truism, however, carries more punch than one might expect. The text does not say “powers not delegated to the United States, *if any*.” Rather, it declares that “[t]he powers not delegated to the United States” are retained by the states and the people. Communicated in the context of the Founding, these words were naturally read as a reference to a real thing: a set of powers that had not been delegated to the federal government. In a different historical context, these same words might not communicate the existence of a set of non-delegated powers. In the United States in 1789, however, these words restated a principle already expressed by a Constitution of enumerated powers: only *some* powers had been delegated, and therefore “*the*” powers not delegated were reserved.

This is not all that the text communicates “more precisely.” The dominant political ideology in the Founding-era United States was popular sovereignty.⁸⁶ Post-revolutionary America embraced the ideal of democratic government in which the only legitimate powers of government were those delegated by the consent of the governed,⁸⁷ but gave this idea a distinctly American spin. Though the government received authority from the people, the government itself was not and could never claim to be the people.⁸⁸ The people themselves retained the sovereign right to define and constrain the powers of government

84. See WRITINGS, *supra* note 79, at 451.

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

86. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 530-32, 544-47, 590-91, 599-600, 614 (1969) (discussing the importance of popular sovereignty in various periods between the 1770s and the ratification of the Constitution).

87. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights . . . —That to secure these rights, Government are instituted among Men, deriving their just powers from the consent of the governed.”).

88. WOOD, *supra* note 86, at 309, 328 (discussing the Founding-era distinction between the ordinary law of government representatives and the higher law of the people themselves).

by way of a written constitution.⁸⁹ Not only were non-delegated powers retained by the sovereign people, sovereignty itself remained with the people.⁹⁰

Whether the people in the states would continue to enjoy their separate sovereign existence after the adoption of the federal Constitution was a key issue during the ratification debate. We know from the prior section that Federalists insisted that the document's strategy of enumerating federal power necessarily, if implicitly, preserved the people's sovereign status and authority over all non-delegated power. The original proposed document, however, *precisely* linked non-delegated power with the principle of retained sovereignty. The Tenth Amendment provides the missing specificity with its closing words: "or to *the people*." The last two words, as Akhil Amar reminds us, are the quintessential words of popular sovereignty.⁹¹ Madison did not include these words in his initial draft.⁹² Instead, states-rights advocates like Thomas Tucker insisted that the Amendment include a reference to the reserved powers of the sovereign people.⁹³ As the Founding generation understood, this language more precisely declared the preexisting principle that non-delegated power remained with the sovereign people in the several states, who could delegate the same to their own state government or retain it themselves through a state declaration of rights. This is, of course, how courts have understood the language of the Tenth Amendment ever since.

The sparse language of the Tenth Amendment, understood in the context in which it was first communicated, confirms both the original principle of partially delegated federal power and the retained sovereign status of the people in the several states. Again, one can imagine possible worlds where these words are communicated in a different context and therefore mean something else. In the actual world of the Founding, these words communicated—these words *meant*—that federal authority exists within a constitutionally imposed framework of limited enumerated power.

89. *Id.* at 266.

90. *Id.* at 382-83.

91. See AMAR, *supra* note 80, at 64, 119.

92. See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in WRITINGS, *supra* note 79, at 437, 444.

93. 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1834). For a discussion of Tucker's proposal and the drafting of the Tenth Amendment, see Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1920 (2008).

B. *The Ninth Amendment*

The Tenth Amendment does not stand alone. It neighbors the Ninth Amendment, which declares: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”⁹⁴ As was true of the Tenth, the Ninth Amendment is most naturally read as communicating the existence of reserved sovereign prerogatives.⁹⁵ Although it is possible to read the Ninth Amendment as referring to “other [rights] retained by the people, *if any*,” this is neither the most natural reading nor one that seems plausible absent additional language. Instead, when viewed in the historical context in which it was first proposed, the Ninth Amendment communicated the implied existence of “other” rights beyond those “external constraints” expressly enumerated in the Constitution.⁹⁶ Preserving these “other” retained rights requires a limited construction of delegated federal power.

At the time of the Founding, it was generally understood that retaining a right meant reserving a power. As James Wilson explained, “A bill of rights annexed to a constitution is an enumeration of the powers reserved.”⁹⁷ An inadequate bill of rights might therefore be understood to authorize the extension of federal power into all matters not expressly reserved by the bill. As Madison explained in his speech introducing the Bill of Rights, critics of the Constitution were concerned that “by enumerating particular exceptions to the grant of power,” “those rights which were not singled out, were intended to be assigned into the hands of the General Government.”⁹⁸ The Ninth Amendment addresses this concern by prohibiting such an erroneous implication. The fact that the Constitution enumerates *some* “exceptions to the grant of power” does not suggest the non-existence of *other* “exceptions to the grant of power.”

By preventing the denial or disparagement of non-enumerated constraints on federal power, the Ninth Amendment preserves the space necessary for the Tenth Amendment to have operative effect. The Ninth prevents federal regulations from filling every possible space other than those areas expressly reserved by an enumerated right. The Tenth Amendment then guarantees that these real, though unenumerated, limitations on federal power are reserved to the sovereign people in the several states. The Ninth and Tenth Amendments therefore work together to constrain the interpretation of federal power and preserve a set of retained powers and rights to the sovereign people in the

94. U.S. CONST. amend. IX.

95. Notice that both amendments end with a declaration of the people’s sovereignty.

96. See Randy Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 413 (2013).

97. Wilson, *supra* note 61, at 436.

98. 1 *ANNALS OF CONG.* 456 (1791) (Joseph Gales ed., 1834).

states.⁹⁹ Although today it might seem odd to view the Ninth and Tenth Amendments as working together to preserve the retained rights of local self-government, this is precisely how these amendments were understood for the first 150 years of their existence.¹⁰⁰

C. *Applying the Canon*

If the text of the Constitution communicates a limited delegation of federal power, then how should courts apply what Primus calls the internal-limits canon of construction? To begin with, it would be odd if the canon required *misconstruing* enumerated powers in order to preserve some degree of state regulatory autonomy. Nothing in the text of the Ninth and Tenth Amendments, for example, suggest that courts should not give full original value to terms like “commerce . . . among the several states.” Presumably, the Founders chose these particular words because they were satisfied that textually enumerating powers *in this way* sufficiently preserved the existence of reserved sovereign powers and rights. The problem is that terms like “commerce among the several states” are capable of being misconstrued in order to advance the interests of the national government at the expense of the states. The danger of biased construction seems especially acute when delegated powers are combined with the Necessary and Proper Clause.

We know that the Founders added the Necessary and Proper Clause to clarify that each enumerated power carried with it the implied authority to appropriately carry the power into execution.¹⁰¹ The Clause tells us nothing, however, about the substance or scope of implied powers other than they must be both “necessary” and “proper.” Many of the proposed Constitution’s critics feared that this particular clause would fatally undermine the otherwise-applicable principle of limited enumerated power and ultimately erase the re-

99. As St. George Tucker wrote in his 1803 treatise, *A View of the Constitution of the United States*, when the Ninth and Tenth Amendment are combined,

[t]he sum . . . 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.

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

100. See Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

101. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

tained sovereign powers and rights of the people in the states. This would not be an accurate understanding of implied federal power, but it nevertheless remained a possible reading of implied federal power. Philadelphia Convention member Edmund Randolph, for example, refused to sign the proposed Constitution, not because the document actually authorized unlimited federal power (which he believed it did not¹⁰²), but rather because he believed that the Necessary and Proper Clause might be erroneously interpreted to allow federal power “to gather to a dangerous length.”¹⁰³ Federalists like James Madison ultimately agreed.

The problem was not that the document correctly read granted unduly expansive powers. The problem was possible *misconstruction*. As Madison carefully explained to the House of Representatives:

It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of *abuse* to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent; because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof; this enables them to fulfil [sic] every purpose for which the government was established. Now, may not laws be considered necessary and proper by Congress, for it is them who are to judge of the necessity and propriety to accomplish those specific purposes which they may have in contemplation, *which laws in themselves are neither necessary or proper . . .*¹⁰⁴

Madison submitted the Bill of Rights in general, and the Ninth and Tenth Amendments in particular, in order to clarify what constitutes a “proper” exercise of implied federal power and what constitutes an “abuse.”¹⁰⁵ Any assertion

102. Randolph feared what he called the “sweepings clause” was “ambiguous, and that ambiguity may injure the States. My fear is, that it will by gradual accessions gather to a dangerous length.” Randolph, Debate in the Virginia Convention (June 17, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 74, at 1353. Rather than rejecting the Constitution, however, Randolph suggested that such ambiguities be resolved either by public declarations or through the addition of amendments to the Constitution. *See id.* at 1354.

103. Randolph, Debate in the Virginia Convention, *supra* note 74, at 1353.

104. WRITINGS, *supra* note 79, at 447.

105. *Id.*; see also Proposed Amendments and Ratifications 1789, in WRITINGS, *supra* note 79, at 40 (“The Conventions of a number of the States, having at the time of their adopting the Con-

of implied authority that denies the sovereign existence of the people in the several states cannot be “proper.”¹⁰⁶ Equally improper would be any assertion of implied power that has the effect of eradicating the distinction between delegated and reserved power or which claims that the only limits to federal power are those “external constraints” actually enumerated in the Constitution.¹⁰⁷ Even without the Bill of Rights, such assertions of implied power would not be proper. The Ninth and Tenth Amendments simply use “more precise language” to confirm a “canon” that the original Constitution already communicated.

CONCLUSION: THE CANON AND THE TEXT

Primus’s *Limits of Enumeration* presents the strongest scholarly argument to date against the continued enforcement of the internal-limits canon, or the principle of limited construction of delegated federal power. What his argument establishes is that the internal-limits canon does not follow as a matter of logical necessity simply because we have a list of enumerated powers in Article I. The case for the canon must instead rest on context—a context that includes other provisions of the Constitution and the circumstances in which the Constitution was framed and ratified. As a consequence, Primus’s essay performs a valuable service. By noting the Supreme Court’s failure to offer a fully elaborated argument, Primus’s article provides the occasion for scholars to fill this gap.

stitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.”).

106. See, e.g., James Madison, Speech in Congress Opposing the National Bank, in WRITINGS, *supra* note 79, at 482 (“An interpretation that destroys the very characteristic of the government cannot be just.”); see also *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) (“It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.”).

107. As Chief Justice Roberts recently explained:

“[W]e have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not ‘consist[ent] with the letter and spirit of the constitution . . . are not *proper* [means] for carrying into Execution’ Congress’s enumerated powers. Rather, they are, in the words of *The Federalist*, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’”

Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2592 (2012) (citations omitted).

As this Essay demonstrates, however, the gap is easily filled. Given the context of the Founding, the original Constitution's strategy of enumeration communicated the creation of a government of only partially delegated sovereign authority. The addition of the Bill of Rights in general and the Ninth and Tenth Amendments in particular confirmed this preexisting principle of limited enumerated power. Even if Primus is correct that there is a possible world in which the words of the Constitution could amount to a delegation of general legislative power, they cannot plausibly be understood as doing so given the actual context of the Founding. When viewed against the background of preexisting state constitutions of indefinite general authority, a document employing the strategy of enumerating specific powers cannot be plausibly understood as communicating anything other than a partial delegation of sovereign authority. This is not a matter of private expectation or Framers' intent; it is a matter of public meaning. In the case of the federal Constitution, the sum of all enumerated power is less than all possible power.¹⁰⁸

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Preferred Citation: Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 YALE L.J. F. 180 (2014), <http://www.yalelawjournal.org/forum/the-sum-of-all-delegated-power>.

¹⁰⁸. As usual, James Madison may have said it best:

But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere. In this relation then the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

THE FEDERALIST NO. 39, *supra* note 27, at 245 (James Madison).