No. 98-1464

IN THE SUPREME COURT OF THE UNITED STATES

JANET RENO, ATTORNEY GENERAL OF
THE UNITED STATES, ET AL.,
Petitioners,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE
STATE OF SOUTH CAROLINA, ET AL.,
Respondents.

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Filed September 3, 1999

QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, contravenes constitutional principles of federalism.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights. WLF has appeared before this Court in cases involving federalism. *See, e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991).

WLF believes that the attached brief will assist the Court in resolving this case by supplying relevant matter not already raised by any party. In particular, WLF's brief argues that the Court ought to adopt the doctrine of enumerated powers as its guiding principle when deciding federalism cases.[1]

SUMMARY OF ARGUMENT

Federalism is more than a speed bump on the road to national progress. It reflects a pattern of life that predates the American Revolution and a constitutional order deliberately adopted by the American people. This brief addresses a single question: What is the soundest constitutional basis for adjudicating cases that raise questions of federalism? We contend that the answer lies with the doctrine of enumerated powers.

The Founding generation regarded the doctrine of enumerated powers as the mainspring of federalism. Friends of the Constitution relied on the doctrine to assure the Nation that the proposed Constitution would not create a consolidated government. Precedent and scholarly commentary confirm that the doctrine of

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief, and letters indicating their consent have been filed with the Clerk of the Court.

enumerated powers has long been regarded as the guiding principle with which to understand federalism.

The doctrine of enumerated powers yields a coherent theory of judicial review for deciding federalism cases. Among other virtues, it makes sense of the text and structure of the Tenth Amendment, justifies the exercise of judicial review as a vindication of popular sovereignty, keeps the form of government close to what the Constitution prescribes, and constrains the exercise of power by government—including the exercise of judicial review. An approach grounded in reserved powers offers none of these advantages.

ARGUMENT

THIS COURT SHOULD ADOPT THE DOCTRINE OF ENUMERATED POWERS AS ITS GUIDING PRINCIPLE WHEN DECIDING FEDERALISM CASES

The question presented asks [w]hether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, contravenes constitutional principles of federalism." "[F]airly included," SUP. CT. R. 14.1(a), is a further question. On what basis should the Court decide cases where a federal law or regulation is drawn in question on the ground that it violates "constitutional principles of federalism"? We contend that the answer lies with the doctrine of enumerated powers. This doctrine holds that the federal government "can exercise only the powers granted to it," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819), by the written Constitution according to "a fair construction of the whole instrument." *Id.* at 406.

Before launching into our argument, however, we reluctantly acknowledge an obvious fact. The doctrine of enumerated powers needs to be revived. Collective forgetfulness, *see* Martin Diamond, *The Forgotten Doctrine of Enumerated Powers*, 6 PUBLIUS 187, 187 (Fall 1976), has reduced it to all but an historical curiosity. "[I]n this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994). Only recently has the Court breathed new life into it. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). This nascent (and welcome) change opens the door to restoring the doctrine of enumerated powers to the center of constitutional interpretation.

Federalism finds its classic expression in the Tenth Amendment, which confirms that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X. These words plainly say that neither the federal government nor the states possess all the powers of government. But by speaking both of "powers . . . delegated" and "powers . . . reserved," *id.*, the amendment invites alternative readings and a question.

One may test whether a federal law offends the Tenth Amendment by asking whether it is authorized by a power delegated to the federal government. *See New York* v. *United States*, 505 U.S. 144, 155 (1992). Or one may ask whether a federal law "invades the province of state sovereignty reserved by the Tenth Amendment." *Id.* Which approach is correct? When invited to choose, the Court saw no real difference between them.

> [J]ust as a cup may be half empty or half full, it makes no difference whether one views the question . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

Id. at 159. We respectfully disagree. Constitutional text, evidence of original understanding, precedent, and commentary agree that the doctrine of enumerated powers furnishes the soundest basis for deciding federalism cases. We begin by discussing the original understanding of the doctrine of enumerated powers and its relation to federalism.

A. The Founding Generation Regarded the Doctrine of Enumerated Powers as the Mainspring of Federalism

1. *The doctrine of enumerated powers stems from America's rejection of Blackstone's theory of absolute parliamentary sovereignty*

The doctrine of enumerated powers grew out of America's impassioned rejection of the British theory of sovereignty. Blackstone, "the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 119 S Ct. 2240, 2248 (1999), declared that "the power of parliament is absolute and without control." 1 WILLIAM BLACKSTONE, COMMENTARIES *157.

> It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, . . . this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . . It can, in short, do every thing that is not naturally impossible . . . .

Id. at *156.

Blackstone's description of British sovereignty strikes today's reader as nothing short of tyrannical. Yet it was regarded at the time as a noble achievement,

eked out of "the great struggle . . . of the common law against the king," F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 271 (H.A.L. Fisher ed., 1908). Freedom-loving Englishmen fought a Civil War, beheaded a king, and waged a Glorious Revolution—all to settle the point that the king is subject to law. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 22 (1997) (Maier).

However, unlimited government, even unlimited representative government, was alien to traditional patterns of American life. "From the beginning of settlement, circumstances in America had run directly counter to the exercise of unlimited and undivided sovereignty." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 202–03 (1967). Parliament governed the postal service, naturalization, navigation, and trade. *See id.* at 203. Its power "touched only the outer fringes of colonial life," while local colonial authority penetrated "most of the substance of everyday life." *Id.*; *see also* Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 216–18 (1918) (comparing the powers exercised by the British government with those exercised by colonial American governments in 1760).

Britain's theory of sovereignty and America's tradition of local self-government were thus bound to clash. In 1766, Parliament declared that it "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and vitality to bind the colonies and people of America . . . in all cases whatsoever." Declaratory Act, 1766, 6 Geo. 3, ch. 12, *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 659–60 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937). For eight years this declaration of unlimited authority remained a paper tiger. But in 1774 Parliament relied on the Declaratory Act to humble recalcitrant Massachusetts by replacing her colonial charter with a new form of government.

See Act for Better Regulating the Government of Massachusetts Bay (Massachusetts Government Act), 1774, 14 Geo. 3, ch. 45. "This attempt presented the issue of parliamentary authority over the colonies in the plainest terms. The act unified Massachusetts behind the Boston insurgents, and it rallied the other colonies behind Massachusetts. It led directly to the First Continental Congress and the Revolution." 1 R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 175 (1959) (Palmer); *see also* 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 98-101 (Lester H. Cohen ed., 1990) (1789) (relating the colonists' alarm at the passage of the Massachusetts Government Act).

Once America declared her independence from Britain, and with it her right "to institute new government," THE DECLARATION OF INDEPENDENCE, *reprinted in* Maier, at 236, the states joined together under the Articles of Confederation. *See* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 132 (1988). The Articles represented a complete repudiation of the Blackstonian theory of unitary and unlimited legislative sovereignty. Contrary to that theory the Articles spell out—they enumerate—the powers granted by the states to the Continental Congress. For example, Article IX begins with the words, "The united states in congress assembled, shall have the sole and exclusive right and power," followed by a description of the powers thereby granted. THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 380 (Donald S. Lutz ed., 1998). Succeeding paragraphs in Article IX adhere to the same pattern. *See id.* at 380–83. And if the circumscribed nature of congress's powers were still unclear, the penultimate paragraph of Article IX removes all doubt by imposing specific prohibitions on that power. *Id.* at 383.

For purposes of understanding the connection between the doctrine of enumerated powers and federalism, however, the most striking limitation on

power of the Continental Congress lies in Article II. It provides, "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Id.* at 377. Aside from assuring the states' continuing "sovereignty, freedom, and independence," Article II marks the line dividing the authority of the Continental Congress from the authority of the states at the point where "Power, Jurisdiction and right" is "expressly delegated to the United States." *Id.* In short, article II makes it clear that the congress possessed only the power "expressly delegated" and that the states "retain[ed]" everything else. *Id.*

2. *Federalists fighting to ratify the Constitution relied on the doctrine of enumerated powers to assure the Nation that the Constitution did not create a consolidated government*

Eventually the Articles had to be replaced. Four pivotal moments during the proceedings of the Constitutional Convention gave the new federal system its central features. First, the Convention spurned the broad delegation of legislative powers contained in the Virginia Plan. Article 6 of the Plan proposed the creation of a national legislature with the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1966) (Farrand). Article 6 was tacitly rejected when the committee of detail returned from its deliberations with a report containing a lengthy and precise enumeration of legislative powers. *See* 2 Farrand, at 181–83. That about-face is reflected in the detailed enumeration of

congressional powers composing Article I, § 8. *See* U.S. CONST. art. I, § 8.

Second, the Convention rejected the Virginia Plan's total reliance on proportional representation in Congress. Article 2 of the Plan proposed that "the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." 1 Farrand, at 20. Tortuous debates over the disproportionate role that Article 2 would give the large states in Congress spanned five weeks, *see, e.g., id.* at 35–38, 176–80, 196–202, 437–38, 444–50, 461–68, and brought the Convention to "a full stop." *Id.* at 511. Finally, the Convention formed a grand committee, which broke the deadlock. It proposed that representation in the House of Representatives follow the population of each state, while in the Senate "each State shall have an equal Vote." *Id.* at 524 (footnote omitted). Article I bears the imprint of that compromise. *See* U.S. CONST. art. I, § 2 (declaring that representation in the House of Representatives is proportional to each state's population); *id.* at § 3 (declaring that each state has equal representation in the Senate).

Third, the Convention rejected the Virginia Plan's proposal, which would have given Congress authority "to negative all laws passed by the several States, contravening in the opinion of the national Legislature the articles of Union." 1 Farrand, at 21. In place of James Madison's beloved negative on state laws the Convention adopted the principle of federal supremacy. *See* 2 Farrand, at 28–29. Because of that decision, conflicts between state and federal law are settled according to the rule that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." U.S. CONST. art. VI.

Fourth, the Convention replaced the mode of ratification prescribed by the Continental Congress with one of its own devising. According to the resolution that authorized the Philadelphia Convention, any revisions to the Articles of Confederation would be valid only after "agreed to in congress and confirmed by the states." 3 Farrand, at 14. Madison argued that the mode of ratification ought to be changed. He reasoned that sending the Constitution to state legislatures for ratification would form a "league or treaty," while ratifying it in special conventions elected for that single purpose would form a "Constitution." 2 Farrand, at 93. From this difference in the mode of ratification Madison discerned a profound difference in the legal effect of a law enacted contrary to the terms of the document. If the Constitution were ratified by state legislatures, thereby forming a league of states, a law violating the document "might be respected by the Judges as a law, though an unwise or perfidious one." *Id.* In contrast, a law violating a constitution ratified by the people in special conventions "would be considered by the Judges as null & void." *Id.* With these arguments still ringing in their ears, the Convention turned back a "motion to refer the plan to the Legislatures of the States," deciding instead to submit the Constitution to "assemblies chosen by the people." *Id.*

During ratification, the Antifederalists' central charge against the proposed Constitution was that it would erect a consolidated government. By this they meant two things. *See* JACK N. RAKOVE, ORIGINAL MEANINGS 181 (1996) (Rakove). First, the Antifederalists pointed out that the Constitution exchanged the confederal form of government established by the Articles of Confederation for a government that would act on citizens directly. Along this line, the author of the Federal Farmer letters wrote, "The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of

being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government." Federal Farmer No. 1, Oct. 8, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 248 (Bernard Bailyn ed., 1993) (Debate). Antifederalists also used the word "consolidated" to denote the more sinister possibility that the new national government would eventually devour state sovereignty. Addressing the North Carolina Ratifying Convention, Samuel Spencer said, "It appears to me that the state governments are not sufficiently secured, and that they may be swallowed up by the great mass of powers given to Congress." Samuel Spencer in North Carolina Ratifying Convention, July 25, 1788, reprinted in 2 Debate, at 854. Robert Whitehill, who led the opposition to ratification in Pennsylvania, declared "with encreasing confidence . . . that the proposed constitution must eventually annihilate the independent sovereignty of the several states." Robert Whitehill in Pennsylvania Ratifying Convention, Nov. 30, 1787, *reprinted in id.* at 811. And the author of the *Brutus* letters struck the same note of alarm. "[A]lthough the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it." Brutus No. 1, *New York Journal* (Oct. 18, 1787), *reprinted in id.* at 165–66.

The Federalists responded with a battery of defenses. In *Federalist* 39 James Madison offered a careful description of the federal system designed by the Constitution. He wrote, "The proposed Constitution . . . is in strictness neither a national nor a federal constitution; but a composition of both." THE FEDERALIST NO. 39, at 257 (Jacob E. Cooke ed., 1961) (James Madison) (Federalist). Madison explained that the mode of ratification marked the document as federal, since ratification would be "given by the people, not as individuals composing one entire nation; but as

composing the distinct and independent states to which they respectively belong." *Id.* at 254. The mode of amendment struck him as incorporating both national and federal elements. National because it allows less than a unanimous vote to amend the Constitution, *see id.* at 257, federal because it requires more than a majority and calculates the proportion by the number of states rather than the number of citizens. *See id.* Madison assessed Congress and the Executive, classifying each as mixture of federal and national elements. *Id.* at 254–55. He then probed the operation of the federal government and the scope of its powers. Madison regarded the operation of government as a sign that it was national, since it operated on citizens rather than states. The scope of government he considered federal, because "its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *Id.* at 256.

With Madison's careful description of the federal system in view, it was now possible to confront the charge of consolidation head-on. "It was left to James Wilson in the Pennsylvania Ratifying Convention to deal most effectively with the Antifederalist conception of sovereignty. More boldly and more fully than anyone else, Wilson developed the argument that would eventually become the basis of all Federalist thinking." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530 (1969) (Wood). Wilson began his argument by returning to the premise that underlay Blackstone's theory of sovereignty. "There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute, and uncontrollable. Where does this power reside?" James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 JAMES WILSON, THE WORKS OF JAMES WILSON 770

(Robert Green McCloskey ed., 1967). Wilson's answer dramatically changed American constitutional thought.

> Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that, in our governments, the supreme power was vested in the constitutions. . . . The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superiour to our legislatures; so the people are superiour to our constitutions.

Id. Speaking of the federal Constitution, Wilson said, "In this constitution, all authority is derived from THE PEOPLE." *Id.* at 772.

By locating sovereignty in the people rather than in the states, Wilson "seemed to make sense of the entire system." Wood, at 532. He could now reply with force to the Antifederalist charge of consolidation. "It is objected to this system, that under it there is no sovereignty left in the state governments. . . . I should be very glad to know at what period the state governments became possessed of the supreme power." James Wilson, Pennsylvania Ratifying Convention, Dec. 11, 1787, *reprinted in* 1 Debate, at 840. Adding to his earlier insight, Wilson argued, "The power both of the general government, and the state governments, under this system, are acknowledged to be so many emanations of power from the people." *Id.* at 840–41.

> If they chuse to indulge a part of their sovereign power to be exercised by the state governments, they may. If they have done it, the states were right in exercising it; but if they think it no longer safe or convenient, they will resume it, or make a new distribution, more likely to be productive of that good, which ought to be our constant aim.

Id. at 840; *see also* Federalist No. 46, at 315 ("The Fœderal and State Governments are in fact but different

agents and trustees of the people, instituted with different powers, and designated for different purposes.").

Locating sovereignty in the people enabled the Federalists to understand and defend federalism, "where, contrary to the prevailing thought of the eighteenth century, both the state and federal legislatures were equally representative of the people at the same time . . . ." Wood, at 545–46. "Only a proper understanding of this vital principle of the sovereignty of the people could make federalism intelligible." *Id.* at 600. Indeed, Wilson's theory of popular sovereignty revealed American federalism to be "a new kind of federal structure unknown in Europe." 1 R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION 228 (1959). "The new idea was that, instead of the central government drawing its powers from the states, both central and state governments should draw their powers from the same source; the question was the limit between these two sets of derived powers." *Id.*

Once again, Wilson furnished the answer by first articulating the relationship between enumerated and reserved powers.

> When the people established the powers of legislation under their separate governments, they invested their representatives with ever right and authority which they did not in explicit terms reserve; and therefore upon ever 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 fœderal 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 union. Hence it is evident that in the former case every thing which is not reserved is given, but in the latter the reverse

> of the proposition prevails, and every thing which is not given, is reserved.

James Wilson, Speech in the State House Yard, Oct. 6, 1787, *reprinted in* 1 Debate at 63–64.

From this explanation it was a small step for Wilson to flourish the doctrine of enumerated powers as the means of accurately marking the line dividing federal and state powers.

> Sir, I think there is another subject with regard to which this Constitution deserves approbation. I mean the accuracy with which the *line is drawn* between the powers of the *general government* and those of the *particular state governments*. We have heard some general observations, on this subject, from the gentlemen who conduct the opposition. They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as *limited* and *defined*. . . . But it is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. . . . [A]re not the enumerated powers as well defined here, as in the present Articles of Confederation?

James Wilson, Speech at the Pennsylvania Ratifying Convention, Dec. 4, 1787, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 400–01 (Phillip B. Kurland & Ralph Lerner eds., 1987).

Other defenders of the Constitution echoed Wilson's arguments. James Iredell, speaking before the North Carolina Ratifying Convention, emphasized the doctrine of enumerated powers. "The powers of the government are particularly enumerated and defined: they can claim no others but such as are so enumerated. In my opinion they are excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed." James Iredell,

Speech at the North Carolina Ratifying Convention (July 30, 1788), *reprinted in* 2 Debate, at 914. In Virginia, Madison stressed the doctrine of enumerated powers. "[T]he powers of the Federal Government are enumerated; it can only operate in certain cases: It has Legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction." James Madison, Speech in the Virginia Ratifying Convention (June 6, 1788), *reprinted in id.* at 620. In Connecticut, similar ideas were neatly expressed in a newspaper polemic. "The powers vested in the federal government are particularly defined, so that each state still retains its sovereignty in what concerns its own internal government and a right to exercise every power of a sovereign state not particularly delegated to the United States." A Citizen of New Haven, Jan. 7, 1788, *Connecticut Courant*, *reprinted in* THE COMPLETE BILL OF RIGHTS 701 (Neil H. Cogan ed., 1997).

Antifederalists refused to be swayed. In Pennsylvania, for example, William Findley pointed to "[t]he judiciary power, which is co-extensive with the legislative," William Findley, Pennsylvania Ratifying Convention, Dec. 1, 1787, *reprinted in* 1 Debate, at 819, as further evidence that "the proposed constitution established a general government and destroyed the individual governments." *Id.* at 818.

James Wilson replied that the federal judiciary represented one of the Constitution's "efficient restraints upon the legislative body." James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in id.* at 822; *see also* Federalist No. 78, at 526 (stating that "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments").

> [U]nder this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . I had occasion, on a former day, to state that

> the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void; and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to act the sanction of judicial authority.

James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 1 Debate at 822-23.

Oliver Ellsworth and John Marshall voiced nearly identical arguments in their respective state conventions. Oliver Ellsworth, Connecticut Ratifying Convention, Jan. 7, 1788, *reprinted in id.* at 883; John Marshall in Virginia Ratifying Convention, June 20, 1788, *reprinted in* 2 Debate, at 731–32. Interestingly, Marshall invoked the doctrine of enumerated powers and judicial review as defenses to George Mason's claim that the powers delegated to the federal judiciary in Article III were "unnecessary and dangerous, as tending to impair and ultimately destroy the State Judiciaries, and by the same principle, the legislation of the State Governments." George Mason, Virginia Ratifying Convention, June 19, 1788, *reprinted in id.* at 726.

These public assurances demonstrate that by the end of the ratifying process, the Founding generation regarded the doctrine of enumerated powers as the mainspring of federalism and judicial review as its chief security. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997).

B. Precedent and Scholarly Commentary Agree that Federalism Must Be Understood from the Perspective of Enumerated Powers

The Court early on accepted the doctrine of enumerated powers as its guiding principle in discerning the boundary dividing federal and state powers. This was in keeping with the doctrine's firmly established place at the foundation of constitutional law. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Van Horne's Lessee* v. *Dorrance*, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857) (Paterson, J.). In the leading case of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall, writing for the Court, laid down the principles by which to resolve "the conflicting powers of the government of the Union and of its members." *Id.* at 400. To decide that conflict, Justice Marshall heavily relied on the proposition that "[t]his government is acknowledged by all, to be one of enumerated powers." *Id.* at 405. Because the case ultimately turned on the existence of implied powers, *id.* at 425, one could easily overlook the fact that Marshall repeatedly invoked the doctrine of enumerated powers as the rule for settling the conflicts between federal and state powers. *See id.* at 406–09, 412–13. In subsequent cases the Court reaffirmed its acceptance of the doctrine of enumerated powers as guiding principle in deciding federal-state conflicts. *See, e.g.*, *Wheeling, Parkersburg & Cincinnati Transp. Co.* v. *City of Wheeling*, 99 U.S. 273, 279 (1878); *United States* v. *Butler*, 297 U.S. 1, 68 (1936).

Ableman v. *Booth*, 62 U.S. (21 How.) 506 (1859), contains an especially illuminating discussion on this point. There Justice Taney, writing for the Court, acknowledged that "the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred

by the General Government." *Id.* at 519. From this the Court reasoned that resulting disputes "must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal." *Id.* at 519–20. It then noted that the range of federal jurisdiction described in Article III "covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution." *Id.* at 520. Armed with such broad authority and the doctrine of enumerated powers, the Court considered itself capable of blunting attacks on federalism, whether from the direction of the federal government or the states.

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void.

Id.

Notice that the Court makes a passing reference to the states' "reserved rights" in this passage. Yet the reference is just that—passing. The central argument in *Ableman* does not rely on identifying the powers reserved in the states as a means of shielding them from federal encroachment. Instead, as this passage shows, the Court in *Ableman* understood federalism in precisely the same terms expressed by Wilson and the other Founders during the ratification debates. According to that understanding, judicial review safeguards federalism by holding the federal government within

the bounds set by the delegations and disabilities comprising the written Constitution.

Influential commentators have agreed that the doctrine of enumerated powers supplies the key principle for correctly understanding federalism. Justice Story, certainly no slouch when it came to broadly construing federal authority, *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting), predicted dire results if the doctrine of enumerated powers were disregarded. "The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 372 (abridged and reprint ed., 1987) (1833).

Alexis de Tocqueville wrote that "the attributes of the federal government were carefully defined, and it was declared that everything not contained within that definition returned to the jurisdiction of state governments. Hence state authority remained the rule and the federal government the exception." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 114–15 (George Lawrence trans. & J.P. Mayer ed., 1969).

More recently, Edwin Corwin identified the doctrine of enumerated powers as the primary ingredient of dual federalism, which he defined in terms of four "postulates or axioms of constitutional interpretation closely touching the Federal System." Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950). In Corwin's view, the replacement each of these "axioms" with "a concept favorable to centralization" explains how "the Federal System has shifted base in the direction of a consolidated national power." *Id.* at 2. Like Story, Corwin fingered the doctrine of enumerated powers as a principle without which federalism will die.

C. The Doctrine of Enumerated Powers Yields a Coherent Theory of Judicial Review in Federalism Cases, Which Interpreting Federalism from the Perspective of Reserved Powers Cannot Provide

1. *The doctrine of enumerated powers makes sense of the language and structure of the Tenth Amendment*

The Tenth Amendment provides, "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." U.S. CONST. amend. X. Notice that the first phrase points to the category of "powers *not* delegated to the United States by the Constitution." *Id.* (emphasis added). The second refers to "powers [not] prohibited by [the Constitution] to the states." *Id.* Presumably this meant the prohibitions on state power spelled out in Article I, § 10. Following these is a clause containing the amendment's only verb, "reserved." What is reserved? The categories of power described in the first two phrases, namely, powers not delegated to the federal government and powers not prohibited to the states. These categories compose all the powers and disabilities in the Constitution, save the prohibitions on federal power catalogued in Article I, § 9. The clause and the final phrase answer the question, reserved for whom? Reserved for "the states respectively" or "the people." *Id.*

Emphasizing the enumerated powers aspect of the Tenth Amendment makes the best sense of its plain language and structure. The words of the Tenth Amendment confirm that the states or the people have all power that the people have not already delegated to the federal government or prohibited to the states. If the Constitution circumscribes the limits of federal authority and places certain limits on the states, as well,

it follows that every power falling outside those circles belong to the states or the people.

Emphasizing the reserved powers aspect of the Tenth Amendment leads headlong into a dead end, however. If the Constitution affirmatively protects reserved powers, why does it say nothing about them? Besides the passing reference to reserved powers in the Tenth Amendment, the rest of the Constitution is silent on the question. Surely a document that took several months of painstaking deliberation to write and ratify would yield a better answer to this question than "because the Tenth Amendment says so." Yet that is all a reserved powers interpretation of the text offers.

2. *Adopting the doctrine of enumerated powers as a guiding principle for deciding federalism cases establishes judicial review on a solid foundation of popular sovereignty*

The doctrine of enumerated powers rests on the premise that the American people are sovereign and that in their sovereign capacity they have constituted state and federal governments. To each they have delegated certain powers and withheld others. Some powers they have kept entirely for themselves, such as the rights of free speech and religion. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The Constitution thus marks the line running between federal and state powers; it accomplishes this by defining the powers delegated to the federal government and leaving the rest to the states or the people.

Guided by the doctrine of enumerated powers, judicial review in federalism cases proceeds on exactly the same theory as it does for any other question "arising under this Constitution." U.S. CONST. art. III, § 2. Chief Justice Marshall expressed that theory in

terms that indicate its basis in popular sovereignty. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." *Marbury*, 5 U.S. at 177.

Unfortunately, reading the Tenth Amendment from the direction of reserved powers yields a thin and unsatisfying theory of adjudication. It requires courts to identify the members of a class—powers reserved to the states or the people—on which the Constitution is almost entirely silent. Other than the reference in the Tenth Amendment, the Constitution provides no basis for deciding when a congressional act violates "constitutional principles of federalism" by identifying powers reserved to the states and then protecting them from federal interference. At most a reserved powers approach allows one to defend the exercise of judicial review in federalism cases by pointing to the Tenth Amendment and to the manifest importance of preserving *some* division of power between the federal government and the states.

3. *Adopting the doctrine of enumerated powers as its guiding principle in federalism cases keeps the Court close to the form of government ratified by the American people*

Because it hews close to the words of the Constitution (and to the original understanding of that text), the doctrine of enumerated powers ties the decisions of this Court to the form of government ratified by the American people. That virtue is considerable. "The individual American—as the heir to those who brought the Constitution into being and agreed to its adoption—has a fundamental entitlement to living under the form of government spelled out in the Constitution."

A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985).

Approaching federalism from the direction of reserved powers lacks that virtue. It carries the significant danger that judicial decisions will cut too far, either in favor of the states or the federal government. The resulting line dividing federal and state powers may resemble the federalism designed by the Founders and ratified by the people in name only. Given the antidemocratic implications of fundamentally revising the constitutional order without constitutional guidance, this danger ought to be regarded as substantial indeed.

4. *The doctrine of enumerated powers enables the Court to recognize that it is people, not states, who lose when federalism is eroded*

Locating sovereignty in the American people holds profound implications for federalism. If sovereignty lies with the people, then the dichotomy between states' rights and federal power is false. The people, not states, win when federal power is restrained within the limits demarcated in the written Constitution. Hence an *ultra vires* federal act robs the American people of powers they did not consent to giving up.

Things look substantially different from the perspective of reserved powers. From that position federalism is a tug-of-war between governments, rather than a constitutional device protecting individual liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991). Because a reserved powers approach views federalism solely as a problem of guarding states from federal encroachment, it implicitly presumes that the federal and state governments are sovereign. And once they are regarded as sovereign, it follows that the

American people have little directly at stake when federal and state powers conflict.

5. *The doctrine of enumerated powers puts the burden of proof in federalism disputes on the federal government, where it belongs*

The doctrine of enumerated powers puts the burden of proof in federalism cases where it belongs. That doctrine requires the federal government to "show that what Congress has or might do has an appropriate connection to the powers that the Constitution delegates to it." H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 672 (1995). Placing the burden of proof on the proponent of federal power respects the differing "default rules" that the doctrine of enumerated powers assigns to the federal government and the states. "[W]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Approaching federalism from the direction of reserved powers, however, forces the states to bear the burden of proof. This turns the rule upside-down, defining any power not "reserved" as "enumerated" and therefore within the federal domain. *See id.* at 851–52. States win under the reserved powers theory only if the challenged federal action trenches on "core" or "traditional" functions of "states as states." *See National League of Cities* v. *Usery*, 426 U.S. 833, 841, 852 (1976), *overruled by*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). They cannot win solely because they demonstrate that a congressional act exceeds the authority granted by the people in the Constitution.

6. *The doctrine of enumerated powers enables the Court to view federalism as "an equilibrium of powers" rather than an isolated Tenth Amendment issue*

The habit of thinking of the Constitution mainly in terms of rights makes it tempting to read the Tenth Amendment in isolation from the rest of the Constitution. (The reserved powers approach inevitably succumbs to this temptation.) But the doctrine of enumerated powers, which takes its cue from "a fair construction of the whole instrument." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), overcomes that temptation and reveals federalism as more than a Tenth Amendment issue.

Madison recognized that federalism forms "an equilibrium of powers as constitutionally divided between the Government of the whole and the Government of its parts . . . [and] the equilibrium must be equally disturbed by an assumption by either of the Governments of powers belonging to the other." Letter from James Madison to Francis T. Brook (22 Feb. 1828), *reprinted in* JJAMES MADISON'S "ADVICE TO MY COUNTRY" 48 (David B. Mattern ed., 1997). Understood in this way, it becomes clear that federalism is threatened quite as much by state laws unlawfully extended into the federal realm, *National Foreign Trade Council* v.*Natsios*, 181 F.3d 38 (1st Cir. 1999) as by the more common incursions into state authority by the federal government. *See Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 826 (4th Cir. 1999).

7. *Deciding federalism cases based on the doctrine of enumerated powers puts real constraints on governmental power—including the exercise of judicial review*

The doctrine of enumerated powers puts the constitutionalism in the Constitution. Whether defined as "a contrivance which not only describes but confines government, at least in its everyday activities." FRANCIS D. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 3 (1949), or as "the limitation of government by law," CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT & MODERN 22 (1947), constitutionalism requires the placement of real constraints on government. The accent falls on the word "real." Experience shows that a written constitution standing alone poses no obstacle to arbitrary power, since many of them have become "merely precatory." *See* William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732 (1985). As Martin Diamond implored, unless "the Constitution has some sort of fixed, objective, intelligible, and accessible meaning, we cannot say that we govern ourselves under a constitution. " Martin Diamond, *The Forgotten Doctrine of Enumerated Powers*, 6 Publius 187, 190 (Fall 1976).

The doctrine of enumerated powers acts as a real constraint on government. So much is clear from recent decisions applying the doctrine in cases where federalism figured prominently. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). But it also constrains the judiciary by anchoring federalism decisions in the text and original understanding of the written Constitution.

A reserved powers approach cannot do the same. It leaves the judiciary free to define the powers reserved to the states with nothing but a rubric and a purpose to steer by: the rubric of "reserved powers" and the purpose of safeguarding *some* allocation of powers

between the federal government and the states. Lacking any textual mooring, the reserved powers approach to protecting federalism resembles the "discrete and insular minorities," *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), approach to protecting civil rights. It simply launches the Court onto an uncharted sea of judicial legislation. At best, the Court can make a guess, which can at best be justified by analogizing the state activity in question with "core" state functions, such as legislation, that themselves are presumed to lie beyond federal control. But to make that guess the Court must travel beyond what the constitutional text will fairly justify.

D. Neither a Lack of Precision, the Risk of Formalism, Nor the Loss of Legislative Flexibility Offers a Persuasive Objection to Adopting the Doctrine of Enumerated Powers as the Court's Guiding Principle in Deciding Federalism Cases

Three objections may be raised. One might argue that the doctrine of enumerated powers does not precisely settle federal-state conflicts, especially in close cases. Or one could reject the doctrine of enumerated powers on the grounds that it is excessively formalistic or that it deprives Congress of needed flexibility. None of these objections holds up.

The difficulty of using the doctrine of enumerated powers to settle closely-contested federalism cases sounds serious. Even James Wilson admitted that the line dividing federal and state powers is not "drawn with mathematical precision." James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 400–01 (Phillip B. Kurland & Ralph Lerner eds., 1987).

Yet the argument from imprecision proves too much. The doctrine of enumerated powers directs the Court to examine the entire Constitution for proof or disproof

that a particular federal act is valid. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). If the features marking the end of federal power were as imprecise as some might claim they are in the area of federalism, judicial review would be discredited as an exercise in bold fiat rather than a vindication of popular sovereignty. In fact, courts manage to draw fine lines when the question is one of preemption. *See, e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). "It is only when *state* prerogatives are at issue that federal judicial competence suddenly comes into question." Steven G. Calabresi, *"A Government of Limited and Enumerated Powers,"* 94 MICH. L. REV. 752, 800 n.156 (1995). Besides, arguments based on the doctrine of enumerated can settle federalism questions, as the Brief *Amicus Curiae* of the Pacific Legal Foundation attests. *See id.* 4–11.

To the degree that relying on the principle of enumerated powers is charged with entangling the Court in the dreaded coils of formalism, the proper answer is that constitutionalism *is* formalism. *See* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 200 (1991); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) (celebrating formalism as the basis of the rule of law). Moreover, as this Court has recognized, constitutional forms wisely constrain the government, even when its purpose is benevolent.

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. *United States*, 505 U.S. 144, 187 (1992).

The argument from legislative flexibility makes an appearance in this case. Petitioners urge the Court to interpret the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, so as to leave Congress with what the government regards as salutary flexibility. "[T]he breadth of the Clause confirms that it vests in Congress the inherent discretion normally possessed by legislative bodies to adapt their laws to the problems they confront, including the flexibility to choose between laws of general and particular applicability." Br. Pet. 44–45. To this the Court has written an apt riposte.

> Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course—but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999); *see also First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 321 (1987) ("many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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