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Note to Michigan Readers: Weighing in at over 28,000 words, this draft is excessively long. Richard and I are working on cutting it down to a sensible length. In the meantime, if you (quite understandably) do not have time to read the entire paper, I am most interested in your comments on the Introduction and Part I(A) (pages 1-12) and Parts II-III (pages 32 to 50). I should add that Richard has not yet commented on Part III(B)(1) and might not agree with my assessment of NFIB v Sebelius: We will iron out whatever differences we might have on this visit, I hope!

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1. NFIB v. Sebelius as Anti-Corporate Non-Delegation Doctrine

2. The Anti-Preemption Canon as Anti-Corporate Non-Delegation Doctrine

C. Can courts pull it off?

Introduction

Officially, the Constitution’s enumeration of congressional powers marks the boundary between two mutually exclusive domains. Within the domain of its enumerated powers, Congress may legislate. Outside that domain, legislative power belongs exclusively to the states. The official account goes on to imagine that there is significant space on each side of the line and, more pointedly, that the zone of exclusive state jurisdiction is larger than that of Congress. In James Madison’s oft-quoted words, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” But this official picture bears little resemblance to the way that American federalism actually works. In reality, Congress is not much limited by its enumerated powers, and national lawmaking has been normal across an awful lot of policy domains for a very long time. Moreover, the enumeration’s failure to confine Congress to smaller domain does not reflect some bizarre judicial failure to understand and enforce the Constitution. It reflects consistent practice over most of the Constitution’s history, and for understandable reasons. As a conceptual matter, the Constitution’s enumeration of congressional powers is not well-suited for the task of marking limits beyond which Congress cannot go. It was probably not drawn for that purpose, and the interpretive devices used to construe it as a limiting list fit awkwardly with the actual content of the Constitution’s text. So it should not be surprising that courts have been unable to use the enumeration as the basis for any practically successful and theoretically sensible set of rules for policing the limits of federal power.

It does not follow, however, that American constitutional law has no resources for sorting policy domains into those appropriate for national legislation and those better left to more local decisionmakers. The Constitution’s enumeration of congressional powers is not a good tool for that job, but the job is still important, and it can be done with different tools. Instead of trying to identify what should be left to the states by making negative inferences from a list of affirmative congressional powers, constitutional decisionmakers could think directly about what sorts of lawmaking should, either categorically or presumptively, be left to local authorities.

Many Supreme Court decisions have reflected the idea of proceeding this way, speaking variously of “traditional government functions” or topics of “traditional state concern.” The text of the Constitution specifies only a few federalism-based limits on national lawmaking, and analysts have reasonably raised doubts about whether courts should try to identify and enforce

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3 Subject, of course, to affirmative limits like those in the Bill of Rights.
4 See, e.g., Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (“The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.”) (emphasis added).
5 The Federalist No. 45.
others. Nonetheless, constitutional decisionmakers have persistently asserted that some sorts of lawmaking are off-limits to Congress on federalism grounds, either because such laws would interfere unduly with the state governments themselves or because they would inappropriately federalize a given policy domain. The anticommandeering doctrines are a good example of the former. Intuitions of the latter kind have varied widely: prominent candidates for fields of regulation where the federal government should not act have included family law, education, agriculture, banking, the chartering of corporations, the law of the workplace, insurance, criminal law, the internal operations of a state’s own government—and the institution of slavery and, later, white supremacist violence against the freedmen. Substantively, some of these choices may be wiser than others. But for present purposes, the key point is that the process by which these (categorical or presumptive) limits on federal power are identified has mostly not begun—and should not begin—by looking at Congress’s enumerated powers and asking what the photo-negative looks like. For the most part, decisionmakers have long behaved as if Congress had the power to legislate in general, except where its legislation would bump up against some limiting principle whose basis is not really excogitated from the enumeration of congressional powers.

To express that thought with a set of modern terms, the federalism-based limits under which Congress labors are mostly external limits (that is, affirmative prohibitions) rather than internal limits (that is, limits inhering the grant of Congress’s own powers). Sometimes these external limits are enforced directly, as when a court strikes down federal law because it trenches on some unwritten state prerogative. Sometimes these limits are enforced in softer ways, as with clear-statement rules used to construe federal statutes narrowly. But either way, looking at the balance of power between Congress and the states through the assumption that what matters is the enumeration of congressional powers is bound to mislead. To map the zones where national power has run into serious federalism-based resistance, one needs to set aside the framework of the enumeration and the photo-negative and instead treat federalism-based limits on nationallawmaking as freestanding principles only very loosely tethered to the text of Article I.

The mission of this article is to articulate criteria that would sensibly generate such federalism-based external limits on national lawmaking. Rather than defining a zone of exclusive state jurisdiction consisting of whatever residuum is left over after constitutionally enumerated powers have been deducted, our criteria would define a set of suspect spheres where national lawmaking should be presumptively disfavored or, more rarely, categorically prohibited. The criteria we suggest are drawn from structural constitutional considerations and from the history of the American system: they aim to deliver a sensible, workable approach that is grounded in the realities and traditions of American law and politics. In particular, we suggest that four basic principles are essential for defining the spheres in which national lawmaking should be considered suspect.

First and most important, federalism limits congressional power much like individual rights do: most regulation is valid, but there are distinct types of laws that we treat with skepticism because of the special burdens they impose or the special risk that they are the result of law-making pathologies. With individual rights, we use the language of “heightened scrutiny” for “suspect classifications” or burdens on “fundamental rights” to describe such skepticism. There are certain kinds of laws that raise concerns, either because of their substance or because of things we know about how some laws get passed (or both). So we take a more skeptical attitude toward those laws than toward others. In our conception of suspect spheres of federal lawmaking, a roughly analogous doctrine is appropriate, in which ordinary deference to the

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6 See, e.g., García.
necessity and propriety of federal law is suspended for certain topics, because of skepticism about the process or substance of the federal law. Often federal lawmaking is limited only presumptively, with “soft” constraints that can be overcome with sufficiently plain statements or thorough findings. Sometimes federal lawmaking is more categorically proscribed, and suspicion is fatal in fact. In either case, however, our account rejects the traditional premise that national action is presumptively disfavored as a general matter. That premise, which is an orthodox part of the official view of the limiting function of the enumeration of congressional powers, has long been at variance with the reality of American federalism. We come to theorize and make constructive recommendations about that reality, not to upend it in the name of an imaginary alternative rooted in the myth of Article I’s enumeration. In reality as opposed to myth, our federalism is akin to our doctrines of individual rights: Federal regulation, like regulation in general, is appropriate except in those domains where there is affirmative reason to be skeptical.

Second, any normative account of the distribution of lawmaking responsibility between national and local authorities requires a sense of the distinctive pathologies to which national and local decisionmaking are respectively prone. That sense should be rooted in American political and legal experience, not merely in an abstract account of the values of federalism. As mentioned above, the written Constitution articulates a few federalism-based affirmative limits on congressional power, but beyond those few it does not list suspect spheres of federal lawmaking. Most external limits on federal power must therefore be the result of constitutional construction rather than textual interpretation. Constitutional construction, practiced well, is attentive to post-ratification sources like political settlements and traditions, prevailing customs and values, and judicial precedent.7 There are persistent traditions in American history about what constitutes the pathologies of federal power, as we will describe below. If these traditions do not fly too far from empirical reality and contemporary mores, then they can be used by contemporary judges, politicians, and bureaucrats as guideposts for external limits on federal power that have both a respectable common-law pedigree and practical utility.

Third, taken as a whole, the suspect spheres of federal lawmaking must be abstract enough to bridge, or limit the significance of, bitter partisan divisions. A framework for limiting the domain of national lawmaking can benefit American political culture today by limiting the nationalization of partisan disagreements, thereby reducing the stakes of party politics and preserving spaces for each party to act as a loyal opposition at the subnational level. To perform this function, however, each party must make a credible commitment to the other that, if each respects the constructed limit when it is in control of the federal government, then its self-restraint will be reciprocated later when it is out of power and its opponents hold the federal reins. Constitutional construction bluntly requires a suspect-spheres principle transcending Left and Right, Republican and Democrat, liberal and conservative. Only such a principle can ground a constitutional coalition – that is, groups of citizens large enough to resist the temptation to renge from the federal compromise when their party is in power.

Finally, a sustainable principle of suspect spheres will not always be fully judicially enforceable. Much of the time, the question of whether a certain sort of law should be made by Congress or left off the national legislative agenda will have to be answered by non-judicial officials. But constitutional analysis is not just for judges: we mean to give those other officials something to work with. Our suggested doctrines largely connect the dots of existing precedents

that include a mix of a few “hard” constitutional constraints, a lot of anti-preemption and clear statement canons, and some limits on *Chevron* and *State Farm* deference to executive rule-making. This disparate set of doctrines is unified not by any novel departure from existing norms but rather by an understanding that those norms are best understood as constituting discrete external limits on otherwise normal federal power. A historically grounded and practically plausible sense that the issues are especially important for state control or especially inappropriate for federal control, not the text of the enumeration, does the real work.

As an illustration of how American constitutional traditions can yield principles that meet these four criteria, we examine one historically rooted observation about federal pathologies that risk unnecessary and improper federal policies. There has been a longstanding worry in American history about federal delegations of power to private corporations. This suspicion has been expressed in a variety of historical moments, including Madison’s fight against the First Bank of the United States, Jackson’s struggle against the Second Bank, Brandeis’ and Wilson’s attack on the “House of Morgan,” all the way up to the New Deal Court’s rejection of the NIRA. Whatever the justification, a persistent streak in the external limits imposed on the federal government in American history is that, because the federal government is especially susceptible to capture by well-placed and financially astute insiders, raw delegations of federal power to private, for-profit corporations are especially suspect.

We also suggest that this basic principle can explain a wide array of apparently unrelated modern doctrines and decisions. Such decisions and doctrines include canons of statutory construction that disfavor preemption of state law as in *Altria v. Good* as well as the Court’s otherwise perplexing distinction between commercial regulations that mandate rather than forbid commercial activity in *Nat’l Federation of Independent Businesses v. Sebelius*.

Underlying these decisions is an ill-articulated intuition that federal law is operating in domains where it should not. Making sense of that intuition (where it is sensible) requires an analysis that bears little connection to the enumeration. Courts have been reluctant to admit that the relevant principles go beyond constitutional text, clinging to the myth that Article I’s enumeration of powers will somehow yield doctrines delineating areas of special state concern. Getting rid of that myth does not entail the loss of the idea that within the American constitutional system, some sorts of decisions should be made locally rather than nationally. Instead, a more honest and helpful justification for those doctrines would take seriously the idea that the federalism-based limits on national lawmaking rest substantially on nontextual sources, much as is the case with constitutional doctrines defining individuals’ rights.

I. How Internal Limits Fail to Identify Reserved State Powers

On the orthodox account, the Constitution’s enumeration of congressional prevents, or is supposed to prevent, Congress from legislating in areas where regulation is supposed to come only from the states. We think it important that constitutional decisionmakers be able to identify regulatory spheres where legislation should (either conclusively or presumptively) be local rather than national. But for reasons we explain in this Part, the enumeration of congressional powers does not and cannot deliver a sensible set of reserved state powers.

A. Internal v. External Limits
Consider two ways to infer limits on Congress’ power to legislate. First, one might tease out textually implied limits from the enumeration of powers contained in Article I. On that model, “The enumeration of powers is also a limitation of powers”\textsuperscript{8}; it means that Congress has certain abilities and no others. The animating thought here is that if the Constitution were intended to give Congress general legislative jurisdiction, it could just say “Congress may legislate,” or “The legislative power of the United States shall be vested in a Congress,” or the like. The choice instead to provide a long list of specific powers implies, \textit{expressio unius} style, that every type of legislation not included on the list belongs by default to some other legislator. The Tenth Amendment reinforces this perspective by providing that whatever powers the federal government does not enjoy are reserved either “to the States, or to the people.” In keeping with a modern terminological convention, we call such a limit rooted in the enumeration of powers an \textit{internal limit}, because it is derived from — internal to — the grant of powers itself.

By contrast, one might instead specify limits on Congress by focusing on affirmative reasons why Congress should \textit{not} enact certain kinds of legislation. Congress may not, for instance, make laws abridging the freedom of speech, or taking private property without just compensation, or imposing cruel and unusual punishments. Laws transgressing those limits are unconstitutional even if they otherwise fit within Congress’s enumerated powers. Think of a regulation of commerce that takes private property, or a law punishing counterfeiters by boiling them in oil. The reasons why Congress should not engage in these kinds of lawmaking are rooted in considerations located outside of—external to—the Constitution’s textual enumeration of congressional powers, so we call these limits \textit{external limits} on congressional power.

External limits on Congress are sometimes rooted not only in considerations of individual rights but also of federalism. From an eighteenth-century perspective, both the Establishment Clause and the Second Amendment were, for instance, federalism-based external limits: irrespective of what Congress’s enumerated powers might say, the Establishment Clause blocked a type of legislation that might endanger the peace of the Union if done centrally rather than locally, and the Second Amendment blocked a type of legislation that a renegade central government might use to skew the balance of power toward itself and away from the states. Other federalism-based external limits on Congress include the prohibitions against Congress’s unilaterally redrawing state boundaries, dictating the location of a state’s capital, or taxing a state’s own tax revenue.

One can usefully visualize the distinction between internal and external limits on Congress’ powers with three Venn diagrams in Figures 1, 2, and 3 below.

\textsuperscript{8} \textit{NFIB v. Sebelius}, 567 US at 534 (Opinion of Roberts, CJ)
Figure 1 depicts a traditional “internal limit” conception of congressional power. It imagines that the enumerated powers of Congress define a relatively small space (the red and yellow ovals, representing respectively the zones of exclusive congressional jurisdiction and concurrent federal/state jurisdiction) within the overall universe of potential legislation, and it imagines an extensive residuum of exclusive (and residual) state power occupying the remainder of that universe. The space occupied by congressional power includes areas that are exclusively federal (like the power to declare war) as well as areas of concurrent federal and state power such as taxation of most private revenue sources, where states can legislate until and unless Congress legisitates to the contrary. But, in this traditional account, Congress’s zones of exclusive and concurrent legislative jurisdiction together form only a small island of (in Madison’s phrase) “few and defined” topics floating in a sea of states’ “numerous and indefinite” reserved powers. State law is the presumptively normal form of law; federal law is the exception that must be justified. The burden of argument is, therefore, naturally focused on defining and justifying that island of federal power, by explaining the exceptional circumstances requiring federal intervention. Moreover, this traditional account has nothing to say about what sorts of legislation, within the vast blue sea, might be particularly important to be kept local—or, conversely, about whether some potential legislation lying within the yellow zone of concurrent power might still be better suited for local rather than national policymaking, such that Congress should think twice about acting even though it has an enumerated power sufficient to justify action.

Figure 1 manifestly fails to describe the reality of American government. There is no meaningful sense in which federal laws are a small island floating in a sea of reserved state powers, nor has there been at any point in our lifetimes. Federal law is just as normal a part of our regulatory landscape as state law. All aspects of your job -- wages, hours, working conditions, hiring and promotion criteria, and collective bargaining, to name but a few topics -- are pervasively regulated by federal law. The air you breathe, the car you drive, the food you eat, the water you drink and clean with, and the energy that powers your home, office, farm, or factory are all pervasively regulated by federal statutes. Moreover, it is uncontroversial that Congress has authority to preempt a vast swath of the state law that still remains in force,
setting aside states’ torts, contracts, and property laws (for instance) with contrary federal rules. State law remains immensely important, but not because it operates in a space that Congress cannot reach.

The actual scope of the states’ exclusive legislative domains, therefore, looks much more like the blue zones in Figure 2 below rather than the blue field in Figure 1 above:

The sphere of exclusive federal power (red) could still be sensibly imagined as a small subset of all possible legislative power. But the zone of concurrent federal and state authority occupies the vast majority of the space. The residuum of exclusive state jurisdiction is less like an encompassing sea and more like a few discrete ponds on the margins of the law. The purely intrastate possession of a firearm that has never been shown to have traveled in interstate commerce, for instance, would fall into one of those corner patches of blue, because regulation of such possession is not sufficiently close to regulation of interstate commerce to fall within Congress’ necessary and proper power. But the intrastate and non-commercial possession of a gun that has moved in interstate commerce—which is a large majority of all guns—does not.

To be sure, state law can still regulate that gun that has moved in interstate commerce. States legislate not only in their exclusive-power zones but also in the large (yellow) zone where their power is concurrent with that of Congress, so long as the specific legislation they wish to

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*Bass; Lopez.*
enact has not been preempted. There is a lot of state law out there, and importantly so. The list we offered above of areas regulated by federal statute—your job, your car, your food, your house, the very air around you—is also a list of things regulated by state law. Most of the social world is subject to both state and national legislation, until and unless Congress makes itself the exclusive authority through preemption.

Despite the apparently radical difference between Figures 1 and 2, they share a common assumption. Although exclusive state jurisdiction is large in Figure 1 and small in Figure 2, both diagrams present the allocation of powers between national and local legislations exclusively by reference to what Congress is allowed to do. In neither diagram does any part of the analysis ask whether some area of law is particularly important for states to control or (not the same thing) whether some sorts of lawmaking are likely to go badly if done at the national level. There is no recognition of the possibility that a piece of legislation might be encompassed within the textually enumerated powers of Congress but still be, for federalism reasons, a sort of thing that Congress should not enact.

Consider: Congress has an enumerated power to lay and collect taxes. A law providing that states must pay 100% of the money that they collect as tax revenue to the federal treasury would be, straightforwardly, a law for the laying and collecting of taxes. It would also be a terrible idea, for federalism reasons: it would destroy a great deal of the states’ ability to govern. We have little trouble saying that such a federal tax law would be unconstitutional. The reason for that unconstitutionality, however, cannot be discerned from a close examination of the enumerated powers of Congress. The reason instead turns on the importance of a certain kind of state lawmaking, or, put differently, about the destructiveness of a certain kind of national lawmaking, even though that lawmaking is sensibly described as falling within the textually specified powers of Congress. Such considerations of either the importance of state power or the destructiveness of national power are invisible in an account that takes the enumeration of congressional powers as the basis for allocating legislative powers among state and national legislatures. On any such account—whether it looks like Figure 1 or Figure 2—the zones in which state jurisdiction cannot be overridden by federal law have no internal coherence. They are random snippets left over when the set of congressional powers is subtracted, like the oddly shaped and practically useless bits of cloth left over after a tailor cuts out pieces for a suit of clothes.
Contrast this internal-limit approach to Congress’ powers with the external-limit approach visualized in Figure 3 below:

![Figure 3: “External” definition of States’ reserved powers, independent from the definition of Congress’ law-making powers](image)

In Figure 3, everything within the yellow rectangle, including the interior of the two circles, is within the enumerated powers of Congress. But within that overall space, a particular zone is carved out as belonging to the states on the basis of considerations that override Congress’s enumerated powers. Thus, the blue circle representing states’ reserved powers is not defined merely as a space in which Congress’ enumerated powers have run out. A federal law might be sensibly understood as an exercise of Congress’ enumerated powers (with or without the extension of the Necessary and Proper Clause) and yet fall within the “blue zone” and, therefore, be unconstitutional on federalism grounds. So the blue space is not a residuum; it is an affirmative reserve. On this model, which we think is both more sensible and closer to reality than Figures 1 and 2, determining the zone of reserved state powers is not just a by-product of determining whether a federal law executes a textually enumerated power of Congress. Instead, the area of reserved state powers is defined by factors independent from – external to – the enumeration, such as the importance of a state’s being able to make certain kinds of laws, or the dangerousness of letting certain kinds of laws be made at the national level. (Those two conditions are sometimes opposite sides of the same coin, but sometimes one is at work rather than the other.)

To think further about the value of thinking in the way that Figure 3 suggests, consider the anticommandeering doctrines that prohibit the federal government’s “directly” commanding state officials to regulate third parties. In its first anticommandeering decision, *New York v. United States*, the Supreme Court rested its analysis on multiple grounds, none of which rested on the text of the constitutional clauses enumerating congressional power. One such ground was a historical claim about the Founders’ having deliberately rejected a system in which Congress operated directly on the states (under the Articles of Confederation). Another was a claim about democratic accountability, which the Court argued is compromised if Congress can make state legislatures do its dirty work, thus confusing the electorate about who is to blame for a given regulatory regime. In the second anticommandeering decision, *United States v. Printz*, the Court...
also added an argument about traditional practice (i.e., that Congress through American history has not commandeered state officials, and that Congress’s self-restraint on this point has signaled its awareness of a constitutional limitation) and an argument that letting Congress conscript the resources and personnel of all fifty state governments would instantly make the federal government much more powerful than it would be if it had to rely only on its own personnel, and voluntarily participating state officials, when trying to get things done. Reasonable people can disagree about the strength of these rationales. For present purposes, what matters is that all of these considerations are matters of history and structure. None of them is about the text of the enumerated powers of Congress, and none turns on the purpose or spirit of the enumeration. All such arguments – original understanding, political accountability, tradition, etc. – would be just as strong (or weak) even if Article I simply conferred “the legislative power of the United States” on Congress without all of those clauses in Article I defining specific types of legislative power. So on the understanding that considerations like these are the justifications for the anticommendeeing doctrines, those doctrines are *external limits* on the powers of Congress, rooted in considerations lying outside the text and spirit of the enumerated powers of Congress. They occupy the blue circle in figure 3, defined not by the edge-of-the-picture triangles in figure 2 but rather by principles independent of the shape of Congress’ powers.

The confusion of trying to provide an “internal” justification of the anticommendeeing principle justification as somehow a byproduct of Article I’s enumeration is nicely illustrated by newest commandeering decision, *Murphy v. NCAA.*10 Earlier Supreme Court opinions in commandeering cases pretty forthrightly acknowledged that the anticommendeeing doctrines do not simply follow from the content of the enumerated powers themselves.11 But according to Justice Alito’s opinion for the *Murphy* Court, the reason why Congress may not compel a state to regulate is neither more nor less than this: Congress is authorized to do only those things described in its enumerated powers, and nothing in the enumerated powers authorizes Congress to commandeer state officials.

It is of course true that the Constitution enumerates no congressional power to commandeer state decisionmakers. But neither does the Constitution enumerate a power to charter corporations or prohibit the growing of wheat. Those other powers are implied by the Necessary and Proper Clause as reasonable ways to regulate commerce, borrow money, or fund armies. Why, then, is not the power to commandeer state officials equally a reasonable way to carry out express powers? The law in *Printz* directed state officials to help regulate retail sales of a consumer good. Why isn’t such a law necessary and proper for the regulation of commerce? Nothing in *Murphy* explains its skepticism about inferring a commandeering power with the same ease as, say, a corporation-chartering power. A high court can of course by sheer judicial fiat stipulate that requiring state bureaucracies to implement federal statutes is not “proper.” Such a stipulation, however, does not rest on the semantics of the word “proper”.12 It rests on

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11 O’Connor in NY, saying this is a non-textual thing; Rehnquist in Condon, presenting the 10A as an external limit just like the 1A.
12 Thus, Professor Gary Lawson’s general idea that the Necessary and Proper clause limits the means by which Congress implements express powers to those deemed to be “proper” is a purely formal limit absent an account of the term “proper” that supplies meaningful semantic limits to the ends that the federal government is entitled to pursue or means that it can use. As explained below, the 18th century usage of the phrase suggests nothing more
considerations that plainly lie outside Article I’s text– considerations that Murphy ignores as it seeks to derive the anticommandeering rule from the textual enumeration of powers.

The real strength of the anticommandeering idea is that there is something special about the control of a state’s own governance processes, such that letting Congress direct it would be an affirmative mistake, not that control of a state’s own governance process is residually left off of Congress’s enumerated powers. Even if Congress’s enumerated powers did authorize (some?) commandeering as a prima facie matter—and like Chief Justice Rehnquist, we think they can be read that way—an anticommandeering doctrine could still be good constitutional law, because the reasons for it are not to be found by looking at the enumerated powers of Congress or by thinking more generally about Congress in isolation from the states. Instead, the considerations underlying the anti-commandeering doctrine lie in what is important for state governance and for the federal balance.

At bottom, internal-limit arguments are all about what Congress should do. External-limit arguments, in contrast, can also directly consider the benefits of doing things locally. That’s an advantage, because those benefits are often important to the calculus of where decisionmaking should occur. To be sure, internal-limit arguments have their advantages, too. Notably, they have the conventional legitimacy of being the official form of constitutional analysis. They might also seem to have the important advantage of being able to look to the 429 words of Article I, Section 8, and to the various clauses elsewhere in the Constitution conferring power on Congress, for textual guidance. But where the aim is to identify domains of decisionmaking that should be (presumptively or conclusively) reserved to state legislatures, the value of that textual guidance should not be overestimated. As we explain below, the textual enumeration of Congress’s powers is not capable of mapping the spheres of regulation that, for reasons of federalism, are better addressed in local legislatures than in Congress. The enumeration of congressional powers was not written to serve that function, and the attempt to conscript it for that function anyway is a bit like looking for one’s wallet under the lamppost—a case of using a tool because it is available, even when it cannot do the job.

B. The Limits of Textual Inference

Constitutional interpreters commonly try to use the textual enumeration of congressional powers as a basis for reasoning about what sorts of legislation should be left to the states. The threshold move takes the fact of the enumeration itself, either alone or in conjunction with the Tenth Amendment, to indicate that the Constitution leaves a meaningful residuum of powers to the states exclusively. In another standard move, interpreters argue that omissions signal particular powers reserved to the states. Considered more carefully, however, the constitutional text is not really capable to doing the work that these various interpretive moves require. In the end, the texts of the clauses specifying congressional powers cannot provide adequate guidance in the project of identifying types of legislation that should (conclusively or presumptively) be the domain of states.

than vague requirements for non-arbitrary treatment the meaning of which are essentially policy determinations rather than interpretations of well-defined terms.
1. “The Enumeration Presupposes Something Not Enumerated”

The threshold move in attempts to use the enumeration of congressional powers as a basis for identifying types of legislation that Congress should not pass is inspired by the Tenth Amendment, the canon of expressio unius, and (a misunderstanding of) Chief Justice Marshall’s dictum that the enumeration presupposes something unenumerated. On this view, the fact that the Constitution affirmatively lists a bunch of specific congressional powers shows that Congress enjoys less than general legislative jurisdiction.

This way of thinking has important limits. For one, it is not true that the Constitution’s enumeration of powers and the rule stated by the Tenth Amendment necessarily preclude Congress from regulating any particular thing. Sometimes a set of enumerated powers turns out, in practice, to cover all the ground that a grant of general jurisdiction would. Maybe, as applied to the circumstances of the social world in 2018, the enumerated powers of Congress are sufficient warrant for anything that Congress might choose to legislate—subject to the blocking force of external limits. Or maybe not; maybe there are things left over. The Supreme Court has given the latter answer. But for reasons one of us has explained at length elsewhere, it is a mistake to think that there must be things left over. (A legislature with seven enumerated powers would have the power to do anything that a legislature of general jurisdiction had the power to do if the seven enumerated powers were the power to make law applicable on Sundays, the power to make law applicable on Mondays, and so forth.) Whether any particular set of enumerated powers adds up in practice to less than a power of general jurisdiction is a question that can only be answered at retail, by looking at the specific set of powers granted and asking whether they leave some part of the social world uncovered.

But even if it were true that the enumerated powers of Congress must leave something unreachable by federal legislation, that interpretive principle would be of basically no value in identifying which domains of legislation should be off limits. In practice, the application of this principle has so far led only to the sort of exclusive state jurisdiction pictured in Figure 2, in which Congress is denied power over disconnected and marginal bits of the social world. So Congress cannot regulate the possession of firearms that have not moved in interstate commerce, and Congress cannot create a cause of action for victims of gender-motivated violence. Those rules make a difference in the lives of the people affected by those specific rules. But nothing functionally helpful about federalism is thereby served. Put differently, if all that the enumeration of powers can say about what sorts of legislation Congress should not engage in is said in the holdings of Lopez and Morrison—or even Lopez, Morrison, and three or four other cases like them—then the enumeration of congressional powers would not have said very much at all.

2. Inferences from Absences

Interpreters who would like to identify specific domains of reserved state power by imagining the photo-negative of Congress’s enumerated powers might press their case, however, by reasoning from apparently specific omissions from Congress’s arsenal, rather than from the fact of the enumeration overall. The intuition is easy to grasp. If we tell our students that class will meet on Monday, Wednesday, and Friday, they will reasonably understand us to mean that class does not meet on Tuesday and Thursday. The same logic can be applied to constitutional
clauses granted power to Congress. For example, Congress has the power to regulate commerce “with foreign nations, and among the several states, and with the Indian tribes.” Chief Justice Marshall famously wrote that the listing of three kinds of commerce implied the existence of a fourth—purely interstate commerce—to which the power given in this Clause does not extend.

But what happens if one tries to make this interpretive move generally? Consider Article I, Section 8, clause vi, which gives Congress the power “To provide for the punishment of counterfeiting the securities and current coin of the United States.” We know from the prior clause that Congress has the power to coin money; now we know that Congress can also punish the people who counterfeit the money it creates. And it would seem that we also know, from the fact that Section 8 affirmatively specifies the power to punish counterfeiters, that Congress does not have the power to punish tax evaders, or mail thieves. Why not? Well, the Constitution expressly grants Congress a power to protect the money it coin by punishing counterfeiters, and in clear contrast the Constitution omits any mention of a congressional power to impose punishments in aid of its power to collect taxes, or its power to establish post offices and post roads. So clearly Congress lacks those other powers of punishment.

This is nonsense: no reasonable person doubts that Congress has the power to punish tax evaders and mail thieves. To be sure, Section 8 does not expressly give Congress that authority. Instead, that authority is implicit, either as incident to Congress’s taxing power and its post office power or else (if this is a different thing) as part of the authority specified by the Necessary and Proper Clause.13 It is true, of course, that a close reading of Section 8 would notice the express specification of a power to punish counterfeiters and the absence of any parallel power to punish tax evaders and mail thieves. But the inference that Congress therefore lacks those other powers of punishment is based on a false premise: that the existence of clause vi is a necessary condition for Congress’s having the power to punish counterfeiters. Even if there were no clause vi, Congress would have the power to punish counterfeiters, just as everyone understands that Congress has the power to punish tax evaders and mail thieves.14 And since Congress would have the power to do something specified by one of its enumerated powers (here, punish counterfeiters) even if that power were not enumerated, it cannot be the case that the enumeration’s failure to include a given power necessarily means that any particular authority is denied. Yes, this line of reasoning means that clause vi is superfluous, and many constitutional interpreters resist the idea that the Constitution contains surplussage. But it does, just as most documents drafted by large committees do. Section 8 is not an artfully written whole.15 It is a competently drafted (dare we say prolix) code, but we should not exaggerate its elegance. Some of its clauses are superfluous.16

13 McCulloch states that the two formulations are identical.
14 As St. George Tucker casually observed, the Punish Counterfeiters clause “seems to be a natural incident to” the Borrowing and Coining Money clauses. St. George Tucker, Blackstone’s Commentaries 1:App. 262-64 (1803).
15 Nor, a fortiori, is the full set of the forty-three constitutional clauses scattered throughout the Constitution conferring power on Congress, only eighteen of which are in Section 8.
16 Some prominent constitutional interpreters insist on going badly wrong in exactly this way. See, e.g., NFIB v Sebelius (Roberts, J.); United States v. Lopez, 514 U. S. 549, 588-89 (1995) (Thomas, J., concurring) (complaining that current understanding of the Commerce Clause renders “superfluous” the Article I, Section Eight clauses “permitting Congress to enact bankruptcy laws, coin money, fix weight and measure standards, punish counterfeiters, establish post offices, or grant patents or copyrights”).

14
3. “Necessary and Proper” Requires Extra-Textual Judgment

The Necessary and Proper Clause creates a further problem for any attempt to infer reserved state domains from apparent omissions in the enumerated powers, because that Clause makes it impossible to construe the boundaries of the whole body of congressional powers without recourse to extra-textual considerations. Even if all of Congress’s other powers had clear internal limits—a heroic assumption, given the myriad questions that might arise about the meanings of the texts describing those other powers—the Necessary and Proper Clause would mean that no analysis of congressional power could ever say “Well, we’ve identified the limit of what Congress can do based on the text of the Constitution and without the need for substantive judgment about the propriety of congressional action.” After all, the Necessary and Proper Clause means that any conclusion that some action lies beyond Congress’s ken may require the substantive judgment that that action is unnecessary or improper, and those judgments cannot be made on the basis of constitutional text alone.

This built-in shortcoming of the texts specifying congressional power as a guide to what Congress cannot do is not simply a bug in the system, brought about by the unfortunate inclusion of a clause specifying indeterminate power. The Constitution probably could not have managed without something like the Necessary and Proper Clause. It is difficult to foresee all of the things that a well-functioning continental-scaled government might have to do. The Articles of Confederation attempted to list all of the Confederation Congress’ powers while excluding all powers not “expressly” listed, and government under the Articles was a failure. The Philadelphia Convention avoided this problem by conferring on Congress all powers “necessary and proper” for executing any of the federal government’s powers. And there is no way to limit the scope of permissible legislation under the Necessary and Proper Clause without making substantive, extra-textual judgments.

That need to make substantive, extra-textual judgments was present from the beginning. Federalist congresspersons in the eighteenth century believed that a law chartering a lending bank with the power to issue banknotes that could act as a circulating medium with which taxpayers could pay their taxes was warranted as a law necessary and proper for the execution of Congress’s express power to impose taxes. Democratic-Republicans like James Madison argued that rather than being necessary and proper, such a bank bore only a tenuous relationship to Congress’s express powers and, moreover, would arbitrarily discriminate among classes of citizens by giving insiders special access to capital. We do not think that the contest between these positions is just a matter of unaccountable taste, like the difference between preferring vanilla or chocolate: we think there are sensible methods for evaluating rival views about whether particular legislation is authorized under the Necessary and Proper Clause. Those methods take account of certain dynamics of national and local lawmaking, as visible in the long experience of American government. But the semantics of the phrase “necessary and proper” will not draw a sensible line around those forms of lawmakers that should be reserved to state legislatures.17 All those semantics can do is ask constitutional interpreters to reason

17 Not even if those semantics come from the review of an eighteenth-century dictionary, or even a database of the eighteenth-century linguistic corpus. The Members of the First Congress who fought extensively about the scope of
The necessity of reasoning from extra-textual principles about the risks of federal legislation rather than from Article I’s semantics is illustrated by James Madison’s argument that “important” powers should not be lightly inferred as implied means for executing express powers.19 Some of Madison’s contemporary congressmen thought that a power’s high importance was a reason to believe that power implicitly included in the powers of the national government, not a reason to lean against inferring it: who better than the national government, their thinking ran, to exercise the most important powers?20 Similarly, Madison regarded a privately owned lending bank with exclusive rights to hold the federal government’s revenue as “important” because he regarded such banks as threats to citizens’ equality – in his words, “a monopoly, which affects the equal rights of every citizen.”21 But Chief Justice Marshall was more sanguine about corporations as an ordinary tool of government, so he denied that the corporation-chartering power was “a great substantive and independent power which cannot be implied as incidental to other powers.”22 These disagreements cannot be resolved by parsing the words “necessary and proper.”23

The situation with the Tenth Amendment is similar. Like the Necessary and Proper Clause, it can suggest the existence of spheres of decisionmaking where Congress should not intervene, but it does not identify any particular sphere as falling within that category. It does not name, or describe the purpose of, any particular field of regulation that it is important be handled (conclusively or presumptively) by local decisionmakers. Those fields are instead defined as the photo negative of whatever has been granted to Congress. So when the scope of Congress’s sixty-plus powers turns out to be pretty broad, the photo negative can become vanishingly small, and the Constitution’s text offers no resources for identifying where it is important to push back.
To return to a prior concrete example: Congress unambiguously has an enumerated power to lay and collect taxes. A federal statute providing that all state governments must remit 100% of their own tax revenues to the Internal Revenue Service would be a law laying a tax, plain and simple. We do not hesitate to say that such a law would be unconstitutional. But nothing in the text of Congress’s enumerated powers (or in that the Tenth Amendment) offers a basis for concluding that it is a state’s tax revenue, rather than (say) its power to regulate agricultural production or its prerogative to decide how to pay its employees, that must be beyond federal interference. The internal limits of Congress’s textually enumerated powers cannot do that work.

4. Regulatory space doesn’t come in discrete categories

The problems with trying to use the text of the Constitution’s clauses enumerating congressional powers to infer the regulatory spaces that should be (conclusively or presumptively) reserved for state legislation are not merely semantic. There is also a serious conceptual problem with trying to use a list of powers given to a legislature as a guide to what areas that legislature should not regulate. That problem, in brief, is that domains of regulation are not analytically separate from one another.

Roughly speaking, the idea that the enumerated powers of Congress can be mapped as an image whose photo-negative includes everything that should be reserved to the states works best if we imagine that the universe of potential legislation can be divided into some set of mutually exclusive subcategories. “My legislation will govern Mondays and Tuesdays, and yours will govern everything else” will successfully preserve your ability to make law for Thursdays. But unlike the days of the week, the actual categories that any reasonable system of government would use to organize the responsibilities or portfolios of different decisionmakers—defense, finance, education, labor, foreign affairs, the environment, the economy, and so forth—do not constitute a clean set of mutually exclusive domains. To use a canonical example, “commerce” and “manufacture” and “labor” are not synonyms, but it is hard to maintain a picture of the social world on which given pieces of regulation never fall into more than one of those categories. One can choose to define the categories to be mutually exclusive, of course—anything can be defined to mean anything—but it stretches plausibility to imagine that the categories can be defined in a way that both yields a scheme of mutually exclusive regulatory domains and also cleaves social reality into stable natural kinds. As a result, the residuum that remains after Congress is given a set of substantively defined powers might not consist of categories with conceptual integrity of their own. It might just be a hodgepodge, as portrayed in Figure 4 below:
From such a hodgepodge, it is impossible to infer a coherent principle for limiting Congress’ implied powers.

5. **The Limits of Purpose-Based Inferences from Article I**

Where constitutional texts taken separately cannot deliver, interpreters sometimes wisely read constitutional text by reference to broader constitutional purposes. In this vein, some theorists have thought that if we can determine the purpose for which the Constitution enumerates congressional powers, we can also establish the content, and therefore the limits, of the textually conferred powers more clearly. But this strategy faces a basic obstacle: the limits of federal power might not be a function of the purposes for which federal power exists. They might be better understood as functions of the likely pathologies of federal power, relative to those of local power. If so, trying to derive the limits of federal power from an account of its purposes will not succeed.

By way of illustration, consider Robert Cooter’s and Neil Siegel’s important argument that the purpose of Article I’s enumeration of congressional powers is to enable Congress to solve collective action problems among the states. Cooter and Siegel would use that account of Article I’s purpose to resolve ambiguities in constitutional text, justifying federal regulation where such collective action problems exist while barring federal law elsewhere. But even if this approach can succeed in explaining why the Constitution should be read to confer certain powers on Congress, it cannot without more explain why the Constitution should not be read to confer other powers on Congress. That the Constitution aims to empower Congress to solve collective action problems provides no reason to restrict congressional power to collective-action-problem scenarios. Maybe Congress should be understood to have the power to solve collective action problems and also to act in some other situations.

Cooter and Siegel accordingly argue for a background principle by which there should be no national regulation except where the collective-action rationale recommends it. Their “internalization principle,” which resembles the European idea of “subsidiarity,” holds that all governmental power should presumptively be exercised by the smallest possible political unit, because “local residents possess better information than nonresidents” and “have stronger incentives than nonresidents to monitor the officials responsible for creating and maintaining [local public goods].” But it is not clear what justifies this internalization principle. As a


25 *Id.* at 144.

26 *Id.* at 138
practical matter, the proposition that absent collective action problems local residents are the best
decisionmakers is sometimes true and sometimes not. And it is hard to think that the
internalization principle emerges from the text of the Constitution. After all, nothing in the
Constitution even addresses the issue of what virtues local decisionmaking has.

The internalization principle is thus less an inference from the text of the Constitution
than an attempt to give rational content to a photo-negative of the idea that Congress is
empowered to solve collective action problems. The thought process runs like this: the
Constitution seeks to empower Congress to solve collective action problems; therefore, the
Constitution does not empower Congress to act in other scenarios; therefore, some principle
unites those other scenarios. But the reasoning is flawed, in part because the principle that the
Constitution aims to empower Congress to solve collective action problems, even if sound on
its own terms, does not entail the conclusion that the Constitution empowers Congress is no other
way or for no other purpose. Indeed, there is no reason to think that all of Congress’s powers are
reducible to a single general purpose. (If the powers were so reducible, perhaps the drafters
would have included a text telling readers what that principle was, rather than hiding the ball.)
So even if we read the Constitution’s enumeration of congressional powers as having the purpose
of letting the national government solve collective action problems, it does not follow that we
should read it to confer power on Congress only where states face collective action problems.

To justify constitutional limits on Congress, one needs a theory explaining when and to
what extent Congress has perverse incentives to over-centralize, as well as a theory of how the
answers to that question map on to the scenarios where local decisionmaking is especially
subject to pathologies of its own. 27 Just as the answers to those questions will not emerge from
the specific texts of the Constitution’s clauses vesting power in Congress, they will not emerge
from an account of the purpose for which the Constitution as a whole confers power on
Congress. After all, the answers to these questions are not about the purpose for which Congress
holds power. They are about the typical pathologies of national decisionmaking, relative to the
pathologies of local decisionmaking. To map that terrain, we need tools that lie outside not only
the text but also the purpose of Article I’s enumeration.

6. An Enumeration of Powers is No Way to Limit a Legislature

The constitutions of some federal systems respond to this problem with a straightforward
solution: rather than leaving the domains of subnational decisionmakers to be inferred as the
things omitted from a list of enumerated national powers, they affirmatively specify the topics
that should be (conclusively or presumptively) reserved to subnational decisionmakers. The
most straightforward way would be to specify the reserved subnational topics affirmatively.
Article 92 of the Canadian Constitution is a good example of such an express definition of
powers presumptively belonging to the subnational governments, rather than leaving local power
to be inferred as the photo-negative of what the national government can do. 28

This affirmative specification of subnational powers does not eliminate all uncertainty
about the legislative jurisdictions of the national and local legislatures in Canada. The powers
specified as belonging to each legislature must still be interpreted, and sometimes a piece of

27 Roderick M. Hills, Jr., Federalism and Public Choice, in Research Handbook on Public Choice and Public Law
207, 210-211 (Daniel A. Farber & Anne Joseph O’Connell eds. 2010).
regulation might seem to come within both a grant of power to the national government and a grant of power to a subnational government. But the written Constitution does supply a basis for identifying the local legislatures as the preferred bodies for certain kinds of regulation. Examples include education, property, and the provinces’ own civil service. So when national power makes law in one of these spaces, albeit in the exercise of some authority granted to the national legislature, there is a basis in constitutional text for asking whether national power is being read too broadly.

Why does the United States Constitution not follow the same straightforward strategy? In part, the Framers assumed a relatively small federal footprint, so as a general matter they did not invest much effort in affirmatively marking the domains of states. (The qualifier “as a general matter” is important. In the matter of slavery, where some Members of the Convention were particularly invested in protecting local decisionmaking, the Constitution was written with affirmative limits on Congress, in the form of the non-importation clause and the export clause of Article I, Section 9.) As it happens, the federal footprint has expanded, in ways permitted by the enumerated powers even if not foreseen by the Founders. The Constitution’s failure to specify affirmatively what the state spheres are has accordingly left us in a situation where the text provides few resources for identifying external limits.

It would be a mistake, however, to think that this phenomenon is solely the result of a vast and unforeseen expansion of federal governance unfolding over many generations. It is also a function of the Constitution’s having been written predominantly for the purpose of empowering the national government rather than limiting it. Obviously, constitutional law must do both of those things. But the Framers went to Philadelphia to solve the problem of insufficient central power, so perhaps it is not surprising that the document they drafted concentrates heavily on the measures that would solve that problem—that is, on conferring rather than limiting national power. The challenge of trying to establish limits on congressional power by reference to a text that was not really written for that purpose has accordingly been present from the beginning. As the example of the 1791 struggle over the Bank demonstrates, prominent actors in the constitutional system even in the First Congress believed in constitutional limits on Congress that were not really derivable from the text of Congress’s enumerated powers. From Madison’s failed arguments against the Bank forward, such arguments have struggled to root themselves in inferences from a text that was not written to generate such inferences.

Indeed, the text that most constitutional interpreters think of as the essence of the Constitution’s enumeration of congressional powers—Article I, Section 8—was, for the most part, not written for the purpose of allocating powers between Congress and the state governments at all. Instead, Article I, Section 8 mostly lists powers that the Convention thought should be allocated to Congress rather than to the President. As W.W. Crosskey showed long ago, and as Michael McConnell has more recently reminded us, most of the powers listed in

30 Constitution Act of Canada, Article 93.
31 Id., Article 92(13).
32 Id., Article 92(4).
Section 8 were powers of the Crown under the British constitutional system. When the Philadelphia Convention wrote a Constitution that would for the first time give the United States a strong Executive leader, it took care to specify that many powers a Chief Executive might claim would in this system be exercised by Congress. To the quite significant extent that this concern drove the content of Section 8, it does not make sense to think of Section 8 as crafted with attention to what states should do, because it was not crafted with the assumption that things left off the list would belong to states. It was crafted with the assumption that things left off the list might belong to the President.

To be sure, some of the powers specified in Section 8 are there because the Convention wanted to shift power from the states to the national government, not (or not only) because it wanted to allocate power between Congress and the President. The power to tax and the power to regulate commerce are two important examples: letting the central government wield those powers was a central part of the Convention’s project. But to the extent that Section 8 is about federalism rather than the separation of national powers, it was written with primary attention to the needs of the national government rather than those of the states. Limning the sorts of decisionmaking that states really must control, or that Congress really should not, was not the activity in which the drafters of Section 8 were engaged. So it should not be surprising that their work product is not a good guide for answering those questions.

D. Conclusion: Toward External Limits

The text and purpose of Article I’s enumeration, in sum, do not provide much of a basis for any specific doctrine of reserved state powers. The Necessary and Proper clause is too devoid of semantic content to specify spheres of presumptive state power, and the practically overlapping nature of regulatory categories dooms the idea that as well. Any idea that the states should enjoy some specific domain of reserved powers must accordingly rest on considerations outside of Article I—that is, on external limits rather than internal ones.

It will also have to rest (to use a different piece of constitutional-theory jargon) on constitutional “construction” rather than “interpretation.” In other words, the text of the Constitution alone will not be a sufficient guide: the need to look outside Article I here is a need to look outside the text of the document entirely, not just to a text in some other part of the written Constitution. This does not mean that constitutional text is never relevant: constitutional construction need not be a wholesale alternative to the interpretation of constitutional text. In particular, the construction of external limits on congressional power does not require abandoning the conventional ideas that Congress must justify any statute by tracing that statute to one of the express powers listed in the Constitution. Any judicial opinion or brief must continue to recite this formula as the preface to any argument that a particular statute either falls within or outside Congress’ powers. But if constitutional reasoning is to identify any meaningful federalism-based limits to congressional power other than those few that are expressly stated in the Constitution, 34 extra-textual construction must also do work. In most cases where a serious question can be asked about the compatibility of federal legislation with a sound approach to federalism, the weight-bearing part of any argument on either side will be about whether that statute is “necessary and proper” for executing one or another enumerated powers.

34 E.g., the ones in Art. IV.
national end. The text of Article I lacks the resources necessary for answering that question. So if the question is to be answered, it will have to be on the basis of considerations external to the text of Article I.

II. Constructing Federalism’s Suspect Spheres

How, then, can an external limit be constructed? We will offer a sketch of some external limits in Part III below. Before defending any particular limits, however, we must step back to set out some basic principles and clear away some likely objections.

The first basic principle is that external limits should take the form of suspect spheres -- areas of policymaking where the usual deference towards Congress’s choices is reduced or suspended. As we explain in Part II(A), the idea of heightened scrutiny for individual rights under the Fourteenth Amendment provides a model for suspect spheres in which heightened scrutiny for the sake of state power is a burden-shifting device that need not be fatal in fact. Federal laws even in suspect spheres should be sustained when careful consideration suggests that there will be no undue damage to the purposes of the federal balance or when adopted with self-conscious deliberation about the stakes for that balance.

The first likely objection to any such project is that a suspect spheres approach amounts to a re-branding of the old idea of “dual federalism,” in which judicially enforced constitutional doctrines “divide up the world into spheres of state and federal primacy” and forbid Congress from acting within the regulatory spaces assigned to states. For a variety of well-rehearsed reasons, that enterprise is unworkable. As we explain in Part II(B), however, the suspect-spheres approach need not give rise to the problems associated with dual federalism, and for at least two reasons. First, suspect spheres should not correspond to static and simplistic categories of policymaking like “family law” or “criminal law.” They are instead defined by criteria counseling caution in the exercise of national power. Second, as described above, the suspect-spheres approach does not aim to define policymaking areas where federal law cannot intrude. It aims to reduce the deference shown to federal law in certain areas, not to create areas free of federal law. As such, the suspect-spheres approach does not preclude cooperative (and uncooperative) federalism. On the contrary, by deferring less to federal power in areas where the benefits of decentralization are the greatest and the urge to centralize is most suspicious, the suspect-spheres approach can facilitate those modern models of federal-state interaction.

A second likely objection is that, by abandoning the text of the enumeration, we abandon any source of constitutional authority beyond the current judiciary’s policy preferences. So stated, this objection has the same flaws as all other forms of the idea that nontextual decisionmaking is wholly subjective and unconstrained. It rests on the fallacy that enacted text is the only form of authority that can shape or constrain constitutional decisionmaking. Given how little the text of the Constitution shapes constitutional decisionmaking in practice, and given the

35 Corwin
role of judicial precedent as the most normal form of constraint on courts, the fact that we expect some people to raise this objection is more than a little remarkable. The idea that nontextual judging is freewheeling and that recourse to text is necessary for objectivity or constraint in the law is noteworthy not because it says anything accurate about constitutional decisionmaking but because its persistence in the face of abundant contrary evidence signals the existence of a remarkably resilient cultural myth, one that ethnographers of American law and politics should want to study and understand.

All that said, though, there are also more moderate forms of this objection. Even if one knows that seeking guides to constitutional decisionmaking outside of the text rather than inside does not mean abandoning determinacy for chaos, one might still worry about giving up the assistance of a source of constitutional authority that, whatever its limits, is by consensus a legitimate source of constitutional law. We think that worry would be misplaced. As explained above, the text is not so helpful for the project of establishing limits—hard or soft—on congressional power. One does not give up much by declining to look for something where it cannot be found. And as we explain in Part II(C), suspect spheres can be constructed from the same sorts of materials that ground any number of constitutional doctrines not determined by constitutional text. Those materials include legal and political traditions and sound understandings of constitutional structure. To be sure, those materials do not direct uniquely correct answers to hard questions about where federal power is disfavored or prohibited. But no plausible sources of authority will do that, and the text of Article I certainly will not. Measured by the alternatives, we think our approach is promising.

To fulfill that promise, a suspect-spheres approach must do a better job of construing constitutional tradition and structure than the Supreme Court has usually done when speaking of “traditional government functions,” “areas of traditional state responsibility,”38 or “the usual constitutional balance of federal and state powers.”39 Such statements have generally been too perfunctory to provide any sufficient basis for sensible constitutional doctrine in this area. Indeed, the weakness of these invocations may reasonably have given all attempts in a suspect-spheres direction a bad name. We therefore bear the burden of finding a better way. Our suggestion, as we explain in Part II(C), gives a central place to asking not just what sorts of policymaking is suspect at the national level but why some policymaking is so suspect. Otherwise, invocations of history will tend to be either unreasoned deference to surface-level pictures of the past or else open invitations for lawyerly manipulation of categories,40 or both. We will defer until Part III our analysis of the specific historical practices that can form the foundation for suspect spheres today. For now, we merely defend the general idea that political traditions can be a proper basis for suspicion towards—emphatically, not prohibition of—federal innovations in suspect spheres.

Finally, Part II(D) explains why American citizens and decisionmakers today should be motivated to construct a doctrine of suspect spheres out of the available historical materials. Well-executed decentralization has widespread benefits for citizens across the ideological spectrum, many of which are well-known in the federalism literature. We emphasize in particular decentralization’s promise for lowering the stakes and temperature of our hyper-polarized national partisan conflicts. By accommodating “Red” and “Blue” political heterogeneity, decentralization can provide enclaves for loyal opposition to the federal institutions.

38 Bond, 572 U.S. ___, 134 S. Ct. 2077, 2089.
39 Gregory v. Ashcroft at ___
40 Gerken, Slipping the Bonds, supra note ___ at 86 (speaking of “lawyers’ tricks and logicians’ games).
government’s party in power (the “PIP”) at any given time. Since everyone will eventually be part of the part out of power (the “POOP”), all citizens should see partial decentralization as a rational insurance policy against defeat at the national level. That said, citizens also have rational incentives to press for immediate centralized enforcement of their preferred policies when they are part of the PIP, especially if they lack assurance that their opponents will exercise reciprocal self-restraint when the worm turns, those opponents become the PIP, and the current incumbents become the POOP. Constitutional doctrine’s supplying that credible commitment would be a healthy thing, allowing PIPs and POOPs to make a constitutional truce in favor of certain temperature-reducing decentralizations.

Whether American history and traditions can supply the materials for such a truce consistent with existing judicial doctrine is a topic we reserve for Part III. The potential benefits of such an approach, however, seem great enough to justify an effort.

A. Tiers of Scrutiny under the Necessary and Proper Clause

Like the Necessary and Proper Clause, the doctrines implementing the Equal Protection and Due Process Clauses of the Fourteenth Amendment use means-ends tests requiring that governmental decisions bear specified relationships to an acceptable governmental purpose. None of these clauses provides semantic guidance as to how such a means-ends test ought to be structured. And for analysis under both the Necessary and Proper Clause and the Fourteenth Amendment, background principles of electoral accountability suggest a default principle of significant judicial deference. In cases involving the Necessary and Proper Clause as well as cases involving the Fourteenth Amendment, that default principle is generally called rational basis review.

Unlike doctrine under the Necessary and Proper Clause, however, Fourteenth Amendment doctrine explicitly suspends deference for certain categories of governmental decisions that raise suspicions about procedural pathologies (like racial prejudice) or especially onerous burdens (for instance, on private liberties deemed “fundamental”). But this difference is not as great as it seems. In many cases under the Necessary and Proper Clause, decisions defining a “federalism canon” of statutory construction have been inarticulately grasping at an analogous concept of heightened scrutiny for certain types of federal laws that intrude into suspect spheres. Invoking this federalism canon, the Court avoids interpretations of federal laws that displace certain types of state law, because such interpretations are supposed to raise “serious constitutional questions.” The Court’s narrow constructions of such laws often defy the statute’s plain text in an effort to avoid giving force to a federal statute in a way problematic for federalism. In effect, such canons subject such statutes to a kind of heightened scrutiny, not by striking them down but by trimming them back. The “suspect classification” triggering such careful judicial scrutiny of federal statutes is the threatened intrusion of those statutes into fields where local control is deemed especially important.

Consider Bond v. United States. Carol Anne Bond’s unsuccessful attempts to poison her husband’s lover with an arsenic-based compound violated Pennsylvania’s criminal law of assault. But Pennsylvania prosecutors charged Bond only with “harassing telephone calls and letters,” perhaps because the risks and consequences of Bond’s behavior were actually minor. Federal prosecutors, however, charged Bond with “us[ing] … any chemical weapon” in violation

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of the Chemical Weapons Convention Implementation Act of 1998, a statute intended by Congress to bring the United States into compliance with the Convention on Chemical Weapons, a treaty ratified by the U.S. Senate. The Act defines “chemical weapon” as “[a] toxic chemical,” which is further defined as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” Bond’s conduct straightforwardly satisfied the statute’s plain text. The Bond majority, however, relied on Gregory v. Ashcroft’s principle that statutes ought to be read against “the background principle that Congress does not normally intrude upon the police power of the States.” On that view, the Act should be read to exclude uses of chemicals, like Bond’s, that seem more like small-time local crime than “assassination, terrorism, and acts with the potential to cause mass suffering.” The “background assumption that Congress normally preserves ‘the constitutional balance between the National Government and the States’” did the heavy interpretative lifting in Bond: The majority’s analysis of the text was perfunctory, ignoring plain text in favor of statutory context and purpose – in particular, the apparent purpose of the Act to deter uses of chemical weapons substantial enough to trigger international conflict or violate human rights with mass casualties.

Bond’s aggressive use of federalism-based canons of construction to overcome otherwise clear statutory text inspired serious criticism. But it was no bold new departure. It was cut from the same cloth as Gregory’s “clear statement rule” for preserving states’ powers from federal intrusion. In reading the Age Discrimination in Employment Act (ADEA) narrowly to exclude state judges, Justice O’Connor’s majority opinion admitted that the statutory language excluding “‘appointee[s] at the policymaking level’ particularly in the context of the other exceptions that surround it [would be] an odd way for Congress to exclude judges” from the federal rules about age discrimination. But given that a contrary interpretation would “interfere[] with this decision of the people of Missouri, defining their constitutional officers” and “upset the usual constitutional balance of federal and state powers,” the Gregory majority held that the ADEA should not be read to cover judges unless that coverage would “be plain to anyone reading the Act[.]” In other words, the fact that discerning lawyers would likely read the statute’s protections against age discrimination to cover judges was not enough. In order disrupt such “a decision of the most fundamental sort for a sovereign entity,” the statute’s application had to be super-clear.

Gregory’s canon, in other words, is not a mere tie-breaking canon like the presumption against preemption. It is a clear statement rule that plainly puts the thumb on the scale in favor of state power over some range of topics. The Gregory-Bond “clear statement rule” defines in part what we call the “suspect sphere” of federal legislation. Federal statutes that intrude into this sphere are treated with skepticism by the federal courts. Their otherwise plain text, clear enough in ordinary circumstances to dictate the statute’s coverage, is deemed not plain enough in light of the consequences of an ordinary textualist reading. Unless some other circumstance -- crystal-clear text, for instance -- suggests that Congress really intended to enter the suspect

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45 Bond, 134 S. Ct. at 2092.
46 Id. at 2091
47 (emphasis added).
48 On the distinction between anti-preemption canons and clear statement rules, see Ernest Young, Ordinary Diet of the Law at 271-72.
sphere, the courts trim back the statute’s coverage to block the intrusion. This judicial obstruction, however, is not absolute. Because the interpretation is merely an interpretation of the statute, Congress can waive the judicial obstruction by amending the statute to restore its reach into the suspect sphere.

Clear statement rules are not the only devices by which suspect spheres might be defined and defended. In Part V, we will defend other mechanisms including suspension of Chevron deference to federal agencies, reduction in State Farm deference to agency fact-findings, judicially or presidentially imposed limits on the use of guidance documents, and even a few “hard” constitutional constraints that cannot be overcome. But Gregory and Bond illustrate the two basic properties of the suspect-sphere approach well enough to permit a preliminarily general evaluation. The two properties are (1) a subject matter area deemed especially appropriate for decentralization and (2) a mechanism by which the federal government’s lawmaking in that area can at least sometimes be stalled.

Understood at this level of generality, suspect spheres bear an analogy to suspect classifications in Equal Protection doctrine and fundamental rights under the Due Process clause. Like suspect spheres, suspect classifications and fundamental rights shift the burden to the legislature to explain some sort of potential problematic legislation. This burden could be understood as a burden of persuasion or merely as a burden of production. That is, the legislature might have to establish by some quantum of evidence that its action is justified, or it might merely proffer reasonable-sounding justifications with just enough evidence to make them seem sincere. The former is akin to a burden of a movant in a civil case, and the latter resembles the burden of an agency undergoing administrative review. In either case, suspicion need not be fatal. But in either case, a reviewing court would scrutinize reasons and consequences more closely than under rational basis review.

B. Dispelling Fears of Dual Federalism

Any effort to defend such a suspect-spheres approach must distinguish itself from an effort to reestablish a system of dual federalism. In brief, dual federalism is the theory that state and federal governments should each swim in their own lanes, regulating distinct, non-overlapping topics separated by a rigid constitutional barrier. That image of American federalism has rightly been criticized as both descriptively fanciful and conceptually unworkable. Descriptively, dual federalism imagines a world in which state and federal governments pursue separate goals with distinct resources—in Gerken’s phrase, “engaged in the governance equivalent of parallel play.” The actual world looks nothing like that. In reality, state and federal officials “govern shoulder-to-shoulder in a tight regulatory space,” cooperating or fighting with each other to accomplish overlapping purposes. This intertwining of federal and state governance is longstanding, pervasive, and ordinary. Conceptually, it makes little sense to imagine that categorical terms like “education,” “criminal law,” “family law,” “commerce,” and “taxation” can define mutually exclusive regulatory realms that can then be allocated separately to state or federal control. The social world does not come in separate packages corresponding to categories like these. Attempts to carve the social world into such categories with legal rules predictably invite lawyerly efforts—perhaps clever, but unsatisfying—to manipulate the labels in ways that win cases without making substantive regulatory sense.

50 See Ernest Young, supra.
Our suspect-sphere approach avoids the first problem completely, and at the very least it greatly mitigates the second. Unlike the dual-federalism model, the suspect-spheres model acknowledges and embraces the reality of mixed federal and state governance in regulatory sphere after regulatory sphere. It identifies areas where federal policy should not lightly displace state policy, but it never imagines substantively policy realms in which Congress simply may not enter. Nor does the suspect-spheres approach imagine that the areas where federal policy should not lightly displace state policy can be defined with static categories like “education” and “family law.” Instead, it seeks to identify reasons why local control is presumptively preferable for some kinds of decisionmaking and then to put a thumb on the local side of the scale when those reasons apply.

With respect to the descriptive reality of mixed governance, we agree with Gerken that “[i]t would be better if we thought of states as reefs rather than isolated islands” through which “[f]ederal power” like water “flows … and yet states stand and nurture worlds of their own.”51 But unlike Gerken, we think that presumptions and burden-shifting regimes like those suggested in decisions like Bond could be compatible with or even facilitate such a federalism of porous state power permeated by federal influences. This is not to say that the Court’s analysis in Bond hits upon the optimal burden-shifting regime. But in principle, and if properly practiced, heightened judicial scrutiny for federal laws occupying suspect spheres could promotes the sort of “integrated regime” that Gerken praises, in which state and federal officials “forg[e] relationships in the crucible of politics.”52

The example of federal anti-corruption prosecutions illustrates how heightened scrutiny for federal laws intruding into state turf can improve federal and state officials’ negotiations without impeding integrated law enforcement. The federal Mail Fraud Act prohibits the use of mail in “any scheme or artifice to defraud.”53 Federal prosecutors eager to extirpate corruption have applied the statute to a broad array of local political practices, from wining and dining legislators54 to endorsing a state judge’s reelection campaign.55 Since 1987, the U.S. Supreme Court has tussled with Congress to narrow the scope of this statute, applying what we describe as heightened scrutiny to applications of the statute that would intrude into a suspect sphere of presumptively state authority.56 Some of these applications have threatened to criminalize political exchanges constituting normal and even practically beneficial state and local types of state politics the prohibition of which deserved more justification and deliberation than any federal prosecutor could provide.57 Even when the design of subnational politics is not at stake,

51 Heather Gerken, Slipping the Bonds, supra note ___ at 116.
52 Id. at 119.
53 18 U.S.C.S. § 1341 (2004), provides, in relevant part:
WHOEVER, having devise[d] or intending to devise any scheme or artifice to defraud … for the purpose of executing such scheme or artifice or attempting to do so, places in any post office … any matter or thing whatever to be sent or delivered by the Postal Service … shall be fined under this title or imprisoned not more than five years, or both.
54 See, e.g., United States v. Sawyer, 239 F.3d 31 (1st Cir. 2001).
55 [Ricky Scruggs’ Case]
56 In McNally v. United States, 483 U.S. 350 (1987) the U.S. Supreme Court construed the Mail Fraud Act to exclude schemes to defraud citizens of their intangible right to honest services, thereby depriving federal prosecutors of the power to use the statute to attack arguably corrupt behavior by state and local politicians. In response, Congress amended the statute to define “scheme or artifice to defraud” to include any “scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C.S. § 1346.
the Court has been suspicious if giving prosecutors broad discretion to define “corruption.”

Where mail fraud prosecutions are directed against state officials, however, the Court has relied on the Gregory v. Ashcroft canon as an additional reason for narrowly construing the Mail Fraud Act, holding that a state official’s attending meetings, giving speeches, or pursuing “broad policy objectives” are not the sort of official acts that can be the basis of a bribery conviction on the ground that the state’s power to “define the structure of its government” under Gregory v. Ashcroft “includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents.”

Nothing in the McDonnell-Bond-Gregory canon prevents officials from the two levels of government from interacting with each other or suggests that somehow states should “govern their own empire.” Federal prosecutors can still investigate precisely the same sorts of suspicious conduct, subpoenaing documents and witnesses, seeking warrants for wiretaps, and so forth. The Court’s insistence on a more stringent proof of a quid pro quo does not create any island of exclusive state power: It merely places a speed bump in the way of the federalizations of anti-corruption law, in effect heightening federal prosecutors’ burden of justification for prohibiting conduct on the border between “corrupt” and merely unsavorily transactional.

The suspect-spheres approach that we defend here, like the Bond-Gregory canon, is about changing the burden of justification for federal intervention, not excluding such intervention altogether. The approach thus preserves state power as a metaphorical coral reef permeated by waves of federal influences. Where the federal interest seems remote or attenuated—say, in preventing witness tampering where no witness was communicating anything to federal officials—then the model resists federalization. But those cases sit cheek by jowl with federal prosecutions where there is a nexus to some federal interest, often involving the same defendants, opening the way to intergovernmental bargaining over plea deals and cooperative law enforcement that the federalism canon does nothing to impede. The concept of suspect spheres, in sum, creates no pragmatic impediment to federal and state officials’ operating in overlapping zones where they can, in Dean Gerken’s words, “[t]ussle and campaign and negotiate and compromise.”

And though the suspect-spheres approach differentiates between areas where federal regulation should be easily sustained and those where its justifications should be more carefully scrutinized, it need not traffic in the idea that the regulatory landscape can be carved into categorically separate realms. Others have worried, and not unreasonably, that any attempt to differentiate among policy areas in this way would “reintroduce[] the same confusion that led to the demise of dual federalism in the first place.” Ernest Young has urged an across-the-board

58 Citing the canon of lenity, the U.S. Supreme Court has taken the stance that, absent clarification by Congress, the Mail Fraud statute ought to be construed narrowly to exclude conflicts of interest short of bribes or kickbacks. See Skilling v. United States, 561 U.S. 358, 404, 410 (2010) (construing honest services fraud to forbid “fraudulent schemes to deprive another of honest services through bribes or kickbacks” in part because “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”).


62 Gerken, Slipping the Bonds, supra note ___ at 119.

63 Ernest Young, “The Ordinary Diet of the Law,” supra note ___ at 332.
anti-preemption canon in part because it would avoid the need for any such tricky line-
drawing. But as Young candidly acknowledges, the Supreme Court has never endorsed such
an indiscriminate speed bump to all federal preemption. Instead, it has found preemption more
readily in commercial transactions, admiralty, and banking than in criminal law, family law, tort
law, and land use law.64

There is reason behind the Court’s continued, albeit implicit, line-drawing: Neither the
overall spirit of the Constitution nor sensible policy suggests that federal law should always be
suspect. The Constitution was created as much to suppress and protect subnational policy-
making. Preserving state power with indiscriminate obstacles to federal law-making, therefore,
cannot sensibly be an end in itself.65 One might with equal reason treat all classifications as
equally suspect under the Fourteenth Amendment’s Equal Protection clause. Such even-handed
suspicion, however, would make no sense of the reasons for providing national oversight for
state laws targeting vulnerable minorities. Likewise, erecting a uniform barrier to national law
for the sake of protecting state power across the board makes no sense of a constitution most
intelligibly read as both a nationalizing and decentralizing device.

In sum, the court has no choice but to tailor its presumptions to the legally relevant risks.
Suspect spheres for federalism can do much of the same work that heightened scrutiny for
suspect classifications performs for equal protection: Increasing the burden of justification for
types of law that have a greater risk of proceeding from pathological reasons or imposing
indefensible burdens.

C. Constructing Suspect Spheres Using Post-Ratification Experience

For reasons explained above, the shape of the suspect spheres—that is, the domains in
which federal legislation should be treated more skeptically—cannot be established by simply
interpreting the text of the Constitution. It must instead be a matter of constitutional
construction,66 one that draws upon sources from within what scholars sometimes call the small-
capital c constitution. Those sources include historical experience and precedential decisionmaking,
both inside and outside the courts. The aim of the constructive process is to develop principles
that would let judges and others assess how effectively suspicion towards federal legislation
advances constitutional ends. In this way, suspect-sphere doctrines would resemble other
doctrinal frameworks that implement constitutional values in ways not foreseeable when the

64 Id. at 332-339.
65 Ernest Young, ‘The Ordinary Diet of the Law,’ supra note ___ at 336.
66 Roderick M. Hills, Jr., Preemption Doctrine in the Roberts Court: Constitutional Dual Federalism by Another
Name? in BUSINESS AND THE ROBERTS COURT (Jonathan Adler ed., Oxford University Press 201_); Thomas
Merrill.
67 Dean Gerken asserts that def enders of  state autonomy, including one of  us, take positions “aimed at preserving
state autonomy.” Gerken, Slipping the Bonds, supra note ___ at 121 (citing Roderick M. Hills, Jr., The Political
Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t, 96 MICH.
L. REV. 813, 819 (1998)).
68 For an overview of constitutional construction, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION
(1999).
69 We do not meant to endorse across the board the distinction between constitutional meaning and implementation.
As one of us has argued elsewhere, the distinction is illusory to the extent that it suggests that “implementation” has
less of a foundational status as “constitutional law” than some other sort of doctrine defining “meaning.” For a
discussion, see Mitchell N. Berman, Constitutional Constructions and Constitutional decision Rules: Thoughts on
the Carving of Implementation Space, 27 CONST’L COMM. 39, 61-62 (2010)(discussing Roderick M. Hills, Jr., The
most relevant constitutional texts were enacted. Such doctrines include heightened scrutiny for gender classifications, exclusion from evidence of un-Miranda-ized confessions, the requirement of “one person, one vote” electoral districting under Reynolds v. Sims, and several aspects of the separation of powers. 70

Partly because the historical record furnishes useful knowledge (indeed, knowledge not available to the Founders) about how federalism actually works, and partly because patterns of historical practice can legitimize constitutional arrangements with the venerability bestowed by longstanding precedents 71, our analysis looks to post-enactment political and legal history as a basis for constitutional construction. We do so aware of the many ways in which “looking to history” for constitutional authority can go wrong. Many attempts to ground constitutional law in historical experience are shallow or peremptory, if not fictional. Moreover, good accounts of history can often be subject to multiple and contradictory interpretations. 72 So simply describing brute facts about how powers have been allocated in the past to show that certain regulatory fields are “traditional state concerns” will provide little guidance for present doctrine. 73 Indeed, “history” as such is not voice recommending specific constitutional principles but rather a source of raw material that can be used in different types of constitutional arguments. 74 Historical knowledge sometimes suggests a popular consensus about constitutional meaning, 75 a natural experiment showing practical consequences of a political system, 76 or a political settlement that courts ought to accept for the sake of a stable decision-making process. 77 Without some explanation for why history matters, it is impossible to determine whether and how history matters.

Our arguments about federalism and history are intended to demonstrate the feasibility of identifying criteria that can help decisionmakers identify areas of regulation where federal lawmaking should be treated with some suspicion. We do so in part by identifying themes in the past behavior, and the historical intuitions, of American decisionmakers trying to make federalism work to its best advantage. We do not claim that ours is the only possible way of reading the historical record, and we do not claim that facts about history compel our recommendations for constitutional law. We hope to show, however, that a suspect-spheres approach would not be a radical break with American constitutionalism as practiced to this point. On the contrary, it would be behavior with thematic antecedents in the constitutional past, and it would be a strategy consistent with a set of important insights that can be gleaned from one responsible reading of American constitutional history. And we acknowledge that the approach

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70 For an account of how the division of powers between Congress and the President is powerfully driven by historical settlements between the branches, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411 (2012).
71 On how “reverence for the laws” is fortified when the “examples which fortify opinion are ANCIENT as well as NUMEROUS,” see James Madison, Federalist #49.
75 William Baude, Constitutional Liquidation.
76 Balkin, supra note __ at 665-668.
77 Bradley & Morrison, supra note ____ at ____.
D. Why Bother? The Present Value of a Constitutional Truce on Decentralization

Lots of mutually inconsistent views of the Constitution might be historically plausible and practically workable. External limits on Congress’ authority modeled after Fourteenth Amendment suspect classifications, in particular, might be feasible and even have a decent historical pedigree. (We will discuss the pedigree of one such external limit below in Part III). But history and feasibility do not dictate that we enforce any such limits. There is always the alternative of simply leaving the question of state and federal powers up to the give and take of ordinary politics. Absent some pressing present need, a court might naturally be reluctant to stake its authority on debatable constitutional construction of an external limit.

What present need might an external limit of the sort described above serve? Especially in times of highly polarized politics, federalism might have special value in mitigating partisan rancor. By allowing the people inhabiting different regions of a nation to adopt different policies about which there is intense but reasonable disagreement, federal regimes reduce the stakes of national politics by giving rival groups of citizens geographic enclaves in which their views can prevail subnationally. Those subnational enclaves could sustain a party out of political power at the national level by demonstrating the feasibility or even desirability of their rival program in some subpart of the nation. Federalism, on this account, is a species of pluralism in which geographic subunits stand in as proxies for rival ideologies.

That geographic units are imperfect proxies for ideology containing ideologically heterogeneous populations could be a feature rather than a bug. Ideological diversity insures that geographic subunits need not be ideological echo chambers. Even predominantly Red States like Texas or Arizona will have some Blue spots — college towns or left-leaning big cities with ethnic minorities leaning Blue — and even reliably Blue states like New York or Illinois have rural voters who return state representatives suspicious of the Big City pols and college town liberals. By allowing these subnational politics to resolve issues on which there is heated partisan contention, federal regimes avoid winner-take-all national politics without risking what Madison characterized as majoritarian factionalism at the subnational level. Federalism thereby extends a type of equal concern and respect to each side not only through the co-existence of Blue States and Red States but also the intra-state politics of Blue and Red parties.

On this account of federalism as pluralism, federal regimes operate as insurance policies protecting each party when it is the Party out of (national) Power (a concept we abbreviate, with apologies, as the “POOP”) at the expense of that party’s capacity to advance all of its policy priorities with perfect geographic uniformity when it is the Party in Power (hereinafter, the “PIP”). The loss of the power to the PIP is the “premium” that each party pays for the protection of being afforded subnational policy-making space when they are the POOP.

Such a characterization of the benefits of federal regimes highlights a respect in which such regimes are politically fragile. Each party, when it is the PIP, must have some credible assurance that forbearing to impose its policy priorities will be reciprocated by its rivals when that party later becomes the POOP. Such credible commitment could be difficult to provide.

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current POOP might theoretically promise to exercise self-restraint later in return for the PIP’s present self-restraint, but the potential for each incumbent administration to change its mind makes such promises difficult to enforce. The failure of an incumbent President or congressional majority to exploit its current dominance of the national law-making process therefore, will seem more like the concession of a chump than like mature self-restraint. The political pressure on incumbent PIPs from their own rank-and-file can accordingly be intense to construe as broadly as possible their law-making powers.

This temptation to abandon the insurance scheme of federalism can be expected to be especially intense where political parties are highly polarized and ideologically programmatic. In a system of non-programmatic parties, members of different parties have overlapping ideologies that give legislators an incentive to delegate policy-making to subnational institutions, thereby ducking controversial decisions that might alienate substantial numbers of their own party. Consider, as an example of such controversy-ducking delegation, New Deal Democrats’ delegation of the administration of social welfare programs to state and local officials in an effort to assure Southern members of the Democratic Party that national officials would leave undisturbed Southern prejudices about race and gender. Likewise, the McCarran-Ferguson Act’s turning over the regulation of insurance to the states in 1945 has proven durable in part because it has the support of insurers and state insurance commissioners who face no organized partisan opposition. By contrast, where national parties are more tightly unified by rival and non-overlapping ideologies, each has less incentive, when it is the PIP, to preserve the power of the POOP at the subnational level. Where rank-and-file party members are impatient for comprehensive policy change, partisan leaders who supported federalism when they were in the POOP predictably abandon such support upon becoming the PIP. These institutional flip-flops can be understood as a symptom of the inability of the PIP and POOP to make a binding truce to preserve subnational power across a transition in partisan control of government.

External limits taking the form of suspect spheres could serve as a basis for such credible commitments. By raising the costs of preempting subnational policy within suspect spheres, such external limits spheres give each political party some basis for confidence that its self-restraint when it is the PIP will be reciprocated when it is the POOP. Suspect spheres, therefore, help politicians entrench subnational power where such power is most beneficial. This is not to say that constitutional doctrine is necessary for such entrenching of decentralization: As suggested by the McCarran-Ferguson Act’s durability, ordinary politics might also turn over power to the states for extended periods of time simply by creating benefits and focal points that

82 The McCarran Ferguson Act declares that “[t]he business of insurance . . . shall be subject to the laws of the several States” and that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.” 15 U.S.C. §§ 1012(a)-(b). For a description of the details and durability of the McCarran-Ferguson Act’s allocation of authority over insurance to the states, see Jonathan R. Macey & Geoffrey P. Miller, The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation, 68 NYUL REV 13, 20-40 (1993). On the political coalitions that created and sustain the McCarran-Ferguson Act’s delegation of power to states, see Margaret F. Brinig, Politics, Economics and the McCarran-Ferguson Act, 73 PUBLIC CHOICE 371, 381 (1992)(arguing that the durability of the McCarran-Ferguson Act’s decentralization of insurance regulation is the result of opponents’ being “[d]ilute groups that might be dissuaded by the high costs of obtaining legislative relief”).
mobilize powerful interest groups who benefit from subnational control. The advantage of suspect spheres is that constitutionally entrenched decentralization might be more rationally connected to the mutual interest of PIPs and POOPs in maintaining a constitutional truce beneficial to everyone but difficult for any single party to sustain.

Critical to this idea of an external limit as a truce between POOP and PIP is that such a limit actually provide benefits for both sides of the partisan aisle. The constitutional concept of “suspect spheres” must be general enough that it can be expected to provide benefits to both parties to the truce. At the very least, the bipartisan nature of the truce must cover a broad swath of policies including those favored by both Red and Blue politicians. A theory of suspect spheres that allowed federal law to preempt policies favored in Blue States (say, states’ medical marijuana law) but not policies favored in Red States (for instance, open- or concealed-carry laws) would be suspect as such a bipartisan truce. The motivation for the PIP to accede to limits on its power is that it will benefit from those same limits when it becomes the POOP: Only an external limit that promises such widespread benefits meets this standard for a mutually beneficial cross-aisle truce.

III. Tradition, Truce, and Doctrine: The Anti-Corporate Non-Delegation Doctrine as a Case Study in Suspect Spheres

The external limit that we propose, in sum, must meet a set of demanding standards. It must define spheres in which federal law is presumptively suspect without preventing intermingled federal and state policy-making. It must find some support in American constitutional tradition. It must support a constitutional truce against excessive centralization that politicians on both sides desire but cannot achieve without some mechanism for credible constitutional commitment.

One might reasonably ask whether such a doctrine is practically possible. In what follows, we seek to demonstrate that possibility with a case study drawn the United States’ constitutional traditions regarding delegations of governmental power to private corporations. As we explain below, from James Madison’s attack on the First Bank of the United States through Andrew Jackson’s attack on the Second Bank all the way through the invalidation of the National Industrial Recovery Act of 1934 by the Hughes Court, there has been a tradition of suspicion towards federal laws delegating broad immunities and powers to private corporations. We urge that this tradition can form a foundation for a modern constitutional doctrines that otherwise seem homeless—in particular, the Roberts Court’s acceptance of an anti-preemption canon of statutory construction and its prohibition on federal laws that mandate rather than prohibit commercial activity in National Federation of Independent Businesses v. Sebelius. Finally, we urge the utility of this particular tradition as a constitutional truce that can help alleviate the acute polarization afflicting our current politics, by protecting a space for subnational contention.

Whatever its practical present merits or traditionalist pedigree, the anti-corporate non-delegation doctrine illustrates, for better or worse, the way that constitutional federalism actually works in the United States— not as an internal limit drawn from the text of the enumeration but rather as an external limit drawn from past tradition and present need.

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A. The Basis for the Anti-Corporate Non-Delegation Doctrine in Constitutional Tradition

The idea that delegations of power to private corporations are especially suspect was a dominant theme of antebellum American constitutional law. This theme, however, had no foundation in either the text or original understanding of the enumeration. It is not merely that the text of the Constitution is silent about the Congress’ power to confer powers on corporations. Every effort by the Constitution’s drafters and ratifiers to clarify the text with specific amendments either authorizing or forbidding federal grants of corporate power was defeated. Federalists at Philadelphia toyed with the idea of proposing a specific power to charter corporations only to be warned off such an idea by the danger that it would arouse opposition to the Constitution. During state ratification conventions, Anti-Federalists repeatedly sought amendments prohibiting federal aid to corporations, only to be told that Article VII’s procedure for ratification required an up-or-down vote that foreclosed any such amendments. The Constitution, in short, conspicuously left the question of what Congress can do to promote corporations undecided, to be resolved -- “liquidated,” in Madison’s term – by post-enactment deliberation.

As we explain below, politicians’ post-enactment efforts to “liquidate” this question aimed for an external limit on Congress’ power largely disconnected from the text of Article I. Except for ritualistic invocations of the idea that Article I’s enumeration required a narrow construction of Congress’ powers, the argument against the constitutionality of aid to corporations did not turn on the interpretation of the specific terms of Article I’s enumeration. Instead, defenders of limits on corporate aid focused on the danger that corporate power could manipulate the federal government to serve private interests.

1. Madison’s External Limit on “Great and Important Powers”

Consider, first, James Madison’s 1791 stand against the bill to bestow a charter on the First Bank of the United States in the House of Representatives. As Jonathan Gienapp has powerfully argued in Second Creation, the Federalists’ attitude towards the scope of Congress’ powers in the first years of the new republic was largely untethered to the specific text of the

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85 James Madison, then a supporter of an expansive view of national government’s powers, had proposed on September 14th that Article I of the Constitution include a clause “to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent.” Rufus King, the Massachusetts ally of Alexander Hamilton, was sympathetic to the idea as a matter of principle, but he argued that the politics of ratification counseled against such clarity: “The States will be prejudiced and divided into parties by an express power to charter corporations,” King noted, reminding the Convention of the controversies over the Bank of North America by observing that “[i]n Phila[d]elphia & New York, It will be refered to the establishment of a Bank, which has been a subject of contention in those Cities.” Farrand’s Debates, September 14th, 1787.

86 For a list of the various amendments urged by Anti-Federalist to limit congressional power to aid corporations, see In the New York ratifying convention, Melancton Smith urged an amendment providing that “nothing in the ... Constitution shall be construed to authorize Congress to grant monopolies, or erect any company with exclusive advantages of commerce.” The Anti-Federalist Writings of the Melancton Smith Circle 328-29 (Michael P. Zuckert & Derek A. Webb eds. 2009). Smith withdrew the amendment and voted for the unamended Constitution when he was informed that “conditional approval” of the Constitution subject to ratification of such amendments was not an option. See Robin Brooks, Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York, 24 Wm. & Mary Q. 339 (1967).
enumeration and instead driven by their sense of the Constitution’s overriding purpose of creating an effective nation-state. 87 Madison’s speech against the Bank, by contrast, offered a new way of looking at the Constitution more driven by the history and wording of Article I’s text. 88

Although Professor Gienapp is surely correct that Madison placed greater stress on textual specificity and originalist history, close analysis of Madison’s argument suggests that the load-bearing parts of his argument rested on considerations altogether external to the text of Article I’s enumeration. Rather than inferring a limit on Congress’ power from the words of the enumeration, Madison inferred a limit based on fears about what sorts of powers were especially dangerous for Congress to exercise – fears that Madison captured by describing such powers as “great and important.” The limit that he inferred was then grafted onto a reading of Article I’s text.

Consider, first, the thinness of Madison’s textual argument rooted in the text of Article I. The essence of this argument was an application of an anti-redundancy canon: “The latitude of interpretation required by the [Bank] bill,” Madison concluded, was “condemned by the rule furnished by the constitution itself,” because Article I’s enumeration expressly listed minor powers that could have been inferred from the Necessary and Proper clause using the “latitude of interpretation required by the [Bank] bill.” “Congress have power ‘to regulate the value of money’; yet it is expressly added, not left to be implied, that counterfeitors may be punished.” Likewise, “[t]he very power to borrow money is a less remote implication from the power of war than an incorporated monopoly bank from the power of borrowing — yet the power to borrow is not left to implication.” By using “latitude of interpretation” that would allow all of these minor enumerated powers to be inferred as implied powers, the Bank’s defenders were rendering the enumeration of such minor powers redundant, thereby violating a basic canon of legal interpretation against inferring that a legal text contains unnecessary words. 89

Madison’s implicit reliance on the anti-redundancy canon, however, proved too much. As argued above in Part I(B)(2), such a rule of construction condemns several implied powers that are uncontroversially within Article I. The Second Congress in 1790 had enacted a law conferring a monopoly on the U.S. Post Office to carry letters. 90 There apparently were few objections to this exercise of federal power when the statute was enacted, even though members of Congress made strong constitutional objections to other parts of the postal law. 91 Yet Madison’s “rule furnished by the Constitution itself” would seem to condemn this federally conferred monopoly. After all, as Federal Express, UPS, and other private shipping companies attest, the Congress’ establishing post office hardly requires that such an office enjoy a monopoly over delivery of packages and letters. In particular, the relationship between a postal monopoly and the establishing of a post office seems more attenuated than the relationship between the coining of money and the punishing of counterfeitors: Coins with certain value could hardly exist if they could be freely copied, but a federal post office manifestly could exist (even if it might be less profitable) in competition with private carriers. Given that the

87 JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 125-163 (2018) (describing debates over the President’s removal power)
88 Id. at chapter 5.
90 1 Stat. at 234-37, §§5, 11, 16, 17.
relationship between coining money and punishing counterfeiters was not left to implication, how could creating a postal monopoly be deemed necessary and proper for establishing a post office without rendering redundant the Counterfeiters clause?

Unsurprisingly Madison backed off the most extreme version of his textual argument, conceding that “[i]t is not pretended that every insertion or omission in the constitution is the effect of systematic attention.” In fact, the purely textual part of Madison’s argument was at best indeterminate and, at worst, a rhetorical feint: It either said nothing in particular about the Bank’s constitutionality, or it said too much about the unconstitutionality of much of the Second Congress’ most uncontroversial handiwork.

The load-bearing part of Madison’s argument was rooted not in Article I’s enumeration but instead in Madison’s assessment that establishing a corporation like the First Bank was “a great and important power” that could not be safely left to implication. Madison’s argument that “great and important powers” should not be lightly inferred rested on the common-sense idea that the ratifiers of the Constitution were less likely to leave to implication an important than an unimportant power. Madison’s application of his “great-and-important-powers” canon, however, had nothing whatsoever to do with figuring out the “photo-negative” of reserved state powers left over after the enumerated powers were subtracted. It also had nothing to do with figuring out the general spirit of Article I’s enumeration as, for instance, a list of powers directed towards solving the states’ collective action problems. Rather than focus on the absence of any need for a federally chartered bank, Madison focused on why it was especially dangerous for Congress to confer a “monopoly” on a banking corporation. These dangers were rooted in notions of citizen equality and democratic sovereignty completely external to Article I’s enumeration. The Bank was simply too exclusive and too powerful a corporation for Congress to create through implied powers.

Madison’s most effective argument against the Bank’s constitutionality, in sum, was not an argument about enumerated powers at all but rather an argument about suspect spheres. Madison did not focus on why a federally conferred bank charter was unnecessary but rather on why it was dangerous. Of course, one could explain such an argument as a gloss on the term “proper” in the Necessary and Proper clause, but, as explained above in Part I(B)(3), with the word “necessary,” the semantics of the enumeration’s text does no work whatsoever in fixing the scope of the limit. Such a focus necessarily led Madison away from the text of Article I—and, indeed, away from any specific constitutional text.

Commented [PR1]: This is great. But I think we need to anticipate the objection that says that “dangerous” here is just a synonym for “proper” in the text of Article I (such that his argument that the Bank is dangerous is in fact grounded in constitutional text). How shall we meet that? I might need to re-read Madison. Does he say he’s making an argument about “necessity” in particular?

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92 As Madison phrased the point, “In admitting or rejecting a constructive authority, not only the degree of its incidentalness to an express authority is to be regarded, but the degree of its importance also, since on this will depend the probability or improbability of its being left to construction.”
93 For instance, Madison argued that, by giving the Bank the power “to make bylaws, the bill delegated a sort of legislative power, which is unquestionably an act of a high and important nature.” Likewise, the twenty-year term of the bank’s charter “takes from our successors, who have equal rights with ourselves, an opportunity of exercising that right for an immoderate term,” and the charter’s giving a single corporation the power to hold federal revenues “involves a monopoly, which affects the equal rights of every citizen.”
95 The only text Madison cited to justify characterizing the creation of the Bank as excessively “important” was Article IV, section 3’s prohibition on Congress’ acquiring land within a state without the consent of its legislature, not Article I’s enumeration. Madison inferred that, because Article IV, section 3 provided that “Congress themselves could not purchase lands within a state ‘without the consent of its legislature,’” it followed that Congress could not “delegate a power to others which they did not possess themselves.”
Instead, Madison built his argument around long-standing Anglo-American tradition of suspicion towards corporate power, especially when such power was backed by the central government. This tradition had its most lasting and powerful manifestation in the pamphlet attacks on the corruption of the British Government by the South Sea Company in the 1720s. In particular, John Trenchard and Thomas Gordon made denunciation of corporate finance—"stock-jobbing" in 18th century jargon—a central theme of their *Cato's Letters*, essays that were widely read in the American colonies. Rhetoric denouncing corporations for corrupting legislatures by underwriting governmental debt became a staple part of American rhetoric against the British government after 1773, when Parliament enacted the Tea Act to bail out the East India Company, a company that, like the South Sea Company, had assumed millions of pounds in loans to the government, with a monopoly on the right to sell tea in North America. The resentment of American colonists towards this corporate monopoly was a major impetus to Revolution and found ready expression in *Cato's Letters* much earlier denunciations of "great companies" and their excessive influence in London. The colonists added to *Cato's Letters* the further idea that centralized governments of large empires were unusually prone to being corrupted by financial insiders.

Madison, therefore, drew on a deep well of rhetoric and ideology in characterizing the power to create “an incorporated monopoly bank” as a “great important power.” It was this tradition, not the text of Article I’s enumeration, that allowed Madison to distinguish the First Bank of the United States from postal monopolies and other similar fruits of the Congress’ early exercise of its implied powers.

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96 For a general narrative history of the South Sea Company’s rise and fall, see LEWIS MELVILLE, THE SOUTH SEA BUBBLE (1921). With Parliament’s consent, the South Sea Company had undertaken to re-finance governmental debt by offering debt-holders the right to exchange debt for company stock the value of which the Company directors pumped up through rumors and their connections to governmental officials, many of whom were stock-subscribers. When the stock bubble burst, thousands were financially ruined.

97 John Trenchard & Thomas Gordon, *Cato’s Letters*, or Essays on Liberty, Civil and Religious, and Other Important Subjects (edited and annotated by Ronald Hamowy, Liberty Fund, 1995), available at http://oll.libertyfund.org/title/1239. On denunciations of stock-jobbing’s corrupting influence, see, e.g., No. 6, December 10th, 1720, in 1 *Cato’s Letters* at 48 (“How easily the People are bubbled by the deceiver”); Id. at 48-49 (“[c]ommon sense could have told them, that credit is the most uncertain and most fluctuating thing in the world, especially when it is applied to stock-jobbing”); No. 47, October 7th, 1721, in 2 id. at 68 (“Thus, ordinarily reliable popular judgment was “corrupted and weighed down by the biases that passion, delusion, and interest” fostered by financiers); No. 32, June 10th, 1721, in 1 id. at 190 (financiers are “impostors”); No. 6, December 10th, 1720, at 48. See also No. 4, November 26th, 1720, in 1 id. at 42 (“folly or distraction of the people . . .”); No. 3, November 19th, 1720, in 1 id. 39 (“credulity of the people” led to the South Sea bubble).


100 John Dickinson, *Essay on the Constitutional power of Great-Britain Over the Colonies in America* 21 note * (1774). “The attention of small states extends much more efficaciously and beneficially to every part of the territories, than that of the administration of a vast empire.”
For former Anti-Federalists, Madison’s embrace of suspicion towards private corporations was common sense. Throughout the debates over the ratification of the Constitution, Anti-Federalists had urged that continental-scale legislatures like the proposed Congress were at risk of being captured by financiers, merchants, and other elites — “natural aristocrats” in their phrase — dominant in eastern seaboard cities. Behind this fear of capture lay the reality that urban elites enjoyed organizational advantages from their concentration in cities. Communication among merchants, lawyers, and financiers across a continent was facilitated by networks created by trade, universities, and newspapers (most of which were controlled by Federalists). By contrast, farmers in the hinterland enjoyed none of these organizational advantages in their local rural networks.

Madison himself was a recent convert to the Anti-Federalists’ way of looking at representation in the legislatures of large-scale republics. In his 1791 essay “Consolidation,” written for the National Gazette, he warned that the diversity of interests praised in Federalist #10 for preventing majoritarian factionalism could also lead to paralysis of the legislature and excessive executive influence over policy-making, because “neither the voice nor the sense of ten or twenty millions of people, spread through so many latitudes as are comprehended within the United States, could ever be combined or called into effect.” Secretary of Treasury Alexander Hamilton’s pressing through the First Bank’s charter and his subsequent use of open-market operations to manage credit reinforced Madison’s and Jefferson’s sense that the federal government’s scale made it prone to capture by financiers in the way suggested by the Anti-Federalists.

Madison’s claim about the power to charter a “monopoly bank” was a distillation of these worries about institutional dysfunction into abbreviated constitutional language. Owing little to constitutional text and nothing whatsoever to Article I’s enumeration of powers, such a reading was open to the object that it did not count as constitutional law at all but instead as simply one political party’s view of policy. The Federalists, after all, took a different and more benign view of corporations as being nothing especially dangerous. (One Federalist, Chief Justice John Marshall, was later to read this Federalist take on corporate power into the Necessary and Proper clause in McCulloch v. Maryland).

There are, however, at least three good reasons for understanding Madison’s argument as sounding in a genuine constitutional key despite its substance being largely external to the text of

104 As one Anti-Federalist put it, the “mercantile interests” in the seaport could focus their lobbying “where they please,” while “the landed interest” were “scattered far and wide” and “have but little intercourse and connection with each other” such that “carrying elections of this kind” — that is, elections that transcend the jurisdiction in which the farmer’s real estate was located — “is entirely out of their way.” Letter of “Cornelius,” Hampshire Chronicle, December 11 and 18, 1787, reprinted in Samuel Bannister Harding, 2 The Contest over the Ratification of the Constitution 117, 125 (1896).
105 For a description of Madison’s shift on this and other constitutional issues, see John Ferejohn & Roderick M. Hills, Jr., Publius’s Political Science, in CAMBRIDGE COMPANION TO THE FEDERALIST PAPERS (Jack Rakove & Colleen Shewah eds.) (forthcoming 2019, Cambridge University Press).
106 James Madison, Consolidation, Nat’l Gazette, December 5th, 1791.
107 McCulloch v. Maryland, 17 U.S. 316, 411 (1819) (“The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them”).
Article I. First, Madison and his followers described the argument as a constitutional rather than merely policy-based argument. Madison’s Bank speech, for instance, carefully distinguishes between his “remarks on the merits of the bill” and his argument against Congress’ “authority of Congress to pass it.” Second, the Democratic-Republicans underscored the constitutional tone of their rhetoric with dutiful references to constitutional text: Madison’s “great and important powers” argument, for instance, was ostensibly a gloss on the Necessary and Proper clause. Finally, and most important, the Democratic-Republicans invested the case against the Bank with an uncompromisingly moralistic tone typical of constitutional claims.

Framing the argument as a contest as a matter of saving the United States’ republican character from aristocrats was not merely a matter of whipping up his followers’ enthusiasm: Madison was also trying to solve a collective action problem posed by distributive politics and thereby achieve a truce among the disparate sections of the Democratic-Republican Party. As he noted in his “Candid State of Parties,” another National Gazette essay marking his change of views from his Federalist papers, “[t]he anti republican party” will try to multiply the dimensions of politics “by reviving exploded parties, and taking advantage of all prejudices, local, political, and occupational, that may prevent or disturb a general coalition of sentiments.” Put more plainly, the Federalists would buy westerners’ support with promises of infrastructure and easy credit. To counteract this effort to divide the majority by multiplying the issue environment, the gentry needed to “bury[] all antecedent questions” and “banish[] every other distinction than that between enemies and friends to republican government, and in promoting a general harmony among the [landed interest].” Framing the case against the Bank as a matter of principle helped prevent such a division of the majority.

That Madison characterized his argument as sounding in constitutional law did not, by itself, confer constitutional status on his reading of the Necessary and Proper clause. After all, he lost in Congress, and the First Bank’s charter became law. The substance of Madison’s constitutional distrust of corporations and monopolies at the national level, however, eventually became one of the important planks of Democratic Party’s platform. In that form, the anti-corporate non-delegation doctrine became not only the dominant reading of the Constitution prior to the Civil War but, even after the fall of antebellum Democratic Party in the 1860s, exercised lasting influence on how Americans viewed private corporations’ exercise of public power.

2. Andrew Jackson’s Anti-Corporate Constitutional Platform for the Democratic Party

In the wake of Madison’s and Jefferson’s triumph in 1800, the anti-corporate non-delegation doctrine as a constitutional principle did not seem to face very promising odds. The problem was that the Democratic-Republicans, once they were ascendant in the national government, seemed to abandon the doctrine. Confronted with the practical problems of providing a continental-scale nation-state with credit and infrastructure, they gradually accepted...
not only the idea of the national government’s sponsoring a national bank but also the analogous idea of the national government’s subscribing to the stock of private canal and road-building companies.112 By 1816, President Madison abandoned his old anti-corporate stance by signing the bank bill into law, citing precedent as the reason for him to set aside his personal constitutional scruples.113 Three decades later, however, President Andrew Jackson had made the doctrine a centerpiece of the Democratic Party’s platform and eventually the basis for the nation’s monetary and infrastructure policy. This rebirth of the anti-corporate non-delegation doctrine is a case study of how a principle with no basis in constitutional text can form the basis for a lasting form of federalism on the basis of extra-textual tradition and contemporary ideology.

Jackson’s attack on federal aid to private corporations was primarily rooted in his objections to special privileges for insiders, not to any close parsing of the text of Article I’s enumeration. Jackson argued that federal subscriptions to road- and canal-building companies, for instance, was “an authority unknown to the Constitution and beyond the supervision of our constituents,”114 but this argument was rooted in his belief that such aid allowed well-connected insiders to use federal aid “as artful expedients to shift upon the Government the losses of unsuccessful private speculation.”115 Fear of such “artful expedients” could not easily be teased out of a positive grant of powers in Article I: That list might indirectly hint at the inadequacies of the states, but it said nothing about the dysfunction of Congress.

Likewise, in rejecting the policy of using a single private bank to act as the federal government’s fiscal agent, Jackson’s reliance on Article I’s enumeration was perfunctory, while his reliance on objections to special privileges to well-connected insiders was passionate. Aside from a negative inference from the Copyright and Patent clause, Jackson cited nothing in Article I explaining why delegations to private corporations were especially objectionable.116 Decrying “artificial distinctions,… titles, gratuities, and exclusive privileges” that “make the rich richer and the potent more powerful,” Jackson argued that the privileges conferred by the Second Bank’s charter, from owning real estate and holding federal revenues to immunity from state taxes, were all too extensive to delegate to a private corporation. This bare objection to delegation, however, proved too much: Congress had, after all, delegated broad legislative powers to territorial legislatures without sparking serious constitutional objections. The real work of his argument was performed by an idea invisible in Article I’s enumeration — the idea that corporations held citizens, and especially westerners and southerners, in colonial subservience to Northeastern and

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112 Albert Gallatin’s 1808 plan, an effort in national planning of routes for a national road and canal system according to expert survey data and impartial assessment of migration and trade patterns, suggested such stock subscriptions as a possible financing mechanism. Gallatin Plan of 1808 at 69-74. The 1810 Pope-Porter Bill, the first congressional legislation to take up the Gallatin Plan, likewise called for the Federal government to purchase up to one third of the shares of private infrastructure companies, relying on dividends from tolls for reimbursement. Annals of Congress, Senate, 11th Congress, 2nd Session, 524-25 (January 18th, 1810); Ronald E. Shaw, Canals for a Nation: the Canal Era in the United States, 1790-1860, at 24 (2014).

113 Madison’s Letter to Mr. [Jared] Ingersoll, June 25, 1831

114 For a veto relying on this ban on federal subscriptions of private corporations’ stock, see Register of Debates, 21st Cong., 2nd sess., ii-xiii, at v (December 6th, 1830) (President Jackson’s explanation of his pocket veto of an appropriation to purchase stock in the Louisville & Portland Canal Company).


116 Jackson argued that the express enumeration of the Congress’s power to confer exclusive privileges in copyright and patent implied that “such a power was not intended to be granted as a means of accomplishing any other end.”
European financiers. "I do not dislike your Bank any more than all banks" Jackson famously informed Nicholas Biddle, the Second Bank’s president, "[b]ut ever since I read the history of the South Sea Bubble I have been afraid of banks."  

Such an anti-corporate non-delegation doctrine, taken to its logical conclusion, implied a complete break between all level of government and private corporations. Indeed, Jackson himself called for such a break, urging that state governments’ use of private banks as fiscal agents to regulate the supply of currency violated Article I, section 10’s prohibition on states’ issuing “bills of credit” or paper money. Likewise, the Party’s “hard money” radicals urged a strict constitutional principle barring all aid to private corporations under the slogan, "separation of bank and state!" Such an absolute ban on governmental involvement with private corporations could not, however, be the basis for any constitutional truce, because the extreme position was rejected by important sections of the Democratic Party. That Party consisted of an uneasy coalition between westerners hungry for infrastructure and credit, urban radicals suspicious of inflation and banks, and Southerners suspicious of the federal government. Important party leaders like David Henshaw were also up-and-coming financiers who resented the Bank of the United States’ dominant position as “aristocratic” but nevertheless urged governments, state and federal, to deposit their revenue with state-chartered banks run by “active young businessmen” of “talent and virtue” like themselves. Telling every level of government that they could not use private banks as fiscal managers would alienate these constituents.

To unite this disparate coalition, therefore, the Party’s leadership turned to federalism as a safe compromise. In the teeth of constitutional text and over Justice Story’s vigorous dissent, the U.S. Supreme Court permitted state-owned banks to issue notes that practically served as currency, despite the apparent violation of Article I, section 10. At the same time, the Democratic Party’s platform adopted a strict policy of strictly “divorcing” the federal government from private banking, eventually adopting the Independent Treasury System under which the federal government would hold its own revenue in the form of coin stored in governmentally owned “subtreasuries.” The Independent Treasury was defended on constitutional principles of non-delegation and democracy: Private corporations could not be given power over public functions like control of the currency supply.

117 John Spencer Bassett, 2 Life of Andrew Jackson 599 (1911).
118 Bray Hammond, Banks and Politics in America, at 349-50.
120 Workingmen’s parties in northern cities endorsed both the deflationary effects and the anti-corporate rhetoric of hard money politics. (“The currency expands, the loaf contracts,” was a popular slogan). Hammond, Banks and Politics, at 493-96. By contrast, entrepreneurs like August Belmont and David Henshaw who joined the Democratic Party in order to contest the dominance of old families and eastern capitalists over the economy sought to expand credit as well as lending opportunities for their own banks. See Richard Hofstadter, Andrew Jackson and the Rise of Liberal Capitalism in The American Political Tradition and the Men Who Made It 57-87 (1948); Hammond, Banks and Politics in America 251-52 (1957); Irving Katz, August Belmont; A Political Biography (1968); Stephen Mihm, A Nation of Counterfeiters: Capitalists, Con Men, and the Making of the United States 136 (2009).
121 David Henshaw, Remarks upon the Bank of the United States 18, 35, 42-43 (1831).
123 For examples of this common argument, see remarks of Albert Marchand, 8 Cong. Globe 450, 26th Cong., 1st Sess. (June 16th, 1840)(complaining that directors of depository banks “act legislatively, in the fullest sense of the word”); Charles Atherton, id. at 427 (June 2nd, 1840)(“Why should these [banks] be entrusted with the public revenue, the possession of which conferred political power?”)
sponsorship of transportation companies took the form of requiring the federal government to subsidize railroads only indirectly by granting public domain land to state governments on the condition that proceeds from sale were used for financing transportation. Again, the justification for interposing state governments between railroad corporations and the federal government was to prevent the former from corrupting federal power for private ends.

The antebellum Democratic Party’s anti-corporate federalism was, in sum, a product of both constitutional principle and practical politics. The principle, indeed, served the politics, because the various constituencies within the Party needed assurance that each constituency would honor principles that would foreclose policies favored by each. Members of each group might be tempted to defect to the Whigs in order to secure their first-best policy preferences. (Some, in fact, did). By grounding the Party’s position in constitutional principle rather than shifting and contingent policy, the Party’s leadership was able to prevent such defections, rigorously ostracizing those who defied party “regularity” as traitors to fundamental principles of the Constitution.

As with Madison’s “great and important powers,” the Jacksonian Democrats’ version of anti-corporate federalism owed little or nothing to the text of Article I’s enumeration. It was a theory of suspect spheres, not enumerated powers. Federal power over the currency supply was obviously useful for interstate commerce and federal borrowing. Likewise, federal charters and subsidies for rail corporations would obviously facilitate interstate commerce and the delivery of the mails. To Democrats, however, these connections between implied and enumerated powers were not enough to justify federal aid to corporations, because the implied power of conferring such aid carried with it such dangers of corruption. Democrats could not and did not infer these dangers from anything in the letter or spirit of the list of powers in Article I, because that list reflects the benefits, not the harms, of national power. Instead, they inferred the dangers from popular beliefs and political tradition lying outside Article I altogether, attaching these traditions to the empty vessel of the Necessary and Proper clause and enforcing the limit through Party discipline and political rhetoric.


The Democratic Party’s view of the Constitution was not shared by the Whigs or their successors, the Republicans. Nevertheless, the Whigs and Republicans left much of this framework undisturbed. Part of the durability of the Democrats’ theory of federalism as the result of a deep and lasting change in public opinion. By the 1850s, there was little support for vesting the nation’s monetary policy in a single privately owned bank acting as the nation’s fiscal agent and regulator of currency. When the Republicans took control of the federal government in 1861, therefore, they abandoned Hamilton’s and Clay’s idea of having a private business corporation act as the nation’s fiscal agent and monetary policy-maker. Instead, the Republicans modeled the National Bank Acts of 1863 and 1864 after New York’s system of free banking in which banks were regarded as purely private enterprises pursuing private commercial purposes. The control of banking policy was delegated to the Comptroller of the Currency, a federal officer statutorily barred from holding any interest in any private bank.124

Unlike the Democrats, however, the Republicans did not defend this separation of government from corporations as a matter of constitutional principle. Republicans underscored

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their willingness to let Congress directly aid private corporations by bestowing federal charters on trans-continental railroad companies. The corruption of national politics by the boosters of the Union Pacific Railroad tarnished this policy of federal aid, but neither the Congress nor Court responded by to the fiasco by systematically barring corporations from receiving federal support. To the contrary, the Republican-controlled judiciary aggressively expanded nationally chartered banks’ immunities from state regulation by construing the National Bank Act as preempting state laws that interfered with banking business.

Throughout the late 19th and early 20th centuries, moreover, important Republican constituencies persistently lobbied for a return to Alexander Hamilton’s Federalist vision of an economy managed by leaders of private corporations, because only such corporations had the necessary expertise. Financiers, for instance, repeatedly decried the administrative incompetence of the Treasury Department in sending accumulated customs receipts of coin back into the interior with the seasonal demands of an agricultural economy. To manage the money supply, they called for an association of private bankers to insure that solvent but illiquid banks could call on pooled reserves. Railroad managers likewise repeatedly implored the federal government to enforce pooling agreements to prevent price wars between long-distance lines from lowering shipping rates below what was needed to cover fixed costs and thereby driving the lines into bankruptcy. Against state and federal politicians’ demands that railroads charge uniform rates per mile for short- and long-haul traffic, railroad managers responded that high rates on uncompetitive short-haul lines were essential to cover fixed costs on competitive long-haul lines. In the view of railroads’ leaders, however, the larger problem was simply that party politicians did not understand rate-making. In manufacturing, the wave of mergers between 1895 and 1905 created industry-wide firms. In the wake of their experience with cartelization by the War Industries Board during World War I, the leaders of these firms called

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128 In the wake of the Panic of 1907, Senator Nelson Aldrich, John D. Rockefeller’s son-in-law, proposed a plan under which an association of private bankers would pool resources to stave off similar liquidity crises by bailing out solvent but illiquid banks. See ELMS WICKER, THE GREAT DEBATE ON BANKING: NELSON ALDRICH AND THE ORIGINS OF THE FED ch. 4 (2005). For a discussion of hostility to the plan from small banks and businesses, see ROBERT H. WIEBE, BUSINESSMEN AND REFORM 76-79 (1962).
129 ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917, AT 186, 191, 197 (1985) [on railroads’ open defense of pooling of major lines].
130 Arthur Twining Hadley, Yale economics professor, famously explained the principle as a problem of natural monopolies. Railroad Transportation: Its History and Laws 115 (1885) (“In other words, in order to live at all, the road must secure two different things—the high rates for its local traffic, and the large traffic of the through points which can only be attracted by low rates”). The simple economics of short haul-long haul discrimination are summarized in HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 153-56 (1991).
131 As Albert Fink, famed railroad manager and defender of railroad pooling, explained, rate-making was “necessarily the work of experts, and not the work of legislative departments of a government.” ALBERT FINK, THE RAILROAD PROBLEM AND ITS SOLUTION 6-7 (1880). On the Fink brothers’ reputation as railroad experts, see their extended obituary in The Three Fink Brothers: Pioneer Rail Builders, NY Times, Sunday Magazine section, July 21st, 1912, Page SM3.
for postwar “self-government in industry” in which relaxed enforcement of antitrust laws would prevent “destructive competition” from undermining high wages and product quality.133

All of these efforts at turning over economic management to private industry failed spectacularly. The Aldrich Plan for delegating monetary policy to a bevy of private banks was laughed out of Congress.134 Instead, in the wake of Louis Brandeis’s and the Pujo Commission’s denunciation of J.P. Morgan’s promotion of monopolies, Congress instead enacted the Federal Reserve Act placing monetary policy under a board controlled by presidential appointees confirmed by the Senate.135 Congress likewise rejected railroad managers’ pleas for self-governing pools, placing the decision to allow mergers and rate changes with the Interstate Commerce Commission.136

None of these defeats rested on any constitutional prohibition: Congress affirmed only the policy prescription that private businesses should not be trusted to exercise regulatory power. Such distrust, however, continued a pattern in which bipartisan majorities rejected delegations of public power to private organizations dating back to the antebellum Jacksonian constitution.

The formal recognition that this principle was indeed a constitutional limit as well as a desirable policy came with the U.S. Supreme Court’s rejection of the National Industry Recovery Act (“NIRA”). The NIRA had been enacted with the support of industrialists who sought to reproduce the ideal of the “self-governing industries” supervised by Bernard Baruch and the War Industries Board during World War I.137 By turning over the issues of wages, hours, working conditions, production standards, and prices to private trade associations loosely supervised by the President, these industrialists hoped to free industry cartels from antitrust liability and thereby achieve price stability during a recession. The industrialists were not the only constituency interested in taming markets with private cooperation: Trade unions hoped for protection of collective bargaining against retaliation under section 7(a) of the Act,138 while anti-market intellectuals dreamed of an economy in which the needs of consumers, labor, and industry might be balanced by expert planners.139 Initially greeted with enthusiasm, the NIRA soon became mired in controversy between these rival visions. Critics claimed that it was a thin cover for industry cartels that squeezed smaller businesses while providing nothing but higher prices and stagnant wages to consumers and workers.140 By the time that the US. Supreme Court granted certiorari to review its application to a Brooklyn kosher poultry processor, the statute

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135 Id. at 280-81. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 51-52 (1914) (referring to interlocking directorates created by Morgan as “the most potent instrument of the Money Trust”).
136 Sanders, supra, at 212-14.
138 Section 7(a) provided that “employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in selforganization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; [and] (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing…”
139 Hawley, supra, at 43-46.
was largely perceived to be a failure, and FDR’s lawyers gloomily described their efforts to defend the law as “galloping to the guillotine.”

The unanimity of Schechter Poultry in holding that section 3 of the NIRA constituted an unconstitutional delegation of legislative power reflected this widespread revulsion at turning the regulation of business over to businessmen. Formally, the Court reviewed a delegation of power to the President, because the President was responsible for the ultimate approval of all “codes of fair competition” submitted by the various trade associations. The practical reality of the NIRA, however, was that the codes were in practical effect designed by private economic actors whom the NRA, the agency tasked by the President with overseeing the statute’s implementation, lacked the manpower to review. In an effort to show that the idea of “fair competition” was adequately defined by the deliberation of the trade association that recommended them, the Roosevelt Administration, in fact, attempted to defend the codes of fair competition as “rules of competition deemed fair for each industry by representative members of that industry – by the persons most vitally concerned and most familiar with its problems.”

The Court’s rejection of this defense rooted in industrial self-government suggested the degree to which the Court was repudiating decades of efforts by business leaders to resurrect the ideal of regulation through private organizations:

[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

“The answer is obvious.” Such words suggest confidence rooted in constitutional text. Yet there is no plain textual home for the non-delegation doctrine. The vesting clause of Article I does not provide such a home. As Adrian Vermeule and Eric Posner have argued, any power that Congress could retrieve by repealing a delegation could be regarded as non-legislative: On this view, statutory grants of power, being repealable, are never grants of “legislative” power. Gary Lawson and Patricia Granger have proposed that the true home of the doctrine is the Necessary and Proper Clause, on the theory that grants of legislative powers are “improper.” The 18th century notions of administrative law to which the term “proper” arguably refers, however, allowed delegations of power to private corporations like the Bank of England or the First Bank of the United States. The business supporters of industrial self-government could
invoke decades of advocacy seeking revive such traditions in railroads and banking. Why was it so “obvious,” then, that the NIRA’s revival of a longstanding ideal of the business community was illegal?

The answer lies not in the text of Article I but rather the political battles of the 18th and 19th centuries external to that text. James Madison’s and Andrew Jackson’s principle that private corporations could not properly be given regulatory responsibilities had been repeatedly vindicated before the Civil War in the battles over the Bank of the United States and after the Civil War in the battles over railroad pooling. Every effort to resurrect the principle of government through private business expertise had been repudiated in political fights often replete with moralistic denunciations of the “Monster Bank” or the “House of Morgan.” The old Jacksonian rhetoric against special privileges had been passed down through Jacksonian treatise writers like Thomas Cooley, Christopher Tiedeman, and John Dillon.148 That rhetoric united libertarian conservatives like Justice McReynolds (Woodrow Wilson’s Attorney General who avidly enforced antitrust laws against monopolies) and Wilsonian progressives like Louis Brandeis. The breadth of this hostility to delegations of power to private corporations could unite a coalition sufficiently broad to entrench it as constitutional law. That coalition could draw on rhetoric so ensconced in American political history that it could be invoked merely with the declaration, “[s]uch a delegation of legislative power is unknown to our law.”

The anti-corporate non-delegation doctrine had the added virtue of being a principle of federalism and, therefore, the basis for a broad coalition. The idea that public power should not be conferred on private actors has a parallel existence as a principle of Due Process, equivocally recognized by the U.S. Supreme Court in a string of precedents invalidating zoning laws conferring the power on neighbors to veto variances.149 The difficulty with such a doctrine, however, is that it would hamstring states as well as the federal government. Several states, to be sure, have state constitutional prohibitions on aid to corporations, enacted in the wake of the panic of 1837 that caused nine states to default on their canal-financing bonds. Those provisions, however, have been notoriously difficult for state courts to enforce and play a limited role in state constitutional doctrine. Many state and local governments enlist private organizations ranging from the SPCA to the Salvation Army to administer governmental programs. Nationalizing the anti-delegation doctrine of Schechter through the Due Process clause would raise intractable problems about whether and how to build up an independent bureaucracy with its own expertise and grandly Weberian impartiality. By relying on the non-delegation doctrine, an Article I principle that is not enforced against the states, Schechter Poultry, the Court side-stepped the question of how to strike the balance between public and private power, allowing different states with their heterogeneous political cultures, to address that problem.

Such geographic diversity is, of course, a familiar virtue of federalism. The advantage of the anti-corporate non-delegation doctrine is that it provided a historically defensible external limit by which this virtue could be vindicated. This doctrinal limit was not merely historically resonant but also bipartisan, attracting a unanimous court otherwise bitterly divided. The doctrine, in other words, formed the basis for a truce between POOPs (Republicans) and PIPs (Brandeis-style Progressives, an important constituency in the New Deal coalition). That the


149 Eubank v. City of Richmond; Roberge. But see Cusack.
The doctrine was both bipartisan and deeply rooted in history was no accident: The very fact that the doctrine had survived the vicissitudes of different partisan alignments meant that each side could trust that it could be later deployed on behalf of their preferred policies — for liberals, constitutional limits on federal aid to joint-stock corporations; for conservatives, analogous limits on federal aid to trade unions.

B. Traces of the Anti-Corporate Non-Delegation Doctrine in the Roberts Court

The anti-corporate non-delegation doctrine is, in short, an illustration of how an external limit on Congress’ powers can emerge from history and be put to good use as the basis for a nation-uniting constitutional truce that advances some of the benefits of federalism. One might nevertheless fairly ask whether it is a robust illustration. The non-delegation doctrine is, after all, hardly a frequently invoked constitutional doctrine. Why is not the anti-corporate non-delegation doctrine the exception that proves the rule against judicially enforced federalism?

As we explain below, such skepticism misunderstands the multitude of ways in which an external limit can be re-shaped and deployed to meet the needs of the day and the capacities of courts. Schechter Poultry could draw on a long tradition of skepticism towards federal aid for corporations — but it re-shaped the specific rules that had previously emerged from that tradition. The NIRA’s delegation of powers to trade associations, after, was importantly dissimilar from the delegation of power to the First and Second Banks. A principle that can be deployed against both can be re-shaped to attack later and different problems in different ways.

Consider, for instance, two manifestations of the principle, described in more detail below, a “hard” constitutional doctrine barring mandates to engage in commerce and as a “soft” canon of construction disfavoring the preemption of state law. Both of these doctrines are examples of judicially enforced federalism that lack persuasive constitutional “homes.” Their source in text is non-existent, and their source in constitutional tradition has never been convincingly identified. Part of the problem, we suggest, is that the search for internal sources of these doctrines has led to confusion about how they might actually be justified. Once one gives up the forlorn hope that meaningful limits on Congress can be distilled from Article I’s list of powers, one can focus on the more profitable pursuit of defining external limits based on history and the present viability of durable constitutional truces.

We offer such external justifications for National Federation of Independent Businesses v. Sebelius and the anti-preemption canon below. We do so not in the spirit of trying to show that either doctrine is an indisputably correct constitutional rule but instead with the aim of showing that, whatever conclusion one ultimately reaches about these doctrines, the best case to made for them sounds in external limits rooted in post-enactment tradition, not internal limits rooted in text or originalist history.

1. NFIB v. Sebelius as Anti-Corporate Non-Delegation Doctrine

As Cass Sunstein, famously quipped, the non-delegation doctrine has had only one good year – 1935, in the Schechter Poultry and Panama Refining decisions.

Such associations were both more representative of Americans — there were lots of members, theoretically representing a lot of business and worker interests -- and much more powerful than the Banks.

Consider, first, the doctrine that the power to regulate commerce among the several states does not include any power to require private citizens to purchase goods or services. First announced in *National Federation of Independent Businesses v. Sebelius (NFIB)*, the doctrine attracted a lot of criticism for being a newly minted creation of a Court bent on undermining the Affordable Care Act (“ACA”), the signature legislative achievement of the Obama Administration. We suggest that Chief Justice Roberts’ plurality opinion excluding the individual mandate is explicable only as a particular instance of the anti-corporate non-delegation doctrine - and that, in fact, such an explanation has the virtue of transforming a doctrine that lacks any foundation in text or original understanding into a doctrine with plausibly bipartisan roots in American political tradition.

To appreciate the need for a new rationale for NFIB’s anti-mandate argument, consider the fraility of NFIB’s textualist foundation. According to NFIB, the ACA’s mandate that individuals purchase “minimum essential” health insurance coverage could not be justified as regulation of “commerce,” because the “power to regulate commerce presupposes the existence of commercial activity to be regulated.” Because the ACA’s mandate creates the commercial activity (purchase of insurance) that is the predicate condition for allowing Congress to regulate, NFIB argued, the mandate cannot be justified by the regulatory power. Roberts’ plurality opinion backed this argument up with the familiar idea that no power in Article I’s enumeration could be construed is broadly as to make other powers redundant: If Congress could create the activity being regulated then “many of the provisions in the Constitution would be superfluous.” This combination of textualism and the anti-redundancy canon is an eerily familiar reproduction of the textualist parts of Madison’s 1791 argument against the Bank. Like Chief Justice Roberts, Madison argued that it would be a “dangerous principle” to infer from “the power to borrow” any “power of creating the ability, where there may be the will, to lend,” because any such inference “would give an unlimited discretion to Congress” and also render superfluous many of Congress’ enumerated powers. As explained in Part I, however, this internal argument is a patent failure: The anti-redundancy principle proves too much, and the textually limited reading of “commerce” proves too little. There is no way to construe the enumeration to exclude redundancies: Under any minimally plausible reading of implied powers, the power to punish counterfeiters must be implied from the power to coin money, rendering the “Punish Counterfeitors” clause redundant, and many of the uncontroversial criminal laws enacted by the First Congress would render superfluous the detailed specification of powers over criminal law in Article I. As for the limits on the term “regulate commerce,” such limits do nothing to explain why mandates to purchase goods and services is not a necessary and proper implied power to regulate the business of insurance.

Like Madison, therefore, Chief Justice Roberts was forced to abandon textualism in favor of some sort of external argument that the power to mandate commercial activity was the sort of power that could not lightly inferred – what Madison calls a “great and important power” and *McCulloch* calls a “great, substantive and independent power.” Chief Justice Roberts chose the latter formulation, but the difference in words does not hide the paucity of reasons: One needs some argument for why the power to mandate the purchase of health insurance is so “great, substantive and important.” Madison offered deeply rooted Country Party suspicion of exclusive privileges for financial corporations as his basis for inferring that the First Bank’s was too “great and important” a power to infer. By contrast, Chief Justice Roberts offered nothing but gruffly perfunctory ipse dixit: “the distinction between doing something and doing nothing would not have been lost on the Framers,” Roberts assured us, because those Framers “were "practical
statesmen,’ not metaphysical philosophers.” Undoubtedly, the Framers were very practical – but what about their practice caused them to fear mandated purchases? Roberts has nothing to say, because nothing internal to Article I will shed light on the Framer’s fears of, as opposed to hopes for, the national government. To explain which powers are especially suspect, one needs a theory of suspect spheres that the enumeration simply cannot yield.

This is not to say that nothing can be said on behalf of the idea that the ACA’s individual mandate falls within such a suspect sphere. Indeed, that mandate bears a striking resemblance to the sorts of “taxless financing” deeply despised by both Democratic-Republicans and Jacksonian Democrats. The essence of such taxless finance was that the government conferred some sort of special privilege on a private corporation in exchange for that corporation’s providing some sort of public service to the citizens. For transportation infrastructure – bridges, canals, and railroads – the government provides the private corporation with exclusive rights to tolls or public land. For financing corporations like banks, such financing involved the government’s conferring on a corporation the right to hold government’s revenue as a fiscal agent in exchange for the provision of credit and currency to the private economy. The attraction of such financing schemes was that the government itself did not raise revenue through taxes: The special privileges substituted for such taxes, subsidizing the costs of the infrastructure or financial services sought by the state. In either case, as explained in Part III(A) above, such “taxless financing” invited corporation and sweetheart deals that incited not only fury but also constitutional doctrine from Andrew Jackson and his followers.  

ACA’s individual mandate bears a family resemblance to the delegations of governmental responsibility to private corporations so disliked by the Jacksonians. Rather than provide health insurance directly through revenues raised through taxes, ACA’s individual mandate subsidizes insurance companies by obliging healthy citizens to purchase insurance used to cross-subsidize insurance for the old and the sick. In states where there are few insurers on the ACA-defined insurance exchange, those insurance companies gain not only a guaranteed revenue stream from healthy individuals but also some degree of monopoly power. There were proposals for the federal government to provide such insurance directly to citizens through a federally funded insurance option. Such proposals bear a rough analogy to the Independent Treasury System championed by “hard money” radicals in the Democratic Party: By weakening the delegation of power to private corporations, these proposals allayed suspicions that private corporations would exploit a special privilege for their own gain. Proposals to create such a publicly funded option were, however, shot down by Senator Joe Lieberman – a Senator from the state in which most insurers are headquartered – with the threat of a filibuster. One might plausibly analogize Lieberman’s role to the pro-banking “soft money” Democrats who prevailed

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For a description of the fears of corruption surrounding such exclusive privileges, see Part III(A) supra; James J. Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HI ST. 211 (2005).


on Jackson to adopt a “pet bank” system in which certain favored state-chartered banks would receive the right to hold federal revenue.

In analogizing ACA’s individual mandate to the First and Second Bank’s use of private banks as fiscal agents, we do not endorse either Jackson’s argument against the Second Bank or Roberts’ argument against ACA’s individual mandate. The point of the analogy is not to defend either argument, which would require another and quite different article, but rather to proffer both as illustrations of the sort of external argument on which constitutional federalism must be based if it is to survive at all as a judicially enforced concept. Just as Madison’s and Jackson’s case against the Banks rested on a theory about the special risks posed by delegations of power to financial corporations, so too, Roberts’ argument needs a foothold in some theory about the special risks of delegating power to private insurers. Compared to the dead-ends and sophistries of internal arguments about the semantics of the phrase “regulate … commerce,” such external arguments candidly face up to the task of “liquidating” constitutional ambiguities with post-enactment tradition. That Roberts’ plurality opinion relied so heavily on the alleged novelty of ACA’s individual mandate suggests a gesture in the direction of such tradition. An obsession with somehow milkimg meaningful limits from constitutional text, however, stymied such an external argument.

We also stress that post-enactment tradition provides a sounder basis for a constitutional truce between POOP and PIP. The argument that federal delegations to private corporations are especially suspect has resonance across party lines precisely because it is deeply rooted in traditions on which both parties can draw. Andrew Jackson’s campaign against the Bank, after all, became a wellspring for the anti-oligarchical constitution celebrated by Willie Forbath and Joey Fishkin, but the same tradition was the foundation for nineteenth century libertarian treatise writers like Thomas Cooley, a “Locofoco” “hard money” Jacksonian. That tradition has echoes in “Tea Party” Republicans’ anger at bailouts for banks in 2008, and it bears a family resemblance to the tradition motivating anti-monopoly small businessmen and Brandeis Progressives to attack the NIRA. An anti-mandate doctrine rooted in the impropriety of under-supervised delegations of power to insurance corporations could tap into Left Democrats’ suspicion of such delegations, suspicion that led to their advocating a public option to prevent citizens’ exploitation by oligopolistic insurers.

In sum, whatever the ultimate merits of an anti-mandate doctrine rooted in the anti-corporate non-delegation doctrine, such a doctrine provides a sounder case against ACA than the semantics or spirit of Article I. The attraction of that latter internal argument is, of course, the sense that the ratified text of the Constitution is “real” law that can trace its pedigree with procedurally formal rigor back to a founding moment. As Part III(A)’s history of 19th century arguments about federalism suggests, however, such formalist arguments have never been the engine driving arguments about federalism. Our Federalism is, for better or worse, a federalism of external limits defended extra-textually on the basis of tradition and political theory. To abjure such external limits but still insist on judicially enforced federalism is necessarily to offer rules without reasons, because Article I’s enumeration simply cannot supply reasons sufficient to ground any rule.

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C. Can courts pull it off?