SEPARATION, ENUMERATION, AND THE IMPLIED BILL OF RIGHTS

Laurence Claus[♦]

The United States Constitution sets forth two strategies for distributing power within the system of government that it establishes. To distribute power horizontally within the national government, the Constitution seeks to separate power by kind – legislative, executive, and judicial. To distribute power vertically between the national and state governments, the Constitution seeks to enumerate power by subject.

Neither strategy works. Separation by kind fails because governing actions are not of single kinds. Governing in all three branches necessarily involves both lawmaking and law-executing. Enumeration by subject fails because governing actions are not about single subjects. Governing actions can readily be characterized in more than one way, as about more than one subject. Consequently, those who must decide disputes about the distribution of power are obliged to create a law of institutional competence and a law of constitutional characterization with far less guidance from the Constitution than it purports to give them.

How did these two unachievable strategies come to be adopted? What should guide courts in creating a law of institutional competence and a law of constitutional characterization to settle the actual horizontal and vertical distribution of power? Examining these questions illuminates a clearer path for courts to expound the Constitution's meaning in ways that expand its protections. Deciding the distribution of power lets courts create an implied bill of rights.

♦ Professor of Law, University of San Diego. I am grateful for valuable comments from participants at the National Conference of Constitutional Law Scholars 2019, the Third International Biennial Public Law Conference, and a constitutional studies faculty colloquium at the University of Texas at Austin School of Law. I am particularly grateful for insights in our panel at the National Conference from Jessica Bulman-Pozen. I am also grateful for comments in past discussion from Larry Alexander, Richard Albert, Andrew Coan, Eric Fish, Dov Fox, Jeffrey Pojanowski, David Pozen, Michael Ramsey, Maimon Schwarzschild, Steven Smith, and Mila Sohoni.

INTRODUCTION 94

I. THE CONVENTION'S CHOICE OF DISTRIBUTIVE PRINCIPLES 97

A. *Separating Kinds of Power* 97
B. *Enumerating Subjects of Power* 101

II. CREATING THE LAW OF INSTITUTIONAL COMPETENCE AND THE LAW OF CONSTITUTIONAL CHARACTERIZATION 109

A. *Why Separation?* 109
B. *Why Federalism?* 112

III. DISTRIBUTING POWER AND DETERMINING RIGHTS 118

A. *Applying Theories of Constitutional Meaning* 118
B. *An Implied Bill of Right*s 122

CONCLUSION 128

INTRODUCTION

How can a written constitution protect unwritten rights? The familiar answers supplied by American constitutional law have never been altogether satisfying. We can find a more convincing answer when we bring together insights about the American founders' two primary strategies for distributing power – separation of kinds and enumeration of subjects. The inadequacy of these strategies to settle how power will be distributed requires the courts to create a lot more law, and that allows the courts ample space to create a more expansive implied bill of rights.

In drafting the United States Constitution, the Philadelphia Convention created not only an enduring form of government for its new nation, but also a template for written constitutionalism the world over. From the opening phrase of its first article, the document declared itself a device for *distributing* power.[1] In the text that followed, the document displayed and implemented two strategies for distributing power that have ostensibly operated and been hailed as hallmarks of American government ever since, and that have been widely emulated elsewhere.[2] To distribute power

[1] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[2] *See, e.g.*, Andreas Auer, *The Constitutional Scheme of Federalism*, 12 J. EUR. PUB. POL'Y 419, 424 (2005) (observing that most federal constitutions deploy the American model of power enumeration).

horizontally within the new national government, the document purported to separate power by kind – legislative, executive, judicial. To distribute power vertically between the new government and existing state governments, the document purported to enumerate power by subject.

Neither strategy works. Separation by kind fails because governing actions are not of single kinds – all valid order issuing by those in government executes existing law and in all three "branches," governing involves a mix of macro and micro lawmaking. Enumeration by subject fails because governing actions are not about single subjects – they are mostly easy to characterize in more than one way, as about more than one subject. Consequently, neither distinguishing kinds of power nor enumerating subjects of power comes close to settling the actual distribution of power under constitutions that adopt these strategies.

None of this would matter if the actual distribution of power were in all or even most cases a political question to be settled among institutions using the tools of ordinary politics. It isn't. The American model of power distribution, both in America and elsewhere, has been implemented substantially through adjudication by independent dispute resolvers. That task of deciding distribution has contributed crucially to the salience and significance of constitutional courts around the world.[3] Unlike resolution through political bargaining, resolving power distribution through independent adjudication depends for its durability as a practice on the possibility of reaching *right answers* – answers that can be justified in principle and turned into precedent.[4] The integrity of the judicial role depends on the credibility of courts' claim to be impartial sources of answers that are not arbitrary. Constitutional adjudication must offer disputing parties more than a coin toss. Accordingly, constitutional dispute resolvers under constitutions that try to separate by kind and enumerate by subject have had to create whole bodies of law – a law of institutional competence

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[3] *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY 32 (2004); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, 86, 106 (2007); Laurence Claus, *Federalism and the Judges: How the Americans Made Us What We Are*, 74 AUSTL. L.J. 107 (2000); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011). "Federalism has been the one most decisive factor for the establishment of constitutional adjudication. For Dicey, 'federalism, lastly, means legalism—the predominance of the judiciary in the Constitution' and according to Kelsen, 'the institution of the constitutional tribunal achieves legally the political idea of federalism.'" Auer, *supra* note 2, at 426 (first quoting ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 175 (10th ed., MacMillan & Co. 1959) (1885) and then quoting HANS KELSEN, *WESEN UND ENTWICKLUNG DER STAATSGERICHTSBARKEIT* 81 (1929)).

[4] *See* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* NOMOS 15: FEDERALISM AND SUBSIDIARITY 34, 64 (James E. Fleming & Jacob T. Levy eds., 2014) (citing Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959)).

and a law of constitutional characterization – to settle the actual horizontal and vertical distribution of power. For example, the United States Supreme Court's law of institutional competence must settle the actual constitutional limits on executive lawmaking and on congressional supervision of executive action. Neither is settled by saying, as the Constitution does, that Congress has legislative power and the President has executive power, because law-making and law-executing cannot be so neatly compartmentalized. And the Court's law of constitutional characterization must settle what *relations* between governing actions and enumerated subjects of power are necessary or sufficient to bring governing actions within subjects of power. That is not settled by saying, as the Constitution does, that Congress has power to make all laws which shall be necessary and proper for carrying into execution powers to regulate a series of subjects, because "necessary and proper" is not self-specifying; its specification depends on reasoning that enumeration by subject does not intrinsically supply. As we will see, the principles and tests developed within the Supreme Court's law of institutional competence and law of constitutional characterization have not been *determined* by the principles of separation by kind or enumeration by subject, because separation by kind and enumeration by subject are incapable of supplying the necessary guidance. In building the law of institutional competence and the law of constitutional characterization to distribute power constructively, the Court has not been just expounding conceptual truths about separation by kind and enumeration by subject, such as the distinction between law-making and law-executing. Yet the need to *connect* the law of institutional competence and the law of constitutional characterization to constitutions' purported distributions of power by kind or subject often threatens to detach judicial reasoning about the right distribution of power from considerations we have actual reasons to care about, such as securing liberty or safeguarding self-government. That articulated reasoning may attempt a show of faithfulness to constitutions' purported principles of distribution by kind or subject. Yet the vision of authentic distribution by these principles is a mirage.

How did these two misguided distributive strategies come to be adopted and widely borrowed despite their inadequacy? Did the American founders really think distributing power in these ways was both possible and desirable, and if so, why? To the extent that the existing literature has poked holes in the separation and enumeration strategies, it has not adequately explained the choice to adopt those strategies in the first place. Given the lack of guidance they get from separation by kind and enumeration by subject, what *should* guide constitutional dispute resolvers in crafting the

law of institutional competence and the law of constitutional characterization to settle the actual distribution of power? Examining these questions reveals a better way to explain how the Constitution empowers courts to protect more rights than it expressly mentions. Separation and enumeration constrain the United States Government in ways that let courts create an implied bill of rights.

I. THE CONVENTION'S CHOICE OF DISTRIBUTIVE PRINCIPLES

In the first Congress, James Madison proposed constitutional amendments to help safeguard the nation's adherence to the Constitution's two core principles of power distribution.[5] Yet his own observations, public as well as private, revealed his personal skepticism about their efficacy.[6] This Part seeks to explain how the two principles of distribution came to be adopted with the support of key founders, including Madison and James Wilson, despite the skepticism that Madison's words reflected.

A. Separating Kinds of Power

In establishing a tripartite structure for American national government, the Philadelphia Convention followed in the footsteps of state constitutional conventions over the preceding decade, adopting a principle most memorably expressed in the Massachusetts state constitution of 1780: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[7] The founders at Philadelphia did not merely call three institutions they created a legislature, an executive, and a judiciary. They purported to invest three institutions they created with differing kinds of power. Articles I, II, and III began not by naming institutions, but by naming kinds of power, and then created institutions to exercise those powers. "All legislative Powers herein granted" went to a Congress, "[t]he executive Power" to a President, and "[t]he judicial Power" to the one supreme Court and its subordinates.[8] In explaining this choice, Madison observed: "The oracle

[5] *See infra* notes 17-18 and accompanying text.
[6] *See infra* notes 19, 53-54 and accompanying text.
[7] MASS. CONST. pt. 1, art. XXX.
[8] U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying, and recommending it most effectually to the attention of mankind."[9]

What was so valuable about distributing power among those who govern by reference to its *kind*, rather than in other ways? Set in the context of an existing Enlightenment canon to which he was contributing, Montesquieu's reason for seeing things that way seems to have been a judgment about sustainability. Writing against a background scholarly consensus that sovereignty had to be undivided to survive,[10] Montesquieu sought to explain the endurance and success of the system he had witnessed on a long visit to England. Sovereignty in England was sustainably divided, he contended, because the separate power centers in English public life each singularly possessed its own special kind of power.[11] Parliament, as ultimate lawmaker, could keep the law coherent. The monarch, as chief executive, could keep law's execution consistent through the day-to-day business of governing. Because their powers differed in kind, England's governing institutions could govern alongside one another in a coordinate rather than hierarchical relation, without anyone treading on anyone else's toes. Separation of power by kind was Montesquieu's way around the indivisibility of sovereignty.[12]

What, then, did Montesquieu make of the monarch's power to veto legislation and the Parliament's power to impeach the monarch's officials? Montesquieu noticed these and other checks and balances within the system of English government, and acknowledged their importance to the success of the system.[13] But that importance lay, he insisted, in the contribution those checks and balances made to maintaining the primary separation of the institutions that exercised the differing kinds of power.[14]

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[9] THE FEDERALIST NO. 47 (James Madison), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 499 (John P. Kaminski et al. eds., 1984) [hereinafter DOCUMENTARY HISTORY].

[10] *See, e.g.*, JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 52-55 (M.J. Tooley abr. & trans., Basil Blackwell 1955) (1576); THOMAS HOBBES, LEVIATHAN, ch. 18, ¶ 16 (1651); SAMUEL VON PUFENDORF, AN INTRODUCTION TO THE HISTORY OF THE PRINCIPAL KINGDOMS AND STATES OF EUROPE 282 (8th ed., London, T. Book et al. 1719); SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 679 (4th ed., London, J. Walthoe et al. 1729).

[11] 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, chs. 4-6 (Thomas Nugent trans., Cincinnati, Robert Clarke & Co. 1873). *See also id.* bk. VI, ch. 3.

[12] *See* Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 426 (2005).

[13] MONTESQUIEU, *supra* note 11, bk. XI ch. 4, at 172-73; *id.*, ch. 6, at 181-84.

[14] *See, e.g.*, *id.*, ch. 6, at 183 ("The executive power . . . ought to have a share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative.").

Even as Montesquieu wrote, a convention of responsible government was putting down roots in England that ran deep by the time that the Philadelphia Convention assembled. The secret of systemic success in England lay not in power *separation* but in power *sharing*. If the monarch wielded her veto power independently, as American Presidents do, that afforded her more leverage to shape the law to her liking than any other member of Parliament possessed, for the power of any individual legislator *qua* legislator lies substantively in his ability to say no to the proposals of others until he gets some of what he wants in exchange for saying yes.[15] In that negotiating game, the monarch had a whole third legislative chamber to herself, uniting legislative and executive power in her person. If, on the other hand, the monarch consistently deferred to the advice of parliamentary leaders, then legislative and executive power united in a different way. Yet the multi-member, multi-chamber structure of Parliament *shared* power among many. Fuller analyses of other checks and balances in English public life collapsed Montesquieu's supposed separation just as completely. Most strikingly, Montesquieu failed to recognize the method of the common law, by which the reported opinions of English judges shaped the law at every level, even the law of the constitution.[16]

The Philadelphia Convention brushed aside Montesquieu's premise that separation by kind was the only sustainable way to distribute power and adopted a different device to distribute power vertically between the new national government and the existing states. Yet they clung to his false premise in expressing their horizontal distribution, even as they provided for extensive inter-institutional checks and balances. Power sharing through checks and balances was really to be the key to the system, in America as surely as in England, because hermetically sealing distinguishable kinds of power in separate institutional silos was neither desirable nor possible.

If we consider what features cause us to call some institutions *governmental*, we can notice that applying law is not one of them – we all do that, to ourselves and in our relations with others. We often resolve disputes by private means, too. When we focus on the kinds of actions that distinctively *govern* a community, we can see that they issue orders that

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[15] Though the monarch's last use of the veto was Queen Anne's disallowance of the Scottish Militia Bill in 1708, the possibility of veto, coupled with other less tangible reasons for politicians to value monarchical favor, gave the eighteenth-century monarch substantial ability to influence Parliament's agenda through consultations with the ministry. *See* Claus, *supra* note 12, at 428 n.57.

[16] *Id.* at 431-33. *See, e.g.*, Dr. Bonham's Case (1610) 8 Co. Rep. 113b, 118a (Eng.); R. (Jackson and others) v. Att'y Gen. (Eng.) [2006] 1 A.C. 262, 302-03 ¶ 102 (Lord Steyn, House of Lords, decided October 13, 2005). *See also* the speech of Lord Hope of Craighead, *in* R. (Jackson and others) v. Att'y Gen. (Eng.) [2006] 1 A.C. 262 at 304 ¶ 107.

either make law for that community or operate like law for particular recipients on particular occasions. But those two categories of order do not neatly distinguish two institutionally separable kinds of power. All three "branches" in American-style "separation of powers" systems do both lawmaking for the community as a whole and cognate context-specific order-issuing to individuals. Implementing existing law in any community of scale and complexity calls for elaboration that makes more law, and no single deliberative body can conscientiously do it all. Calling Congress a legislature acknowledges the hierarchical status of the laws it makes, but not their relative volume – courts and executive agencies add far more to the words that count as American law. And Congress also gets into context-specific order-issuing, such as when it declares war, impeaches officials, or issues subpoenas. That these are a drop in the bucket compared to the volume of context-specific order-issuing done by the so-called executive does not distinguish Congress in any way that matters – Congress's formal lawmaking is a drop in the bucket compared to the volume of formal regulation making by the so-called executive too. "Legislatures" execute existing law when they make more law, and "executives" actually make more law than "legislatures" do.

In the first Congress, Madison proposed two amendments, one of which passed and one of which did not, that sought to secure the Philadelphia Convention's two power-distributing strategies—distributive strategies made insecure by their own conceptual incoherencies. The amendment that passed backed up the Convention's vertical distribution strategy, and now appears as the tenth amendment.[17] The amendment that failed seemed to support the horizontal distribution strategy of separation by kind.[18] Its failure perhaps reflected nascent appreciation of that strategy's tension with the Constitution's checks and balances and the chameleonic character of governing action in general. Writing as Publius, Madison had conceded:

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[17] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[18] "The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments." JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 196, 202 (William T. Hutchinson et al. eds., 1979). *See* James Madison in Debates of Congress (June 8, 1789), *in* 1 THOMAS LLOYD, THE CONGRESSIONAL REGISTER 423, 429 (New York, Harrison & Purdy 1789).

> Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[19]

Formal essentialism that purports to distribute power by reference to its kind simply does not help guide those who must resolve disputes about what the actual horizontal distribution of power should be.[20] It appears that key founders saw this, but felt saddled by their heritage with a formal, essentialist framework for achieving an effective and enduring horizontal power distribution. The received wisdom declared separation by kind as the way to achieve liberty and the rule of law, so the founders deferred to that framework even as they saw the crucial character of checks and balances. Madison's concession cried out for a more coherent theory of power distribution, while implicitly acknowledging the founders' need to work within the theory they had inherited.

B. Enumerating Subjects of Power

The Philadelphia Convention assembled pursuant to a resolution of the existing American Congress "for the sole and express purpose of revising the Articles of Confederation."[21] The Articles were a treaty among the newly-independent American states. They provided for a Confederation Congress and enumerated the subjects that it had power to address. But what that treaty actually let Congress do remained wholly up to its member states. To Congress, each state government sent a delegation of representatives who

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[19] THE FEDERALIST NO. 37 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 343, 346.

[20] *See generally* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Claus, *supra* note 12 (on the incoherence of separation of powers orthodoxy).

[21] Resolution of Congress (Feb. 21, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 13, 14 (Max Farrand ed., 1911) [hereinafter RECORDS]. Some support to those who sought a truly different form of government did appear in the preamble to the Confederation Congress's resolution, which recited: "such Convention appearing to be the most probable mean of establishing in these states a firm national government." *Id.* This likely reflected the prevailing fluidity of usage. See, for example, the arch localist Robert Yates's notes of committee deliberations on the Connecticut Compromise, in which he expressed his "attachment to the national government on federal principles." Robert Yates's Notes (July 3, 1787), *reprinted in* 1 RECORDS, *supra*, at 522.

were at all times fully accountable to their state government and subject to recall and replacement by it. Together, the representatives of each state cast that state's single vote in the deliberations of Congress.[22] The states retained control of their choice to participate and had ultimate judgment about what their referrals of decision making let Congress accomplish. Enumerating Congress's powers merely framed an agenda for political negotiation. In the context of the treaty, enumeration did not need to supply a coherent criterion for distributing power between the center and the parts, because the center was merely an agent of the parts.

At the Philadelphia Convention's opening, delegates were presented with a very different vision of how government in America should work. The Virginia Plan proposed an independently chosen national assembly that resembled the British Parliament in bicameral structure and whose powers would extend beyond those of the Confederation Congress to cover "all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." [23] The plan effectively shifted control of vertical power distribution from the states to this new national Congress, by empowering it "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."[24] Leading this centralizing charge, James Madison and James Wilson went even further in the early debate, and advocated that no state law should go into effect unless Congress pre-approved it.[25]

Blindsided by the extent of the Virginia Plan's nationalizing ambition, delegates who had thought they were there to tinker with the existing treaty were left scrambling to come up with a response. They swiftly slapped down the more extravagant version of the proposal to let Congress control the operation of state laws, one delegate exclaiming that it had "never been suggested or conceived among the people. No speculative projector, and there are eno' of that character among us, in politics as well as in other things, has in any pamphlet or newspaper thrown out the idea."[26] But as to

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[22] ARTICLES OF CONFEDERATION of 1781, art. V.

[23] James Madison's Notes (May 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 17, 21.

[24] *Id. See* ALISON LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 154-66 (2010) (on the fate of the proposed national negative).

[25] James Madison's Notes (June 8, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 164, 164-68.

[26] *Id.* at 165-66 (quoting Delegate Elbridge Gerry). *See also, e.g.*, James Madison's Notes (June 9, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 175, 178 (quoting Delegate William Paterson) ("We have no power to go beyond the federal scheme, and if we had the people are not ripe for any other."); Letter from Robert Yates and John Lansing to Governor George Clinton of New York, *reprinted in* 3 RECORDS, *supra* note 21, at 244, 244-45 (". . . [W]e have been reduced to the disagreeable alternative, of either exceeding the powers delegated to us . . . or opposing . . . .").

the Virginia Plan's overall vision, opponents soon realized that it would take a plan to beat a plan, and set about devising one.

The New Jersey Plan proposed keeping the unicameral Confederation Congress and supplementing its enumerated powers.[27] Even before its formulation, some delegates had urged that national powers be enumerated, and Madison and Wilson had responded that enumeration would be difficult to do.[28] That debate showed a shared understanding among the delegates that enumeration, if it were to happen, would be a distributive device, a way to limit national power. Enumerating merely to highlight salient national powers would obviously *not* have been difficult to do. When the Convention later accepted and edited an enumeration of national powers, their edits again showed that they understood enumeration as a device to limit national power. Debate over omitting national power to "emit bills" reveals this clearly.[29] Even Wilson supported omitting the phrase as a way to prevent national power to issue a paper currency,[30] despite his history of advocating for a conception of implied or inherent or otherwise undefined national

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[27] James Madison's Notes (June 15, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 242, 242-45.

[28] Two delegates "objected to the vagueness of the term incompetent, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition." James Madison's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 47, 53. Another "called on Mr. Randolp [sic] for the extent of his meaning." *Id.* And another "was of opinion that it would be too indifinitely [sic] expressed, —and yet it would be hard to define all the powers by detail." William Pierce's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 57, 59-60. James Wilson "observed that it would be impossible to enumerate the powers which the federal Legislature ought to have." *Id.* at 60. James Madison said that he strongly favored an enumeration of national legislative powers but doubted that it was practicable. His own notes record him saying that he was unsure what his ultimate opinion would be. James Madison's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 47, 53. William Pierce recorded Madison saying that "at present he was convinced it could not be done." William Pierce's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 57, 60. In a subsequent debate over Congressional power to control the operation of state laws, several delegates recorded Madison saying that "[n]o Line can be drawn between the State Governments and the General Government." Pierce Butler's Notes on Debates (June 8, 1787), *reprinted in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 61 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT]. *See also* John Lansing's Notes on Debates (June 8, 1787), *reprinted in* SUPPLEMENT, *supra*, at 60; Robert Yates's Notes (June 8, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 169. On Madison's omission of this point from his own notes, *see* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 76-77 (2015).

[29] James Madison's Notes (Aug. 16, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 304, 308-10.

[30] Wilson, who authored the Necessary and Proper Clause, *see* Committee of Detail (July 24-26, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 129, 168, supported the omission because it would "have a most salutary influence on the credit of the [United] States to remove the possibility of paper money." James Madison's Notes (Aug. 16, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 304, 310.

power.[31] The delegates thought that omitting express power was enough to deny power, that they did not need to add an express prohibition.[32] State governments, on the other hand, had to be expressly prohibited from printing money, because their powers were unenumerated.[33] Edmund Randolph, who had with Wilson helped draft the enumeration of Congress's powers in the Convention's Committee of Detail, later told the Virginia Ratifying Convention that "if its powers were to be general, an enumeration would be needless."[34] The long history of Anglo-American rights enumeration had never been about limiting rights,[35] yet the delegates understood that their pioneering attempt at power enumeration was precisely about limiting powers. And the open-ended Ninth Amendment[36] would soon contrast with the closed-ended Tenth Amendment[37] to confirm that difference.

For much of its first half, the Convention was preoccupied by debate over whether to adopt another structural strategy for distributing power between the nation and the states. That strategy had potential to complement or

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[31] *See* James Wilson, *Considerations on the Bank of North America* (1785), *reprinted in* 2 THE WORKS OF JAMES WILSON 824, 829 (R.G. McCloskey ed., 1967) ("Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature . . . An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.").

[32] *Cf.* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013) (on the historical support for a conception of great powers, the existence of which cannot be left to implication).

[33] U.S. CONST. art. I, § 10, cl. 1.

[34] Debates of the Virginia Convention (June 17, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 9, at 1338, 1348. John Mikhail has recently argued that the Necessary and Proper Clause's reference to all other powers vested by the Constitution in "the Government of the United States" would be redundant if it referred only to express investitures of power by provisions of the Constitution other than Article I, Section 8, because the clause also extends to all other powers vested in "any Department or Officer" of the government. *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015). But the Constitution's other uses of "Department," both in Article II, Section 2, suggest that the Convention did not use that term to denote a whole branch of government. The "branches" metaphor was already in use – Madison used it at the Virginia Ratifying Convention. Debates of the Virginia Convention (June 20, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 9, at 1412, 1413. Without being superfluous, "all other Powers vested by this Constitution in the Government of the United States" covers other express conferrals of powers on those institutions that the Constitution itself creates and collectively calls the Government of the United States, namely, each House of Congress, the President, and the Supreme Court, including express conferrals of powers exercisable by some of these institutions only in combination. *See also* Laurence Claus, *Vindicating Judicial Supremacy*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 134, 143-44, n.60 (Heidi M. Hurd ed., 2018).

[35] *See, e.g.*, MAGNA CARTA (1215) (Eng.); BILL OF RIGHTS (1689) (Eng.); DECLARATION OF RIGHTS (1776) (Va.).

[36] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[37] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

substitute for power enumeration. It relied not on defining a boundary by expressly allocating subjects of power, but on letting state governments collectively block national measures that the states considered overreach. The Connecticut Compromise as actually proposed by the Connecticut delegates combined aspects of the Virginia and New Jersey Plans. It called for Congress to self-police by balancing a directly elected national House of Representatives with a Senate composed just like the existing Confederation Congress – that is, an assembly of delegations from the state governments that would each collectively exercise their respective states' votes.[38] A unifying Germany would adopt such a structure a century later, and show that it could effectively distribute power vertically without recourse to judicial review.[39] Soon after the Convention compromised the Compromise and maintained the Virginia Plan's vision of an elite Senate composed of individually voting, long-term tenured appointees (albeit arriving from the states in equal numbers),[40] the Convention's Committee of Detail proceeded to enumerate national powers.[41] And from the moment they enumerated, delegates pointed to the judiciary as the institution to implement this unprecedented strategy for distributing power and the reason that other structural strategies for distributing power were not needed.[42] Enumeration

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[38] *See* James Madison's Notes (June 11, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 196, 201-02; Journal (June 11, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 192, 193; James Madison's Notes (June 20, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 335, 343; James Madison's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 461, 468; Robert Yates's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 470, 474; Rufus King's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 476, 477. *See also* James Madison's Notes (June 30, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 481, 489-90; James Madison's Notes (July 2, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 509, 510; Journal (July 7, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 548, 549. For a fuller account, *see* Laurence Claus, *The Framers' Compromise*, 67 AM. J. COMP. L. 677 (2019).

[39] GER. CONST. of 1871 arts. 5-7, 76. *See* JAMES HARVEY ROBINSON, THE GERMAN BUNDESRATH 62 (1891) ("The jurisdiction in constitutional questions is not delegated to the courts, but, so far as it is provided for at all, it is exercised by the Bundesrath.").

[40] James Madison's Notes (July 23, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 87, 94-95 (altering the effect of the July 16 vote: Journal (July 16, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 13-15; James Madison's Notes (July 16, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 15-16).

[41] Journal (July 23, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 84, 85, 87; Journal (July 24, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 97, 98; James Madison's Notes (July 24, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 99, 106; Committee of Detail (July 24-26, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 129, 134-150 (early committee draft in Edmund Randolph's hand). *See* the reference to an expository judicial role in Randolph's draft of the enumeration. *Id.* at 144.

[42] *See, e.g.*, James Madison's Notes (Aug. 10, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 248 (Charles Pinckney observing that "[t]he Judges . . . will even be the Umpires between the U. States and individual States as well as between one State & another."); James Madison's Notes (Aug. 27, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 426, 428-29 (Committee of Detail members Edmund Randolph

had come naturally to the American founders' minds, thanks to its presence in their existing treaty. But that treaty had never required courts to make sense of it.

Enumerating the subjects of a government's power shifts the focus of dispute resolvers a step away from whatever reasons those adopting the enumeration strategy have for wanting to distribute power vertically. Instead of directly consulting the real reasons for wanting to distribute power, dispute resolvers who must decide "who can do what" are corralled into asking whether what a government wants to do is within subjects of power that belong to that government. But what a government wants to do will be susceptible of more than one characterization. Canada's dual listing of national and provincial powers helps illuminate this. Consider a case like *Labatt*, in which the Canadian Supreme Court had to decide whether an attempt to regulate beer labeling fell within enumerated subjects of exclusive national power, which included the regulation of trade and commerce,[43] or within enumerated subjects of exclusive provincial power, which included local works and undertakings.[44] Of course the regulation at issue could be characterized in more than one way. It was about subjects in both lists. But the Court had to choose, and did so in reliance on law of the judiciary's own making. [45] As that example shows, the source of indeterminacy in implementing enumeration is not just the familiar core-periphery problem that more pervasively plagues legal language when we encounter abstraction. The issue is not just one of interpreting the relatively abstract legal words that express constitutional subjects of power. The issue is one

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and John Rutledge on the importance of judicial independence, particularly, as Rutledge put it, "[i]f the supreme Court is to judge between the U.S. and particular States"); Journal (Aug. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 294, 294-95; James Madison's Notes (June 4, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 96, 97-98; James Madison's Notes (Aug. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 296, 298-99; William Pierce's Notes (June 4, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 109; James Madison's Notes (July 21, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 73, 73-74, 76-78, 80 (on judicial review obviating need for and appropriateness of a judicial role in pre-approving national laws); James Madison's Notes (July 17, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 25, 28; James Madison's Notes (Aug. 23, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 384, 390-91 (on judicial review obviating need for and appropriateness of a Congressional power to veto state laws); James Madison's Notes (Aug. 24, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 400, 401 (on judicial review substituting for ad hoc tribunals to settle inter-state disputes); James Madison's Notes (Aug. 27, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 426, 430 (unanimous adoption of a motion by Connecticut's William Samuel Johnson to give the Supreme Court express jurisdiction over all cases arising under the Constitution).

[43] CONSTITUTION ACT 1867, 30 & 31 Vict. c. 3, § 91(2) (UK).

[44] CONSTITUTION ACT 1867, 30 & 31 Vict. c. 3, § 92(10) (UK).

[45] Labatt Breweries of Canada v. Att'y Gen., [1980] S.C.R. 914, 935, 945. For an extended discussion, *see* Laurence Claus, *Enumeration and the Silences of Constitutional Federalism*, 16 INT'L. J. CONST. L. 904, 906-08 (2018).

of characterizing chameleonic governing actions, a task that is not syllogistic no matter how concrete the constitutional subjects in relation to which governing actions must be characterized.

Deciding distribution under one-list enumerations involves just as much adjudicative discretion as deciding under two-list enumerations. One-list configurations just do a better job at obscuring this, by focusing attention on the level of government that has the list. Given that enumeration is supposed to distribute power between governments, and given that almost any governing action can be characterized as rationally related to any subject of power in some way, courts have to decide what in fact is enough relationship to get a particular governing action inside a particular subject of power. And in formulating the tests for that, the enumeration itself is of little help. A power over trade and commerce does not tell dispute resolvers whether, to come within it, laws must *express* a certain kind of relationship to trade and commerce, or tackle only phenomena that are instances of trade and commerce, or have certain kinds of effects on trade and commerce, or have certain kinds of purposes, or some combination of these criteria and others. Only by reverting to the background reasons for wanting to distribute power in the first place can dispute resolvers make sense of the choice to enumerate. A constitution that skipped enumeration and just expressed general distributive principles, such as the original Virginia Plan's "all cases to which the separate States are incompetent,"[46] would leave a lot to the judgment of dispute resolvers, but no more so than an enumeration does. And expressing in those general principles the actual reasons for wanting to distribute power vertically would focus dispute resolvers' exercise of judgment on what we actually care about.

The records of Philadelphia supply ample evidence that by late in the proceedings, delegates generally understood that the courts would be responsible for deciding the distribution of power between the nation and the states.[47] Leading figures from the Convention and other prominent

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[46] James Madison's Notes (May 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 17, 21.

[47] *See, e.g.*, Committee of Detail (July 24-26, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 129, 144; James Madison's Notes (Aug. 10, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 248; James Madison's Notes (Aug. 27, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 426, 428-29; Journal (Aug. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 294, 294-95; James Madison's Notes (Aug. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 296, 298-99; James Madison's Notes (June 4, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 96, 97-98; William Pierce's Notes (June 4, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 109; James Madison's Notes (July 21, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 73, 73-74, 76-78, 80; James Madison's Notes (July 17, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 25, 28; James Madison's Notes (Aug. 23, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 384, 390-91; James Madison's Notes (Aug. 24, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 400, 401; James Madison's Notes (Aug. 27, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 426, 430.

participants said as much during the ratification debates.[48] Yet the records also suggest that few, if any, adequately appreciated how little guidance their enumeration of national powers actually afforded those who would have to decide disputes about the distribution. We can see this from the dismissive response to calls for adding express provisions to protect cherished individual rights. After one such call in the closing days of the Convention, a delegate replied "[t]he power of Congress does not extend to the Press," before his colleagues voted down a motion to protect the press.[49] That a law about the enumerated subjects of Congress's power might also be about the press was apparently beyond their field of vision.[50]

Amid a general myopia among the Philadelphia delegates about enumeration's efficacy as a distributive device, Madison and Wilson may have been exceptions who saw more clearly. Both had called enumeration impractical at the outset,[51] and though during the ratification debates they both claimed that judicially-enforced power enumeration supplied a straightforward way to distribute power vertically,[52] they may have privately stayed skeptical. A contemporaneous letter from Madison to Thomas Jefferson suggests as much. In it he defended his support for letting Congress control vertical distribution via a power to veto state laws, observing that

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[48] *See, e.g.*, The Pennsylvania Convention (Dec. 1, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 444, 450-51 (James Wilson); The Pennsylvania Convention, (Dec. 7, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 512, 517 (James Wilson); The Connecticut Convention (Jan. 7, 1788), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 9, at 547, 553 (Oliver Ellsworth); The Massachusetts Convention, (Feb. 1,1788), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 9, at 1390, 1395 (Samuel Adams); The Virginia Convention (June 20, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 9, at 1412, 1431-32 (John Marshall); THE FEDERALIST NO. 39 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 380, 384-85; THE FEDERALIST NO. 44 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 469, 473. *See also* THE FEDERALIST NO. 78 (Alexander Hamilton), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 9, at 87, 89-91.

[49] James Madison's Notes (Sept. 14, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 612, 617-18.

[50] A claim that enumerated powers did not reach cherished rights could have been a claim about a future law of constitutional characterization that future courts would create. James Wilson seemed to display such a sophisticated vision during the ratification debates. *See infra* notes 107-119 and accompanying text. As the founders had no experience of judicially enforced power enumeration, most who saw no danger of conflict between powers and rights likely just did not appreciate the extent to which the multi-subject character of governing actions rendered power enumeration indeterminate.

[51] William Pierce's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 57, 60; James Madison's Notes (May 31, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 47, 53; Pierce Butler's Notes (June 8, 1787), *reprinted in* SUPPLEMENT, *supra* note 28, at 61. *See also* John Lansing's Notes (June 8, 1787), *reprinted in* SUPPLEMENT, *supra* note 28, at 60; Robert Yates's Notes (June 8, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 169.

[52] *See, e.g.*, The Pennsylvania Convention (Dec. 1, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 444, 450-51 (James Wilson); The Pennsylvania Convention (Dec. 7, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 512, 517 (James Wilson); THE FEDERALIST NO. 39 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 380, 384-85; THE FEDERALIST NO. 44 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 469, 473.

"the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial, requires some such expedient as I contend for." [53] And in contributing to public debate, Madison acknowledged

> three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the Federal and State jurisdictions, must have experienced the full effect of them all.[54]

II. CREATING THE LAW OF INSTITUTIONAL COMPETENCE AND THE LAW OF CONSTITUTIONAL CHARACTERIZATION

Having recognized that distributive principles of separation by kind and enumeration by subject do not come close to settling actual horizontal and vertical distributions of powers, what should guide dispute resolvers when they set about making more law to decide those distributions? A good place to start is another question. What are our reasons for wanting to distribute power?

A. Why Separation?

The goals recited in the preamble to the United States Constitution culminate in a commitment to "secure the Blessings of Liberty to ourselves and our Posterity."[55] Montesquieu had argued that power separation was the way to do just that – the way it had been done in England, the way it could be done enduringly. What made his "political liberty" a blessing was apparent from his definition of it: "[t]he political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In

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[53] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 DOCUMENTARY HISTORY, *supra* note 9, at 442, 446.

[54] THE FEDERALIST NO. 37 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 343, 347.

[55] U.S. CONST. pmbl.

order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another."[56]

The visiting Montesquieu could see that English people no longer lived in fear of their government, yet that government was as effective as governments elsewhere, perhaps more so. This had been accomplished, he argued, by the way power was distributed across the institutions of government that he noticed – the Parliament, the monarchy, the courts. The system protected from arbitrary mistreatment at the whim of particular persons in power, because before government could act adversely, there needed to be existing law, independent decisions to enforce that law, and judgments by juries of one's peers. That picture of the rule of law explained the system's dual success at both getting things done and, to a unique degree, securing liberty. [57]

What was it about the arrangement of English government that explained its success in securing liberty, if it was not the separating of kinds of power? The answer lay in the checks and balances that Montesquieu noticed but called ancillary. [58] Checks and balances were not just institutional turf defenders, they were the substantive source of liberty and the rule of law. Power sharing through checks and balances was what stopped any one participant in the system from conclusively determining the reach of their own powers.

If our goal in distributing power horizontally is to secure liberty, then the question we should ask about any disputed aspect of distribution is how it stacks up against that goal. We should view a constitution's existing checks and balances as baseline requirements, and allow further innovation in the way power is distributed so long as it bends toward liberty. "Separation of powers" should never be invoked to protect an official from being checked and balanced in ways that are likely to secure liberty more. In Justice Brandeis's words, "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[59]

Securing liberty means stopping any one person from having too much power over others, and more concretely, stopping any one person from conclusively deciding what their own powers are. That makes intra-institutional divisions of power just as important to "separation of powers" as the choices to create separate institutions and interrelate them with checks

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[56] MONTESQUIEU, *supra* note 11, bk. XI , ch. 6, at 174.
[57] LAURENCE CLAUS, LAW'S EVOLUTION AND HUMAN UNDERSTANDING 107-09 (2012).
[58] Claus, *supra* note 12, at 423-24.
[59] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

and balances.[60] That is why we put up with the cumbersome dynamics of multi-member, multi-chamber legislatures, and multi-tiered appellate processes to reach multi-member benches. We see that the highest stakes law – the law that affects everyone the most, not because of its volume, but because of its hierarchical relation to other lawmaking – is best made by collective deliberation of many minds, so we insist on the institutions that generate that law having many minds involved.[61] But the point can be put more generally – governing decisions that are highly consequential need more minds involved, checking and balancing one another. That is why individual chief executives are so dangerous. Montesquieu argued for a single chief executive because executive decision making had "need of dispatch,"[62] but that isn't always so.

If a multi-member, multi-chamber legislative body wishes to increase checks and balances on and within the executive, "separation of powers" arguments should not stand in the way. Legislatures are well situated to judge how much discretion executives need to get the job done, and to adjust any added checks and balances over time in ways that strike an optimal balance between liberty and efficiency, subject to constitutional baseline protections for liberty. The added checking may come from the legislature itself or from part of it or from dividing up the executive more and creating more power sharing procedures within it. If, for example, a bicameral legislature wants to let either of its chambers veto executive actions done in exercise of statutory powers, we should ask only what threat that could pose to liberty, and, if we see none, wave it through.[63] On the other hand, when an executive protests "need of dispatch" and seeks to act without statutory support, our law of institutional competence should ask not what kind of

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[60] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322 n.21 (2006) (citing M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 654 (2001)) (disputing the claim that existing power diffusion within the American national government is adequate to allay concerns about "dangerous concentrations of power").

[61] "[T]he more minds that must concur in the constitutionality and virtue of a proposed exercise of power, the more likely that exercise is to be constitutional and virtuous." Claus, *supra* note 12, at 425. *Cf.* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS (2009); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006); Adrian Vermeule, *Many Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 1 (2009).

[62] MONTESQUIEU, *supra* note 11, bk. XI, ch. 6, at 179.

[63] *Cf.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (invalidating a one-house veto on executive action regardless of whether that device was used to promote or to curtail liberty). A one-house veto can *protect* Congress's lawmaking structure by not letting the executive make laws that could not get through Congress. *See* Laurence Claus, *A Republic, If the Courts Can Keep It?*, 2020 WIS. L. REV. 395, 396-98 (2020).

power the action would exercise, but how great the need of dispatch really is, and how opposed the multi-member, multi-chamber legislature really is.[64]

There is nothing timelessly right about framing government as three branches. That picture, along with the rhetoric of "separation of powers," may be contingently precious inside particular systems where it has a pedigree, in combating those who would prey upon liberty. But we may come to judge other institutional divisions as mattering too. We may come to see the independence of prosecutors from a badly behaved chief executive as mattering almost as much as the independence of courts.[65] After all, nothing gets to court unless someone brings it there. Such separations and divisions can coherently be done by reference not to the kinds of power that office holders have, but to the institutional relations among persons that those office holders' roles involve.

B. Why Federalism?

In the course of the Connecticut delegates' push for compromise during the first half of the Philadelphia Convention, William Samuel Johnson asked Madison and Wilson what mechanism *they* were offering to ensure a genuine vertical distribution of power within the proposed new system. How, Johnson asked, could the states' share in power be preserved "without allowing them to participate effectually in the Genl. Govt.," without giving them a direct say in what Congress did?[66] Conspicuous by its absence from their replies was any mention by Madison and Wilson of judicially enforced power enumeration, a mechanism on which they would later both rely when selling the Convention's completed draft in the ratification debates.[67] Madison's response, according to his own notes, directly challenged the historic rationale for federalism, the very premise that a vertical distribution of power was important. It crescendoed to conclude:

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[64] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (focusing on actual inter-branch dynamics rather than the kind of power being exercised).

[65] *See, e.g.*, William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006); Katyal, *supra* note 60; Christopher R. Berry & Jacob E. Gerson, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Laurence Claus, *The Divided Executive*, 13 DUKE J. CONST. L. & PUB. POL'Y 25 (2018) (on the value of dividing executive government).

[66] James Madison's Notes (June 21, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 354, 355. *See also* Robert Yates's Notes (June 21, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 362, 363.

[67] *See, e.g.*, The Pennsylvania Convention (Dec. 1, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 444, 450-51 (James Wilson); The Pennsylvania Convention (Dec. 7, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 512, 517 (James Wilson); THE FEDERALIST NO. 39 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 380, 384-85; THE FEDERALIST NO. 44 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 9, at 469, 473.

> Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts. the people would not be less free as members of one great Republic than as members of thirteen small ones. A citizen of Delaware was not more free than a citizen of Virginia: nor would either be more free than a citizen of America. Supposing therefore a tendency in the Genl. Government to absorb the State Govts. no fatal consequence could result.[68]

A truly republican government, genuinely accountable to its people and protective of their interests, did not need to be small, Madison argued; Americans in large states were not less free than Americans in small states. In making that claim, Madison rejected the received wisdom of the Enlightenment. Montesquieu had argued:

> If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection. ... The evil is in the very thing itself; and no form can redress it. It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic.[69]

A *république fédérative*, according to Montesquieu, was the unique way that republican government could survive, because genuine republicanism, whether democratic or aristocratic, could occur only in small communities. Small scale was essential for a shared vision of and commitment to a common good; large scale fractured authentic community and predisposed

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[68] James Madison's Notes (June 21, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 354, 357-58. *See also* Robert Yates's Notes (June 21, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 362, 363-64; James Madison's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 461, 463-64, 464 n.2 (citing to Robert Yates's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 470); Robert Yates's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 470, 471; Rufus King's Notes (June 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 476, 477; Letter from James Madison to W.C. Rives (Oct. 21, 1833), *in* 3 RECORDS, *supra* note 21, at 521, 521-24.

[69] MONTESQUIEU, *supra* note 11, bk. IX ch. 1, at 145.

to authoritarianism.[70] Federalism let small communities band together for common defense while keeping their internal governance local. The reason to be federal was to keep government local in so far as it realistically could be. Federalism made sense because, and only because, local control was a virtue. Local control in a democratic republic was what let ordinary people individually influence their government. If one disagreed that local control was a virtue, if one judged that sound policy across the spectrum was likely to be better achieved by concentrating talent and expertise from across a large area in some distant center, then one frankly did not favor federalism.

American federalism ever since the Founding has had at its core an existential doubt. Thoughtful Americans just do not agree about whether federalism is a good idea. In contrast to the consensus that a horizontal distribution of power is crucial to good government, there is no consensus about what should really happen on the vertical axis. From Hamilton, Wilson, and the early Madison onward, there have been those who think the value of unified national policy far outweighs the benefits of localized control. The original Virginia Plan was transparent about this, but its fate in the first half of the Convention taught its architects that they could not afford to be. Their opinion of local control had to stay in the closet; lip service had to be paid to federalism. Hamilton took the tactic of arguing that authentic federalism could embrace complete subordination of the states, so long as they survived as subunits of the system.[71] But his allies in the ratification debates recognized that they had to assure their audiences of a genuine vertical distribution of power. They insisted that judicially enforced power enumeration would ensure such a distribution.[72]

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[70] *See* Jacob T. Levy, *Beyond Publius: Montesquieu, Liberal Republicanism and the Small Republic Thesis*, 27 HIST. POL. THOUGHT 50, 50-56 (2006) (discussing Montesquieu's account and its eighteenth-century influence).

[71] "The definition of a Confederate Republic seems simply to be 'an assemblage of societies,' or an association of two or more states into one state. The extent, modifications, and objects of the Federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished, so long as it exists by a constitutional necessity for local purposes, though it should be in perfect subordination to the general authority of the Union, it would still be, in fact and in theory, an association of States, or a confederacy." THE FEDERALIST NO. 9 (Alexander Hamilton), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 9, at 158, 162.

[72] *See supra* note 48. At the New York State Ratifying Convention, John Lansing observed:

> It has been admitted by an honorable gentleman from New-York, (Mr. Hamilton) that the state governments are necessary, to secure the liberties of the people. He has urged several forcible reasons why they ought to be preserved, under the new system; and he has treated the idea of the general and state

Now that two centuries of American experience combines with comparative constitutional experience to confirm the indeterminacy of power enumeration, what principles should guide courts in deciding what to make of it?[73] The answer turns on whether one favors federalism.[74] Those who don't can argue that the enumerated subjects of national power embrace any national action that could rationally be said to relate to those subjects,[75] which is to say, all national action. National action should be within the zone of national power unless something else in the Constitution, such as a bill of rights, kicks that action out of power.[76]

> governments being hostile to each other, as chimerical. I am however firmly persuaded, that a hostility between them will exist. This was a received opinion in the late convention at Philadelphia. That honorable gentleman was then fully convinced that it would exist; and argued with much decision and great plausibility, that the state governments ought to be subverted; at least, so far as to leave them only corporate rights; and that, even in that situation, they would endanger the existence of the general government. But the honorable gentleman's reflexions [sic] have probably induced him to correct that sentiment.

The New York Convention (June 28, 1788), *reprinted in* 22 DOCUMENTARY HISTORY, *supra* note 9, at 1976, 2002. Francis Childs' record of the debate then reports: "Alexander Hamilton here interrupted Mr. Lansing, and contradicted, in the most positive terms, the charge of inconsistency included in the preceding observations. This produced a warm personal altercation between those gentlemen, which engrossed the remainder of the day." *Id.* at 2004-05.

[73] Of course, it may not come to that. Cooperative federalism is possible and a constitutional dispute resolver could nudge disputing governments toward it with a good faith principle such as the German Constitutional Court's *Bundestreue*. *See, e.g.*, First Television Case, 12 BVerfGE 205, 254-59 (1961); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 739-62 (2004). *Cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016). On the power sharing virtues of cooperative federalism, see ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012). The system depends, however, on being backstopped by constitutional dispute resolvers when cooperation breaks down.

[74] *Cf.* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1, 26-27 (2016) ("One can advocate federalism as a political value in itself, to be weighed against others, and not merely reducible to the policies one invokes federalism to preserve. . . . [O]ne could argue that federalism is valuable precisely because it allows people with profoundly different moral views to stay peacefully united in one country.").

[75] *Cf.* United States v. Lopez, 514 U.S. 549, 617 (1995) (Breyer J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) ("the specific question before us, as the Court recognizes, is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather, whether Congress could have had '*a rational basis*' for so concluding." (emphasis in original)).

[76] *Cf.* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 642 (2014) ("[f]or a long time, constitutional law has featured a stable paradox whereby courts articulated the internal-limits canon but permitted Congress to legislate as it thought proper, within the external limits of constitutional law. . . . In my view, the practice is sensible and should prevail."). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 291 (2000) ("[w]hat should the Court do? It should continue to follow what had been its practice—formally since the New Deal, as

What of those who favor federalism, the successors of the delegates at Philadelphia who pushed for power enumeration in the first place? Their answer to the question "why federalism?" may cite a range of reasons for valuing local control. Maybe they think local control actualizes the ideal of self-government,[77] or in some more specific way aids the coexistence of diverse subcultures or valuable policy experimentation.[78] Maybe they judge federal traditions to be the historically contingent way that their nation has developed its most reliable checks on concentrated power. [79] In reconstructing German government after the totalitarian horrors of Nazism, the Western Allies saw vertical power distribution as crucial. [80] The particular reasons for wanting vertical power distribution will shape the mix of governing actions that advocates think should stay local. The general aspiration is captured by the concept of subsidiarity – that governing should happen at the most local level that is up to the task.[81] Right at the American beginning, the Virginia Plan had expressed that idea – national power should reach "all cases to which the separate States are incompetent."[82] But in

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a practical matter before that—of applying rational basis scrutiny to questions regarding the limits of Congress's power under Article I."); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78 (2014) ("the Court should displace Congress's judgment only when Congress unreasonably interprets what is 'necessary and proper.'"); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that the Court "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.").

[77] Larry Kramer observes: "the best argument for federalism is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decision making." *Understanding Federalism*, 47 VAND. L. REV. 1485, 1511 (1994). *See also* Zaid Al-Ali, *Egypt's Third Constitution in Three Years: A Critical Analysis*, *in* EGYPT'S REVOLUTIONS 123, 123 (Bernard Rougier & Stéphane Lacroix, eds.) (2013) ("There has been for some time a global trend toward decentralization for a very obvious reason: it brings policy formation and democracy closer to the people . . . [C]entralization has clearly been a major contributor to Egypt's current predicament: . . . local officials are appointed by Cairo and are therefore not accountable to the people who live in the provinces . . . .").

[78] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[79] *Cf.* Bulman-Pozen, *supra* note 73; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (on various ways that power dynamics between the American national and state governments may help protect against undue concentrations of power); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009). *See also* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009).

[80] *See* LUCIUS D. CLAY, DECISION IN GERMANY 396, 399, 421 (1950).

[81] *Cf.* Consolidated Version of the Treaty on European Union art. 5(3), July 6, 2016, 2016 O.J. C 202 ("Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.").

[82] James Madison's Notes (May 29, 1787), *reprinted in* 1 RECORDS, *supra* note 21, at 17, 21.

whose eyes? The need to concretize those cases in which the separate states were not up to the task of governing was what prompted power enumeration. Yet, as we have seen, that move just shifted the unsettled question from whether national actions met a subsidiarity test to whether national actions were related enough to enumerated subjects of power. A principle of subsidiarity is indeterminate, but at least reflects reasons to want federalism, whereas deciding whether a law is requisitely related to a particular subject can lead to judicially-created tests that are disengaged from any reason that constitution writers had for dividing power vertically. Consider the activity vs. inactivity[83] and economic vs. non-economic[84] distinctions of recent United States Commerce Clause jurisprudence. What value do these distinctions bring to distributing power between the nation and the states?[85] How do they help us see who is best situated to govern? If we want federalism because we care about subsidiarity, shouldn't subsidiarity inform our reasoning about what power enumeration accomplishes?[86] In asking what relation to enumerated subjects is enough for national power, shouldn't those who favor federalism to promote subsidiarity argue for principles and tests that expressly build in subsidiarity?[87]

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[83] *See* Nat'l. Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (drawing a distinction between regulating activity and requiring activity for the purpose of recognizing power under the Commerce Clause).

[84] *See* United States v. Lopez, 514 U.S. 549 (1995) (drawing a distinction between economic and non-economic activity for the purpose of allowing aggregation to establish substantial effects on interstate commerce).

[85] *See* Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985 (2016) (questioning the constitutional basis of the Court's characterization tests).

[86] *See, e.g.*, Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, *in* NOMOS 15: FEDERALISM AND SUBSIDIARITY 123 (James E. Fleming & Jacob T. Levy eds., 2014) (proposing that a version of subsidiarity contribute to deciding distribution); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (arguing that Article I, Section 8 should be construed to authorize Congress to address collective action problems caused by interstate externalities and national markets). *See also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 836 (1996) (proposing an approach that "focuses on the reasons that justify congressional change of existing federal-state relations rather than more formalistically on definitive and categorical boundaries"); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995) ("Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?").

[87] *Cf.* Vicki C. Jackson, *Subsidiarity, the Judicial Role, and the Warren Court's Contribution to the Revival of State Government*, *in* NOMOS 15: FEDERALISM AND SUBSIDIARITY 190, 196-99 (James E. Fleming & Jacob T. Levy eds., 2014); *id.* at 198 ("The Necessary and Proper Clause provides a plausible textual basis to read 'subsidiarity' into the Constitution . . .").

III. DISTRIBUTING POWER AND DETERMINING RIGHTS

The indeterminacy of the United States Constitution's purported power distributing strategies leaves constitutional dispute resolvers with little guidance in creating the law of institutional competence and the law of constitutional characterization. This reposes in the courts an extraordinarily open discretion in deciding what powers government actors actually have. Where does this truth leave background theories of constitutional meaning? How does it affect their relevance to constitutional adjudication? And how do the courts' power and duty to decide the distribution of powers affect the courts' capacity to recognize and to protect rights?

A. Applying Theories of Constitutional Meaning

Originalism as a theory of constitutional meaning has generated a large and lively debate among American scholars, judges, and other commentators.[88] Contributing to the verve of that debate are the age of the United States Constitution, the height of the hurdles that block the path to changing it, and the depth of constitutional dispute resolvers' reach in shaping the fabric of American life. A source of originalism's theoretical traction is the answer to the question: "why do we need law?" At the core of our need of law is a need for shared understanding across law's community and over time that lets us live together.[89] That possibility depends on some substantial scope for meaning fixedness across the community and over

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[88] *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM 12 (Grant Huscroft & Bradley W. Miller eds., 2011); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law and Legal Theory Res. Paper Series, Working Paper No. 07-24, 2008), https://ssrn.com/abstract=1120244.

[89] *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 201 (William H. Rehg trans., Polity Press 1996) ("A flat revocation of any guarantees of legal certainty leads to the conclusion that the legal system must ultimately give up the idea of satisfying the very function of law, to stabilize expectations. The realists cannot explain how the functionally necessary accomplishments of the legal system are compatible with a radical skepticism on the part of legal experts."). In his postscript to the second edition of *The Concept of Law*, H.L.A. Hart acknowledged that a legal system's rule of recognition exists in virtue of shared understanding and expectation among well situated participants in the system:

> Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance. . . . [C]onventional social rules . . . include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.

HERBERT L. A. HART, THE CONCEPT OF LAW 255-56 (2d ed. 1994). *See generally* CLAUS, *supra* note 57, at 165-87.

time. As *Cooper v. Aaron* reflected,[90] courts' ability to shape the actions of lower courts and everyone else depends not only on deference, but on shared understanding of what the courts are saying the law *is*. The claim that constitutions should be read in the same light as judicial opinions and other legal documents is a claim that constitutions are *law*.[91]

For all its theoretical interest, debate about how to decide the meaning of words that confer power has much less practical significance if the constitutional mechanisms used to deploy those words do not work. We might think we have compelling evidence of how the Founding generation understood the concepts of legislative and executive power, but if those powers cannot actually be separated, then a command to separate fails to guide decisions that must be made about the actual horizontal distribution of power. We might decide that we should defer to a well evidenced original understanding of what regulating commerce means, and still be none the wiser about how much power the commerce clause gives the national government, because the *relation* to regulating commerce that national laws must have is constitutionally underspecified. The enumeration just does not settle the question of how to handle laws that bear some rational relation to regulating commerce, but also to lots of other subjects too. The conclusion that the particular relation a given law has to regulating commerce is enough to authorize the law depends on reasoning that forms part of an additional, judicially created law of constitutional characterization. The separation and enumeration devices do not help courts decide the required relations between governing actions and constitutional powers. Courts are left with as much discretion in deciding what actions each branch of government can validly take, and what laws each level of government can validly make, as courts would have if the text simply created differently-configured institutions, described salient activities of each, such as enacting statutes or deciding disputes, and then laid out general principles that should govern institutional behavior – efficiency, subsidiarity, liberty, justice.

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[90] 358 U.S. 1 (1958). The Court's holding "that the federal judiciary is supreme in the exposition of the law of the Constitution, and . . . that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States" (*id*. at 18), necessarily implied that other participants in the system are not free to read the Court's words to mean whatever those participants decide, all things considered, it would have been best for the Court to have held.

[91] *Cf.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) ("[O]riginalism seems to best describe our current law."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 820 (2015) ("[T]here's a clear originalist strain in our legal thought, one best captured by viewing originalism as a theory of legal change.").

Responding to Richard Posner's claim that sophisticated theories of originalism have little significance for actual constitutional adjudication,[92] William Baude and Stephen Sachs cite a range of constitutional issues about which they think evidence of original understanding could affect the outcome of actual cases. One of their examples is the scope of the commerce power.[93] That issue does indeed belong front and center in a conversation about the relevance of constitutional theory to constitutional outcomes, given the extraordinary range of American national regulation that has relied on that one source of power. Baude and Sachs doubt that the original understanding of the United States Constitution can support "'commerce' regulation of wholly intrastate activity."[94] Yet recent fights over the scope of the commerce clause and how much it lets Congress regulate intrastate activity have not been just about what it *means* to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The fights have been about what *relation* there needs to be for a governing action to be necessary and proper for carrying into execution the power to regulate those phenomena.[95]

When we ask the originalist question "what did the Founding generation understand to be the required relation of governing actions to interstate commerce in order for those governing actions to be within a power to make laws necessary and proper for carrying into execution a power to regulate interstate commerce?," we pose a question to which in theory there could be answer but in fact there is not. There was no such shared understanding because there was no historical precedent for asking the question. The need for such a principle arose only when adjudication by independent courts was established as the mechanism for apportioning power between levels of government. That did not happen until the American Founding. The ratification debates revealed deep disagreement and uncertainty about what the enumeration would let Congress do.[96] Judicially enforced power

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[92] *See* Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable Part II*, 19 GREEN BAG 2D 257, 259, 264, n.12 (2016).

[93] *See* William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 108 (2016).

[94] *Id.*

[95] *See* Alison LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014) (on the role of reasoning about the necessary and proper clause in deciding disputes over the vertical distribution of power).

[96] *See, e.g.*, future President James Monroe's critique of the Necessary and Proper Clause at the Virginia Convention:

enumeration was a wholly new thing. Courts therefore had to make it all up as they went along, and the enumeration itself merely created the question, it did not help answer that question. We see this clearly in John Marshall's first major crack at supplying an answer. In *Gibbons v. Ogden*, Marshall meandered across the arguments for and against finding the necessary relation for national power. He declared that "[t]he completely internal commerce of a state, then, may be considered as reserved for the state itself,"[97] after opining that national power was designed to reach "those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do *not affect* other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[98] Marshall's cadence sounded as though he was building an impregnable defense for state government power, but his conjunctions and double negatives actually built a Trojan Horse that harbored with each addition yet another way power could pass to the nation. Intrastate activity could affect other states. Interfering with it could be necessary for executing national power. In gesturing toward effects tests and the Necessary and Proper Clause, Marshall planted the seeds of national omnipotence. On intergovernmental relations, about which the Constitution said little, Marshall in *M'Culloch* had previewed the future twists and turns of intergovernmental immunity doctrine, including attempts to distinguish sovereign from commercial activity and to distinguish discrimination from laws of general application.[99] Now in *Gibbons*, when he had to decide which

> There is a general power given to them, to make all laws that will enable them to carry their powers into effect. There are no limits pointed out. They are not restrained or controuled [sic] from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect. By this general unqualified power, they may infringe not only the trial by jury, but the liberty of the press, and every right that is not expressly secured, or excepted, from that general power.

The Virginia Convention (June 10, 1788), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 9, at 1092, 1112. Edmund Randolph, who had refused to sign the Constitution at Philadelphia partly because of the clause, came around to defending it at the Virginia Convention. James Madison's Notes (Sept. 10, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 557, 563-64; James Madison's Notes (Sept. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 622, 631. Nonetheless, he still conceded "that the clause is ambiguous, and that that ambiguity may injure the States." The Virginia Convention (June 17, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 9, at 1338, 1353.

[97] 22 U.S. 1, 195 (1824).

[98] *Id.* (emphasis added).

[99] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (condemning a state tax on the operations of the Bank of the United States without specific regard to the discriminatory character of the

level of government could actually regulate their shared citizens, Marshall showed that the detail supplied by the Constitution's enumeration of powers by subject left the actual rule for decision just as up in the air.

B. An Implied Bill of Rights

When Justices of the United States Supreme Court have sought to explain how America's written constitution protects unwritten rights, their most frequent sources of support have been the due process clauses of the Fifth and Fourteenth Amendments.[100] On some occasions early in the life of the Court, Justices seemed to suggest that unwritten rights drew their constitutional status not merely from nestling inside abstract constitutional text, but from higher principles that the Constitution should be understood to implement beyond the extent of its express provision. Those Justices appeared to read the Constitution's text as illustrating, not exhaustively defining, the ways in which the constitutional scheme limits what government can do.[101] In other words, they read the Constitution as a common lawyer reads case law, as helping to implement legal principles potentially broader than what was expressly written, and which might have applied even without what was expressly written. From the outset, other Justices demurred, and asserted that we should read a written constitution in the definitive way that we usually read statutes.[102] Echoes of an illustrative conception could nonetheless be heard in the Court's later reliance on so-called "substantive due process." Some on the *Griswold* Court chose expressly to rely not just on the due process clauses, but on "penumbras, formed by emanations" from a range of express rights,[103] and on the Ninth Amendment.[104]

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tax, but observing that the Court's decision did "not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."). Marshall's "spheres of sovereignty" reasoning implied that the Maryland tax on banking operations would have been invalid as applied to the Bank of the United States even if it had applied to Maryland-chartered banks too. *Id.* at 428-30. Yet he left open the possibility of valid taxes on other related but less "governmental" subjects—such as property—so long as they were not discriminatory.

[100] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Bolling v. Sharpe, 347 U.S. 497 (1954); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[101] *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798). *See also* Laurence Claus, *Implication and the Concept of a Constitution*, 69 AUSTL. L.J. 887 (1995). *Cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-36 (1810).

[102] *Calder*, 3 U.S. at 398-99 (Iredell, J.).

[103] *Griswold*, 381 U.S. at 484.

[104] *Id.* at 486-99 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

Each of these justifications for constitutionalizing unwritten rights has been controversial. In the Court's first decade, Justice James Iredell insisted that the whole point of a written constitution was to define the reach of powers, not merely to signpost higher principles.[105] And the Court's subsequent attempts to fit unwritten rights inside that definitive vision by relying on the due process clauses have been widely accused of lacking adequate linguistic and historical support.[106] These debates have missed a completely different and much more convincing way to draw unwritten rights from a written constitution. It is the path to which key defenders of the Constitution pointed during the ratification debates when arguing that an express bill of rights was unnecessary. Seeing this path to protecting unwritten rights sheds fresh light on the first Congress's decision to add the Ninth Amendment. The Constitution's power-distributing strategies of separation and enumeration leave to courts the task of settling what the national government can do. In this way, the Constitution's text sets up a straightforward mechanism for the courts to limit national power by recognizing an implied bill of rights.

Three weeks after the Philadelphia Convention concluded, James Wilson delivered a public speech setting the tone and key talking points that leading nationalists would use to sell the draft constitution in their states. "If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation," he opined.[107] According to Wilson, a law that was constitutionally within the commerce power would not intrude on freedom of the press. The enumeration of powers was effective to protect freedom of the press; there was no need to protect that freedom expressly, because the enumerated powers just did not authorize intrusions on that freedom. Other leading supporters of the draft argued congruently,[108] and Wilson did so again at the Pennsylvania ratifying convention.

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[105] *Calder*, 3 U.S. at 398-99 (1798) (Iredell, J.).

[106] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 32 (1980).

[107] James Wilson's Speech in the State House Yard, Philadelphia, October 6, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 167, 168.

[108] *See* Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 315-21 (1993). *See also* THE FEDERALIST NO. 84 (Alexander Hamilton), *reprinted in* 18 DOCUMENTARY HISTORY, *supra* note 9, at 127, 130-31 ("the constitution is itself in every rational sense, and to every useful purpose, a bill of rights.").

> [A]n imperfect enumeration of the powers of government reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.[109]

What if the President and Congress chose to treat enumerated national lawmaking powers as enough to let them curtail important rights, such as freedom of the press? Wilson had a ready answer, which his discussion of the commerce power showed to be as applicable to rights protection as it was to vertical power distribution: "the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department."[110] Congress might "transgress the bounds assigned to it" but when a transgressing act "comes to be discussed before the judges – when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void."[111] As the judges would be "independent and not obliged to look to every session for a continuance of their salaries, [they] will behave with intrepidity and refuse to the act the sanction of judicial authority."[112] Later he added that "[i]f a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and *the particular powers of government being defined*, will declare such law to be null and void."[113]

Wilson was anticipating and responding to calls for an express bill of rights that ultimately proved impossible for the Constitution's proponents to dismiss.[114] But when the first Congress added a bill of rights, it included a

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[109] The Pennsylvania Convention (Nov. 28, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 382, 388. *See also* The Pennsylvania Convention (Dec. 4, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 465, 470, 482, 496.

[110] The Pennsylvania Convention (Dec. 1, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 445, 450.

[111] *Id.* at 450-51.

[112] *Id.* at 451.

[113] The Pennsylvania Convention (Dec. 7, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 9, at 512, 517 (emphasis added).

[114] *See, e.g.*, The Virginia Convention (June 10, 1788), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 9, at 1092, 1112; George Mason's Notes (Sept. 15, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 636, 640; Letter of Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 8 DOCUMENTARY HISTORY, *supra* note 9, at 248, 249.

rule of construction:[115] "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[116] Adding the express bill of rights was not to detract from the protections that the existing constitutional structure afforded rights anyway. The existing enumeration of powers did protect rights anyway, according to Wilson, because what that enumeration let the national government do was ultimately a question for the courts. Through the judge-made law of constitutional characterization, courts could read down the reach of enumerated powers so as not to let the national government intrude upon important rights unless those intrusions were specifically authorized in the terms of the powers. A specific express power to regulate literary publications would have triggered a need for an express constitutional limitation to protect the press, but a general power to regulate commerce would be read by the courts not to allow any act that threatened press freedom. Wilson had even supplied a textual support for this approach through his drafting of the "necessary and proper" clause.[117] The constitutional requirement that laws carrying into execution constitutional powers had to be "proper" imposed a qualitative qualifier that could be used by characterizing courts to condemn national action if it trampled on important values.[118] Wilson had from the outset been skeptical of power enumeration as a distributive device.[119] He saw that courts would be needed to make sense of it. And in making sense of it, in creating the law of

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[115] *See* Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585 (2004); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011) (addressing the voluminous literature on the Ninth Amendment over the preceding decade).

[116] U.S. CONST. amend. IX.

[117] Committee of Detail (July 24-26, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 129, 163 n.17, 168.

[118] *See* Lawson & Granger, *supra* note 108. Although they do not mention Wilson's authorship of the Necessary and Proper Clause, Lawson and Granger set forth substantial historical evidence that the word "proper" was understood at the founding to limit national power. However extensive or confined various founders may have considered the limits of propriety to be, the indeterminacy of enumeration as a distributing strategy allows courts to shape the law of constitutional characterization in ways that could create a far-reaching implied bill of rights. That would be just as true had Wilson not included the word "proper" in the Necessary and Proper Clause, and is just as true elsewhere in the world, where constitutional courts must decide what to make of enumerations that lack a Necessary and Proper Clause. *See, e.g.*, John Toohey, *A Government of Laws and Not of Men?*, 4 PUB. L. REV. 158, 170 (1993) (a public speech delivered soon after the Australian High Court's landmark decisions on implied freedom of speech in *Australian Capital Television v. Commonwealth*, 177 CLR. 106 (1992) and *Nationwide News v. Wills*, 177 CLR 1 (1992)).

[119] *See* William Pierce's Notes (May 31, 1787), *reprinted in* 2 RECORDS, *supra* note 21, at 57, 60 (Wilson "observed that it would be impossible to enumerate the powers which the federal Legislature ought to have.").

constitutional characterization, those courts could create an implied bill of rights.

Protecting individual rights through the process of characterizing national laws under enumerated powers takes to the constitutional level principles familiar in the administrative law of various common law jurisdictions by which courts read down broad statutory conferrals of executive discretion.[120] In Lord Halsbury's famous words:

> discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion…; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.[121]

Just as courts can read down statutory delegations to administrative agencies in ways that protect liberty and equality, so courts can read down constitutional delegations to chief executives and legislatures.

The potential to limit power through the law of constitutional characterization has particular significance under written constitutions that enumerate powers but do not express many limits on those powers. In a leading Australian intergovernmental immunity case, Chief Justice John Latham implemented a state immunity from national law by characterizing the challenged national law in its purported targeting of another government

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[120] *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) ("[C]onstitutionally sensitive questions (for example, whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own. So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. This idea trumps Chevron for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear.").

[121] Sharp v. Wakefield [1891] AC 173, 179.

as about a subject outside the national government's enumerated powers.[122] By parity of reasoning, a court that took James Wilson's example to heart might hold that national laws restricting interstate commerce in newspapers are not properly characterized as laws with respect to interstate commerce, but rather as laws with respect to press freedom, over which the national government has no enumerated power. In fulfilling its constitutional duty to create the law by which governing acts are characterized as inside or outside enumerated powers, a constitutional court could in this way elaborate an implied bill of rights. Justice John Toohey of the Australian High Court made that point in a speech delivered soon after that Court's landmark decisions finding for the first time an implied freedom of speech under the Australian Constitution.[123]

Even under written constitutions that emulate America's in both enumerating powers and expressing many limits on those powers, the law of constitutional characterization could be evolved to fill lacunae among the expressed limits, what Wilson called omissions in the enumeration of the rights of the people. For example, *Brown v. Board of Education*[124] needed a companion conclusion about school segregation in the District of Columbia. How could the Court require a momentous social change everywhere across the nation except the very city where the Court sat? So the Court in *Bolling v. Sharpe*[125] declared that a principle of nondiscrimination in conferring the benefit of education did apply to the national government, and cited due process. But the due process clause limits deprivations of liberty; it targets the terms of takings, not the terms of givings.[126] John Hart Ely called the *Bolling* Court's reliance on due process "gibberish both syntactically and historically."[127] The Court could have reached its constitutional conclusion much more convincingly had it simply observed the crucial distinction

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[122] Melbourne Corp. v. Commonwealth (1947) 74 CLR 31, 61 (Latham, C.J.) (Austl.) ("what is called 'discrimination' shows that the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State."). *See also id.* at 99-100 (Williams, J.). Justice Dixon conceived of the immunity as a separate implied limitation, rather than as intrinsic to characterization, observing that if a law "operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power." *Id.* at 79. *See* Leslie Zines, *Sir Owen Dixon's Theory of Federalism*, 1 FED. L. REV. 221, 234 (1965).

[123] *See* Toohey, *supra* note 118.

[124] 347 U.S. 483 (1954).

[125] 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

[126] U.S. CONST. amend. V. ("No person shall … be deprived of life, liberty, or property, without due process of law.") The Court in *Bolling* did not address any *requirement* that children attend segregated schools, but only a segregation-based refusal to admit children to a school. *See* 347 U.S. at 498.

[127] ELY, *supra* note 106, at 32.

between American national government power and American state government power. State power is unenumerated, so a national constitutional requirement that state governments not discriminate unjustly awaited the express provisions for equal protection and for protecting privileges or immunities that the Fourteenth Amendment supplied. National power is enumerated, and so, the Court could have concluded, the enumerated subjects of national power just do not extend to measures that discriminate unjustly.

Finding implied rights in the necessarily judge-made law of institutional competence and of constitutional characterization reconciles American constitutional law's extensive protections for unwritten rights with America's commitment to a written constitution. The written Constitution tasks the Supreme Court with settling disputes about the reach of government powers. The written Constitution sets forth criteria for resolving those disputes – separation of kinds and enumeration of subjects – that simply do not resolve them. Only by creating the law of institutional competence and the law of constitutional characterization can the Supreme Court fulfill its constitutional duty to decide the distribution of national power. And in doing so, the Supreme Court can exercise the ample discretion that the written Constitution affords it to articulate the contours of a national implied bill of rights.

CONCLUSION

The American founders did not adequately appreciate how much constitutional lawmaking their two power distributing strategies would leave to the courts. The minority among them who did see the inadequacy of separation and enumeration to achieve their intended ends, notably James Madison and James Wilson, nonetheless saw endorsing the strategies as a necessary means to achieve the overall good that ratifying the Constitution would do.

What, then, should guide courts in creating the law of institutional competence and the law of constitutional characterization to settle the actual horizontal and vertical distribution of power? Our history of seeking a separation of powers coalesces around a clear guiding principle: *bend toward liberty*. Congressional initiatives to adjust horizontal distribution in innovative ways should be considered compatible with the constitutional "separation of powers" so long as they promote liberty by bringing in more minds, letting more people partake in the exercise of power, checking and balancing more, whether within institutions or among them. In contrast,

there is no consensus around a guiding principle of vertical distribution, because there is widespread good faith disagreement about what those who seek good government should be aiming for on the vertical axis. Many judge the value of local control to be outweighed by the value of concentrating talent and expertise to lead nationwide, and judge uniformity in regulation to be so often desirable that deciding whether to depart from it should be left to the discretion of a powerful center. Many others strongly disagree, and see greater value in local control, perhaps as a way to let ordinary people have more say in the shape of their own governance, perhaps to let diverse subcultures coexist more peaceably, perhaps for other reasons, such as states' capacity to serve as laboratories of policy experiment, or as the system's most reliable checks against power becoming concentrated in too few hands. Of this divergence on first principles, this article has shown that it was ever so. The indeterminacy of enumeration by subject affords latitude to dispute resolvers to shift the law of constitutional characterization toward uniformity or subsidiarity.

Where a constitution's words express strategies for distributing power that direct down blind alleys, as they do when they demand separations by kind or subject, evidence of original meaning has limited potential to contribute to the content of the judge-made law that decides the actual distribution of power. The separation and enumeration strategies pass to courts a broad discretion in crafting the law of institutional competence and the law of constitutional characterization. The written Constitution empowers the courts to decide the distribution of powers in ways that protect unwritten rights. America's written Constitution is fully compatible with an expansive American implied bill of rights.