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Limiting Unlimited Government through Constitutional Points of Order

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Limiting Unlimited Government through Constitutional Points of Order:  
A Modest Proposal with the Immodest Ability to Change Everything

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I. Introduction

Whether one considers the doctrine of substantive due process to be a necessary and proper juridical tool or intellectual applesauce, all can agree that its adoption spawned fundamental transformations in constitutional law and politics. The scope of this device and scale of the changes it would foment in our polity were not immediately apparent in foundational rulings. A parallel device has been developed in a recent constitutional case; it is not hyperbole to suggest that this Tenth Amendment adjudication has the ability to affect the federalism debate in our time as significantly as Rehnquist’s revolution did in his. Unfortunately, press coverage and academic analysis of oral arguments was lacking, and the legal literature has been silent since the decision was handed down on December 23, 2009. Unfortunate but unsurprising, as lawyers are professionally attuned to (and inordinately fond of) the courts, and the plaintiffs themselves might not have understood the import of their actions. Nevertheless, an Act of Congress was objected to by petitioners seeking “constitutional recognition of the portion of sovereignty remaining in the individual States,”¹ and “the instrument for preserving that residuary sovereignty”² rendered a verdict. History records that the cause of action argued before the highest tribunal in the land last December was a constitutional point of order; this unprecedented holding on the meaning of the Tenth Amendment to the United States Constitution was handed down by the United States Senate.³

Libertarians and laymen occasionally read the Constitution and identify in its language an affirmative limitation on the power of the federal government to regulate over and against the interests of the states and people. That ours is ‘a government of limited and enumerated powers’ is a colloquialism as frequently employed as its precepts are ignored; that literacy is not sufficient qualification for reading and understanding the Constitution is a fact the Supreme Court routinely illustrates. The judiciary has ratified the erosion of state powers on countless occasions: the expansion of the Commerce Clause to the point of unqualified power by the courts is an established fact. The uninterrupted growth of federal regulatory activity owes to obvious causes such as the Seventeenth Amendment’s substitution of popular election of senators for state appointment and the Sixteenth Amendment’s authorization of federal power to levy an

² Id.
³ See The Federalist No. 65 for a discussion of the Senate’s unique ability to serve as a tribunal to deliberate political questions. See also The Federalist No. 62 for the assertion that the Senate is “solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic. . . . Another advantage accruing from this ingredient in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation.”

* Thanks are due to Valerie Heitshusen and Richard Beth of the Congressional Research Service, as well as staff and interns in the office of Congresswoman Ginny Brown-Waite, for borrowed expertise and assistance in preparing this paper.
income tax, as well as a subtle succession of expansive readings by the Court of Congress’s taxing and spending powers since the New Deal, and the undoing of the non-delegation doctrine. The Fourteenth Amendment expanded federal power against the states, but subsequent nationalization of the Bill of Rights through Court adoption of the incorporation doctrine went much further in limiting state prerogatives. With such a sordid history, it is surprising that advocates of limited government continue to accept the concept as an exclusive jurisprudential concern. The Tenth Amendment is as judicially unenforceable as the Ninth, and the days of Court enforcement of federalism and libertarian economic and social principles have passed. The issue of limiting government can and must be reclaimed by the political branches.

The judiciary can and must render final judgment on the meaning of the Constitution in the cases in controversy before it; Congress cannot invest itself or its members with judicial power. The courts, however, do not issue advisory opinions or speak to the wisdom of proposed legislation, and there is no law or binding precedent preventing co-ordinate branches from considering the Constitution in regards to their own functions. This paper proposes that Congress has the authority to implement a constitutional review process in the course of promulgating new laws, and that such a process is exceedingly necessary. It suggests that Congress can utilize a simple procedural device to reanimate the issue of constitutional limitations on the powers of government and breathe new life into dormant federalism clauses and amendments. This mechanism need not be created by bicameral legislation; it is an overlooked procedural rule extant in both houses. The Senate, or the House, or both, can utilize it as is, or strengthen it by slightly modifying existing rules. Justification for a constitutionality review process for proposed legislation will be provided on the assumption that it is not self-evident, and the mechanism will be examined along with recommendations as to how it could be employed to limit unlimited government.

II. Justification

I. Background:

It has been suggested that we are living in a libertarian moment, when the principles of limited government have returned to public attention. The national debate

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4 See e.g. Lochner v. New York, 198 U.S. 45 (1905) (“A Constitution is not intended to embody a particular economic theory . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural or familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”)(Holmes, dissenting). Accord US v. Caroline Products Company, 304 U.S. 144 (1938)(in which the Court finally conceded the issue of economic rights to Congress).


surrounding the passage of health care reform has stirred the public imagination; supporters and opponents of the Patient Protection and Affordable Care Act can agree on one thing: this law represents an unprecedented expansion of federal power. They may disagree whether this was a legitimate exercise of constitutional authority by Congress, but the law does impose substantial regulatory and administrative burdens on the states, as well as an insurance mandate on individual citizens. The government of the United States has never before ordered citizens to purchase a commodity from a private company, and many Americans instinctively reject its authority to do so. States have echoed these concerns: fourteen state attorney generals filed legal challenges the day the law was passed. Despite these earnest constitutional appeals, recourse from overreaching legislation will not be had from the courts. Election Day may provide some redress, but producing a new cache of legislators ostensibly committed to limited government is bound to be ineffective in that any perceived necessity or expedient inevitably overrides every principle of federalism or congressional restraint. These are less cynical comments than recognition of two important realities:

1. Federalism is not protected by the courts.

Libertarians can only bemoan the great expanse of Court rulings ratifying unlimited government, though the academy regularly produces abstruse legal arguments that commerce and tax cases were wrongly decided, and abstract protestations that the Court should rule differently, even return to the Lochner era. There are of course effective arguments that the judiciary is the last branch of government one should rely upon for the defense of federalism, but it should be enough to point out that, an empirical study of attributes causes for it) Available at http://www.nybooks.com/articles/archives/2010/may/27/tea-party-jacobins/?pagination=false


9 See e.g. Is the Constitution Libertarian? Randy E. Barnett available at http://www.cato.org/pubs/scr/2009/SimonLecture-Barnett.pdf (“The judicial passivism of the Supreme Court has combined with activism by both Congress and presidents to produce the behemoth federal and state governments that seem to render the actual Constitution a mere relic, rather than the governing document it purports to be.”)

10 See generally The Cato Journal, Vol. 1 No. 1 through Volume 30 No.1; See also Harvard Journal of Law and Public Policy, Volume 1, Issue 1 through Volume 33, Issue 1. Compare Texas Review of Law and Politics Vol. 1 No. 1 through Vol. 14 No. 1

11 See e.g. A Healthy Debate: The Constitutionality of An Individual Mandate. Available at http://www.pennumbra.com/debates/debate.php?did=23. Pitting David Rivkin and Lee Cassidy against Professor Jack Balkin, the libertarian protagonists ably contend that the individual mandate does not fit neatly within supposed limits of commerce and taxing and spending powers. Professor Balkin seems to have the better of the argument, simply by pointing out that legal reasoning forced to rely upon aged if not archaic precedents is an argument against probability. Outmoded if not overruled case law is unlikely to be instructive when pitted against the established practice of the Supreme Court ratifying plenary Article I, Section 8 powers.

12 See e.g. David E. Bernstein Equal Protection for Economic Liberty: Is the Court Ready? Available at http://www.cato.org/pub_display.php?pub_id=1041&full=1

13 See e.g. Lino Graglia, Revitalizing Democracy, Harvard Journal of Law and Public Policy, Fall 2010. (“The most we can or should ask of the Court on the federalism issue is that it cease its pretend review and
law involving “prophecies of what the courts will do in fact,” wishing the Court would do away with two centuries of expansive readings of Article I, Section 8 powers is impractical. The problem is less that the judiciary will not enforce federalism than that it cannot. The great effort to undermine the New Deal almost ended in disaster for the Court and our constitutional structure. Rehnquist’s federalism revolution petered out, he died and his ally O’Connor resigned. Justices Roberts and Alito show no sign of overt sympathy toward earlier states rights efforts and it is difficult to imagine that a libertarian consensus will return to the judiciary in the form of federal appointments in the next few years. Despite the novelty and creativity of some libertarian arguments and the best efforts of allied legal societies and institutes, the ship has sailed on the Commerce Clause and taxing and spending powers. To brilliant and brave fools willing to search for the limits of government powers in the dicta of Raich and Morrison, best of luck.

There is the nagging question of whether the Tenth Amendment will ever pose any real threat to federal reach, a guillotine to cut off the fingers of Congress when it probes too far into the domain of the states. Tenth Amendment arguments have less case-law to draw upon but the great body of law in this area can be summed up thusly: for a long

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See also Lopez, Morrison, and Raich: federalism in the Rehnquist Court, Harvard Journal of Law and Public Policy, Spring 2008 (“The conclusive reason that the Court should not protect federalism is that a Court with the power to disallow policy choices by the national government on federalism grounds will necessarily have power to disallow them on other grounds, as well as to disallow policy choices by the States. The Court itself is the greatest enemy of federalism. The principal assault on state sovereignty since the middle of the twentieth century has come not from Congress, but from the Court. . . The power of the Court to disallow in the name of the Constitution any policy choice it disagrees with has reduced the States to supplicants before the Court, pleading to be allowed to continue to make policy choices in some areas.”)


15 “How far the clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law.” The Anti-Federalist No. 1, (Herbert Storing, ed., Chicago: University of Chicago Press, 1985)(Brutus)

16 Suspicion of the deference justices Alito and Roberts would show to principles of federalism was widespread at the time of their appointment (See, e.g. Cristopher Banks and John Blakeman, Chief Justice Roberts, Justice Alito, and New Federalism Jurisprudence. Publius: The Journal of Federalism, Vol. 38, Issue 3, pp. 576-600 (2008)) and followed from mixed rulings in federal preemption and Commerce Clause cases (See Dan Schwietzer, Federalism in the Rehnquist Court, available at http://www.naag.org/federalism_in_the_roberts_court.php). The recent decision in US v. Comstock, 551 F. 3d 274, (2010), in which Alito and Roberts defected from conservative opposition to a new federal police power, strongly suggests that a renewed federalism revolution will not be a legacy of the Roberts Court.

17 See supra Graglia “Among the many reasons for the Court to withdraw from Commerce Clause review, the most basic is that the Constitution does not provide a clear basis for such review; that is, it does not sufficiently define the scope of the power to make review the application of a rule of law rather than simply a policy decision . . . Another reason that the Court should explicitly withdraw from Commerce Clause review is its inability to limit the power of the federal government, even when it consistently tries to do so. One could not expect the Court, an arm of the federal government, to limit the power of the federal government in order to protect the power of the States; the umpire is a member of one of the teams. Throughout its history, the Court's decisions have served more to validate than to restrict federal power.”
time the Tenth Amendment was held as a “truism” that was manifestly untrue. It added nothing to the Constitution as originally ratified, extraneous verbiage. For a few fleeting moments it was thought there were attributes of state sovereignty the Tenth Amendment stood to protect, but as no-one can say what those attributes are this moment has passed. The federalism amendment prevents the federal government from commandeering state officials, but Congress can bribe them, can pressure them, can make them an offer they cannot refuse. The Tenth Amendment limits federal powers to those granted, not those expressly granted. If one reads case law as the Talmud to the

18 “The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.” United States v. Darby, 312 U.S. 100, 124 (1941).


20 “[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress lacks an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner.” National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

21 “We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it diserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions - as undoubtedly there are - we must look elsewhere to find them.” Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-547 (1985).


23 Congress may attach conditions on the receipt of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)(Burger, Concurring).

24 See generally South Dakota v. Dole, 483 U.S. 203 (1987) (Pressuring a State to comply is distinguished from compelling it to do so.)

25 See e.g. Hodel v. Virginia Surface Mining & Reclamation Assn., Inc. 452 U.S. 264, 289 (1981). (Offering states the choice of regulating an activity according to federal standards or having state law preempted by federal regulation is akin to telling a sovereign at gunpoint that he will cede his rights, asking only if he would prefer that his signature or brains be on the contract.)

26 In the first Congress, Elbridge Gerry proposed inserting the word “expressly” so the Tenth Amendment would read “the powers not expressly delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the states respectively, or to the people.” Rejection of his proposal begs the question whether the federal government’s delegated powers are plenary or qualified; limiting the federal government to powers "expressly" delegated would have denied implied powers as effectively as the corresponding Article of Confederation. Art. of Conf. II. (1777). Marshall declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument.” McCulloch v. Maryland 17 U.S. (4 Wheat) 316, 372. The practical application of this ruling has been that the Tenth Amendment in no way conditions the Necessary and Proper Clause. From McCulloch through modernity, the Tenth Amendment theoretically restricts the powers of government to those granted, but the Court consistently discovers novel and limitless federal powers have in fact been granted.
Constitution’s Torah, one finds that the federal government is one of enumerated and independent, and inherent, and resulting, and effectuating, and delegable powers. All power therefore delegated to the United States by the Constitution, and supreme when confronting state powers, none are reserved to the states exclusively, or the people.

27 Independent powers are those not subject to limitations imposed by other enumerated powers. The Court gave up the ghost in holding that “Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States . . . It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” US v. Butler, 297 U.S. 1, 65-66 (1936). A Tenth Amendment jurisprudence the Court tried to formulate to bar this independent power to tax and spend from truly becoming an authorizing force for any act of government failed, as did the proposed qualification that the exercise of the spending power must be in pursuit of “the general welfare.” Helvering v. Davis, 301 U.S. 619, 640-641 (1937). O’Connor was left with the lament that Butler was “the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause”, South Dakota v. Dole, 483 U.S. 203, 207 (1987), and we the people are left contending with the fact that the general welfare clause provides no judicially enforceable limitation on federal taxing and spending powers. Buckley v. Valeo, 424 U.S. 1, 90-91 (1976).

28 Inherent powers have no explicit constitutional grant but are assumed to be characteristics of a sovereign or department. Article I, section 1 of the Constitution vests legislative powers “herein granted” to Congress. By contrast the vesting clause in Article II, section 1 says: “shall be vested,” and the President is accordingly not limited to powers enumerated in Article 2. See e.g. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) See also Myers v. United States, 272 U.S. 52. Cf Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The judiciary similarly suffers no limitations from the enumerations in Article III. State of Kansas v. State of Colorado, 206 U.S. 46, 82 (1907). The legislature alone is restricted to enumerated powers, though the concept of resulting powers proves this to be a distinction without a difference.

29 Resulting powers are those that “rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated.” 2 J. Story, Commentaries on the Constitution of the United States (Boston: 1833), 1256. See American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 543 (1828)(reifying Story’s constitutional theory into law.)

30 Implied powers granted in McCulloch v. Maryland, 17 U.S. 316 (1819), may usefully be severed into effectuating and delegable powers. Effectuating powers may be defined as the powers to legislate in effectuation of enumerated rights. “No one has ever supposed, that congress could, constitutionally, by its legislation, exercise powers, or enact laws, beyond the powers delegated to it by the constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618-619 (1842).

31 Delegable powers naturally follow from the ends-justify-means declaration in McCulloch v. Maryland. Supra 413, 414. It never did need independent justification. “Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.” Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). Delegation of legislative power seems on its face to violate the principle of separation of powers, and at various points in our constitutional history the Court seemed to suspect the motives behind any delegation of legislative powers to administrative agencies or coordinate branches. Nevertheless, having authorized delegable powers, the Court “discovered that there is some difficulty in discerning the exact limits” of delegable powers. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928). As with any legal doctrine or concept unaccompanied by a bright line or sharp juridical rule, the non-delegation doctrine is unenforceable. The modern administrative state, where regulations are compounded continually, is the inevitable result.

32 U.S. Const. Article VI, Clause 2. The Constitution is supreme “not only of itself, but of the laws made in pursuance of it.” Gibbons v. Ogden, 9 Wheat (2 U.S.), 210-211 (1824). Tenth Amendment inquiries
Federalism finds no refuge in Tenth Amendment jurisprudence because the Court’s ability to discern unique attributes of state sovereignty is doubtful. The Tenth Amendment is judicially unenforceable.

2. Federalism is not protected by federalists.

The only bar to federal interference with the states is the restraint of federal officials, and self-restraint is not a quality noted in Congress, presidents, or politicians in general. Even that upstanding constitutionalist, the earliest and most ardent (and most quoted) defender of states rights, Thomas Jefferson, found un or extra-constitutional policies necessary when convenient. Principles invariably fail against arguments of expedience, in Court or Congress; the little wet puppy syndrome infects every elected official at some point: citizens being more likely to recognize their representatives in Congress than state senators or delegates, they petition for federal legislation to protect the little wet puppies that are the concern of their particular interest group. These citizens should not be faulted, there are puppies that get wet and someone must do something. A politician eventually responds with the Little Wet Puppy Act of that given year, replete with congressional findings that little wet puppies in any state affect the traffic in/supply of puppies in every state, and with such Commerce Clause approval forestalling judicial disapproval, the Department of Little Wet Puppies is born. Immortal, so long as people love puppies and members of Congress want the love and votes of people who love puppies. Even if the little wet puppy problem were to be eliminated or substantially reduced, doing away with the department that protects them would seem mean-spirited and politically unpopular. That dogcatchers, pounds, and neutering have been exclusive local and state concerns is no bar to federal interference, and the public can expect that increases in annual appropriations will regularly surpass the rate of inflation for the Department of Education. And puppies.

There is one way to break this cycle. The answer is not found in the law, perhaps a lawyerly approach to politics: every aspiring litigator learns in trial advocacy that there are a number of ways to win an argument, but the easiest way to lose an argument is simply to have the same argument your opponent is having. Conceding the issue, on any issue, results in failure. Take abortion: one side says the issue is life, and we are for life, and who can be against life? An argument against life will invariably fall short, so the contending issue becomes choice, and we are for choice, and who can be against choice? When Congress votes, politicians do not cast ballots for or against federalism, they vote for or against little wet puppies. How then to put the issue of federalism back in policy debates?

Have Congress argue and vote on federalism directly, on the meaning of the Tenth mirror Commerce Clause scrutiny. New York v. United States, 112 S.Ct. 2408, 2418 (1992). Both are pro forma as any law may be passed in pursuance of the infinitely elastic Article 1, Section 8 powers.

33 The Louisiana Purchase is a case in point. It is important to note that Court cases ratifying federal acquisition and administration of new territories occurred after the fact. See generally American Insurance Co. v. Canter, 26 U.S. (1 (Pet.) 511 (1828).

34 Two principles conflict in our constitutional system: federalism and expedience. Federalism is widely paid lip-service to and commonly understood; expedience is the limitless power the Federal Government has to legislate over and despite the interests of the States, under the Commerce Clause, taxing and spending power, the Necessary and Proper Clause, etc. When they conflict, federalism never wins and expedience always does. Therefore, there is no federalism and only ever expedience.
Amendment, on the limits of its power to tax and spend. There are a number of websites and organizations that track voting records to determine a given congressman’s stance on life, choice, guns, business regulations and the environment, but they choose not to identify a representative’s position on states rights as they would need to intuit the motivation behind any number of votes to do so. Imagine then that a congressman’s record on federalism were clear, not because he had a lifetime “A” rating from the Cato Institute or the National Taxpayers Union, but because in any given term he debated and voted on the Tenth Amendment directly, quotes recorded and votes tracked in the congressional record and live on C-Span. If one of 100 Senators raises a constitutional point of order, or any of 435 House Representatives, non-voting Delegates or the Resident Commissioner raises a point of order on constitutional grounds, that Member can steal the issue for federalism and ignore the underlying policy argument. Little wet puppies, or health care reform, are no longer the issue for debate. A constitutional provision or principle is. A vote is taken, a precedent is set to influence future congresses and the Court, and a record is made available for the electorate.

Constitutional review generally degenerates into a ridiculous tautology, particularly in Tenth Amendment jurisprudence: the Supreme Court regularly refuses to strike down laws that infringe on the federal structure of government, believing that these determinations are political questions that can and will be answered by Congress; Congress regularly passes laws infringing on principles of federalism, believing that determinations of constitutionality are legal questions that can and will be answered by the Supreme Court. The Constitution effectuates the separation of powers into three branches of government but from the outset intermixed certain functions: the President may veto legislation, the Senate may second guess treaties negotiated by the executive, and the legislature approves the President’s nominations to positions in the judiciary. The “precaution in favor of liberty” - our system of checks and balances - “did not demand rigid separation.” What the framers intended by a system of overlapping departmental jurisdiction was “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” Is it possible then that responsibility for identifying the constitutional limits of government powers could be shared by coordinate branches of government?

The concept of co-lateral or inter-departmental review - that every department must interpret the Constitution in respect to their own functions - was widely held at the outset of our Republic: a President must not enforce a law he considers unconstitutional, Congress must not pass legislation it considers unconstitutional, and the Court must not uphold unconstitutional laws, particularly those that have unconstitutional effects on states or individuals. Jefferson was the classic exemplar of this policy:

35 The Federalist Nos. 47-51 (J. Cooke ed. 1961), 323-353 (Madison)
36 Id. No. 51, 349 (“[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”)
37 See Story, supra at 373.
38 “My Construction of the Constitution is . . . that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in cases submitted to its action most especially where it is to act ultimately and without appeal . . . Each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what
produced the Alien and Sedition Acts and the Court did not strike it down, but the President would not enforce it. Concededly, if the subjective notion of constitutionality proffered by each branch becomes a license for unrestrained action this concept becomes ineffective and unacceptable; Andrew Jackson bastardized the concept by placing his determination of constitutionality above those of co-ordinate branches, ignoring their judgment. Jackson’s behavior does not necessarily follow from Jefferson’s concept; this is not a call to anarchy. The purpose if not the tone of this paper is to propose a simple and pragmatic solution to promote the principle of federalism and perhaps alleviate the pressures built by the Court’s countermajoritarian difficulty, not to alter or even disapprove of our existing constitutional structure.

For a co-ordinate branch of government to assume the right to interpret the Constitution does not preclude it from recognizing the authority of other branches to do the same, much less the final authority of the Supreme Court, particularly in regards to cases in controversy before it. Congress can pass on the constitutionality of a law and be overruled by the Court; the status quo before last December is not upset now, and will not be if constitutional points of order are more widely used. Congress will respect the final

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39 See Story, supra at 374.
40 Ineffective in forestalling federal actions, unacceptable to advocates of limited government because other branches could ignore limitations declared by any branch.
41 In Worcester v. Georgia, 31 U.S. 515 (1832), the Court held that states could not pass laws affecting federally recognized Indian nations. Jackson responded, “John Marshall has made his decision, now let him enforce it.” Quoted in Edward Corwin, The Doctrine of Judicial Review (Princeton, NJ: Princeton University Press, 1914), 22. Jackson believed that “Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others . . . The opinion of Congress has no more authority over Congress than Congress has over the judges, and on that point the President is independent of both.” President’s Veto Message (July 10, 1832), A Compilation of the Messages and Papers of the Presidents, Vol. 2, ed. J Richardson (New York: Bureau of National Literature, 1917), 582. As Senator Daniel Webster rightly responded, President Jackson’s message “converts a constitutional limitation of power into mere matters of opinion, and then strikes the judicial department, as an efficient department, out of our system.” Id. One can concede that a Court opinion is binding for a particular case in controversy, and instructive for similarly situated cases, without restricting the ability of the President and Congress to decide a matter of constitutionality absent instruction from the Court.
42 See Planned Parenthood of Southeastern Pa. v. Casey, 505 US 833, (1992) for a recognition by the majority that public pressure can be and has been a juridical tool in cases where popular opinion in overwhelming. See Id 960 - 964 (Scalia, dissenting) for its succinct observation that countermajoritarian pressures are self engendered difficulties. Faithful interpretation of the Constitution in legal cases will always be a matter of dispute, and any Court ruling against the will of a majority or even a passionate plurality of the public will generate pressure as the decision is always rendered outside of the political process.
43 The concept of collateral or inter-departmental review survives in the form of Presidential signing statements. These are generally statements that direct executive agencies to apply the law according to the president's interpretation of the Constitution. In existence since the days of James Monroe though only sporadically used until dramatically rediscovered by Reagan and his successors, the Department of Justice has advised the past four Presidents that the Constitution provides him with the authority to decline to enforce a law he considers unconstitutional. See e.g. The Legal Significance of Signing Statements; Memorandum for Bernard N. Nussbaum, Counsel to the President. Nov. 3, 1993 Available at: http://www.justice.gov/olc/signing.htm#N_8_. See also fn 44.
judgment of the courts, issuing only an earlier determination about the constitutionality of its actions. Legislation will have to survive a gauntlet in the House and Senate as well as the courts to be considered constitutional. There is no concern about declarations of constitutionality when a law might be unconstitutional; the benefit is redundant review for unconstitutionality: declarations of unconstitutionality by the legislature where the Court would otherwise uphold a law as constitutional. At this stage in our constitutional development judicial review and supremacy are established facts. Jefferson’s concept can now be implemented with less fear of a Jacksonian interpretation. If this concept has value, the question becomes whether a political review of the constitutionality of legislation is authorized or necessary.

II. Authorized and Exceedingly Necessary:

Whether Congress has the authority to pass judgment on the meaning of the Constitution is less relevant than whether the judiciary thinks otherwise: will the Court consider this an intrusion into its sphere of influence? Despite the practice of the courts exercising an exclusive review function, precedents strongly suggest that the Supreme Court will not consider the creation of a limited form of constitutionality review to be an unconstitutional aggrandizement of power on the part of the legislature. Congress has created and vested in legislative courts nonjudicial functions of a legislative or advisory nature, with the caveat that their judgments are deprived of finality. Congress has the right and responsibility to author its own rules of procedure and debate, and the vacuum created by the Court’s unwillingness to provide advisory opinions speaks to the need for

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44 Presidential signing statements may present an instructive parallel. While the Supreme Court has not directly addressed whether the executive or any other branch may employ a form of constitutionality review, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) established a precedent of Court acceptance of executive agency legal interpretations, subject only to final Court review for reasonableness of the interpretation. Clinton v. City of New York, 524 U.S. 417 (1998) is not dispositive because the line-item veto struck down in that case violated the Presentment Clause by absolutely overruling the language of legislation. A Presidential interpretation of a law does not necessarily overrule the intent or interests of a coordinate branch of government. Ultimately, a presidential interpretation can simply be ignored, as it was in the recent case of Hamdan v. Rumsfeld, 548 U.S. 557 (2006). The Court can similarly ignore any congressional constitutional interpretation it disagrees with, as has been its practice since 1803.


47 U.S. Const. Art. 1, Section 5, Clause 2. “The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.” United States v. Ballin, 144 U.S. 1, 5 (1892). The only caveat is that when a rule affects private rights, the rule becomes a judicial question. United States v. Smith, 286 U.S. 6, (1932).
constitutional consideration by Congress at an earlier stage in the development of legislation. Courts constantly search the congressional record for indicators of legislative intent, and the assumption of constitutionality review and debate could only aid Court deliberations. Tacit authorization for a constitutionality review of proposed legislation by Congress can also be found in the Court’s repeated assertions that federalism and limitations on the powers of the federal government are question of public policy rather than law. Constitutionality review is authorized, the more interesting question: is it necessary?

Start with the premise that ours is a government of limited and enumerated powers. Perennial presidential candidate and libertarian firebrand Congressman Ron Paul has suggested that “the Constitution granted authority to the federal government to do only 20 things,” an interesting interpretation which might even be true, despite being at odds with current case law and persuasive arguments that the Constitution was not designed to preclude policy choices. Regardless of one’s subjective views of federalism, the appropriate role of government in people’s lives, proper jurisprudential method and constitutional interpretation, the present fact remains that the courts cannot effectively protect federalism. The problem is that federalism is a principle, and like all principles, an abstraction. When abstract principles collide with concrete cases, the principle collapses. Law deals with absolutes: words on a page. When a principle is nicely bundled in a well-worded constitutional provision such as “Congress shall make no law . . .” the constitutional mandate seems clear. Even so, the Court finds it necessary to implement any number of balancing tests to determine where the letter of a law violates a Constitutional provision. Even the clearest of constitutional commands are qualified by competing interests, and in weighing fundamental principles against, say, the public interest in regulating moneys spent to influence elections, strict adherence to principle

48 The Court continues to accept that “to give opinions in the nature of advice concerning legislative action, [is] a function never conferred upon it by the Constitution and against the exercise of which this court has steadily set its face from the beginning.” Muskrat v. United States, 219 U.S. 346 (1911).
49 See infra fn 75, 76.
50 See Garcia supra fn 21 and all subsequent Tenth Amendment cases for Court protestations that limits on Congress’ authority to regulate state activities are structural, not substantive. “States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.” Id at 512.
52 See supra Graglia, (“It is always problematic in a system of self-government to have constitutional limitations on policy choices, which amount, as President Jefferson pointed out, to the rule of the living by the dead.”)
53 The Court, for example, has reached near-absolute levels of protection for free speech, but continues to balance this individual right with societal interests. State and federal obscenity statutes, prohibitions on speech that incites imminent danger, and child pornography laws are still permitted. Despite later qualification of Holmes’ ruling in Schenck v. US, 249 U.S. 7 (1919), his famous formulation that this fundamental freedom will not protect an individual who yells “fire” in a crowded theater stands as a classic recognition of the fact that principles cause problems not because they are declared to exist, but because principles invariably conflict. In a world of competing rights and principles all rights and principles are qualified by other rights and principles.
yields unpopular rulings. How much more so where the principle is opaque, as in the case of federalism? When the Court makes a stand on ephemeral principles against any pressing or perceived need, public scorn and pressure are the inevitable result. Recognizing this, even principled courts regularly cave, providing by way of explanation the important assertion that the Constitution is not a suicide pact.

Following consistent Court rulings that the limitations the founders placed on government are not meant to kill us, are supposed constitutional restrictions on the powers of government any use? Absolute principles exist in the untouchable domain of God and philosophy. Constitutional principles argued in the Court are always weighed against competing interests, and the Court will never be able to stand long on the federalism principle for structural reasons, so what of Congress? As noted above, Congress does not even talk about principles. The common assumption is that individual members weigh these principles privately in the course of regular policy votes, but why should congressmen be any more immune to arguments of expedience than Court justices?

Federalism limitations are not hard and fast rules, more like guidelines. But this does not argue that principles must always be ignored. If principles are abstractions they should be argued as abstractions, separately from policy concerns. The Constitution is not just law, it embodies principles, and it is manifestly the responsibility of the people, through their elected representatives, to declare what those principles are. Disentangling arguments of principle from arguments of policy is necessary if principles are to survive. Courts must consider principles in the context of a case in controversy, but Congress suffers no such restrictions on the form or substance of its deliberations. If case precedents argue that federalism can be no judicial bar to Congress’s power to act, this does not mean that Congress does not have the power not to act on federalism grounds: to consider the federalism principle, and by doing so at sufficient remove from the demands of expedience it might occasionally be inclined to favor the principle over pragmatism. Constitutionality review by Congress is necessary if we can agree that principles need be preserved. Matters of principle can properly be considered only in a vacuum, and Congress has the unique ability to suck the oxygen out of a debate; Congress can separate policy from principle by way of a constitutional point of order. This happened in


55 Federalism is a principle extrapolated from a number of structural provisions in the Constitution, the poorly worded Tenth Amendment, the experience of the Articles of Confederation and a number of constitutional commentaries including the Federalist Papers. Structural provisions and the Tenth Amendment do not read as statutes; commentators are influential but often contradictory, and are certainly not legal authorities. As a result, federalism suffers as a political principle, however.

56 Constitutional restrictions on governmental power must give way to urgent practical needs. See Terminiello v. Chicago 31 U.S. 1 (1949)(Jackson, dissenting). That this logic has been tacitly accepted as a juridical rule is both historically evident and implied in Planned Parenthood v. Casey. See supra fn 43.

57 The requirement of a case in controversy presupposes that litigants are real and adverse, seeking a decision that will resolve their dispute. Higher questions or hypothetical concepts like federalism are not argued in and of themselves but as a tool of an adverse party. Expedience can always be argued against federalism due to the structural limitations of the judiciary.
December of 2009 in the Senate and can happen in the House. Turning now to the mechanism:

III. Constitutional Points of Order
   I. What Happened in the Senate:
   In 2009, confronted by an aggressive Democratic policy agenda and deprived of the filibuster by merciless political math, Senate Republicans were left searching for dilatory practices in arcane Senate rules of procedure. Constitutional points of order, which mandate a floor debate and vote, were an obvious choice. No constitutional point of order had been raised since the 107th Congress, and since their inception they had been used infrequently and almost exclusively on the grounds that a pending matter would violate the Origination Clause, a procedural question. On four occasions in 2009 the Senate employed constitutional points of order in a manner that broke with this tradition. Senator John McCain raised a point of order against the D.C. Voting Rights Bill in February. In July, a last-minute point of order was raised on Tenth Amendment grounds as an objection to the amendment of an annual appropriations bill, but was improperly disposed of as the presiding officer put the question as whether or not “to allow the amendment” rather than as a vote on the point of order itself. Undeterred (and perhaps desperate), Senate Republicans raised as separate constitutional points of order that an amendment to the Patient Protection and Affordable Care Act violated Article 1, Section 8 of the Constitution (powers of Congress) and the 5th Amendment (takings), as well as the 10th Amendment (powers reserved to the states, and to the people). On

58 Mandatory floor debate and vote on constitutional questions is a practice established by Senate precedent. Constitutional points of order are not explicitly provided for in the Standing Rules of the Senate (available at http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome). Pursuant to Rule XX a point of order, if not ruled on by the presiding officer, may be submitted to the Senate for its decision. A point of order that a pending matter (a bill or amendment, for example) violates the U.S. Constitution is always submitted for debate and vote in accordance with a ninety-year old precedent. Floyd M. Riddick and Alan S. Frumin, Riddick’s Senate Procedure, (hereafter, Riddick’s) 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 989 (available at http://www.gpoaccess.gov/riddick/browse.html). Precedents guide but do not always dictate behavior, as the Senate in its wisdom may alter a practice over time. The relevant analogy is the juridical rule of stare decisis, which guides Court behavior until it doesn’t.
59 The guiding precedent for the current practice of submitting a constitutional point of order to the Senate floor took place June 16, 1926. Riddick’s pp. 52-54. Prior to that time the Presiding Officer disposed of them on his own authority, in the same manner that the Speaker does in the House of Representatives.
60 Between 1993 and 2009, five constitutional points of order were raised and disposed of by vote, all on Origination Clause (process) grounds; six constitutional points of order were similarly disposed of between 1989 and 1993. Interestingly enough, five of these six were based on constitutional claims other than article I, section 7, clause 1. Two cited some undefined constitutional authority, but there were two substantive claims that a proposed amendment violated the 1st Amendment (free speech) and one 5th Amendment (Due Process) objection. Since 1924 there have only been a handful of constitutional points of order objecting to the impending violation of a substantive constitutional provision (one brought on behalf of the 14th Amendment’s Equal Protection Clause). It is fair to state that constitutional points of order are primarily procedural objections citing the one authority superior to the Standing Rules of the Senate, usually stating that an act would violate the Origination Clause, but occasionally questioning Senate rule-making procedures, presentment, representation or apportionment issues.
December 23, 2009, for the first time in the history of the Republic, Senators held a direct debate on the meaning and purpose of the Tenth Amendment and the limits of government power, and voted accordingly.

A point of order is “[a] claim made by a Senator from the floor that a rule of the Senate is being violated. If the Chair sustains the point of order, the action in violation of the rule is not permitted.” 62 A constitutional point of order is raised in the same format and forum as a generic point of order, with a single Senator seeking to address the presiding officer at a time when no other Senator holds the floor. 63 Points of order, including constitutional points of order, have been analogous to procedural due process objections in the courts; 2009 can be viewed as the year when the Senate adopted a theory of substantive due process for Senate adjudications. 64 Citing the Constitution as it relates to congressional procedure has given way to citing substantive constitutional provisions as a source of objection to pending legislation. As no presiding officer has an exclusive right or ability to interpret the Constitution, custom dictates that constitutional points of order are submitted to floor debate and majority vote. 65 Constitutional points of order are an emerging form of constitutionality review, with ordered and recorded argument and a verdict rendered by a simple majority of Senators present.

The Senator raising a constitutional point of order has the ability to frame the issue and terms of debate; what was so remarkable about December 23, 2009, was that the constitutional question posed could not have been asked in court: when is it appropriate, as opposed to legally permissible, for federal power to be exercised? To understand the potential of this mechanism a hypothetical is perhaps in order: take any law that supporters of federalism might object to, say the Real ID Act of 2005, 66 which mandates federal standards for state drivers licenses. Under rule XV any Senator may have a question for debate divided. 67 The question the Senator raising a constitutional point of order puts to the Senate, the issue Senators debate and vote upon, is whether the manufacture and regulation of drivers’ licenses is and has been a state prerogative. Is this an aspect of state sovereignty? Arguably, fewer Senators would be willing to vote that licensing is not a matter for state regulation - to vote in favor of abrogating state sovereignty - than were willing to vote in favor of security, necessity or other competing policy concerns. The Tenth Amendment can be removed from the question of Article I, 62 http://www.senate.gov/reference/glossary_term/point_of_order.htm
63 Riddick’s pp. 990, 993-994.
64 All points of order argue that an action the Senate is taking or about to take violates procedural rules, with the corollary understanding that a procedural objection is one of process; the idea of using a procedural tool to force a substantive debate on the meaning of the Constitution is novel, as evidenced by the fact that the smattering of precedents supporting the new usage of this mechanism has not yet been identified as Senate practice by the parliamentarian. Riddick’s continues to believe that constitutional points of order are procedural objections that object only to improper procedure (usually Origination Clause): “When a point of order is made against an amendment under the Constitution (on the grounds that the amendment would raise revenue and should therefore originate in the House), the Chair has no authority to rule on the point of order, but submits for debate and decision the question ‘Is it in order to offer such an amendment to the bill.’” (Emphasis mine) Riddick’s at 989. The precedents of 2009 establish a different practice.
65 Id.
67 Riddick’s pp. 807-812. See also pp. 1404-1409 (Division Vote)
Section 8 permissibility as well as the underlying policy arguments.

If December 23, 2009 holds no special significance for Congress, lawyers and libertarians or the public at large, that is understandable. Senators advertised a substantive debate on constitutional questions; Senators delivered random musings about the will of the American people, and resorted to personal anecdotes and policy arguments that would demand objections of topicality in high school debating societies. Perhaps it is too much to expect a reprise of the Webster-Hayne debates, but maybe the first vote on the meaning of the Tenth Amendment in the history of the body responsible for protecting the interests of the states should have offered the public a more dignified spectacle - a grander legacy from the unprecedented events of 23 December 2009 - than the video clip entitled “Senator Max Baucus Drunk on Senate Floor” that went viral on youtube. Rules of decorum preclude Senators from prosecutorial behavior but are no bar to topicality objections, and had Senate Republicans themselves not drifted so wildly off-topic, the requirement that “all debate shall be germane and confined to the specific question then pending before the Senate,” and the privilege of raising questions of order to enforce it could have restricted the debate to the Constitution. As it was, Democrats went no further than protesting that they had considered the Constitution before quickly reverting to policy pronouncements, and Republicans frustratingly forgot the second rule of trial advocacy: ask the question.

The question the Senate forgot to ask was the one that killed Tenth Amendment jurisprudence, the question the Court could not answer in Garcia: what are the essential functions reserved to the states? The Court recognized it lacked the capacity to answer this question; surely the representatives of the states, Senators, are able to identify what are or should be subject-matters reserved to the states, and to the people. Whether courts should or should not consider legislative history in arriving at an appropriate statutory

68 At least one news release prompted the expectation that: “DeMint and Ensign are going to force them to stand in the sunshine on the [10th Amendment] question.” [http://thehayride.com/2009/12/constitutional-point-of-order-on-obamacare-bill]; At least one Democrat Senator (or staffer) took the challenge seriously enough to author a considered rebuttal: [http://leahy.senate.gov/press/press_releases/release/?id=2ddf0c69-1861-46ef-a26e-c4f6bdd0b154]


70 The Webster-Hayne debates were a series of unplanned constitutional arguments at a time when constitutional theory and interpretation was not the exclusive purview of Court justices and law faculties. Two Senators already known for their erudition became equally famous for their eloquence in debating whether the Constitution was a treaty between the states or an unseverable entity originating from the people in the course of eight days in January of 1830. Concededly, the general acceptance of Webster’s interpretation owes more to the outcome of the Civil War than his impassioned arguments, but for the briefest of moments the Senate was at the intellectual center of Constitutional debate.

71 Which arguably received more media attention than the substance of the debate. Available at [www.youtube.com]

72 Rule 19.1(b). See also Rule 19.4, Rule 20, Riddick’s pp. 742-745, 862-863. Germaneness is a requirement of debate in the Senate but not one that is regularly enforced. Norms in the Senate tend to be enforced by implicit social pressure, not the chair. However, precedents are made to be bent (or broken), and existing rules could be employed more forcefully; it is not necessary to establish a rule that allows for regular objections that debate is not germane, but it would help.

73 The first rule is control the issue, the third is stay on topic.

74 See supra fn 22, 51.
interpretation, they do, and the dialogue between coordinate branches can only be strengthened by regular debates and votes on the meaning of the Constitution by Congress. It is even conceivable that a regular body of rulings identifying exclusive state prerogatives in the Senate could provide the judiciary with the juridical tool necessary to enforce the Tenth Amendment.

Other questions could have been posed in the course of this debate: how is it that in the purportedly democratic society the founders provided, their progeny came to regard rights and principles as exclusive legal matters, to be argued by lawyers alone and enforced only in the courts? How divorced is this from a conception of freedom organized and authorized by collective political action among equals? If this first Tenth Amendment debate was underwhelming, what is important is that a Senate precedent was set, and supporters of federalism have a tool at their disposal they should continue to utilize. If Senators stop exercising their prerogative to debate the Constitution, constitutional points of order will join Reagan’s federalism impact statements as a forgotten tool for limiting unlimited government. December 23 provided only a moment of passing political theater, but constitutional points of order, employed regularly, could create a body of rulings on the meaning of the Constitution to influence the courts and the public at large. The Senate could even raise constitutional points of order to exercise a proper constitutional review function over administrative agency rules under the Congressional Review Act though doing so would raise a host of competing considerations.

The Senate has the power to use constitutional points of order, though they are subject to the dictates of unanimous consent agreements and vulnerable to motions to

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75 See Zedner v. US, 547 U.S. 489, 509-511 (2006)(Scalia, dissenting)(“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face”)

76 See Id for the fact that the Court does consider legislative history in the interpretation of any statute.

77 This may seem a stretch with the process of constitutional review so new to the Senate, but it is possible that a Court ‘looking elsewhere to find’ limits on the powers of the federal government after Garcia might spot them in a body of Senate rulings identifying the traditional or essential state functions the Tenth Amendment was said to protect in Usery. See supra fn 20, 21.

78 Executive Order 12612

79 “The legislative process on the Senate floor is governed by a set of standing rules, a body of precedents created by rulings of presiding officers or by votes of the Senate, a variety of established and customary practices, and ad hoc arrangements the Senate makes to meet specific parliamentary and political circumstances.”

80 The Congressional Review Act (“CRA,” 5 U.S.C. §§801-808) established a special set of expedited or “fast track” legislative procedures, primarily in the Senate, through which Congress may enact joint resolutions disapproving agencies’ final rules; the CRA provides Congress the authority to disapprove of administrative agency rules within sixty days of their submission to Congress or publication in the Federal Register. A constitutional point of order would again be a mechanism for a minority voice to redefine the review of the validity of a proposed rule as a federalism inquiry. A bicameral resolution is still required and there are undoubtedly presentment issues with congressional review of executive functions, but it could theoretically provide for a check on the growing administrative state. There is no principle of double jeopardy protecting arguably unconstitutional legislation or rules from redundant forms of review, there is no ex-post facto protection either. In reviewing regulations of federal agencies Congress can revisit questions of constitutional authority that the Supreme Court has seemingly passed judgment on.
table without discussion on the merits. In some cases, statutory provisions expressly limit debate on points of order; these would apply to constitutional points of order as well. As Senators no less than citizens consider any matter they may disagree with to be unconstitutional, there is a risk of abuse; used overmuch constitutional points of order could become subject to denigration as a dilatory motion, and aggravate public frustration with Senate processes as surely as does the filibuster. Any practice grounded in precedent rather than required rules is more likely to be overruled when suspicions arise as to its usefulness or efficacy, particularly when the practice is seen to favor a minority interest. Rule changes are rare and difficult to undertake in the Senate, though there are a number of obvious alterations that could help entrench this mechanism. A more practical approach might be to provide for points of order by statute, as does a bill introduced in the Senate last June. The Enumerated Powers Act requires the disposition of all points of order in the manner evinced last December, and prohibits motions to table from precluding debate on the meaning of the Constitution.

Constitutionally defined federalism is currently a legal opinion held by a minority of lawyers and not in accord with Court rulings. As public opinion on what constitutes obscenity or decency influences the courts, a body of public opinion on federalism limitations could similarly serve as a guide for judicial federalism. Public opinion is formed in a process of public discussion and debate. In the absence of opportunity for the

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81 If a unanimous consent agreement specifies that a vote on a matter would occur “at a time certain without any intervening action,” it would preclude a point of order being raised. Riddick’s, p. 1358. A point of order is also subject to a non-debatable motion to table. Riddick’s, pp. 989, 992. See also Riddick’s, pp. 53, 686, 766, 987, 989. (Once cloture is invoked on a question, Rule XXII prohibits debate on points of order, as well as on appeals of the chair in circumstances on which the chair has ruled.)

82 According to section 305(c)(2) of the Congressional Budget Act, for example, points of order on a budget resolution or a reconciliation measure are restricted to one hour of debate.

83 The Senate is "a continuing body." McGrain v. Daugherty, 273 U.S. 135, 181-182 (1927); Senate rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress. Venerable tradition is one bar to far-reaching overhaul; cloture requirement of two thirds of Senators present and voting is another. The Senate protects the rights of political minorities to the extent that political minorities are capable of tyrannizing majorities. The difficulties of amending cloture requirements or doing away with the filibuster are relevant examples.

84 Explicitly providing for constitutional points of order in Rule XX, restricting the ability of the Senate to subject them to motions to table, and strengthening requirements for germaneness in debate are obvious alterations.

85 The Enumerated Powers Act is bill that would require Congress to specify the source of authority under the Constitution for the enactment of laws, and for other purposes. Introduced in June of 2009, subsection (a) of S. 1319 states: “This Act proposes to establish new procedures by which legislation shall be considered by Congress and is enacted pursuant to the power granted Congress under article I, section 5, clause 2, of the United States Constitution establishing that each House may determine the rules of its proceedings.”

86 “(1) LIMIT ON DEBATE- In the Senate, a point of order raised under subsection (a) shall be—
(A) submitted to the Senate for decision; and
(B) subject to not more than 3 hours of debate equally divided between the Senator raising the point of order and the floor manager of the underlying measure or their designees.

(2) MOTION TO TABLE- In the Senate, no motion to table a point of order raised under subsection (a) shall be in order until all debate time has expired or has been yielded back.”

87 See e.g. Miller v. California, 413 U.S. 15 (1973); Atkins v. Virginia, 536 U.S. 304 (2002)(the Court routinely relies on public opinion in determining constitutional principles.)
forming of public opinion, there are only public moods. Congress is the court of public opinion; tea parties and Tenth Amendment resolutions, nullification acts and political purity tests suggest a public mood drifting back in favor of principles of federalism and limited government. If we are living in a libertarian moment, make it a teachable moment; if only witnessing a passing libertarian mob, why waste a good mob? The legacy of December 23, 2009, is this: a single Senator sympathetic to federalism principles is all that is necessary to hijack public discussion, shape public opinion and, just maybe, begin to reform the political landscape.

II. What Can Happen in the House:

House precedents preclude raising a constitutional point of order in the form witnessed in the Senate.\footnote{In the House, consideration of the constitutionality of a measure is considered to be an implicit responsibility of individual Members in the course of a policy vote. House precedents are clear: the Speaker will summarily overrule a point of order that a measure violates the Constitution. Asher C. Hinds, \textit{Hinds' Precedent of the House of Representatives of the United States} (Washington: GPO, 1907), vol. II, secs. 1255, 1318-1320. Clarence Cannon, \textit{Cannon's Precedents of the House of Representatives of the United States} (Washington: GWP, 1935), vol. VIII, sec. 3427.} The Speaker of the House rules on all points of order with the advice of the parliamentarian.\footnote{Id.} There remains an opening in the current rules of procedure for an association of like-minded Representatives (say, a Tenth Amendment caucus)\footnote{See Jackie Kucinich, \textit{GOP Constitutes Task Force on 10th Amendment}, Roll Call (May 4, 2010) A Member may appeal a ruling of the chair and submit the issue to a debate and vote. House Rule I, Clause 5. Made in the Committee of the whole, the appeal would not be vulnerable to a motion to table, though debate would be restricted under the 5-minute rule and the Committee can still vote to end debate. It is difficult to prove a negative, but there seems to be no recorded precedent of an appeal from the Speaker's ruling on a constitutional point of order. Having had one such debate, the precedent would most probably be established that appeals could be quickly overruled. \textit{House Practice: A Guide to the Rules, Precedents and Procedures of the House}, by Wm. Holmes Brown and Charles W. Johnson (Washington: GPO, 2003), pp. 48-50 (“Amendments”), pp. 65-69 (“Appeals”), pp. 661-674 (“Points of Order; Parliamentary Inquiries”), and pp. 823-827 (“Rules and Precedents of the House”). \textit{Available at} \url{http://www.gpoaccess.gov/hpractice/browse_108.html}.} to produce a one-time moment of political theater by appealing a ruling of the chair and securing a debate and vote by the House,\footnote{Id at 65-69} though the issue on appeal would be framed by the Speaker: put to the House would be the question of whether the Speaker had ruled correctly as a procedural matter.\footnote{See generally Bryan W. Marshall, \textit{Rules for War: Procedural Choice in the US House of Representatives}, (Aldershot, England: MPG Books) 2005. (Rules in the House are a weapon of the majority party, and are consequently changed to suit their preferences and interests. House Rules are adopted at the outset of each new Congress).} The House can and does change its rules of order with some regularity,\footnote{In the 111th Congress, the Act was introduced as H.R. 450.} and it is conceivable that any future majority swept into office by a tide of libertarian discontent would alter its rules to allow constitutional deliberation, but this paper proffers a more practical and immediate tool.

The Enumerated Powers Act is a proposed bill that has been introduced in the House of Representatives in every Congress since the 104th.\footnote{In the 111th Congress, the Act was introduced as H.R. 450.} It would require legislation promulgated by Congress to cite the provisions in the Constitution that grant
Congress the authority to produce it. TheEnumerated Powers Act has never been passed, but the 105th Congress did incorporate aspects of the bill into House rules regulating the content of committee reports. The rules of the 111th Congress continue to require that every report on a public bill or resolution contain a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.95 This obligation is not an onerous one in practice, as committees tend to comply with this rule by resorting to a single sentence: “authority for this Act can be found in article 1, section 8 of the Constitution.”96

A way to raise a constitutional point of order in the House without altering existing rules is to reserve and raisenbsp97 a point of order that the constitutional authority statement accompanying a given bill is insufficient. The distinction again is that the generic sentence above is a statement of legal permissibility, not constitutional authority. The Court continues to hold that federalism presupposes a two-part examination of government powers: both the source of congressional power and the extent to which a power is reserved to the states as an essential state function are necessary.98 The two inquiries mirror each other only in Court; the Court cannot investigate the second part, Congress must. A statement that a given bill or resolution is legally permissible does not satisfy the requirement set forth by the Court that Congress must provide a “plain statement” of its intent to intrude on state functions.99 A point of order raised on this constitutional matter might not force a floor debate,100 but a succession of objections could propel committees to either conduct the more thorough investigation or provide the appropriate declaration of what is or is not a power reserved to the states. A legislative record, a body of determinations of essential state functions, would accompany every law passed, and could be relied upon by federalists in the judiciary in implementing a dormant juridical rule,101 or the public at large in discerning the sympathies of a given congressman toward federalism.102

If one reads the federalist papers as the Hadiths to the Constitution’s Koran, one finds that the founders expected the divided structure of government would better serve to protect principles of federalism than the Court. It is quaint to consider that a process for protecting the powers reserved to the states has been developed by the body originally invested with this responsibility, though the 17th Amendment has fundamentally upset

95 Rule XIII, 3(d)(1), Rules of the House of Representatives, 111th Congress.
96 E.g.: “Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.” Committee on the Judiciary, Report Accompanying H.R. 3695.
97 A point of order may be made against an amendment only after it has been read (or designated) but before debate on the amendment has begun. A member may reserve a point of order to avoid the risk of losing the right to raise it later. See House Practice, p. 49.
98 See supra fn 20, 21, 77.
99 Gregory v. Ashcroft, 501 U.S. 452 (1991)(A “plain statement” must be made that Congress intended to intervene in any traditional state function. O’Connor explained that, because Garcia “constrained” consideration of “the limits that the state-federal balance places on Congress’ powers,” a plain statement rule was all the more necessary.)
100 The Speaker and the majority have at their disposal a number of resources to table, avoid debate or vote on a point of order.
101 Supra fn 77
102 Committee reports contain a record of individual committee votes.
the constitutional foundations of the Senate. Nevertheless, the founders believed that the
democratic organ in our bicameral legislature would always serve to return the federal
government to its fundamental form and features. Any future majority could enshrine
the practice of creating a comprehensive constitutional authority statement into house
rules; methods for disposing of points of order could be curtailed, and meaningful
consideration of federalism principles could be provided for by statutory provisions or
modification of House rules. Unfortunately, minorities have fewer opportunities to
tyrannize majorities in the House, and rule changes or statutory provisions may be
necessary to ensure a long-lasting review mechanism and meaningful review process. For
now, federalism needs but a few champions. Proposals for Court-enforced, process and
administrative federalism have been floated and failed, but Presidential signing
statements and constitutional points of order in the Senate suggest that co-ordinate
branches are beginning to develop their own constitutional review processes. The House
of Representatives can and should exercise a constitutional review function as well.

IV. Conclusion

Separation of powers doctrine has been the source of intractable disputes between
the political branches because of the contradictory constitutional mandate to separate and
intermix departmental functions, but the least-kept secret in constitutional history is
that the Supreme Court has arrogated unto itself sole responsibility for determinations of
constitutionality, seemingly undermining Hamilton’s defense of the “least
dangerous branch” and justifying the worst fears of the Anti-Federalists. Perhaps it

103 "[T]hat the federal Senate will never be able to transform itself, by gradual usurpations, into an
independent and aristocratic body, we are warranted in believing, that if such a revolution should ever
happen from causes which the foresight of man cannot guard against, the House of Representatives, with
the people on their side, will at all times be able to bring back the Constitution to its primitive form and
principles. Against the force of the immediate representatives of the people, nothing will be able to
maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and
attachment to the public good, as will divide with that branch of the legislature the affections and support of
the entire body of the people themselves.” Federalist No. 65.

104 See generally fn 84 for sample rules changes applicable also in the House.

105 "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice
will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness
but interdependence, autonomy but reciprocity.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,
635 (1952) (Justice Jackson concurring)

106 In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Justice Marshall proclaimed that the Courts no
less than Congress or the President have a duty to interpret the Constitution, securing judicial review for the
exercise of power by the executive and legislative branches of government is subject to judicial restraint,
the only check upon our own exercise of power is our own sense of self-restraint.” An assertion of judicial
supremacy.

107 The Federalist No. 78. Hamilton pointed to the Judiciary’s lack of capacity to “annoy or injure” the
other branches, as the legislature has the power of the purse and the executive has the power of the sword.
What Hamilton would have made of the judiciary’s power of the pen in practice - such as the ability to
override other branches in ordering funding of school districts or demanding corresponding executive
action - is an open question.

108 “The opinions of the Supreme Court, whatever they may be, will have the force of law; because there is
no power provided in the Constitution, that can correct their errors or controul their adjudications. From
did not follow from Chief Justice Marshall’s claim that the Constitution created a limited
government that only the judiciary may enforce those limitations, but in practice this is
the case: politicians in our polity continue to expand the power and influence of the
federal government and rely on the courts alone to identify any constitutional restrictions
on their ability to do so. That this is and has been the case does not argue that it should or
will continue to be so.

Our Constitution is Lamarckian. Perhaps ours should be a proper system of
federalism, states should be co-equal sovereigns, and the 10th Amendment should be
(should have been) a limitation on the powers of the federal government, but if we are to
see the world the way it is and not just the way we want it to be we must recognize that,
whether or not a government of plenary power was the vision framed by the founders, our
federal government has acquired these traits, and we the people have inherited them
along with the Constitution. Considering constitutional restrictions on the powers of
the federal government that may be enforced by some future Court ruling is fun but
fanciful. The fact is that the wording of the Tenth Amendment, two centuries of judicial
precedent and the inherent structure of our courts system precludes federalism limitations
from receiving due consideration by the Court. This does not mean that principles of
federalism and limited government have no place in public policy debates; the reality is
that these principles are political questions that will only be given due consideration in
the course of our national political processes, and it is therefore the responsibility of
Congress to consider them.

Libertarians say they want a revolution; we all want to change the world. Our
nation moves by Burkean processes, however. Changes wrought by the steady
progression of law will not be undone by miraculous interposition. No periodic
disturbance or passing social movement, no New Deal/Great Society program or its
reverse, and no single Court case, constitutional amendment or revocation thereof will
limit the federal government to what it once was: an assemblage of state and popular
representatives which, along with the Supreme Court and executive departments, could
fit in its entirety into one third of what is now the house of Congress. To return the
Constitution to its primitive form and features, for federalism to reclaim pride of place in

this Court there is no appeal” Brutus, in The Complete Anti-Federalist, 445-446. Also “[t]here seem to be
no well-defined limits of the Judiciary Powers, they seem to be left as a boundless ocean.” A Columbia
Patriot, in The Complete Anti-Federalist, 276.

1825). Gibson’s criticism was of the exercise of judicial review over co-equal branches of Government.

110 Marked by the inheritance of acquired traits. “Do we not therefore perceive that by the action of the
laws of organization . . . nature has in favorable times, places, and climates multiplied her first germs of
animality, given place to developments of their organizations, . . . and increased and diversifyed their
organs? Then . . . aided by much time and by a slow but constant diversity of circumstances, she has
gradually brought about in this respect the state of things which we now observe. How grand is this
consideration, and especially how remote is it from all that is generally thought on this subject!” Text of a
lecture given by Lamarck at the Musée National d'Histoire Naturelle, Paris, May 1803. See Burkhardt, R.

111 Federal law incorporates not only the Constitution and congressional enactments and treaties but as
well the interpretations of their meanings by the United States Supreme Court. Cooper v. Aaron, 358 U.S. 1
(1958).
our constitutional structure, federalists will have to wage and win as many minor battles as advocates of expediency and other competing principles have won since the birth of the Republic. Constitutional points of order are one mechanism federalists can use to bring the fight to Congress, and Congress is a more favorable battleground for federalism than the Courts. If history is any guide, where Congress is deemed to have a power it will use that power. Congress has the power and responsibility to utilize this mechanism; it can and should use it. It has already started.