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The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power

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Abstract

Today, courts and commentators generally agree that early efforts to strictly limit the federal government to only expressly enumerated powers were decisively rebuffed by Chief Justice John Marshall in *McCulloch v. Maryland*. According to Marshall, the fact that the Framers departed from the language of the Articles of Confederation and omitted the term “expressly” suggested that they intended Congress to have a broad array of implied as well as expressly delegated powers. As Supreme Court Justice Joseph Story later wrote, any attempt to read the Tenth Amendment as calling for strict construction of federal power was simply an attempt to insert “expressly” into the text. Today, Marshall’s point regarding the significance of this omitted term is probably one of the least controversial claims about the original understanding of Tenth Amendment as currently exists in legal commentary.

It is also almost certainly wrong. James Madison, Alexander Hamilton, early Supreme Court Justice Samuel Chase and numerous other members of the Founding generation regularly inserted into their description of federal power the very word that Marshall insisted had been intentionally left out. According to these Founders, Congress had only *expressly* delegated power. Upon investigation, it turns out that this rephrasing of the Tenth Amendment actually reflects the original understanding of the text and its underlying principle. Completely missed by generations of Tenth Amendment scholars, the addition of the phrase “or to the people” to the Tenth Amendment ensured that the Clause would be read as a declaration of popular sovereignty. According to this theory of government, the sovereign people were presumed to retain all powers not expressly delegated away. Repeatedly stressed by advocates of the Constitution as representing the proper construction of federal power, the principle of “expressly delegated powers” meant that Congress could utilize no other means except those necessarily or clearly incident to its enumerated responsibilities. Consistently read in combination with the Ninth Amendment’s declaration of the retained rights of the people, the Tenth Amendment was broadly understand to establish a rule of strict construction of federal power - the very interpretive principle rejected by John Marshall in *McCulloch v. Maryland*.

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I. Introduction

Courts and the legal academy both generally agree that early efforts to limit the federal government to only “expressly” delegated powers were decisively rebuffed by Chief Justice John Marshall in *McCulloch v. Maryland*. In *McCulloch*, the state of Maryland argued that because chartering a bank was not within any of Congress’ expressly enumerated powers, the matter was therefore left to state control under the Tenth Amendment. In response, Chief Justice Marshall argued that the very language of the Tenth Amendment refuted Maryland’s claim:

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving 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 on a fair construction of the whole instrument.

According to Marshall, the fact that the framers of the Tenth Amendment departed from the language of the Articles of Confederation and omitted the term “expressly” suggested that they intended for Congress to have significant implied as well as expressly delegated powers. As Marshall’s colleague Justice Joseph Story wrote in his famous *Commentaries on the Constitution*, all attempts to read the Tenth Amendment as calling for a strict construction “are neither more nor less, than attempts to foist into the text the word "expressly."”

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2 According to Maryland counsel, Walter Jones, “[the Constitution] is a compact between the states, and all powers which are not expressly relinquished by it, are reserved to the states.” *McCulloch*, 17 U. S. at 363.

3 *Id.* at 406.


5 Story, 3 Commentaries on the Constitution, *supra* note ___ at 754.
Marshall’s opinion in *McCulloch v. Maryland* is one of the most famous in the history of the United States Supreme Court. Contemporary scholars frequently cite Marshall’s argument regarding the omitted word “expressly” in support of broad interpretations of federal power. Even those Supreme Court Justices most committed to reinvigorating federalist limits on congressional authority appear to accept the legitimacy of Marshall’s “omitted text” analysis of the Tenth Amendment. In fact, Marshall’s point in *McCulloch* about the missing word “expressly” is probably one of the least controversial claims about the original understanding of Tenth Amendment.

It is also almost certainly wrong. Even before the addition of the Bill of Rights, advocates of the new Constitution insisted that Congress had only *expressly* enumerated power. According to James Madison, the addition of the Ninth and Tenth Amendments merely confirmed the preexisting principle of expressly delegated power. During the early decades of the Constitution, judges and commentators regularly inserted into their description of the Tenth Amendment the very word John Marshall insisted had been intentionally left out. These statements take place during and immediately after ratification and are voiced by a broad range of figures directly involved in the effort to ratify the Constitution.

The most vocal proponents of this view were Federalist supporters of the Constitution. For example, throughout the ratification debates Federalist proponents of the Constitution insisted that Congress had only expressly delegated power. In the New York Ratifying Convention, Alexander Hamilton declared that “whatever is not

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6 In addition to the sources cited in note __, see Albert J. Beveridge, 4 The Life of John Marshall 282 (1919) (“if Marshall’s “fame rested solely on this one effort, it would be secure.”).


expressly given to the federal head, is reserved to the members.” \(^9\) In the South Carolina debates, Federalist Charles Pinckney insisted that “no powers could be executed or assumed [by the federal government], but such as were expressly delegated.” \(^10\) In a speech delivered to the House of Representatives while the Bill of Rights remained pending in the states, James Madison reminded the assembly that the proponents of the Constitution had assured the states that “the general government could not exceed the expressly delegated powers.” \(^11\) Writing shortly after the adoption of the Bill of Rights, Madison again declared that, “[w]hen the people have formed a Constitution, they retain those rights which they have not expressly delegated.” \(^12\) According to Representative John Page, a member of the first Congress that drafted and debated the Bill of Rights, the combined effect of the Ninth and Tenth Amendments rendered the Tenth as if it had in fact included the term “expressly.” \(^13\) Finally, in one of the most famous decisions of the Supreme Court’s first decade, Justice Samuel Chase declared that “the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States.” \(^14\) (emphasis supplied by Justice Chase). These are just a few examples that can easily be found in the historical record. There are many others. They arise in every major period of American constitutional law, from the Founding, \(^15\) to the Reconstruction era, \(^16\) to the \textit{Lochner} era, \(^17\) and right up to the modern Supreme Court. \(^18\)

We are confronted then with a puzzle. Despite Chief Justice Marshall’s seemingly unanswerable argument regarding the omission of the term “expressly” from the Tenth Amendment, there exists a long-standing tradition, from the Founding to the modern Supreme Court, whereby the principle underlying the Tenth Amendment is presented as containing the very word its framers rejected.


\(^10\) Charles Pinckney, Speech Before the South Carolina House of Representatives (Jan. 16, 1788), reported in The Pennsylvania Packet and Daily Advertiser, page 2 (February 21, 1788). See also, 2 The Founders’ Constitution 8 (Philip B. Kurland and Ralph Lerner, eds.) (1987) [hereafter “Founders’ Constitution”].


\(^12\) 4 Annals of Cong. 934 (Nov. 27, 1794).

\(^13\) John Page, Address to the freeholders of Gloucester County, at their election of a member of Congress, to represent their district, and of their delegates, and a senator, to represent them in the General Assembly of the Commonwealth of Virginia 27-28 (April 24, 1799) (“I say considering these things, how could it be possible to suppose, that these two amendments [the Ninth and Tenth] taken together, were not sufficient to justify every citizen in saying, that 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, as fully and completely; as if the word expressly had been inserted?”).


\(^15\) See \textit{infra} note ___ through ___ and accompanying text.

\(^16\) See \textit{infra} note ___ and accompanying text.

\(^17\) See \textit{infra} note ___ and accompanying text.

\(^18\) See \textit{infra} note ___ and accompanying text. See also Griswold v. Connecticut, 381 U.S. 479, 490 n.5 (1963) (Goldberg, J. concurring) (“The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.”).
This article contends that this tradition, and not Marshall’s argument in *McCulloch*, most accurately reflects the original understanding of federal power and the Tenth Amendment. In addition to a remarkably copious historical record, support for this position can be found two significant pieces of historical evidence that until now have gone completely unnoticed. The first is a major speech by James Madison in which he declared that the Bill of Rights, including the Tenth Amendment, delivered on a promise to the state conventions that the federal government would have only expressly delegated power. Although the speech is well known, Madison’s declaration is not, for it is reported in a version of Madison’s speech consistently passed over by historians.19 Secondly, although the framers of the Tenth Amendment rejected the term “expressly,” they added the phrase “reserved to the states respectively or to the people”—a declaration of non-delegated sovereign power. At the time, the concept of popular sovereignty was understood to embrace the attendant principle that all power delegated away by the people would be strictly construed. This explains why the phrase “or to the people” was suggested by the same man who wanted to add the term “expressly”—a fact rather remarkably omitted from all prior accounts of the Tenth Amendment. Adding a declaration of the retained sovereign powers of the people in the several states by definition limited the federal government to only expressly delegated powers. Properly understood, “expressly delegated power” included the power to adopt those means incident to advancing the expressly enumerated end, but required these implied means to be clearly or directly related to the express grant of power. It required, in other words, that delegated power be strictly construed.

In addition to presenting newly uncovered historical evidence regarding the original meaning of the Tenth Amendment, this article challenges a number of commonly held assumptions regarding the early history of the Constitution. In particular, it establishes that it was the advocates of the proposed Constitution who consistently declared that federal power would be narrowly construed. This runs counter to the frequent narrative which portrays strict constructionists as antifederalist dissenters and their descendents.20 It also suggests that, despite conventional wisdom which suggests that the Constitution contains no rules regarding the proper method of interpretation, those who debated and ratified the document believed the text did in fact contain both express and implied rules of construction, particularly in regard to delegated federal power. Finally, this account calls into question the generally unchallenged reasoning of John Marshall’s opinion in *McCulloch v. Maryland*. It appears that the original meaning of the omitted term “expressly” is quite different than Chief Justice Marshall would have us believe.

Following a brief introduction to the methodology employed in this article, Part II explores the historical background to the framing of the Tenth Amendment and the

19 See infra note __ and accompanying text.
20 See Calvin E. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution 175 (2005); Saul Cornell, The Other Founders, Antifederalism and the Dissenting Tradition in America, 1788-1828 (1999); [others ].
Bill of Rights. Reacting against the constricted scope of congressional power under the Articles of Confederation, the members of the Philadelphia Convention presented a Constitution with an expansive degree of federal authority, including the power to enact all laws necessary and proper to advance enumerated responsibilities. When the proposed Constitution was submitted to the states, however, concerns immediately arose that the Constitution delegated unchecked authority into the hands of the federal government and imperiled the independent and sovereign existence of the people in the several states. In response, advocates of the Constitution assured the ratifiers in the state conventions that Congress would have only expressly enumerated power. This was not a denial of implied federal power, but an assurance that those implied powers would be limited to those necessarily incident to the express grant of authority. Strict construction of delegated power was an inherent aspect of popular sovereignty, a political theory which assumed that power delegated by a sovereign should be narrowly construed.

Part III focuses on the framing and original understanding of the Tenth Amendment. Along with their notice of ratification, most of the state conventions either proposed amendments which would restrict the new Congress to expressly enumerated power or submitted “declarations” indicating their understanding that this principle already informed the Constitution. Delivering on a promise made to the Virginia Convention, James Madison proposed a Bill of Rights, including early drafts of the Ninth and Tenth Amendments. Unlike Article II of the Articles of Confederation, Madison’s proposed Tenth Amendment omitted the term “expressly” and he successfully turned aside efforts to add that term to the final language of the Tenth. Although Madison’s speeches and letters indicate that although he feared adding the term “expressly” might erroneously imply that Congress had no implied powers whatsoever, he nevertheless agreed with the idea that the Constitution granted only “expressly delegated” (and thus narrowly construed) authority. Madison thus joined the majority of Congress in voting to add the language of popular sovereignty to both the Ninth and Tenth Amendments, thus ensuring that federal power would be understood as having been delegated to the government by the people, thereby calling for a limited construction of the grant.

Part IV explores the post-adoption understanding of the Tenth and the emerging struggle between nationalists like Alexander Hamilton and John Marshall and men like James Madison and St. George Tucker who insisted on standing by the promises made to the state ratifying conventions. The divide emerged even before the adoption of the Bill of Rights with the debate over the first Bank of the United States. Taking a far broader view of federal power than he had during the ratification debates, Hamilton now argued that the Bank fell within the necessary and proper powers of Congress. Madison, on the other hand, insisted that the Bank violated the principle of expressly delegated power—a principle properly relied upon by the ratifiers in the state conventions. Before the end of first decade of the Constitution, the struggle over the proper interpretation of federal power reached a climax in the controversy surrounding the Alien and Sedition Acts. Relying on arguments startlingly similar to that Marshall would rely upon in *McCulloch v. Maryland*, defenders of the Sedition Act pointed to the omission of the term “expressly” from the Tenth Amendment as evidence of broadly delegated federal power. In response, men from the Founding generation like John Page and St. George Tucker insisted that the adoption of the Ninth and Tenth Amendment established the principle of expressly delegated power, despite the omission of the word. Although the
Federalists’ nationalist approach fell out of favor with the dramatic victory of the Republicans in the election of 1800, Marshall revived the same theory two decades later in decisions like *McCulloch* and *Gibbons v. Ogden*. Marshall’s broad interpretation of federal power (and narrow view of the Tenth) faded upon his retirement from the Court, only to be restored at the time of the New Deal.

The article concludes with an analysis of James Madison’s “middle way.” Rejecting both the radical states’ rights position and the consolidating nationalist position of men like Marshall and Hamilton, Madison advocated a limited construction of federal power—one that he believed had been promised to the parties that ratified the Constitution. Even taking into consideration the adoption of the Fourteenth Amendment, an originalist reading of the Tenth Amendment which tracks Madison’s reading of the Clause would place the contemporary Court’s federalism jurisprudence on firmer ground, both in terms of constitutional text and historical understanding.

II. The Historical Background of the Tenth Amendment

1. Methodology

This article employs the interpretive methodology of originalism. The goal is to identify to the extent possible the likely original meaning of the Tenth Amendment. Unlike earlier iterations of originalism which sought the original intent of the framers, most originalists today seek the original understanding of those who debated and ratified the constitutional text. Accordingly, although evidence of the private intent of the framers is relevant to understanding the likely public meaning of the text, the focus is on determining the likely meaning of the clause as it was received by its ratifiers—those with the sovereign authority to establish the text as fundamental law.21

This is not a new idea. The man primarily responsible for the Constitution and the Bill of Rights, James Madison, insisted that the document be interpreted according to the understanding of its ratifiers. According to Madison:

> Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in the expounding of the Constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument,

[21] Although all contemporary originalists seek to identify the original understanding of the ratifiers, the effort is particularly important for popular sovereignty-based originalism, a normative theory of constitutional interpretation which maintains that we ought to follow the meaning of the text as it was understood by the people who added it to the Constitution. See Keith E. Whittington, *Constitutional Interpretation, Textual Meaning and Original Intent* *supra* note __. See also Kurt T. Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 Va. L. Rev. 101 (2007).
beyond the face of the instrument, we must look for it not in
the general convention, which proposed, but in the state
conventions, which accepted and ratified the constitution.\textsuperscript{22}

Identifying the original meaning does not necessarily establish contemporary
meaning. Not only might the original scope of the amendment have been
significantly affected by later amendments, any one of a number of normative
theories maintain that original understanding need not (or ought not) be
determinative for contemporary interpretations of the Constitution. Most theories of
contemporary constitutional interpretation, however, consider original understanding
to be at least relevant to the modern understanding of the Constitution.\textsuperscript{23}

Finally, readers should be aware that the available historical record regarding the
original Bill of Rights, particularly in regard to the Ninth and Tenth Amendments has
dramatically increased over the past few years. Much of this evidence calls into
question a number of long-standing assumptions regarding the role of federalism in
the original drafting and ratification of the Constitution and the Bill of Rights.\textsuperscript{24} This
article builds upon and extends this newly expanded historical record.

2. \textit{The Traditional Story}

Contemporary accounts of the Tenth Amendment generally focus on the tug-of-war
between the Anti-federalists who wanted to restrict the scope of federal power and
the Federalists who wanted to avoid repeating the problems with the Articles of

\textsuperscript{22} James Madison, Speech on the Jay Treaty (April 6, 1796), \textit{in} Writings, \textit{supra} note ___ at
574-75.

\textsuperscript{23} Once associated with the political goals of the right, the originalist enterprise has come to
be embraced by a wide spectrum of constitutional theorists. Some of the most influential
liberal constitutional works of the 1980s and 1990s employed sophisticated originalist
analysis. See Bruce A. Ackerman, \textit{We the People} (I & II), Akhil Reed Amar, \textit{The Bill of
Rights}. Recent originalist work by libertarian, liberal and federalist scholars have all shed
important light on the original understanding of the Constitution. See Randy Barnett,
\textit{Restoring the Lost Constitution: The Presumption of Liberty} (2003); Lawrence Kramer, \textit{The
People Themselves: Popular Constitutionalism and Judicial Review} (2005); Jack M. Balkin,

\textsuperscript{24} In a series of recent articles, I have presented a significant body of previously unknown or
unrecognized evidence regarding the original understanding and traditional application of the
Ninth and tenth Amendments. See, e.g., Kurt T. Lash, \textit{The Lost Original Meaning of the
Ninth Amendment}, 83 Tex. L. Rev. 331 (2004); Kurt T. Lash, \textit{The Lost Jurisprudence of the
Ninth Amendment}, 83 Tex. L. Review 597 (2005); Kurt T. Lash, \textit{A Textual-Historical Theory
of the Ninth Amendment}, 60 Stan. L. Rev. ___ (2008)(forthcoming); Kurt T. Lash, Federalism,
For a counter-reading of some of this evidence, see Randy E. Barnett, Kurt Lash’s
Majoritarian Difficulty, 60 Stan. L. Rev. ___ (2008)(forthcoming); Randy E.
Confederation. Under Article II of the Articles, the states retained all power jurisdiction and rights not expressly delegated to the federal government. The Constitution proposed by the Philadelphia Convention, however, had no such reservation clause. The omission raised immediate concerns among both the enemies and the tentative friends of the Constitution. Anti-federalists opposed the very idea of a strong centralized government. But even those otherwise disposed to be in favor of a new federal government nevertheless balked at the lack of any provision explicitly limiting the scope of its power.

In response, Federalists insisted that Congress could never claim any powers beyond those listed in the Constitution. Adding particular restrictions was therefore unnecessary. As far as the old Article II was concerned, Federalists pointed out that this provision had placed the national government in the untenable position of either doing nothing, or appearing to intentionally flout the requirement that all laws find express authorization in the Articles of Confederation. As James Madison argued in Federalist No. 44:

Had the convention [followed the] method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the

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26 Articles of Confederation, Art. II (“Each state retains . . . every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”). Article II had not completely hamstrung the government. Congress had managed, for example, to find the authority to charter a national bank under the Articles of Confederation, despite the lack of a text expressly granting such authority. See Killenbeck, *McCulloch v. Maryland*, supra note __ at 11.

27 See, e.g., Essays of Brutus I, N.Y.J., Oct. 18, 1787, reprinted in 2 The Complete Anti-Federalist 367 (Herbert J. Storing ed., 1981) (arguing that the proposed central government would exercise its commerce power “as entirely to annihilate all the state governments, and reduce this country to one single government”); Essays of an Old Whig VI, Independent Gazetter, reprinted in 3 The Complete Anti-Federalist, this note, at 43 (arguing that granting Congress the power to tax would “annihilate the individual states”).

28 See *infra* note __ and accompanying text (discussing the concerns of Edmund Randolph).

29 Not only was a Bill unnecessary given the doctrine of enumerated powers, adding a list of enumerated rights, Federalists argued, might raise a dangerous presumption of otherwise unlimited federal power. See Federalist No. 84 (Hamilton) in the Federalist Papers 518 (Clinton Rossiter ed. 1961) (“I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. . . .For why declare that things shall not be done which there is no power to do?”). See also, remarks of James Wilson, Pennsylvania Convention (Oct. 28, 1787), in *The Complete Bill of Rights*, supra note __ at 655.
alternative of construing the term “expressly” with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.\(^{30}\)

As Alexander Hamilton explained, if the framers of the Constitution had added a provision like Article II, then Congress would have been “reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution.”\(^{31}\)

Even if Madison and Hamilton were correct about the need to avoid repeating the language of Article II, the fact remained that the Constitution as originally proposed lacked any provision expressly limiting the scope of federal power—an omission especially disconcerting for those who also questioned the omission of a Bill of Rights. In order to ensure ratification and head off a second constitutional convention, Madison and the Federalists promised that, should the proposed Constitution be ratified, adding a Bill of Rights would be one of the first tasks of the new Congress.\(^{32}\) The promise proved sufficient to garner the requisite votes for ratification and Madison kept his word by submitting a list of proposed amendments to the new House of Representatives. One of these was a draft of what would become our Tenth Amendment—a provision clearly mirroring Article II of the Articles of Confederation, though lacking the restrictive term "expressly" in describing the powers delegated to Congress:

“The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the states respectively.”\(^{33}\)

When the House debated the proper drafting of the Tenth Amendment, some members attempted to restore the language of Article II. In an exchange widely cited in support of John Marshall’s reading of the Tenth Amendment, James Madison turns aside Thomas Tucker’s attempt to add the term “expressly” to the Amendment:

Mr. Tucker proposed to amend the proposition, by prefixing to it "all powers being derived from the people." He thought this a better place to make this assertion than the introductory clause of the Constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word "expressly," so as to read "the powers not expressly delegated by this Constitution."

Mr. Madison objected to this amendment, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the


\(^{31}\) Federalist No. 21 (Hamilton), supra note ___ at 139.


\(^{33}\) 1 Annals of Congress 761 (August 18, 1789).
Constitution descended to recount every minutia. He remembered the word "expressly" had been moved in the convention of Virginia, by the opponents to the ratification, and, after full and fair discussion, was given up by them, and the system allowed to retain its present form. . . .

Mr. Tucker did not view the word "expressly" in the same light with the gentleman who opposed him; he thought every power to be expressly given that could be clearly comprehended within any accurate definition of the general power.

Mr. Tucker's motion being negatived, Mr. Carroll proposed to add to the end of the proposition, "or to the people;" this was agreed to.34

In the end, the House on two separate occasions rejected an attempt to add the restrictive term “expressly” to the Tenth Amendment.35 Whatever one makes of this history, one cannot say the omission was inadvertent. But what can one make of it? Despite such a clear and considered rejection, we know that there are numerous examples of Founders, including Hamilton and Madison, embracing the very term they so vigorously fought to exclude from the Constitution. Getting a handle on this mystery requires a closer look at both the history of Article II of the Articles of Confederation and the debates surrounding the ratification of the Constitution.36

34 See Annals of Congress, House of Representatives, 1st Cong. 1st Sess. at 790 (August 18, 1789). On August 21, there was a second unsuccessful attempt to restore the term “expressly”:

The ninth proposition Mr. Gerry proposed to amend by inserting the word “expressly,” so as to read "the powers not expressly delegated by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." As he thought this an amendment of great importance, he requested the yeas and nays might be taken. He was supported in this by one-fifth of the members present; whereupon they were taken, and were as follows:

Yeas.--Messrs. Burke, Coles, Floyd, Gerry, Grout, Hathorn, Jackson, Livermore, Page, Parker, Partridge, Van Rensselaer, Smith, (of South Carolina,) Stone, Sumter, Thatcher, and Tucker.--17.


Id. at 797.

35 The additional attempt was made on August 21. See id.

36 An easy, if cynical, explanation would be that the advocates of the Constitution engaged in dissembling. The historical record, however, reveals how these seemingly conflicting statements can be reconciled. See infra. Even if one accepts the dissembling explanation, however, the ratifiers were entitled to treat Federalist explanations of the Constitution as made in good faith. For an example of the “dissembling” reading of the statements made by the Federalists during the ratification debates, see Calvin Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution (2005).
3. *Article II of the Articles of Confederation*

After formally announcing the break with England, the newly “free and independent States” ultimately organized themselves into loosely formed confederacy under the Articles of Confederation. The original draft of what would become Article II contained a general reservation of non-delegated power to the states:

> Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation.

Thomas Burke of North Carolina objected that this proposed language insufficiently protected the sovereign states. As he explained in a letter to North Carolina Governor Richard Caswell:

> [The original draft of Article II] expressed only a reservation of the power of regulating internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the future Congress or General Council to explain away every right belonging to the States, and to make their own power as unlimited as they please. I proposed, therefore, an amendment, which held up the principle, that all sovereign Power was in the States separately, and that particular acts of it, which should be expressly enumerated, would be exercised in conjunction, and not otherwise; but that in all things else each State would Exercise all the rights and powers of sovereignty, uncontrolled. . . . in the End however the question was carried for my proposition, Eleven ayes, one no, and one divided.

Burke sought to reverse the presumption of the originally proposed language from implying that “all power not expressly retained is granted,” to “all power not expressly granted is retained.” As amended per Burke’s suggestion, here is the final version of Article II:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

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37 Declaration of Independence (1776).
38 See The Articles of Confederation and Perpetual Union, art. II, reprinted in The Anti-federalist Papers and the Constitutional Convention Debates 357 (Ralph Ketchum ed., 1986). Although the Articles were drafted and adopted by the Second Continental Congress in 1777, there were not formally ratified until 1781.
39 See Journal of the Continental Congress, July 12, 1776 (Avalon Project, July 12, 1776).
40 From his Letter of April 29th, 1777 to Gov. Richard Caswell (Letters of Delegates to Congress: Volume 6 January 1, 1777 - April 30, 1777; Thomas Burke to Richard Caswell; Wood at 359).
41 Art. II, Articles of Confederation and Perpetual Union (1777).
Article II’s demand that all federal acts have express authorization in the Articles could be construed in different ways. For example, it could mean that federal acts needed to be expressly authorized or clearly inferable from an express authorization. A narrower construction of the text, however, would seem to deny Congress the authority to take any action not specifically mentioned in the text of the Articles. For example, opponents of the Bank of North America relied upon a strict reading of Article II in arguing that Congress had exceeded its “expressly delegated powers.”\textsuperscript{42} As Alexander Hamilton complained in the Federalist Papers, a strict reading of Article II forced Congress to choose between utter immobility or blatant disregard of an express restriction on the delegated powers of Congress.\textsuperscript{43} Not surprisingly, when it came time to draft a new constitution, the delegates of the Philadelphia Convention declined to add anything like the problematic Article II.

The omission of a provision like Article II, however, left the proposed Constitution without any express limitation on the construction of federal authority. Unlike most state constitutions, the federal Constitution did not contain a Bill of Rights. Instead, provisions like the Necessary and Proper Clause appeared to affirmatively authorize expansive interpretations of federal power.\textsuperscript{44} According to the Anti-federalist writer Centinel, “the omission of such a declaration [as Article II] now, when such great devolutions of power are proposed, manifests the design of reducing the several States to shadows.”\textsuperscript{45} Anti-federalist broadsides repeatedly raised concerns about unlimited federal power and the potential “consolidation” of the states.\textsuperscript{46}

\textsuperscript{42} For a defense of Congress’ power to create the Bank of North America, despite the restrictions of the Articles of Confederation, see James Wilson, Considerations on the Bank of North America, \textit{in} 2 The Works of James Wilson 824-40 (R. McClosky ed. 1967).

\textsuperscript{43} According to Hamilton in Federalist No. 21:

\begin{quote}
The next most palpable defect of the subsisting Confederation, is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction, in the face of that part of the second article, by which it is declared, "that each State shall retain every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled."
\end{quote}

\textsuperscript{44} See The Federalist No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961)(referring to the Necessary and Proper Clause as “the sweeping clause”).


\textsuperscript{46} According to the Anti-federalist writer Brutus:
4. The Federalist Response

The widespread criticism of the failure to include specific limits on federal power placed the Federalists on the defensive, having to explain why the proposed Constitution did not pose the danger insisted upon by its opponents. The defense of the proposed Constitution took various forms, but a theme running throughout the Federalists’ apologies was that there was no need to add a clause like Article II of the Articles of Confederation: the Federal Government would have no more than expressly delegated powers. According to Charles Pinckney in a speech defending the proposed Constitution before the South Carolina House of Representatives in January 1788,

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

In Massachusetts, newspapers published Pinckney’s “Observations on the new federal Constitution,” in which he explained:

The powers vested in the federal government are particularly defined, so that each state still retains its sovereignty in what concerns its own internal government, and a right to exercise every

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. A power to make all laws, which shall be necessary and proper, for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and definite [indefinite?], and may, for ought I know, be exercised in a such manner as entirely to abolish the state legislatures.


power of a sovereign state, not expressly delegated to the government of the United States.”

In the same Massachusetts newspaper, the editors published an essay rejecting Anti-federalist concerns about unlimited power. According to the editorial, “[t]he constitution defines the powers of Congress; and every power not expressly delegated to that body, remains in the several state legislatures.” In New Jersey, the local newspaper published an essay defending the proposed Constitution and declaring that “[I]n America (thanks to the interposing providence of God!) the people hold all power, not by them expressly delegated to individuals, for the good of the whole.” In Virginia, Alexander White published To the Citizens of Virginia in which he declared that “should Congress attempt to exercise any powers which are not expressly delegated to them, their acts would be considered as void, and disregarded.”

All of these declarations that Congress would have only expressly delegated powers came from advocates of the proposed Constitution. Despite conventional wisdom, it was not the ultimately unsuccessful Anti-federalists who originally insisted on strict construction of expressly delegated federal power. Narrow interpretation of federal power emerged as a promise by those most interested in ratifying the Constitution.

5. The State Conventions

In the state ratifying conventions, Federalists repeatedly insisted that the federal government would have only expressly delegated powers. In the North Carolina Convention, Archibald Maclaine defended the decision to omit a Bill of Rights on the ground that “the powers of Congress are expressly defined, and the very definition of them is as valid and efficacious a check, as a bill of rights could be, without the dangerous implication of a bill of rights. The powers of Congress are limited and enumerated . . . It is as plain a thing as possibly can be, that Congress can have no power, but what we expressly give them.” The President of the Convention, Governor Samuel Johnston, agreed and insisted that “[t]he Congress cannot assume any other powers than those expressly given them, without a palpable violation of the Constitution.”

Sounding a theme that would be repeated throughout the state conventions, former member of the Philadelphia Convention and future Supreme Court Justice James

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48 Salem Mercury (June 30, 1789) (“Observations on the new federal Constitution and the alterations that have been proposed as amendments”).
49 Salem Mercury (January 15, 1788).
50 “A Correspondent”, in the New Jersey Journal (December 19, 1787).
52 For a discussion of the Federalists’ use of “expressly delegated powers” in support of the proposed Constitution, see Wood, The Creation of the American Republic, supra note __ at 539-43. As Wood illustrates, the concept of expressly delegated power was inextricably linked to the emerging concept of popular sovereignty. Id.
53 4 Elliot’s Debates, supra note __ at 140-1.
54 Id. at 142.
Iredell, stressed the link between the people’s retained sovereignty and expressly delegated power:

Of what use therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give; and consequently retain all they do not? It is a declaration of particular powers by the people to their representatives for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised, but what is expressly given. Did any man ever hear before, that at the end of a power of attorney, it was said the attorney should not exercise more power than was there given him.\[55\]

Although in the Federalist Papers Alexander Hamilton had stressed the need to abandon Article II, in his arguments before the New York Convention Hamilton nevertheless assured the Convention that “whatever is not expressly given to the Federal Head, is reserved to the members. The truth of this principle must strike every intelligent mind.”\[56\] According to Hamilton, the sovereign people of the states “have already delegated their sovereignty and their powers to their several Governments; and these cannot be recalled and given to another, without an express Act.”\[57\] Hamilton’s statement illustrates the link between popular sovereignty and the narrow construction of expressly delegated power—a link that ultimately would inform both the Ninth and Tenth Amendments.

6. **Sovereignty and the Construction of Delegated Power**

When the people have formed a Constitution, they retain those rights which they have not expressly delegated.\[58\]

James Madison

Although far less important in constitutional argument today, at the time of the Founding (and for many decades afterwards) the question of delegated sovereignty was of critical importance in determining the nature and extent of federal power.\[59\] The concept of delegated sovereign power was not a new idea in 1787; the subject was as old as international law itself. It was a matter of historical fact that sovereign entities occasionally delegated away aspects of their sovereign authority in order to

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\[55\] *Id.* at 148. In spite of the Federalists’ best efforts, a majority of the Convention remained unconvinced and voted against the proposed Constitution 184 to 84. *Id.* at 250. North Carolina ultimately ratified only after Congress drafted and circulated for ratification a proposed Bill of Rights.


\[57\] *Id.* at 78.

\[58\] 4 annals of Cong. at 934, (Nov. 27, 1794).

\[59\] Contemporary debates regarding the proper conception of state sovereignty play a role in the Court’s Eleventh Amendment jurisprudence and in the so-called “commandeering” cases limiting the power of the federal government to force states to enact or enforce federal policy. See New York v. United States, 488 U.S. 1041 (1992); Printz v. United States, 521 U.S. 898 (1997). See also U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (various opinions considering the nature of state sovereignty at the time of the founding).
gain the benefits of a treaty or compact between independent nations. In a treaty between sovereign authorities, however, the sovereign was presumed to have delegated away only those powers expressly enumerated in the treaty—and the delegation was to be strictly construed.

At the time of the Founding, this theory of strictly construed delegated power had been recently articulated by one of the most influential legal theorists of that generation. In 1752, Emmerich de Vattel published his *Le Droit des Gens* (“The Law of Nations”). Here, Vattel explained that because sovereigns are presumed to have retained all sovereign powers not expressly delegated away, delegations of power were to be strictly construed. The Founding generation was deeply influenced by Vattel’s work and his treatise would continue to be well-cited in legal scholarship and judicial opinions for the next one hundred years. In the first constitutional treatise, St. George Tucker’s 1803 *View of the Constitution*, Tucker embraced Vattel’s reasoning as analogous to the situation of the several states in the aftermath of the American Revolution. As newly “sovereign and independent” entities, the states retained all power, jurisdiction and rights not “expressly delegated” under the federal Constitution. Although this principle had been expressly declared in Article II of the Articles of Confederation, the idea was simply “a declaration of the law of nations.”

For no free nation can be bound by any law but its own will; and where that will is manifested by any written document, as a convention, league, treaty, compact, or agreement, the nation is bound only according as that will is expressed in the instrument by which it binds itself. And as every nation is bound to preserve itself, or, in other words, its independence; so no interpretation whereby its destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the most express terms, given its consent to such an interpretation.

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61 See *id.* at Book I, Chap. 2 sect. 16 (On the duty of self-preservation); see also *id.* at Book 2, sections 305, 308 (on the need to narrowly construe “odious” delegations of sovereign power).
64 St. George Tucker, 1 Blackstone’s Commentaries, Note E: Of the Unwritten or Common Law of England, and Its Introduction Into, and the Authority Within the United American States 407 (1803).
65 St. George Tucker, 1 Blackstone’s Commentaries, *supra* note __ at 408 (citing Vattel).
66 *Id.* at 423 (citing Vattel).
Citing Vattel’s theory of sovereign power throughout his analysis of the Constitution, St. George Tucker argued that powers delegated away by the people of the several states ought to be strictly construed. Tucker’s work was extremely influential and remained the predominant treatise on the Constitution until well into the nineteenth century.

Vattel wrote in a continental context in which sovereignty was believed to reside in the person of the King, or at most The King-In-Parliament. Political theorists in America, however, easily translated his views of delegated sovereign power into a context in which the people, not the people’s government, were considered the ultimate source of sovereign power. As Gordon Wood describes in his Creation of the American Republic, popular sovereignty gained widespread acceptance in colonial America in the period between the Revolution and the adoption of the Constitution. American popular sovereignty distinguished between the people and their government, with the latter serving as no more than the people’s agents, with no greater power than that delegated to them by the people themselves. Following the Revolution, the people of each state remained an independent sovereign entity. These, then, were the sovereign people(s) who debated and, ultimately, delegated away a portion of their sovereign powers to the new federal government.

Tucker’s work has long been associated with the so-called “compact theory” of the original Constitution—the theory that the Constitution arose out of a compact between the several states, with each retaining the right to secede at will. As such, Tucker’s work tends to be lumped together with later more radical states rights proponents such as Calhoun and the secessionists who constructed their theories in an effort to protect the state-based institution of slavery. St. George Tucker, however, was an abolitionist and he wrote long before the rise of radical states’ rights theorists like Calhoun and the Nullifiers in the 1820s and 30s. Far from representing the emergence of a new and radical view of state autonomy, Tucker’s theory of retained state sovereignty and limited express federal power echoed the very arguments put forward by the advocates of the Constitution in order to secure ratification. This includes those Founders’ most associated with expansive views of

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67 In addition to those cited above, see id. at 151 n.9 (linking the work of Vattel with the Tenth Amendment); id. at 187 (citing Vattel in support of retained state sovereignty). There are many other examples throughout the work.
68 See id. at 154 (“[T]he powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”).
69 According to historian Saul Cornell, Tucker’s Commentaries was "an instant publishing success" and "became the definitive American edition of Blackstone until midcentury." Saul Cornell, The Other Founders, supra note __ at 263.
73 See Declaration of Independence (1776) (“[T]hese United Colonies are, and of Right ought to be Free and Independent States”).
national authority. For example, in his remarks to the New York Ratifying Convention, Alexander Hamilton explained in detail how the sovereign people of the several states retained all aspects of sovereignty not expressly delegated to the federal government:

In the first formation of Government, by the association of individuals, every power of the community is delegated, because the Government is to extend to every possible object; nothing is reserved but the inalienable rights of mankind; but when a number of these societies unite for certain purposes, the rule is different, and from the plainest reason; they have already delegated their sovereignty and their powers to their several Governments; and these cannot be recalled and given to another, without an express Act. I submit to the committee, whether this reasoning is not conclusive.\textsuperscript{75}

In sum, the concept of delegated sovereign power carried with it the principle of strict construction of delegated authority. All power not expressly delegated was assumed to be retained by the sovereign. This idea pre-dated the Constitution and continued to inform constitutional analysis well into the nineteenth century.

7. \textit{The Other Meaning of Expressly Delegated Powers}

In advancing the theory of expressly delegated power, the Federalists were not (and were not understood to be) claiming that Congress would have no implied powers whatsoever. Not only would this be difficult to maintain in the face of the Necessary and Proper Clause, it was a position affirmatively rejected by the advocates of the Constitution.\textsuperscript{76} The theory of express powers was one of limited or \textit{narrow construction} of delegated authority.

For example, in the Virginia Convention Edmund Randolph understood the advocates of the Constitution to be claiming that the Constitution “gives no supplementary power, but only enables them to make laws to execute the delegated powers.” Although this allowed for the exercise of incidental powers, Randolph understood that these powers would be limited to those means that were “necessary for the principle thing.”\textsuperscript{77} According to Roger Sherman, a member of the Philadelphia Convention from Connecticut, “[t]he powers vested in the federal government are clearly defined, so that each state will retain its sovereignty in what concerns its own internal government, and a right to exercise every power of a sovereign state \textit{not particularly delegated} to the government of the United States.”\textsuperscript{78} In New York, Alexander Hamilton had insisted that, due to the ultimate sovereignty of the people of the United State, the federal government had only expressly delegated power.

\textsuperscript{75} New York Ratifying Convention (June 28, 1788) (remarks of Alexander Hamilton), \textit{in} V Papers of Alexander Hamilton, \textit{supra} note __ at 117.
\textsuperscript{76} See Federalist Papers (Madison and Hamilton).
delegated powers and the New York Convention included the following declaration along with their notice of ratification:

“[E]very power jurisdiction and right, which is not by the said constitution clearly delegated to the congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same.”

The Rhode Island Convention appended the same declaration (Congress had only those powers clearly delegated) along with their own notice of ratification. The same Convention also proposed an amendment declaring that “the United States shall guarantee to each state its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Constitution expressly delegated to the United States.”

In sum, in order to counter concerns about unchecked federal power, the advocates of the Constitution maintained that the Congress would have no more than expressly delegated powers. This did not mean that Congress would have no implied powers whatsoever, but that the implied means would be limited to those “clearly implied” or “necessarily incident” to the enumerated power. This rule of strict construction of delegated power flowed from the fundamental principle of popular sovereignty: All powers delegated from a sovereign authority must be strictly or narrowly construed. As Tunis Wortman wrote in his 1800 treatise on the liberty of the press,

[T]he objects of federal jurisdiction are specifically defined. The powers vested in the general Government are such as are expressly and particularly granted by the Constitution, or such that flow in obvious and necessary consequence from the authorities which are thus expressly conferred. Powers claimed by implication should be such as follow from evident and necessary construction, and not in consequence of distant or conjectural interpretation. Much latitude cannot be admitted upon the occasion without endangering public liberty and destroying the symmetry of our political system.

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79 Ratification of the Constitution by the State of New York: July 26, 1788, in II Documentary History of the Constitution 191 (1894). See also 1 Elliot’s Debates, supra note __ at 327.
80 Ratification of the Constitution by the State of Rhode Island: May 29, 1790, in II Documentary History of the Constitution 311 (1894). See also 1 Elliot’s Debates, supra note __ at 334. See also The Address and Reasons of Dissent by the Penn. Minority: [Proposed Amendment]: That the sovereignty, freedom and independency of the several states shall be retained, and every power jurisdiction and right, which is not by this Constitution expressly delegated to the United States in Congress assembled.” The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), reprinted in 2 The Documentary History of the Ratification of the Constitution 624 (Merrill Jensen, ed., 1976).
81 Ratification of the Constitution by the State of Rhode Island, supra note __ at 316. See also, 1 Elliot’s Debates, supra note __ at 336.
82 See Tunis Wortman, A treatise, concerning political enquiry, and the liberty of the press 212 (1800). Wortman goes on to cite the First, Ninth and Tenth Amendments as “relat[ing] to the immediate subject of discussion [the power of the federal government to enact libel laws].” Id. at 220. He also rejects the idea that particular restrictions on power can be
8. A Pre-existent Principle

Federalist assertions that Congress had only expressly delegated power were made throughout the states in every available medium, including newspapers, pamphlets, public speeches, and legislative debate. All of this occurred, moreover, prior to the adoption of the Tenth Amendment. Accordingly, it is not surprising to find evidence that even without the adoption of the Bill of Rights, the proper construction of the original constitution nevertheless included the principle of expressly delegated power. As the Maryland court explained in 1790, a year before the ratification of the Bill of Rights:

Congress has no power but what is expressly delegated to them by the new government. The states retain all power not delegated, and from the exercise of which they are not restrained by the new government.\(^\text{83}\)

Even earlier, in June of 1789, the editors of the New York Packet (which also published the Federalist Papers) published “Observations on the New Federal Constitution, and the Alterations that have been proposed as Amendments.” The editorial, which was published in Massachusetts as well as New York, describes the Constitution as preserving the sovereignty of the states and, accordingly, limiting federal authority to “expressly enumerated powers”:

The powers vested in the federal government are particularly defined, so that each state retains its sovereignty in what concerns its own internal government, and a right to exercise every power of a Sovereign state, not expressly delegated to the government of the United States.\(^\text{84}\)

According to Federalist Robert Goodloe Harper during the 1804 House Impeachment Proceedings against Samuel Chase:

But it must be recollected, Mr. President, that the Constitution is a limited grant of power; and that it is of the essence of such a grant to be construed strictly, and to leave in the grantors all the powers, not expressly, or by necessary implication granted away. In this manner has the constitution always been construed and understood; and although an amendment was made, for the purpose of expressly declaring and asserting this principle, yet that amendment was construed to imply otherwise affirmative powers, and cites the 11\(^\text{th}\) and 12\(^\text{th}\) articles of amendments as declaratory provisions that did not alter previous grants of power.\(^\text{83}\)

Donaldson v. Harvey, 3 H. & McH. 12 (Md.Gen. 1790) (J.T. Chase, J.) (Oct Term 1790). The opinion is by Judge Jeremiah Townley Chase, not to be confused with Judge Samuel Chase who served on the same Maryland court. Judge Chase had voted against the proposed Constitution at the Maryland Convention due to concerns about the impact on state rights. See Charles W. Smith, Jr., Roger B. Taney: Jacksonian Jurist 7 (1936). Although Chase’s antifederalism no doubt influenced his reading of the Constitution, it nevertheless echoed assurances made by Federalists during the ratification debates.\(^\text{84}\)

“From the New York Packet,” in the Salem Mercury (June 30, 1789). The editorial was published in Massachusetts as well as in New York.
always understood by those who adopted it, and was represented by
the eminent character who brought it forward, as a mere declaration
of a principle inherent in the constitution, which it was proper to
make, for the purpose of removing doubts and quieting
apprehensions.85

Harper spoke a decade after the adoption of the Constitution and the Bill of Rights,
and in the aftermath of a grant public debate regarding the proper construction of
federal power.86 His views nevertheless coincide with the original arguments used to
support the ratification of the Constitution. As we shall see, James Madison himself
insisted, even before the addition of the Bill of Rights, that the implied powers of
Congress were to be strictly construed on the grounds that the state conventions had
been promised Congress had only expressly delegated power.87 The restrictions in
the Bill were to be added ex abundanti cautela—for greater caution.88

III. The Framing and Original Understanding of the Tenth Amendment

1. The State Convention Declarations and Proposed Amendments

Despite the Federalists’ repeated assurances that the proposed Constitution granted
only limited or expressly delegated power, many remained unconvinced. Some Anti-
federalists, of course, were unalterably opposed to the Constitution.89 Others,
however, were open to being persuaded in favor the Constitution, provided that
certain safeguards were put in place. In Virginia, although Governor Edmund
Randolph rejected the exaggerated Anti-federalist claim that the Constitution granted
Congress general police powers,90 he nevertheless remained convinced that
provisions like the Necessary and Proper Clause opened the door to dangerous (if
erroneous) interpretations of enumerated federal authority.91 According to Randolph,
the so-called “sweepings clause” was “ambiguous, and that ambiguity may injure the
states. My fear is, that it will, by gradual accessions, gather to a dangerous length.”92
Rather than rejecting the Constitution, however, Randolph suggested that such
ambiguities be resolved either by public declarations or through the addition of
amendments to the Constitution.93

85 Volume II Trial of Samuel Chase [microform] an associate justice of the Supreme Court of the
United States, impeached by the House of Representatives for high crimes and
misdemeanors before the Senate of the United States taken in short-hand, by Samuel H. Smith
and Thomas Lloyd. (page 257) (Early American Imprints, 2nd series, no. 9643 (filmed).
86 See infra note and accompanying text.
87 See infra note ___ and accompanying text.
88 Out of “an abundance of caution.”
89 See Leonard Levy, Origins of the Bill of Rights 42 (discussing the efforts of some Anti-
federalists to “sabotage the Bill of Rights”).
90 X Documentary History, supra note ___ at 1348 (Remarks of Edmund Randolph) (rejecting
the exaggerated claims of the Anti-federalists and declaring “[i]t is not then fairly deducible
that [the federal government] has no power but what is expressly given it”).
91 Id.
92 Id. at 1353.
93 Id. at 1354. See also id. at 1483 (supporting the adoption of a provision declaring the
sovereignty of the people, thus securing the principle that “All rights are therein declared to
Randolph’s demand for express clarification echoed similar demands from a number of state conventions.⁹⁴ Even if the Federalists could be taken at their word that the proposed Constitution granted no more than expressly enumerated powers, declarations making this principle explicit ought to be adopted, if only for “greater caution.”⁹⁵ Of all the proposed amendments, the most common was one calling for an express declaration of the people’s reserved powers and rights. According to Samuel Adams, “a reservation clause is a summary of a bill of rights.”⁹⁶ In the Virginia Convention, Patrick Henry similarly declared, “[a] Bill of Rights may be summed up in a few words. What do they tell us?—That our rights are reserved.”⁹⁷

Not surprisingly, a clause reserving all powers not expressly delegated to the federal government was generally high on the list for those states proposing amendments. Leading Massachusetts’s list, for example, was a provision which “explicitly declared, that all powers not expressly delegated by the aforesaid Constitution, are reserved to the several States, to be by them exercised.”⁹⁸ So too for New Hampshire.⁹⁹ Maryland likewise proposed an amendment declaring “[t]hat Congress shall exercise no power but what is expressly delegated by this constitution.”¹⁰⁰ The Convention then supplied its understanding that such an amendment would accomplish a strict construction of federal power:

By this amendment, the general powers given to Congress by the first and last paragraphs of the 8th sect. of art. I, and the second paragraph of the 6th article, would be in a great measure restrained:

be completely vested in the people, unless expressly given away.”). See generally, infra at note ___ and accompanying text.

⁹⁴ In the end, eight states submitted proposed amendments, all of which included provisions declaring the retained sovereignty of the people and limiting the construction of delegated federal power. See The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins (Neil H. Cogan, ed.) (1997).

⁹⁵ See Virginia’s proposed amendments, infra note __. See also Centinel, No. II., 1 The Maryland Journal and Baltimore Advertiser (Nov. 02, 1787) (“Mr. Wilson tells you, that every right and power not specifically granted to Congress is considered as withheld. How does this appear? Is this principle established by the proper authority? Has the Convention made such a stipulation? By no means.”).

⁹⁶ Samuel Adams, Debates in the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 1, 1788), in VI Doc. Hist. of the Rat. of the Const., supra note ___ at 1395 (“a summary of a bill of rights, which gentlemen are anxious to obtain.”). See also, 2 Elliot’s Debates, supra note 19, at 130, 131.

⁹⁷ Debates in the Virginia Convention (June 16, 1788) (remarks of Mr. Henry), in X Doc. Hist. at 1331.

⁹⁸ VI Documentary History, supra note ___ at 1469. Massachusetts’ proposed amendments were widely published in newspapers throughout the states. See, e.g., The Boston Gazette, and the Country Journal February 04, 1788.; Mass Gazette, February 05, 1788; Cumberland Gazette, February 07, 1788 (Portland Maine). See also VI Documentary History, supra note __, at 1395 (Remarks of Mr. Adams) (“Your Excellency’s first proposition is, “that it be explicitly declared that all powers not expressly delegated to Congress, are reserved to the several states to be by them exercised.” This appears in my mind to be a summary of a bill of rights.”); “Samuel” in The Independent Chronicle (Jan. 10, 1788).

⁹⁹ See 1 Elliot’s Debates, supra note ___ at 326.

¹⁰⁰ See 2 Elliot’s Debates, supra note ___ at 550. Maryland’s proposed amendments also were widely published. See e.g., The Pennsylvania Packet, and Daily Advertiser May 08, 1788.
those dangerous expressions by which the bills of rights, and constitutions of the several states may be repealed by the laws of Congress, in some degree moderated, and the exercise of constructive powers wholly prevented.\footnote{Amendments Proposed by the Maryland Assembly (April 29, 1788), as reported in The Maryland Gazette, and reprinted in The Pennsylvania Packet, and Daily Advertiser, page 2 (May 8, 1788).}

Finally, Pennsylvania’s proposed amendment clearly linked strict construction of federal power to the retained rights of sovereignty:

\begin{quote}
That the sovereignty, freedom and independency of the several states shall be retained, and every power jurisdiction and right which is not by this Constitution expressly delegated to the United States in Congress assembled.”\footnote{II Documentary History, supra note __ at 624.}
\end{quote}

Again, these amendments were not proposals to alter the Constitution’s grants of federal authority. Instead, they reflected a principle which, according to the Federalists, already inhered in the idea of delegated power. This explains why some states like New York and Rhode Island believed a “declaration of understanding” was sufficient. Similarly, the South Carolina Convention declared its understanding of delegated federal power even in the absence of amendments:

\begin{quote}
This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them, and vested in the General Government of the United States.”\footnote{See 1 Elliot’s Debates, supra note __ at 325.}
\end{quote}

Finally, these proposed amendments and declarations did not demand that Congress had no other powers besides those specifically enumerated in the Constitution. By “expressly delegated” powers, the state conventions were taking Federalists on their word; Congress could exercise only those powers clearly or necessarily incident to an expressly enumerated power.

2. The Virginia Ratifying Convention

As had other states, the Virginia Convention proposed an amendment reserving all non-delegated power to the states. Virginia’s proposal, however, left out the word “expressly.”\footnote{The Virginia Convention proposed the addition of two interlocking amendments:}

\begin{quote}
That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government.

That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to
\end{quote}
particular phrase had been interpreted in an unduly restrictive manner under the Articles of Confederation. In the end, efforts to add the term failed, with James Madison adding his vote to those who opposed the addition. Virginia’s rejection of “expressly delegated power” seems significant because Madison helped to draft Virginia’s proposed amendments and he relied on Virginia’s proposal when he produced his own draft of the Tenth Amendment—a draft which also omitted the term “expressly.”

Although the Virginia Convention seems to have intentionally omitted the word “expressly,” before the Virginia Convention adjourned both Randolph and Madison insisted that Congress nevertheless was limited to “expressly delegated power.” In response to Anti-federalist arguments that adding a Bill of Rights would imply otherwise unlimited federal power, Edmund Randolph quoted Virginia’s proposed declaration that “all power comes from the people, and whatever is not granted by them, remains with them.”

“Could you devise any express form of words, by which the rights contained in the bill of rights of Virginia could be better secured or more fully comprehended? . . . All rights are therein declared to be completely vested in the people, unless expressly given away.”

To Randolph, a declaration of retained popular sovereignty by definition limited the powers of government to those expressly enumerated. Soon after Randolph spoke, James Madison rose and declared that “[t]he observations by [Edmund Randolph], on that subject, correspond precisely with my opinion. . . . [E]very thing not granted is reserved.” If Madison’s statement seems ambiguous in regard to expressly delegated power, soon afterwards (before the Bill of Rights were officially ratified), he publicly declared that the state conventions had been promised a government of

Amendments Proposed by the Virginia Convention (June 27, 1788), in X Documentary History, supra note __ at 1553. A separate draft of Virginia’s proposed amendments does include the term “expressly.” See id. at 1548. The “Wythe Committee” draft, reproduced above, does not and this seems more in keeping with the remarks made during the Virginia debates and later by James Madison. See supra note __ and accompanying text.  

105 See X Documentary History, supra note __ at 1485 (“When we see the defects of [the old Article II] are we to repeat it? Are those gentlemen zealous friends to the Union, who profess to be so here, and yet insist on a repetition of measures which have been found destructive to it?”).  

106 X Documentary History, supra note __ at 1501 (“The observations by a gentleman lately up [Edmund Randolph], on that subject, correspond precisely with my opinion. . . . [E]very thing not granted is reserved.”).
only “expressly delegated power.” In yet another public speech delivered only three years later, Madison again declared that not only had the principle of expressly delegated power been promised to the states, the addition of the Ninth and Tenth Amendments enshrined this very principle.

3. Summary of the State Conventions

Almost every state convention submitted along with its notice of ratification a list of declarations or proposed amendments (or both). Among the most common of these were declarations or amendments mirroring the language of Article II and the limited delegation to congress of only express powers. Although the Virginia proposals lacked the term “expressly,” Madison and other federalists insisted that the principle of “expressly delegated power” remained an inherent part of the proposed Constitution.

Historians have tended to dismiss such proposals or declarations as the wishful thinking of the “losers” in the struggle over the Constitution. Having canvassed the assurances of the Federalists in the debates, we can see this is not correct. When those anxious to preserve broad autonomy over local self-government insisted that the constitution granted only expressly enumerated power, they were repeating the assurances of the advocates of the proposed Constitution. This is not wishful thinking: it is reliance.

4. Drafting the Tenth Amendment

Having explored the variable meaning of “expressly delegated powers,” we are now in a position to revisit the House debates over the proper language of what would become the Tenth Amendment. Consider once again the exchange between Madison and Tucker:

Mr. Tucker proposed to amend the proposition, by prefixing to it "all powers being derived from the people." He thought this a better place to make this assertion than the introductory clause of the Constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word "expressly," so as to read "the powers not expressly delegated by this Constitution."

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109 See infra note ___ and accompanying text.
110 See infra note ___ and accompanying text (discussing Madison’s 1791 speech against the Bank of the United States).
111 See e.g., Saul Cornell, The Other Founders, supra note ___ at 239.
112 Some Anti-federalists, of course, went further and insisted that the Constitution included no such limits—but these arguments were meant to derail ratification and force a second convention. The requisite votes for ratification were attained due to the successful argument of the Federalists that no such unlimited power had been granted. In order that this promise not be forgotten, the conventions submitted their declared understanding that the Federalists were telling the truth, or insisted on amendments declaring the same. Even if the Federalists had in fact dissembled in order to gain ratification, the reasonable understanding of the ratifiers, as Madison later explained, controlled the original understanding of the document.
Mr. Madison objected to this amendment, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae. He remembered the word "expressly" had been moved in the convention of Virginia, by the opponents to the ratification, and, after full and fair discussion, was given up by them, and the system allowed to retain its present form. . . .

"Mr. Tucker did not view the word "expressly" in the same light with the gentleman who opposed him; he thought every power to be expressly given that could be clearly comprehended within any accurate definition of the general power."

Mr. Tucker's motion being negatived, Mr. Carroll proposed to add to the end of the proposition, "or to the people;" this was agreed to.

Tenth Amendment scholars who analyze the above colloquy invariably focus on Tucker's failed attempt to add the term “expressly.” Notice, however, that Tucker’s primary purpose was to add a statement of popular sovereignty to the Tenth Amendment. The addition of the term “express” was Tucker’s secondary recommendation. Tucker’s primary goal of adding a statement of retained sovereign power has gone unnoticed in Tenth Amendment scholarship. His success in doing so, however, is critical to understanding the ultimate nature of the Clause and I discuss it in full below.

First, however, notice how the colloquy between Tucker and Madison illustrates how the same term could be understood in different ways. Madison opposed the addition of the term “expressly” due to his belief that the addition might be construed to deny the government even those means “clearly comprehended” by the express grant.

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113 Daniel Carroll of Maryland.
114 See Annals of Congress, House of Representatives, 1st Cong. 1st Sess. at 790 (August 18, 1789). There is a discrepancy here among different reporters. The Annals of Congress reports Carroll making the motion to add “or to the people.” The Gazette of the United States, on the other hand, reports that Elbridge Gerry made the motion and that Carroll opposed it on the grounds that it “tended to create a distinction between the people and their legislatures.” See Gazette of the United States, 22 August 1789, in Creating the Bill of Rights at 193.
115 Calvin Johnson assumes that the addition of the popular sovereignty language to the Tenth Amendment must have come from federalists—Johnson in fact goes so far as to claim that the language amounted to a “slap in the face” to the antifederalists since they believed in states rights and not the rights of the people. See Johnson, Righteous Anger, supra note ___ at 175. The record, of course, expressly shows the opposite is true: the language was first suggested by the same member who sought to add the term “expressly to the Tenth.
116 This reading seems to be supported by the report of the debate in Gazette of the United States in which Roger Sherman of Connecticut supports Madison’s objection on the ground that “all corporations are supposed to possess all the powers incidental to their corporate capacity: It is not in human wisdom to provide for every possible contingency.” Sherman’s final point means that he believed the addition of the term would require the Constitution to expressly “provide for every possible contingency.” Once again, Tucker did not share the same reading of “expressly” for he believed it allowed the government sufficient flexibility to use those implied means necessarily incident to the express delegation of power.
As Madison put it in Federalist No. 44, adding such a term might lead to accusations that Congress had “violat[ed] the Constitution, by exercising powers indispensably necessary and proper, but, at the same time, not expressly granted.” Madison viewed the term as inescapably linked to the language of Article II and its attendant problems. The Virginia convention had rejected the term “expressly” precisely because men like Randolph and Madison believed it would incorporate a term that had hamstrung the earlier Congress.

Tucker, on the other hand, “did not view the word ‘expressly’ in the same light” as Madison. According to Tucker, it was understood that expressly delegated powers allowed for the exercise of all specific powers “clearly comprehended within any accurate definition of the general power.” Adding the term would therefore not preclude the exercise of implied powers—it would, however, control their scope. Tucker did not disagree with Madison that Congress was to have a certain degree of implied powers—indeed his comments show he clearly believed “expressly” delegated powers included those implied means necessarily incident to the grant. For his part, Madison did not oppose a narrow construction of implied congressional means. His worry was that the term might be read to reject all implied means—an unreasonable constraint on the exercise of congressional power. Put another way, there is no evidence that Madison or anyone else in House of Representatives rejected the general idea that Congress had none but expressly delegated powers properly understood.

In fact, before Congress was through drafting the Ninth and Tenth Amendments, the text of both amendments would be altered in a manner that emphasized the need to strictly construe the expressly delegated powers of the sovereign people.

5. Popular Sovereignty and the Tenth Amendment

At the time that Tucker spoke, the House was considering adding a statement of popular sovereignty to the preamble of the Constitution. Tucker objected to this placement on the ground that the preamble was not actually part of the Constitution and therefore not binding upon the government. Instead, Tucker wished to make the declaration a part of the officially binding Bill of Rights. Tucker’s request echoed similar requests by a number of state conventions who had asked for the addition of an express statement of popular sovereignty. Virginia, South Carolina and Rhode Island had each proposed adding a declaration “[t]hat all power is naturally vested in, and consequently derived from, the people; the magistrates therefore, are their trustees and agents, and at all times amenable to them.” Tucker’s idea of combining the language of popular sovereignty with a statement of reserved powers tracked the approach of the New York Convention which had proposed:

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117 The Federalist Papers, No. 44, supra note ___ at 284 (Madison).
118 Madison, Speech Introducing Proposed Amendments to the House of Representatives (June 8, 1789), in Madison: Writings, supra note ___ at 441.
119 See Creating the Bill of Rights, supra note ___ at 128-29.
120 3 Elliot’s Debates, supra note ___ at 657-61.
121 4 Elliot’s Debates, supra note ___ at 242-47.
122 1 Elliot’s Debates, supra note ___ at 334-37.
That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States . . . remains to the people of the several states.  

A declaration of the people’s sovereign power did more than merely remind the government of their source of authority. As the people’s agent, the government could claim no powers but those “clearly” or “expressly” delegated to it. As James Iredell put it “[the Constitution] is a declaration of particular powers by the people to their representatives for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised, but what is expressly given.”

This echoes Edmund Randolph’s assertion that adding a statement declaring the reserved powers of the sovereign people would, by definition, limit the government to expressly delegated powers, for “[a]ll rights are therein declared to be completely vested in the people, unless expressly given.” To Randolph, the link between a declaration of popular sovereignty and a government of expressly delegated powers was of critical importance:

If I did believe, with the honorable gentleman, that all power not expressly retained was given up by the people, I would detest this government. But I never thought so, nor do I now. If, in the ratification, we put words to this purpose, "and that all authority not given is retained by the people, and may be resumed when perverted to their oppression; and that no right can be cancelled, abridged, or restrained, by the Congress, or any officer of the United States,"--I say, if we do this, I conceive that, as this style of ratification would manifest the principles on which Virginia adopted it, we should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein.

Understanding the link between the concept of retained sovereign power and the limited construction of delegated power explains why Thomas Tucker’s primary goal was to add a declaration that all non-delegated powers were reserved to the states or to the people. By definition, delegated sovereign power was to be narrowly construed. Tucker’s secondary proposal, adding the term “expressly,” simply underlined his primary purpose. Although the particular term “expressly” was rejected on the grounds that it too closely followed the crippling language of the Articles of Confederation, the House ultimately voted to add the words “or to the People.”

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123 Id. at 327-31.
124 See proposals by New York and Rhode Island, supra note __ and accompanying text.
125 See proposals by Massachusetts, New Hampshire, Maryland, Pennsylvania, supra note __ and accompanying text.
126 4 Elliot’s Debates supra note __ at 148.
127 X Documentary History, supra note __ at 1483.
128 Id. at 576.
129 Annals of Congress, House of Representatives, 1st Cong. 1st Sess. at 797 (August 18, 1789).
implicit restrictions on federal power became an enforceable part of the Constitution.\footnote{130}

The relationship between the popular sovereignty addition to the Tenth and the issue of expressly delegated power has been completely missed by contemporary Tenth Amendment scholarship. Those scholars who note the addition of the popular sovereignty language to the Tenth Amendment generally view it as a vague reference to individual rights, thus ignoring the fact that it was introduced at the same time and by the by the same man who sought to limit the new government to expressly delegated power.\footnote{131}

Indeed, the final words of the Tenth Amendment may seem vaguely out of place in a clause seemingly devoted to states rights. We read terms like “the people” through the lens of nationalism—a nationalism hard-won through the struggle of a bloody civil war. Today, “the people” is understood to refer to the unified people of the United States of America. When the Tenth Amendment was drafted and adopted, however, the only conventions of “the people” that had ever been held were those involving the people of individual states. It was “the people” of Massachusetts (or Virginia or New York) who held the sovereign power to ratify or reject the proposed Constitution. Thus, the reference to “the people” in the Tenth Amendment was generally understood at the time (and later) as a reference to the people of several states.\footnote{132} All powers not delegated to the federal government, or denied to the states, were reserved to the people of each state—who in turn could delegate that power to the respective state governments if they wished to do so. This is how courts and commentators have read the Tenth Amendment for over two hundred years.\footnote{133}

It did not matter, moreover, whether one viewed the proposed Constitution as creating a single national “people” or as preserving the individual sovereignty of the

\footnote{130} The same principle would be expressed in the Tenth’s sibling, the Ninth Amendment.

\footnote{131} Those few scholars who have focused on the addition of the “or to the people” provision have in fact moved in the precisely opposite direction of that envisioned by Tucker, and attempted to read the clause in tandem with the Ninth as guarding individual natural rights. See David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee, 16 S. Ill. U. L. J. 313, 317 n.13 (1992); Norman G. Redlich, “Are There Certain Rights ... Retained by the People”?, 37 N.Y.U. L. Rev. 787, 806-07 (1962). For a critique of this view see Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, supra note __. See also Thomas B. McAffee, The Federal System as a Bill of Rights: The Original Understanding, Modern Misreadings, 43 Vill. L. Rev. 17 (1998).

\footnote{132} See Kurt T. Lash, The Inescapable Federalism of the Ninth Amendment (A Reply to Randy Barnett) (forthcoming Iowa Law Review 2007). Anti-federalists in Virginia attempted to make hay out of the fact that the addition of “or to the people” might imply the creation of a unified national people, thus obliterating the independent existence of the states. See Entry of Dec. 12, 1789, Journal of the Senate of the Commonwealth of Virginia 64 (Richmond 1828). The exaggerated concern was part of an effort to discredit the proposed Bill of Rights in order to fuel the drive for a second national convention wherein Anti-federalists could restructure the Philadelphia document. See Lash, The Inescapable Federalism of the Ninth Amendment, supra note __ at [35].

“peoples” of the several states (or both, as Madison believed\textsuperscript{134}). A single national people was fully capable of dividing power between a national and local government.\textsuperscript{135} Where the local governments were assumed to have broad unenumerated police powers,\textsuperscript{136} the federal government was understood as having only specific delegated powers. All other powers were reserved to the people of the several states.\textsuperscript{137} Thus, no matter how one viewed the principle of popular sovereignty: as the will of a single people or the will of the many people(s) of the United States, power delegated to the national government was to be strictly construed, as were all delegations of power from a sovereign to the sovereign’s agents. As Madison put it, “[w]hen the people have formed a Constitution, they retain those rights which they have not expressly delegated.”\textsuperscript{138} Finally, notice that both the Ninth and Tenth Amendments end with a reference to “the people.” As I explain in detail elsewhere,\textsuperscript{139} these two amendments were read in tandem as calling for a strict construction of federal power. This is not surprising once we understand the nature of power delegated by the people. Standing behind all such delegations are the sovereign people who assumed to have retained all power and rights not expressly delegated away.

IV. Post-Submission Commentary

The first decade of the Constitution witnessed the emergence of two competing views of federal power. The first, represented by Founders like James Madison, Thomas Jefferson, stressed the commitment made to the state ratifying conventions that federal power would be strictly construed. The second, most associated with Alexander Hamilton, James Wilson and the Federalist Party under President John Adams, pressed for a broad reading of Congress’s enumerated powers. These two approaches emerged early on in the public debate over the establishment of the Bank of the United States. The clash of competing visions of federal power would reach its climax in the controversy surrounding the enactment of the Alien and Sedition Acts. The first decade of the Constitution would close with a decisive rejection of

\textsuperscript{134} See infra note ___ and accompanying text.
\textsuperscript{135} See, The Federalist Papers No. 39, supra note ___ at 246 (Madison).
\textsuperscript{136} See The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution, in 2 Elliot’s Debates, supra note ___ at 362-63 (remarks of Mr. Hamilton) (“In the first formation of government, by the association of individuals, every power of the community is delegated, because the government is to extend to every possible object; nothing is reserved but the unalienable rights of mankind but, when a number of these societies unite for certain purposes, the rule is different, and from the plainest reason--they have already delegated their sovereignty and their powers to their several governments; and these cannot be recalled.”).
\textsuperscript{137} At least until such time that a combination of both the national and state people amend the Constitution. See U.S. Const. Art. V; The Federalist Papers, No. 39, supra note ___ at 246 (Madison)(discussing how the procedures for amendment involve a combination of national and state majorities).
\textsuperscript{138} 4 Annals of Cong. at 934. (Nov. 27, 1794).
\textsuperscript{139} See sources cited in note ___. See also infra note ___ and accompanying text (discussing the joint citation of the Ninth and Tenth Amendments as establishing the principle of expressly delegated power).
Hamilton’s nationalism and a reaffirmation of the promised principle of expressly delegated power.

1. The Bank Controversy

The first major debate over federal power occurred in regard to the proposed chartering of a national bank.\textsuperscript{140} James Madison and Edmund Randolph believed the Bank was beyond the legitimate powers of Congress. Although both men conceded that Congress had both express and implied powers, the means chosen by Congress to advance its enumerated ends had to be sufficiently related to its express authority and not merely “expedient” towards advancing those ends.\textsuperscript{141} Thomas Jefferson was even more insistent that the Bank exceeded federal power, claiming that under the Tenth Amendment, Congress could authorize only those implied means absolutely necessary to advancing an expressly enumerated power.\textsuperscript{142} The opinion that ultimately convinced President Washington to sign the Bank Bill, however, was that of Alexander Hamilton. Despite his insistence during the ratification debates that Congress had only limited enumerated power, Hamilton now rejected the narrow construction of federal power advocated by Madison, Randolph and Jefferson, and, in language John Marshall would pick up on years later, argued that Congress possessed any means which were “needful, requisite, incidental, useful, or conducive” to advancing an enumerated end.\textsuperscript{143} According to Hamilton:

\begin{quote}
[E]very power vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions & exceptions specified in the Constitution; or not immoral, or not contrary to the essential ends of political society.\textsuperscript{144}
\end{quote}

Foreshadowing the position Marshall would hint at in \textit{McCulloch} and make express in \textit{Gibbons}, Hamilton insisted that the only constitutional limits to federal power were those “specified” in the Constitution.\textsuperscript{145} Sensing an attempt to stretch

\textsuperscript{140} For background on the debate over the first Bank of the United States, see Stanley Elkins & Eric McKitrick, \textit{The Age of Federalism: The Early American Republic, 1788-1800}, at 223-244 (1993). See also, Mark R. Killenbeck, M’Culloch, \textit{supra} note ___ at 9-30.

\textsuperscript{141} See Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), \textit{in} H. Jefferson Powell, \textit{The Constitution and the Attorneys General} (1999) (“Hence the rule contended for by the enemies of the bill is defective every way. It would be still more so with respect to those (if any such there be) who construe the words, "necessary and proper," so as to embrace every expedient power.”); See also James Madison, Speech Opposing the Creation of a National Bank, \textit{in} Madison, \textit{Writings, supra} note ___ at 486 (“If implications, thus remote and thus implied, can be linked together, a chain may be formed that while reach every object of legislation”).


\textsuperscript{144} \textit{Id.} at ___.

\textsuperscript{145} This seems to contradict the Ninth Amendment which declares that the restrictions on federal power enumerated in the Constitution are not the \textit{only} restrictions on federal power. See Lash, A Textual-Historical Theory of the Ninth Amendment, \textit{supra} note __. 
congressional authority beyond its legitimate limits, a number of Representatives objected that the Bank Bill exceeded the properly construed powers of Congress. Future Virginia Governor William Branch Giles, for example,

... took notice of some of the observations which had fallen from a gentleman from Connecticut regarding incidental powers, and denied that Congress possessed those powers. The general government he said was not a consolidating government, but a federal government, possessed of such powers as the states or the people had expressly delegated.146

In his own speech opposing the Bank, James Madison pointed out that the state conventions had ratified the Constitution on the assumption that federal power would not receive such a “latitudinary” construction. In a passage of his speech that until now has gone unnoticed, Madison explicitly embraced the principle of expressly delegated power and tied it directly to the Ninth and Tenth Amendments:

In confirmation of his sentiments, [Madison] adduced certain passages from speeches made in several of the state conventions by those in favor of adopting the constitution. These passages were fully in favor of this idea, that the general government could not exceed the expressly delegated powers. In confirmation also of this sentiment he adduced the amendments proposed by Congress to the Constitution.147

All these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of the articles proposed, remarking particularly on the [Ninth and Tenth Amendments].148

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146 Speech of Mr. Giles in the House of Rep. Feb. 2, 1791, reprinted in General Advertiser, published as The General Advertiser and Political, Commercial, Agricultural and Literary Journal; Date: 02-05-1791; Issue: 110; Page: [3]. Three years later, Giles left no doubt that the Tenth Amendment embraced this specific principle. In a discussion regarding the power of the government to provide relief for destitute aliens:

“Mr. Giles enlarged on the unconstitutionality of the power proposed to be exercised by the legislature. The scope of his argument turned on the force of an amendment to the constitution, which precludes congress from the exercise of powers not expressly delegated.”

Greenleaf's New York Journal & Patriotic Register (January 18, 1794) (Page: [2]).

147 The Federal Gazette, and Philadelphia Evening Post (February 12, 1791) (Page: [2]). See also 4 Elliot's Debates, supra note ___ at 414.

148 Here Madison refers to the “11th and 12th” amendments. His reference reflects the early convention of referring to provisions in the Bill of Rights according to their placement on an original list of twelve proposed amendments. What we know as the Ninth and Tenth Amendments were eleventh and twelfth on that original list.
guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.\textsuperscript{149}

The above combines two separate incomplete accounts of Madison’s speech. The first paragraph comes from an account of Madison’s speech published by The Federal Gazette.\textsuperscript{150} The second paragraph is from an account of the speech published a few days later in the Gazette of the United States.\textsuperscript{151} Because the later version contained a more extensive version of Madison’s remarks, this is the account presented in collections of Madison’s writings.\textsuperscript{152} The initial version published in Federal Gazette, however, contains aspects of Madison’s speech which were only paraphrased in the account printed in the Gazette of the United States.\textsuperscript{153}

Instead of quoting Madison (as does the Federal Gazette), the reporter for the Gazette of the United States breaks off from Madison’s actual remarks just when Madison began speaking about the promises made to the state conventions. At that point, the reporter inserts a parenthetical paraphrase of Madison’s remarks.\textsuperscript{154} The reporter for the Federal Gazette, on the other hand, \textit{quotes} this portion of Madison’s speech, including Madison’s declaration that the states were promised that “the general government could not exceed the expressly delegated powers.” The passage is obviously significant, for it presents Madison as explicitly claiming that the ratifiers in the states had relied upon the promise that the federal government would have only expressly delegated powers. The Gazette of the United States, on the other hand, includes critical information left out of the Federal Gazette, in particular Madison’s insistence that the principle of expressly delegated power was made an official part of the Constitution through the adoption of the Ninth and Tenth Amendments. To my knowledge, these two accounts have never before been viewed in conjunction—indeed, the critical passage in the Federal Gazette regarding expressly delegated power has never been noticed at all.

\textsuperscript{149} James Madison, Writings, \textit{supra} note ___ at 489.
\textsuperscript{150} The Federal Gazette, and Philadelphia Evening Post (February 12, 1791) (Page: [2]).
\textsuperscript{153} This earlier account can also be found in Elliot’s Debates, see 4 Elliot’s Debates at 414. The use of Elliot’s Debates, however, has fallen out of favor among legal historians due Elliot’s somewhat notorious states’ rights advocacy, see H. Jefferson Powell, The Principles of ‘98: An Essay in Historical Retrieval, 80 Va. L. Rev. 689, 689 (1994), and the gradual emergence of more complete collections of Founding materials such as the Documentary History of the Ratification of the Constitution (Wisconsin Historical Society Press)(vols. I – XXI). The Documentary History collection, however, does not at this time include materials on the Bank debate.
\textsuperscript{154} See James Madison, Speech Opposing the National Bank, \textit{in} Madison: Writings, supra note ___ at 489 (“(Here he read sundry passages from the debates of Pennsylvania, Virginia, and North Carolina conventions, shewing the grounds on which the constitution had been vindicated by its principle advocates, against a dangerous latitude of its powers, charged on it by its opponents.”)".”).
In support of his claim that the states expected no more than expressly delegated power, Madison quoted “certain passages” from the Pennsylvania, Virginia and North Carolina Conventions.\textsuperscript{155} We know that all of these Conventions heard Federalist assurances that Congress would have only expressly enumerated power. In North Carolina, Archibald MacLain, Governor Samuel Johnston and future Supreme Court Justice James Iredell all assured the convention that Congress would have none but expressly delegated powers.\textsuperscript{156} In Virginia, Edmund Randolph made the same assurances.\textsuperscript{157} In Pennsylvania, future Supreme Court Justice James Wilson apparently made a similar claim\textsuperscript{158} and the Pennsylvania Convention ratified the Constitution with the expectation that amendments would soon be added, with top priority being a provision limiting the government to expressly delegated power. After reminding the House about these assurances, Madison then pointed out that the Ninth and Tenth Amendments had been proposed in order to put in writing the promised principle of expressly enumerated power.\textsuperscript{159}

Even some of Madison’s opponents on the question of a national bank agreed that the Tenth Amendment represented an underlying principle of expressly delegated power. John Vining of Delaware, for example, accepted the rules of narrow construction urged by Madison and Giles, but nevertheless insisted that power to incorporate the Bank fell within Congress’ legitimate authority. According to Vining, “[t]he constitutionality [of the Bank] he urged from a fair construction of those powers, expressly delegated, and from necessary implication.”\textsuperscript{160} Likewise, Fisher Ames accepted the principle of expressly enumerated power while still supporting the Bank:

\begin{quote}
Gentlemen had noted the Amendment proposed by Congress to the Constitution as conveying the sense of the legislature on the nature of the power vested by that instrument; the amendment stated, that it should be declared, that the powers not expressly delegated to the General Government, and such as could be exercised by the states, should be considered as belonging to the states. But the power of
\end{quote}

\textsuperscript{155} See id. The earlier account in the \textit{Federal Gazette} reveals that the specific arguments Madison referred to were those limiting Congress to expressly enumerated powers.

\textsuperscript{156} See supra note \_\_ and accompanying text.

\textsuperscript{157} See supra note \_\_ and accompanying text.

\textsuperscript{158} See Centinel, No. II., 1 The Maryland Journal and Baltimore Advertiser (Nov. 02, 1787) (“Mr. Wilson tells you, that every right and power not specifically granted to Congress is considered as withheld. How does this appear? Is this principle established by the proper authority? Has the Convention made such a stipulation? By no means.”). For a discussion of Wilson’s argument and the concept of “expressly delegated” powers, see Wood, The Creation of the American Republic, supra note \_\_ at 539-40.

\textsuperscript{159} Madison, \textit{Writings}, supra note \_\_ at 489. For readers unfamiliar with developments in Ninth Amendment historical scholarship, it might seem odd that Madison paired the Tenth with the Ninth Amendment. Until recently, scholars have tended to view the amendments as having very different purposes, with the Ninth guarding rights and the Tenth guarding powers. As I have discussed elsewhere, however, it appears that the two amendments were viewed as working in conjunction to preserve the people’s retained right to local self-government. See sources cited in note \_\_.

\textsuperscript{160} Remarks of Mr. Vining, reported in The General Advertiser page 3 (February 5, 1791) (Philadelphia).
establishing a National Bank, he said, could not be exercised by the States, and therefore rested nowhere but in the Federal Legislature. Notice how Ames describes the Tenth Amendment as “conveying the sense of the legislature on the nature of power” delegated to the federal government. Specifically, “powers not expressly delegated to the federal government . . . should be considered as belonging to the states.” Ames thus reads the Tenth as declaring a preexisting limitation on the proper construction of federal power, and he concedes that the principle declared by the Tenth was one of expressly delegated federal power.

Although Madison failed to persuade his fellows in the House (or the President) that the Bank exceeded Congress’s delegated powers, his speech was widely distributed and commentators praised his defense of the principle of expressly delegated power. Before the close of the Constitution’s first decade, Justice Chase of the

161 Speech of Fisher Ames, in The Columbian Centinel (March 9, 1791). See also The Observer No. V, in The Federal Gazette, and Philadelphia Evening Post (April 01, 1791) (Page: [2]) (“While [the Constitution] provided for the strength and common defense of the whole, left every part in possession of the rights not expressly delegated or resigned”).

162 Similar statements were made by Theodore Sedgwick who argued:

The amendment proposed by Congress to the constitution had been mentioned to prove that agreeable to the sense of the federal legislature the general government had no authority to set on foot a bank: he conceived it did not go so far; the establishment of an institution that was intended to have a general operation, could only rest with the representatives of the Union. If it was dubious whether the power contested could not be clearly deduced from the constitution, it should not, he said, be exercised: but it appeared to him clearly delegated by that instrument.

See Federal Gazette, page 2 (Feb. 16, 1791) (remarks of Mr. Sedgwick). Some advocates of the Bank, of course, shared Alexander Hamilton’s newly announced view of federal power. See, e.g., The Federal Gazette and Evening Post, page 2 (February 15, 1791)(remarks of Mr. Smith)(“The more important powers are specially granted, but the choice from the known and usual means of carrying the power into effect is left to the decision of the legislature.”).

163 See “An American,” in Dunlap’s American Daily Advertiser, page 2 (February 16, 1791) (noting that “state governments and the people retained all powers not expressly granted by the Constitution” and praising Madison’s effort against the Bank).

Madison’s arguments against the bank had a long life. The Richmond Enquirer reprinted the speech in its entirety when the charter was up for renewal in 1810. Following the Supreme Court’s decision upholding the Second Bank of the United States in McCulloch v. Maryland, St. George Tucker planned to add a note to his revised edition of Blackstone’s Commentaries acknowledging the decision, but directing his readers to Madison’s speech. See St. George Tucker, Notes for Revised Version of 1 Tucker’s Blackstone (n.d.), in View of the Constitution, supra note 6, ed. app. at 287 (handwritten notes on facing pages of Tucker’s personal copy of Tucker’s Blackstone, located at the Earl Gregg Swem Library at the College of William and Mary). The following was to be added as note * to his discussion of the Necessary and Proper Clause:

+ See also, the late President Madison’s Speech in Congress in February 1791 against the Bill for establishing a Bank, published in the Richmond Enquirer, vol: 6; no:73. January 4, 1810. But the question on the right of Congress to establish a Bank, with branches in the several states is put at rest, by the Decision of the Supreme Court of the United States,
United States Supreme Court would issue two opinions embracing this same principle of expressly delegated power. Of the two,\(^\text{164}\) Chase’s famous opinion in *Calder v. Bull* is most often cited in support of judicial protection of unenumerated natural rights.\(^\text{165}\) The opinion, however, includes a rarely quoted but strongly worded passage on the retained sovereignty of the people in the states and the limits of federal power:

> It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures. All the powers delegated by the people of the United States to the Federal Government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the State Governments are indefinite; except only in the Constitution of Massachusetts.\(^\text{166}\)

unanimously, in the case of McCulloch vs the State of Maryland March 1819. “That the Act to incorporate the Bank of the U.S. is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.” and also, “That the Law passed by the Legislature of Maryland, imposing a Tax on the Bank of the U.S. is unconstitutional and void.”

*Id.* See also Letter from “Hampden” to the Enquirer, June 15, 1819, *reprinted in* John Marshall’s Defense of McCulloch v. Maryland 123, 133 (Gerald Gunther ed. 1969) (repeating Clinton’s argument that incidental powers must be subordinate to enumerated end, and later referring to Madison’s “celebrated speech against the first bank law.”).

\(^\text{164}\) In addition to the case discussed in the text, Justice Samuel Chase also delivered an opinion while on circuit in which he declared:

> In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States: For, the Constitution of the Union, is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed.”


\(^\text{166}\) *Calder v. Bull*, 3 U.S. 386 (1798).
By citing the above examples (and there are others), I do not mean to claim that the principle of expressly enumerated power was uniformly embraced by all relevant parties during the first decade of the Constitution. Indeed, as I indicated at the opening of this section (and as the Bank debates obviously reveal) a strong counter-interpretation of broad federal power emerged during this same period. The above examples illustrate, however, that the same principle which was pressed by the Federalists in the ratifying conventions lived on after the establishment of the Constitution. Before this principle could prevail, however, it would have to overcome a very different understanding of national power—a far more nationalist interpretation that relied on the omission of the word “expressly” in the Tenth Amendment.

2. The Alien and Sedition Acts Controversy

Although the issue of a national bank remained a subject of fierce debate for decades, it pales in comparison to the political controversy triggered by the adoption of the Alien and Sedition Acts. Passed in the midst of a political stand-off with France in

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167 In addition to those examples cited in this and the next section, see, Legislative Acts or Legal Proceedings Paper: Commercial Advertiser, published as New York Commercial Advertiser (January 24, 1805) (Page: [2]); The National Intelligencer and Washington Advertiser (November 27, 1807) (Page: [1]) (Remarks of Mr Sawyer: “Whatever powers and authorities are not expressly delegated by the Constitution to the United States, or necessarily arising under it, shall be reserved to the states themselves or to the people.”); George Hay (Hortensius), An essay on the liberty of the press (Richmond, 1803) (“That the individuals selected from the mass of the people, to administer the government, possess no power, general or special, but those which are either expressly delegated, or are necessary to carry a power expressly delegated into effect.”); George Watterston, Letters from Washington, on the Constitution and laws: with sketches of some of the prominent public characters of the United States 87 (1818) (“You will easily discover, and it must always be understood, that the powers not expressly delegated, are reserved to the states and to the people. All constructive or assumed powers are considered as dangerous to the liberties of the citizen, and fatal to the rights and the union of the states.”); Ex parte Tate, 39 Alabama 254 (1864) (“the general government is the mere creature and agent of the States, and possesses only such powers as are expressly delegated to it, or such as are necessary to carry into effect the delegated powers.”) (George W. Gayle for petitioner). As Senator Hayne put it during the Tariff Debates of the 1820s:

Gentlemen surely forget that the supreme power is not in the government of the United States. They do not remember that the several states are free and independent sovereignties, and that all power not expressly granted to the federal government is reserved to the people of those sovereignties. When I say expressly delegated, I wish to be understood that no power can be exercised by Congress which is not expressly granted, or which is not clearly incident to such a grant.

The Debates in the Several State Conventions on the Adoption of the Federal Constitution, in 4 Elliot's Debates, supra note ___ (Senate, April, 1824)(Mr. Hayne). Hayne, of course, was on the historically perceived losing end of the famous Haynes-Webster debates. Whatever one makes of his arguments in terms of the politics of the 1830s, he is clearly using terms and principles that extend back to the Founding.

1798, the Acts authorized presidential deportation of suspected subversive aliens and essentially criminalized public criticism of the national government. Outraged by what they perceived as an unconstitutional usurpation of powers reserved to the states, James Madison and Thomas Jefferson anonymously prepared their famous Virginia and Kentucky Resolutions which declared that the Acts exceeded any reasonable interpretation of federal power and violated the First Amendment’s express denial of power to regulate the Press. Because the subject was intended to be beyond federal control, the Acts violated the reserved powers declaration in the Tenth Amendment.

As the Presidential election of 1800 approached, the Republican majority in the Virginia Assembly prepared a Report on the Virginia Resolutions and distributed it as a campaign document supporting the election of Republicans to the national Congress (and the Presidency). Despite the dominance of Republicans in most of the state, there remained a number of Virginia districts where Federalists stood a chance of gaining seats in the next election, including one particular district where future Supreme Court Chief Justice John Marshall hoped to gain a seat in the national House of Representatives. The controversy over the Federalist Party-enacted Alien and Sedition Acts, however, placed all Federalist candidates in Virginia on the defensive. In an effort to defend their party from accusations of unconstitutional usurpation, the Federalist minority in the Virginia Assembly submitted “The Report of the Virginia Minority”—a defense of the Alien and Sedition Acts.

The Report, whose authorship at the time was unknown, presented a strong constitutional defense of the Acts and, in so doing, articulated an expansive vision of federal power. In response to claims that the Acts exceeded the implied necessary and proper powers of Congress, the author of the Minority Report argued that the omission of the term “expressly” from the text of the Tenth Amendment implied otherwise broad congressional authority:

The government of the United States is indubitably limited as to its objects, however it may be as to the means of obtaining those objects . . . . It is necessary in pursuing this inquiry to bear in mind that we are investigating a constitution which must unavoidably be restricted in various points to general expressions, making the great outlines of a subject; and not a law which is capable of descending to every minute detail. . . . It would be difficult too to assign a reason for


171 Id. at 449.

omitting in the [Tenth]\textsuperscript{173} amendment to our constitution, which is evidently copied from the second article of the ancient confederation, the very material word \textit{expressly}. That article of the confederation, and the amendment to our constitution, were designed as a plain and explicit admission of the principle, that the powers not delegated are retained. In the confederation all powers not \textit{expressly} delegated are retained, but in the amendment this very operative word is wisely omitted.\textsuperscript{174}

This passage bears a number of striking similarities to arguments John Marshall would use decades later in \textit{McCulloch v. Maryland}.\textsuperscript{175} Like the author of the Minority Report, Marshall would stress that "we must bear in mind it is a constitution we are construing," and that one should therefore expect broad pronouncements of general power rather than the prolixity of a legal code. Marshall’s argument in \textit{McCulloch} also uses the exact same argument as the Minority Report in regard to the implications of the missing word “expressly.”\textsuperscript{176} It should come as no surprise, therefore, to learn that the anonymous author of the Minority Report has traditionally been attributed to none other than John Marshall himself.\textsuperscript{177}

Although the Virginia and Kentucky Resolutions did not receive the support from other states wished for by Jefferson and Madison, Republicans continued to press their case against the Alien and Seditious Acts. James Madison drafted what would come to be known as “Madison’s Celebrated Report of 1800” which provided a detailed analysis and defense of the Virginia Resolutions’ claim that Congress had

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\textsuperscript{173} Here the author refers to the “12\textsuperscript{th}” proposed amendment to the Constitution, reflecting an early convention by which the original amendments were referred to according to the place on an original list of twelve proposed amendments. Our Tenth was the twelfth on that original list.
\textsuperscript{174} Address of the Minority in the Virginia Legislature, Phila. Gaz. & Universal Daily Advertiser, at 1 (Feb. 9, 1799). The author refers to the 10\textsuperscript{th} as the “12\textsuperscript{th}” amendment, reflecting the early practice of referring to the amendments according to their placement on an original list of twelve proposed amendments. See supra note ___.
\textsuperscript{175} 17 U.S. 316 (1819).
\textsuperscript{176} Id. at 406.
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exceeded its powers and violated the Tenth Amendment. In his 1799 campaign pamphlet, future Governor John Page argued that the Alien and Sedition Acts were “not only unnecessary, impolitic and unjust, but unconstitutional.” According to Page, the Acts violated the retained rights of the states as protected by the Ninth and Tenth Amendments. Specifically addressing the Virginia Minority Report’s claims about implied federal power and the Tenth Amendment, Page insisted that the combination of the Ninth and Tenth Amendments (which he referred to as the 11th and 12th) had restored the missing term from Article II of the Articles of Confederation. Below, I have provided an extended portion of his argument as it presents a detailed and sophisticated analysis of the relationship between retained sovereignty and strict construction of delegated power:

For how could it be supposed when the 2d article of the confederation declared that “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled” and the design of appointing a convention and the authority given by the different confederated states to that convention went no farther than to “render the then Federal Constitution adequate to the exigencies of government and the preservation of the union.” (neither of which could require farther powers in government than are expressly granted) that although the convention omitted the insertion of a familiar article; where as unnecessary in their opinion or, through design (such as seems now avowed) as the amendment was made, and as these words preceded it in the 11th article “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”

I say considering these things, how could it be possible to suppose, that these two amendments taken together, were not sufficient to justify every citizen in saying, that 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, as fully and completely; as if the word expressly had been inserted? . . and candor and respect for the majority of congress which recommended the amendments ought to induce us to think, that they also were of the same opinion [that the 2d art. of the art’s still operated] and therefore that they would not have recommended the addition of the

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179 Address to the freeholders of Gloucester County, at their election of a member of Congress, to represent their district, and of their delegates, and a senator, to represent them in the General Assembly of the Commonwealth of Virginia, April 24, 1799, by John Page, of Rosewell. (at [9] no pagination in text). Page was a member of Congress from 1789-1797, and Governor of Virginia from 1802 to 1805. Thus, not only was he in congress when Madison gave his Bank speech, he was a representative from Virginia at the time that state was considering the Bill of Rights. He would be well aware of Madison’s opposition to the bank—indeed, the men regularly corresponded.

180 Id. at 13, 14.
Page was a member of Congress that helped frame and submit the Bill of Rights, including the Ninth and Tenth Amendments. He was a member of the House when Madison gave his speech on the Bank of the United States and he represents yet another Virginian who believed that the Ninth and Tenth Amendments established Congress would have none but expressly delegated powers.

The same “popular sovereigntist” reading of the Ninth and Tenth Amendments can be found in contemporary court proceedings, including an opinion by a member of the second North Carolina Ratifying Convention, John Overton. Overton went on to join the Tennessee bench and there presided over a case that contains one of the earliest state judicial references to the Ninth and Tenth Amendment. The background issue involved whether a state property judgment was binding on a portion of land falling within Indian territory. Overton held that it is, in part on the basis of retained sovereignty of the states:

> But how far has the Constitution and laws of the United States, made in pursuance of it, abridged the sovereign rights of each State? The answer is easy. No further than the States have expressly, and not by equitable construction, delegated authority to the United States. [footnote citing the Ninth and Tenth Amendments]. The Constitution of the United States was proposed to each State possessing the rights of sovereignty within their respective limits. It proposed that each State should give up a portion of its sovereignty for the more secure and convenient enjoyment of the remainder.

The elections of 1800 represented a triumph of the Republican vision of federal power. Federalists lost control of both political branches of the national government and the Alien and Sedition Acts were allowed to ignominiously expire (Jefferson

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181 Id. at 27-28.
182 Other campaign documents distributed in the months leading up to the national election stressed the same reading of federal power. In an essay entitled “On the Election of the President of the United States,” the author declared:

> “[The Constitution] appears to be founded entirely on the principle that the federal government is only to exercise the powers that have been expressly delegated to it.”

The Carolina Gazette (September 04, 1800).

183 See The trial of Cyrus B. Dean [microform] for the murder of Jonathan Ormsby and Asa Marsh, before the Supreme Court of Vermont (Burlington, August 23 1808) revised and corrected from the minutes of the judges (page 47) (“We learn from the eleventh and twelfth articles of the first amendment to the Constitution of the United States [then quotes the Ninth and Tenth Amendments]. If then, Congress have power to intermeddle with the soil within a state’s jurisdiction—to say who should, or rather who should not hold or possess it, this power must have been expressly delegated to the government of the United States.”).

184 Although, the first convention neither accepted nor rejected the Constitution, the second convention in 1789 voted in favor of ratification.

pardoned those convicted under the Sedition Act). For decades, the so-called Revolution of 1800 was viewed as a referendum on the proper interpretation of federal power. Having strongly criticized the constitutional theories underlying the Alien and Sedition Acts, St. George Tucker capitalized on the Republican’s victory and published the first treatise on the United States Constitution. In his “View of the Constitution,” Tucker summarized the rule of strict construction insisted upon by so many opponents of the hated Acts. According to Tucker, “The sum [of the Ninth and Tenth Amendments] which appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”

3. **The Nationalism of John Marshall**

As the clock ran out on the out-going Federalist Administration, Adams nominated his Attorney General John Marshall to the take the seat of the Chief Justice of the Supreme Court. By doing so, he insured that the same vision of federal power that animated the Alien and Sedition Acts would live to fight another day. A rise in national sentiment following the War of 1812, and an expanding country together created opportunities and incentives to expand the role of the federal government, particularly in the areas of finance and internal improvements. Doing so, however, required a more nationalist vision of federal power than that which had been promised to the states and had triumphed in the Revolution of 1800. That vision was supplied by Chief Justice John Marshall in *McCulloch v. Maryland*.

A trilogy of important cases came before the United States Supreme Court in 1819 term, including *Sturgis v. Crowninsheild*, *Dartmouth College v. Woodward* and

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187 For decades, the triumph of the Republicans was viewed as a vindication of the original understanding of the Constitution. See, e.g., Padelford, Fay & Co. v. Mayor of Savannah, 14 Ga. 438, 494-95 (1854) (discussing the battle over the Alien and Sedition Acts as a battle for a rule of strict construction of the Constitution). In this way, the election of 1800 represents an example of the sovereign people acting “people out of doors” in order to defend their understanding of the Constitution. See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 35, 45 (2004). For a general account of the struggle over the Alien and Sedition Acts and the influential election of 1800, see Kurt T. Lash, James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 Geo. Wash. L. Rev. 165 (2006).
188 See St. George Tucker, Treatise on the Common Law, Blackstone’s Commentaries (Appendix), *supra* note __.
189 St. George Tucker, 1 Blackstone’s Commentaries, *supra* note __ at 154.
192 See James Madison, Statement Accompanying his Veto of the Internal Improvements Bill (March 18, 1817), in Writings, *supra* note __ at 718.
193 See *id*.
McCulloch v. Maryland.\(^{196}\) Of the three, McCulloch was the last to be decided and, according to Marshall’s first great biographer, Albert Beveridge, had Marshall’s “fame rested solely on this one effort, it would be secure.”\(^{197}\) That general sentiment remains true today as McCulloch is broadly considered the seminal discussion of congressional power under the Constitution.\(^{198}\) Written soon after President Madison’s veto of the Bank Bill on the grounds that the strict construction of Constitution denied Congress such power, Marshall and the rest of the Court were determined to use McCulloch as an opportunity to establish a broad (or, in Marshall’s words, “fair”) reading of federal power.\(^{199}\)

\(\text{a. Popular Sovereignty and McCulloch}\)

Prior to McCulloch, the most influential discussion of enumerated federal power was contained in St. George Tucker’s View of the Constitution. Tucker’s rule of strict construction was premised on the idea, borrowed from international law, that delegations of power from a sovereign ought to be strictly construed in order to retain all power not expressly delegated away. As the people of the states were the sovereigns who delegated power to the new federal government, their delegation ought to be “strictly construed . . . whenever it affected the rights of the states.”\(^{200}\) Tucker, like Madison, believed that this rule was made express in the adoption of the Ninth and Tenth Amendments.

John Marshall, however, rejected strict construction. In cases like McCulloch and Gibbons v. Ogden, he articulated a vision of federal power not only expansive for its day, but expansive enough to become the foundational theory of the modern administrative state.\(^{201}\) In 1819, however, establishing such a vision required transplanting the locus of delegated sovereignty from Tucker’s “people of the several states” to the undifferentiated people of the nation as a whole. In Marshall’s very first paragraph on substantive principles of law, he attempted to do just that:

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\text{In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by}
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\(^{196}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^{197}\) Albert Beveridge, 4 The Life of John Marshall 282 (1919).

\(^{198}\) A quick glance at the table of contents in constitutional textbooks and treatises will quickly confirm this.

\(^{199}\) Not long after McCulloch was decided, Justice Johnson wrote President Monroe on behalf of himself and the other Supreme Court Justices and informed him that “the lucid and conclusive reasoning” contained in McCulloch “completely commits them on the subject of internal improvements.” Johnson to James Monroe (undated), in Smith, John Marshall, supra note ___ at 468-69. Justice Johnson suggested that the opinion in McCulloch should be printed and “dispensed throughout the Union.” Id. at n. 128.

\(^{200}\) Tucker, View of the Constitution, supra note ___ at ___.

the states, who alone are truly sovereign; and must be exercised in
subordination to the states, who alone possess supreme dominion. It
would be difficult to sustain this proposition. The convention which
framed the constitution was indeed elected by the state legislatures.
But the instrument, when it came from their hands, was a mere
proposal, without obligation, or pretensions to it. . . .

[T]he instrument was submitted to the people. They acted upon it in
the only manner in which they can act safely, effectively and wisely,
on such a subject, by assembling in convention. It is true, they
assembled in their several states—and where else should they have
assembled? No political dreamer was ever wild enough to think of
breaking down the lines which separate the states, and of
compounding the American people into one common mass. Of
consequence, when they act, they act in their states. But the measures
they adopt do not, on that account, cease to be the measures of the
people themselves, or become the measures of the state governments.

By characterizing Maryland as defending the sovereignty of the state governments,
Marshall is able to present his view of federal power as resting on the sovereignty of
the people. Maryland, however, had made no such argument. Walter Jones,202
for example, had insisted on behalf of Maryland “that the Constitution was formed and
adopted, not by the people of the United States at large, but by the people of the
respective states. . . . It is therefore a compact between the states, and all the powers
which are not expressly relinquished by it, are reserved to the states.”203 By
mischaracterizing Maryland’s argument as advocating complete state sovereignty,
Marshall was able to avoid the critical question of how best to construe powers
delegated by the sovereign people of the states. Limiting his discussion to the people
as a national body, Marshall declared that it was of no relevance that the people
ratified the Constitution in their respective states—“where else should they have
assembled?”204

Over and over again in his opinion, Marshall presents the issue as one involving a
contest between “sovereign states” and a “sovereign people,” the latter being a
reference to a national people. “The government of the Union,” Marshall declared,
“is emphatically and truly, a government of the people. In form, and in substance, it
emanates from them. Its powers are granted by them, and are to be exercised directly
on them, and for their benefit.”205 As far as the Tenth Amendment was concerned,

202 According to Killenbeck, “Jones was the least prominent of the six men who argued but
had a reputation as a ‘legal genius.’” Killenbeck, supra note __ at 102.
203 McCulloch, 17 U.S. at 363.
204 McCulloch, 17 U.S. at 403.
205 Id. at 403-05. Here Marshall builds upon arguments originally presented by his fellow
Justice Joseph Story in Martin v. Hunter’s Lessee. There, Story argued:

These deductions do not rest upon general reasoning, plain and obvious as
they seem to be. They have been positively recognised by one of the articles
in amendment of the constitution, which declares, that ‘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.’ The
government, then, of the United States, can claim no powers which are not
this Clause was as irrelevant as the fact of state-by-state ratification. The Clause was not adopted to control the interpretation of federal power, but “was framed for the purpose of quieting excessive jealousies which had been excited.” The fact that the framers omitted the restrictive term “expressly” indicated their desire that Congress have “incidental or implied powers” as well as those expressly enumerated. Rather than strict construction, proper interpretation of federal power “depend[ed] on a fair construction of the whole instrument.” And Marshall’s idea of a fair construction was broad indeed:

[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

Marshall’s construction of federal power has been embraced so widely and for so long that it takes some effort to appreciate the radical nature of his argument. So long as a law is “calculated to effect” (not actually affects), Congress could employ any means so long as they were not “prohibited” by the Constitution—regardless of the degree of necessity. In his second great opinion on national power, Gibbons v. Ogden, Marshall wrote that congressional power to regulate commerce was “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.” Whatever one makes of the Ninth and Tenth Amendments, at a minimum they were designed to prevent just this kind of argument—that the only limits to federal power were those listed in the Constitution. Marshall, however, rejected the idea that any Clause in the Constitution suggested any limit to federal power beyond those expressly listed in the text:

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that

granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

Martin v. Hunter’s Lessee, 14 U.S. 304, 325-26 (1816). Notice that Story reads the Tenth as recognizing an undifferentiated national people. In this passage Story also manages to move from the federal government having no powers but those “expressly given or given by necessary implication,” to powers broadly construed unless a strict construction is expressly required or arises “by necessary implication.”

McCulloch, 17 U.S. at 406.

Id.

Id.

Id. at 423.


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which grants, expressly, the means for carrying all others into
execution, Congress is authorized "to make all laws which shall be
necessary and proper" for the purpose. But this limitation on the
means which may be used, is not extended to the powers which are
carried; nor is there one sentence in the constitution, which has
been pointed out by the gentlemen of the bar, or which we have been
able to discern, that prescribes this rule. We do not, therefore, think
ourselves justified in adopting it.\footnote{Id. at 187-88.}

When one combines \textit{McCulloch} and \textit{Gibbons}, it appears that Marshall has effectively
flipped the Ninth and Tenth Amendments on their heads: a government broadly
conceived to have no more than expressly enumerated \textit{powers} has been transformed
into a government with only expressly enumerated \textit{restrictions}. Marshall’s
nationalist vision of the Constitution derives much of its rhetorical persuasiveness by
comparing his broad view of federal power with what he portrays as the impossibly
restrictive view of strict constructionists. Maryland, according to Marshall, claimed
that only the states “are truly sovereign” and that federal power “must be exercised in
subordination to the states, who alone possess supreme dominion.”\footnote{\textit{McCulloch} at 402.}
Once again, Maryland had argued no such thing, but saying so made Marshall’s opinion seem all
the more reasonable. It allowed Marshall to take the rhetorical high ground of
popular sovereignty, where the people were conceived as a single sovereign \textit{national}
people and whose implied powers had no limit beyond those listed in the
Constitution.

In his opening section in \textit{McCulloch}, Marshall implied that Madison and other
original opponents of the Bank had changed their mind about the constitutionality of
the Bank and had come to share a broader view of federal power.\footnote{McCulloch, 17 U.S. at 402 (“The original act was permitted to expire; but a short
experience of the embarrassments to which the refusal to revive it exposed the government,
convinced those who were most prejudiced against the measure of its necessity, and induced
the passage of the present law.”).} Madison, however, had never changed his opinion that the Constitution, properly construed,
did not grant Congress the power to charter the Bank. In his Detached Memoranda,
Madison criticized Marshall for “[i]mputing the concurrence of those formerly
opposed to change of opinion, instead of precedents superseding opinion.”\footnote{\textit{Id.} Despite his objections to the first Bank of the United States, when President Madison
signed into law the bill for the Second Bank of the United States. That act opened him to
criticism as having acted inconsistently with his stated view on the constitutionality of the
First Bank. Madison insisted, however, that he had not changed his mind, but nevertheless
believed that acquiescence was appropriate as a matter of precedent, particularly in light of
the acceptance of the Bank by numerous political majorities. See James Madison, Detached
Memoranda, \textit{in} Madison, \textit{Writings}, \textit{supra} note \textit{\_} at 756. For a discussion of Madison’s view
of precedent and proper constitutional interpretation, see Kurt T. Lash, \textit{Originalism, Popular
Sovereignty} and \textit{Reverse Stare Decisis}, 93 Va. L. Rev. 1437 (2007).}
Madison rejected Marshall’s arguments in \textit{McCulloch} and wrote that the decision
was based on “erroneous views.” Top on Madison’s list of Marshall’s “errors” was
the Chief Justice’s assertion about “the people” ratifying the Constitution, “if [by this
he] meant people collectively & not by States.”\footnote{\textit{Madison}, \textit{Writings}, \textit{supra note \_} at 756.} This fundamental error had led to
Marshall “[e]xpounding power of Congs—as if no other Sovereignty existed in the States supplemental to the enumerated powers of Congs.”

In fact, it was Marshall’s assertion of undifferentiated national sovereignty that triggered an immediate public outcry following the publication of *McCulloch*. In the broadsides that followed, it was not so much the Bank that critics deplored, as Marshall’s vision of sovereignty. *McCulloch v. Maryland* was excoriated in Republican newspapers as embracing the same nationalist theories that had led to the adoption (and defense) of the hated Alien and Sedition Acts. When one compares the language and reasoning of *McCulloch* with that of the Minority Report, the criticisms seem justified.

b. After Marshall

Marshall’s expansive vision of federal power did not survive his tenure on the Supreme Court. Even before his retirement, the Court began to back away from his most expansive readings of federal power. Within a few years of his death, the Court had embarked on what would become the dominant jurisprudence of the nineteenth century—narrow construction of federal power. Sensing the need to shore up the theoretical justifications for his mentor’s nationalist vision of federal power, Joseph Story dedicated his *Commentaries on the Constitution* to the Chief Justice and proceeded to attack compact theories of the Constitution presented in works like Tucker’s *View of the Constitution*. Story was particularly disparaging of those who would replace Marshall’s vision with a strict reading of federal power:

> When this amendment was before congress, a proposition was moved, to insert the word "expressly" before "delegated," so as to read "the powers not expressly delegated to the United States by the constitution," &c. On that occasion it was remarked, that it is impossible to confine a government to the exercise of express powers. . . .

> It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any

216 *Id.*


218 See *New York v. Miln*, 36 U.S. 102 (1837) (Barbour, J.) (narrowly construing the Commerce Clause and declaring “all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.”). See also, *The License Cases*, 46 U.S. (5 How.) 504 (1847) (sustaining state law against claim of exclusive federal power over liquor licenses); *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down federal power to prohibit private discrimination in public accommodations); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal law regulating the transportation of goods moving in interstate commerce).

of the powers granted under the constitution, whether they are express or implied, direct or incidental.

The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the text the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined.²²⁰

Notice that Story reads the omission of the term “expressly” as opening the door not only to implied powers but, more crucially, to “incidental” (indirect) powers. This extends federal power beyond those closely associated with expressly defined powers (those directly involved) and embraces any implied means “incidentally” related to those powers. Story thus reads the omission of the term expressly as requiring the rejection of both the broad and narrow meanings of “expressly delegated powers.” Indeed, according to Story, the Tenth had no “restrictive” influence whatsoever. Not surprisingly, Story supported both Marshall’s interpretation of the Tenth Amendment in McCulloch and Marshall’s expansive reading of federal power in Gibbons.²²¹

As Marshall had recognized in McCulloch, so Story knew that the key to establishing a broad vision of federal power lay in locating sovereignty in a national people, and not in the people of the several states.²²² Marshall had argued that although the people may have delegated sovereign power to the states prior to the Constitution, they had “resumed” all such power and then, acting as a national people, delegated it anew to the federal government with the ratification of the Constitution.²²³ Story went even further and argued that there had never been any sovereign and independent states, but that sovereignty had descended on the national people at the moment they declared their independence in 1776—a view even Story’s biographer calls “as metaphysical as the states’ rights school he criticized.”²²⁴

But Story was fighting a losing battle. Even before he and Marshall retired, the Court had begun to back away from Marshall’s nationalist vision of federal power. Cases such as Willson v. Blackbird Creek Marsh Co.,²²⁵ and especially Mayor of New York v. Miln,²²⁶ rejected the idea of exclusive federal power over local matters affecting interstate commerce (hinted at in Gibbons), and instead flipped the idea on its head by holding that it was the states who had exclusive authority over certain municipal

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²²⁰ 3 Joseph Story, Commentaries on the Constitution, supra note __ at 752-54.
²²¹ 1 Joseph Story, Commentaries on the Constitution, supra note __ at 401-02; 413-15.
²²² As Story biographer R. Kent Newmyer writes, “[t]he definition and location of sovereignty in the American federal system was, as Story correctly perceived, the foundation on which all else rested.” Newmyer, supra note __ at 187.
²²³ See McCulloch at 404 (“It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country.”).
²²⁴ Newmyer, supra note __ at 184.
²²⁵ 2 Peters (U.S.) 245 (1829).
matters—regardless of their impact on interstate commerce.\textsuperscript{227} Witnessing the end of Marshall’s nationalist construction of the Constitution, Justice Joseph Story could only pen dissents\textsuperscript{228} and lament in his letters:

\begin{quote}
I am the last of the old race of Judges. I stand their solitary representative, with a pained heart, and a subdued confidence. Do you remember the story of the last dinner of a club, who dined once a year? I am in the predicament of the last survivor.\textsuperscript{229}
\end{quote}

Despite their best efforts, John Marshall and Joseph Story failed to exorcise either the term or the principle of “expressly” delegated power. In his polemic against the Court’s decision in \textit{McCulloch}, John Taylor declared the principles that would ultimately dominate judicial construction of federal power from Marshall’s retirement until the time of the New Deal. According to Taylor, the federal constitution “excludes congress from exercising internal powers over persons and property, not expressly delegated.”\textsuperscript{230} The textual source of this principle could be found in the Ninth and Tenth Amendments:

\begin{quote}
The [9th] amendment prohibits a construction by which the rights retained by the people shall be denied or disparaged; and the [10th] reserves to the state respectively or to the people the powers not delegated to the United States, not prohibited to the states. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.\textsuperscript{231}
\end{quote}

\textsuperscript{227} According to Justice Barbour in \textit{Miln}:

\begin{quote}
[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. . . . That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.
\end{quote}


\textsuperscript{228} Dissenting in the \textit{Miln} case, Story remonstrated:

\begin{quote}
I have the consolation to know that I had the entire concurrence, upon the same grounds of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was that the act of New York was unconstitutional, and that the present case fell directly within the principles established in the case of Gibbons v. Ogden.
\end{quote}

\textit{Miln} at 161 (Story, dissenting).

\textsuperscript{229} Joseph Story to Harriet Martineau (Apr. 7, 1837), \textit{reprinted in} 2 J. Story, Life and Letters of Joseph Story 277 (W. Story ed. 1851).

\textsuperscript{230} John Taylor, \textit{Construction construed, and constitutions vindicated} 298 (Richmond, 1820).

During the 1832 debates over renewing the Charter of the Second Bank of the United States, the principle of “expressly delegated power” was repeatedly referred to, Marshall’s opinion in *McCulloch* notwithstanding.\(^\text{232}\) According to Thomas Law’s antebellum “The Statesman’s Manual of the Constitution of the United States”:

> The articles of Confederation also adopted the title “The United States of America,” at the same time declaring that “each state retains its sovereignty, freedom and independence, and every power and right which is not expressly delegated to the United States in Congress assembled.” The Tenth Amendment of the present Constitution makes the same declaration.\(^\text{233}\)

Finally, if only to illustrate the durability of the principle beyond the fall of the Confederacy and the radical state’s rights theories of men like John C. Calhoun, here is the Supreme Court’s articulation of the principle in 1868—the same year as the adoption of the Fourteenth Amendment:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: The Federal and State governments are in fact but different agents and trustees of the

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\(^\text{232}\) See *Annals of Cong.*, 11th Cong. 3rd Sess. 721 (House of Rep.) (Remarks of Mr. Johnson). After quoting the Tenth Amendment, Representative Richard M. Johnson declared that “[t]he parts of the constitution recited prove the position taken that the Constitution is a grant of specified powers; that we can exercise no power not expressly delegated to us by this instrument.” *Id.* at 721. John Clopton also declared “[t]he true principle of construction of the constitution being that all powers not expressly delegated are reserved, he contended that Congress could by no forced construction derive the power to establish a national bank.” *House of Representatives, 13th Cong. 2d Sess., Remarks of Mr. Clopton (Oct. 28, 1814), in Legislative and Documentary History of the Bank of the United States 485* (Gales and Seaton, 1832).  

people, constituted with different powers and designated for different purposes.\textsuperscript{234}

As Chief Justice Salmon Chase’s opinion emphasizes, the principle of “expressly delegated power” is derived from the theory of popular sovereignty. The people, whether viewed as a single national collective or as the many peoples of the individual states, they remain the source of all delegated authority. As the mere agents of the people, the government can claim no powers beyond those expressly delegated to them.

4. \textit{James Madison’s Middle Ground}\textsuperscript{235}

Much of the discussion in this article might appear to recapitulate the well known battles between those who viewed the Constitution as creating as national people and those who insisted on viewing the Constitution as no more than a compact between the states. This dualist approach is how the arguments in \textit{McCulloch v. Maryland} are generally viewed with Marshall representing the (correct) view of a strong national government and Maryland representing the (unworkable) compact theory of the Constitution. In the years following the \textit{McCulloch} decision, there did in fact develop a strong movement in favor of compact theory and the right of states to interpret the Constitution for themselves, resist the enforcement of disfavored federal law and, ultimately, to secede from the Union. Driven by a growing list of southern state grievances and a hardening determination to preserve (and extend) slavery at all costs, the Calhounians of the pre-Civil War era articulated a theory of the Constitution that James Madison rejected as utterly alien to the original understanding of the Founders.\textsuperscript{236}

There was, however, a middle way between the extremes of wholly nationalist and wholly localist (federalist) readings of the Constitution. Just as Madison rejected the theory of the nullifiers, so he just as strongly rejected the nationalist reading of the Constitution pressed by Alexander Hamilton and (later) John Marshall. Articulating a view of the Constitution that he would hold for the rest of his life, Madison’s famous Federalist No. 39 presents the Constitution as a compromise between nationalist and federalist theories of government:

\begin{quote}
The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both. In its foundation, it is federal, not national; in the sources from which the ordinary powers of the Government are drawn, it is partly federal, and partly national: in the operation of these powers, it is national, not federal: In the extent of them again, it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.\textsuperscript{237}
\end{quote}

\textsuperscript{234} Lane County v. State of Oregon, 74 U.S. 71, 76 (1868) (Chief Justice Salmon P. Chase).
\textsuperscript{235} I owe this section’s title to the fine work of Charles Lofgren, see Lofgren, \textit{supra} note \_\_ at 336 (writing of “James Madison’s “Middle Ground” and Its Fate).
\textsuperscript{236} See James Madison to James Everett (Aug. 28, 1830), \textit{in} Madison: Writings, \textit{supra} note \_\_ at 842 (rejecting of the doctrine of nullification); James Madison to Matthew Carey (July 27, 1831), \textit{in} Madison: Writings, \textit{supra} note \_\_ at 858 (same).
\textsuperscript{237} The Federalist Papers No. 39, at 246 (Madison) (Clinton Rossiter ed. 1961).
Notice that Madison sees the foundation of the Constitution as federal—meaning that it required the consent of the people in the several states, and not a single national plebiscite, to bring the Constitution into being. This is a critical move in that it makes the powers of the national government a delegation from sovereign states. However, even if the Constitution was brought into being by the people in the several states, it necessarily created a national people at the same time it preserved the independent existence of the states. Thus, future amendments would involve a mechanism both national and federal. Unlike the original ratification, dissenting states could be bound by future amendments, but those amendments would be ratified on a state-by-state basis, and not through a single national vote.

The political theory driving this “mixed” view of the Constitution was not one of divided sovereignty (the dreaded *imperium in imperio*), but one of divided sovereign power. The people had exercised their sovereign right to delegate some degree of sovereign power to the national government while retaining a degree of sovereign authority to the independent states. States that joined the Union were obligated to obey legitimate exercises of federal power (expressly so under the Supremacy Clause). However, because the delegation of authority which created the federal government came out of the independent states, it was to be strictly construed—as required by the norms of international law and as promised by the advocates of the Constitution.

Madison’s simultaneous struggle against the views of Nullifiers and the views of the Nationalists reflects his life-long effort to balance these competing ideas of sovereign authority. When the national government exercised power over seditious speech, Madison opposed the effort on the grounds that it exceeded the properly interpreted express powers of the government, thus violating the Tenth Amendment. When the Nullifiers of the 1820s and 30s attempted to use Madison’s arguments against the Alien and Sedition Acts in support for their claim that states could unilaterally nullify federal law, Madison opposed that effort as misreading his work and violating the Constitution’s balance of federal and state authority. Over and over again, Madison found himself opposing the exaggerated claims of one side or the other in the never ending battle to balance state and federal authority.

Ultimately, of course, the center did not hold. A Civil War and the enactment of the Reconstruction Amendments significantly altered the original balance between state and federal authority. Despite their losing a significant degree of authority over matters originally viewed as “local,” nothing in the Reconstruction Amendments altered the political nature of either the federal or state governments: Federal power remained limited under the theory of delegated sovereignty and enumerated power and states remained constituent parts of the constitutional structure through their continued independent role in constitutional amendments. As long as the federal government remained an agent of the people, whether viewed in their national or state-level capacity, the proper rule of construction regarding delegated authority remains the same.

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239 See *supra* note ___ and accompanying text.
240 See *supra* note ___.

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V. Conclusion

As Gordon Wood recounts in his magisterial *Creation of the American Republic*, the Federalists succeeded in their efforts to supplant the old Articles of Confederation with a new Constitution by stressing the ultimate sovereignty of the people.\textsuperscript{241} Although popular sovereignty was a new concept in American political theory, by 1787 it had nevertheless become the dominant understanding of the legitimate source of government authority. Vestiges of the older system remained, however, including the assumption that “all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers.”\textsuperscript{242} State governments, for example, were presumed to have general authority to act on the people’s behalf absent an express restriction in the state constitution’s Declaration of Rights. It was due to this vision of “expressly retained rights” that the Anti-federalists objected to the omission of a Bill of Rights in the proposed Constitution.\textsuperscript{243} In response, the Federalists flipped this vision completely around and, stressing the emergent theory of popular sovereignty, insisted that all powers and rights were retained to the people in the states other than those expressly delegated away. This was the vision of federal power presented to the state conventions, and as James Madison insisted his entire life, this was the vision state conventions reasonably relied upon in ratifying the federal Constitution.

This combination of Federalist explanation and ratifier reliance explains how a word could be omitted from the Tenth Amendment, but nevertheless embraced both before and after the adoption of the Bill of Rights. The concept of expressly delegate power and retained sovereignty was an accepted principle of the law of nations; sovereign power must be assumed retained absent an express delegation. Put another way, delegated power must be narrowly construed in favor of the grantor. Despite John Marshall’s best efforts to portray the national government as having received delegated power from an undifferentiated people of the United States, the Founding vision of independent peoples endured, as did the concept of strict construction of delegated sovereign power. It was not until the 20\textsuperscript{th} century that rule of strict construction withered and Marshall’s vision was revived to provide historical support for the rise of the modern regulatory state.\textsuperscript{244}

Today, although the Tenth Amendment has seen its fortunes rise and fall over the past century, the text remains universally accepted as a statement of state rights—even if the text is treated as expressing no more than a truism. This renders the Amendment’s closing declaration of the ultimate sovereignty of the people as something of an oddity—either ignored altogether or construed in a manner completely the opposite of the same words in the Ninth amendment. In the beginning, however, the words “by the people” and “to the people” represented the same concept of retained sovereignty, a concept which necessarily entails a strict construction of delegated power.

\textsuperscript{241} See Wood, *The Creation of the American Republic*, *supra* note __ at 536-43, and passim.
\textsuperscript{242} Patrick Henry, III Elliot’s Debates, *supra* note __ at 445.
\textsuperscript{243} Wood, *supra* note __ at 541.
\textsuperscript{244} See Darby; Wickard.
The original meaning of the Tenth Amendment thus sheds light on the original meaning of the Ninth. As dual expressions of popular sovereignty, the clauses mutually reinforced the idea of limited federal power. This is how Madison presented the Clauses, and this is how the two amendments were read for the first one hundred and fifty years of the Constitution. Also, because the principle of expressly delegated power applied to all delegated powers, the attendant rule of strict construction would have applied to the interpretation of Article III and the jurisdiction of the federal courts. When the Supreme Court ruled in Chisholm v. Georgia that Article III allowed federal courts to hear suits brought by private individuals against the states, the immediate response by state legislatures was that the Court had engaged in an unduly broad reading of the text. The Eleventh Amendment’s declaration that Article III shall not be construed to allow such suits in federal court echoes the same principle of strict construction that informed the Ninth and Tenth Amendments. This along with the fact that the Amendment was proposed less than three years after the adoption of the Ninth and Tenth Amendments suggests there may be far more commonality between these three amendments than has generally been recognized.

Finally, if the reading of history in this article is accurate, then this calls into question the traditional reading of John Marshall’s opinion in McCulloch v. Maryland and its place in our understanding of the original meaning of federal power. Marshall’s reading of the Tenth Amendment adopted a deeply contested understanding of “the people” and rejected the principle of expressly delegated power which had been promised by the proponents of the Constitution. Although Marshall correctly identified the original understanding that Congress would have implied powers, his rejection of a narrow interpretation of those implied powers conflicts with the historical record and the original understanding of retained sovereign power and rights.

In terms of modern doctrine, it appears that the Supreme Court’s recent attempts to enforce federalist limits on congressional authority have greater textual and historical warrant than previously supposed. Obviously, the original scope of state autonomy was significantly curtailed by the adoption of later amendments, in particular the Fourteenth. However, assuming that the Ninth and Tenth Amendment were not fully repealed in 1868, there remains the important work of determining where national authority ends, and the retained sovereign powers and rights of the people in the states begin. Indeed, the history presented in this paper suggests that the

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245 See Lash, The Lost Jurisprudence of the Ninth Amendment, supra note __. As I have discussed elsewhere, although the clauses are mutually reinforcing and overlap to some degree, they nevertheless express distinct principles of limited federal power. See Lash, A Textual-Historical Theory of the Ninth Amendment, supra note __.

246 I plan to explore these connections in an upcoming article.


248 For a discussion of how the historical Ninth and Tenth Amendments might be reconciled with the Fourteenth Amendment, see Kurt T. Lash, The Inescapable Federalism of the Ninth Amendment, Iowa Law Review (forthcoming 2008).

249 As is usually the case, James Madison provided us with a number of clues regarding how this principle of expressly delegated power might be put into practice. Madison believed that,
Supreme Court’s enforcement of federalist separation of powers is as much an aspect of enforcing the Bill of Rights as is the Court’s enforcement of individual rights. An adequate exploration of all these issues must be left to later works. The goal of this particular paper is to challenge the blithe assumption that the omission of a word requires the rejection of a principle.

Over time, judicial review would produce specific doctrines and “legal landmarks” clarifying the area of retained sovereignty even as it allowed for the legitimate exercise of federal authority. We have some idea of what Madison viewed as proper landmarks (see internal improvements veto, the Bank speech, etc). But Madison also left room for “political precedent” whereby an otherwise unduly broad exercise of federal power might receive sufficient sanction over time that later courts would be obliged to uphold the power as a matter of entrenched precedent. For an analysis of Madison’s views on original and precedent, see Lash, Originalism, Popular Sovereignty, and Reverse Stare Decisis, supra note ___.