

A GOVERNMENT OF ADEQUATE POWERS

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I am about to commit an act of unmitigated blasphemy for a Federalist Society member: I am about to attack most Federalist Society members' views of federalism.

So, first let me establish my credentials: I am most liberals' nightmare constitutional conservative. I am an original public meaning textualist. I believe that the single correct method of constitutional interpretation is to attempt faithfully to apply the meaning that the words would have had, in context, to a reasonably well-informed speaker or reader of the English language at or about the time the text was adopted. I believe further that this interpretive methodology is prescribed by the Constitution, which implicitly directs textualism as the way of interpreting the Constitution when it specifies that it is "this Constitution" that is adopted.¹ This is all set out in an elaborate article that I published with Vasana Kesavan in the *Georgetown Law Journal*, called "The Interpretive Force of the Constitution's Secret Drafting History."²

There is only one correct way to interpret the Constitution, and that is original public meaning textualism. Now, here comes the blasphemy: I believe that applying that interpretive methodology faithfully, one must conclude that the powers conferred on the national government are huge, sweeping, overlapping,

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1. U.S. CONST. art. VI, cl. 2.

2. Vasana Kesavan & Michael S. Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003). For further elaboration of the textual case for textualism—and, specifically, original-public-meaning textualism, see Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. (forthcoming 2009).

and, when taken together, very nearly comprehensive. Alexander Hamilton was right. And nearly every member of the Federalist Society is wrong.

The Constitution's enumeration of powers, if pushed to its logical limits, in fact provides the national government with truly sweeping powers. The fact that, for many years, those limits were never reached or even pressed does not mean that the Constitution did not, in fact, confer broad powers on the national government. The fact that, politically, the full exercise of such powers might be unpopular or constitute bad public policy does not mean that the Constitution did not, in fact, confer such broad powers. The fact that the political virtues of federalism might be eroded or altered by the full exercise of the Constitution's enumerated national legislative powers does not mean that the Constitution did not, in fact, confer such broad powers.

Federalism, properly understood, is a descriptive term attached to the Constitution's allocation of powers. It is not a free-standing constitutional rule. There is no "Federalism Clause" in the Constitution. The Constitution's allocation of powers can result in many different practical arrangements, leaning more or less in favor of national predominance or state predominance in policymaking, depending on how the national government chooses to exercise its constitutional powers.

My proposition is simply this: the enumerated powers of the national government are huge powers. Although it is undoubtedly true that "[t]he enumeration presupposes something not enumerated,"³ it is also true that the enumeration considered as a package fairly admits of a construction that permits the national government to act very nearly as if it were a government of general legislative power. The powers to tax, to spend, to regulate commerce, to wage war, to enforce prohibitions on state government actions abridging individual liberties, especially when combined with the sweeping power to enact laws that are necessary and proper for carrying those enumerated powers and any other powers of the national government into execution, create a national government of truly enormous constitutional powers.

There is very little that the federal government lacks constitutional power to do, if it employs its grants of powers carefully,

3. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 74 (1824).

properly, ingeniously, and to full effect. Aside from the exceptions the Constitution creates in favor of individual rights, the primary limitation on the exercise of federal legislative power is the logical and political plausibility of the asserted relationship between the enacted policy and the constitutional powers on which it is asserted to rest.

Now, I know how deeply heretical this position is to my Federalist Society friends, and it probably means that I have forfeited (for the sixty-seventh time or so) my prospects of being appointed to the Supreme Court. Nonetheless, I am persuaded that this is the right answer. I emphasize that I do not necessarily *like* all of the political consequences to which this constitutional position might lead. But surely if the Federalist Society stands for anything, it stands for the proposition that one must never let one's political impulses drive one's constitutional interpretation. Along that route lies *Dred Scott*,⁴ *Lochner*,⁵ *Roe*,⁶ *Casey*,⁷ *Lawrence*,⁸ and *McConnell v. FEC*,⁹ among hundreds of other atrocities.

I offer here, as gently as I can, the admonition that the federalism-policy-driven, narrow reading of the Constitution's grant of specific and more general enumerated powers to the national government may be a milder version of the same disease that so grotesquely afflicts our liberal, anti-constitutionalist adversaries. That disease is the tendency to read the Constitution in accordance with our political preferences, rather than being guided by the objective original meaning of the words. It is a mistake to extract from the Constitution's grant of specific enumerated power a general abstract constitutional principle of federalism, and then to read that principle back into the specific enumerations as a rule of constitutional law that alters what otherwise would be the objective textual understanding of the grants of powers that the document actually gives. It is a mistake of the same type (but perhaps not of the same severity) committed by liberal activists, who extract from specific constitutional provi-

4. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Roe v. Wade*, 410 U.S. 113 (1973).

7. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

8. *Lawrence v. Texas*, 539 U.S. 558 (2002).

9. *McConnell v. FEC*, 540 U.S. 93 (2003).

sions a general right of privacy or liberty, and then read that principle back into the Constitution, as if that is what it said.

In the rest of this Essay, I will present an outline of six points. The first point is an interpretive principle that frames everything else: Where a constitutional provision has a legitimate range of meaning—where there is ambiguity or open-endedness—and the legislature has acted pursuant to a view fairly within that range, a court may not properly invalidate what the legislature has done. I think this principle flows absolutely clearly from the very justification for judicial review set forth in *Federalist No. 78*¹⁰ and in *Marbury v. Madison*.¹¹ That justification, in a nutshell, is this: The Constitution is law, and it is supreme law. Thus, where the Constitution supplies a rule of law and a legislative act is contrary to, or inconsistent with, that rule of law, the duty of the court is to apply the rules supplied by the Constitution, not the rules supplied by the unconstitutional statute.¹²

Conversely, where the Constitution does *not* supply a rule of law, there is no justification for a court striking down an act of the legislature as being contrary to the Constitution. It is essential, then—it is part of the core justification of judicial review—that the court conclude that the legislative act violates a rule of law that is set forth by the text of the Constitution before it strikes down the act.

Now, I believe in what friends of mine call “naïve right-answerism.” I believe that original meaning textualism yields single, correct answers to legal questions—at least sometimes. Sometimes that single right answer is a determinate point. Sometimes the right answer to a constitutional question is that

10. THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“If there should happen to be an irreconcilable variance between the two [i.e., the Constitution and a legislative act], that which has the superior obligation and validity ought of course to be preferred . . . [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former.”).

11. 5 U.S. (1 Cranch) 137, 178 (1803) (“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.”).

12. For discussion of this straightforward position and its sometimes radical implications for much of our current constitutional practice, see Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

a text legitimately bears a range of meaning, a number of possible applications, and it is hard to privilege one over another. In other words, sometimes you run this interpretive program and you get answer A. Sometimes you run this program and you say, "You know what? The correct reading of the text is that it could embrace A, B, C, or D." My proposition is that where the text yields "A, B, C, or D," it is not legitimate for the judiciary to choose A and impose that as if it is the single, correct answer. Where it yields A, B, C, or D, and the legislature has acted pursuant to option A or option C, it is the duty of the courts to accept that legislative action. The power of constitutional construction within the boundaries of a general text is for Congress, not the courts. A corollary is that the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted.

Once you have adopted this interpretive proposition, all that remains is to recognize that the Constitution's most important grants of enumerated powers are written in broad and sometimes downright sweeping terms that bear a fairly substantial range of meaning.

My position is that, where the legislature has acted pursuant to a meaning that is within the fair range of a general text, the legislature's decision must be upheld. Note that this is not a rule of deference to the legislature in the sense of deliberately abstaining from ruling in accordance with what you think is the right answer to the constitutional question. Mine is *not* some notion that we should enforce the Constitution incorrectly. I think that, almost always, that sort of deference is illegitimate. Rather, what I am saying is that the *right* answer is that textual imprecision or generality often admits of a range of choices, and that the right answer is that the legislature must be permitted to choose from options within that range.

The classic case of a broadly-worded, open-textured provision, and probably the perfect illustration of this proposition, is the Necessary and Proper Clause. The Clause is fairly capable of a very broad range of meanings. Congress is granted the power to pass all laws which are "necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers” of the government.¹³ If Alexander Hamilton and James Madison were right in their description of the inevitable linguistic implications of this clause in *The Federalist Nos. 23*,¹⁴ 33,¹⁵ and 44¹⁶—and they were—and if Chief Justice John Marshall was right in following this line of reasoning, and plagiarizing Hamilton, in *McCulloch v. Maryland*¹⁷—and he was—then Article I, Section 8, Clause 18 is truly the Big Lebowski of the Constitution. The Anti-Federalists were right in seeing in this clause the route to a national government of enormous powers.

The Federalist Papers soft-pedaled the argument a little bit—but not all that much. Madison and Hamilton did not really deny the breadth of what the Anti-Federalists referred to, disparagingly, as “the sweeping clause.”¹⁸ Rather, the *Federalist Papers* argued that the power granted by the Necessary and Proper Clause was an inevitable corollary of principles that one would have inferred from the structure of the Constitution anyway.¹⁹ But the Framers did not leave the matter to structural inference. They wrote the principle into the Constitution in express terms. And as Madison and Hamilton explained, the Necessary and Proper Clause is indeed a sweeping power to enact laws that, within Congress’s reasonable judgment, are needed and appropriate for carrying into effect all the other powers of the national government.²⁰

Now, I think that in so-called Commerce Clause cases it is usually the Necessary and Proper Clause that is doing most of

13. U.S. CONST. art. 1, § 8, cl. 18.

14. THE FEDERALIST NO. 23 (Alexander Hamilton).

15. THE FEDERALIST NO. 33 (Alexander Hamilton).

16. THE FEDERALIST NO. 44 (James Madison).

17. 17 U.S. (4 Wheat.) 316, 421 (1819).

18. E.g., THE FEDERALIST NO. 33, at 198–99 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“And it is *expressly* to execute these powers that the *sweeping clause*, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws.”).

19. E.g., THE FEDERALIST NO. 33, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“[T]he constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated They are only declaratory of a truth which would have resulted by necessary and unavoidable implication”); THE FEDERALIST NO. 44, at 253 (James Madison) (Clinton Rossiter ed., 1999) (“Had the Constitution been silent on this head [i.e., the power granted through the Necessary and Proper Clause], there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.”).

20. E.g., THE FEDERALIST NO. 33, at 199 (Alexander Hamilton).

the work in the controversial instances. But the commerce power itself is a broad power. Congress may do anything that literally regulates interstate commerce, traffic, or "intercourse."²¹ It is irrelevant that the regulation of the articles or goods or means or instrumentalities of interstate commerce is for a noncommercial purpose. The purpose to which the commerce power is employed is not relevant to the scope of the power to do whatever falls within its terms. The power is plenary within the bounds of actual regulation of commerce.

The Necessary and Proper Clause is the true source of the principle that Congress may regulate intrastate activity that has a substantial effect on interstate commerce, or that is otherwise needful and requisite to a regulatory scheme that, in fact, attempts to regulate interstate commerce or to prohibit interstate commerce. This is the position of Justice Scalia in *Raich*.²² It was the position of the Court in *United States v. Darby*.²³ And I believe it is correct. A corollary of this is that Congress is, in substantial measure, the judge of what intrastate regulation is needed to accomplish the object of a legitimate interstate commerce regulation or prohibition.

This is a great and fearsome power, and it can be abused. At some point, the mind rebels; we all have our squeal points. And where it would require a court to pile inference upon inference in an essentially implausible way, the court might rightly conclude that it is unconstitutional for Congress to do what it has done. I tend to think, for that reason, that *Lopez*²⁴ and *Morrison*²⁵ were correctly decided, establishing limits on the plausibility of an extreme Necessary and Proper Clause rationale.

21. An interesting example of this latter understanding is supplied by the Mann Act, 8 U.S.C. § 1557 (2000).

22. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

23. 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

24. *United States v. Lopez*, 514 U.S. 549 (1995).

25. *United States v. Morrison*, 529 U.S. 598 (2000).

Even where the federal government cannot accomplish some end through the vehicle of the commerce power, it usually can accomplish that end through some other vehicle. There is, as the saying goes, more than one way to skin a cat.

Consider the taxing power. The taxing power entails a power to regulate. The power to tax is the power to destroy.²⁶ And the federal government has the power to tax. Indeed, Hamilton considered the taxing power to be the most important of the enumerated powers of Congress,²⁷ and it is absolutely clear from the text and history that the taxing power may be employed for regulatory purposes essentially unrelated to the collection of revenue, as long as a measure really does operate as a tax.

For example, the taxing power extends to duties and excises.²⁸ And it is plain that one of the reasons for this empowerment was to permit the new national legislature to be protectionist, in order to advance a policy of promoting the development of domestic industries. That is a policy unrelated to the raising of revenue, and it can be accomplished by imposing a tax. The taxing power, then, is a freestanding power. The power to tax is plenary, limited only by the uniformity clause proviso that immediately follows it. The *Child Labor Tax Case*²⁹ was, therefore, wrongly decided.

Consider next the spending power. The federal government has the power to spend. Just as the power to tax is the power to destroy, the power to spend—to confer or withhold a benefit—is the power to coerce, or to destroy. In fact, that is a paraphrase of language from *United States v. Butler*.³⁰ Once again, Alexander

26. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

27. See, e.g., THE FEDERALIST NO. 12, at 90–91 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“What will be the consequence, if we are not able to avail ourselves of the [power to tax] in its full extent? A nation cannot long exist without revenues . . . Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land.”).

28. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .”).

29. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

30. 297 U.S. 1, 70–71 (1936) (“If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? . . . The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree

Hamilton was right. The power to spend is a freestanding power of government that is not limited by the other specific power grants of Article I. It is its own separate power, and may be employed to produce results that might not be attainable under powers to regulate. A power to spend is different from a power to regulate. You may spend money even for unenumerated purposes.

Hamilton was right, but he might have been right for the wrong reason. He located the power to spend in the Taxing Clause of the Constitution.³¹ If you read it carefully, you cannot possibly make the same error that Seth Waxman made in referring to this clause as the Spending Clause.³² There is no Spending Clause, as such, in the Constitution; there is only a power to tax. We have already talked about the scope of the taxing power. But, actually, there is a spending power in the Constitution. It is just located elsewhere.

Ironically, it is located in Article IV, Section 3, Clause 2, which is often known as the Property Clause. That clause says that the “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” The spending of money is the disposing of and the making of rules with regard to the dispensation of property of the United States, however derived. Such property could be derived from exercise of the taxing power, or it could be property obtained through some other means. But look at what the Clause says. If this provision is, as Professor David Engdahl has convincingly argued, the source of the spending power,³³ it is a plenary power of the federal government to spend and to make all needful rules for

to the proposed regulation. *The power to confer or withhold unlimited benefits is the power to coerce or destroy.*” (emphasis added)).

31. U.S. CONST. art. I, § 8, cl. 1.

32. Transcript of Oral Argument at 14, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (“Justice O’Connor, we did the best we could in our supplemental brief to explain the operation of this provision of the Department of Transportation Appropriations Act. One of the unusual things about it is that it includes a provision that if States don’t comply they will not lose any funding, *although it does also purport to apply Congress’s Spending Clause authority to the Driver’s Privacy Protection Act.*” (emphasis added)). In my original presentation, I was referring to Mr. Waxman’s remarks as a member of the same panel discussion. I am grateful to the editors of the *Harvard Journal of Law & Public Policy* for finding this real-life illustration of customary, but misleading, usage.

33. See David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1994).

disposing of the federal government's property, however obtained. But it is *only* a power to spend. It is not also a power to directly regulate. The exercise of the spending power, therefore, does not preempt inconsistent state law. States (or individuals or entities) may refuse the money. They may preserve their inconsistent policy by declining the money in the first place.

But one might ask, can the spending power not be used as a *de facto* power to coerce, induce, bribe, and extort, even if it is not a power to legally require? The answer is *yes*. The only limitation on what the federal government may spend money for, and the conditions it may attach, is that the condition itself not be *independently* unconstitutional. Now this is the most heretical thing I have said so far: The flaw in *South Dakota v. Dole*³⁴ is not that it recognizes too broad a federal government spending power, but that it recognizes too *narrow* a federal government spending power.³⁵ The correct view is that the government of the United States may spend money for any purpose for which it has money to spend, and that it may attach whatever conditions it wants—"germane" or not—to acceptance of such money, so long as the conditions are not independently unconstitutional.³⁶

I turn now to an undervalued source of federal legislative power: the war power. One of the best ways to understand the different views of the Founding generation with respect to national governmental power is to look at who actually fought in the Revolutionary War. Both Washington and Hamilton ended up with strongly nationalist views. So did John Marshall. Jefferson did not serve in the Continental Army, and had a far narrower, state-centric view of sovereignty and national legis-

34. 483 U.S. 203 (1987).

35. *Id.* at 207–08 (restricting congressional spending power by requiring that the spending power be exercised (1) only "in the pursuit of the general welfare"; (2) "unambiguously," in relation to "the federal interest in particular national projects or programs"; and (3) in accord with "other constitutional provisions" (internal citations and quotation marks omitted)).

36. South Dakota is not *constitutionally entitled* to its "fair share" of highway funds. Thus, there is nothing constitutionally wrong with the federal government's decision not to give South Dakota any federal highway funds if the federal government dislikes South Dakota, or its policies, for any reason. Similarly, universities have no constitutional entitlement to federal grants or loans. Thus, there is nothing constitutionally wrong with the federal government's decision not to give money to universities that exclude federal military recruiters. *Cf. Rumsfeld v. Forum for Academic Institutional Rights*, 547 U.S. 47 (2006) (rejecting a First Amendment objection to such a funding condition).

lative power. But let us consider what the war power adds to the foregoing analysis.

Remember that Congress has the necessary and proper power to carry into execution its powers to declare war and to raise and support armies, and the President's power as Commander-in-Chief and duty to preserve, protect, and defend the nation. The Supreme Court has said that the power to wage war is the power to wage it successfully—the power to win.³⁷ It is the power to marshal the nation's resources to the war effort and to protect the nation and its citizens from attack. I believe that Congress has the power to pass all laws necessary and proper for carrying into execution the power of our government to win wars and protect its people. The war power of the national government is a fearful, terrible, vital, enormous, encompassing power. This has broad implications.

When I teach *Youngstown Sheet & Tube Co. v. Sawyer*,³⁸ I always point out the line of this opinion that says, well, the President cannot do this on his own, but Congress could, pursuant to the commerce power.³⁹ There is a simpler, more direct answer. If there is a war, Congress clearly has the power—a dangerous power to be sure—to nationalize industries, to seize steel mills, if necessary, to effectuate the war that is being waged.

A related point seeks to connect the *Lopez* case to the tragedy in Beslan. Beslan, I hope we have not forgotten, is the city in Russia where there was a siege at an elementary school. Something similar could happen in the United States. My proposition is that the Gun-Free School Zones Act⁴⁰ could legitimately be adopted by the federal government as a national security defense measure. Congress could determine that prohibiting or deterring or tracking or punishing the possession of violent weapons in school zones is a power that the federal govern-

37. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("The war power of the national government is the power to wage war successfully." (citation and internal quotation marks omitted)). There is much that is wrong in the Court's unanimous opinion in *Hirabayashi*, but this proposition is unexceptionable.

38. 343 U.S. 579 (1952).

39. *See id.* at 588 ("The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy.").

40. 18 U.S.C. § 922(q) (2000) (originally enacted as Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844).

ment, if it chooses, needs to exercise in order to provide for the defense of its citizens during a time of war and terrorism.⁴¹

There is more yet: The Civil War Amendments' enforcement clauses⁴² are most naturally read as new, sweeping "necessary and proper" clauses. They grant Congress broad power to pass "appropriate" legislation to enforce some pretty broadly-worded, generally-expressed limitations on state government power. If one were to apply—as one probably should—the then-prevalent, *McCulloch*-driven broad understanding of Congress's powers under the Necessary and Proper Clause to these linguistically similar provisions ("proper" / "appropriate"), one ends up with a truly sweeping assignment of new legislative power to the national government.⁴³

These provisions give Congress "necessary and proper" power with respect to vast new areas of federal governmental authority: protection against private coercive action eviscerating persons' physical or economic liberty;⁴⁴ protection from private violence tolerated by state authorities;⁴⁵ protection of individual civil rights against government;⁴⁶ protection against or redress from state action denying or failing to provide equal protection of the laws or due process of law;⁴⁷ and enforcement of the right to vote without discrimination on the basis of race.⁴⁸ When read in light of their enforcement clauses, these amendments constitute dramatic additions to the menu of Congress's enumerated powers—additions in many ways broader and

41. Note that this does not answer the question whether the Second Amendment limits the exercise of this power.

42. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

43. For an excellent defense of this position on historical grounds, see Steven A. Engel, Note, *The Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

44. U.S. CONST. amend. XIII, § 1 (prohibiting slavery or involuntary servitude).

45. U.S. CONST. amend. XIV, § 1 (prohibiting state denial of equal protection of the laws).

46. U.S. CONST. amend. XIV, § 1 (prohibiting state abridgement of the privileges or immunities of national citizenship).

47. U.S. CONST. amend. XIV, § 1 (prohibiting state denial of equal protection or due process of law).

48. U.S. CONST. amend. XV, § 1 (prohibiting denial of the right to vote based on race or prior condition of servitude).

more encompassing than most of the power-grants of Article I, Section 8. In a sense, the Fourteenth Amendment is the enactment, in slightly less comprehensive terms, of Madison's earlier proposal, rejected at the framing, of a federal congressional veto over state laws. Moreover, the very generality of the terms with which these state prohibitions/federal power-grants are expressed means that Congress possesses, as a practical matter, broad latitude to define more specifically what it is that it wishes to "enforce" with "appropriate" legislation.

This is not the Supreme Court's current understanding, of course. It considers Congress's powers to be mere adjuncts to the Court's own broad interpretive authority. Congress's powers are weak; the Court's are strong.⁴⁹ Both of these conclusions are probably wrong. The original meaning of the Amendments' texts suggests just the opposite of the Court's rule: Congress has sweeping authority in this area; the courts are the adjuncts.⁵⁰ Federalist Society members are likely to cheer the latter half of this proposition. But they ought not neglect the former: Congress has broad power to define and legislate rights against state governments that protect the privileges or immunities of national citizenship, provide for equal protection of the laws to all persons within a state, guarantee that states provide due process of law, and eradicate racial discrimination in voting. The power to enforce the broadly-worded prohibitions of the Civil War Amendments is a sweeping grant of national legislative power.⁵¹

49 See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

50. I hope to develop this understanding in future writing. The core insight is that as a matter of text, structure, and history, the Fourteenth Amendment is primarily a text empowering Congress to legislate against state laws and practices. The broader one's understanding of the language of Section 1, the *less* one can say that it authorizes federal judicial invalidation of state action that fits within the range of meaning admitted by such broad language; but the *more* one can say that the grant of federal legislative power over such a broadly-described subject matter authorizes broad congressional choice in such matters. See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 252–53 n.10 (1995) (suggesting such an understanding of the Section 5 enforcement power); see also Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184–192 (1997); Engel, *supra* note 43.

51. See *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (noting that the text of the Fourteenth Amendment does not say that "the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged.").

My final point relates to the statements of a few liberal critics of original meaning textualism to the effect that originalism tends to produce for conservatives the results they like to see. Not always; I like some but not all of the policy implications of originalism. The consequence of my interpretive position, here, is that the federal government has a lot more power than I am comfortable with, as a matter of my political preferences as a conservative Republican. But although I would prefer that the federal government be a government of fewer powers, we go to war with the Constitution we have, not the one we prefer.

Aren't there *some* things the national government cannot do? Yes. It may not dictate the location of a state's capitol.⁵² It may not directly require a state legislature to enact specified state legislation.⁵³ And I have my doubts about protecting hapless toads that never stray far from home.⁵⁴ The enumeration of powers presupposes something unenumerated.

But not very much.

52. *Coyle v. Smith*, 221 U.S. 559 (1911).

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

54. Compare *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), with 334 F.3d 1153, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*). For a brilliant and entertaining analysis of this last type of issue, see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower Loving Fly*, 97 MICH. L. REV. 174 (1998).