2011 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HCR 3015

2011 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HCR 3015
February 17, 2011
14695

☐ Conference Committee

Committee Clerk Signature	Carmen Hart

Explanation or reason for introduction of bill/resolution:

Reaffirming ND's sovereignty under the 10th amendment to Constitution of the US and to demand federal government halts its practice of assuming powers and imposing mandates on the states for purposes not enumerated in the Constitution of the US

Minutes:

Vice Chairman Randy Boehning opened the hearing on HCR 3015.

Rep. Jim Kasper, District 46, appeared in support of HCR 3015. We are talking about the sovereignty. The tenth amendment, "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 tenth amendment means what it says. Over the years there are many citizens in our nation. There are constitutional scholars all over our country, and there are people like myself and maybe some of you who believe that there definitely is in our United States constitution a separation of powers and that the federal government has gone beyond where it should in many cases as far as you _the powers that have been delegated and left to the states. The constitution when it talks about forming our republic was very specific. Our framers were very specific in drafting that document so that they enumerated in the constitution the powers that they wished for the federal government to have. Then they clearly stated in the tenth amendment the powers that are not delegated to the United States federal government are left to the states or the people. We will be having as we continue through 2011 and in years hence more and more confrontations by state legislatures, governors, and citizens on the issue of sovereignty. This resolution is simply to state that federal government honor the tenth amendment and quit getting into the state's business.

Rep. Lonny Winrich: I would refer you to Article 1, Section 8 of the constitution, the main body of the constitution where the first clause reads: The congress shall have the power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States. What powers do you believe are delegated to the federal government for the provision of general welfare?

Rep. Jim Kasper: General welfare is in the area of protecting our state citizens. It is in the area of assuring that our citizens are not discriminated against and I would assume where we have our welfare departments set up for those citizens who are unable to take care of themselves to provide for those types of services. This is an area of the constitution where some think that the federal government can go beyond where others think they should. Of course, it is in the area where we have a lot of supreme court decisions. Again, Rep. Winrich, there was a definite mindset of the framers that we were a group of states forming a federal republic and that the group of states were superior to the federal republic in all areas except where the federal republic, our United States government, had to intervene where the states individually could not. I would also say that it would tend to want to have some uniformity across state lines of certain types of goods and services that is sort of in the commerce clause but probably in the general welfare clause as well. You must remember, Rep. Winrich, I am not a constitutional scholar. I am not an attorney. I am simply a citizen who reads the constitution like you do, but I do have the opportunity to maybe send an email and get you further information about some legal opinions on what the general welfare clause means and I would be happy to.

Rep. Lonny Winrich: What I find confusing, Rep. Kasper, your resolution speaks of specifically delegated powers and restricting the federal government to its specific delegated powers under the constitution. I think in your answer to the question you essentially said that the general welfare clause is open to interpretation and has in fact been interpreted differently over the years by the supreme court and by others. The whole concept of limiting the federal government to specific itemized delegated powers in the constitution seems flawed.

Rep. Jim Kasper: The beauty of our republic the way our founders established it when they established the three separate branches of government, the executive, legislative, and the judicial was to have a series of checks and balances. Of course, the judicial is the arbiter of battles between the executive and the states and so on when it comes to constitutional issues. However, what they also said and I wished I would have brought it with me, I have a quote from Thomas Jefferson which I will be reading this afternoon on the floor debate where he specifically talks about the fact that anytime the states did not believe or felt that the federal government was going beyond their enumerated powers it was the obligation and is the obligation of the states to fight back so to speak and to rise up. Rep. Winrich, over the years from my prospective we have been too docile as citizens and as state governments and have been run roughshod by the federal government. I can't get into minutia with you. I can tell you the concept that I believe and when we get to the specifics then there will be the argument with the state and the federal government and the legislative bodies of the various states and the supreme court will be asked to decide.

Rep. Lonny Winrich: Thank you for your interpretation.

Rep. Bill Amerman: In the second to the last resolve where it says requires states to pass legislation or lose federal funding be prohibited or repealed, so if we have to pass legislation to get federal funding for like a Fargo diversion or whatever, that would be prohibited then?

Rep. Jim Kasper: That is apples and oranges. The issues are not at all the same. If we read the whole resolved be further resolved that all compulsory federal legislation that direct states to comply under threat of civil or criminal penalties, so the federal government telling us if you don't do this you are going to face a civil or criminal penalty, then we are saying no we don't want that. Stop those practices. It has nothing to do with us asking them for the money. That is another issue that we are not dealing with in that part of the resolution.

There was no one neutral or in opposition to this resolution.

The hearing was closed.

Rep. Roscoe Streyle made a motion for a **Do Pass.**

Rep. Lisa Meier seconded the motion.

DO PASS, 10 YEAS, 3 NAYS. Rep. Roscoe Streyle is the carrier of this resolution.

Date: 2-17-11
Roll Call Vote #: ____

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3015

House GOVERNMENT AND VETERAN AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Streyle Seconded By Meier

Representatives	Yes	No	Representatives	Yes	No
Chairman Bette Grande	✓		Bill Amerman		✓
Vice Chairman Randy Boehning	✓		Ron Guggisberg		✓
Glen Froseth	✓		Lonny Winrich		✓
Karen Karls	✓				
Lisa Meier	✓				
Gary Paur	✓				
Karen Rohr	✓				
Mark Sanford	✓				
Vicky Steiner	✓				
Roscoe Streyle	✓				

Total (Yes) 10 No 3

Absent 0

Floor Assignment Streyle

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3015: Government and Veterans Affairs Committee (Rep. Grande, Chairman) recommends **DO PASS** (10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HCR 3015 was placed on the Eleventh order on the calendar.

2011 SENATE GOVERNMENT AND VETERANS AFFAIRS

HCR 3015

2011 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veteran's Affairs Committee
Missouri River Room, State Capitol

HCR 3015
March 25, 2011
16015

☐ Conference Committee

Committee Clerk Signature Katie Olive

Explanation or reason for introduction of bill/resolution:

A concurrent resolution reaffirming North Dakota's sovereignty under the 10th Amendment to the Constitution of the United States and to demand the federal government halts its practice of assuming powers and imposing mandates on the states for purpose not enumerated in the Constitution of the United States

Minutes: *Testimony attached.*

Representative Jim Kasper: District 46 in Fargo. See attached testimony #1.

Senator Cook: Do you remember how many of the original drafters signed the document?

Representative Jim Kasper: I don't know.

Senator Cook: When you reference the reasons that they chose not to include the bill of rights. That surprised me; it was the bill of rights that was the most important piece.

Chairman Dever: My perception of the 10th amendment is that it didn't apply to the federal level but more to the state level.

Representative Jim Kasper: If you think about the United States, the states came together to form the government call the USA and all the rest was reserved to the states.

Senator Nelson: You made mention that we had this thing last time, will this happen every biennium?

Representative Jim Kasper: I think that every legislative session every legislative assembly should do something like this.

Sandy Clark: North Dakota Farm Bureau. Stand in support of HCR 3015.

There was no one else to speak in support, opposition or a neutral position on HCR 3015

2011 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veteran's Affairs Committee
Missouri River Room, State Capitol

HCR 3015
March 31, 2011
16260

☐ Conference Committee

Committee Clerk Signature Katie Olive

Explanation or reason for introduction of bill/resolution:

A concurrent resolution reaffirming North Dakota's sovereignty under the 10th Amendment to the Constitution of the United States and to demand the federal government halts its practice of assuming powers and imposing mandates on the states for purpose not enumerated in the Constitution of the United States

Minutes: *No testimony attached*

Senator Cook: It's a delicate issues but it is an issue that many states are aware of.

Chairman Dever: The day before yesterday when Senator Mathern brought forth the 75 page amendment, I thought about standing up to boil it all down, because what it comes down to is do we take the steps that some of us consider necessary to satisfy federal rules and regulations that have not yet been developed or do we take a giant leap to actually in the larger amendments to adopt 3 different sets of model legislation from the National Association of Insurance Commissioners expecting that is going to satisfy whatever it is that the federal government is going to do.

Senator Cook: One of the beauties of 50 sovereign states working as sovereign state to find solutions to what they see as their states' problems is that the states become the incubators of some pretty sound solutions. It's not so important that we all do it at the same time all the time but what is important is when one gets it right you become a model and the others follow you.

Senator Nelson: I don't think that there are any of us that are opposed to the idea that states have right under the 10th amendment. The problem that I have is that I have been here for 11 sessions now and I think every session we have had proposed legislation like this. One thing that I can't stand is form letters and somewhere along the line I heard it was an ALEC resolution which is telling me that it will come from a bunch of other states and worded exactly like this is.

A motion was made for a do pass by Vice Chairman Sorvaag with a second by Senator Berry. There was no further discussion, roll was taken and the motion passed 5-2 with Senator Berry carrying the bill to the floor.

Date: 3/31/11
Roll Call Vote # _____

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3015

Senate GVA Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sorvaag Seconded By Barry

Senators	Yes	No	Senators	Yes	No
Chairman Dever	X		Senator Marcellais		X
Vice Chairman Sorvaag	X		Senator Nelson		X
Senator Barry	X				
Senator Cook	X				
Senator Schaible	X				

Total (Yes) 5 No 2

Absent _____

Floor Assignment Barry

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3015: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HCR 3015 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HCR 3015

THE ENUMERATED POWERS OF STATES[1]

Robert G. Natelson[2]

"The most numerous objects of legislation belong to the States. Those of the National Legislature [are] but few."

—Rufus King, at the Federal Constitutional Convention.[3]

"I am, sir, at a loss to know how the state legislatures *will spend their time."*

—Melancton Smith, at the New York ratifying convention[4]

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[1] Repeatedly-referenced works: the sources listed in this footnote are cited repeatedly in this Article:

Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 23 YALE L. & POL'Y REV. 23 (1996) [hereinafter Butler & Macey];

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997) [hereinafter CHEMERINKSY];

JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC (1978) [hereinafter COOKE];

Tench Coxe, *A Freeman* (Essays I and II) *in* COLLEEN A. SHEEHAN & GARY L. MCDOWELL, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-88 (1998) [hereinafter Coxe];

JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols; 1941 ed. inserted in 2 vols.) [hereinafter ELLIOT];

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (4 vols.) (Max Farrand ed., 1937) [hereinafter Farrand];

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford ed., 1888) [hereinafter Ford, PAMPHLETS];

A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM (Robert A. Goldwin ed., 1974) [hereinafter Goldwin];

Alexander Contee Hanson ("Aristides") *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford ed., 1888) [hereinafter Hanson];

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (18 vols. projected; not all completed) (Merrill Jensen et al. eds., 1976) [hereinafter Jensen];

JACK N. RAKOVE, ORIGINAL MEANINGS (1997) [hereinafter RAKOVE]; and

THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST].

[2] Professor of Law, The University of Montana; Senior Research Fellow, Initiative and Referendum Institute; Senior Fellow in Western Studies, the Independence Institute. J.D., Cornell University; A.B. History, Lafayette College. I am grateful for the assistance of the following individuals and groups: for reviewing the manuscript, Professor Frances Wells, The University of Montana School of Law; for research assistance, Stacey Gordon, Reference Librarian, and Varya Petrosyan, Class of 2003, The University of Montana School of Law; for secretarial assistance, Charlotte Wilmerton, The University of Montana School of Law.

[3] 1 Farrand, *supra* note 1, at 198.

[4] 2 ELLIOT, *supra* note 1, at 313.

I. INTRODUCTION

In constitutional form, the federal government is one of enumerated powers, and all powers not enumerated are reserved exclusively to the states and the people.[5] The federal government's enumerated powers have been construed so broadly, however, that the modern student may be pardoned for asking if anything really has been reserved. Even forty years ago, Professor Lindsey Cowen could say, "As things now stand, there may not be any powers which are 'not delegated to the United States by the Constitution,'"[6] and, of course, the federal government has grown a good deal since then. Over the past century, the power to regulate commerce has come to include the power to regulate agriculture,[7] the power to tax has become the power to control inheritances,[8] and the power to spend for the "general Welfare" has enabled the federal government to create programs to inculcate and educate,[9] as well as for many other purposes.[10]

The proffered legal basis for most of this expansion of federal power is the wording of the original Constitution. Subsequent amendment justifies relatively little of it. This fact, in turn, raises the oft-argued question of whether the powers granted the federal government in the original Constitution, especially as modified by the Ninth and Tenth Amendments, really encompass such subjects as agriculture, education, health care, and the like.

The drafters of the Constitution chose to enumerate the powers of the federal government but not, with a few procedural exceptions,[11] the exclusive powers of states. However, that decision should not be understood as implying that exclusive state powers were narrow, but rather that they were vast. As the drafters explained, they had decided not to enumerate the states' reserved powers for the same reasons they had decided not to include a bill of rights: first, the reserved powers were too extensive to enumerate;[12] second, a discrete list would encourage the pretense that the federal government could act everywhere else.[13]

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[5] The enumeration of federal powers is found primarily in U.S. CONST. art. I, § 8. The explicit statements of reserved powers are located in the Ninth and Tenth Amendments.

[6] Lindsey Cowen, *What is Left of the Tenth Amendment?*, 39 N.C. L. REV. 154, 183 (1961).

[7] Wickard v. Filburn, 317 U.S. 111 (1942).

[8] *E.g.*, through marginal rates of federal estate tax of up to fifty percent. 26 U.S.C.A. § 2001(c)(1) (West 2002).

[9] *See, e.g.*, 20 U.S.C.A. § 951 (West 1999) (creating National Foundation on the Arts and the Humanities).

[10] United States v. Butler, 297 U.S. 1 (1936) (the spending power is not limited to direct grants of legislative power found in other clauses in the Constitution).

[11] *E.g.*, U.S. CONST. art. I, § 2, cl. 1 (states set qualifications for electors for House of Representatives); *id.* § 2, cl. 4 (state governors issue writs of election to fill vacancies in House); *id.* § 3 (state legislatures choose Senators); *id.* § 4, cl. 1 (states have exclusive power to establish place of choosing Senators); *id.* art. II, § 1, cl. 2 (states determine manner of choosing Presidential electors); *id.* art. I, § 10, cl. 3 (right of states to enter into compacts, subject to Congressional approval).

[12] *E.g.*, 2 ELLIOT, *supra* note 1, at 87 (James Bowdoin at the Massachusetts ratifying convention); 4 ELLIOT, *supra* note 1, at 149 (James Iredell speaking at the North Carolina ratifying convention).

[13] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 436 (James Wilson at the Pennsylvania ratifying convention). Wilson, speaking of a bill of rights, stated: "If we attempt an enumeration,

On the other hand, if we did have an enumeration of exclusive reserved state powers, perhaps it would enable us to understand more precisely the scope of the granted powers. Such an enumeration also could shed light on basic principles of American federalism.[14] For example, an enumeration might help us determine whether it is constitutionally true, as is sometimes claimed, that growing national economic interdependence justifies more expansive interpretation of federal powers. Put another way, an enumeration could help us determine whether the presence of externalities – spill-over effects – from one state to another creates a constitutionally defensible reason for further central control.

In point of fact, leading federalists left in the historical record some rather specific enumerations of the reserved powers of states. They offered these lists as part of the basis of the political bargain by which the Constitution was ratified. As such, these lists help us divine the actual meaning of such phrases as "general Welfare"[15] and "Commerce . . . among the several States."[16]

Surprisingly, there has been almost no attention in the legal literature[17] to the federalists' enumeration of state powers for the benefit of the ratifying public. In this Article, I distill the essence of these enumerations for the modern reader. After doing so, I conclude that the listed items strongly suggest that a guiding principle of American federalism is a Coasean one: externalities and/or interdependence, without more, generally do not serve as constitutional justifications for further centralization.

II. THE ADOPTION PROCESS: TOWARD CENTRALIZATION AND BACK AGAIN

An overreaching federal government was not, of course, the big problem facing the country when the constitutional convention gathered in Philadelphia in May 1787. The delegates convened in order to craft a proposal to rein in

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every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." *Id.* *See also id.* at 453-54 (Wilson); 3 ELLIOT, *supra* note 1, at 620 (James Madison commenting at the Virginia ratifying convention); 4 ELLIOT, *supra* note 1, at 140-41 (William MacLeane speaking at the North Carolina ratifying convention); *id.* at 142 (Gov. Samuel Johnston speaking at the same convention); *id.* at 316 (Gen. C.C. Pinkney speaking in the South Carolina legislature) (considering calling a ratifying convention); 8 Jensen, *supra* note 1, at 231-32 (George Lee Turberville) (writing, "I am satisfied that an enumeration of those priviledges which we retained – wou'd have left floating in uncertainty a number of non enumerated contingent powers and priviledges – either in the powers granted or in those retained – thereby indisputably trenching upon the powers of the states").

[14] Then Professor (now Judge) Jay S. Bybee compared the task of identifying exclusive state powers solely from the Constitution's grants of federal powers to understanding reality from the mere shadows on the wall of Plato's cave. Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551 (2000).

[15] U.S. CONST. art. I, § 8, cl. 1.

[16] U.S. CONST. art. I, § 8, cl. 3.

[17] I have been able to find an occasional enumeration of specific state powers, but without citations to historical references. *E.g.*, Malcolm B. Montgomery, *States' Rights Under the Federal Constitution*, 20 MISS. L.J. 336, 339 (1949). Also, a noted historian has discussed briefly one enumeration, that of Tench Coxe. RAKOVE, *supra* note 1, at 192.

centrifugal forces that immediately impaired the capacity of the new nation to function on the world stage – and, ultimately, might tear it apart. The present perils of extreme decentralization, coupled with the understandable influence of British precedents, help explain why the first instinct of convention leaders was to propose a "consolidated" rather than a "foederal [sic]" union.

The consolidationist vision was embodied in the Virginia Plan, so-called because it was proposed by the Virginia delegation, under the guidance of Governor Edmund Randolph and by James Madison. In effect, this was a scheme in which the states would survive only as "corporations," fulfilling the kind of subordinate roles that local government played in England.[18] One delegate, George Read of Delaware, proposed abolishing the states entirely.[19] Most of the delegates believed, however, that the states should be preserved, if merely for instrumental reasons: the general government simply could not "extend its care to every requisite object"[20] over such a large territory.

The Virginia plan served as the basis of discussion during the first few weeks of the convention. By its terms, it would bestow on the new government the cumulative total of powers (1) that Congress had enjoyed under the Confederation, (2) in which "the separate states are incompetent," and (3) necessary to "the harmony of the United States." In addition, Congress would receive (4) a plenary veto over state legislation.[21] At this stage, proposals for a more limited list of federal powers were dismissed as impractical.[22] Thus, when the New Jersey delegation offered its own, more decentralized proposal on June 16, 1787, the delegates rejected it by a decisive vote. The delegates further appeared willing to grant the new government even the power to interfere with the "internal police" (internal governance) of states. When Roger Sherman suggested that the states ought to retain power over such matters, Gouverneur Morris responded that, in some cases, they ought not even have that power;[23] and when Sherman introduced his proposal in the form of a motion, the convention rejected it.[24]

The date on which the convention rejected Sherman's motion – July 17, 1787 – marked the high tide of nationalization. The important fact for present purposes was that the constitutional bargain was not finalized until the tide of nationalization had ebbed over the ensuing four years.

Some delegates, of whom Roger Sherman was but one, always had maintained that the states should be left with considerable powers.[25] Later in the day on July 17, those delegates won their first battle: the convention voted to

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[18] Some anti-federalists later charged that this was exactly what the Constitution would do. *See, e.g.*, 4 Jensen, *supra* note 1, at 277 ("American Herald"); 5 Jensen, *supra* note 1, at 638 (same).

[19] 1 Farrand, *supra* note 1, at 136.

[20] *Id.* at 357 (James Madison).

[21] *Id.* at 21.

[22] *E.g.*, *id.* at 53 (James Madison); *id.* at 59-60 (Roger Sherman).

[23] 2 Farrand, *supra* note 1, at 26.

[24] *Id.* at 21, 26.

[25] *E.g.*, 1 Farrand, *supra* note 1, at 86 (John Dickinson); *id.* at 133 (Roger Sherman) (stating that criminal and civil jurisdiction should be left with the states); *id.* at 160 (George Mason); *id.* at 165 (Hugh Williamson) (averring that states ought to control their "internal police"); *id.* (Elbridge Gerry) (opining that control of the militia ought to be a state power).

abandon the Congressional veto over state legislation and to replace it with a general supremacy clause. On July 23, when the draft constitution was submitted to the Committee of Detail, the new government was not yet limited to enumerated powers;[26] but when the Committee submitted its revision on August 1, the sweeping language of the Virginia Plan was gone, and an enumeration had replaced it.[27] As the convention wore on, some delegates tried to add powers to the enumeration, but most of these efforts were defeated. When the convention adjourned, it presented to Congress and to the states a scheme for a much weaker central government than had been envisioned in the Virginia Plan. Indeed, one could argue that the final proposal was as dissimilar to the Virginia Plan as it was to the Articles of Confederation.[28]

Still, the retreat toward localism had not gone far enough for the Constitution to be politically acceptable. Because the document listed few *state* powers and had no bill of rights, many people thought it would create a central government stronger than had, in fact, been intended. This misconception offered the anti-federalists an easy – and perhaps their most effective[29] – line of attack. The Constitution, they said, would lead to a consolidated government because it granted what seemed to be very broad powers, but did not enumerate what had been reserved. Anti-federalists assailed three granted powers in particular: the General Welfare Clause[30] (although it had been merely copied from the Articles of Confederation[31] and actually was designed to limit Congressional power[32]) the Taxation Clause[33] (although a fair reading of the document would limit this to effectuation of Congress' other powers[34]), and the Necessary and Proper Clause[35] (called by one anti-federalist the "Omnipotent Clause,"[36]

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[26] 2 Farrand, *supra* note 1, at 131-32.

[27] *Id.* at 157-59. *Cf.* John C. Hueston, *Note: Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990). *See also* RAKOVE, *supra* note 1, at 177-78.

[28] Thus, at the South Carolina legislative session that voted to call the state's ratifying convention, Edward Rutledge pointed out that the powers under the new Constitution were basically similar to those under the Confederation, except that the government under the Constitution would have the power to enforce its decrees. 4 ELLIOT, *supra* note 1, at 299. For other observations of the similarities between the documents, see 4 Jensen, *supra* note 1, at 245-46 (Cumberland GAZETTE); 5 Jensen, *supra* note 1, at 567 (Nathaniel Peaslee Sargeant). *See also* RAKOVE, *supra* note 1, at 177-79 (citing Madison).

[29] COOKE, *supra* note 1, at 117 (citing the opinion of Tench Coxe).

[30] *E.g.*, 2 ELLIOT, *supra* note 1, at 338 (John Williams) (speaking at the New York ratifying convention); Letter from Silas Lee to George Thatcher (Jan. 23, 1788), *in* 5 Jensen, *supra* note 1, at 782.

[31] THE FEDERALIST No. 41, at 263 (Madison).

[32] Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. __ (forthcoming 2003); FORREST MCDONALD, NOVUS ORDO SECLORUM (1985).

[33] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 60 (W. Bodman speaking at the Massachusetts ratifying convention).

[34] THE FEDERALIST No. 41, at 262-63 (Madison).

[35] *See, e.g.*, Objections of the Hon. George Mason to the Proposed Federal Constitution, *in* 1 ELLIOT, *supra* note 1, at 494, 496; 2 Jensen, *supra* note 1, at 426 (Robert Whitehill speaking at the Pennsylvania ratifying convention); 8 Jensen, *supra* note 1, at 323, 324 (William Russell) (claiming that clause gives Congress plenary power).

[36] 5 Jensen, *supra* note 1, at 846 ("The Republican Federalist VI").

although, as Hamilton and many others convincingly pointed out, that clause added not a jot of substantive power to the central store).[37]

Despite the technical weakness of the skeptics' position, they had grasped certain psychological and social truths that the federalists did not understand – or at least purported not to understand. The anti-federalists predicted that, over the long term, the extremely clever sorts who would cleave to the national authority (the Hamiltons, the Morrisses, and their counterparts who spin most modern constitutional theories[38]) would create strong pressure to construe the central government's granted powers expansively.[39] Future promoters of fed-

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[37] THE FEDERALIST NO. 33, at 202. *See also* RAKOVE, *supra* note 1, at 180 (stating that the framers did not think this clause augmented Federal powers). At the Pennsylvania ratifying convention, federalist Thomas McKean claimed the anti-federalists there finally had conceded this point. 2 ELLIOT, *supra* note 1, at 537. *Cf.* 3 ELLIOT, *supra* note 1, at 455 (James Madison at the Virginia ratifying convention) (claiming that the clause applies only to enumerated powers); *id.* at 441 (Edmund Pendleton at the Virginia ratifying convention) (making the same point); *id.* at 443 (George Nicholas at the Virginia ratifying convention); *id.* at 206 (Edmund Randolph at the Virginia ratifying convention); *id.* at 463-64 (same, but with an apparently confused statement that the clause was necessary because of how constitutions should be interpreted); 4 ELLIOT, *supra* note 1, at 141 (William MacLean speaking at the North Carolina ratifying convention).

The Supremacy Clause also came under attack. *See, e.g.*, 4 Jensen, *supra* note 1, at 468 ("One of the Common People").

[38] Thus, for example, I have with me as I write a book that makes the ingenious argument that adoption of the Seventeenth Amendment (direct election of Senators) eliminated "the structural protection" for federalism, and that therefore the courts should no longer protect state prerogatives from central authority, thus allowing the feds to do pretty much whatever they want to do. RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY (2001). The fact that such arguments are bunk does not make them any less ingenious – perhaps more so.

Actually, the Founders erected multiple protections for federalism, including the enumerated powers concept, most of which survive at least on paper. They explicitly expected the courts to defend vigorously the integrity of these and other constitutional provisions against overreaching Congressional legislation; there is no merit to the claims of some that the Founders did not contemplate judicial review. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 1 THE FOUNDERS' CONSTITUTION, ch. 17, doc. 22, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch8s14.html) (last accessed Apr. 8, 2003); THE FEDERALIST NO. 16, at 117 (Hamilton); THE FEDERALIST NO. 44, at 285-86 (Madison); James Sullivan as "Cassius" *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 43, 46 (Paul Leicester Ford ed., 1892); 4 ELLIOT, *supra* note 1, at 71 (John Steele speaking at the North Carolina ratifying convention); 2 ELLIOT, *supra* note 1, at 446, 478, 489 (James Wilson speaking at the Pennsylvania ratifying convention); 3 ELLIOT, *supra* note 1, at 541 (Patrick Henry speaking at the Virginia ratifying convention); *id.* at 548 (Edmund Pendleton speaking at the Virginia ratifying convention).

[39] *See, e.g.*, the comments of William Lenoir at the North Carolina ratifying convention:

> There was a very necessary clause in the Confederation, which is omitted in this system. That was a clause declaring that every power, &c., not given to Congress, was reserved to the states. The omission of this clause makes the power so much greater. Men will naturally put the fullest construction on the power given them. Therefore lay all restraint on them, and form a plan to be understood by every gentleman of this committee, and every individual of the community.

4 ELLIOT, *supra* note 1, at 206.

George Turner was an example of a moderate anti-federalist who expressed reservations about the failure to identify reserved powers more specifically. *See* Letter to Winthrop Sargent (Nov. 6, 1787), *in* 2 Jensen, *supra* note 1, at 209.

although, as Hamilton and many others convincingly pointed out, that clause added not a jot of substantive power to the central store).[37]

Despite the technical weakness of the skeptics' position, they had grasped certain psychological and social truths that the federalists did not understand – or at least purported not to understand. The anti-federalists predicted that, over the long term, the extremely clever sorts who would cleave to the national authority (the Hamiltons, the Morrisses, and their counterparts who spin most modern constitutional theories[38]) would create strong pressure to construe the central government's granted powers expansively.[39] Future promoters of fed-

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[37] THE FEDERALIST NO. 33, at 202. *See also* RAKOVE, *supra* note 1, at 180 (stating that the framers did not think this clause augmented Federal powers). At the Pennsylvania ratifying convention, federalist Thomas McKean claimed the anti-federalists there finally had conceded this point. 2 ELLIOT, *supra* note 1, at 537. *Cf.* 3 ELLIOT, *supra* note 1, at 455 (James Madison at the Virginia ratifying convention) (claiming that the clause applies only to enumerated powers); *id.* at 441 (Edmund Pendleton at the Virginia ratifying convention) (making the same point); *id.* at 443 (George Nicholas at the Virginia ratifying convention); *id.* at 206 (Edmund Randolph at the Virginia ratifying convention); *id.* at 463-64 (same, but with an apparently confused statement that the clause was necessary because of how constitutions should be interpreted); 4 ELLIOT, *supra* note 1, at 141 (William MacLean speaking at the North Carolina ratifying convention).

The Supremacy Clause also came under attack. *See, e.g.*, 4 Jensen, *supra* note 1, at 468 ("One of the Common People").

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eral grandeur would point to Article I, § 9's short enumeration of the powers denied to the central government as demonstrating that the central government was otherwise omnipotent.[40] Their less-clever country cousins would be better equipped to resist if they could point to a more extensive enumeration of their own.[41] Anti-federalists understood that an enumeration gives the concrete-minded – that is, most of us – some examples to hold onto and to expand by broad interpretation or by analogy.[42] "This precious, this comfortable page will be the ensign, to which on any future contestation . . . the asserters of liberty may rally, and constitutionally defend it."[43] Subsequent history makes it hard to argue that the anti-federalists were wrong on this point: today the explicit enumeration in the first eight amendments offers most of the few remaining harbors from ubiquitous federal authority.[44]

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[40] *See, e.g.*, 2 Jensen, *supra* note 1, at 398, 427 (Robert Whitehill speaking at the Pennsylvania ratifying convention); Letter from Thomas B. Wait to George Thatcher (Jan. 8, 1788), *in* 5 Jensen, *supra* note 1, at 646; Letter from Silas Lee to George Thatcher (Jan. 23, 1788), *in* 5 Jensen, *supra* note 1, at 782; *id.* at 822 ("Agrippa XIV, Jan. 29, 1788").

[41] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 80 (General Thompson at the Massachusetts ratifying convention) (stating that, without an enumeration of rights, the Constitution does not state, "Thus far shall ye come, and no farther."); *id.* at 338-39 (John Williams speaking at the New York ratifying convention); 3 ELLIOT, *supra* note 1, at 449 (William Grayson speaking at the Virginia ratifying convention); 4 ELLIOT, *supra* note 1, at 167 (Timothy Bloodworth speaking at the North Carolina ratifying convention).

Particularly noteworthy are the speeches of Samuel Spencer to the North Carolina ratifying convention:

> The gentleman said, all matters not given up by this form of government were retained by the respective states. I know that it ought to be so; it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution, and not left to mere construction and opinion. I am authorized to say it was heretofore thought necessary. . . . With respect to these great essential rights, no latitude ought to be left.

Id. at 152-53. *See also id.* at 168:

> Mr. Chairman, the gentleman expresses admiration as to what we object with respect to a bill of rights, and insists that what is not given up in the Constitution is retained. He must recollect I said, yesterday, that we could not guard with too much care those essential rights and liberties which ought never to be given up. There is no express negative – no fence against their being trampled upon. They might exceed the proper boundary without being taken notice of. When there is no rule but a vague doctrine, they might make great strides, and get possession of so much power that a general insurrection of the people would be necessary to bring an alteration about. But if a boundary were set up, when the boundary is passed, the people would take notice of it immediately.

Other examples of anti-federalist understanding of the relevant psycho-political reality include 2 Jensen, *supra* note 1, at 304 ("A Federal Republican, A Review of the Constitution," Nov. 28, 1787); *id.* at 393 (Robert Whitehill speaking at the Pennsylvania ratifying convention) (making an argument very similar to Spencer's – and perhaps the source of Spencer's).

[42] Thus, the protection of "liberty" in the Fourteenth Amendment has expanded into a right to privacy. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[43] 8 Jensen, *supra* note 1, at 220 ("A True Friend," Dec. 6, 1787). *See also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 8 Jensen, *supra* note 1, at 250 (stating that the bill of rights will provide protection "without the aid of sophisms"); George Lee Turberville to Arthur Lee (Oct. 28, 1787), *in* 8 Jensen, *supra* note 1, at 127 (stating that he prefers a bill of rights to "Mr. [James] Wilsons sophism" about reservations of power).

[44] Although enforcement of the Second Amendment has been limited and cases under the Third have rarely arisen, the courts have used the other six to invalidate federal legislation far more often than they have resorted to the limits of federal enumerated powers. For

At the time, these anti-federalist arguments seem to have scored heavily with the general public. Throughout the ratification process, the Constitution's proponents retained their leadership position in the debate only by conceding more and more.[45] The federalist concessions were of three kinds:

(1) They agreed to a specific enumeration of individual rights, i.e., the first eight amendments, together with a general clause against disparagement of unenumerated rights (the Ninth Amendment).[46]

(2) Key federalists – such as Madison – threw their support behind the Tenth Amendment, a rule of construction, or "truism,"[47] clarifying that what was not granted was denied.[48]

(3) Influential federalists issued public oral and written reassurances as to the scope of powers reserved exclusively for the states.

Together, these concessions were designed to create an "original understanding" of the Constitution as authorizing only a government of distinctly curtailed powers.[49]

III. THE FEDERALIST REASSURANCES REGARDING STATE-RESERVED POWERS

Federalists often made the formal argument that what the Constitution did not grant to the central government was denied.[50] In response, anti-federalists

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example, of the approximately 1000 pages of text in CHEMERINSKY, *supra* note 1, approximately two-thirds deal with issues arising mediately or immediately from the Bill of Rights. All other legislative power issues, including federalism, comprise about eighty pages.

[45] Unfortunately, some historians have focused on the story leading up to the climax of proposed centralization while omitting or truncating the long reversal to decentralization. *See, e.g.*, Martin Diamond, *What the Framers Meant By Federalism*, in Goldwin, *supra* note 1 (admitting at the end, however, that a long course of ratification history remained); William P. Murphy, *State Sovereignty and the Founding Fathers*, 30 MISS. L.J. 135 (1959).

[46] Opinion on the scope of the Ninth Amendment is sharply divided, but practically all writers agree that whatever else it may do, it certainly serves as a rule of construction against the conclusion that federal power covers the entire field outside the exceptions in the Bill of Rights. For a collection of views, see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989). *See especially id.* at 60 (speech by James Madison).

[47] United States v. Darby, 312 U.S. 100, 124 (1941). *See generally* Walter Berns, *The Meaning of the Tenth Amendment*, in Goldwin, *supra* note 1.

[48] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). For examples of demands for this kind of wording, see 2 ELLIOT, *supra* note 1, at 550 (setting forth the resolution of the Maryland ratifying convention); 3 ELLIOT, *supra* note 1, at 442 (George Mason speaking at the Virginia ratifying convention); 4 ELLIOT, *supra* note 1, at 163 (Samuel Spencer addressing the North Carolina ratifying convention); 2 Jensen, *supra* note 1, at 599 (Robert Whitehill speaking at the Pennsylvania ratifying convention).

[49] On the distinction between original intent and original understanding and the legal primacy of the latter, see RAKOVE, *supra* note 1, at 8-9, 17-18. On ratification as the primary source of original understanding, see *id.* at note 17.

[50] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 540 (Thomas McKean at the Pennsylvania ratifying convention):

> Again, because it is unnecessary; for the powers of Congress, being derived from the people in the mode pointed out by this Constitution, and being therein enumerated and *positively* granted, can be no other than what this positive grant conveys . . . . With respect to executive officers,

rejoined that the denied powers were slender, and that the Constitution would leave the states with little to do.[51] The federalists countered, in turn, that the states would enjoy control over their "internal police."[52] One example of this

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they have no manner of authority, any of them, beyond what is by *positive* grant and commission delegated to them.

Id. *See also* 4 ELLIOT, *supra* note 1, at 148-49 (James Iredell at the North Carolina ratifying convention). *Cf.* the comments of Tench Coxe:

> The Federal government and the state governments are neither coordinate, co-equal, nor even similar . . . . They are of different natures. The general government is federal, or a union of sovereignties, for special purposes: The state governments are social, or an association of individuals, for all the purposes of society and government.

Quoted in COOKE, *supra* note 1, at 118.

[51] *E.g.*, 2 ELLIOT, *supra* note 1, at 313 (Melancton Smith speaking at the New York ratifying convention) ("I am, sir, at a loss to know how the *state legislatures* will spend their time."). *Cf.* 3 ELLIOT, *supra* note 1, at 171 (Patrick Henry at the Virginia ratifying convention):

> You [state legislators] are not to have the right to legislate in any but trivial cases; you are not to touch private contracts; you are not to have the right of having arms in your own defence; you cannot be trusted with dealing out justice between man and man. What shall the states have to do? Take care of the poor, repair and make highways, erect bridges, and so on, and so on? Abolish the state legislatures at once. What purposes should they be continued for? Our legislature will indeed be a ludicrous spectacle – one hundred and eighty men marching in solemn, farcical procession, exhibiting a mournful proof of the lost liberty of their country, without the power of restoring it. But, sir, we have the consolation that it is a mixed government; that is, it may work sorely on your neck, but you will have some comfort by saying, that it was a federal government in its origin.

Id.

[52] *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 1 THE FOUNDERS' CONSTITUTION, ch. 17, doc. 22, *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html (last accessed Apr. 8, 2003) ("to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them"). *See also* Letter from the Hon. Roger Sherman & the Hon. Oliver Ellsworth, Esq. to Governor Huntington (Sept. 26, 1787), *in* 1 ELLIOT, *supra* note 1, at 492.

Examples of such statements at the federal convention include: 1 Farrand, *supra* note 1, at 157 (James Wilson) (opining that "The state governments ought to be preserved – the freedom of the people and their internal good police depends on their existence in full vigor – but such a government can only answer local purposes . . . ."); *id.* at 165 ("Mr. Williamson was agst. giving a power that might restrain the States from regulating their internal police."); *id.* at 439 (Luther Martin) (stating that "A general government may operate on individuals in cases of general concern, and still be federal. This distinction is with the states, as states, represented by the people of those states. States will take care of their internal police and local concerns. The general government has no interest, but the protection of the whole."). *See* Roger Sherman's remarks in 2 Farrand, *supra* note 1, at 25, observing:

> that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States; that he did not like the definition contained in the Resolution, and proposed in place of the words "of individual legislation" line 4 inclusive, to insert "to make laws binding on the people of the <United> States in all cases <which may concern the common interests of the Union>; but not to interfere with <the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General> welfare of the U. States is not concerned."

See also id. at 26 (reporting Edmund Randolph as saying, "This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police."); *id.* at 198 (Rufus King) (stating "The most numerous objects

argument was offered by the federalist-lexicographer Noah Webster, who wrote that "the powers of the Congress are defined, to extend only to those matters which are in their nature and effects, *general* . . . . [T]he Congress cannot meddle with the internal police of any State, or abridge its Sovereignty."[53] James Madison penned what is probably the best known comment of this sort:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[54]

In the contemporary public understanding, a reservation to the states of "internal" governance implied a partial enumeration of exclusive state powers. This public understanding was the product of writings by popular pre-Revolutionary authors, such as Richard Bland and John Dickinson, who had argued that only the colonial governments, and not Parliament, had constitutional power over "internal" colonial affairs. The examples of "internal" affairs cited most frequently were taxation and judicial matters; but the colonies' exclusive

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of legislation belong to the States. Those of the Natl. Legislature were but few. The chief of them were commerce & revenue.").

Examples of such statements at the state ratifying conventions include: 2 ELLIOT, *supra* note 1, at 78 (Col. Joseph B. Varnum speaking at the Massachusetts ratifying convention); *id.* at 241 (John Williams at the New York ratifying convention) (opining that "The constitution should be so formed as not to swallow up the state governments: the general government ought to be confined to certain national objects; and the states should retain such powers as concern their own internal police."); *id.* at 283 (John Jay speaking at the New York ratifying convention); *id.* at 385 (Chancellor Robert Livingston speaking at the New York ratifying convention); 3 ELLIOT, *supra* note 1, at 259 (James Madison speaking at the Virginia ratifying convention); 4 ELLIOT, *supra* note 1, at 38 (James Iredell speaking at the North Carolina ratifying convention); *id.* at 160 (William Davie speaking at the North Carolina ratifying convention).

See also Letter from Pierce Butler to Weedon Butler (Oct. 8, 1787), *in* 3 Farrand, *supra* note 1, at 103 ("The powers of the General Government are so defined as not to destroy the Sovereignty of the Individual States."); 2 Jensen, *supra* note 1, at 190 ("One of the People" writing that internal matters are reserved to the states); Coxe, *supra* note 1, at 93 ("nor can [Congress] do any other matter or thing appertaining to the internal affairs of any state, whether legislative, executive or judicial, civil or ecclesiastical."). Other quotations are collected in RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 66-76 (1987).

Anti-federalists sometimes adopted the same distinction. *See, e.g.*, 2 ELLIOT, *supra* note 1, at 332 (Melancton Smith speaking at the New York ratifying convention).

[53] "America," *in* COLLEEN A. SHEEHAN & GARY L. MCDOWELL, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-1788 176 (1998). *See also* HANSON, *supra* note 1, at 252 (writing that states retain, "The whole internal government of their respective republics"); 1 Farrand, *supra* note 1, at 492 (Oliver Ellsworth and Rufus King) (distinguishing between state or local objects and federal or general objects).

[54] THE FEDERALIST NO. 45, at 292-93. *Cf.* 9 Jensen, *supra* note 1, at 692 ("A Native of Virginia") (stating that, "To [the state legislatures] is left the whole domestic government of the states; they may still regulate the rules of property, the rights of persons, every thing that relates to their internal police, and whatever effects [*sic*] neither foreign affairs nor the rights of other States."). As we shall see, the "rules of property" and the "rights of persons" must be seen as *in addition to* matters that do not affect other states. *See infra* Part V.

right to tax was said to follow from their exclusive right to regulate colonial property; and other legislative authority was claimed as well.[55] Thus, by representing that the states would control their "internal police," federalists were assuring the public that the states would, with the exceptions enumerated in the Constitution, retain at least the powers that Americans had claimed for their colonial governments.

Such reassurances were not, however, enough for the anti-federalists, who wanted yet more specificity.[56] They pointed out that the drafters themselves had enumerated some powers denied to the central government; why not list more?[57] In response, federalist essayists and orators – particularly those who were lawyers – proceeded to enumerate particular powers and classes of powers to be exercised concurrently or exclusively by the states. Some shorter enumerations came from such prominent founders as Alexander Hamilton; James Madison; James Wilson; Edmund Pendleton, Chancellor of Virginia; James Iredell, who had served North Carolina as a judge and attorney general and who later was appointed to the United States Supreme Court; and John Marshall, a delegate at the Virginia ratifying convention and later Chief Justice of the United States Supreme Court. Several anonymous Federalist authors also provided short enumerations.[58]

A number of longer, more complete enumerations of state-reserved powers have survived as well. Some were contained in anonymous, but important, federalist tracts.[59] Another long list appeared in a popular article by Alexander

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[55] *See* TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 174-81 (Liberty Fund 1998) (1965) (discussing Bland's influence and ideas). *See also* THE POLITICAL WRITINGS OF JOHN DICKINSON, 1764-1774 173-77 (Paul Leicester Ford ed., Da Capo Press 1970) (1895) ("Resolutions Adopted by the Assembly of Pennsylvania Relative to the Stamp Act," claiming for colonies taxation power and trial by jury), 193-96 ("A Petition to the King from the Stamp Act Congress," claiming for the colonies "full power of legislation" and trial by jury).

[56] *See, e.g.*, Letter from Edmund Randolph to the Speaker of the House of Delegates of Virginia (Oct. 10, 1787), *in* 1 ELLIOT, *supra* note 1, at 482, 491; Letter from the Hon. Roger Sherman & the Hon. Oliver Ellsworth, Esq. (Sept. 26, 1787), *in* 1 ELLIOT, *supra* note 1, at 492, 493 (containing the reasons of the Hon. Elbridge Gerry, Esq. for not signing the federal constitution); 2 ELLIOT, *supra* note 1, at 81 (Rev. Samuel Niles at the Massachusetts ratifying convention).

Sometimes a federalist admitted that the lines were rightly vague. *See, e.g.*, *id.* at 84 (James Bowdoin at the Massachusetts ratifying convention).

[57] 2 Jensen, *supra* note 1, at 398, 427 (Robert Whitehill speaking at the Pennsylvania ratifying convention). The primary enumeration of powers denied occurs in U.S. CONST. art. 1, § 9, and includes, but is not limited to, protection from suspensions of the writ of *habeas corpus* and from bills of attainder.

Federalist Jasper Yeates, at the same convention, responded to Whitehill's argument by stating that the enumerated items in Article I, § 9 were merely exceptions to enumerated powers. 2 Jensen, *supra* note 1, at 435. This counter-argument may have proved too much, and does not seem to have been widely used.

[58] *E.g.*, 4 Jensen, supra note 1, at 70 ("Harrington") (implying that states would have power over "real estates").

[59] 5 Jensen, *supra* note 1, at 599 ("A.B.," Jan. 2, 1788); 5 Jensen, *supra* note 1, at 651-52 (Massachusetts GAZETTE Jan. 8, 1788). Both clearly were intended to be relied on. The former was in specific response to the claims of the anti-federalist essayist "Brutus" that the Constitution imposed insufficient limits on the federal government. *Id.* at 596, 599. The

Contee Hanson, a Congressman from Maryland.[60] Still another was located in a letter to a New Hampshire ratifying convention delegate, written by Nathaniel Peaslee Sargeant, a Justice (and shortly thereafter, Chief Justice) of the Massachusetts Supreme Judicial Court.[61] Yet another is part of an essay by Alexander White, a distinguished Virginia lawyer who served in the House of Burgesses before the Revolution, in the House of Delegates after the election, and in the Virginia ratifying convention in 1788.[62] Perhaps the most significant enumeration of state powers appeared in the essays of Tench Coxe.[63] His were significant because of his extraordinary influence on the public debate. Coxe was a friend of Hamilton, a Philadelphia businessman, a member of Congress, and later Hamilton's assistant secretary of the treasury. His writings were so prolific and so widely circulated that he, more even than Hamilton or Madison, may have been most responsible for creating a public understanding of the Constitution.[64] As was true of other enumerations, moreover, Coxe's list was never convincingly rebutted. He drew a response from an anti-federalist author called "A Farmer," but merely to question the importance of the items on the list, not the list itself.[65]

It is notable that the various enumerations of state powers were remarkably consistent. Some items were on some lists and not on others, of course, but

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latter was reprinted in two other papers. In one, the Massachusetts *Centinel*, it was published under the headline, "READ THIS! READ THIS!" 5 Jensen, *supra* note 1, at 652.

[60] HANSON, *supra* note 1. On March 27, 1788, Hanson wrote to Tench Coxe of the "avidity, with which I am informed my humble essay has been bought up." 8 Jensen, *supra* note 1, at 520-21.

[61] 5 Jensen, *supra* note 1, at 563, 568.

[62] The relevant (first) portion of White's essay (with explanatory annotations) is found at 8 Jensen, *supra* note 1, at 401-08.

[63] Coxe, *supra* note 1 (contains the first two "Freeman" essays). They also are found in 15 Jensen, *supra* note 1, at 454, 508. A third "Freeman" essay appears in 16 *id.* at 49.

Coxe also wrote "An American Citizen." *See* Ford, PAMPHLETS, *supra* note 1, at 133-54.

[64] COOKE, *supra* note 1, at 111.

[65] *The Fallacies of the Freeman Detected by a Farmer*, ch. 8, doc. 35 (Apr. 23, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch8s35.html (last accessed Mar. 7, 2003). The Farmer argued that the retained powers were merely ministerial in character and federal powers, including the taxing power, could render them nugatory:

> That the state governments have certain ministerial and convenient powers continued to them is not denied, and in the exercise of which they may support, but cannot controul the general government, nor protect their own citizens from the exertions of civil or military tyranny, and this ministerial power will continue with the states as long as two-thirds of Congress shall think their agency necessary; but even this will be no longer than two-thirds of Congress shall think proper to propose, and use the influence of which they would be so largely possessed to remove it.
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> But these powers, of which the *Freeman* [i.e., Coxe] gives us such a profuse detail, and in describing which he repeats the same powers with only varying the terms, such as the powers of officering and training the militia, appointing state officers, and governing in a number of internal cases, do not any of them separately, nor all taken together, amount to independent sovereignty; they are powers of mere ministerial agency. . . .
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> . . . The state governments may contract for making roads (except post-roads) erecting bridges, cutting canals, or any other object of public importance; but when the contract is performed or the work done, may not Congress constitutionally prevent the payment?

Id.

there was a great deal of overlap and relatively little dispute among federalist writers about which powers were reserved to the states.

The following are the reserved powers of states, as federalist speakers and writers enumerated them:

A. *Training the Militia and Appointing Its Officers*

Federalist writers emphasized continued state control over the militia, one of the few retained state powers actually specified in the Constitution.[66] State governance of the militia had been supported strongly at the national convention by Elbridge Gerry, who declared that it was "a matter on which the existence of a State might depend."[67] Its importance to the states was to lie in the militia's role as a counterweight to national military forces and protection of state power against federal overreaching.[68]

B. *Local Government*

The federalists represented that incorporation of local government was a state, not a federal, power.[69] So also was regulation of local government[70] and selection of its officers.[71]

C. *Regulation of Real Property*

Federalists depicted the Constitution as leaving regulation of real property outside the national authority. They repeatedly represented that the states were

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[66] U.S. CONST. art. I, § 8, cl. 16. *See also* 2 ELLIOT, *supra* note 1, at 537 (Thomas McKean discussing this clause at the Pennsylvania ratifying convention); 3 ELLIOT, *supra* note 1, at 419 (John Marshall discussing this clause at the Virginia ratifying convention); 2 Jensen, *supra* note 1, at 222 ("Plain Truth: Reply to an Officer of the Late Continental Army," Independent Gazetteer (Nov. 10, 1787)); 9 Jensen, *supra* note 1, at 655, 673 ("A Native of Virginia") ("the appointment of militia officers, and training of the militia, are reserved to the respective States"); Ford, PAMPHLETS, *supra* note 1, at 152 (Tench Coxe).

[67] 1 Farrand, *supra* note 1, at 165.

[68] THE FEDERALIST No. 46, at 299 (James Madison). *See also* Coxe, *supra* note 1, at 92-93. *Cf.* 3 ELLIOT, *supra* note 1, at 52 (Patrick Henry speaking at the Virginia ratifying convention). For a general discussion of federalism values in state control of the militia and the right of citizens to bear arms, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 50-56 (1998).

[69] *E.g.*, 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE, Jan. 8, 1788) (citing incorporation of "political societies, towns and boroughs").

[70] 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant).

[71] Ford, PAMPHLETS, *supra* note 1, at 152.

to enjoy exclusive power over land titles,[72] land transfers,[73] descents,[74] and other aspects of real estate.[75]

D. *Regulation of Personal Property Outside of Commerce*

The text of the Constitution acknowledges the right of states to adopt and enforce laws pertaining to the inspection of goods.[76] In addition, federalists assured their audience that regulation of personalty outside interstate commerce was to be exclusively a state responsibility.[77] Specifically, they listed as state preserves: control of testamentary succession[78] and of intestate distribution of personalty;[79] firearms for hunting and self-defense; hunting, fowling, and fishing; and titles to goods.[80] Moreover, state jurisdiction was very nearly exclusive over a uniquely important and unfortunate kind of movables: slaves.[81] Of

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[72] Coxe, *supra* note 1, at 94 (entails); 5 Jensen, *supra* note 1, at 599 ("A.B.," Hampshire GAZETTE, Jan. 2, 1788) (citing title to lands); 8 Jensen, *supra* note 1, at 404 (Alexander White) (citing "titles of lands").

[73] 3 ELLIOT, *supra* note 1, at 40 (Edmund Pendleton); *id.* at 553 (John Marshall); THE FEDERALIST NO. 29, at 183 (Hamilton). *Cf.* Maryland Resolutions, 2 ELLIOT, *supra* note 1, at 551.

[74] 3 ELLIOT, *supra* note 1, at 620 (Madison at the Virginia ratifying convention); THE FEDERALIST NO. 29, at 183 (Hamilton); THE FEDERALIST NO. 33, at 204 (Hamilton); Maryland Resolutions, 2 ELLIOT, *supra* note 1, at 551; *id.* at 40 (Edmund Pendleton at the Virginia ratifying convention); Coxe, *supra* note 1, at 94; 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant); 8 Jensen, *supra* note 1, at 404 (Alexander White).

[75] 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (opining that land officers and surveyors would be within the state sphere); 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant) (partition); 4 Jensen, *supra* note 1, at 79 ("Harrington") (implying that federal government would not control "real estates"); 16 Jensen, *supra* note 1, at 51 (Tench Coxe, claiming that the states retain "[t]he lordship of the soil," which "remains in *full perfection* in every state") (emphasis in original). *See also* 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 1764-1774 xvi (Paul Leicester Ford ed., Da Capo Press 1970) (1895), wherein Dickinson is noted to have approvingly quoted Lord Chatham (William Pitt the Elder), who in 1774 spoke on behalf of the colonies:

> "As an Englishman, I recognize to the Americans, their supreme unalterable right of property. As an American, I would equally recognize to England, her supreme right of regulating commerce and navigation. The distinction is involved in the abstract nature of things; property is private, individual, absolute; the touch of another annihilates it. Trade is an extended and complicated consideration; it reaches as far as ships can sail, or winds can blow; it is a vast and various machine. To regulate the numberless movements of its several parts, and combine them into one harmonious effect, for the good of the whole, requires the superintending wisdom and energy of the supreme power of the empire."

[76] U.S. CONST. art. I, § 10, cl. 2; *see also* 16 Jensen, *supra* note 1, at 50 (Tench Coxe).

[77] Hanson, *supra* note 1, at 252; 2 ELLIOT, *supra* note 1, at 355 (Hamilton speaking at the New York ratifying convention); *id.* at 384 (Chancellor Robert Livingston at the New York ratifying convention) (opining that states would retain "the power over property"); 3 ELLIOT, *supra* note 1, at 553 (John Marshall at the Virginia ratifying convention) (speaking of state control over "the mode of transferring property"); 5 Jensen, *supra* note 1, at 599 ("A.B.") (citing "lands *and other property*").

[78] 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (citing probate, administration of estates); 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant) (citing wills and administrators).

[79] 8 Jensen, *supra* note 1, at 404 (Alexander White).

[80] *Id.*

[81] 3 ELLIOT, *supra* note 1, at 453, 621-22 (James Madison speaking at the Virginia ratifying convention); 4 ELLIOT, *supra* note 1, at 102 (James Iredell speaking at the North Carolina

course, an express exception to exclusive state jurisdiction over property was the power of Congress to adopt patent and copyright laws.[82]

E. Control Over Domestic and Family Affairs

State control over slavery and decedents' estates were but two aspects of exclusive state authority over domestic affairs. The federalists represented sumptuary laws[83] and the regulation of marriage and divorce[84] as among the states' exclusive reserved powers. An anonymous advocate of the Constitution affirmed that the states would assure to men "possession of their houses, wives, children . . . ."[85] States were to supervise guardianship and issues of legitimacy.[86] Alexander Hamilton referenced generally the retained nature of state control over domestic life.[87]

F. Criminal Law

On numerous occasions, federalists cited criminal law and local law enforcement,[88] as well as the administration of civil justice and state legal systems generally,[89] as exemplars of reserved state powers. With the exceptions

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ratifying convention); *id.* at 286 (Gen. C.C. Pinkney, speaking in the South Carolina legislature, considering calling a ratifying convention); 2 ELLIOT, *supra* note 1, at 114-15 (William Heath speaking at the Massachusetts ratifying convention) (assuming it was a state prerogative as to whether to end slavery).

At the Pennsylvania ratifying convention, James Wilson and Thomas McKean both suggested that Congress might, after 1808, have the power to outlaw slavery. 2 ELLIOT, *supra* note 1, at 484 (Wilson); 2 Jensen, *supra* note 1, at 417 (McKean). However, Wilson may have been speaking ironically. He and others, in response to complaints from abolitionists that the Constitution did not abolish slavery or give Congress power to do so, stated that the power to prohibit importation would merely lay a *foundation* for eventual abolition. 2 ELLIOT, *supra* note 1, at 452. Similarly, at the Massachusetts ratifying convention, Thomas Dawes argued that "But we may say, that, although slavery is not smitten by an apoplexy, yet it has received a mortal wound, and will die of a consumption." *Id.* at 41.

[82] U.S. CONST. art. I, § 8, cl. 8; 2 Jensen, *supra* note 1, at 415 (Thomas McKean speaking at the Pennsylvania ratifying convention).

[83] 2 Farrand, *supra* note 1, at 394 (rejecting George Mason's proposal to give Congress this power). *Cf. id.* at 607 (Mason) (impliedly admits that, without authorization, Congress does not have this power).

[84] Coxe, *supra* note 1, at 95 (referencing state power to "regulate descents and marriages"); 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (averring that licensing marriage is exclusively a state concern); 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant) (referencing marriage and divorce as state concerns).

[85] 5 Jensen, *supra* note 1, at 599 ("A.B.").

[86] *Id.* at 568 (Nathaniel Peaslee Sargeant).

[87] 2 ELLIOT, *supra* note 1, at 267-68 (Hamilton at the New York ratifying convention) (speaking on domestic life generally).

[88] Coxe, *supra* note 1, at 95-96; 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (referencing county lieutenants, sheriffs, coroners, constables).

[89] 2 ELLIOT, *supra* note 1, at 267-68 (Hamilton at the New York ratifying convention) (speaking on federal inability to "new model" state civil and criminal institutions or the private conduct of individuals); *Id.* at 350, 355 (Hamilton at the New York ratifying convention); *id.* at 384 (Chancellor Robert Livingston at the New York ratifying convention) (opining that states would retain "the power over life and death"); 3 ELLIOT, *supra* note 1, at 620 (Madison at the Virginia ratifying convention) (speaking of the states' right to preserve their legal systems); 4 ELLIOT, *supra* note 1, at 142 (Gov. Samuel Johnston at the North Carolina

specified in the Constitution, *mala in se* criminal law was to be exclusively a state concern.[90] Speaking at the North Carolina ratifying convention, James Iredell represented that Congress could punish treason and that "[t]hey have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations," but that "[t]hey have no power to define any other crime whatever."[91]

Despite the sweeping nature of this statement, other federalists acknowledged that Congress, as part of its commercial power, would enjoy concurrent jurisdiction with the states over *mala prohibita*.[92]

G. Civil Justice

The federalists represented that the administration of civil justice (e.g., contract, tort, and property disputes) was reserved exclusively to the states unless the issue was one of federal law or the dispute involved citizens of different states.[93] For example, they affirmed that the torts of libel,[94] defamation

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ratifying convention on the same topic); 1 Farrand, *supra* note 1, at 133 (Roger Sherman at the federal convention); *id.* at 134, 318-19 (Madison at the federal convention) (stating that the security of private rights, the administration of justice should be state powers); 4 ELLIOT, *supra* note 1, at 162 (William MacLeane at the North Carolina ratifying convention) (telling the delegates that "the judicial power of the states is not impaired"); 2 Jensen, *supra* note 1, at 190 ("One of the People" writes that trials by jury are outside the federal sphere); 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (justices of the peace); *id.* at 599 (citing murder, adultry, theft, robbery, burglary, lying, perjury as all matters for state action); *id.* at 568 (Nathaniel Peaslee Sargeant) (citing state courts).

[90] Coxe, *supra* note 1, at 95-96; Hanson, *supra* note 1, at 252; 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE). *See also* 2 ELLIOT, *supra* note 1, at 355 (Hamilton speaking at the New York ratifying convention).

[91] 4 ELLIOT, *supra* note 1, at 219. *See also* 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant) (averring that, "ye Laws respecting criminal offenders in all cases, except Treason, are subjects for [state] Legislation"); Ford, PAMPHLETS, *supra* note 1, at 359 (James Iredell, in his written response to George Mason).

[92] Coxe, *supra* note 1, at 95. This may be the origin of the criminal jurisdiction of Congress to which Madison referred in the Virginia ratifying convention. 3 ELLIOT, *supra* note 1, at 464-65.

[93] THE FEDERALIST No. 17, at 118 (Hamilton); Coxe, *supra* note 1, at 95 (property, contract, and nuisance law).

See also the comments of William MacLaine at the North Carolina ratifying convention:

> There are many instances in which no court but the state courts can have any jurisdiction whatsoever, except where parties claim land under the grant of different states, or the subject of dispute arises under the Constitution itself. The state courts have exclusive jurisdiction over every other possible controversy that can arise between the inhabitants of their own states; nor can the federal courts intermeddle with such disputes, either originally or by appeal.

4 ELLIOT, *supra* note 1, at 163. *See also supra* note 70.

At one point, James Wilson speaks of federal jurisdiction over contracts, but, from the context, he appears to be speaking of diversity jurisdiction. 2 ELLIOT, *supra* note 1, at 492 (James Wilson speaking at the Pennsylvania ratifying convention). *See also* 3 ELLIOT, *supra* note 1, at 553 (John Marshall speaking at the Virginia ratifying convention).

[94] James Wilson distinguished the tort of libel from other "freedom of the press" issues; freedom of the press, as he understood it, was merely freedom from prior restraint. 2 ELLIOT, *supra* note 1, at 449 (James Wilson speaking at the Pennsylvania ratifying convention). While maintaining that Congress had no power to impose a prior restraint on the press, Wilson and other federalists also represented that it had no authority over the law of

generally,[95] and nuisance[96] remained entirely state concerns. Outside of Congress' bankruptcy power,[97] only the state courts would have cognizance of contracts made[98] or debts owed[99] between citizens of the same state. By extension, Congress could not interfere with state paper money already issued[100] or with a state's public securities.[101]

H. Religion and Education

At the time of the ratification debate, religion and education often were thought of as inseparable.[102] Although massive federal case law arose after adoption of the First Amendment,[103] at the time of ratification federalists represented that the governance of religion, the establishment of religious institutions, and the incorporation of religious entities were all exclusively state concerns.[104] With one exception, the same was to be true for education: the national convention rejected a proposal to add a national university to Congress' enumerated powers, after being told that this could be accomplished through administration of the federal capital district. But, in context, the implication was that the federal government could not establish a university otherwise or anywhere else.[105] Similarly, the convention rejected resolutions offered to add Congressional authority "[t]o establish seminaries for the promotion of literature and the arts and sciences" and "[t]o establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures."[106] Thus, federalist authors seem to have been on

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libel. *See, e.g., id.* at 468 (James Wilson speaking at the Pennsylvania ratifying convention); 2 Jensen, *supra* note 1, at 219 ("Plain Truth").

[95] 5 Jensen, *supra* note 1, at 599 ("A.B.").

[96] *Id.* at 652 (Massachusetts GAZETTE).

[97] U.S. CONST. art. I, § 8, cl. 4.

[98] 8 Jensen, *supra* note 1, at 404 (Alexander White); 3 ELLIOT, *supra* note 1, at 553 (John Marshall speaking at the Virginia ratifying convention).

[99] 4 ELLIOT, *supra* note 1, at 181 (William MacLaine speaking at the North Carolina ratifying convention).

[100] *Id.* at 181-83 (William Davie speaking at the North Carolina ratifying convention); *id.* at 184 (Stephen Cabarrus speaking at the same convention).

[101] *Id.* at 191 (William Davie speaking at the North Carolina ratifying convention).

[102] Thus, in the Northwest Ordinance of 1787, Congress had stated that "Religion, morality, and knowledge . . . being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

[103] For a survey, see CHEMERINKSY, *supra* note 1, at 967-1037.

[104] Coxe, *supra* note 1, at 92-93; 4 ELLIOT, *supra* note 1, at 194 (James Iredell speaking at the North Carolina ratifying convention); *id.* at 198 (Gov. Samuel Johnson at the North Carolina ratifying convention); *id.* at 208 (Richard D. Spaight speaking at the North Carolina ratifying convention); *id.* at 300 (Gen. C.C. Pinkney, speaking in the South Carolina legislature, considering calling a ratifying convention); 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE); 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant); 8 Jensen, *supra* note 1, at 404 (Alexander White).

[105] 2 Farrand, *supra* note 1, at 616. *See also* Ford, PAMPHLETS, *supra* note 1 (Tench Coxe, stating that the federal government could not interfere with the selection of "Presidents and other officers of Universities, Colleges and Academies").

[106] Ford, PAMPHLETS, *supra* note 1, at 322; Coxe, *supra* note 1, at 92-93, 95 (can be read as meaning that states and federal government have concurrent rights to establish public institu-

firm ground when they assured the public that the national government had no power to create "charity schools"[107] – or any other schools.[108]

I. Social Services

In the founding era, social services generally were the responsibility of churches, families, and local communities. According to the federalists, this would continue. Alexander Contee Hanson,[109] Tench Coxe,[110] and other federalists[111] ruled this area of life out of the national sphere.

J. Control of Agriculture

The great source of authority for national economic regulation was to be, of course, the Commerce Clause.[112] That clause was relatively non-controversial;[113] however, federalist writers clearly represented it as a good deal narrower than courts have since construed it. For example, the United States Supreme Court has relied on the Commerce Clause to justify federal regulation of agriculture.[114] Insofar as original understanding is a guide, this is almost certainly an error.[115]

Thus, Alexander Hamilton, the arch nationalist who once expressed a desire to regulate agriculture at the national level,[116] purportedly[117] had changed his mind by the time of the ratification debates. In Federalist No. 17, he famously wrote that "the supervision of agriculture and of other concerns of

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tions, but this is uncertain, because some of the institutions on Coxe's list – the religious ones – he also says may be chartered only by states).

[107] 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE).

[108] *Id.* at 568 (Nathaniel Peaslee Sargeant).

[109] Hanson, *supra* note 1, at 252 (citing "protection of the weak").

[110] Coxe, *supra* note 1, at 96. Coxe adds, "In short, besides the particulars enumerated, every thing of a domestic nature must or can be done by them [i.e., the states]."

[111] 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (saying that overseeing the poor and poor houses are state concerns); *id.* at 568 (Nathaniel Peaslee Sargeant) (referencing as state concerns, "looking after Poor persons, punishing Idlers, vagabonds & c.").

[112] U.S. CONST. art. I, § 8, cl. 3.

[113] 4 Jensen, *supra* note 1, at 318-19 (William Cranch) (noting in a letter to John Quincy Adams that "It is allow'd by every body that [Congress] ought to have power 'To Regulate Commerce.'"); 8 Jensen, *supra* note 1, at 70, 72 ("Cato Uticensis" – an anti-federalist) ("[I]t was, I believe, the general opinion, that new powers should be vested in Congress, to enable it, in the amplest manner, to regulate the commerce.").

[114] Wickard v. Filburn, 317 U.S. 111 (1942).

[115] The error is not mitigated by the interrelationship of agriculture and commerce; *see infra* Part V.

[116] 1 Farrand, *supra* note 1, at 287, 329.

[117] "Purportedly" because Hamilton's goal was, apparently, to deceive the public into believing the federal government would be one of strictly limited powers, but then after ratification, to "triumph altogether over the state governments and reduce them to an entire subordination, dividing the large states into smaller districts." 13 Jensen, *supra* note 1, at 278 (private, unpublished paper by Hamilton, Sept. 1787). Subsequently, Hamilton sought to bring his fraud to fruition with his "Report of Manufactures" of 1791, which claimed that agriculture and manufactures were matters of national concern. *See* Alexander Hamilton, *Report on Manufactures, in* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_1s21.html (last accessed Apr. 8, 2003). Of course, Hamilton's private thoughts, in contradiction to his public representations, are not probative of the understanding of the ratifiers.

a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[118] Perhaps George Mason, an advocate of keeping control of farming at the state level,[119] had influenced him. In any event, even Melancton Smith, Hamilton's great antagonist at the New York ratifying convention, conceded that he also understood control over agriculture to be a reserved power, although he was not sure that the states should exercise it.[120] In Massachusetts, Justice Sargeant let it be known that only the states would have power to regulate "common fields" and "fisheries."[121]

All of these inferences were strengthened by the fact that the constitutional convention had rejected the idea of a Secretary of Domestic Affairs, who was to have authority to regulate agriculture.[122]

K. Control of Other Business Enterprise

Federalist writers and speakers represented that, outside the immediate stream of commerce, regulation of non-agricultural business was to be exclusively a state prerogative. This appears to be the meaning of Hamilton's reference to "agriculture and *of other concerns of a similar nature*."[123] Indeed, the national convention had rejected a resolution that would have empowered the federal government directly to regulate manufacturing[124] and also defeated a motion to authorize the federal government to cut canals and issue corporate

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[118] THE FEDERALIST NO. 17, at 18 (Hamilton). *See also* THE FEDERALIST NO. 34, at 209 (Hamilton).

[119] 1 Farrand, *supra* note 1, at 160 (quoted in Hamilton's notes).

[120] 2 ELLIOT, *supra* note 1, at 313 (Melancton Smith) ("I am, sir, at a loss to know how the state legislatures will spend their time. Will they make laws to regulate agriculture? I imagine this will be best regulated by the sagacity and industry of those who practise it.").

[121] 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant).

[122] 2 Farrand, *supra* note 1, at 342-43.

[123] THE FEDERALIST NO. 17, at 118 (emphasis added). *See also* THE FEDERALIST NO. 34, at 209 (Hamilton).

> What are the chief sources of expense in every government? . . . The answers plainly is, wars and rebellions . . . The expenses arising from those institutions which are relative to the mere domestic police of a state, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure), are insignificant in comparison with those which relate to the national defense.

Id.

At the New York ratifying convention, 2 ELLIOT, *supra* note 1, at 265-66, Hamilton suggested that federal legislation should include manufacturing, but the context makes the passage deceiving. In fact, he was rebutting complaints about the small size of the proposed federal Congress by stating that its members need know only about those issues in a general, not a detailed, way. *Id.* at 256; *cf. id.* at 283 (John Jay). *See also id.* at 442-43 (James Wilson at the Pennsylvania ratifying convention).

[124] 2 Farrand, *supra* note 1, at 342-43. Madison later wrote in a private letter that Congress retained the right to promote manufacturing through tariff protection, but that was in 1832, more than forty years later:

> It deserves particular attention, that the Congress which first met contained sixteen members, eight of them in the House of Representatives, – fresh from the Convention which framed the Constitution, and a considerable number who had been members of the State Conventions which had adopted it, taken as well from the party which opposed as from those who had espoused its adoption. Yet it appears from the debates in the House of Representatives, (those in the Senate

charters, apparently for transportation companies.[125] During the ratification debate, federalists itemized several other businesses that would be regulated only by the states. The federal government would have no power over the press, according to Hamilton[126] and numerous other federalists.[127] Alexander Contee Hanson identified "promotion of useful arts" – i.e., technology – as exclusively a state concern.[128] Justice Nathaniel Sargeant cited fisheries.[129] Of course, the Constitution itself affirms the authority of states to inspect goods,[130] and Tench Coxe concluded that this was an exclusive state power.[131] Coxe also placed regulation of "unlicensed public houses, nuisances, and many other things of like nature" in the state sphere.[132] All or most business licensing was an exclusive state concern as well.[133] Some writers denied that the central government would have any power to construct or maintain local infrastructure, such as roads, ferries, and bridges, unless it was "post road" infrastructure.[134] The post office, with its appurtenant roads, apparently comprised the only socialized business the federal government was to operate.[135]

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not having been taken,) that not a doubt was started of the power of Congress to impose duties on imports for the encouragement of domestic manufactures . . . .

1 ELLIOT, *supra* note 1, at 518.

[125] 2 Farrand, *supra* note 1, at 616. Note, however, that James Wilson seems to have thought that the federal government would be able to make "internal improvements." *See* 2 ELLIOT, *supra* note 1, at 526 (James Wilson speaking at the Pennsylvania ratifying convention). His conception of the federal power may have been broader than most, if that is the proper interpretation of some other remarks at the Pennsylvania convention: "The power and business of the state legislatures relate to the great objects of life, liberty and property; the same are also objects of the general government." *Id.* at 464.

[126] *See* THE FEDERALIST NO. 84, at 513-14 (Hamilton) ("Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.").

[127] *E.g.*, 2 ELLIOT, *supra* note 1, at 463 (James Wilson speaking at the Pennsylvania ratifying convention); 4 ELLIOT, *supra* note 1, at 208-09 (Richard D. Spaight speaking at the North Carolina ratifying convention); 2 Jensen, *supra* note 1, at 190 ("One of the People"), 192 ("AVENGING JUSTICE"); *id.* at 219 ("Plain Truth"); 4 Jensen, *supra* note 1, at 182 ("Popicola") (stating that press is a reserved power); *id.* at 331 ("One of the Middling Interest") (same); *id.* at 334 ("Valerius") (same); 9 Jensen, *supra* note 1, at 691 ("A Native of Virginia) (same); Ford, PAMPHLETS, *supra* note 1, at 48 (Noah Webster).

[128] Hanson, *supra* note 1, at 252. The exception, of course, is federal copyright and patent protection.

[129] 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant).

[130] U.S. CONST. art. I, § 10, cl. 2. *See also* 2 Farrand, *supra* note 1, at 607.

[131] Coxe, *supra* note 1, at 92.

[132] *Id.* at 95.

[133] 2 ELLIOTT, *supra* note 1, at 468 (James Wilson at the Pennsylvania ratifying convention) (speaking on licensing of press); 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE) (licensing of public houses).

[134] 5 Jensen, *supra* note 1, at 652 (Massachusetts GAZETTE); 5 Jensen, *supra* note 1, at 568 (Nathaniel Peaslee Sargeant) (highways, bridges). Coxe, *supra* note 1, is unclear on whether infrastructure is a concurrent or exclusive state power.

[135] U.S. CONST. art. I, § 8, cl. 7.

IV. Value of the Enumeration of Exclusive Reserved State Powers

Although the federalists' enumeration of state reserved powers (with few exceptions) never was written explicitly into the Constitution, that enumeration should inform our understanding of the Constitution. Just as lawyers and judges marshal listed examples to help define the scope of general classes under the principle of *ejusdem generis*,[136] the federalists' enumeration assists us in identifying the dividing line between federal authority and exclusive state authority. The federalists' enumeration does this not because it reveals the framers' intent, "but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[137] More broadly, the enumeration assists us in identifying the principles underlying American federalism.

The next Part furnishes an example of the latter: the enumeration establishes that the Constitution was not finally understood to institutionalize an exclusively internality/externality division between state and federal powers. Rather, the enumeration shows that the founding generation ultimately decided to leave certain prerogatives with the states alone, even though they understood that the exercise of those prerogatives would have implications beyond state boundaries – and even though they understood that state action might impinge on the federal government's exercise of its own authority.

V. Limits of the Internality/Externality Dichotomy As a Criterion for Division of Powers

Scholars writing on federalism often have referred to it as system in which powers are, or should be, divided according to whether the results of their exercise are felt across jurisdictional lines. The idea is that decisions with only local impacts should be made at the local level, while all or most decisions with externalities – spill-over effects – ought to be made at a higher level.[138] Professor Henry N. Butler and Professor Jonathan R. Macey have called this the "matching principle."[139] Although this argument sometimes is advanced by those who consider themselves federalism's friends, its practical result can be to strengthen advocates of centralization because a determined seeker can find

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[136] "Of the same class." For application of the maxim in private law, see Robert G. Natelson, Modern Law of Deeds to Real Property 182-84 (1992). For treatment in the public law context by an even more distinguished author, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 26-27 (Amy Gutmann ed., 1977) (hereinafter Scalia).

[137] Scalia, *supra* note 136, at 38. *See also* Rakove, *supra* note 1, at 8-9, 17-18.

[138] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1495 (1987) ("Externalities present the principal countervailing consideration in favor of centralized government . . . .").

[139] Butler & Macey, *supra* note 1, at 25 (under the matching principle, "in general, the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution"). Later in the article, however, the authors suggest that in the presence of externalities, interstate bargaining may be a better solution than federal regulatory authority. *Id.* at 36-40.

some spill-over effect in almost any activity.[140] The finding in *Wickard v. Filburn*,[141] that a farmer who consumes his own crops thereby "affects" commerce by not selling his goods to someone else, is, after all, factually accurate, and many writers, at least since the New Deal, have cited increasing interdependence as a justification for expanding federal authority relative to that of the states.[142]

Whatever the objective merits of a pure internality/externality division of powers, that is not the decision the founding generation made. To be sure, the historical record contains plenty of quotations noting that internal matters were reserved to the states.[143] Spill-over effects sometimes were cited to justify the grant of some powers to the federal government.[144] Especially after the early days of the Constitutional Convention, however, federalists were quick to deny that the federal government was to regulate *all* matters with interstate implications.[145]

To see that this was the case, one must first understand that the fact of economic and interstate interdependence is not a recent development. Close connection between commerce, agriculture, manufacturing, taxation, even the arts, were realities in 1787. More importantly, *this interrelationship was an oft-repeated axiom in the constitutional debates.* Hamilton, writing as Publius, made the point:

> The often-agitated question between agriculture and commerce has, from indubitable experience, received a decision which has silenced the rivalship [*sic*] that once subsisted between them, and has proved, to the satisfaction of their friends, that their interests are intimately blended and interwoven. It has been found in various countries that, in proportion as commerce has flourished, land has risen in value. And how could it have happened otherwise? Could that which procures a freer vent for the products of the earth, which furnishes new incitements to the cultivation of land, which is the most powerful instrument in increasing the quantity of money in a state

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[140] One is reminded of Edward Lorenz's "butterfly effect" in meteorology. *See, e.g.*, Bob Ryan, *A Look At Predicting the Weather; I Read Snowflakes, Not Tea Leaves*, WASHINGTON POST, Nov. 21, 1999, at B-03, col. 1 ("Does the flap of a butterfly's wings in Brazil set off a tornado in Texas?").

[141] 317 U.S. 111 (1942).

[142] *See, e.g.*, Jefferson B. Fordham, *The States in the Federal System – Vital Role or Limbo?*, 49 VA. L. REV. 666, 668 (1963) ("Ours is now an interdependent national economy. Effective regulation must be country-wide in extent."). *See also* Karl A. Crowley, *States' Rights and Responsibilities and the Federal Constitution*, 54 TEX. L. REV. 76, 87 (1935) (expressing similar sentiments in address to state bar association).

[143] *See, e.g.*, Butler & Macey, *supra* note 1, at 26 (quoting James Wilson). *See also supra* notes 51-54. Bankruptcy was an exception to the rule that the states controlled internal matters. U.S. CONST. art I, § 8, cl. 4.

Some other clauses that seem to govern only intra-state questions actually were viewed as preventing externalities. One of these is the Guarantee Clause, U.S. CONST. art. IV, § 4. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guaranty Clause*, 80 TEX. L. REV. 807, 825 (2002) (noting that some founders feared that if some states were monarchies, they would unsettle republican forms in other states).

[144] *E.g.*, 2 Jensen, *supra* note 1, at 415 (Thomas McKean at the Pennsylvania ratifying convention) (speaking on the federal copyright power).

[145] An apparent exception is the speech of Jasper Yeates at the Pennsylvania ratifying convention. 2 Jensen, *supra* note 1, at 435 ("The objects of state legislation are different from those of the Federal Constitution. They are confined to matters within ourselves [sic].").

> – could that, in fine, which is the faithful handmaid of labor and industry, in every shape, fail to augment that article, which is the prolific parent of far the greatest part of the objects upon which they are exerted?[146]

Other federalists said much the same thing: Charles Pinkney discussed the interdependence of commerce, agriculture, and the professions at the national convention in Philadelphia.[147] Thomas Dawes and James Bowdoin, both delegates at the Massachusetts ratifying convention, provided detailed expositions of the interconnections between commerce, agriculture, taxation, manufactures, and other matters.[148] James Wilson offered similar observations at the Pennsylvania ratifying convention,[149] as did William Davie at the North Carolina convention[150] and, to a lesser extent, James Madison at the Virginia convention.[151] Tench Coxe[152] and many other federalists,[153] made closely-related comments. Anti-federalists agreed.[154]

There was also discussion of non-economic externalities, notably the influence of religion.[155] Several participants, for example, raised the perceived negative impact of the absence of federal power to enforce Christian religious standards. At the Massachusetts ratifying convention, for example, some dele-

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[146] THE FEDERALIST No. 12, at 91 (Hamilton).

[147] 1 Farrand, *supra* note 1, at 397-404.

[148] 2 ELLIOT, *supra* note 1, at 57-59. Bowdoin's remarks on the interrelationship of economic factors appear in at least two places. *Id.* at 83, 85. Both are much too long and intricate to reproduce here.

[149] *Id.* at 492 (discussing the interaction of manufactures, commerce, contracts, credit, navigation, and internal state laws).

[150] 4 ELLIOT, *supra* note 1, at 18-20, 149 (discussing interdependence of agriculture and commerce).

[151] 3 ELLIOT, *supra* note 1, at 345 (discussing the interdependence of agriculture and the carrying trade).

[152] COOKE, *supra* note 1, at 120; 9 Jensen, *supra* note 1, at 833, 839 (Coxe, writing as "An American"). *See also* 2 Jensen, *supra* note 1, at 186, 187 ("One of the People" writing, "The people of Pennsylvania, in general, are composed of men of three occupations, the farmer, the merchant, the mechanic; the interests of these three are intimately blended together."). The same author argued that the power over commerce should be in *Congress*, in part so the *states* could "effectually encourage their manufactories." *Id.* at 187-88.

[153] Examples include: 4 Jensen, *supra* note 1, at 25 ("A True American"); *id.* at 65-66 ("A"); *id.* at 80-81 (Boston GAZETTE); *id.* at 85 ("One of the People"); *id.* at 234-35 ("Truth" – a response to a writer also using that pseudonym); *id.* at 298-99 ("Atticus"); *id.* at 322-23 (Massachusetts GAZETTE, "Agrippa"); *id.* at 385-389 ("One of the Middle-Interest"); 5 Jensen, *supra* note 1, at 531-34 ("Atticus"); *id.* at 563-69 (Nathaniel Peaslee Sargeant); *id.* at 631-32 (Resolution of the Tradesmen of the Town of Boston); *id.* at 665-66 ("A Farmer"); 8 Jensen, *supra* note 1, at 345, 349 ("The State Soldier") (asserting, "Commerce then, freed from the oppressive hand of state jealousy and local interest, traversing the whole continent and seeking your commodities, would stamp a higher value on all your property."); *id.* ("State Soldier") (referencing "that extensive commerce which alone can ensure a lasting value to our property"); 10 Jensen, *supra* note 1, at 1640-41 ("A Delegate Who Has Catched Cold"); *id.* at 1736, 1737 (Speech by John O'Connor).

[154] *E.g.*, 4 Jensen, *supra* note 1, at 233 ("Truth"); 5 Jensen, *supra* note 1, at 483-86, 540-42 ("Agrippa"); *id.* at 493-500 ("Candidus").

[155] Besides the material in the accompanying text, *see, e.g.*, 5 Jensen, *supra* note 1, at 600-02 ("An Association of Christian Ministers to the Public") (expounding the temporal advantages of piety, religion, and morality); *id.* at 631-32 (Resolutions of the Tradesman of the Town of Boston) (claiming improved trade resulting from adoption of the Constitution would promote industry and morality).

gates pleaded for a federal religious test. Major Thomas Lusk said that, "he shuddered at the idea that Roman Catholics, Papists, and Pagans might be introduced into office, and that Popery and the Inquisition may be established in America."[156] Charles Turner gave an eloquent speech about the need he saw for Christian religious and moral standards to pervade the country.[157] At the North Carolina ratifying convention, delegate David Caldwell, among others, expressed similar concerns.[158]

The important point here is that participants in the constitutional debate comprehended that states and federal governments would operate independently – exercising concurrent taxation powers, exclusive federal control over foreign trade and immigration, and exclusive state power over domestic affairs, tort law, manufacturing, property, agriculture, and religion. They also understood that there would be spill-overs from activities within particular states.[159] Yet the federalists' enumeration of state powers reveals a specific decision to reserve to the states considerable sway over matters that (1) affected the nation as a whole or (2) impacted the operations of the federal government's powers.

Perhaps leaving individual states with final authority over such matters was merely a concession to political reality. Then again, perhaps not. As modern scholars (who sometimes seem to be just catching up to the Founders) have

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[156] 2 ELLIOT, *supra* note 1, at 148.

[157] *Id.* at 171-72:

> But I hope it will be considered, by persons of all orders, ranks, and ages, that, without the prevalence of Christian piety and morals, the best republican constitution can never save us from slavery and ruin. If vice is predominant, it is to be feared we shall have rulers whose grand object will be (slyly evading the spirit of the Constitution) to enrich and aggrandize themselves and their connections, to the injury and oppression of the laborious part of the community; while it follows, from the moral constitution of the Deity, that prevalent iniquity must be the ruin of any people. The world of mankind have always, in general, been enslaved and miserable, and always will be, until there is a greater prevalence of Christian moral principles; nor have I any expectation of this, in any great degree, unless some superior mode of education shall be adopted. It is education which almost entirely forms the character, the freedom or slavery, the happiness or misery, of the world. And if this Constitution shall be adopted, I hope the Continental legislature will have the singular honor, the indelible glory, of making it one of their first acts, in their first session, most earnestly to recommend to the several states in the Union the institution of such means of education as shall be adequate to the divine, patriotic purpose of training up the children and youth at large in that solid learning, and in those pious and moral principles, which are the support, the life and soul, of republican government and liberty, of which a free constitution is the body; for, as the body, without the spirit, is dead, so a free form of government, without the animating principles of piety and virtue, is dead also, being alone.

[158] The discussion at the North Carolina ratifying convention appears in 4 ELLIOT, *supra* note 1, at 199. Mr. Caldwell's speech is particularly offensive to modern sensibilities. He stated, in part:

> In the first place, he said, [the lack of a federal religious test] was an invitation for Jews and pagans of every kind to come among us. At some future period, said he, this might endanger the character of the United States. Moreover, even those who do not regard religion, acknowledge that the Christian religion is best calculated, of all religions, to make good members of society, on account of its morality. I think, then, added he, that, in a political view, those gentlemen who formed this Constitution should not have given this invitation to Jews and heathens. All those who have any religion are against the emigration of those people from the eastern hemisphere.

Id.

[159] This point has been developed also by Justice Clarence Thomas. See his opinion in *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

recognized, rectifying spill-overs through centralized regulation may cost more than it is worth.[160] If you are annoyed by your neighbor's dog barking, it may make more sense to talk to your neighbor or do nothing at all than to call in the cops.

The founding generation was concerned about liberty and the danger to liberty that a too-centralized government would create.[161] They also were concerned about efficiency. A federal government strong enough to internalize most externalities would be inefficient at best, and tyrannical at worst.[162] Rather than accept that cost, the framers reserved to the states the power to deal with externalities by entering compacts with each other, subject to Congressional consent.[163] If bargaining did not work, then they deemed it better to suffer spill-overs than to suffer an all-powerful "consolidated" government.

Justice Clarence Thomas[164] and Professor Richard Epstein[165] have observed that the Commerce Clause gives Congress authority to regulate "commerce" – not matters "affecting commerce" nor even matters "substantially affecting commerce."[166] The founders' enumeration of the powers of states supports their view. That enumeration strongly suggests that the kind of interdependence cited in *Wickard v. Filburn*[167] between agriculture and commerce is simply irrelevant to the constitutional scheme. The framers knew all about that interdependence, and they decided to reserve agriculture to the states anyway. To be sure, you do not absolutely have to read the federalist "enumeration" of state powers to understand that – neither Justice Thomas nor Professor Epstein needed to do so, apparently – but examples always help us less-clever country cousins to see the point.[168]

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[160] RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 20-30 (1988). This point is also recognized in Butler & Macey, *supra* note 1.

[161] *See, e.g.*, 4 Jensen, *supra* note 1, at 295 (Thomas B. Wait to George Thatcher) (Nov. 22, 1787) ("Otherwise State sovereignty will be but a name – the whole will be *'melted down'* into one nation; and then God have mercy on us – our liberties are lost.").

[162] For example, the trade-off between dealing with externalities and the cost of too much government is captured in the constitutional debate over the absence of a federal religious power. *Supra* notes 155-158 and accompanying text.

[163] U.S. CONST. art. I, § 10, cl. 3.

[164] United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

[165] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1444 (1987).

[166] United States v. Lopez, 514 U.S. 549 (1995).

[167] The *Wickard* court applied to agriculture Justice Hughes' reason for extending federal regulation to intrastate commerce: because in the first case intrastate commerce and in the second case agriculture had

> such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

Wickard v. Filburn, 317 U.S. 111, 123 (1942) (citing Shreveport Rate Cases (Houston, E. & W.T.R. Co. v. United States), 234 U.S. 342, 351 (1914)).

[168] On the need for enumeration for those of us out in the sticks, *see supra* notes 40-43 and accompanying text.

VI. CONCLUSION

The drafters of the Constitution did not enumerate the reserved powers of states in the document itself, choosing rather to rely on general implication and, with adoption of the Tenth Amendment, general exception. However, the federalist supporters of the Constitution did "enumerate" many specific reserved powers during the public debate leading to adoption. In effect, they represented that enumeration as authoritative. Moreover, just as lawyers and judges employ the principle of *ejusdem generis* to draw conclusions about the scope of a general clause from a list of examples, so also the founders' enumeration of reserved state powers offers us precious insight into the scope of state authority.

Finally, the founding generation's list of state enumerated powers helps us understand the Constitution's limit on federal powers. This enumeration suggests that the Constitution does not vest jurisdiction over all arguably "national" issues to the federal government. On the contrary, in order to avoid the unacceptably high costs of centralized government, the Founders opted deliberately to reserve exclusive jurisdiction over certain "national" concerns to the states.

Date: _____
Roll Call Vote # _____

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3015

Senate GVA Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sorvaag Seconded By Barry

Senators	Yes	No	Senators	Yes	No
Chairman Dever	X		Senator Marcellais		X
Vice Chairman Sorvaag	X		Senator Nelson		X
Senator Barry	X				
Senator Cook	X				
Senator Schaible	X				

Total (Yes) 5 No 2

Absent _____

Floor Assignment Barry

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3015: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HCR 3015 was placed on the Fourteenth order on the calendar.