ESSAY

THE TENTH AMENDMENT AMONG THE SHADOWS: ON READING THE CONSTITUTION IN PLATO'S CAVE

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In Plato's Allegory of the Cave, he describes a cavernous chamber in which men are imprisoned. Although a large fire lights the cave, the prisoners cannot see the light source. Instead, they can only make out figures that dance and parade in front of them illuminated by the fire. The prisoners cannot even see the figures directly, only their shadows. Everything that the prisoners know about reality they have learned from the distorted shapes of the shadows dancing about the cave's walls. Socrates wonders, if a prisoner were suddenly freed and could see the objects themselves and not merely their shadows, whether he would know them from their two-dimensional shapes or whether he would be perplexed and find the objects less real than their images.¹

For Socrates, the final burst of light represents "the essential Form of Goodness[,]... the parent of intelligence and truth," a dazzling, bewildering display for which only some men will be prepared.² Upon their return to the cave, these select "king bees in a hive" will see "a thousand times better than those who live there always [and] will recognize every image for what it is."³ For our freed prisoner, the sudden illumination reveals a whole new world previously hidden from his view, a world whose ultimate reality may seem unreal to one whose

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1. See THE REPUBLIC OF PLATO VII, at 227-29 (Francis MacDonald Cornford trans., Oxford Univ. Press 1945).
2. Id. at 231.
3. Id. at 234.
vision had been obscured for so long. Our prisoner may not recognize the new shapes that appear before him, although their general contours are familiar. Once exposed to three-dimensional objects having depth and color, our enlightened prisoner will never be satisfied with the limited images of his former existence.

For the rest of our prisoners, however, for whom escape will never come, the shadows on the wall are the only evidence of those objects that they will know. They may suspect that there is something behind those limited shapes, but their understanding of the world must be based on the shadows that they actually know, rather than a reality that they cannot see and have no means of accessing. From our perspective, the prisoners of the cave live a visually—and sensorially—impoverished existence; for them, their life is as rich as their circumstances will permit.

In one sense, the shadows the prisoners have viewed for so long are no less real than the objects they represent, but they are only two-dimensional representations of much more complex and variegated forms. The shadows are, nonetheless, real in the shadowy world in which they exist. The shadows themselves do not obscure the objects they represent. Instead, the shadows are the confluence of light and the perspective of the viewer, whose vantage point is blocked from full view of the ultimate objects. The shadows may distort the true shape of those objects, but sometimes the shadows are themselves the best evidence of the reality behind them. The prisoners may be deceived by the shadows; but more often than not, the shadows prove that at least something is there. Once the prisoners know of the existence of some ultimate reality beyond the shadows, they will not mistake the shadows for the thing itself, but the shadows may nonetheless prove reliable and serve as the best evidence of a reality whose access has been denied them.

In this essay, I argue that we more closely resemble the prisoners left in the cave than Socrates’s enlightened prisoner and that the Constitution is full of shadows that demand our careful scrutiny. These shadows are evidence of state power and are the only evidence the Constitution will provide us. Owing to its origins, the Constitution creates a federal government and confers power to its branches. Those powers that are not so conferred—either expressly or implicitly—are
reserved to the states that ceded their own powers under the Constitution, or to the people, who are the ultimate source of all governmental power. Because the Constitution does not define the powers of the states in the same way that it defines the powers of Congress, for example, we must seek vestiges of state power. Unlike Socrates's enlightened prisoner who finds the ultimate light source, we shall not discover the source of state powers in the Constitution. Only in the shadows of federal authority will we make out the authority of the states. The shadows themselves—of which the Tenth Amendment is the most obvious example—are the most direct evidence of the reality of state authority.

The Supreme Court has long struggled to define substantively the powers that belong to the states, and it has long searched for that meaning in the Tenth Amendment. To the extent that the Court is looking for substantive content in the Tenth Amendment, that exercise will be futile. The Tenth Amendment defines a relationship between the federal government, the states, and the people and, accordingly, cannot supply the powers that belong to the states or the people, as the Court attempted to do in National League of Cities v. Usery and New York v. United States. Furthermore, the Court cannot abandon the search for constitutional federalism to the political process, as it has suggested in cases such as Garcia v. San Antonio Metropolitan Transit Authority, because the Court's process-based federalism makes no sense in light of the Court's history of substantive constitutional review. Even the Court's most recent pro-state decisions, Printz v. United States and Alden v. Maine, offer little promise. Those cases preserve the irreducible core of state powers, the administration of state government itself, but promise no substantive authority to govern anything but the state itself. These cases are symbolic—and symbols can be important—but no real state authority lies

4. 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.").
within their pages.

The Court can and should, however, take meaning from the simple existence of the Tenth Amendment. The fact that we even have a Tenth Amendment demonstrates the reality behind it and imposes on the Court a duty to define the enumerated powers in such a way that the states are not relegated to irrelevance and, ultimately, extinction. Thus, the only recent case that holds real promise for enhancing state powers is United States v. Lopez.\(^{10}\) Moreover, the Tenth Amendment is not the sole evidence for the states' powers. The Constitution is textured with the shadows of state authority that prove, indirectly, the reality of that authority.

I. STATE POWERS IN THE CONSTITUTION’S SHADOWS

In some sense we are prisoners of our Constitution. As a law superior to all other laws, the Constitution circumscribes our political institutions and holds us as a people securely within its walls.\(^{11}\) The Constitution is well illuminated, full of the inspired political thought of a generation schooled in the Enlightenment. The Constitution creates a government, to which it both assigns power and divides the assignment among three branches. The separation of powers was a great contribution to the world’s political thought; but it was not the Constitution’s most original contribution. That contribution was constitutional federalism, a plan knitting together a body of existing states into a union in which the national government could represent states and people in some matters, while the states could retain their own sovereignty with respect to other matters.\(^{12}\) Whatever political order the Constitution’s framers hoped to bring to the American states, they never pretended to prescribe all governmental powers,\(^{13}\) and they frankly

\(^{10}\) 514 U.S. 549 (1995); see also United States v. Morrison, Nos. 99-5, 99-29 (S. Ct. argued Jan. 11, 2000) (challenging the constitutionality of the Violence Against Women Act under Section 5 of the Fourteenth Amendment).

\(^{11}\) See U.S. CONST. art. VI, cl. 2.

\(^{12}\) See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political entities, one state and one federal, each protected from incursion by the other.").

\(^{13}\) See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").
acknowledged that there was another realm beyond the charter's general purview. This realm was the power of the states, which were governed by their own existing constitutions and charters.\textsuperscript{14}

Our Constitution presupposed the governmental powers of the states. Where the document prohibited certain state activities,\textsuperscript{15} it did so to secure the powers of the federal government\textsuperscript{16} and to respect the powers of coordinate state governments.\textsuperscript{17} The Constitution is asymmetrical with respect to power: whereas the Constitution enumerates the powers of the federal government,\textsuperscript{18} it never contemplated affirmatively prescribing the powers of the states. To the extent that it defines state powers, the Constitution does so through negative implication: it vests the Congress with "[a]ll legislative Powers Herein granted,"\textsuperscript{19} it lists a number of actions that "[n]o state shall" commit,\textsuperscript{20} and it otherwise provides that, "[t]he 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."\textsuperscript{21}

For those powers affirmatively granted to the United States, and for those negative powers, or disabilities, imposed on the states, the Constitution provides the powers or disabilities themselves; it does not ask us to imagine or define those powers or disabilities ourselves. By contrast, the powers retained by the states (including those powers that are not only concurrent, but exclusive) are a shadowy lot, whose existence is largely defined by what has not been committed to the United States or prohibited to the states. The task of determining what powers belong to the states is not impossible, but the effort has been made difficult because it cannot be done directly or affirmatively, as can be done with respect to the powers of Congress. To understand state authority under our Constitution, rather, we must determine what is not assigned

\begin{flushleft}
\textsuperscript{14} See U.S. CONST. amend. X.
\textsuperscript{15} See, e.g., U.S. CONST. art. I, § 10; art. IV, §§ 1-3.
\textsuperscript{16} Compare U.S. CONST. art. I, § 8, cl. 5 ("Congress shall have Power . . . To coin Money . . . ") with art. I, § 10, cl. 1 ("No State shall . . . coin Money . . . ").
\textsuperscript{17} See U.S. CONST. art. IV, §§ 1, 2.
\textsuperscript{18} See U.S. CONST. art. I, § 1; § 8, cl. 1.
\textsuperscript{19} U.S. CONST. art. I, § 1.
\textsuperscript{20} U.S. CONST. art. I, § 10.
\textsuperscript{21} U.S. CONST. amend. X.
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to Congress. State authority, like Plato's ultimate reality, cannot be determined by reference to the thing itself, but only by studied reflection on the shape of something else, namely, the powers of Congress. This mechanism proves extraordinarily awkward in defining the powers of a government. (In retrospect, I would not recommend this mechanism, but it is a consequence of the way in which our Constitution came into being.)

For much of our history, the Court has labored to define those federal powers that most obviously touch on state powers: commerce, taxing, and spending. These powers are so central to what states do that it is obvious that Congress cannot possess exclusive authority to tax, spend, and regulate anything that arguably affects commercial activity. But does the Constitution place any limits on what Congress can do, so that the states may claim exclusive power? The Commerce Clause presents a particularly vexing example. The text cannot answer directly the question of what powers the states have to regulate commerce. Instead, we have to study the shadow cast by Congress's exercise of its commerce authority to comprehend the extent and nature of the states' power to regulate commerce. Since Cooley v. Board of Wardens, the states have enjoyed power concurrent with that of Congress to regulate commerce, except when congressional legislation actually displaces state regulation or when the states have regulated matters that by their very nature require a national rule (regardless of whether Congress has actually supplied that rule). This rather complex formula is only the calculus for determining whether the states can exercise power concurrently with Congress. The far more difficult question, though, is whether Congress has any limits on what it can do under the guise of "regulat[ing] Commerce among the several States"—i.e., whether anything is not "commerce"—or whether any commerce is not "commerce among the several states?" Any such non-commercial or non-interstate commercial areas lie outside of Congress's power and belong exclusively to the states.

22. U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").
As the Court struggled with the political branches' aggressive use of the commerce authority, the Court found it more and more difficult to define "commerce." 25 Instead of finding internal restraints on Congress within the Commerce Clause, the Court turned to the Tenth Amendment as an external restraint on the steady expansion of federal authority. 26 However, the Tenth Amendment itself could provide no standards for decision. The best that the Court could do was allude to "subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States." 27 What those "subjects" were, the Court could not say, except that there were a "great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment." 28 Finally, in United States v. Darby, 29 the Court declared the Tenth Amendment to be of no special force. It did not represent a substantive, external restraint on federal authority, but was merely "declaratory of the relationship between national and state governments;" it was a "truism." 30 At the same time, the Court surrendered further judicial control of Congress's commerce power to the political process. Despite the text of the Commerce Clause, the Court announced that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to intrastate activities that "affect interstate commerce." 31

The Court's reliance on the Tenth Amendment should have ended with Darby's pronouncement, but the Court has never been able to admit to the full implications of its pronouncement: that the enumerated powers doctrine as a

25. This history is a familiar one. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918); Houston, E. & W. T. Ry. v. United States (The Shreveport Rate Cases), 234 U.S. 342 (1914); Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903); United States v. E.C. Knight Co., 156 U.S. 1 (1895); United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1869).
27. The Child Labor Tax Case, 259 U.S. at 37.
28. Id. at 38.
29. 312 U.S. 100 (1941).
30. Id. at 124.
31. Id. at 118.
judicially-enforceable limitation failed, and that the states could only retain power by getting Congress to limit itself voluntarily. So, the Court found a new, narrower use for the Tenth Amendment in cases in which the state itself was a party regulated by congressional statute. The Court's efforts in these cases to give substantive meaning to the Tenth Amendment have been very controversial. In *National League of Cities v. Usery*, the Court struck down the application of the 1974 Fair Labor Standards Act ("FLSA") amendments to state employees, so long as the state employed these individuals in governmental and not proprietary functions. Justice Rehnquist wrote that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." The Court conceded the truism of the Tenth Amendment and accepted only the most narrow umbra—that the Tenth Amendment does not restrain federal encroachment of state powers, except when the object of state regulation is the state itself. Moreover, the Court conceded the near plenary power of Congress—in the Court's view, the FLSA amendment was proscribed, but "not because Congress may lack an affirmative grant of legislative authority." In other words, the Court conceded the broad scope of Congress's commerce powers. What the Court did was to create a state exemption from the commerce power based on the Tenth Amendment. The Court's argument took the form of *reductio ad absurdum* in which we deduce from a flawed conclusion that one of the premises is wrong. The Court reasoned backwards that, to the extent the FLSA "directly displace[d] the state's freedom to structure integral operations in areas of traditional governmental functions, [the FLSA was] not within the authority granted Congress by Art. I, § 8, cl. 3." The problem with this approach was that the Court had no means of

34. *Id.*
35. *Id.* at 852.
explaining a conclusion under the Tenth Amendment except by reference to the Commerce Clause, and the Court had no explanation for the Commerce Clause except to assert that Congress’s power does not extend to state actions that are “governmental.”

Even that most modest reservation in National League of Cities evaporated in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, the Court considered whether, consistent with National League of Cities, the Department of Labor could enforce the FLSA against a municipally-owned transportation system. The Court found that it could no longer distinguish between states acting as governments and states acting as proprietors. In other words, the Tenth Amendment exception to the Commerce Clause proved too much even when it only shielded state governments. The Court could not abide the notion that, in a federalist system, state governments might be free of federal supervision. Having despaired of finding internal restraints in the Commerce Clause, and unwilling to read a governmental/proprietary exception into the Tenth Amendment’s reserved powers, the Court found that the protection of state powers inhered in the Constitution as “one of process rather than one of result.”

In an effort to revive the flagging status of the states, the Court has more recently endeavored to resuscitate the Tenth Amendment. In New York v. United States, the Court reconsidered the Tenth Amendment in the context of a congressional directive specifically addressed to “States qua States” and not part of a scheme subjecting states to “generally applicable laws.” The law in question required states to develop an acceptable nuclear waste disposal plan. States that did not develop a plan had to accept title to nuclear waste generated within their borders (the “take-title” provision). The question of federal power, the Court declared, “can be viewed in either of two ways.” The Court may ask if the Constitution authorizes Congress’s action under Article I, or the Court may ask if the action “invades the province of state sovereignty

37. Id. at 554. See Part IV for a discussion of process-based federalism.
39. Id. at 160.
40. Id. at 155.
reserved by the Tenth Amendment . . . the two inquiries are mirror images of each other."\textsuperscript{41} Changing metaphors, the Court added that

just as a cup may be half empty or half full, it makes no difference whether one views the question at issue . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.\textsuperscript{42}

The Court concluded that the take-title provision was beyond Congress's power because it attempted to regulate the states directly. If \textit{New York} represented a victory for federalism, it was quite hollow because it reduced the irreducible power of the states to a single proposition: Congress cannot compel directly the "States as States."\textsuperscript{43} Even given this nearly trivial island of state authority, some members of the Court questioned whether \textit{Garcia} and \textit{New York} could be reconciled.\textsuperscript{44}

\textit{New York} was followed by \textit{Printz v. United States},\textsuperscript{45} in which the Court held unconstitutional Congress's attempt to force local law enforcement officials to conduct background checks for a handgun licensing scheme. After the Court participated in a lengthy discussion of historical practices, constitutional structure, and the Court's own jurisprudence, the majority "conclude[d] categorically . . . [that] '[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.'"\textsuperscript{46} But it is testimony to how far "Our Federalism"\textsuperscript{47} has wandered that \textit{Printz} merely reiterated \textit{New York}'s holding that the federal government may not order the states due to their separate sovereignty. The principle is both so modest and so obvious that it is a noteworthy development only that the Court had to repeat it so emphatically.\textsuperscript{48}

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\textsuperscript{41} \textit{Id.} at 155-56.  \\
\textsuperscript{42} \textit{Id.} at 159.  \\
\textsuperscript{43} \textit{National League of Cities}, 426 U.S. at 854.  \\
\textsuperscript{44} \textit{See New York}, 505 U.S. at 201-07 (White, J., dissenting).  \\
\textsuperscript{45} 521 U.S. 898 (1997).  \\
\textsuperscript{46} \textit{Id.} at 933 (quoting \textit{New York}, 505 U.S. at 188).  \\
\textsuperscript{47} \textit{Younger v. Harris}, 401 U.S. 37, 44 (1971) (Black, J.).  \\
\textsuperscript{48} The Court's decision this Term in \textit{Reno v. Condon}, No. 98-1464 (U.S. Jan. 12, 2000) does not affect my analysis. In that case, the Court held that the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721-2725, did not exceed Congress's authority. The DPPA regulated the disclosure and resale of personal information contained in motor vehicle records. The Court held that the personal information
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This past term, the Court favored the states again in a series of cases involving damage suits against states. In *Alden v. Maine*, the Court held that even though states are subject to the Fair Labor Standards Act (the holding of *Garcia*), the states could not be sued for damages in their own courts, unless the states consent to such jurisdiction. Because the Court had previously held that Congress could not compel the states to defend themselves in federal court, *Alden* leaves state employees without a damages remedy against the state. Although *Alden* has the appearance of strongly supporting the power of the states, *Alden* is largely a consequence of *Garcia*. Had the Court not previously held states subject to federal labor laws, there would have been no opportunity to rule on whether Congress could abrogate the states' sovereign immunity. The juxtaposition of *Garcia* and *Alden* yields a peculiar result: state governments are subject to the FLSA, but no federal court has jurisdiction to hear a suit for damages. *Alden* is the Rehnquist Court's revenge for *Garcia*—a kind of theory-of-the-second-best solution to the Court's unwillingness to overrule *Garcia*.

In the end, this is much ado about almost nothing. *Garcia*—like the cases that chip away at it, *New York, Printz*, and *Alden*—is of such limited scope that it has distracted us from the larger problem. These "States *qua* States" cases have nearly made us forget that the Tenth Amendment is not about reserving power to the states so that they can administer themselves as governments, but an amendment expressing a relationship among the federal government, the states, and the people. The real point of the Constitution is to divide responsibility for governing the people between the states and the federal government, and that point is lost in the "States *qua* States" cases. *New York, Printz*, and *Alden* do say something about the

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mood of the Court. They are surely symbolic of something, but symbols have little meaning if we cannot discern the broader principles that the symbols purportedly represent.

II. THE TENTH AMENDMENT AND THE RELATIONSHIP BETWEEN CONGRESS AND THE STATES

So what should be done with the Tenth Amendment? Does it have any meaning for federal-state relations? One problem is that Garcia and New York were both correct in part. The Garcia Court was correct that the Court’s Tenth Amendment analysis has approached “freestanding conceptions of state sovereignty ... [to] measur[e] congressional authority under the Commerce Clause.” 51 The Court in New York was correct that there are state functions that must be beyond Congress’s commerce authority. The two decisions were informed by different modes of approaching the Tenth Amendment. The Garcia Court’s concern was means, the process by which residual state authority is determined. The New York Court was concerned with results, the substantive powers that the states retain.

The problem with the Court’s overall approach to the Tenth Amendment is that the Court looked to it for substantive constraints on Congress’s authority (National League of Cities and New York) and, having failed to find concrete constraints therein, the Court abandoned the enterprise of restricting Congress at all (Garcia). If the Court wishes to give any meaning to the Tenth Amendment or, to state the problem differently, if the Court wishes to preserve constitutional federalism, it must reconceive the Tenth Amendment. The Court must first accept the Tenth Amendment on its own terms.

Since Darby, we have conceded that the amendment expresses a truism, that it is simply definitional. To state it in algebraic terms:

\[ S = \neg C \]

where the powers belonging exclusively to the states or the people (S) are those that are not permitted to Congress (\( \neg C \)). 52 This algebraic expression has limits. Justice O’Connor argued that federalism is like asking whether a glass is half empty or

52. Here I assume that the powers are not denied to the states.
half full; we may look at either the powers granted to Congress or we may discern the powers retained by the states. Justice O'Connor's formulation suggests that we may look at either side of the equation; that is, we may examine either the top half or the bottom half of the glass. The analogy is only partially accurate, and it may be misleading. When we look at a glass that is half filled, we know something about both the top half and the bottom half of the glass. The "half empty/half full" phrase is only a way of characterizing the state of affairs in the glass. It is not analytic, but descriptive. What if we only knew that at least the bottom half of the glass contained milk? Does that tell us anything about the top half of the glass? Or, if we knew that at least the top half of the glass is empty, does that tell us what the contents of the bottom half are? Only if we know the contents of both halves of the glass can we accurately describe the glass; in other words, we have to know facts about both sides of the equation. The phrase "the glass may be half empty or half full" is true, but more importantly, it is complete in itself. To say that a glass is half empty is to imply that it is half full; to say that it is half full is to imply that it is half empty. The Court's analogy does not actually help us to understand the problem of state sovereignty. The formula S = \neg C tells us that S is whatever is not C. Yet the Constitution only defines C and gives us almost no tools for defining S except by reference to C. Thus we can only solve for C because without tools beyond the Tenth Amendment, we cannot determine S without having first determined C. That is the dilemma of National League of Cities and New York: the Court, in a paternalistic effort to preserve state powers, has proceeded from the wrong premise. The Court is trying to enumerate state powers (S) without reference to the enumerated powers of Congress (C), an effort doomed from the start.

The problem can be illustrated by reference to United States v. Lopez. In Lopez, the Court held that the Gun Free School Zones Act, which banned possession of weapons in or near schools, was beyond Congress's power under the Commerce Clause. In the majority opinion, the Court suggested that some

areas of "historical" state powers exist, including family law, criminal law enforcement, and education.\textsuperscript{55} Did the Court equate "historical" state powers with "exclusive" state powers? The Court evidently did, but how do we prove exclusive state powers by the Constitution? If we attempt the \textit{New York} Court's "mirror image" argument, it collapses quickly under scrutiny: according to \textit{New York}, it is equivalent to argue that family law, criminal law enforcement, and education are not within Congress's powers or to argue that those matters are within the states' sovereignty under the Tenth Amendment. But the latter approach has no constitutional or "legal" basis.\textsuperscript{56} Only the former argument, that Congress lacks constitutional authority, is an effective argument under the Tenth Amendment.\textsuperscript{57} One consequence of \textit{Lopez} is that the states retain plenary authority to address guns in schools, free of federal interference.\textsuperscript{58} If the Court is serious about \textit{Lopez}, it may yet construe the Commerce Clause so that Congress cannot reach family law, ordinary criminal law enforcement, and education. \textit{Lopez}, as a case limiting the Commerce Clause, is, thus, a much more promising approach to federalism than \textit{New York}, as a case expanding the Tenth Amendment.

\section{III. The Tenth Amendment and the Relationship Between Congress and the People}

Here is where Plato comes in. The problem with \textit{New York}'s algebraic formula is not that it restates a truism, but that it lacks a term. The text of the Tenth Amendment, however, cannot supply the missing term. Rather, the very existence of the Tenth Amendment supplies that term. It is this:

\begin{equation}
S > 0.
\end{equation}

The Tenth Amendment per se does not define the residuum of state control but it proves that there is such a residuum.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{55} See \textit{id.} at 549, 564.
\item \textsuperscript{58} See \textit{Lopez}, 514 U.S. at 581 (Kennedy, J., concurring) (noting that more than forty states had criminal laws outlawing gun possession on or near schools).
\item \textsuperscript{59} The Court came close to recognizing this additional term in \textit{New York}: "The Tenth Amendment . . . restrains the power of Congress, but this limit is not
The shadows cast by the Tenth Amendment are proof of the residuum of some state authority, even if they are insufficiently clear to discern the substantive terms of that authority. This additional term assumes that the Framers would not have trivialized the Constitution by including an amendment that had, literally, no substantive content whatsoever and that prostrated the states to the whims of Congress. If the Tenth Amendment does not indicate some residuum of state power, then the states as states (much less as viable political entities) exist at congressional sufferance.

With the addition of this term, we can begin to derive a rough rule of construction for Congress’s enumerated powers. The revised formula presently reads:

\[ S = \neg C \text{ and } S > 0. \]

The new term actually gives us a new perspective on the enumerated powers. No power granted to Congress—think of the Commerce Clause—may be so construed as to preempt entirely the states’ power over the people. I employ the phrase “power over the people” for two reasons. First, this phrase emphasizes that the reserved powers of the states must somehow reflect general sovereign powers, which are powers over people.60 The “States qua States” cases preserve the states’ power over some people—those who are state employees. A state that may resist commandeering so as to retain only the power to exist in name possesses no meaningful powers.

Second, I refer to the states’ power over “people” because the Court has overlooked “the people” in its arguments over the Tenth Amendment, and “the people’s” rights are also reserved. The Tenth Amendment expresses a triangular relationship among the federal government, state governments, and the people. Although the context for Tenth Amendment litigation has involved disputes between states and the federal government, residual state authority also inures to the benefit of “the people.” In any contest between Congress and the

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states, a decision that favors expanded federal powers necessarily disfavors the states and the people. When Justice Souter wrote in *Alden* that "the commerce power is no longer thought to be circumscribed," he meant, implicitly, that the people have reserved no powers over commerce or anything affecting it.

The Tenth Amendment does not grant power to the people or to any government, but it recognizes some pre-existing power that the people of a state have retained for their own purposes—including the purpose of granting (or not) the exercise of this power to the state. Whether the people have reserved any particular power to themselves or have committed it to the state, the Tenth Amendment cannot tell us. Moreover, no institution of the federal government—such as the Supreme Court—can pretend to pronounce how the power is, or should be, allocated. At best, the Court can only find that the power has been reserved either to the states or to the people and then refer to the appropriate state constitution or charter. Indeed, so complete is the separation of national and state governments that the Court cannot intervene to resolve a dispute between the state and some of its own citizens who claim that they have reserved a power from the state. The dispute itself has been reserved to the state and to the people and must be resolved in the state's own courts.

The powers reserved to the people are powers denied to the federal and state governments. How do "the people" reserve power from the federal government? They do so either by not conferring the power initially, or, more didactically, by expressly denying the power, as the Constitution did in Article I, Section 9, and in the Bill of Rights. How do "the people" reserve their powers against the states? Once again, two mechanisms exist for doing so, although the Constitution employs only one. One means to deny power to the states is to provide so expressly in the U.S. Constitution. The only powers

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The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.

*Id.* at 546.
expressly withheld from the states were those found in Article I, Section 10, because the Bill of Rights bound only the federal government until the passage of the Fourteenth Amendment. The Section 10 disabilities are important, but they are trivial compared with the concerns over government power that animated our Bill of Rights. So what did the Tenth Amendment reserve to the people? Certainly the Tenth Amendment did not reserve to the people only immunity from ex post facto laws, bills of attainder, and the like.

A second means of denying power to a state is to proscribe the power within the state’s own constitution. Here we have some real promise. The powers reserved to the people included whatever the people, organized in states, had reserved to themselves in their own constitutions. The Tenth Amendment, indeed, stated a truism: whatever the people had not granted to the federal government or prohibited to the states in the federal constitution was reserved to the states or, if the people had reserved power in their own constitutions, to the people. The Tenth Amendment, even if it is a truism and redundant, is not trivial because it recognizes the principle of state constitutionalism.

Yet, if we are to believe the commerce and “States qua States” cases, Congress has near plenary authority by virtue of the Commerce Clause, so that nothing is reserved to the states, except the right of state governments to resist federal conscription. That means, consequently, that no rights have been reserved to the people except those specified in Article I, Sections 9 and 10, and the Bill of Rights and whatever the people can secure through the political process. This view admits the failure of the enumerated powers doctrine and


64. Moreover, if the powers reserved to the people are the powers denied to the states in Article I, Section 10, the Tenth Amendment is internally redundant because it specifically refers to powers “not . . . prohibited by [the Constitution] to the States.”

65. But see U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (finding that the Tenth Amendment limits the powers of the states to those they possessed prior to the adoption of the Constitution; reasoning that the power to prescribe qualifications for members of Congress was created by the Constitution and could not have been reserved).

substitutes for it an enumerated immunities doctrine. Unless the Court alters its conception of the Tenth Amendment, the Court has reduced the reserved rights of the people to a nullity.

IV. THE FAILURE OF PROCESS-BASED FEDERALISM

Members of the Court have frequently taken the position that the “shape of the constitutional scheme” cannot be determined by the Court’s attempts to police some imaginary boundary between the states and the Congress, but “is one of process rather than one of result.”67 The Court has stated that any limits “are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”68 Even with respect to the Commerce Clause, the Court has warned that “effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes.”69 The states, the Court asserts, have representatives in Congress, where matters of federalism can be balanced out and resolved through the give-and-take of politics.

Politics, of course, has always been a means of preventing injury to the states, but it was never meant to solve the puzzle of enumerated powers. Indeed, it is too late to assert that this “keep-it-if-you-can” political process is the solution to federalism anymore than we can contend that the political process is the solution to disputes involving separation of powers70 or the Dormant Commerce Clause.71 The Court crossed that bridge in the earliest cases affirming its power of

68. South Carolina, 485 U.S. at 512.
substantive constitutional review, most importantly, Marbury v. Madison. Abandoning the states to their political fate in Congress would deny the basic premise of Marbury: the Court, regardless of the constitutional views of coordinate political branches or coordinate sovereigns, may declare their actions extra-constitutional. If the political process were sufficient, the Constitution could have comprised a general grant of authority to Congress (perhaps a vesting clause), a supremacy clause, and a Tenth Amendment. Under that proposal, Congress could do anything it wanted. The fact that the Constitution enumerates the powers of the federal government and, indeed, that the Vesting Clause in Article I is self-consciously different from the Vesting Clauses of Articles II and III, refutes the notion that the political process alone determines state-federal boundaries.

The Court has engaged in substantive review of federal and state actions since Marbury, but Marbury could reasonably have adopted a process approach without abandoning judicial review entirely. The Court could have exercised the power to say “what the law ‘is,’” without exercising the additional power of declaring “what is ‘law.’” That would have left the political branches much leeway and, importantly, lodged with them responsibility for defining the constitutional limits of their own powers. Indeed, members of the first congresses paid close attention to the Constitution. David Currie’s

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72. 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court had the power of constitutional review of acts of Congress); see also Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court had appellate jurisdiction over civil cases decided in state courts); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (holding that the Supreme Court had appellate jurisdiction over criminal cases decided in state courts).

73. Following the Civil War, the Joint Committee on Reconstruction proposed a constitutional amendment nearly that broad. The House of Representatives tabled the proposal, and Congress ultimately adopted the Fourteenth Amendment. Recounting this history, the Court recently rejected congressional efforts to enforce the Fourteenth Amendment in a manner inconsistent with the Court’s own precedent: “Congress’s discretion [to secure the guarantees of the Fourteenth Amendment] is not unlimited . . . and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution.” City of Boerne v. Flores, 521 U.S. 507, 536 (1997).


marvelous work on the Constitution in the first congresses reminds us of the conscientious efforts of the members, over a broad array of subjects, to understand the extent and the limits of Congress's authority. But congressional interest in the Constitution waned substantially over the next century, apparently because members of Congress knew that the Court would cure their constitutional excesses. We can only wonder whether there is sufficient evidence of congressional interest in the Constitution over the past 50 years or so for Professor Currie to complete his study.

Even as a purely theoretical matter, the process argument was stronger prior to the passage of the Seventeenth Amendment, a fact noted by the Court in Garcia. If an inference may be drawn from the Seventeenth Amendment, which deprived state legislatures of their direct representation in the Senate and transferred that power to the people, it is that the Court must be ever more vigilant in its enforcement (through the Marbury power) of the enumerated powers doctrine because the states are less capable than they were before of protecting themselves. Perhaps if the Court had not assumed the power of substantive judicial review in Marbury, we would not have been as comfortable adopting the Seventeenth Amendment. We can only speculate whether that Amendment would have passed if the Amendment had been proposed after the constitutional revolution of 1937 and

that none of the first congresses' actions, even the Alien and Sedition Acts, "rested on a clearly incorrect reading of the Constitution"); see also id. at 383 ("As of 1840, for example, far more constitutional questions had been debated and resolved in the Congress than in the Supreme Court. Moreover, the issues resolved in Congress were probably more fundamental.").


78. See 469 U.S. at 554.

79. The Seventeenth Amendment was adopted in 1913 during the heyday of the Lochner era commitment to substantive due process. At the time when the states dealt away their best procedural protection, the Court was working through state and federal laws with a meatcleaver. It would be a cruel joke on the states to have given away their procedural protection during a period when it was clear that the Court would remain active, only to have the Court subsequently abandon substantive review and tell the states to protect themselves—if they could. See generally Jay S. Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment, 36 U. Md. C. L. Rev. 1501 (1997). But see Ralph A. Rossum, The Ironic of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment, 36 San Diego L. Rev. 671, 673 (1999) ("The Seventeenth
whether a constitutional revolution would have occurred if no such amendment had existed in the first place.\(^80\)

The Seventeenth Amendment neither repealed nor modified the Tenth Amendment. If anything, the Seventeenth Amendment enhances the need for judicial enforcement of the boundaries between federal and state governments. The political safeguard of state legislatures' representation in the Senate was the states' best defense to congressional overreaching. The demise of that safeguard virtually guaranteed that there would be more frequent and stronger threats to constitutional federalism. If anything, the Seventeenth Amendment strengthened the Court's *Marbury* power by increasing the opportunities for its use.

This role of protecting states against congressional encroachment is one that the Court has accepted in the past. Moreover, the Court regularly intervenes—perhaps as a way of securing its own power—to prevent state encroachment on Congress through the Dormant Commerce Clause, even when it is not clear that Congress has any objection to the encroachment.\(^81\) There is, of course, a political solution in Dormant Commerce Clause cases as well—if Congress is unhappy with state regulation of commerce, Congress may legislate to prevent states from occupying certain areas. Congress is much better situated to defend itself against state encroachment than the states are to defend themselves against congressional encroachment. All of these ideas suggest that if the Court decides to abandon any area of substantive review to the political process, it should begin by relinquishing its own control over the Dormant Commerce Clause.

More recently, the Court has suggested that the political process is protecting the states as an empirical matter.\(^82\)

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\(^{80}\) See Bybee, *supra* note 79, at 551-53 & n.327 (arguing that, in the absence of the Seventeenth Amendment, the Republicans likely would have controlled the Senate during President Roosevelt's first term, suggesting that Roosevelt's New Deal would have faced much greater opposition in Congress).

\(^{81}\) See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 786-87, 793 (1945) (Black, J., dissenting) (pointing out that the railroads had powerful ties to Congress and that Congress was well aware of Arizona's restrictions on train length, and that Congress had declined to act).

\(^{82}\) See *Printz*, 521 U.S. at 957-59 (Stevens, J., dissenting) ("Recent developments demonstrate that the political safeguards protecting Our Federalism are effective," citing the Unfunded Mandates Act); *see also Garcia*, 469 U.S. at 553-54 & nn.16-17
Evidence for political forbearance and recognition of federalism, such as the Unfunded Mandates Act, evidences congressional tolerance of the states, not the lack of need for the Court's vigilance. To suggest that the Unfunded Mandates Act proves that the political process works is like finding no further need for police because no one was mugged today. Furthermore, the context for the Unfunded Mandates Act was the surprising shift in 1994 of political control of the Senate and especially the House. The Unfunded Mandates Act followed that change as part of House Speaker Newt Gingrich's "Contract with America." Even the Contract with America belied its state-friendly veneer. It included numerous crime proposals that have afforded new opportunities for the federal government to wrest control of crime from the states.

As I previously observed, the political process has failed in another regard: Congress has essentially ceased reading the Constitution, at least in those areas in which the Court has been most active. Even when Congress differs with the Court over the constitutional construction, Congress rarely departs from the Court in ways that favor the states. Congress is more likely to disagree with the Court when the Court's decision tends to favor state autonomy, even when the decision does not seem to subtract from Congress's own powers. A good example of this phenomenon is the Religious Freedom Restoration Act of 1993 ("RFRA"). When the Court in Employment Division v. Smith sub silentio overruled its prior decisions in Sherbert v. Verner and Wisconsin v. Yoder, it appeared that the Court would no longer enforce the Free Exercise Clause of the First

(listing seven examples of federal laws exempting the states from various provisions).

85. See supra text accompanying notes 72-73.
89. 406 U.S. 205 (1972).
Amendment as strictly as it once had. Smith, of course, did not mean the end of religious freedom. It meant that the Court would look less favorably on religious freedom claims. That outcome, however, had the effect of shifting to the states, including state courts, the responsibility to protect religious freedoms; states would largely decide for themselves whether religious observances should be exempt from laws of general applicability.90

Shortly after and in response to Smith, Congress enacted RFRA to force the federal government and the states to adhere (as a federal statutory requirement) to the principles of Sherbert and Yoder. Both Congress and the President made it clear that RFRA’s purpose was to overturn the Court’s decision in Smith and impose statutory requirements on all “Government,” including the states.91 RFRA was evidence of Congress’s general skepticism of whether the states could address religious freedom as seriously as Congress itself had addressed the problem.92 The Court ultimately struck down RFRA in City of Boerne v. Flores,93 concluding that Congress exceeded its power under Section 5 of the Fourteenth Amendment. Congress is considering legislation that would effectively reenact RFRA, this time relying on some combination of its commerce, taxing and spending, and Section 5 powers.94

Despite my general pessimism about Congress’s current willingness to give the states their due constitutional regard, the members occasionally seem to recognize the need for Congress itself to parse the Constitution more carefully. In


92. We might question Congress’s seriousness because Congress, as it often does, reserved the right to exempt its own programs from compliance with RFRA. See 42 U.S.C. § 2000bb-3(b).


those circumstances, senators and representatives realize that the Court cannot or will not save the members from themselves. It is on those rare occasions when political duty and constitutional duty are synonymous that modern congresses are most attentive to the Constitution. Two such areas come immediately to mind: impeachment and the waging of war. Although Congress may not have conducted itself well in the impeachment and trial of President Clinton, for the first time in a long time, members of Congress did take seriously their oaths to uphold the Constitution as they read it, rather than relying on the what the Court said about the Constitution. The same is true, although to a lesser extent, of conflicts between Congress and the President over the conduct of war. In both of these instances, the members must know that the Court will not intervene and that their own powers of interpretation and persuasion over constitutional boundaries will bear final scrutiny.

In sum, we should jettison any notion that the political process suffices to answer the imminent demise of constitutional federalism. The political process will, undoubtedly, supply an answer because Congress will fill any void left by the Court. Whatever confidence we once might have had that Congress would give considered attention to questions of constitutional federalism, we can have no such confidence today. Any competence in constitutional interpretation that Congress might have demonstrated in the past was commensurate with Congress’s ownership of the Constitution. As the Court assumed greater constitutional


authority over federal legislation, Congress naturally paid less attention to constitutional interpretation and, consequently, to constitutional self-restraint.

V. STATE POWERS IN THE CONSTITUTION’S OTHER SHADOWS

In *McCulloch v. Maryland,* Chief Justice Marshall admonished that the Tenth Amendment raised “the question, whether the particular power which may become the subject of the contest has been delegated to the one government, or prohibited to the other,” and that the answer “depend[ed] on a fair construction of the whole instrument.” He warned us that lest we demand “the prolixity of a legal code,” we may expect “only [the Constitution’s] great outlines,” that the Constitution’s “important objects and the minor ingredients which compose those objects”—like Plato’s shadows—“[must] be deduced from the nature of the objects themselves.”

*McCulloch* warns that constitutional interpretation will not be easy; however, the modern Court is simply wrong that the Constitution “offers no guidance about where the frontier between state and federal power lies.”

Reading the Constitution in Plato’s cave will demand much more of the Court than we have demanded of it in the past. It will at least require the Court to examine more carefully the substantive provisions of the Constitution. The Court should start with the Commerce Clause. I will not detail here my views on how the Court should construe the Commerce Clause, except to offer two brief observations. First, the Tenth Amendment must mean that the Commerce Clause is bounded. It cannot mean, as Justice Brennan stated, that

laws within the commerce power may not infringe individual liberties protected by the First Amendment, the Fifth Amendment, or the Sixth Amendment. . . . But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on

98. *Id.* at 406.
99. *Id.* at 407.
the commerce power.\footnote{101}

The Commerce Clause undoubtedly accords great power to Congress, but it cannot have conferred all power on Congress. At this stage, the Court must assume responsibility for finding a sensible limitation on congressional authority.\footnote{102} Second, the Constitution's power-conferring clauses, such as the Commerce Clause, remain the best hope for giving meaning to the Tenth Amendment. *Lopez* has far greater significance for the states than the "States qua States" cases simply because it portends real change in the powers of Congress. That means that real power will actually be reserved to the states and the people.

The Tenth Amendment may be the most important of the shadows on the constitutional wall, but it is not the only such shadow. In *Garcia*, the Court observed that "[w]ith rare exceptions, . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."\footnote{103} The Court is technically correct that the Constitution does not supply "express elements of state sovereignty" in the sections in which we would expect to find it—Article I, Section 10; Article IV; or the Bill of Rights. However, the Court has simply restated the obvious point that the Constitution does not affirmatively enumerate the powers of the states. That is, the Court has merely observed that, as prisoners of the Constitution, we cannot observe the states' powers directly, but that statement alone does not excuse the Court from scrutinizing the Constitution's shadows and discerning the powers that must necessarily reside in the states to maintain a federal system. If we look closely enough, we may well find that the Constitution provides some general outlines of state powers in the Constitution.

Several provisions should enable the Court to rethink its current position on the powers of Congress. Professor Merritt has offered the Republican Guarantee Clause as important evidence that the states may govern themselves with respect to the franchise, the structure of state government, and the wages

of state employees. I have argued elsewhere that the Domestic Violence Clause, when read together with the Extradition Clause and the three enumerated crime provisions, is powerful evidence that the states retain primary control over crime, that the role of the national government is to insure—not provide for—domestic tranquillity, and that the federal government cannot displace state government entirely in defining or enforcing criminal laws. The Import-Export Clause surely implies, as Justice Thomas has recently observed, that the states retain some power over commerce. Indeed, the enumeration of state disabilities in Article I, Section 10 should be strong evidence that, in the absence of that section, the states retained full power to wage war, enter into treaties, coin money, regulate imports, and generally behave as independent sovereigns. Recently, Professor Rappaport has written that there may be a textual basis for the "States qua States" immunities, although it will not be found in the Tenth Amendment.

Even provisions protecting individual rights in the Constitution cast shadows that may illuminate the general sovereign power of the states. The Privileges and Immunities (or "Comity") Clause of Article IV secures the rights of citizens

105. U.S. CONST. art. IV, § 4 ("The United States shall . . . protect each of [the States] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").
106. U.S. CONST. art. IV, § 2, cl. 2 (extradition); art. I, § 8, cl. 6 (counterfeiting, 10 ("piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); art. III, § 3, cl. 2 (treason).
108. U.S. CONST. art I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").
to move from state to state, free of the "disabilities of alienage."\textsuperscript{112} The Privileges or Immunities Clause of the Fourteenth Amendment requires the states to treat their own citizens equally, thereby removing from those citizens the disability of caste legislation.\textsuperscript{113} The Comity Clause demands that states treat citizens of other states the same as its own citizens; the Privileges or Immunities Clause requires that states treat their own citizens the same. Congress, through Section 5 of the Fourteenth Amendment, may address violation of the Privileges or Immunities Clause, but violation of the Comity Clause is self-enforcing and admits of no congressional enforcement.\textsuperscript{114} Thus, Congress can ensure that any particular state has enacted uniform laws within the state; however, Congress has no power to insist that the states enact uniform laws so that U.S. citizens are subject to the same laws from state to state.\textsuperscript{115} Yet the commerce cases suggest that Congress has plenary power. If Congress has plenary power then it may enact uniform national laws directly. Accordingly, the Court's expansive reading of the Commerce Clauses renders the Comity Clause (and perhaps the Privileges or Immunities Clause and Section 5 as well) irrelevant because it would allow Congress to displace state laws entirely and substitute uniform national laws.\textsuperscript{116}

All of these provisions are constitutional shadows, testifying to the reality of residual state powers whose recognition the Tenth Amendment demands. At best, however, they provide an exclamation point to the idea of limited and enumerated federal power. The Tenth Amendment, and these other vestiges of state authority, should prompt us to complete the task of enumerating, and by enumerating, limiting the powers of the federal government. It is in the construction of the

\textsuperscript{112} Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).
\textsuperscript{116} See Jay S. Bybee, Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act, 48 VAND. L. REV. 1539, 1578-84, 1610-12 (1995) (discussing whether the Privileges or Immunities Clause of the Fourteenth Amendment requires that states apply their laws equally to all citizens or whether the Fourteenth Amendment permitted Congress to replace state laws with uniform national laws).
VI. CONCLUSION

In this essay, I argue that the Constitution does not enumerate state powers. That complicates the task of understanding the role of the states because we cannot refer directly to the Constitution. The Court, nevertheless, has attempted to enumerate core state powers through the Tenth Amendment. That effort, though well-intentioned, is doomed to failure. The Tenth Amendment, however, is not irrelevant. I have suggested that the existence of the Tenth Amendment supplies powerful support for the proposition that the federal government is in fact a government of limited powers. Strict enforcement, and even reinterpretation, of the Constitution’s substantive provisions supplies the ultimate solution to the Court’s Tenth Amendment conundrum. If the Court is actually committed to constitutional federalism, it must prevent further evisceration of real state authority. The Court’s history demonstrates that this task will not be easy, but the Tenth Amendment obligates us to make the effort.