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## Why Enumeration Matters

Richard A. Primus

*University of Michigan Law School, raprimus@umich.edu*

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# WHY ENUMERATION MATTERS

Richard Primus\*

*The maxim that the federal government is a government of enumerated powers can be understood as a “continuity tender”:* not a principle with practical consequences for governance, but a ritual statement with which practitioners identify themselves with a history from which they descend. This interpretation makes sense of the longstanding paradox whereby courts recite the enumeration principle but give it virtually no practical effect. On this understanding, the enumerated-powers maxim is analogous to the clause that Parliament still uses to open enacted statutes: “Be it enacted by the Queen’s most Excellent Majesty.” That text might imply that the Queen is a source of legislative authority, but there is no practical sense in which legislation depends on her. Similarly, it might misunderstand the American system to think that Congress is in practice—or ought, in practice, to be—limited by its enumerated powers (as opposed to the political process or affirmative constitutional prohibitions), even though we continue to repeat the traditional statement. One important difference between the two cases, however, is that in the British system there is no controversy about whether the Queen should enjoy legislative power. In the American system, where there is serious disagreement about whether the enumerated powers of Congress must be limiting, it is necessary to bring the ritual-continuity aspect of the maxim more clearly into view, thus explaining why we could be attached to the maxim even if it need not do important practical work in the operations of governance.

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\* Theodore J. St. Antoine Collegiate Professor of Law, The University of Michigan Law School. Thanks to Scott Bloomberg, Evan Caminker, Daniel Crane, Jennifer Fischell, Bruce Frier, Scott Hershovitz, Don Herzog, Amy Lishinski, Claire Madill, Christopher McCrudden, Leah Mintz, Jessica Morton, Gil Seinfeld, Eli Temkin, Rachael Westmoreland, Dayna Zolle, and the participants in workshops at the University of Michigan Law School and the University of Southern California Law School. Research for this Article was funded in part by the Cook Endowment.

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#### INTRODUCTION

The federal government is a government of enumerated powers. As a matter of official theory, the enumeration of those powers limits what Congress can do.<sup>1</sup> As every lawyer knows, however, Congress can in practice use its enumerated powers to regulate pretty much anything that a state could regulate.<sup>2</sup> The judiciary's few decisions striking down federal action as exceeding Congress's enumerated powers have not as a practical matter imposed meaningful constraints upon Congress's legislative jurisdiction,<sup>3</sup> and there is no compelling evidence that Congress has enforced enumeration-based limitations on itself, declining to enact laws that it otherwise favored because it believed its enumerated powers insufficient for their enactment.<sup>4</sup> To be sure, the Constitution does and should limit what Congress can do. Federal legislation is limited by the structure of the government and its institutions, and federal legislation is also limited by affirmative prohibitions like

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1. See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”).

2. See Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 42–43 (2012) (discussing the broad applicability of the Commerce Clause power announced in *Wickard v. Filburn*, 317 U.S. 111 (1942)); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1391 (2010) (identifying this view as “the standard story”).

3. In *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), and *United States v. Morrison*, 529 U.S. 598, 617–19 (2000), the Supreme Court did strike down federal statutes on internal-limit grounds. But the internal limit articulated in those cases does not, in practice, prevent Congress from pursuing any regulatory agenda that it has the political will to implement. See *infra* Section II.A.

4. It is not hard to find examples of members of Congress arguing against bills on these grounds. See, e.g., 156 CONG. REC. 4112, 4117–18, 4134, 4137 (2010) (recording various representatives' arguments that the Affordable Care Act would be unconstitutional because it exceeds Congress's powers). It is just hard to find examples of that argument winning out. To be sure, Congress should, and routinely does, consider whether a particular policy need should be addressed federally rather than locally (or cooperatively), and it often decides against federal regulation. See, e.g., 146 CONG. REC. 16,059 (2000) (characterizing the Innocent Child Protection Act as an inappropriate invasion of a state law domain); 145 CONG. REC. 3318–19 (1999) (“Federalizing criminal activity already covered by State criminal laws that are adequately enforced by State or local law enforcement authorities raises . . . significant concerns.”). When Congress decides to stay its hand, however, it is not clear that it does so (or that it would be sensible to do so) because Congress thinks it lacks a relevant enumerated power, rather than because Congress, on balance, does not favor federal intervention—or cannot agree on a particular federal intervention to enact.

those in the Bill of Rights. But the enumeration of Congress's powers imposes virtually no meaningful constraints, nor has it in a very long time.<sup>5</sup>

To use a helpful set of terms, constitutional law in practice checks congressional power with *process limits* and with *external limits* but almost never with *internal limits*.<sup>6</sup> Process limits are rules and structures governing the mechanisms of legislation rather than the content of laws. They include bicameralism, presentment, and democratic elections, all of which tend to prevent Congress from enacting certain laws.<sup>7</sup> Internal limits, so called because they inhere in the Constitution's conferral of powers on Congress, are the limits of those powers taken on their own terms. For example, the power to govern the District of Columbia<sup>8</sup> cannot be used to govern Delaware, and that limit is contained within the grant of power itself, because the power granted is the power to govern the District of Columbia in particular. External limits, in contrast, find their sources outside the power-conferring provisions of the Constitution, and they function by blocking what would otherwise be valid exercises of congressional power. For example, Congress cannot conduct whites-only elections in the District of Columbia, despite Congress's enumerated power to govern the District, because the Fifteenth Amendment prohibits the practice.<sup>9</sup> Questions about whether a law violates some internal limit on Congress's powers thus include "Is this a tax?" and "Is this a regulation of commerce among the several states?" Questions about whether a law violates some external limit on Congress's powers, by contrast, include "Does this law abridge the freedom of speech?" and "Does this law take private property for public use without just compensation?"

Our present constitutional reality, and the one that we have inhabited for most of a century, is that the internal limits of Congress's enumerated powers play no meaningful role in constraining federal legislation. Some theorists criticize this arrangement,<sup>10</sup> and *National Federation of Independent Business v. Sebelius (NFIB)*<sup>11</sup> might herald a change, inasmuch as five justices

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5. See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 596–604 (2014). That the enumeration imposes virtually no constraints on Congress does not mean that federalism is dead. It means that modern federalism—which is both robust and highly valuable—is maintained by mechanisms other than the enumeration of Congress's powers. *Id.* at 604–10; see also *infra* Section II.A.

6. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 794–95 (3d ed. 2000).

7. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328–31, 1339–42 (2001).

8. U.S. CONST. art. I, § 8, cl. 17.

9. *Id.* amend. XV.

10. See, e.g., Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2589 (2014) (arguing that the modern construction of congressional power is overly broad).

11. 132 S. Ct. 2566 (2012).

in that case articulated an internal limit on the centrally important commerce power.<sup>12</sup> But given that even *NFIB* upheld the statute at issue,<sup>13</sup> the real import of that case might be confirmation of a longstanding status quo. We say that the enumeration of powers limits Congress, but we don't act as if it does. Or perhaps we do, but barely.<sup>14</sup>

It would be easy to see this state of affairs as incoherent. Either we should reform our practice to match our official theory, the idea would run, or else we should repudiate the theory and embrace the practice openly.<sup>15</sup> In this Article, however, I suggest a different perspective. Perhaps the status quo is more coherent than is generally appreciated. Perhaps the tension between the official idea that the federal government is a government of enumerated powers and the operative reality that the powers of Congress face virtually no internal limits serves some important purpose in the constitutional system. Maybe it is a feature and not a bug.

Note that the apparent contradiction has had remarkable staying power. For nearly eighty years, internal limits have done almost no observable work as a mechanism for limiting Congress.<sup>16</sup> Nonetheless, commentators across the ideological spectrum continue to describe the federal government as limited by its enumerated powers.<sup>17</sup> One should not too quickly dismiss three-quarters of a century as nonsense. So it is worth asking whether the status quo can be understood not as incoherent but as a paradox in the strict sense—that is, as an apparent contradiction pointing to a deeper underlying truth. In my view it can. To see how, it is necessary to think of the enumerated-powers idea not as an actionable rule for legislative behavior but as an aspect of the identity, professional and national, of American constitutional lawyers.

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12. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.); *id.* at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

13. *Id.* at 2600 (opinion of Roberts, C.J.); *id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor & Kagan, JJ.).

14. This caveat is meant to account for *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), which did strike down federal statutes on internal-limit grounds, but which did so in a way that does not, in practice, prevent Congress from pursuing any regulatory agenda that it has the political will to implement. *See infra* Section II.A.

15. In a thoughtful opinion wrestling with the constitutionality of the Affordable Care Act, Judge Jeffrey Sutton put the point this way: “[T]he Court either should stop saying that a meaningful [internal] limit on Congress’s commerce powers exists or prove that it is so.” *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part and concurring in the judgment).

16. Again, this observation goes both to an absence of judicially enforced limits and a paucity of evidence suggesting that Congress has declined to pass legislation that it otherwise favored because it believed itself constitutionally limited by the enumeration of its powers. *See supra* notes 3–4 and accompanying text.

17. *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 469 (2009); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1513 (2007).

The description of the federal government as a government of enumerated powers, I suggest, can be understood as something we might call a *continuity tender*.<sup>18</sup> A continuity tender, as I will use the term, is an inherited statement that members of a community repeat in order to affirm their connection to the community's history, even though they may no longer hold the values or face the circumstances that made the statement sensible for some of their predecessors. In the United Kingdom, for example, Acts of Parliament are to this day prefaced with the statement "Be it enacted by the Queen's most Excellent Majesty."<sup>19</sup> A reader of that statement unfamiliar with the realities of British politics might infer that the Queen was an official with legislative authority. Once upon a time, that inference would have been correct. Today, it would misunderstand British politics to think of the Queen as enacting legislation in any straightforward sense.<sup>20</sup> Nonetheless, repeating the traditional enacting clause allows Parliament to demonstrate a loyalty that is important to its self-conception, as well as to the national identity of the polity it serves.

The cases are not identical, but it is possible to understand the axiom "the federal government is a government of enumerated powers" as a continuity tender within the culture of American law. To recite the enumeration principle is to assert that the basic structure of American government remains continuous with what was at the beginning. In a constitutional culture that values its past and reveres its Founders, that sense of continuity is valuable.<sup>21</sup> It helps legitimate the system, ennoble the project, and unite the practitioners. To reap those benefits, we strive to make our constitutional discourse continuous with that of the past—including by repeating the enumeration principle and presenting federal legislation as enacted under particular powers mentioned in the Constitution. We say that the Fair Labor Standards Act<sup>22</sup> is an exercise of the commerce power, that the federal estate tax<sup>23</sup> is an exercise of the taxing power, and that the Digital Millennium

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18. A tender, in the relevant sense, is a formal offer or proffer. One might tender one's resignation, or one's proposal, or a certain sum of money in payment of a debt, by speaking a certain verbal formula or delivering a document containing that formula. The term "continuity tender" is intended to capture the idea of a verbal formula that is spoken (or written) to make a formal show of one's posture of continuity.

19. *E.g.*, Groceries Code Adjudicator Act 2013, c. 19 (UK) ("Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows . . .").

20. Indeed, a recent kerfuffle over a related British practice demonstrates the perils of treating such symbolic gestures as if they pointed to currently actionable principles. *See infra* Section III.A (describing the 2013–2014 Queen's Consent affair).

21. *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009) (describing the distinctive value that American constitutionalism sets on the relationship between the present and its origins).

22. 29 U.S.C. §§ 201–19 (2012).

23. 26 U.S.C. §§ 2001–210 (2012).

Copyright Act<sup>24</sup> is an exercise of the copyright power, rather than speaking as if federal legislation proceeded from some general authority to regulate in the public interest. But we can pretty much always find some power adequate to whatever regulatory project Congress wishes to pursue. As a practical matter, this settlement allows Congress to legislate in a way that is unconstrained by the Constitution's enumeration of powers but simultaneously permits all players in the system to continue invoking an axiom that helps maintain a sense of continuity with the American constitutional past—much as modern Parliaments legislate without worrying about the Queen's policy views but use the language of royal enactment to maintain a sense of continuity with their own national tradition.

Some readers might think that regarding the enumeration principle as a continuity tender trivializes its importance. But no one familiar with American constitutional culture should regard the sense of historical continuity as trivial. For better and for worse, American constitutional law is not only about the mechanics of government. It is also about the construction of national identity.<sup>25</sup> That identity is bound up with a sense of connection to a grand national narrative, one in which the vision of a government handed down by legendary Founders plays a central role.<sup>26</sup> When we use language inherited from those Founders to invoke images about their vision of government—as we do when we say that the federal government is a government of enumerated powers—we link ourselves to that narrative and position ourselves as continuing its project.

The threshold radicalism of this continuity-tender suggestion resides in this simple problem: it is orthodox among constitutional lawyers that the scope of Congress's enumerated powers must in reality be less than a grant of general legislative jurisdiction.<sup>27</sup> That is a hard idea to set aside. According to conventional understandings, the very fact that the powers of Congress are enumerated indicates that the enumeration is supposed to be limiting,<sup>28</sup> or the Tenth Amendment so indicates,<sup>29</sup> or both do. Conventional understandings also maintain that the Founders intended the enumeration as limiting<sup>30</sup> and that a limiting enumeration is necessary, or at least seriously

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24. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 and 28 U.S.C.).

25. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (describing the American ethos as one of the major concerns of constitutional law).

26. See Greene, *supra* note 21, at 63–66.

27. See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995) (asserting that Congress cannot be understood to exercise the equivalent of a police power).

28. E.g., Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 556 (1995).

29. See, e.g., *New York v. United States*, 505 U.S. 144, 156–57 (1992).

30. See, e.g., Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J. F. 180, 204 (2014).

helpful, for the maintenance of federalism and for the preservation of individual liberties.<sup>31</sup> These arguments have some surface plausibility, and they are traditional and well pedigreed in constitutional discourse. I do think, however, that the idea that the enumeration must be limiting is an error. Properly understood, neither the text nor the history nor the structure of the Constitution requires that Congress be limited by the enumeration of its powers.

My complete argument for this view is complex, and I will not try to repeat it here in compressed form. Readers who are interested should simply confront that argument where I have offered it.<sup>32</sup> For present purposes, suffice it to say that both federalism and individual liberty are better protected by more effective mechanisms. Some of these mechanisms are external limits, like the Bill of Rights, and some are built into the structure of government. Neither the text of the Constitution nor fidelity to the Founding design requires us to accomplish through the enumeration of congressional powers what is much better accomplished with other constitutional mechanisms.<sup>33</sup> The Constitution clearly imposes process limits (like bicameralism) and external limits (like those associated with the Bill of Rights) on Congress. Whether it also imposes internal limits is a matter of contingency: it depends on the best constructions of the various powers delegated to Congress and then upon how those powers actually apply to the social world. Maybe that analysis would reveal a gap between what Congress can do and what it could do with a grant of general legislative authority, and maybe not, and the answer could vary over time. But nothing in a proper understanding of constitutional text, history, and structure requires that the sum total of Congress's powers authorize less legislation than a grant of general jurisdiction would.

This is not to deny that the enumeration was originally conceived, and sensibly so, as having a limiting function. More comprehensively put, enumerating the powers of Congress originally had two different purposes: to empower Congress and to limit it. The Constitution was created to respond to a problem of a central government with too *little* power, and specifying the powers that Congress would be entitled to exercise in the new regime made sense as a way of trying to ensure that Congress would wield the authority needed for governing the country more energetically. At the same time, the enumeration could also serve a limiting function. Put more precisely, the reason to enumerate specific congressional powers was to ensure that Congress would have enough power to govern, and the reason to enumerate specific congressional powers rather than simply saying, "Congress may legislate in general" was to avoid giving Congress more power

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31. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676–77 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

32. See Primus, *supra* note 5.

33. *Id.* at 579, 582.



than it needed.<sup>34</sup> And for a time, it was reasonable to think that the enumeration was succeeding both in empowering Congress and in limiting it. Throughout the nineteenth century, Congress enjoyed considerably more power than it did under the Articles of Confederation but less power than a national legislature with plenary authority would.

For nearly a century now, the enumeration has succeeded at the former function to the exclusion of the latter one. But if one of the enumeration's original functions has fallen out of use, the enumeration has also acquired a third function, one that might not have been imaginable in 1787. By the time the enumerated powers of Congress had come to be virtually tantamount to a grant of general regulatory authority, the idea that the federal government was a government limited by its enumerated powers had become a shibboleth for American constitutional lawyers.<sup>35</sup> Perhaps matters could have developed differently. Perhaps, as the enumeration came to limit Congress less and less, constitutional lawyers might have decided to stop saying that the federal government was one of enumerated powers, or at least to stop treating that fact as a matter of significance. But that is not what happened. Instead, constitutional lawyers continued to assert that the federal government is one of enumerated powers and to see that assertion as communicating something important about the constitutional order.<sup>36</sup> In so doing, practitioners in the modern republic linked themselves to their predecessors in earlier centuries, even as the operative realities of the system had been transformed. The Constitution's enumeration of congressional powers had acquired a third function: asserting the enumeration principle

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34. By identifying both empowerment and limitation as original purposes of the enumeration, I do not wish to overstate the degree to which the Framers thought of the enumeration as a device for limiting Congress. When the Convention delegates considered their strategies for preventing the central government from behaving abusively, they did not much focus on the enumeration of Congress's powers. They thought instead mostly in terms of process mechanisms. See generally Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1492, 1515–20 (1994) (attributing this set of views to the drafters and ratifiers of the Constitution); see also THE FEDERALIST NO. 46 (James Madison) (articulating this perspective). Dividing Congress into two houses would slow all legislation and block much of it. A veto-wielding president would add another check. Democratic elections would keep federal officeholders accountable to the people and to the state governments. And the continued existence of the state governments would ensure the availability of alternative centers of power, which, though not legally empowered to block federal law, could act as rallying points for political opposition to objectionable federal policy. See Kramer, *supra*, at 1515–17. The limiting role of enumeration was, for most of the Framers, considerably less prominent, and some of them doubted that an enumeration could reliably limit Congress in practice. See, e.g., Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON 166, 168 (Gaillard Hunt ed., 1901) (stating that enumeration might seem like a good way to limit the legislature, but that, in practice, the nature of legislative power might not be limitable in that manner).

35. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) (“[The] firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution . . .”); *United States v. Butler*, 297 U.S. 1, 65 (1936) (“[T]he United States is a government of limited and enumerated powers . . .”).

36. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

was a way of creating a sense of historical continuity, and therefore legitimacy, despite important changes over time. The enumeration principle now functioned as a continuity tender.

For a while, the use of the enumeration principle as a continuity tender was a stable practice. Between 1940 and 1990, there may have been little prospect of the Supreme Court's striking down legislation as exceeding the enumerated powers of Congress.<sup>37</sup> Nor did the Court seem inclined to jettison the idea of enumerated powers as a matter of principle or to declare that Congress in practice now had plenary power—just as Parliament is neither inclined to let the Queen dictate policy nor to say that the law becomes law whether or not the Queen approves.<sup>38</sup> In more recent decades, however, the enumeration principle has become a problematic continuity tender in a way that Parliament's enacting clause is not. No matter how many times Parliament describes the Queen as the authoritative force enacting its legislation, there is no present risk that policymaking power will slip into her hands.<sup>39</sup> Monarchic lawmaking is not on anyone's agenda, so the use of the traditional enacting clause cannot possibly bring about any practical political consequences. The work it does is solely symbolic. But in the United States, the enumeration principle is relevant to a matter of live controversy. As the sharp divisions in *NFIB* suggest, many highly placed decisionmakers now believe that courts should strike down significant federal legislation on internal-limit grounds.<sup>40</sup> Given that environment, and given the general tendency to assume that the enumeration's sole and essential function is to limit Congress, describing the federal government as a government of enumerated powers does more than create a sense of symbolic continuity. It also reinforces the sense that the constitutional system is committed to meaningful internal limits. As a result, the enumeration principle is simultaneously a unifying creed for the whole constitutional community and a rhetorical weapon for one subgroup within it.

As noted earlier—and for reasons argued at length elsewhere—I think it is a mistake to believe that the enumeration must limit the scope of permissible federal legislation.<sup>41</sup> If I am right, then the continued use of the enumeration principle as a continuity tender now comes with a significant potential cost. Constitutional lawyers standardly hear the assertion that the federal government is one of enumerated powers as implying that the enumeration limits what Congress can do. Continued repetition of the enumeration principle, in an environment where many people think that something

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37. See TRIBE, *supra* note 6, at 816; Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 338 (1997); Seinfeld, *supra* note 2, at 1402–03.

38. For discussion of the Queen's largely symbolic role in Parliament's policymaking, see *infra* Section III.A.

39. See *infra* Section III.A.

40. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2648 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing for the invalidation of the Patient Protection and Affordable Care Act).

41. See Primus, *supra* note 5.

actionable should follow, accordingly raises the likelihood that the formula will in fact be made actionable—as nearly happened in *NFIB*.<sup>42</sup> And if courts strike down federal legislation not because some sound principle of constitutional interpretation requires it, but instead on the misguided view that the enumeration of congressional powers necessarily entails internal limits to Congress's powers, they will have compromised the democratic process for no sufficiently good reason.

So it is important to make two points about the principle that the federal government is one of enumerated powers. The first point is that our attachment to that idea might not suggest that the idea is supposed to have current practical consequences. Perhaps we are attached to it for other reasons—important reasons, to be sure, but reasons that sound in symbolic continuity rather than more practical action. The second point is that the federal government is in fact a government of enumerated powers, even if nothing turns out to follow for the limitation of Congress's legislative jurisdiction. That is, we should recognize and foreground the difference between a government *of* enumerated powers and a government *limited by* its enumerated powers. Put in terms that I have elucidated elsewhere, we should differentiate between the *enumeration principle*, which states that the federal government is a government of enumerated powers, and the *internal-limits canon*, which directs that the combined scope of Congress's enumerated powers must add up to something less than general legislative jurisdiction.<sup>43</sup>

Constitutional lawyers usually conflate those two propositions. Perhaps recalling Chief Justice John Marshall's dictum in *Gibbons v. Ogden*<sup>44</sup> that "[t]he enumeration presupposes something not enumerated,"<sup>45</sup> lawyers customarily reason that the enumeration of powers indicates that there are some other powers not given to Congress, from which they next infer that there are things that Congress cannot do without exceeding the scope of its enumerated powers.<sup>46</sup> But Marshall has long been misread on this point; the great Chief Justice was not even talking about the overall enumeration of congressional powers when he made this statement, and nothing he actually said in *Gibbons* means that the sum total of Congress's enumerated powers must be less than a grant of plenary authority.<sup>47</sup> And the conventional

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42. *NFIB*, 132 S. Ct. at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing for invalidation based on internal-limit grounds).

43. See Primus, *supra* note 5, at 587–94; see also *infra* Part IV.

44. 22 U.S. (9 Wheat.) 1 (1824).

45. *Gibbons*, 22 U.S. at 195.

46. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

47. See generally Richard Primus, *The Gibbons Fallacy* 19 U. PA. J. CONST. L. (forthcoming 2017) (on file with author). When Marshall wrote that "[t]he enumeration presupposes something not enumerated," the enumeration to which he was referring was not the enumeration of congressional powers in the eighteen clauses of Article I, Section 8—much less the enumeration of congressional powers in those eighteen clauses and many other clauses scattered throughout the Constitution. *Gibbons*, 22 U.S. at 195; see Primus, *supra* (manuscript at 5–6); see also U.S. CONST. art. I, § 8. He was referring to the enumeration of three kinds of commerce within the Commerce Clause, arguing that that clause's specification of commerce

misreading of Marshall does him an injustice, because it suggests that he endorsed a patently fallacious idea.<sup>48</sup> As a conceptual matter, it is simply not the case that an enumeration of powers must be limiting. Imagine, for example, a legislature with seven enumerated powers, one authorizing legislation on each day of the week. No matter what the legislature wanted to do, and no matter when, some enumerated power would be sufficient for the task. Or imagine an enumeration that is not a grant of general power on the day that it is enacted but comes to be nearly tantamount to general power over time as facts about the world change. Consider a national legislature with several enumerated powers, including the power to regulate affairs substantially affecting Presbyterians. At the time of the adoption of the relevant Constitution, Presbyterians were a recently persecuted minority group, and this provision was intended to let the national government protect Presbyterians from local discriminatory legislation. If two hundred years later a Presbyterian revival swept the land and all residents became Presbyterians, the national legislature would in practice enjoy a police power—at least until religious diversity reasserted itself, at which time the practical scope of the power might wane again.

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“with foreign Nations, and among the several States, and with the Indian Tribes” implied a fourth category of commerce—wholly intrastate commerce—that the power granted in the Commerce Clause did not reach. U.S. CONST. art. I, § 8, cl. 3; see *Gibbons*, 22 U.S. at 195; *Primus*, *supra* (manuscript at 5–6). But Marshall did not argue that wholly intrastate commerce was a sphere of human activity that Congress could not regulate. See *Primus*, *supra* (manuscript at 6–7). His point was only that Congress could not reach that sphere *with the power granted under the Commerce Clause*. See *id.* (manuscript at 7). Congress might regulate wholly intrastate commerce with one of its other powers—say, its patent power, or its bankruptcy power, or even its Necessary and Proper power, deployed in conjunction with the power to regulate commerce among the several states. See *id.* (manuscript at 20). Indeed, under Marshall’s analysis, the combined force of the Commerce Clause and the Necessary and Proper Clause might allow Congress to regulate *all* commerce, without regard to its status as interstate, intrastate, or anything else. See *id.* The point, for Marshall, was to distinguish between the scope of Congress’s power under the Commerce Clause *simpliciter* and the scope of Congress’s powers as a whole, and the distinction mattered because Marshall favored a view of the Commerce Clause as automatically preemptive of state regulation. See *id.* (manuscript at 7–8, 46–47). By limiting the commerce power itself, Marshall limited the scope of that preemption, thus preserving space for states to regulate local commerce in the absence of federal regulation. See *id.* But because the limit Marshall articulated was a limit only on the commerce power, his dictum articulated no objection to congressional regulation of even local commerce, should Congress choose to regulate it—assuming the regulation was a sensible application of, say, the commerce power in conjunction with the Necessary and Proper Clause, rather than the commerce power on its own. See *id.* (manuscript at 8). In other words, Marshall was not saying that the enumeration of Congress’s powers shows that there are things that Congress cannot regulate—only that the phrasing of the Commerce Clause permitted certain state regulation in the absence of conflicting federal law. See *id.* The idea that Marshall was articulating a limit on Congress’s overall powers is a modern misreading, one that took hold only late in the twentieth century. See *id.* (manuscript at 48).

48. The idea for which Marshall is conventionally read is not patently fallacious if it is taken to mean only that some particular enumeration is limiting. Such a claim about any particular enumeration might or might not be true. The patently fallacious version of the idea is that an enumeration is limiting as such.

The examples are stylized, but they should make the point clear. As Marshall was keenly aware, enumerating the powers of a legislature does not determine the *extent* of those powers.<sup>49</sup> Strictly speaking, a government of enumerated powers is a government of enumerated powers, whatever the scope of those powers turns out to be. So the enumeration principle is true: the federal government is a government of enumerated powers.<sup>50</sup> It is just false to think that the internal-limits canon follows. And it is also false to think that the importance of the enumeration principle resides in some limiting function that it must execute. If the enumeration principle is important, it may be for a very different kind of reason—one that sounds in the constitutional value of continuity, rather than in the practical mechanics of governance.

In Part I of this Article, I develop the idea of continuity tenders. In Part II, I show that the enumeration principle is profitably understood as a continuity tender within the culture of American constitutional law. In Part III, I explore the problem that arises when members of a community disagree deeply about whether a symbolic ritual formula should be understood not just as symbolic, but also as practically actionable. And to respond to that problem in the context of the enumeration principle, I recommend in Part IV a change in the way constitutional lawyers invoke that idea: we should distinguish clearly between the enumeration principle and the internal-

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49. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted, is perpetually arising . . .”).

50. It should be noted, though, that “enumerated powers” is a term of art. Taken literally, “enumerated powers” would mean “numbered powers” or “powers separately and explicitly specified.” Most of the time, constitutional law uses the term “enumerated powers” to refer to powers in that second sense. The “enumerated powers,” on that understanding, are the powers expressly described in the eighteen sections of Article I, Section 8, as well as in about two dozen other constitutional clauses. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 2 (power to determine the day on which presidential electors will meet); *id.* art. III, § 3, cl. 2 (power to declare the punishment for treason); *id.* amend. XIV, § 5 (power to enforce the Fourteenth Amendment). But on several occasions, the Supreme Court has recognized congressional powers arising implicitly from the constitutional structure, rather than from particular power-granting words in the text. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316–18 (1936) (discussing implicit congressional powers in foreign affairs); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 535 (1870) (“[I]n the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.”); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618–22 (1842) (discussing implicit congressional power to enforce the Fugitive Slave Clause). Accordingly, the term “enumerated powers” might be best understood as a term of art, one more synonymous with “delegated powers” than with “powers expressly articulated.” Note that the Tenth Amendment uses the language of delegation, rather than the language of enumeration. 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.”). That said, it is standard usage in American constitutional discourse to speak of the delegated powers as the “enumerated powers.” In this Article, I conform to that conventional usage, but I do not mean thereby to deny the more complex reality whereby some “enumerated powers” are delegated to Congress without being, in a literal sense, enumerated.

limits canon, affirming that the federal government is a government of enumerated powers without suggesting that those enumerated powers necessarily add up to less than a grant of general legislative authority.

The federal government is a government of enumerated powers. Indeed, it is a government of *limited and enumerated* powers.<sup>51</sup> But a government of limited *and* enumerated powers need not be a government limited *by* its enumerated powers. The Constitution limits Congress's exercise of powers with process mechanisms like bicameralism and presentment and democratic elections, and it also limits Congress's exercise of powers with affirmative prohibitions, like those in the Bill of Rights and Article I, Section 9. Once upon a time, it may also have limited Congress by enumerating Congress's powers. But if the best constructions of Congress's enumerated powers as applied to the modern social world happen to leave Congress with sufficient authority to undertake any regulatory project that it deems appropriate, no valid rule of constitutional law would be violated. So the fact that the federal government is one of enumerated powers remains both true and important. But the reason why enumeration matters now is that it lets us repeat a formula that connects us to the constitutional past, not because it limits Congress as a practical matter. If practical limitation were the significance of the enumeration, then the enumeration would have ceased to be important a long time ago.

#### I. CONTINUITY TENDERS

A continuity tender is an inherited ritual formula that one repeats to affirm a connection to one's predecessors, not to endorse the content of that statement as one's predecessors originally understood it.<sup>52</sup> To grasp the ritual's function, one must understand that the statement carries a symbolic meaning that a literal-minded or untutored listener would not comprehend.

In the twenty-first-century United Kingdom, for example, all statutes approved by Parliament begin with the words "Be it enacted by the Queen's most Excellent Majesty."<sup>53</sup> Once passed by Parliament, a statute must receive royal assent in order to be valid,<sup>54</sup> and orthodox British constitutional theory provides that the name of the sovereign lawmaking entity is the Queen-in-

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51. See, e.g., *United States v. Butler*, 297 U.S. 1, 65 (1936) ("[T]he United States is a government of limited and enumerated powers . . .").

52. The phrase "not to endorse the content of the statement as one's predecessors originally understood it" is in a way too simple, because it suggests that one's relevant predecessors understood the statement in a certain straightforward or literal way, the way that we might imagine an untutored outsider's understanding it. A statement used as a continuity tender might have started life as a straightforwardly transparent utterance of that kind, but it also might not have. Some statements are slippery from the inception, and one's predecessors might have had their own complicated relationships to their practices.

53. E.g., *Groceries Code Adjudicator Act 2013*, c. 19 (UK); see also Francis Bennion, *Modern Royal Assent Procedure at Westminster*, 1981 *STATUTE L. REV.* 133, 134.

54. See Bennion, *supra* note 53, at 133.

Parliament.<sup>55</sup> It has been a long time, however, since members of Parliament regarded the monarch as a legislator in any practical sense. Parliament legislates, and it includes the words of the enacting clause in its work product, and the Queen gives her assent on all occasions when Parliament asks for it.<sup>56</sup> Walter Bagehot quipped that the Queen “must sign her own death-warrant if the two Houses unanimously send it up to her,”<sup>57</sup> and the hundred and fifty years since Bagehot wrote have only further solidified the point.<sup>58</sup> So as an operational matter, it would seriously mischaracterize British politics to say that the Queen is the source of what Parliament enacts. Nonetheless, Parliament retains the enacting clause’s formula about the Queen as part of the lawmaking process, and it is not hard to see why. The clause is one of many devices with which Parliament locates itself in a long national tradition, thus better enabling its members (and some audiences within the larger public as well) to see the modern British polity as part of a continuous project that stretches over the centuries.

The use of the traditional enacting clause affirms Parliament’s continuity with eras in British history both during and after the time when kings and queens enjoyed more serious lawmaking authority. By speaking of the monarch as if she were a political power, the formula affirms a connection to Tudors and Stuarts and Plantagenets and so on, as well as to those who served them. But it also does more. It affirms a connection to generations of British subjects (note the term<sup>59</sup>) who lived after the English Civil War and the Glorious Revolution but who still paid homage to the Crown, even though the dominant power in government was clearly somewhere else. Walpole’s Parliament used this formula,<sup>60</sup> as did Pitt’s,<sup>61</sup> and Disraeli’s,<sup>62</sup> and Churchill’s.<sup>63</sup> By using the same clause, Parliament locates itself as part

55. See A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39–40 (10th ed. 1959) (1885).

56. No monarch has refused assent since Queen Anne in 1708. Yann Allard-Tremblay, *Proceduralism, Judicial Review and the Refusal of Royal Assent*, 33 *OXFORD J. OF LEGAL STUD.* 379, 379 (2013) (Eng.); see also POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, *THE IMPACT OF QUEEN’S AND PRINCE’S CONSENT ON THE LEGISLATIVE PROCESS, 2013–2014*, HC 784, at 15 (UK) [hereinafter *COMMITTEE REPORT*] (describing royal assent as “a constitutional formality”) (internal citation omitted).

57. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 48 (Paul Smith ed., Cambridge Univ. Press 2001) (1867). “Unanimously” here means that the two Houses are in agreement, not that the vote in each House was without dissent.

58. See *infra* text accompanying notes 157–159.

59. The term “subject” in the phrase “British subject” is functionally analogous to the term “citizen” in the phrase “American citizen.” But the term “subject” evokes a relationship to the monarch. Its continued use in Britain is thus one of many devices by which political life makes shows of respect to the monarchy, even while denying the monarch any serious legislative authority.

60. *E.g.*, The Charitable Uses Act 1735, 9 Geo. 2 c. 36, pmbl. (Eng. & Wales).

61. *E.g.*, An Act to Protect Masters Against Embezzlements by Their Clerks or Servants 1799, 39 Geo. 3 c. 85, pmbl. (Gr. Brit.).

62. *E.g.*, Court of Session Act 1868, 31 & 32 Vict. c. 100, pmbl. (UK).

63. *E.g.*, War Damage Act 1941, 4 & 5 Geo. 6 c. 12, pmbl. (UK).

of *their* tradition—that is, the tradition of people who say this thing, even though they don’t mean what it once meant—as well as the tradition of the people who said it because they meant it in the original way. With the aptly named “enacting clause,” Parliament *enacts* (that is, *performs*) its continuity with all of those chapters in British history.

The statement in the enacting clause is symbolic. But “symbolic” does not mean “unimportant.” On the contrary, the enacting clause is an important piece of symbolism and is experienced as such. A member of Parliament who suggested that the clause be updated to say “Be it enacted by the People’s representatives in Parliament” would demonstrate alienation from a part of British identity that most of his community continues to find meaningful. At best, he would be missing the point. Yes, it’s true: the Queen does not decide on legislation; and the Queen-in-Parliament is a fiction; and the basis of Parliament’s policymaking is its relationship to the voters, not its relationship to the Queen. But the enacting clause, as presently deployed, has little to do with the substance of legislation. It is about symbolic continuity, and its invocation makes sense so long as that continuity is something Parliament values.<sup>64</sup>

Just as it would miss the point for a member of Parliament to advocate jettisoning the enacting clause on the grounds that it no longer fits the realities of British governance, it would miss the point for a member of Parliament to insist on making reality conform to the world that the formula seems to describe. If we take the enacting clause seriously, such a member might say, then Parliament should not pass legislation to which the Queen objects. But to stand up in Parliament and oppose a bill on the basis of the Queen’s views would be just as alien to the commitments of British politics as it would be to refuse the gesture of continuity that the enacting clause embodies.<sup>65</sup> The deeply rooted practice is to affirm British national

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64. Given the prior invocation of Bagehot, who is associated with the idea that the British monarchy exists mostly as theater aimed at securing the loyalty of people too unsophisticated to understand how modern government really works, *see* BAGEHOT, *supra* note 57, at 34–37, it may be worth emphasizing something about the audience for the performance I am describing. On my account, the continuity tender makes sense as something that members of Parliament value themselves, not merely something that Parliament does because a less elite audience values it. To be sure, Parliament’s use of the ritual formula might be for the benefit of elite and mass audiences at the same time, perhaps in different (if overlapping) ways. But there is every reason to think that elite practitioners within the system would themselves find the sense of historical connection valuable.

65. *See, e.g.*, COMMITTEE REPORT, *supra* note 56, at 17 (providing the testimony of Dr. Adam Tucker of the University of York, quoting Allard-Tremblay, *supra* note 56, at 392) (“Her involvement in the legislature must be sufficient to sustain the constitutional tradition that our legislature, properly understood, consists of the Queen-in-Parliament. But beyond that, no substantive involvement in the legislative process itself is constitutionally appropriate, except the (contested) possibility of intervention in wholly exceptional (and generally implausible) circumstances. Even the most radical (as far as I am aware) contemporary endorsement of the involvement of the Queen in legislative politics includes the pointed concession that her role ‘should be overall minimal to the point of being non-existent.’”).



identity<sup>66</sup> by invoking a hallowed formula about the monarchy while also getting on with the business of democratic government, rather than letting the legitimate interest in doing either thing prevent the government from doing the other.

Rituals of this kind appear in many cultures, and they come with several variations. Sometimes, as with Parliament's enacting clause, the point is to show continuity despite having set aside some of the values or substantive institutional arrangements of an earlier time. In other instances, the point is to show respect for an earlier set of values that the present generation might not be completely comfortable transgressing. In ancient Rome, for example, the Senate would formally confer the office of emperor, even long after emperors actually came to power through the designation of the previous emperor or the use of military force.<sup>67</sup> Sometimes, the point is to claim legitimate descent from an authoritative past while substantially reinterpreting it. In this vein, consider the practice in many Protestant denominations of using the phrase "this is my body" in the Eucharist liturgy. That practice makes sense inasmuch as the speakers understand the statement to mean something different from what it might mean to a literal-minded observer (or to a medieval Christian, or to many modern Catholics).<sup>68</sup> Consider also the Jewish practice of reciting the phrase "next year in Jerusalem" at the conclusion of each Passover seder<sup>69</sup> and at the end of Yom Kippur.<sup>70</sup> For centuries, many Jews understood this phrase to state the hope that the Messiah would come within the next twelve months, such that the following year would find the world transformed and themselves celebrating the holiday in Jerusalem. Large numbers of Jews continue to recite the formula in modern times, even if they do not believe in Messianic redemption and have no particular wish to be in Jerusalem the following year. In so doing, they affirm a connection to a tradition through a statement that does not mean what it means on its face or what it meant to many people who recited it in prior generations.<sup>71</sup> As these examples suggest, continuity tenders often do

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66. I do not mean by this phrase (or others like it) to obscure the complex relationships among various identities plausibly called "national"—British, English, Scottish, Welsh, Irish, Northern Irish, and so on—that members of Parliament actually have.

67. See RICHARD J.A. TALBERT, *THE SENATE OF IMPERIAL ROME* 354 (1984).

68. See generally James F. McCue, *The Doctrine of Transubstantiation from Berengar Through Trent: The Point at Issue*, 61 *HARV. THEOLOGICAL REV.* 385 (1968).

69. See MISHAEL ZION & NOAM ZION, *A NIGHT TO REMEMBER: THE HAGGADAH OF CONTEMPORARY VOICES* 136 (2007).

70. See, e.g., MAHZOR LEV SHALEM: FOR ROSH HASHANAH AND YOM KIPPUR 429 (Edward Feld et al. eds., 2010).

71. Finally, and to draw on a somewhat different aspect of the human experience, consider the most sacred text in the life of my home community: the University of Michigan's fight song. The song ends with the words "Hail, Hail, to Michigan, the Champions of the West." When written, the reference of this last line was to a collegiate athletic association called the Western Conference, of which Michigan was a member. See *Michigan Football Traditions*, MGOBLUE.COM, <http://www.mgoblue.com/sports/m-footbl/spec-rel/021910aad.html> [<https://perma.cc/88SH-X8MX>]. No conference by that name has existed for many decades, but hundreds of thousands of twenty-first century Michigan Wolverines sing the song nonetheless.

their work when the present members of a community find meaning in connection to their predecessors, or in inherited practices—despite changes in the circumstances that the community faces or the values that its members hold. But the people who use inherited maxims as continuity tenders are not trying to live their ancestors' lives, nor do they mean to imbue the ritual formulas with quite the meanings that their ancestors may have.

To be sure, the meaning of any ritual use of language can be contested, with some practitioners preferring more literal, and others more metaphorical, interpretations. Christendom was torn apart by people with different understandings of the sentence “This is my body,”<sup>72</sup> and today, it seems perfectly plausible to think that, within many church communities, there are different individuals who understand the phrase differently. Moreover, the propensity of ritual language to bear multiple meanings is not limited to differences of interpretation among different persons. On the contrary, a single individual who engages in such ritual performances can have divided consciousness about the language's meaning, and in at least two different ways.

The first form of divided consciousness is uncertainty. Suppose that I don't believe in the coming of a Messiah who will gather the Jews to Jerusalem, but I'm not completely sure. I can't disprove the future coming of the Messiah, and I haven't completely banished the possibility, even though it strikes me as fanciful. Some part of me wonders whether the promise of the Messiah might be real after all. Or perhaps I am certain most of the time that the Messiah is not coming, but I also experience moments of belief. It's complex—as doubt and belief often are. Regardless of my view on the Messianic question, though, I'm quite sure that I value my relationship to the tradition in which people believed in the coming of the Messiah and used the “next year in Jerusalem” formula to express that belief. What, then, am I doing when I say “next year in Jerusalem” at the end of a Passover seder? Given that I've mostly set the Messianic idea aside—if you asked me outside of the ritual context, I'd tell you I don't believe in the Messianic promise—I'm likely to be using the traditional formula as a continuity tender. But given that part of me is open to the traditional belief, I also might be expressing that belief, if only momentarily: well-designed rituals often nurture the experience of belief within people who are otherwise inclined to doubt. Or I

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When they sing the last line, they do not mean “Hail to Michigan, the Champion of the Western Conference.” They mean something more general, something like “Hurrah for Michigan.” Some people who sing the song know that the Western Conference existed; others do not but perhaps imagine some other history in which it once made sense to describe Michigan as “Champions of the West”; still others may not think much about the dissonance at all. But no one proposes to replace the words with some other words that might better capture present circumstances. To do so would be to break a chain of tradition that connects today's Wolverines with the hundreds of thousands of people who used these words to cheer for Michigan in previous decades, most of whom did so at a time when the words already lacked straightforward sense.

72. See McCue, *supra* note 68, at 385 (pointing to several different and equally prominent understandings of the doctrine of the physical presence).

might be hedging. Indeed, at the moment when I perform the ritual, I might have no clear view as to whether I am doing one of these things or the other or, if both, then in what proportions.

Something similar can happen when ritual language has both an original meaning and a reinterpreted meaning that has been endorsed by a successor community of practitioners. Suppose that I attend a Protestant church whose official doctrine rejects the idea of transubstantiation and uses the "this is my body" formula in a more metaphorical way. Perhaps most of the time, when I take Communion and say, "This is my body," it makes sense to me to think of those words as carrying the metaphorical meaning that my denomination embraces. But perhaps I wonder, sometimes, whether the more literal reading is the right one, or whether I should strive to be open to the sort of Christian faith on which I could pronounce "This is my body" as an assertion of a more mysterious form of belief. My outward performance is the same on those days when I feel no pull toward the mystery of transubstantiation as it is on those days when I do feel the pull. Indeed, the fact that I worship in a community where the formula is officially limited to a metaphorical meaning might give me cover to recite the words and, now and then, to feel something more magical. I don't believe in transubstantiation, after all; I don't go to a church where saying those words would signal that belief. But I still find reciting the formula appealing, and part of its appeal might be the opportunity it affords for a certain kind of ambiguous performance.

The other relevant form of divided consciousness is the suspension of disbelief. Suppose that I am a member of Parliament and am quite certain that the Queen does, and should do, nothing that counts as legislating. When the enacting clause of a bill is read, I might mentally foreground my democratic values and my sense of the realities of the legislative process and accordingly process the enacting clause as nonsense, as offensive, or both. But if I momentarily move those values and that realistic sense into the background of my consciousness and let a more romantic part of my mind engage with the enacting clause, I can participate more successfully in the ritual of continuity.

To be sure, I could also avoid regarding the enacting clause as offensive nonsense by giving its words a more limited reading. Maybe I could tell myself that "enacted" in the phrase "Be it enacted by the Queen's most excellent Majesty" means something like "ministerially rubber-stamped," rather than "made law." By domesticating the meaning of the phrase in this way, I could render the enacting clause sensible and inoffensive without having to rely on ideas about ritual performance. Perhaps there are individual members of Parliament who think about the enacting clause this way. But there is something important about the practice of using the enacting clause that this framing of the matter cannot explain. If the whole community of practitioners thoroughly rationalized the enacting clause in terms like these, there would be little reason for Parliament to continue including it in every statute it passes, and a bureaucratic rationalization of the legislative process

on which royal assent and the enacting clause were omitted should be expected to occasion no resistance. If it's just a rubber-stamping, nobody would care very much whether it is announced or not, or indeed whether it happens at all. Parliament *couldn't* use the enacting clause if the clause had to mean what it originally meant—but Parliament probably *wouldn't* use the clause unless it meant something important. So the fact that the clause persists, and that we imagine that a move to eliminate it would provoke resistance, signals that it is invested with a deeper kind of meaning—not the meaning it initially had, but an important meaning nonetheless.

Consider, then, this recent comment on the practice of royal assent to legislation, made by one of the United Kingdom's leading authorities on the constitutional role of the Queen:

The procedures which surround the Royal Assent exhaustively capture the appropriate level of legislative involvement by the Queen; they neatly combine the necessary symbolism of the Queen-in-Parliament with a certain (but very modest) ambiguity about the possibility of any substantive involvement in legislating.<sup>73</sup>

Note the role of modest ambiguity. By not officially and completely closing the door to the possibility that the Queen might be involved in the substance of lawmaking, Parliament makes it a bit easier for its members to avoid hearing the enacting clause as something that cannot be taken seriously, or as something that makes sense only if it is rendered trivial. That helps sustain the enacting clause as meaningful ritual rather than empty nonsense. Note too, however, that the ambiguity that helps the audience suspend its disbelief must be “very modest.”<sup>74</sup> It should permit a willing audience to imagine the Queen as a lawmaker without unsettling the principle, which remains clear outside of the ritual space, that she is not. If the Queen's situation were sufficiently ambiguous that members of Parliament might experience actual doubt about her role—that is, if their divided consciousness took the form of genuine uncertainty rather than the suspension of disbelief—matters would have gone too far.

Continuity tenders are thus, in some ways, like certain other kinds of ritual performances that invite people to believe and not believe things at the same time, rather than to rationalize language in order to let everything make sense at once on a single plane of meaning. Consider theater. Every patron in the audience knows that the actor playing Hamlet is not endorsing the propositions and experiencing the emotions that the words he speaks would seem to indicate—or at least that he is not doing so in the way that a person would when saying similar things in a different social role. The success of the actor's enterprise depends on his ability to make the things he says seem credible as his own authentic expressions, even though the audience knows that he is acting. It might be difficult to succeed if the theater manager regularly walked out on stage, addressed the audience, and said,

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73. See COMMITTEE REPORT, *supra* note 56, at 17 (testimony of Dr. Adam Tucker).

74. *Id.*

“Excuse me, everyone: Please remember that the people up here are just pretending.” But the difficulty would not arise from any propositional knowledge that the reality-check statement conveys. The whole audience knows that already. What matters is whether the circumstances of the performance permit the audience to engage the actor’s statements as real in one sense, even while knowing that they are not real in another.

## II. THE ENUMERATION PRINCIPLE AS A CONTINUITY TENDER

For the enumeration principle to function as a continuity tender, two things must be the case. First, the enumeration of congressional powers must have no—or very few—practical consequences in the operation of American government. Second, asserting the principle must signal loyalty to the constitutional tradition. In this Part, I argue that both conditions are met, and I address them each in turn.

### A. *Governing the Present*

As noted just above, the burden of this Section is to demonstrate that the enumeration of congressional powers has no, or very few, practical consequences in the operation of American government. Given the traditional idea that the enumeration and its internal limits are critical both for federalism and for the preservation of individual liberties, a successful demonstration that internal limits in fact do no work might cause some discomfort—and the audience’s desire to avoid that discomfort might impede the success of the demonstration. So after explaining in Part II.A.1 that in practice the internal limits of Congress’s powers are of little or no consequence in modern American government, I turn in Part II.A.2 to explaining that nothing untoward follows from this fact, because federalism and individual liberties are better protected through other constitutional mechanisms.

#### 1. The Unbearable Lightness of Internal Limits

As noted earlier, the idea that the enumeration principle functions as a continuity tender is founded on a longstanding tension: constitutional decisionmakers of all stripes espouse the principle, but as a practical matter the legal system does not reflect the arrangement that the formula seems to insist upon.<sup>75</sup> We assert that the federal government is a government of enumerated powers, and we standardly take that to mean that those powers are subject to internal limits, but meaningful internal limits are nowhere to be found. To be sure, there are people who lament the toothlessness of internal limits. In their view, the system has gone badly wrong by giving Congress the functional equivalent of police-power authority.<sup>76</sup> But their criticism only reinforces the descriptive point that as a matter of practice, Congress

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75. See *supra* notes 27-37 and accompanying text.

76. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 318 (Princeton Univ. Press rev. ed. 2014).

exercises something very close to general legislative power. Congress is checked by external limits and by process limits, but internal limits do vanishingly little work, and everyone knows it.<sup>77</sup>

The modern Supreme Court cases that most insist on the importance of internal limits provide excellent illustrations of how little internal limits actually do. Consider *United States v. Lopez*<sup>78</sup> first. During oral argument in that case, several justices asked this question to the Solicitor General: If section 922(q) of the Gun-Free School Zones Act is valid Commerce Clause legislation, is there any law Congress could pass that would exceed the commerce power's scope?<sup>79</sup> The Solicitor General had no answer.<sup>80</sup> Had he offered an example, even a weak or far-fetched example, he might have preserved a modicum of ambiguity about whether his defense of section 922(q) could be reconciled with the principle that the enumeration of congressional powers limits federal governance. By failing to provide any answer, despite the Court's repeated invitations, the Solicitor General all but openly threatened that upholding section 922(q) would mean the end of internal limits.

Obviously, nothing the Solicitor General said should have raised fears about a completely unchecked federal government. All of the Constitution's external limits would still be in place, even if we acknowledged that internal limits are illusory. But still, something seemed dangerous about a dare to accept publicly that there might be no internal limits on the power of Congress. There is a tight association in the legal profession's consciousness between the idea of internal limits and the principle that the federal government is a government of enumerated powers. Given that association, it is easy (and standard) to think that if we publicly accept that there are no internal limits, we would have to abandon the enumeration principle, much as Parliament might have to abandon the traditional enacting clause if Britain were to abolish the office of Queen.<sup>81</sup> Ritual formulas need not carry their ordinary-language meanings, but they cannot transparently be nonsense, at least not if the rituals are to succeed. It must be possible, in the moment of performance, to feel that the ritual formula means something important, even if one also knows at other moments that the meaning is not the straightforwardly apparent one.

Chief Justice Rehnquist's opinion for the Court struck down section 922(q) on internal-limits grounds, arguing that to sustain section 922(q)

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77. See Seinfeld, *supra* note 2, at 1391 (identifying the idea that the enumeration principle lacks practical force as "the standard story").

78. 514 U.S. 549 (1995).

79. Transcript of Oral Argument at \*5, *Lopez*, 514 U.S. 549 (No. 93-1260), 1994 WL758950 ("What is there that Congress could not do, under this rubric, if you are correct?")

80. *Id.* at \*5-9 (arguing that the Constitution imposes external limits and process limits on Congress, but giving no examples of statutes that would be invalid for exceeding the enumerated powers).

81. Might. Continuity tinders live in the realms of metaphor and imagination, and it is hazardous to make confident predictions about the limits of what a community can imagine.

would strip the enumeration principle of all meaning.<sup>82</sup> What the *Lopez* Court did not do, however, was impose an internal limit in a way that would have any significant consequences for American government in practice. On the contrary, the Court's decision permitted Congress to continue exercising regulatory authority over as broad a domain as if no internal limit had been imposed. *Lopez* held that section 922(q) was invalid because the mere possession of a firearm was neither commercial activity nor economic activity substantially affecting interstate commerce.<sup>83</sup> After *Lopez*, Congress repassed section 922(q) in a slightly different form: the reenacted section regulates the possession of firearms *that have moved in interstate commerce*.<sup>84</sup> Firearms that have moved in interstate commerce constitute an enormously large share of the firearms in use in the United States, such that the substantive regulatory difference between the two versions of the Act is slight at best.<sup>85</sup> And the judiciary has uniformly regarded the reenacted version as constitutional.<sup>86</sup> Despite *Lopez*, Congress *can* use its commerce power to impose the rules about firearms possession that appeared in the original Gun-Free School Zones Act.

It does not follow, of course, that the Court's imposition of an internal limit in *Lopez* was insignificant. The Court presumably thought it was important to decide the case in the way that it did. There is every reason to think that a majority of the justices believed the enumeration principle to be at stake: if we don't draw a line here, the reasoning would run, we will not be able to keep a straight face when articulating the principle in the future. Moreover, the *Lopez* Court might have felt the need to vindicate the enumeration principle more keenly than did its predecessors, who were, as a substantive matter, more broadly sympathetic to federal governance.<sup>87</sup> But whatever importance the imposition of an internal limit in *Lopez* had, it does not seem to sound in the register of practical governance. In substance, Congress can and does regulate after *Lopez* what it could regulate before *Lopez*.

Next, consider *United States v. Morrison*.<sup>88</sup> Once again, it seemed that upholding a statutory provision—here, the civil remedy of the Violence Against Women Act (VAWA)<sup>89</sup>—might too flagrantly belie the idea that Congress is limited by its enumerated powers. Once again, the Court responded by striking down the statutory provision, thus purporting to save the enumeration principle from meaninglessness.<sup>90</sup> And, once again, the

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82. See *Lopez*, 514 U.S. at 567–68.

83. *Id.* at 567.

84. 18 U.S.C. § 922(q)(2)(A) (2012).

85. 141 CONG. REC. 12,377–78 (message from the president of the United States).

86. See, e.g., *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999).

87. See *infra* text accompanying notes 163–69.

88. 529 U.S. 598 (2000).

89. 42 U.S.C. § 13981 (2012).

90. See *Morrison*, 529 U.S. at 617–18.

Court's decision left Congress able to use the commerce power to reenact the substance of its regulation, if only Congress had wanted to do so. It is an easy drafting exercise to rewrite VAWA's civil-remedy provision in a way parallel to the way that the Gun-Free School Zones Act was rewritten after *Lopez*, creating legislative jurisdiction by taking advantage of the fact that so many things move in interstate commerce.<sup>91</sup> Imagine a statute creating a cause of action for any gender-motivated crime of violence in which the perpetrator used a weapon or other instrumentality that had moved in interstate commerce: a gun, a baseball bat, a belt—or a telephone, or a pair of sneakers.<sup>92</sup> To be sure, Congress did not pursue that course of action. But that choice may reflect the changed policy preferences of Congress between 1994 and 2000, as well as the political-process limits that Congress always faces, more than it reflects any hard internal limit on federal regulatory power.

Finally, consider *National Federation of Independent Business v. Sebelius* (*NFIB*).<sup>93</sup> A majority of the justices fervently insisted that Congress is limited by its enumerated powers.<sup>94</sup> Ostensibly putting that principle into practice, that majority duly announced that the individual mandate of the Affordable Care Act exceeded federal power under the Commerce Clause.<sup>95</sup> But that announcement did not in practice limit federal regulatory power, even as applied to the case at hand. Instead, the Court upheld the individual mandate as an exercise of a different enumerated power—the taxing power<sup>96</sup>—thus preventing any internal limit the commerce power might have from

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91. See *id.* at 659 (Breyer, J., dissenting) (making this point); *cf.* *Gonzales v. Raich*, 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting) (lamenting it).

92. *Morrison's* holding on the scope of Section 5 of the Fourteenth Amendment is of little moment here. By holding that Congress may not use Section 5 to reach a private actor, *Morrison*, 529 U.S. at 626–27, the Court did impose an internal limit on one of Congress's enumerated powers. But it is no part of the present argument to deny that the enumerated powers have internal limits when taken individually. Of course they do. The power to declare war cannot be used to coin money, and the power to coin money cannot be used to define and punish piracies. My argument is that internal limits *as a whole* do not meaningfully constrain Congress, and *Morrison's* treatment of Section 5 is consistent with that point. Unlike in cases like *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Section 5 issue in *Morrison* was about Congress's ability to regulate private actors, not its ability to overcome the sovereign immunity of state officials. On the understanding that with respect to private actors Congress could use a *Lopez*-like workaround to impose the civil remedy of the Violence Against Women Act (VAWA) under the commerce power, *Morrison's* view of Section 5 does not limit the extent of Congress's overall regulatory jurisdiction. And the limit on Congress's ability to bind state officials that the cases like *Kimel* and *Garrett* represent is an external limit on Congress, not an internal one: its source is the Eleventh Amendment, U.S. CONST. amend. XI.

93. 132 S. Ct. 2566 (2012).

94. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.); *id.* at 2650 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

95. *Id.* at 2591 (opinion of Roberts, C.J.); *id.* at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

96. *Id.* at 2600 (opinion of Roberts, C.J.); *id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part, joined by Breyer, Sotomayor & Kagan, JJ.).



impeding significant federal legislation. Like *Morrison* and *Lopez*, *NFIB* articulated the enumeration principle in a way that seemed to give it force but in practice left the world as open to congressional regulation as if Article I, Section 8 read, “The legislative authority of Congress shall be general, constrained only by process limits and external limits.”<sup>97</sup> Even the joint dissent in *NFIB* took the position that Congress had the *authority* to impose the individual mandate as an exercise of the taxing power.<sup>98</sup> The dissenters denied only that Congress *had* proceeded under that power, rather than under the Commerce Clause.<sup>99</sup> Accordingly, even if the joint dissent had been an opinion for a majority of the Court, *NFIB* would stand for the proposition that the enumerated powers of Congress are sufficient for the enactment of legislation like the individual mandate, so long as Congress uses its powers in the right way.

None of this is to claim that justices who articulate internal limits are, in the secret recesses of their minds, saying, “I will appear to take internal limits seriously, but I will also ensure that Congress retains the ability to regulate more or less as it sees fit.” There is no reason to doubt that some sitting

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97. The part of *NFIB* that did meaningfully limit the power of Congress—the part dealing with the Medicaid expansion—can be understood as employing either an evadable internal limit on the model of *Lopez* or else as sounding in external limits rather than internal ones. See *id.* at 2603–07 (opinion of Roberts, C.J.) (holding that Congress may not use the threat of withdrawing funding from a large existing program as a means of getting states to agree to participate in a different, albeit related, program); see also Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861 (2013) (formulating this holding). If the rule that Congress may not “leverage” existing spending to coerce states to undertake new programs is an internal limit on the spending power, it is one that Congress could evade by using the spending power a little bit differently—say, by making “New Medicaid” an entirely federal program or even by repealing “Old Medicaid” and then enacting “New Medicaid” as a formally new program. Neither of these alternatives seems particularly realistic today, but the reasons why simply demonstrate the power of structural realities and process limits as constraints on federal lawmaking. It also bears noting that the substance of the Court’s rationale on this subject sounded heavily in external limits. According to Chief Justice Roberts’s opinion for three justices, and also according to the four joint dissenters (not dissenting on this point), the conditional spending provisions of the Affordable Care Act’s Medicaid expansion were tantamount to Congress’s compelling the states to participate in that expansion, and Congress is forbidden to compel states to enact or administer particular regulatory programs. *NFIB*, 132 S. Ct. at 2603–05 (opinion of Roberts, C.J.). That prohibition is the same one animating the anticommandeering rule of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), and the rationales given in *NFIB* echoed and cited those cases. See *NFIB*, 132 S. Ct. at 2602–03 (opinion of Roberts, C.J.). In short, *NFIB*’s striking down this aspect of the Medicaid expansion might be best understood, in substance, as an application of the anticommandeering principle in the context of federal spending, with the necessary variation that, in *NFIB*, the states had a formal choice about whether to participate. The Court found that formalism to be devoid of substance and accordingly insufficient to defeat the general principle. Understood this way, the Medicaid holding in *NFIB* rests on an external limit, because the principle that Congress may not compel the states to regulate is not particular to the spending power. It rests on a principle of federalism that transcends any specific enumerated power and blocks otherwise valid uses of any of the powers listed in Article I.

98. *NFIB*, 132 S. Ct. at 2651 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

99. *Id.* at 2651, 2655.

justices are willing, or even eager, to enforce a consequential set of internal limits. But at a different level of abstraction—one that looks at doctrine and discourse as a whole—constitutional law seems to have settled, for the entire history of the United States as a superpower nation, on a regime in which internal limits do virtually no practical work.

Similarly, we cannot know whether, in some future case, the Court will deploy the internal limit on the commerce power that five justices endorsed in *NFIB* in a way that would more meaningfully restrict the scope of federal legislation. But we cannot simply assume that that will happen, and it well might not. Under present conditions, it is hard to imagine the Court's even having an opportunity to deploy that limit. The relevant internal limit, of course, provides that Congress may use its commerce power to regulate activity, but not inactivity.<sup>100</sup> Under present conditions, it is hard to imagine Congress's adopting legislation falling afoul of that line. In other words, there are, as of today, process limits obviating any function that the action-inaction line might have. And in the slightly different world where Congress might want to use its commerce power more ambitiously, the slightly different Supreme Court might well sustain a statute requiring otherwise-inactive parties to act as valid Commerce Clause legislation, even as it explained why doing so was consistent with the idea that Congress is a government of limited and enumerated powers.

## 2. Actually, It's Pretty Bearable

Given the official and broadly held view that internal limits are critical to the constitutional architecture, the realization that internal limits do very little might seem like cause for concern. So it is here worth noting some reasons why the absence of meaningful internal limits should not be alarming.

First, a world without internal limits is not a world without federalism. Even after three-quarters of a century during which internal limits have been basically moribund, state and local governments are hugely consequential actors in the American system. Reasonable people can disagree about which policy decisions are better made centrally and which ones are better made locally, but the fact that so much of American government remains local indicates that federalism has long been sustained by forces other than internal limits. A few of those forces are judicially enforceable *external* limits on congressional power. These limits include rules about commandeering,<sup>101</sup> state sovereign immunity,<sup>102</sup> conditional spending,<sup>103</sup> and intergovernmental taxation,<sup>104</sup> to say nothing of the prohibitions against Congress's unilaterally

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100. See *id.* at 2591 (opinion of Roberts, C.J.).

101. *E.g.*, *New York v. United States*, 505 U.S. at 161–66.

102. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 730–31 (1999).

103. *E.g.*, *NFIB*, 132 S. Ct. at 2603–05 (opinion of Roberts, C.J.).

104. *E.g.*, *New York v. United States*, 326 U.S. at 582.

abolishing states or reconfiguring state boundaries.<sup>105</sup> No less important (and probably more so) are a host of limitations on the federal government that are practical rather than legal. As many scholars have documented, the implementation of Congress's desired policies regularly requires federal officials to work with and through state governments, rather than cutting them out, because states have the personnel, infrastructure, and local expertise necessary for actually accomplishing the things that Congress would like to see done.<sup>106</sup> Within that framework, state governments are not simply nonopinionated, pass-through devices for federal policy. Instead, the necessity of their cooperation gives state officials the opportunity to negotiate, reshape, contest, frustrate, or undermine federal policy.<sup>107</sup> As a result, a great deal of governance that formally occurs pursuant to statutes passed by Congress reflects the preferences of local officials as well as national ones.

Nothing guarantees that these devices will deliver *optimal* federalism. But there is no reason to think that a federalism using internal limits could deliver that outcome, either. Indeed, there is no reason to think that any set of rules could do that, even if we could agree on what optimal federalism would look like. The federalism that these other devices do deliver, if not optimal, is at least robust enough that state and local decisionmakers are enormously consequential, even nearly eighty years after the collapse of internal limits.

Next, a world without internal limits is not a world without protection for individual liberty. Even in the exercise of its undoubted enumerated powers, Congress may not prohibit Catholicism,<sup>108</sup> or censor the newspapers,<sup>109</sup> or abolish jury trials,<sup>110</sup> and so on, and so on. All of the external limits remain in place. And the Constitution's external limits, combined with the limits inherent in what a democratically elected government with checks and balances is likely to undertake, amount to a pretty good guarantee of the rights of individual Americans—at least as measured by the appropriate standard, which is mindful of what a constitutional system can realistically be expected to deliver.

Maybe the enforcement of some set of consequential internal limits would improve the workings of federalism or the protection of individual rights, relative to where those things stand today. Or maybe not. Maybe

105. See U.S. CONST. art. IV, § 3, cl. 1.

106. See, e.g., Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 *FORDHAM L. REV.* 1749 (2013); Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996 (2014); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 *MICH. L. REV.* 813, 868–70 (1998) (describing the practical limits on federal capacity that prevent federalization of policy areas at will); Kramer, *supra* note 34, at 1543–46.

107. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009).

108. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

109. See *id.* ("Congress shall make no law . . . abridging the freedom of speech . . .").

110. See *id.* art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury . . .").

under present conditions, internal limits are not likely to be effective tools for reaching those ends. I tend to think that mechanisms other than internal limits are doing the job pretty well and that no plausible set of internal limits could work much improvement.<sup>111</sup> But whether or not we would be better served by implementing a meaningful set of internal limits, the descriptive fact remains that internal limits have done little if anything of consequence for quite some time. Constitutional lawyers speak as if internal limits are important, and they make periodic shows of commitment to that idea. But whatever importance internal limits might have does not seem connected to anything practical about the operations of modern American government. Practically, internal limits have virtually no observable effect. So if we are to explain our continued adherence to the idea that the federal government is limited by its enumerated powers, perhaps we should look beyond the practical. Perhaps the importance we attach to enumeration is of a different kind.

### B. *Valuing the Past*

In Section II.B.1, just below, I explain how repetitions of the enumeration principle function as ritual markers of continuity between modern constitutional practitioners and the American constitutional past. Then, in Section II.B.2, I consider the audience for this particular continuity ritual. The audience, I suggest, is peculiarly elite and professional. Reciting the enumeration principle is thus not the sort of ritual that an elite practices in order to hoodwink a credulous public into believing in the legitimacy of a government. It is a ritual with which the members of an elite speak largely to one another or to themselves.

#### 1. The Creed

My suggestion, of course, is that the enumeration principle is profitably understood as a continuity tender—that is, as an inherited ritual formula which no longer retains what was once its primary significance but whose continued repetition demonstrates loyalty to a tradition. Asserting the enumeration principle is a traditional practice that each generation of constitutional lawyers inherits from the one that came before, all the way back to Marshall<sup>112</sup> and Madison.<sup>113</sup> By repeating that the federal government is one

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111. The set of individual rights that American constitutional decisionmakers are substantively prepared to say should be enforced against the government is pretty well protected by external constitutional limits, and the dynamics of federalism are sustained by a combination of external limits and practical ones. See Primus, *supra* note 5, at 604–10.

112. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers. . . . [I]t can exercise only the powers granted to it . . .”).

113. See *THE FEDERALIST*, *supra* note 34, No. 45, at 237 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”). It is worth remembering that, in Federalist 45, Madison was arguing that, under the proposed Constitution, the states were probably going to be a

of enumerated powers, modern lawyers continue a discursive practice that links them to all previous periods in the constitutional tradition. Moreover, the content of the enumeration principle declares and celebrates the continuity between the current constitutional system and America's distinctive constitutional past. It announces that a core element of our system remains now what it was at the beginning.

Both of these features of the enumeration principle—that it is a maxim of long standing and that its substance asserts intertemporal continuity—are important. To begin with the first aspect, it is of course easier to demonstrate continuity by saying something traditional than by saying something new. A lawyer who says, “The federal government is a government of enumerated powers” repeats a formula that he or she learned upon entry into the profession, and the audience recognizes the maxim as handed down from generations past. That said, an inherited principle's longevity is not sufficient to make it function as a tender of continuity. The maxim that a legislature cannot bind future legislatures is of long standing,<sup>114</sup> as is the rule of lenity.<sup>115</sup> But judges who invoke those ideas are not signaling something about their loyalty to a tradition, except perhaps in the minimal and irreducible way in which any application of a preestablished principle shows respect for the decisionmaking of the past. Sometimes the statement of a legal rule is just the statement of a legal rule. But the content of the enumerated-powers idea relevantly differentiates it from an inherited principle like the rule of lenity. The substance of the enumeration principle speaks directly to the idea of historical continuity, asserting that the core structure of American government is today what it always has been.<sup>116</sup>

Affirming the enumeration principle works particularly well as a means of asserting continuity with the constitutional tradition because American lawyers are taught to think of the idea of limiting Congress by enumerating its powers as one of the Framers' central and distinctive insights.<sup>117</sup> Following an argument familiar from Hamilton's *Federalist* 84<sup>118</sup> and a handful of other sources, a canonical trope in constitutional discourse teaches that the

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greater threat to the federal government than the federal government would be to the states. *Id.* at 236. In context, the characterization of the federal government's powers as few and defined might accordingly be understood at least in part as a lament.

114. See, e.g., THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION* 125–26 (The Lawbook Exch., Ltd. 1999) (1868).

115. See, e.g., *United States v. Morris*, 39 U.S. 464, 475 (1840) (“In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly.”).

116. “Always” here takes the timeline of American government to begin in 1788, with the adoption of the Constitution. There was of course American government before the Constitution, but within the conventions of American constitutional discourse, tracing a practice back to 1788 generally counts as tracing it back to the beginning.

117. See, e.g., Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1064 (2015) (“The original constitutional strategy for limiting national power and protecting state autonomy was the doctrine of enumerated powers.”).

118. *THE FEDERALIST*, *supra* note 34, No. 84 (Alexander Hamilton).

Philadelphia Convention saw enumeration as the major brake on federal legislation and accordingly considered a bill of rights unnecessary or even dangerous.<sup>119</sup> Specifying external limits in a bill of rights, the theory ran, might imply that any action not forbidden to Congress was permissible, thus undermining the enumeration's function as the chief guarantor against federal overreaching.<sup>120</sup> Modern Americans attach enormous importance to the bill of rights, so the idea that the Framers envisioned foregoing a bill of rights so that the enumeration might properly function powerfully presents the enumeration as a core feature of the original constitutional vision. Given that understanding of the Framers' theory, to affirm that the federal government is one of enumerated powers is to affirm something deep and encompassing and distinctive about the American constitutional order.

Now it happens that the canonical trope about why the Framers omitted a bill of rights is a stylized morality tale, one that distorts the relevant history in several important respects.<sup>121</sup> The Philadelphia Convention looked mostly to process limits, rather than to either internal or external limits, to keep the new government in check.<sup>122</sup> Most of the delegates expected that the main work of limiting the federal government would be built into the composition of and the relationships among its decisionmaking institutions.<sup>123</sup> A bicameral Congress with different methods of election would prevent the passage of most oppressive legislation; a single-member executive wielding a qualified veto and selected through a state-based mechanism would provide further security; and so on. Most of the Convention's time and attention was spent on matters like these because they were the ones that were expected to matter.<sup>124</sup> And to the extent that these mechanisms failed to protect state prerogatives or individual liberties, most of the Framers expected that the remedy would come from the state governments, which would act as rallying points for resistance to federal abuse.<sup>125</sup>

To be sure, a primary reliance on process limits does not preclude a secondary reliance on internal limits. But the idea that the Convention was sufficiently confident in the limiting power of the enumeration so as to make a bill of rights unnecessary seems to be an *ex post* rationalization, one that a few of the Constitution's defenders cooked up during the ratification debates in the hopes of mollifying people who objected to the Constitution's

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119. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2577–78 (2012) (opinion of Roberts, C.J.) (“[T]he Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government.”); *id.* at 2676–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

120. See *THE FEDERALIST*, *supra* note 34, No. 84 (Alexander Hamilton).

121. See generally William Ewald, *The Committee of Detail*, 28 *CONST. COMMENT.* 197 (2012) (painstakingly reconstructing the ways in which surviving records do not suffice to support Hamilton's account of the reasons for omitting a bill of rights).

122. See Primus, *supra* note 5, at 615–17.

123. See, e.g., Kramer, *supra* note 34, at 1492, 1515–20.

124. See Primus, *supra* note 5, at 615–17.

125. See, e.g., Kramer, *supra* note 34, at 1492, 1515–20.

failure to include a bill of rights.<sup>126</sup> Their argument was widely dismissed as implausible rationalization.<sup>127</sup> And as we all know, the public soundly rejected the idea of relying on the enumeration to limit Congress: adopting a bill of rights was one of the first orders of business for the new government. In short, modern constitutional lawyers take the argument that the enumeration was constructed to be the primary protector of our liberties much more seriously than the Founding generation did.

Nonetheless, the story of a Convention that gave pride of place to the enumeration is canonical within modern constitutional culture. It is more myth than history, but it is an official myth. Prominent players in the system repeat it as if it were both true (which they might or might not think it is) and important (which it surely is, in the way that important myths are important).<sup>128</sup> As a canonical story, it draws a tight association between the Philadelphia Convention and the enumeration principle. So when constitutional lawyers affirm the importance of the enumeration, the continuity they enact runs directly to the Convention. And the Convention, of course, is the greatest source of mystical and time-transcendent authority in American constitutionalism—parallel, if anything is, to the monarchy in the British system. If any sort of ritual performance makes sense as a way for American constitutional lawyers to position themselves as continuous with the tradition from which they descend, a ritual of association with the Convention is likely to be it.

## 2. The Audience

This particular ritual probably has more resonance for a small group of insiders than for the public in general. Obviously, American reverence for the Constitution is widespread, as is reverence for the Philadelphia Convention and its famous participants. But people with different educations have different sorts of access to the Convention and therefore different intuitions about why it is worthy of veneration. For most Americans who are neither lawyers nor historians nor Constitution buffs, the Convention's merits (and the Constitution's) probably seem more general and less technical than they

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126. See, e.g., Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 372–77 (2007); Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 560–61 (2011) (book review) (“Whether Federalists genuinely believed these arguments, most of which were not terribly persuasive, is an interesting question.”).

127. See, e.g., Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, 513 (James Morton Smith ed., 1995) (“To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed, but is surely gratis dictum . . . .”); Graber, *supra* note 126, at 377–78; Primus, *supra* note 5, at 617–18.

128. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 132 S. Ct. 2566, 2577–78 (2012) (opinion of Roberts, C.J.) (“Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government.”); *id.* at 2676–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

do to Americans with more specialized perspectives. Intelligent laypeople are likely to value ideas like democracy and equality, or the general idea of checks and balances, or the liberties in the Bill of Rights.<sup>129</sup> Only a small subgroup of people—people with a particular education and perhaps a taste for the counterintuitive—think of the idea of a limiting enumeration as central to the Constitution’s distinctive genius.<sup>130</sup> That idea is, after all, a somewhat technical conception. As the joint dissent pointed out in *NFIB*, it is not an idea that the broader citizenry is likely to intuit or appreciate.<sup>131</sup> So to the extent that invocations of the enumeration principle function as continuity tenders, the primary audience for the ritual performance is not the broader public. Instead, constitutional practitioners who repeat the enumeration principle are mostly engaged in a performance of continuity for their own benefit and that of other constitutional practitioners.

In this respect, too, there is a parallel between the enumeration principle and Parliament’s enacting clause. In the United Kingdom, the Queen is a pretty simple and accessible symbol of national continuity. Indeed, it is in large part the monarch’s broad comprehensibility that led Bagehot to describe the royal role in the English constitution as mostly theater, aimed at creating loyalty among people too unlearned to understand the realities of modern government.<sup>132</sup> The Queen is something that common people understand, the reasoning went, and common people need ritual and mystery to think of government as authoritative.<sup>133</sup> I suspect that Bagehot was right to think that ritual and mystery are important elements in the creation of national identity and in the legitimacy of national governments. But he probably overstated the degree to which ritual and mystery are for the particular benefit of less educated parts of the population. More highly educated folks may need a bit of ritual and mystery, too. And ritual invocations of royal authority—like ritual declarations of continuity with the Convention—can be meaningful for elite audiences as well as popular ones. It may be the case, of course, that different shows of respect for the Queen will be visible to different people. Everyone hears *God Save the Queen* sung in public, but only a few people hear the enacting clause read in Parliament or see it in the statute book. The popular audience is accordingly likely to benefit from the first ritual but not the second. The elite audience might well benefit from both, perhaps in different, if overlapping, ways.

Similarly, the American legal elite might find value in some of the same rituals of continuity that appeal to broader audiences, but it also might find

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129. This is not a criticism of the lay population. Those reasons to value the Constitution are good reasons, and one cannot be expert in everything.

130. See, e.g., *NFIB* at 2577 (opinion of Roberts, C.J.); *id.* at 2676–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

131. *Id.* at 2676–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Indeed, if the Founding-era critics were right to dismiss as implausible the notion that the enumeration could do the work of limiting Congress, then perhaps we should not expect anyone to hold that idea unless specifically (mis-)educated to its effect.

132. See BAGEHOT, *supra* note 57, at 34–37.

133. See *id.* at 34–35.



specific resonance in rituals of continuity that only members of that elite, by dint of their distinctive education, are likely to appreciate. It is even possible—though this would vary widely from person to person—that members of the legal elite would particularly prize rituals that appealed to them in their elite capacity. After all, those rituals do not merely help establish the sense of continuity. They also confirm the elite’s sense of itself as elite, which is something that elites often enjoy. And in the case at hand, asserting the enumeration principle is a ritual whereby modern practitioners speak the speech (so we imagine) of the greatest elite in American constitutional culture—the Convention itself.

Note, then, the terms in which a group of justices recently invoked the canonical account that places enumeration at the heart of the Framers’ constitutional vision. According to the joint dissent in *NFIB*, the limitations on federal power imposed by the enumeration of congressional powers

are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment.<sup>134</sup>

The joint dissent here explicitly conceives of itself as a special and discerning elite, one that remembers the deeper and less accessible parts of the Founders’ constitutional wisdom. It sees what is not “obvious,” and it is alert to the error of confusing the “romantic” elements of the Constitution with the ones that really do the work. Note the echo of Bagehot’s claim that popular audiences, unable to grasp the realities of the subject in the way that elites and specialists can, must understand modern government through the lens of ritual and mystery. And because ordinary citizens will predictably fail to appreciate a nonromantic mechanism like the system of enumerated powers, the joint dissent continues, the Court must vigilantly insist on its importance. Indeed, the Court must strive to extend the Constitution’s wisdom into the future by teaching the Framers’ insights to those who might otherwise forget them.

Perhaps the joint dissent protests too much when it describes its affinity for internal limits as rooted in the appreciation of an aspect of the constitutional order *less* romantic than the amendments protecting individual rights. As already noted, the canonical story about the centrality of enumeration to the Framers’ vision is largely a matter of myth.<sup>135</sup> To teach that myth to others is to traffic in national romance. And whether or not the Framers

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134. *NFIB*, 132 S. Ct. at 2767–77 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). On its face, this passage from the dissent speaks of structure in general—a category that includes process limits as well as internal ones. But in context, the reference is clearly to internal limits, because the dissent is explaining its insistence on enforcing an internal limit (on the commerce power) rather than trusting a process limit (namely, democratic elections).

135. See *supra* notes 121–128 and accompanying text.

actually held the idea here attributed to them,<sup>136</sup> an opinion that presents itself as channeling the distinctive wisdom of the Philadelphia Convention is engaged in perhaps the most romantic act in American legal culture, as well as the one best calculated to demonstrate loyalty to the constitutional tradition. If affirming the enumeration principle is tantamount to acting as vicar of the Convention, then it is an excellent way of symbolically articulating the value of continuity with the constitutional past.

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Understanding the enumeration principle as a continuity tender can bring coherence to an otherwise puzzling state of affairs. Courts insist that the enumerated powers have internal limits, but judges stop short of denying Congress the ability to promulgate its chosen regulatory regimes.<sup>137</sup> Constitutional lawyers enact American national identity through a host of symbolic actions, one of which is reciting the principle that the federal government today is still what it was at the beginning: a government of enumerated powers. Affirming that maxim points us to the memory of heroic Founders whose plan of a government has officially remained in force over the centuries, thus asserting continuity with the tradition and reminding them—us—of a story in which we locate ourselves. But this tender of continuity does not require the repudiation of another deeply engrained constitutional practice—the one whereby Congress can legislate more or less as it sees fit, subject to external limits and process limits. On that understanding, it is no more necessary to give the formula practical bite than it is for Parliament to involve the Queen in its legislative process before passing laws that present themselves as her enactments.

### III. WEAPONIZATION

For a continuity tender to be a stable means of asserting connection to the past without taking on the substantive commitments of a previous time, the people who invoke the ritual formula need to have broad agreement about, or little investment in, the issue to which the formula's text apparently speaks. But those conditions of consensus will not always be present. If the issue to which a ritual formula apparently speaks is salient and controversial, and if the straightforward reading of the ritual formula seems to support a particular view, the people who share that view will deploy the formula as a persuasive weapon. After all, a formula used as a continuity tender is one that the relevant community treats with reverence, and good rhetoric uses principles that the audience already endorses.

In this Part, I explore the importance of consensus to the stability of continuity tenders. For much of the twentieth century, a broad consensus

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136. See Klarman, *supra* note 126, at 560–61 (“Whether Federalists genuinely believed these arguments, most of which were not terribly persuasive, is an interesting question.”).

137. See, e.g., *NFIB*, 132 S. Ct. 2566; *United States v. Lopez*, 514 U.S. 549 (1995).

about federal power permitted constitutional lawyers to treat the enumeration principle as a sacred formula lacking significant contemporary consequences.<sup>138</sup> Today, however, the intense conflict over the boundaries of congressional power practically guarantees that the enumeration principle cannot be invoked for its continuity value alone. Instead, each repetition of the enumeration principle now raises the likelihood that courts will impose consequential internal limits on the powers of Congress.<sup>139</sup> So if the internal-limits canon is a mistake—as I think it is—then the use of the enumeration principle as a continuity tender is no longer benign, because it may not be containable. Something needs to change.

#### A. *Ritual in an Environment of Consensus*

Parliament's enacting clause is uncontroversial because there is no live issue in British politics on the question of whether the Queen should enjoy policymaking power. Everyone, including the Queen, agrees that she should not. In those contexts where the Queen engages with policy issues, she acts on the advice of her ministers, which is a polite way of saying that she does as directed by the elected government.<sup>140</sup> ("Government" is here used in the British sense, to refer to the set of ruling Ministers responsible to Parliament, not to the general network of state institutions.) As long as everyone agrees that the royal role in legislation is symbolic, Parliament can use the traditional enacting clause without worrying that people will get the wrong idea. The practice is not deceptive, because everyone understands what is going on, and it is also not dangerous, because nobody is trying to make the Queen into a political power.

A recent kerfuffle illustrates the point. In addition to the long-settled constitutional convention of royal assent, by which the Queen agrees to legislation approved by Parliament, British legislative process features a similarly named but different and lesser-known practice called Queen's consent.<sup>141</sup> When Parliament considers bills that would affect the interests of the royal family—say, by affecting its hereditary landholding revenues, or by affecting a privilege that extant British law deems a matter of royal prerogative—the government minister within whose jurisdiction the relevant bill falls is supposed to ask the Queen (or, in appropriate cases, the Prince of

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138. See TRIBE, *supra* note 6, at 794–95.

139. *E.g.*, *NFIB*, 132 S. Ct. 2566.

140. Bennion, *supra* note 53, at 134. The one instance in which the Queen exercises independent judgment with potential policy consequences accordingly arises when there is no government from which to take direction: if no single party commands a majority of the Commons after an election, the Queen chooses which party should have the first opportunity to assemble a majority coalition. See ROBERT HAZELL ET AL., INST. FOR GOV'T, MAKING MINORITY GOVERNMENT WORK 6, <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/147.pdf> [<https://perma.cc/8C5V-NBK8>].

141. See OFFICE OF THE PARLIAMENTARY COUNSEL, QUEEN'S OR PRINCE'S CONSENT 2 (2015) (UK) [hereinafter OPC REPORT].

Wales) to consent to Parliament's proceeding with debate.<sup>142</sup> Until recently, Queen's consent operated largely out of sight, and those members of Parliament who were aware of the practice generally assumed that it was a formality with no more practical consequence than the requirement of royal assent.<sup>143</sup> In January 2013, however, it came to light that a few modern bills had been bottled up in Parliament because the Queen had not consented to let debate proceed—including, most sensationally, a 1999 bill that would effectively have prohibited military strikes against Iraq without formal approval from a majority of Parliament.<sup>144</sup>

Precisely because the whole British polity operates on the understanding that the Queen does not intervene in the substance of modern lawmaking, the revelation about Queen's consent had considerable shock value. British newspapers suggested that the royal family might be secretly influencing a wide range of legislation,<sup>145</sup> and some activists who wish to abolish the monarchy took the occasion to warn that the Queen remains a political power-broker rather than just a benign national symbol.<sup>146</sup> But others were more conscious of the strength of the traditional arrangement and accordingly less alarmist. Even the director of Britain's leading campaign to replace the Queen with an elected head of state expressed skepticism that the Queen would have tampered with the democratic process.<sup>147</sup> Parliament duly opened an enquiry aimed at figuring out just what had been going on.<sup>148</sup> And when the answer came, it sounded less in constitutional crisis than in ordinary political machination.

On March 26, 2014, after taking testimony and finding facts, the House of Commons Political and Constitutional Reform Committee published a report concluding that the Queen had never, on any occasion, blocked or influenced legislation by refusing, or threatening to refuse, a government minister's request that she consent to parliamentary debate.<sup>149</sup> From time to time, however, the *government* had used Queen's consent as a procedural

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142. *See id.* at 2–5.

143. *See* COMMITTEE REPORT, *supra* note 56, at 13–14, 20.

144. *See, e.g.,* Robert Booth, *Secret Papers Show Extent of Senior Royals' Veto over Bills*, GUARDIAN (Jan. 14, 2013), <http://www.theguardian.com/uk/2013/jan/14/secret-papers-royals-veto-bills> [https://perma.cc/GZ6M-4U9F]. The Military Actions Against Iraq Bill required Queen's consent because the power to go to war is, as a matter of British constitutional law, classified as a royal prerogative power. OPC REPORT, *supra* note 141, at 3. But this does not mean that the Queen actually exercises the power. Like many powers that formally fall within the prerogative, the power to go to war is one “exercised on [the Queen's] behalf by Ministers,” meaning that in reality the power is vested in the Government acting as a de facto executive branch. *Id.* at 2.

145. *E.g.,* Booth, *supra* note 144.

146. *See, e.g., id.* (quoting Liberal Democrat MP Andrew George saying that the report “is opening the eyes of those who believe the Queen only has a ceremonial role” and that “[a]t any stage this issue could come up and surprise us and we could find parliament is less powerful than we thought it was”).

147. *Id.* (quoting Graham Smith, Chief Executive Officer of Republic).

148. COMMITTEE REPORT, *supra* note 56.

149. *Id.* at 16.

device for blocking a bill.<sup>150</sup> Faced with an unwanted private member's bill or a troublesome proposal from a minority party, and wanting to avoid debate, the government asked the Queen to withhold her consent on a few occasions—and the Queen, as always, did what Parliament's elected leadership (i.e., her ministers) asked of her.<sup>151</sup> On other occasions, the government sought to avoid debate on bills by simply neglecting to ask for Queen's consent.<sup>152</sup> And on the strength of the procedural requirement that Queen's consent be obtained, House officials kept the disfavored bills off the floor and out of sight.<sup>153</sup>

Not surprisingly, the investigating committee concluded that government ministers should not use Queen's consent as a procedural trick for sinking proposed legislation.<sup>154</sup> To that end, the committee recommended a series of bureaucratic reforms that would make the seeking of consent transparent and routine.<sup>155</sup> But the committee did not recommend abolishing Queen's consent.<sup>156</sup> Abolition might have followed if the Queen really had been exercising a veto. After the initial revelations—but before the committee's investigation identified the problem as one of ministerial gamesmanship rather than royal usurpation—one member of Parliament introduced a bill that would have eliminated Queen's consent entirely.<sup>157</sup> (Debate on that bill required Queen's consent, and the Queen promptly consented.<sup>158</sup>) But once the committee's investigation unraveled the mystery, the bill was allowed to lapse.<sup>159</sup> Now that everyone is satisfied that the royal family is not influencing legislation, and now that the manipulation of Queen's consent has been neutralized by some combination of transparency reforms and general public shaming, government ministers will go on asking the monarch for permission to debate various matters. Whereupon she will give that permission. Queen's consent will continue as a ritual—one that creates a symbolic continuity between modern British government and historic British tradition without interfering with the business of democratic legislation.

That outcome is predicated on a deep substantive consensus about the symbolic nature of the royal role.<sup>160</sup> Note that at no point in the Queen's consent affair did anyone argue that it would be *appropriate* for the Queen

150. *Id.* at 12.

151. *See id.*

152. *Id.* at 13–14.

153. *See id.*

154. *Id.* at 21–22.

155. *Id.*

156. *Id.*

157. Rights of the Sovereign and the Duchy of Cornwall Bill 2013–2014, HL Bill [15] (UK).

158. COMMITTEE REPORT, *supra* note 56, at 11.

159. *Id.* at 21–22; *see also* *Rights of the Sovereign and the Duchy of Cornwall Bill [HL] 2013–2014*, UK PARLIAMENT, <http://services.parliament.uk/bills/2013-14/rightsofthesovereignandtheduchyofcornwall.html> [<https://perma.cc/4GG4-MZ5A>] (noting that the bill has lapsed).

160. Note the contrast with Bagehot's analysis, in which the desirability of a continued royal role rested upon the need to address the sharply *differing* attitudes toward monarchy

to block legislation. On the contrary, the drama provided a platform for all players to reaffirm that a modern British monarch wields no policymaking power. Early on, a Buckingham Palace spokeswoman gave assurances that the Queen had never refused consent “unless advised to do so by ministers.”<sup>161</sup> During the House of Commons committee’s investigation, witness after witness maintained that, whatever the official legal status of the Queen’s consent requirement, there would be no justification for a monarch vetoing parliamentary bills, nor for a monarch demanding amendments or concessions as the price of letting debate proceed.<sup>162</sup> Given the strength of that consensus, the government ministers who had manipulated Queen’s consent could not defend their actions by appealing to ideas about legitimate royal power. Nor could they argue that the existence of the practice of Queen’s consent must mean that the Queen is sometimes entitled to block legislation. Everyone knows that it means no such thing. The manipulation by the government was an attempt to gain practical advantage from something that responsible adults know is not to be used that way. Once the game was out in the open, there was no excuse for playing it.

#### B. *Ritual in an Environment of Conflict*

Now imagine a different state of affairs. Suppose that sometime in the future there were a Royalist revival in Great Britain. (Or in the United Kingdom, really. Partisans of the revival would insist on the polity’s proper name). Under those circumstances, Parliament might not be able to afford the luxury of demonstrating continuity with British tradition through rituals like Queen’s consent and the legislative-enacting clause. In a world where

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among different segments of British society. In Bagehot’s view, a visible and mysterious monarchy was essential, primarily as a way of ensuring reverence for the government among the large mass of common people who lacked the intellectual apparatus necessary for understanding, and feeling obligated to obey, a modern government lacking in mystical claims to authority. See BAGEHOT, *supra* note 35, at 34–37, 46–47. To be fair to Bagehot, it is worth remembering that his position was not simply about the difference between elites who can handle the truth and the great unwashed who cannot. In his view, even intelligent people are more likely to revere old and inherited things than new and invented ones, if only because nobody can get on in life by thinking of everything from scratch, rather than by taking what is given in most areas of life. See *id.* at 36–37. But still, the main audience for royal ritual was, in his view, the less educated one. *Id.* at 34–35.

161. Booth, *supra* note 144.

162. See, e.g., COMMITTEE REPORT, *supra* note 56, at 17 (providing the testimony of Dr. Adam Tucker of the University of York, quoting Allard-Tremblay, *supra* note 56, at 392 (“Her involvement in the legislature must be sufficient to sustain the constitutional tradition that our legislature, properly understood, consists of the Queen-in-Parliament. But beyond that, no substantive involvement in the legislative process itself is constitutionally appropriate, except the (contested) possibility of intervention in wholly exceptional (and generally implausible) circumstances. Even the most radical (as far as I am aware) contemporary endorsement of the involvement of the Queen in legislative politics includes the pointed concession that her role ‘should be overall minimal to the point of being non-existent.’ ”)); *id.* at 18 (providing the testimony of Professor Blackburn of Kings College London) (“The case for maintaining the Royal Consent is simply ceremonial . . .”).

there is a live question about whether the Queen is entitled to exercise political power, asking her permission runs the risk of her saying no. Worse yet, supporters of royal restoration would deploy the practice of Queen's consent and the language of the enacting clause as exemplars of the truth of their vision. "Why do we ask the Queen for permission to debate," their rhetorical question would run, "unless she really does have the right to veto or influence what Parliament does? How can we say that the Queen is an enacting legislative force unless we recognize her right to legislate? Surely the fact that we *do* consistently describe her as an enacting force shows that we are already committed to viewing her as having legislative authority." These arguments would not be shallow opportunism. If one believes in the merits of monarchical government, then it is natural to be inspired by confirming features of the culture and to point to those features when arguing for the rightness of one's view. In short, in the absence of a consensus about which practices are symbolic and which ones are actionable, the people who would like things to be actionable will argue that respected practices and verbal formulas must mean something "real" and that it is hypocritical—false to the values of the community—to refuse to vindicate the things that everyone professes.

Perhaps there was a moment, half a century ago, when some Americans expected the idea of a federal government limited by its enumerated powers to live on only in the way that members of Parliament expect the Queen's role to live on in the British political process.<sup>163</sup> If everyone approved of the broad construction of congressional power that prevailed in the decades after the "switch in time," then the practice of showing continuity with the tradition by repeating the enumeration principle could proceed unproblematically. Indeed, even if some people disagreed on the substantive question of whether internal limits must exist, using the enumeration principle as a continuity tender might still be basically unproblematic so long as not much was at stake, such that the people who thought internal limits necessary were not motivated to press the point. The same would be true even if some people disagreed and were highly motivated to press the point, so long as they were too marginal—that is, too far removed from decision-making power—for their disagreement to make a practical difference.

This last description probably captures the real situation that existed in American law between the 1940s and the 1980s. Throughout that period, some leading lawyers held straightforwardly to the idea that consequential internal limits are a mandatory part of the constitutional scheme.<sup>164</sup> But the view was marginal, and the people who held it were out of power. In 1942, the Supreme Court's expansive construction of the commerce power in *Wickard v. Filburn* was unanimous.<sup>165</sup> Two decades later, a Supreme Court

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163. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (raising the possibility that the commerce power, properly construed, had no remaining practical limits).

164. See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 458–70 (2001).

165. 317 U.S. 111 (1942).

with five Democratic appointees and four Republican appointees unanimously upheld Congress's far-reaching exercise of the commerce power in the Title II cases.<sup>166</sup> Those cases were decided barely six weeks after the leading spokesman for the critics of such a broad construction of the enumerated powers—Barry Goldwater<sup>167</sup>—suffered a landslide loss in a national election. At the time, many people may have thought that Goldwater's stinging defeat closed the book on a certain kind of constitutional conservatism.<sup>168</sup> But Goldwater's then-marginal view did not disappear. In an arc perhaps best represented by the rise of William Rehnquist, who acted as Goldwater's legal counsel on constitutional issues,<sup>169</sup> the idea that the federal government really is—and must be—limited by its enumerated powers returned to mainstream prominence. Barely seven years after Goldwater's defeat, Rehnquist was an associate justice of the Supreme Court. Nine years after that, in a separate opinion in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, Justice Rehnquist criticized the Court's jurisprudence for not taking seriously enough the proposition that Congress can exercise only certain delegated powers.<sup>170</sup> And after another fourteen years, with a new majority behind him, Chief Justice Rehnquist wrote for the Court in *United States v. Lopez*.<sup>171</sup>

Today, many highly placed constitutional lawyers, both on and off the bench, favor using internal limits in seriously consequential ways.<sup>172</sup> They do not regard the enumeration principle as merely a symbol of continuity with predecessors who operated a substantively different system from our own. They consider it the basis for a practical rule of a governmental structure to which our predecessors were wisely committed and that we would abandon only foolishly and at great cost, not to mention unlawfully. A high-stakes national debate about the limits of federal power is in progress. Within that debate, the enumeration principle is already weaponized. And the weapon is potent because it uses a proposition that everyone affirms. Constitutional lawyers generally conflate the enumeration principle with the internal-limits canon: the purpose of enumeration is taken to be the limitation of Congress. So if everyone professes the enumeration principle, the project of imposing

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166. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *McClung*, 379 U.S. 294.

167. See 110 CONG. REC. 14,318–19 (1964) (statement of Sen. Goldwater) (opposing the Civil Rights Act of 1964 on the grounds that Title II and Title VII exceeded the enumerated powers of Congress).

168. See PERLSTEIN, *supra* note 164, at 516.

169. *Id.* at 461.

170. 452 U.S. 264, 307–09 (1981) (Rehnquist, J., concurring).

171. 514 U.S. 549 (1995).

172. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius* (NFIB), 132 S. Ct. 2566, 2676–77 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Barnett, *supra* note 10; Barry Friedman & Genevieve Lakier, "To Regulate," Not "To Prohibit": *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255 (arguing that the commerce power should not be construed to include the power to shut down an interstate market).



internal limits seems to grow inexorably from a proposition that everyone acknowledges to be true.

Under these conditions, it would not be wise for people who do not relish the idea of a robust set of judicially imposed internal limits on Congress to go on repeating the enumeration principle exactly as it has been repeated in the past. People who hold the view that such internal limits are necessary are well served to continue repeating the enumeration principle, and surely most will do so in good faith. And for people on all sides of the doctrinal issue, the enumeration principle retains the value it has long had as a device for constructing a sense of historical continuity. But under present conditions, repeating the enumeration principle risks fostering the idea that the Constitution requires meaningful internal limits. The formula is weaponized, and the weapon points in one particular direction. So for those of us who think that the Constitution might not require internal limits any more consequential than the ones already in operation,<sup>173</sup> the traditional way of repeating the enumeration principle now comes at an important cost. It could contribute to the eventual invalidation of laws that ought to be regarded as perfectly constitutional.

#### IV. WHAT IS TO BE DONE?

What, then, is the best course of action for constitutional lawyers who think it would be a mistake for the rhetorical force of the enumeration principle to foster consequential limits on congressional power? The answer is not to reject the enumeration principle. To be sure, that solution might seem tempting. I have argued that the enumeration principle is best understood as a continuity tender, meaning that it signifies continuity but might otherwise have no practical consequences. If enumeration has no practical consequences, it might seem costless—except to our sense of continuity—to stop saying that the federal government is a government of enumerated powers. And if we were to stop treating the enumeration principle as a significant axiom, it would have no persuasive power.

But there are serious problems with this approach. For starters, it may prescribe the impossible. Constitutional lawyers are unlikely to stop reciting that the federal government is a government of enumerated powers. The traditional axiom is a robust meme in our constitutional culture. Pronouncing it marks the speakers as people educated into the tradition and lets them experience a welcome sense of continuity with the constitutional past. We *like* saying that the federal government is a government of enumerated powers. Invocation of the enumeration principle did not cease during the

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173. I do not mean here to reject the authority of *Lopez*, 514 U.S. 549, and *United States v. Morrison*, 529 U.S. 598 (2000), as precedential case law. Those cases having been decided, it is a correct statement of current doctrine to say that the Commerce Clause is subject to an internal limit, and lower courts are bound to respect that limit. But *Lopez* and *Morrison* were, in my view, wrong to rest on the idea that some internal limit must exist.

half century between *Wickard v. Filburn*<sup>174</sup> and *United States v. Lopez*,<sup>175</sup> when the idea that enumeration should do practical work was at a low ebb.<sup>176</sup> The practice is not more likely to go away now, and a campaign to banish it might be quixotic. Worse, it would mark the campaigners as constitutional heretics, or at least as people insensitive to the traditional norms of constitutional law. In short, turning against the enumeration principle would probably be both fruitless and self-destructive.

Fortunately, the enumeration principle is not really the problem. We all agree that the federal government is a government of enumerated powers, meaning that Congress may legislate only on the basis of powers that the Constitution delegates to it.<sup>177</sup> The problem is with an inference from the principle—that is, the internal-limits canon—rather than with the enumeration principle itself. Constitutional lawyers commonly conflate the two propositions, and for a long time that conflation was not practically damaging. The time has come to insist on the distinction.

The enumeration principle speaks to the *source* of Congress's powers, not to their *scope*. As Marshall wrote, "This government is acknowledged by all to be one of enumerated powers. . . . But the question regarding the extent of the powers actually granted, is perpetually arising[ ] . . ." <sup>178</sup> In other words, the fact that a set of powers is enumerated cannot settle the question of what those powers can be used to do. The enumeration principle requires that every valid federal statute be traced to some power that the Constitution delegates to Congress. But it is perfectly possible for a set of delegated powers, taken collectively, to include power sufficient for any regulatory project that a given legislature might pursue. By way of illustration, I offered earlier the example of a legislature with seven enumerated powers, one authorizing legislation on each day of the week.<sup>179</sup> The powers of the legislature are enumerated, but the enumeration does not limit the legislature, because there will always be a power authorizing the legislature to act.

The preceding example shows that an enumeration of powers can be designed such that it will always have exactly the same scope as a grant of general powers. In other scenarios, whether a set of enumerated powers is equivalent in practice to general legislative authority depends on particular

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174. 317 U.S. 111 (1942).

175. 514 U.S. 549.

176. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1036 (1988); C. Perry Patterson, Book Review, 32 TEX. L. REV. 251, 252 (1953) (reviewing WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

177. Again, subject to the proviso that "enumeration" may be a term of art, such that "enumerated powers" is a category that includes not only those powers whose delegation to Congress appears explicitly in the constitutional text but also those powers that the Court holds to be implicitly delegated to Congress as a matter of constitutional structure. See *supra* note 50.

178. *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 405 (1819).

179. See *supra* text following note 48.

facts about the powers enumerated and the circumstances in which they are applied. Earlier, I offered the example of a legislature with several enumerated powers, one of which authorized it to make law in cases substantially affecting the interests of Presbyterians. That power might become the functional equivalent of a general legislative power if the whole population became Presbyterian, but it would be considerably more limited if Presbyterians constituted only a small minority group—and the Presbyterian proportion of the total population might vary over time.<sup>180</sup> Similarly, imagine that I issue the following authorization to my son at the dinner table: “For dessert, you can have chocolate ice cream, vanilla ice cream, or strawberry ice cream.” Does the enumeration limit his choices? It depends on what is in the freezer.<sup>181</sup>

Once we recognize that an enumeration of powers need not be limiting in practice, we can affirm the enumeration principle without endorsing the internal-limits canon. The enumeration principle tells us that no federal statute is valid unless it is traced to some power that the Constitution gives to Congress. It leaves us free in every case where the conclusion would be warranted to conclude that some power, properly understood, does in fact authorize the action that Congress has taken. To be clear, it also leaves us free to conclude, in cases where the conclusion would be warranted, that the powers of Congress are not sufficient to underwrite some statute that Congress has passed. What must be rejected is the internal-limits canon—that is, the idea that there *must* be internal limits—rather than the sheer possibility of internal limits. Maybe there are internal limits, and maybe there aren’t. It depends on the best construction of the particular powers enumerated and the circumstances in which those powers are brought to bear. But if we distinguish clearly between the internal-limits canon and the enumeration principle, we can affirm that the federal government is a government of enumerated powers without suggesting that those enumerated powers necessarily add up to something less than a grant of general legislative authority.

Lest there be doubt, we can equally well assert the variant formulation of the enumeration principle that describes the federal government as a government of *limited and enumerated* powers.<sup>182</sup> The powers of Congress are enumerated, which, for the reasons just described, does not mean that they must be subject to internal limits. And like all governmental powers in the American system, the powers of Congress are limited. They are limited by the Bill of Rights, by the provisions of Article I, Section 9,<sup>183</sup> and by all other external limits that the Constitution specifies.<sup>184</sup> Unlike a state legislature

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180. See *supra* text following note 48.

181. Primus, *supra* note 5, at 581. For other examples, see *id.*, at 637–38.

182. *E.g.*, United States v. Butler, 297 U.S. 1, 65 (1936) (“[T]he United States is a government of limited and enumerated powers . . .”).

183. See U.S. CONST. art. I, § 9 (prohibiting, inter alia, the passage of bills of attainder and ex post facto laws).

184. See, e.g., *id.* art. III, § 1 (establishing a Supreme Court and implicitly prohibiting Congress from abolishing that Court); *id.* amend. XIX (prohibiting discrimination on the basis of sex in voting).

whose powers are limited but not enumerated, the powers of Congress are therefore limited and enumerated, as the traditional formula says. But the fact that the federal government is a government of limited and enumerated powers does not mean that the enumeration is a mechanism for the limitation of those powers. A government of limited *and* enumerated powers need not be a government limited *by* its enumerated powers.

A constitutional lawyer who wishes to affirm the enumeration principle without endorsing the internal-limits canon might need to take care not to be misunderstood. So long as most of the audience conflates the two ideas, it will be necessary to explain clearly what the difference is between them. Instead of simply saying “The federal government is a government of enumerated powers,” it might be prudent to say something like “The federal government is a government of enumerated powers wisely limited by affirmative constitutional prohibitions.” It would require a bit more effort. But it is effort that the current weaponization of the enumeration principle makes necessary.

To whatever extent a strict understanding of the enumeration principle gained traction, the persuasive power of the traditional formula would be neutralized in arguments about the scope of congressional power. We would still have to argue about whether a particular congressional power justified this or that piece of legislation—as is perfectly appropriate. But within those arguments, people offering broad constructions of Congress’s powers would not need to fear the question “If Congress can do that, what can’t Congress do, short of violating some external limit?” The answer to that question might well be “Maybe nothing, and that’s fine.” Nor would people arguing for broad constructions of congressional power need to forfeit the sense of continuity and the persuasive legitimacy that come from affirming the enumeration principle. They could instead demonstrate loyal continuity with the constitutional tradition by affirming the principle, after which they could give the formula its strict meaning and note that the principle just didn’t bear on the question at hand. They would then proceed to argue about the best understanding of the specific congressional powers at issue in any given case.

Many lawyers would find the strict understanding of the enumeration principle unpersuasive, especially at first. Some would reject it on the theory that there would be no point in enumerating the powers of Congress unless the enumeration were limiting. But in part for reasons already explained, that objection would be too quick. Yes, the fact that the Constitution enumerated congressional powers suggests that there was, in 1787, a point in enumerating those powers. Indeed, there were at least two points to doing so. The primary purpose was to empower Congress, which had up until then been too weak. The secondary purpose was to avoid shifting too much authority to Congress—a purpose for which the enumeration was one strategy among several.<sup>185</sup> But the fact that enumeration was intended in part to limit Congress does not mean that the enumeration must (or can) serve that same

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185. See Kramer, *supra* note 34, at 1515–20.

function today. *Something* must limit Congress, but it need not be enumeration, and in practice external limits and process limits and the dynamics of cooperative federalism do the job pretty well.<sup>186</sup> Moreover, nothing is more common in long-lived institutions than for a rule or practice to outlive its usefulness for one or more of the purposes it initially served. And as explained above, an enumeration designed to be limiting in one set of circumstances might cease to be limiting in practice as circumstances change.

Finally, even if the enumeration no longer serves its original limiting purpose, it would not follow that it serves no purpose at all. Indeed, it still serves two important functions. One is its primary original purpose: it ensures that Congress is adequately empowered to address national problems. The other function is one that developed later on, one that sounds in constitutional identity rather than in the pragmatics of legislation. By reciting that the federal government is a government of enumerated powers, constitutional practitioners locate themselves within the tradition of their predecessors.

A skeptic might wonder at this point whether the invocation of the enumeration principle can really count as a tender of continuity if the enumeration is no longer required to serve its original limiting purpose. But that worry forgets the essence of continuity tenders. As a general matter, continuity tenders function by allowing members of a community to use ritual formulas in ways that do *not* require them to take on all of the commitments that those formulas might have originally signaled. If the Queen were a modern legislative authority, Parliament's enacting clause would not have the same ritual meaning that it currently has. It might simply be a straightforward statement about what is happening today. What gives the enacting clause its symbolic significance as a marker of continuity is its incongruity with the realities of modern legislation. In short, a continuity tender is not a practice whereby we follow in our predecessors' footsteps by speaking as they spoke and thinking as they thought. It is a practice whereby we speak as they spoke as a way of marking our connection with them, even as our thoughts or our conditions are different from theirs.

Finally, it is worth remembering that a continuity tender does not signal a sense of appreciative connection with only a single point in history. It locates the speaker with respect to a tradition over time. And if we are concerned that a nonlimiting construction of the enumerated powers would be foreign to the way that our predecessors understood the enumeration principle, we should remember that "our predecessors" is a large and diverse group and that different people at different times within the constitutional tradition probably meant different things when they described the federal government as one of enumerated powers. We might also take note that our sense of what any of our predecessors meant should be consistent with what we know about their behavior—and that dominant constitutional practice has, for generations, tolerated federal legislation virtually without internal limits.

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186. See Primus, *supra* note 5.

## CONCLUSION

The federal government is a government of enumerated powers. As a practical matter, that proposition need not today differentiate the federal government from a government with general legislative authority, limited by external limits and a democratic political process. But it is still a proposition worth repeating, because there is more to constitutional law than practical governance. Constitutional law is also about the construction of intertemporal national identity, and repeating the enumeration principle is one of the rituals by which constitutional lawyers maintain the sense that we are continuing a project that spans many generations.

Bagehot famously described ritual as indispensable for modern government. Within his own country's constitution, he wrote that the common people could regard the constitutional regime as legitimate only thanks to the monarchy's transcendent mysteries.<sup>187</sup> It was imperative, therefore, that the mysteries be kept mysterious. "We must not let in daylight upon magic," he wrote.<sup>188</sup> Perhaps he was right in some ways, too cynical in others, and in yet others, right and cynical at the same time. But ritual and mystery need not be deployed only in a cynical spirit. Sometimes they speak to the nobler aspects of a community's self-conception, and they can speak to elite as well as mass audiences, and they do not always require deception in order to do their work. But even when a bit of ritual mystery is a healthy thing, decisionmakers should recognize ritual for what it is—not in order to deny the ritual its symbolic power, but so as to avoid mistaking the ritual for something it is not. Too much daylight kills the magic, but one needs enough light to see what one is doing.

The time has come to see more clearly that the enumeration principle does not require the internal-limits canon. Taken figuratively, as a continuity tender, the enumeration principle requires no practical consequences at all. Taken strictly, it is not the case that a government of limited and enumerated powers must be a government limited *by* its enumerated powers. Though to be clear, the fact that it is an error to think there *must* be internal limits on the powers of Congress does not mean that there are no such limits. It means only that there *might* be no such limits. Whether there are in fact meaningful internal limits is a matter of contingency. It depends, as explained above, on the relationship between the particular powers Congress has and the real-world circumstances in which those powers are applied.

My analysis thus calls for the rejection of the internal-limits canon, not the categorical rejection of internal limits. And so long as it remains possible that the best construction of the powers of Congress would not in fact authorize Congress to do everything that a police power would, there are good reasons to avoid describing federal legislative power as fully plenary. One such reason, of course, is that it is good to speak clearly about what power

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187. BAGEHOT, *supra* note 57, at 35–37.

188. *Id.* at 50.

the federal government does and does not have. But another of those reasons, perhaps paradoxically, is that sometimes it is good *not* to speak too clearly about that issue. An open declaration that there are no internal limits would eliminate the “modest ambiguity” about the possibility that the enumeration does practical as well as symbolic work. And the success of a ritual formula’s symbolic work sometimes depends on modest ambiguity about whether the formula can do practical work as well. The trick is to let in enough light that we can see the magic without letting in so much that the magic disappears.