MEMORY, RESISTANCE, AND DOUBT

Richard Primus*

I. THE RESISTANCE OF MEMORY

Burroughs v. United States[1] is not a famous case. But it could be. Its central character was a famous man. James Cannon, Jr., was a bishop in the Methodist church, a player in the worlds of business and banking, a ruthless political power broker, and a zealous Prohibitionist.[2] In Virginia, where he lived, his role within the Democratic Party earned him the informal title of "the dry boss of the state,"[3] and his influence extended well beyond the Old Dominion. Indeed, the essayist H.L. Mencken identified Cannon as the most important Prohibitionist in the country. "More than any other man," Mencken wrote, it was Cannon who "had been responsible for forcing Prohibition upon a suffering United States."[4]

But as sometimes happens to political bosses, Cannon eventually attracted the adverse attention of federal prosecutors. In 1928, Cannon used his political muscle to oppose the presidential candidacy of Al Smith, the eventual Democratic nominee, who favored the repeal of Prohibition. According to an indictment filed against Cannon and his personal secretary, a woman named Ada Burroughs, some of Cannon's anti-Smith activities fell afoul of a federal campaign finance law, the Corrupt Practices Act, which regulated financial contributions and expenditures related to presidential elections.[5]

In their defense, Burroughs and Cannon challenged the constitutionality of the Corrupt Practices Act.[6] The Constitution, they noted, provides that "[e]ach State shall appoint" presidential electors "in such Manner as the Legislature thereof may direct."[7] In their view, that language indicated that the regulation of presidential elections was a matter of state law. Congress's role in legislating with respect to

---

* Theodore J. St. Antoine Collegiate Professor, The University of Michigan Law School. Thanks to Caleb Ashley, Madeline Guth, Haley Rogers, and Kathleen Ross—and, of course, to Jack Balkin and the organizers of this Symposium.

[1] 290 U.S. 534 (1934).

[2] Peter H. Odegard, *Dabney: Dry Messiah*, 55 AM. HIST. REV. 639, 639–40 (1950) (reviewing VIRGINIUS DABNEY, DRY MESSIAH: THE LIFE OF BISHOP CANNON (1949)).

[3] *Id.* at 639.

[4] H.L. Mencken, *Daniel in the Lion's Den*, EVENING SUN (Balt.), Apr. 30, 1934, at 17.

[5] United States v. Burroughs, 65 F.2d 796, 798 (D.C. Cir. 1933).

[6] Burroughs v. United States, 290 U.S. 534, 542, 544 (1934).

[7] U.S. CONST. art. II, § 1, cl. 2.

presidential elections, they contended, was limited to "determining 'the time of choosing the electors, and the day on which they shall give their votes,'"[8] because that is the only aspect of the process that the Constitution expressly empowers Congress to regulate. Rules for how presidential campaigns were financed were therefore beyond Congress's ken, and the Corrupt Practices Act was unconstitutional.

The Supreme Court rejected that argument. Justice George Sutherland's opinion for the Court noted that the Act, by its terms, only covered political activities intended to influence "the election of presidential and vice presidential electors in two or more states."[9] As such, Sutherland wrote, the Act "in no sense invades any exclusive state power" because it regulated something that no state could adequately deal with alone.[10] Moreover, the presidency is a crucial national office, and denying Congress the power to assure the integrity of presidential elections would "deny to the nation in a vital particular the power of self protection."[11] Sutherland continued as follows: "Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[12]

Those observations seem reasonable on their own terms, and I suspect that few modern lawyers would doubt the constitutionality of a statute like the Corrupt Practices Act. But it is worth noting something that is absent from the Court's opinion in *Burroughs*. Nowhere did the Court identify an enumerated power of Congress that justified the Corrupt Practices Act. Sutherland's argument was structural: in his view, Congress had the power to enact that legislation for reasons having to do with what states were and were not capable of doing and also for reasons having to do with what the national government needed in order to be effective. But according to a familiar view, such arguments cannot be sufficient to establish the constitutionality of a federal law. "Every law enacted by Congress," the Supreme Court has prominently announced, "must be based on one or more of its powers enumerated in the Constitution."[13] Structural considerations like those Sutherland articulated can inform the interpretation of Congress's enumerated powers, but every federal law must have some enumerated power at its foundation. Why, then, did the Court identify no such power when it sustained the Corrupt Practices Act in *Burroughs*?

---

[8] *Burroughs*, 290 U.S. at 544 (quoting U.S. CONST. art. II, § 1, cl. 4).

[9] *Id.* at 541.

[10] *Id.* at 544–45.

[11] *Id.* at 545.

[12] *Id.*

[13] United States v. Morrison, 529 U.S. 598, 607 (2000); *see also* NFIB v. Sebelius, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J., writing for the Court) ("If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted . . . .").

If the *Burroughs* Court had felt the need to do so, it would not have been difficult for it to justify the Corrupt Practices Act as an exercise of the federal government's enumerated powers. Here is one way to do it. The Constitution expressly vests the President with several important powers. Those powers cannot be executed unless the office of the presidency is filled. So there needs to be a process for filling the office. And for the powers of the presidency to be carried out in an appropriate way, the process for filling the office must be safeguarded against corruption that would lead to abuses of presidential power. Article I, Section 8 vests Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[14] The President is an officer of the United States,[15] and the executive branch is a department of the national government. Congress, under the Necessary and Proper Clause,[16] therefore has the power to make laws safeguarding the integrity of presidential elections.

So why didn't the *Burroughs* Court say that, or, if not that, give some other explanation of how the Corrupt Practices Act was an exercise of Congress's enumerated powers? Twenty-first century lawyers are not bothered by that question, and the principal reason why not is that they do not think about *Burroughs* at all. But if confronted with *Burroughs* and asked this question, the dominant tendency would be to hypothesize explanations consistent with the proposition that Congress can legislate only on the basis of its enumerated powers. (For ease of reference, we can call that proposition the *enumeration principle*.) That is, the explanations would take for granted that the *Burroughs* Court recognized the authority of the enumeration principle, and the thing to be explained would be why the Court did not think it important to show with particularity that its conclusion was justified in light of that proposition. Maybe the Justices thought it was obvious. Maybe they agreed on the conclusion but not on the reasoning, and they thought it better to present a united front sustaining the Act than to air disagreement about why the Act was valid. Or maybe something else.

My own sense is that the best explanation is something different. The *Burroughs* Court did not identify any enumerated power that warranted the Corrupt Practices Act, I suggest, because the *Burroughs* Court did not subscribe to the enumeration principle. The Justices did not believe—or at least, did not consistently believe—that every federal law must be grounded in some enumerated power. As I have explained at length elsewhere, the text of the Constitution does not actually prescribe the enumeration principle: it can be read to support that idea, but it need not be.[17] And at various moments in American constitutional history, judges and other

---

[14] U.S. CONST. art. I, § 8, cl. 18.

[15] *See, e.g.*, John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 BRIT. J. AM. LEGAL STUD. 237, 249–57 (2024).

[16] U.S. CONST. art. I, § 8, cl. 18.

[17] *See* RICHARD PRIMUS, THE OLDEST CONSTITUTIONAL QUESTION: ENUMERATION AND NATIONAL POWER (forthcoming 2025) (manuscript at 133).

people have taken the view that Congress has non-enumerated powers as well as enumerated ones.[18]

In a way, this potential explanation is the most straightforward of all possible explanations. The Court did not identify an enumerated power because it did not think it was required to. So it is worth thinking about why twenty-first century lawyers would be unlikely to proffer that explanation—and indeed, likely to resist it when offered.

Part of the reason is a matter of doctrine. Twenty-first century lawyers know the enumeration principle as a rule of constitutional law, so they expect the practice of constitutional law to conform to that principle. But that is not all. Twenty-first century lawyers know that constitutional doctrine, in many respects, was different in the past from what it is today. *Burroughs* was decided in 1934.[19] A lawyer who reads a case from 1934 in which the judges seem untroubled by a state's treating people differently on the basis of race or sex would have no trouble understanding that those judges had a different understanding of constitutional law from the one that currently prevails. What prevents twenty-first century lawyers from hypothesizing that the *Burroughs* Court did not subscribe to the enumeration principle is not the fact that the enumeration principle is treated as the law today. It is a simplified view of constitutional history on which the enumeration principle has *always* been the law. In other words, part of what does the work is the force of constitutional memory, in the sense in which theorists like Jack Balkin and Reva Siegel use the term.[20] Constitutional memory, like other forms of social memory, is a shared and simplified understanding of the past.[21] Like other forms of social memory, it presents the past as teaching a certain set of lessons.[22] And once constitutional memory is established, it prompts lawyers to resist noticing ways in which constitutional history does not conform to the story that memory tells.

The prevailing constitutional memory among constitutional lawyers includes a stylized account of the Founding on which the enumeration principle was, from the beginning, a fundamental aspect of the constitutional system. One element of that stylized account is a story on which the Framers omitted a Bill of Rights from the original Constitution because they trusted the enumeration of powers to do all the necessary work of limiting the federal government.[23] Another is that Americans ratified the Constitution in reliance on assurances, given by leading Federalists during

---

[18] *Id.* (manuscript at 154).

[19] Burroughs v. United States, 290 U.S. 534 (1934).

[20] *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022).

[21] Siegel, *supra* note 20, at 22.

[22] *See* PAUL CONNERTON, HOW SOCIETIES REMEMBER (1989).

[23] *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 144–45 (1982).

the ratification debates, that Congress would have only those powers enumerated in the Constitution's text.[24] That picture of the Founding teaches that the enumeration principle has been fundamental from the beginning.

But that picture of the Founding obscures a more complex story. Here are some things that the prevailing memory leaves out. When Federalists, during the ratification debates, tried to justify the Constitution's lack of a Bill of Rights on the grounds that the enumeration of powers would adequately limit the general government, they persuaded essentially no one.[25] On the contrary, many Americans diagnosed the Federalists' claim about enumerated powers as a bogus rationalization of the Constitution's failure to include a Bill of Rights, rather than as an authentic explanation of why the Convention had chosen not to include one.[26] That public skepticism was probably justified: the surviving records of the Convention contain no evidence that the Framers' reason for omitting a Bill of Rights was that they trusted the enumeration of powers to limit the federal government.[27] And the Framers' reluctance to include a Bill of Rights is more straightforwardly explained in other ways—including by reference to the fact that conflicting views about slavery might have made it impossible to agree on the language to be adopted.[28] Similarly, although it is true that leading Federalists assured the ratifiers that Congress could wield only its textually enumerated powers, there is no evidence that any significant number of Americans voted to ratify in reliance on those assurances. We know of no floor speeches or diary entries by state convention delegates saying things like, "I was reluctant to support this Constitution because it might create a too-powerful general government; but the Federalists assure us that Congress will be limited to its enumerated powers, and on that basis I'll go along." And in the First Congress, prominent members took the position that the federal government had non-enumerated powers as well as enumerated ones.[29]

None of that proves that the enumeration principle should not be a part of our constitutional law. As it happens, I don't think it should be. But the fact that Founding-era history is more complex than the prevailing memory admits does not suffice to make that case. The important point for present purposes is that the enumeration principle is supported by a simplified and in some ways distorted memory of the Founding. Constitutional lawyers tell a story about how the Framers and ratifiers thought about enumerated powers. It is a story that mobilizes some authentic truths

---

[24] *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 70–71 (1987); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1920 (2008).

[25] *See* Lash, *supra* note 24, at 1915.

[26] See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 377–78 (2007).

[27] *See* PRIMUS, *supra* note 17 (manuscript at 72).

[28] *Id.* (manuscript at 74–76).

[29] *Id.* (manuscript at 116–19).

about the 1780s. Prominent Federalists did sometimes argue that the enumeration of powers made a Bill of Rights unnecessary or even undesirable,[30] and prominent Federalists did sometimes represent that Congress would be able to exercise only its textually enumerated powers.[31] But it is also a story that leaves out a fair amount of relevant material and fills narrative gaps in ways not supported by documentary evidence.

Once that story is established as a prevailing part of constitutional memory, the simplifying work it does is not limited to the way constitutional lawyers think about the Founding. It also disposes us to resist noticing complexity about enumerated powers at later stages of constitutional law's development. When we confront a case like *Burroughs*, the force of memory teaches that we are not seeing the Court sustain an act of Congress on a basis other than that of enumerated powers, because constitutional law does not work that way. It works the way that the memory-story directs.

This is so even though constitutional lawyers might be aware of reasons to think that the Supreme Court at the time of *Burroughs* was not uncompromisingly committed to the enumeration principle. In *United States v. Curtiss-Wright Export Corp.*, decided in 1936, the Court declared that the federal government is not limited to its enumerated powers when it acts in the realm of foreign affairs.[32] In foreign affairs, the Court wrote, the government of the United States exercises power as a sovereign body under the law of nations, rather than deriving its power from the specifics of the Constitution.[33] After all, the Court noted, the United States is older than the Constitution.[34] Before the Constitution existed, the United States engaged in the activities of a sovereign government in international affairs, like waging war and making treaties.[35] So its power to do things like that is not a function of any specific text in the Constitution.[36]

This discussion in *Curtiss-Wright* might make lawyers open to the possibility that the reason the *Burroughs* Court did not identify an enumerated power underlying the Corrupt Practices Act is that it did not regard the enumeration principle as an always-applicable proposition of constitutional law. The two cases were decided only a few years apart, and the two opinions were written by the same Justice.[37] So perhaps a willingness to recognize non-enumerated powers in one case signals a willingness to do so in the other. But pointing to *Curtiss-Wright* would not change most constitutional lawyers' reluctance to see *Burroughs* as a departure from the

---

[30] *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton).

[31] *See, e.g.*, THE FEDERALIST NO. 39 (James Madison) (describing the federal government as vested with jurisdiction over "certain enumerated objects only").

[32] 299 U.S. 304, 315–16, 318 (1936).

[33] *Id.* at 318.

[34] *Id.* at 317.

[35] *Id.*

[36] *Id.* at 318.

[37] *Id.* at 304; Burroughs v. United States, 290 U.S. 534, 540 (1934).

enumeration principle. For one thing, Sutherland's opinion in *Curtiss-Wright* described foreign-affairs legislation as an exception to the enumeration principle. "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers," Sutherland wrote, "is categorically true only in respect of our internal affairs."[38] One might point to this language in *Curtiss-Wright* as evidence that the Court in *Burroughs* really did think that the Corrupt Practices Act was an exercise of an enumerated power, even though it did not specify which. After all, here is the author of *Burroughs* saying, just a few years later, that in domestic affairs the enumeration principle is "categorically true."[39] But it is also possible that Justice Sutherland, like other constitutional lawyers, sometimes spoke of the enumeration principle in oversimplified ways. Perhaps *Burroughs* was simply not salient to Sutherland when he wrote *Curtiss-Wright*, and he expressed as a general rule something that he might acknowledge was qualified if pushed on a particular point—much as the modern Court often articulates the enumeration principle as a categorical rule even though every Justice surely knows that *Curtiss-Wright* exists.

More generally, and precisely because its account of federal power departs so starkly from the normal enumerated-powers story, constitutional lawyers tend to cabin or downplay *Curtiss-Wright* rather than taking it as evidence that non-enumerated congressional powers might once have been a robust part of constitutional law.[40] (A few months ago, a well-credentialed professor of public law giving a workshop presentation I attended declared more or less in passing that *Curtiss-Wright* is "crazy," and nobody at the workshop asked for further explanation.) And as a matter of atmospherics, the fact that *Curtiss-Wright* is a Sutherland opinion

---

[38] *Curtiss-Wright*, 299 U.S. at 315–16.

[39] *Id.*

[40] Executive branch lawyers in foreign-affairs cases are fond of citing *Curtiss-Wright* for a different proposition: that the President is the sole organ of the United States government in the realm of foreign affairs. *See* Zivotofsky v. Kerry, 576 U.S. 1, 19–20 (2015) (noting the argument of the Secretary of State, in reliance on *Curtiss-Wright*, that the President is "the sole organ of the federal government in the field of international relations" (quoting *Curtiss-Wright*, 299 U.S. at 320)). That aspect of *Curtiss-Wright*, too, is one from which official doctrine keeps its distance; the modern Supreme Court has declined to reaffirm the proposition. *See id.* at 20 ("This Court declines to acknowledge that unbounded power. . . . The *Curtiss-Wright* case does not extend so far as the Secretary suggests."); *see also id.* at 66 (Roberts, C.J., dissenting) ("The expansive language in *Curtiss-Wright* casting the President as the 'sole organ' of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power." (citation omitted)). But be that as it may, the part of *Curtiss-Wright* that asserts inherent and unenumerated federal power in foreign affairs is more outside the mainstream of constitutional thought than the part that asserts the President's role within whatever foreign-affairs power the federal government has.

delivered in 1936 renders it vulnerable to skepticism. Sutherland was, after all, a member of the bloc of Justices whose views about federalism were repudiated during the Switch in Time, from 1937 onward. So it is not hard to choose to treat an odd-sounding account of federal power in one of his opinions in 1936 as a weird outlier, rather than as a sensible and authoritative statement of law.

To be sure, Sutherland's status as a representative of a pre–New Deal understanding of federal power could cut the other way. Suppose we were prepared to understand the history of constitutional law as a complex story in which courts have recognized many kinds of unenumerated federal power. We might then say that *Curtiss-Wright*'s recognition of non-enumerated federal power in foreign affairs should be seen as a signal that the federal government actually has non-enumerated powers in other realms too, because the best understanding of federal power in a post–New Deal world is probably broader than the one that a federal-power skeptic like Sutherland held in 1936. But in fact, constitutional lawyers do not take *Curtiss-Wright* to suggest anything more ambitious about inherent federal powers than Sutherland was willing to allow before the Switch in Time. If we permit *Curtiss-Wright* to disrupt the simple story about the enumeration principle as a fundamental proposition that has existed throughout our constitutional history, we do so only to the smallest extent possible, by taking at face value Sutherland's statement that foreign affairs is an exception and that the enumeration principle remains "categorically true . . . in respect of our internal affairs."[41] We certainly don't let *Curtiss-Wright* stand for something broader—something that might, among other things, suggest that *Burroughs*, too, was a departure from the enumeration principle, even though it was not a case about foreign affairs.

So now consider a third case. In *Prigg v. Pennsylvania*,[42] decided in 1841, the Court upheld the constitutionality of the federal Fugitive Slave Act.[43] But Justice Joseph Story's opinion for the Court did not present that Act as the exercise of a textually enumerated congressional power.[44] Instead, the Court justified the Act partly as a matter of structural reasoning, on the theory that the logic of American federalism required Congress to be able to enact such a law, and partly as a matter of historical reasoning, on the theory that the Southern states would never have agreed to the Constitution if the Constitution did not permit Congress to enact such a law.[45] Story's opinion did say that the Fugitive Slave Act enforced a particular constitutional clause: Article IV, Section 2 provides that a "person held to Service or Labour in one State . . . escaping into another . . . shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[46] But Article IV contains

---

[41] *Curtiss-Wright*, 299 U.S. at 316.

[42] 41 U.S. 539 (1842).

[43] *Id.* at 615.

[44] *See id.* at 618 (denying that federal legislation must always be justified by "the express powers of legislation enumerated in the Constitution").

[45] *Id.* at 564–65, 615.

[46] *Id.* at 634; U.S. CONST. art. VI, § 2, cl. 3.

no text assigning the power to enforce that provision to Congress, and the Constitution enumerates no congressional power to enforce provisions of the Constitution whose methods of enforcement are otherwise unspecified. (The text of the Necessary and Proper Clause authorizes Congress to carry into execution the powers of the national government, not the provisions of the Constitution.[47]) On a strict understanding of the enumeration principle, the Court should have concluded that enforcement of the Fugitive Slave Clause was left to the states, because no constitutional text assigned that power to Congress.

Like *Burroughs* and *Curtiss-Wright*, *Prigg* complicates the simple story on which it has always been clear that Congress can legislate only on the basis of enumerated powers. But as was true of *Curtiss-Wright*, constitutional lawyers will find it easy to resist the idea that their general sense of what the law has been should be revised based on *Prigg*. For one thing, *Prigg* is not familiar to most constitutional lawyers and therefore not part of prevailing constitutional memory.[48] Second, even when *Prigg* is part of what modern constitutional lawyers know, discussions of the case often ignore or fail to notice the enumerated-powers problem.[49] Third, *Prigg* is an ugly case, morally. When trying to persuade constitutional lawyers to adopt a different picture of the history of the law than the one they presently use, it is useful to offer them instead a more attractive story, rather than a less attractive one. Modern constitutional lawyers—if aware of *Prigg* at all—would like *Prigg* to be an example of the law gone wrong, not an example of authoritative constitutional practice.[50] So pointing out that the Court in *Prigg* recognized a non-enumerated congressional power based on structural and historical reasoning might not sound like a reason to think that recognizing such powers is a matter of best practices in constitutional law.

---

[47] *See* U.S. CONST. art. I, § 8, cl. 18.

[48] In a conversation with eight of my colleagues who have recently taught the introductory class in constitutional law at my own institution, the University of Michigan Law School, two reported teaching *Prigg* as a main case, three reported assigning a note mentioning *Prigg*, and three said that their courses do not mention *Prigg*. Some leading casebooks (*e.g.*, NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (21st ed. 2022)) make no reference to the decision.

[49] In the current edition of the casebook that I use when teaching the introductory course in constitutional law, the discussion of *Prigg* says that the Court "held that article IV, section 2 vested Congress with the power to assist owners in securing the return of escaped slaves" but does not ask how that can be so, given the absence from Section 2 of any power-granting language. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 409 (9th ed. 2023). In other words, the discussion fits *Prigg* within the enumerated-powers model rather than asking whether *Prigg* signals the possible limits of that model. For an exception, see RICHARD D. FRIEDMAN & JULIAN DAVIS MORTENSON, CONSTITUTIONAL LAW: AN INTEGRATED APPROACH 102 (2021) (raising the enumerated-powers question).

[50] *See, e.g.*, Sanford Levinson, *Is* Dred Scott *Really the Worst Opinion of All Time? Why* Prigg *Is Worse Than* Dred Scott *(But Is Likely to Stay Out of the "Anticanon")*, 125 HARV. L. REV. F. 23, 30 (2012).

United States v. Kagama[51] is similar. In that case, the Supreme Court held that Congress had the power to enact criminal laws applicable to Native Americans on reservations not because such enactments came within any textually enumerated congressional power but by virtue of historical and structural features of the federal government's relationship with Native Americans.[52] Once again, we have a case indicating that Congress can sometimes legislate on bases other than its enumerated powers. And once again, constitutional lawyers will find it easy to deny that that case should prompt them to rethink their general understanding about enumerated powers. Indian law is enormously important to many people, but, like the law of foreign affairs, it occupies a marginal place in the consciousness of most constitutional lawyers. So as a psychological matter, *Kagama*, like *Curtiss-Wright*, can be written off as an anomaly, rather than as revealing anything about the main business of constitutional law. Moreover, among many lawyers for whom Indian law is a central concern, *Kagama* is disreputable. Just last year, in *Haaland v. Brackeen*,[53] Justice Gorsuch excoriated *Kagama* at length as a product of bigoted attitudes toward Native Americans and insisted that congressional power over Native American affairs, like congressional power over anything else, must arise from Congress's textually enumerated powers.[54]

Justice Gorsuch was not wrong to think that the Court that decided *Kagama* (and other nineteenth-century Indian law cases) saw Native Americans through a racist lens.[55] So *Kagama*, like *Prigg*, is a problematic data point to use if one is trying to get constitutional lawyers to see that the history of enumerated powers is more complex than the prevailing memory allows. The most effective way to alter social memory (including constitutional memory) is usually by replacing it with a different social memory, and most of the time people resist giving up a familiar story in favor of a story that seems worse. If the alternative to the prevailing view of enumerated powers depends on *Kagama* and *Prigg*, the prevailing view is likely to stick around.

What would a Supreme Court case that was more useful as a resource for challenging the prevailing memory of continuous adherence to the enumeration principle look like? Ideally, it would be both normatively attractive and undeniably important. It would establish a proposition that constitutional lawyers are happy to embrace on a topic too central to the constitutional regime to dismiss as marginal. If such a case asserted the existence of non-enumerated constitutional powers, it might be hard to ignore.

---

[51] 118 U.S. 375 (1886).

[52] *Id.* at 379 (holding that the power does not derive from Indian Commerce Clause or Indians Not Taxed Clause); *id.* at 384–85 (explaining that the power arises from logic of history and relationship).

[53] 599 U.S. 255 (2023).

[54] *Id.* at 298–308 (Gorsuch, J., concurring, joined by Sotomayor & Jackson, JJ., in part).

[55] *Id.* at 327.

So consider *Knox v. Lee*,[56] also known as part of the *Legal Tender Cases*.[57] In 1871, the Supreme Court in *Knox* upheld Congress's creation of paper currency in the Legal Tender Acts.[58] Congress's ability to create paper money is about as central to its governing capacity as anything it does, and the circulation of greenbacks has for a long time been a basic and normal aspect of American society. A Supreme Court case making all of that possible should be a big deal, especially given how hotly contested the issue of paper money had previously been.[59] And the Court in *Knox* made clear that, in its view, Congress had the power to create paper money not by virtue of some enumerated power but in spite of the fact that no particular enumerated power authorized that action.[60] "[I]t is not indispensable to the existence of any power claimed for the Federal government," the Court wrote, "that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers."[61] Instead, the Court asserted that some congressional powers were rooted in the national government's general status as a sovereign entity.[62] The power to create currency, the Court reasoned, is a normal incident of sovereignty.[63] So if the Constitution meant to deny that power to the government of the United States, it would have said so.[64] That conception of federal power is deeply different from the normal enumerationist conception. Rather than recognizing only those federal powers that the Constitution affirmatively establishes, it asserts a category of powers that the federal government wields unless the Constitution affirmatively says otherwise. That is the basis, as a matter of constitutional doctrine, on which the Supreme Court decided that the greenbacks in your wallet are legal tender.[65]

---

[56] 79 U.S. 457 (1871).

[57] *Id.*

[58] *Id.* at 529.

[59] Hepburn v. Griswold, 75 U.S. 603 (1870), *overruled by Knox*, 79 U.S. 457.

[60] Many modern Americans reading Article I, Section 8 will have the intuition that Congress's enumerated power "[t]o coin Money," U.S. CONST. art. I, § 8, cl. 5, authorizes Congress to create currency of whatever kind it chooses. But *Knox* did not dispute the then-conventional view that the power to coin money was only a power to create specie—that is, metal coinage. *See Knox*, 79 U.S. at 547.

[61] *Knox*, 79 U.S. at 534.

[62] *Id.* at 535 ("[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.").

[63] *Id.* at 529.

[64] *Id.* at 545–46 ("Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference.").

[65] Justice Joseph Bradley's concurring opinion put the idea this way:

> The United States is not only a government, but it is a National government, and the only government in this country that has the character of

Why, then, does this hugely important Supreme Court case not seem to detract in any way from constitutional lawyers' general sense that Congress can only exercise its enumerated powers (or, among some constitutional lawyers speaking more carefully, that Congress can only exercise its enumerated powers, except in a few anomalous domains like foreign affairs and Indian law that should be regarded as curious exceptions rather than as normal parts of the system)? The short answer is that the *Legal Tender Cases* have been almost entirely written out of the shared knowledge of constitutional lawyers. Several leading casebooks—each one a compilation of well more than a thousand pages of materials that might be part of an education in constitutional law—ignore *Knox* entirely, or nearly so.[66] I am confident that most federal judges sitting today have never read the *Legal Tender Cases*, nor, probably, have most of the people who teach constitutional law at American law schools. (I had been teaching constitutional law for several years before reading them for the first time.)

The judges and law professors who have not read the *Legal Tender Cases* are not blameworthy for this gap in their understanding of the constitutional past. Nobody knows everything that is written on every page of the United States Reports. The legal profession functions based on a body of knowledge that is a subset of all possibly relevant information. Judges and law professors should be aware that there is also more out there and that the work they do will periodically call on them to expand what they know. But they generally assume that whatever else might be out there does not call into question the fundamental principles of constitutional law.

> nationality. . . . It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws . . . . Such being the character of the General government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.

Id. at 555–56 (Bradley, J., concurring).

[66] In the most recent (2023) edition of *Constitutional Law*, edited by Geoffrey Stone et al., the *Legal Tender Cases* appear only as a citation within the Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the topic is takings rather than congressional powers. *See* STONE ET AL., *supra* note 49, at 868, 1360. In the previously mentioned textbooks edited by Feldman and Sullivan and by Friedman and Mortenson, the cases do not appear at all. *See* FELDMAN & SULLIVAN, *supra* note 48; FRIEDMAN & MORTENSON, *supra* note 49. Two exceptions are *Processes of Constitutional Decisionmaking*, edited by Sanford Levinson et al., and *The Constitution of the United States*, edited by Michael Paulson et al.—each one a book that self-consciously departs from traditional approaches to the introductory curriculum in constitutional law. SANFORD LEVINSON ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (8th ed. 2022); MICHAEL STOKES PAULSON ET AL., THE CONSTITUTION OF THE UNITED STATES (5th ed. 2022).

II. SIMPLICITY AND ITS CONSEQUENCES

It should be clear at this point that the history of constitutional law with respect to the enumeration principle is considerably more complicated than prevailing memory allows. In the normal simplified view, the enumeration principle was a central element of the Constitution from the beginning and a matter of consensus. Major disputes about the extent of congressional power in our own time focus not on the question of whether Congress has non-enumerated powers but on the question of whether the broad construction of Congress's enumerated powers during and since the New Deal might undermine the point of limiting Congress to those enumerated powers. Because we see that issue as a product of the New Deal Court's jurisprudence, and because we take the enumeration principle itself as something that goes back to the Founding, we take for granted that prior to the New Deal, constitutional law respected the enumeration principle in a basically simple way. But in fact, the Supreme Court in the nineteenth and early twentieth centuries recognized congressional powers on bases other than their enumeration in the constitutional text.[67] This is not to say, of course, that the Court did not also assert, on other occasions, that Congress was limited to its enumerated powers. But historical practice is more complex than those assertions suggest. In practice, the Court has held that Congress is limited to its enumerated powers, except when dealing with foreign affairs.[68] And slavery.[69]

---

[67] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

[68] *Id.*

[69] It is here worth revisiting the question of whether it is advisable, or viable, to challenge an existing way of thinking on the basis of normatively unattractive Supreme Court decisions. Modern lawyers are likely to find cases like *Prigg* and *Kagama* alienating. Pointing out that the Court in those cases took a particular approach might accordingly persuade a modern audience *not* to adopt that approach. ("If what the Court does when it lets Congress operate beyond its enumerated powers is make decisions like *Prigg* and *Kagama*, then no thank you, let's not let Congress operate beyond its enumerated powers.") But this reaction would be misplaced, in part because it fails to reckon with the real sources of the ugliness we associate with those cases. Nineteenth-century American law tolerated slavery and took a racist view of Native Americans for reasons entirely independent of any theory about the source or limits of congressional power. There is no reason to think that either Congress or the Court would have been any more antislavery or any more racially egalitarian if they had held strictly to the enumeration principle. Indeed, a fair amount of early enthusiasm for the idea of a Congress limited to its enumerated powers was rooted in a desire to prevent Congress from having the capacity to legislate against slavery, and a considerable portion of the nineteenth-century Supreme Court cases striking down federal action as beyond Congress's enumerated powers invalidated laws designed to secure rights to African-Americans or prosecutions of white Southerners who had engaged in racist violence. The overarching point, of course, is that both enumerationist and non-enumerationist constructions of congressional power during the nineteenth century led to normatively objectionable results not because either of those constructions builds in an objectionable race-based agenda but because American decision-makers at that time held the substantive attitudes that they held.

And Indian law.[70] And currency.[71] And elections.[72] And some other things, too.[73] It starts to add up.

These complexities are smoothed out of constitutional memory for more than one reason. For one, human beings have limited mental bandwidth, and simple stories are easier to remember than complicated ones. Academics who hold complicated historical accounts in their heads do not necessarily have greater capacity for retaining complex ideas than federal judges who operate with simplified versions of history. They might simply be allocating more of their capacity for complexity to constitutional history than the judges are. Any given judge might have a more nuanced understanding of civil procedure, or bankruptcy, or antitrust law, than most constitutional historians have. (We all economize on complexity somewhere.) Moreover, legal education is subject to the economics of the syllabus: there is only so much that students in a constitutional law class can be expected to learn. Most law teachers see it as their responsibility to expose students to the ideas that the modern constitutional regime treats as authoritative. That task is large enough to preclude the teaching of a lot of material that does not bear directly on how courts approach constitutional questions in the present.

But the simplified version of the history of congressional power does not prevail only for those reasons. It prevails also because memory is self-reinforcing. Law students who learn the simplified story at Time 1 become judges who write opinions repeating the simplified story at Time 2, which new law students read at Time 3, and so it goes. Once constitutional lawyers as a community learn to think that there is a simple story about enumerated powers running from the Philadelphia Convention to John Marshall to *United States v. Lopez*[74] and *NFIB v. Sebelius*,[75] they have a natural tendency to resist readings of history on which the story is more complex. It is perfectly normal not to notice what one does not expect to see.

In my view, the prevailing memory of enumerated powers is a memory worth challenging—not just in scholarship, where one should always strive to avoid oversimplification, but in the practice of constitutional law. The reason why it should be challenged within that practice is not that it is oversimplified, relative to a nuanced historical account. Most of constitutional law is influenced by constitutional memory, and all constitutional memory is oversimplified relative to nuanced historical accounts. An attempt to banish memory from the practice of constitutional law would be a fool's errand—or even, perhaps, a failure to understand what American constitutional law is actually about. For better and for worse, American constitutional law is an enterprise in which people contest the meaning of America and the character of the American people over time, and struggles over memory are inseparable from

---

[70] United States v. Kagama, 118 U.S. 375, 379, 384–85 (1886).

[71] Knox v. Lee, 79 U.S. 457, 534 (1871).

[72] Burroughs v. United States, 290 U.S. 534, 544 (1934).

[73] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 603–09 (1889) (immigration).

[74] 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990).

[75] 567 U.S. 519 (2012) (upholding the Patient Protection and Affordable Care Act of 2010).

that contest. So the fact that the prevailing memory does not reflect history's real complexity is not a sufficient reason to think that it should be displaced from the practice of constitutional law—though it is certainly a good enough reason to think that historians should recognize it for the distorting simplification that it is.

Instead, the importance of challenging this particular memory within the practice of constitutional law is a matter of its tendency to support or even foster substantively pernicious decision-making. In my view, limiting Congress to its textually enumerated powers serves no practically useful function within constitutional law. It is conventionally understood to play a vital role in maintaining American federalism, but in practice it is a poor tool for that job. What the idea of a limiting enumeration is actually likely to do, under modern conditions, is invite judges to strike down democratically enacted legislation that the judges find intuitively objectionable but which is not prohibited by any previously existing constitutional rules. Given that democratically responsive government is important and that legislation is hard to come by, that outcome seems undesirable: judges should not strike down federal legislation without good reasons, and "this is beyond any power enumerated in the Constitution" is not a sufficient reason.[76] The text of the Constitution does not actually demand that federal legislation be limited to the enumerated powers, and the federalism benefits of trying to limit Congress by reference to the enumerated powers are illusory. This is not the place for a full development of those claims: readers who are interested can consider my arguments elsewhere.[77] For the moment, the point is that if I am right that limiting Congress to its enumerated powers is unnecessary and probably even pernicious, then it would be beneficial to challenge the shared memory that leads constitutional lawyers to regard the enumeration principle as a fundamental rule of constitutional law.

III. DOUBT

An attempt to change some aspect of constitutional memory could aim at either of two things. One is the substitution of a different memory. The other is the cultivation of doubt.[78]

---

[76] To be precise, it *is* a sufficient reason as measured by the standard of compliance with currently prevailing law, so a lower court unable to avoid the conclusion that a federal law was justified by no enumerated power would have a good reason to strike down the law, assuming that the law did not come within some doctrinal exception to the enumeration principle like the one articulated in *Curtiss-Wright*. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–16 (1936). My statement that a law's being beyond the enumerated powers is not a good reason to strike it down is meant as a statement about the way that constitutional law should work, and indeed the way that I think it would work if better understood, rather than as a claim about the current responsibilities of judges bound by the decisions of higher courts.

[77] *See* PRIMUS, *supra* note 17.

[78] In Balkin's terms, the first of these is a constructive use of history and the second is deconstructive. *See* BALKIN, *supra* note 20, at 5–6.

Replacing the dominant memory in constitutional law on the subject of enumerated powers would mean persuading constitutional decision-makers to approach questions of congressional power through the lens of a story whose moral was different from the moral of the limiting-enumeration story. An alternative story might run like this: The Framers went to Philadelphia to build a more powerful general government. They deliberately omitted from the Constitution any language limiting Congress to its enumerated powers.[79] Article I, Section 8 was written to empower Congress, not to limit it. During the ratification debates, Antifederalists read the text of the Constitution and loudly proclaimed that the Constitution would create a national government with something like general jurisdiction, and the public ratified the Constitution with full knowledge of that possibility. In the 1790s, leading members of Congress asserted that the enumerated powers were only a subset of Congress's legislative powers. And through the nineteenth and early twentieth centuries, the Supreme Court on many occasions recognized the existence of non-enumerated congressional powers.

Each element of that story is either clearly true or else mostly true, the latter designation meaning "subject to cavils about overstatement, but still defensible to a first approximation as a claim about the constitutional past." But the story as a whole obscures the historical complexity of the subject. It omits, and perhaps hopes to erase, other aspects of constitutional history: that leading Federalists during ratification did present the Constitution in enumerated-powers terms, that officials throughout American history have (not uniformly, but commonly) subscribed to the idea of a Congress limited by its enumerated powers, that the Supreme Court has on multiple occasions struck down legislation on that basis.[80] In short, this alternative story is a candidate for constitutional memory, not a historical account that would equip decision-makers to proceed on the basis of something like full and nuanced historical understanding.

Jack Balkin cautions that players in the game of constitutional meaning have essentially two options when it comes to memory: they can put forward their own versions of constitutional memory, or they can be governed by other people's versions.[81] This is counsel worth taking seriously. The point seems particularly strong if the alternative to acting under the influence of some version of constitutional memory is acting free from all such influence, because that alternative is not possible. Constitutional law is partly a contest about American national identity, and American national identity is largely a function of what stories we recognize as shared and authoritative about the American past. So there is no prospect of an

---

[79] Even the Tenth Amendment, which was not part of the original Constitution, does not purport to limit Congress to its enumerated powers. It speaks of "delegated powers," not "enumerated powers," and delegations of power need not be express. *See* U.S. CONST. amend. X; PRIMUS, *supra* note 17 (manuscript at 7–8).

[80] *See generally* PRIMUS, *supra* note 17.

[81] BALKIN, *supra* note 20, at 13.

American constitutional law that is not shaped by constitutional memory. And in the realm of constitutional politics, movements for change succeed by replacing one dominant set of memories with another set, rather than by getting Americans to avoid the simplifications and distortions that memory always involves.

It does not follow, however, that there is no way to change or improve the content of constitutional law without banishing one version of memory and installing another one. The question of whether a given constitutional decision-maker is operating with a certain conception of constitutional memory is dimensional rather than binary: among any community with shared memory, some people are more powerfully affected by that memory than others. Most federal judges have a positive (and simplified) view of Founding-era America, but only some federal judges wear three-cornered hats. And sometimes people are uncertain about their memories: we remember things a certain way, but we know there might be something we are leaving out. Sometimes doubt about a memory is a stage through which we pass on the way to remembering things differently. But not always: sometimes we keep our existing conceptions without resolving our doubts. To be sure, memory resists doubt, much as it resists complexity. So if the reasons to doubt a memory don't rise above a certain threshold, people will push the doubt away. (If all you have is *Burroughs*,[82] or *Burroughs* and *Curtiss-Wright*,[83] the conventional story about enumerated powers will probably remain robust.) But beyond that threshold, there is a zone in which responsible decision-makers might doubt the conventional story even if they are not persuaded to adopt a substantially different one. In that zone, a decision-maker might still act as the conventional memory directs, most of the time. But perhaps a bit more uneasily.

The difference between acting with confidence in the truth and power of a certain memory and subscribing to that memory but more circumspectly can be a difference that matters. Suppose that during the coming decade the Supreme Court is asked to strike down important federal laws on enumerated-power grounds. A Court operating with the simple and confident sense that the enumeration principle has always been a fundamental precept of constitutional law would believe itself duty-bound to strike down the law if it seemed to exceed Congress's enumerated powers. Indeed, such a Court might in a close case decide to see a statute as beyond those powers precisely in order to have an occasion for vindicating a principle central to constitutional law as the Court understood it, thus writing itself into the heroic story that it understood itself to inherit.[84] But a Court with nagging doubts about the completeness of the conventional enumerated-powers story might take a more restrained approach. Without giving up the traditional enumerated-powers idea, and without deciding that the story of constitutional law is radically different from what

---

[82] Burroughs v. United States, 290 U.S. 534 (1934).

[83] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[84] *See* Richard Primus, *How the Gun-Free School Zones Act Saved the Individual Mandate*, 110 MICH. L. REV. FIRST IMPRESSIONS 44 (2012).

it previously assumed, such a Court might be more open, if only inchoately, to tempering its commitment to enumerated powers with other considerations germane to constitutional law, like stability and respect for a coordinate branch of government.[85] A memory held a bit more doubtfully might direct action a little less bold.

Memory is resilient. Once established as the shared property of a generation of decision-makers, it is unlikely to be abandoned. Large changes in the constitutional memory that dominates decision-making in American law can therefore only happen slowly, or at exceptional moments when the cast of decision-makers changes more quickly than usual. But as Salvador Dalí's famous painting suggests, the persistence of memory does not mean that the vision memory confers will always be clear.[86] It can be made hazy—the sort of thing that one hesitates to act confidently upon, even as it persists. So where memory points in an unfortunate direction, inducing doubt can be salutary even when it is not possible to replace or overcome that memory entirely.

---

[85] *See* PRIMUS, *supra* note 17 (manuscript at 237). Such a Court need not announce that, in fact, it is consistent with our history for Congress to legislate beyond the limits of its enumerated powers. It could instead simply be willing to construe the enumerated powers broadly enough to sustain the challenged legislation.

[86] Salvador Dalí, *The Persistence of Memory* (illustration), *in Collection 1880s–1940s*, MUSEUM OF MODERN ART, https://www.moma.org/collection/works/79018 [https://perma.cc/Q874-NUFH] (last visited Nov. 27, 2024).