

# The Fiduciary Constitution, the Separation of Powers, and the Legal Landscape After *SEC v. Jarkesy*

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## INTRODUCTION

For decades, the American people’s right to a jury trial under the Seventh Amendment was severely curtailed by Congress, the executive branch, and the judiciary. To implement “functional government,” Congress passed several statutes allowing executive branch agencies to proceed through juryless in-house tribunals, which the Supreme Court blessed through a series of decisions enlarging the so called “public rights doctrine”—with the high-water mark coming in *Atlas Roofing v. OSHC*. Yet the civil jury right is once again ascendant. The Supreme Court held in *SEC v. Jarkesy* that administrative agencies cannot seek civil

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penalties against the American people through juryless in-house proceedings. And the Court made clear that the public rights doctrine is a narrow “exception” to the general constitutional rule that Americans’ right to a jury trial in a civil proceeding must be preserved when they face deprivations of life, liberty, or property.

That ruling perhaps threatens to upend the very structure of agency adjudication that has permeated administrative law for near a century. But in *Jarkesy*’s wake, many have nonetheless proposed new ways to limit the decision’s reach and save this feature of the modern administrative state. For example, some have proposed a defendant sued by an executive agency may well simply agree to have his case heard by that executive agency. Or, others say, most causes of action and remedies pursued in agency proceedings fall outside the Seventh Amendment’s scope, so *Jarkesy* is just a blip. These proposals may well be constitutional under the Supreme Court’s modern precedent. But they raise more fundamental issues about our Constitution’s structure, which the Roberts Court, if slowly, continues to restore by revitalizing the Constitution’s separation of powers.

This article steps back to assess several antecedent questions after *Jarkesy* and suggests that litigants and scholars consider this broader context when exploring how the civil jury right, and other individual rights, should be protected going forward. We advocate for a return to a view of the Constitution that fulfills its original purpose: to protect liberty. Jury rights, like all constitutional issues, fit within a broader framework, and agency adjudication must comply with that framework.

Start at the beginning:<sup>1</sup> what is the nature of the Constitution? The Constitution is fundamentally a fiduciary-like document that establishes a principal-agent relationship between “We the People” and the federal government.<sup>2</sup> Through the Constitution, the American people delegate certain enumerated and limited powers to specific federal actors who serve as the people’s agents in carrying out defined duties and responsibilities.<sup>3</sup> The federal government (more specifically

1. This paper takes certain positions and its authors hold varying conclusions about protecting the civil jury right. But the more important goal here is for the reader to consider the questions in a broader context before thinking about how we move forward. Constitutional adjudication spans hundreds of years and legal opinions over it run into the millions of pages. And the nature of constitutional adjudication narrows the litigation focus to specific issues in individual cases and controversies. We do not make any claim that many of our views are something courts, other than the Supreme Court, can implement in many instances because of doctrines like *stare decisis*.

2. See generally GARY LAWSON & GUY I. SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* (2017).

3. See *id.*; see also, e.g., Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *The Constitution and the Public Trust*]; GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68–70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. 1385 (2018).

certain actors within the federal government) may only wield those powers specifically delegated to it by the people, expressly or implicitly.<sup>4</sup>

This view of the Constitution is supported by the document's text, which specifically enumerates and then vests different powers in different actors: "the executive power" and "the judicial power" are vested, respectively, in the executive and judicial departments, and "all legislative powers herein granted" are vested in Congress.<sup>5</sup> It is those powers that those specific actors may wield. Any time the federal government acts, it must be doing so under these delegated powers.

That sounds basic. And it is. But this framework too often is ignored. Overlooked, too, are the next steps in any proper constitutional analysis: what power is being wielded and whether that power is specifically enumerated (or delegated from the people) within the Constitution. If so, one should then ask a second question: who has the power? The Constitution's enumeration of certain powers to certain actors provides the answer. The Constitution gives separate powers to specific actors—the separation of powers—which proscribes any further subdelegation to other actors. Thus, the Constitution does not authorize agents to give their power away to anyone else. Once these questions are answered, many issues that arise in constitutional litigation, including those that arise in Seventh Amendment cases, can likely be resolved on structural constitutional grounds.

Other constitutional text, of course, plays a role, too. After all, the Seventh Amendment and the Bill of Rights protect individual rights. And "there is nothing in the Constitution that specifically states . . . that Congress may not authorize other actors to exercise legislative power."<sup>6</sup> So, one might say, only those affirmative *limits* on the government found in the Bill of Rights preserve the People's rights. But this gets the order of operations backward, and as Professor Lawson explains, "reflects a fundamental misunderstanding of the American Constitution."<sup>7</sup> The Bill of Rights provides greater protection—like wearing a belt *and* suspenders—when these structural safeguards against an overreaching federal government fail, and at the same time can serve, in some cases, as a structural check on many of the actors assigned to carryout duties under the Constitution.<sup>8</sup> This is not to disparage the Constitution's individual rights provisions—both enumerated and unenumerated. As history and the modern legal landscape show, the Framers were prescient in placing an exclamation point on the limits of federal power with the Bill of Rights.<sup>9</sup> Even so, protecting rights under a Bill of Rights framework can lead to doctrinal

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4. LAWSON & SEIDMAN, *supra* note 2, at 51–54.

5. *Id.* at 52.

6. Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335 (2002).

7. *Id.*

8. See generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

9. Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 513–15 (1999) (arguing that, under the original Constitution, an "extensive Bill of Rights was unnecessary and inappropriate because the national government's enumerated powers did not include the power to regulate" the rights later included and thus became "exclamation points" for what the federal government may not do); Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1142 (noting the "first ten amendments were added to define the rules of" the enumerated powers limitations.).

confusion susceptible to muddled jurisprudence filled with constitutional “exceptions” and pragmatic approaches at odds with the Constitution’s text and structure.<sup>10</sup>

Once one grapples with the Constitution’s structural elements, the Seventh Amendment rarely provides an independent protection; the very nature of the Constitution guards against encroachments on the jury right. The questions of what power and who may wield the power the Constitution assigns may often be dispositive in protecting people’s right to a civil jury trial.

One specific provision is especially apt when it comes to the civil jury right. We the People delegate, under Article III, “the judicial Power of the United States”—to judicial branch actors who are exclusively vested with that power. There is no enumerated power allowing Congress (or anyone) to give away, arrogate, or allow the executive branch to exercise the judicial power—including, but not limited to, federal agencies. In turn, nothing in the Constitution authorizes the executive branch to wield that power. So whether an agency may hear and ultimately decide a matter turns on whether the Constitution has affirmatively allowed them to wield that power.

If true, many of the proposed functional limits on the Supreme Court’s *Jarkesy* decision are nonstarters. Indeed, it does not matter whether a party “consents” to have the executive branch wield power against them, or “waives” the right to have his or her case heard in an Article III court—where the jury right would attach in certain cases. Under our government of enumerated and separated powers, an executive agency may not exercise the judicial power of the United States—no matter how efficient the practice may be. Like all other parts of government, executive agencies act at the direction of the People.<sup>11</sup>

At bottom, the federal government’s powers cannot be divorced from the Constitution’s broader structure and context. Instead, the Founders created a government assigning certain actors limited and enumerated powers to ensure ordered liberty. The Constitution—its text, its history, its *meaning*—tell us what Congress, the executive, and judiciary may do as our agents. Any attempt to circumvent those authorizations undermines the fiduciary nature of the document. And no one may, in the face of convenience, waive or alter these principles.

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10. See e.g., Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27 (2018). We also note that the Bill of Rights plays a very different role under the Fourteenth Amendment, which makes many of the Bill of Rights provisions the primary protection for liberty with respect to the states.

11. We acknowledge that certain adjudications within the executive branch may constitute the exercise of “executive” as opposed to “judicial” powers. We also do not contend that *any* adjudication is judicial simply because it has judicial-like elements. We instead say merely that *whether* a power is judicial or executive cannot turn on an individual’s “waiver,” “consent,” or any other extra-constitutional consideration. We also take seriously Chief Justice Roberts’s observation that “The rise of the modern administrative state has not changed th[e] duty” of Article III *courts* to “say what the law is.” *City of Arlington v. FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

With this background in mind, this article proceeds in three parts: Part I explores the nature of the Constitution's structure and text reflecting a fiduciary relationship between the people and the government, with the people as principals delegating limited powers to their government agents. Part II shows how this fiduciary understanding supports the enumerated powers doctrine, which in turn informs the separation of powers and subdelegation doctrines. Part III applies these principles and reexamines the constitutional debate over the Seventh Amendment Right to a Civil Jury Trial and Article III's grant of "judicial Power" to the federal courts. It argues that, properly understood, the enumerated powers and separation of powers doctrines largely obviate the need to define the scope of these Article III and Seventh Amendment guarantees in the context of agency adjudication of "public rights" cases.

### I. THE NATURE OF THE CONSTITUTION: A FIDUCIARY-LIKE INSTRUMENT<sup>12</sup>

Ask a hundred lawyers what the Constitution means and you're sure to get two hundred answers. Ask a constitutional scholar and be prepared to read a few hundred pages of law review articles. Try to consume it all (if you could in one lifetime) and you would likely be no better off knowing just what our founding document means. Hundreds of years of spilled ink—much of it in the United States Reports and esteemed pages of law review journals—parsing phrases, analyzing commas, and studying prefatory clauses has left us no closer to constitutional consensus. But the project is vital to the American experiment. We will thus, briefly, sketch out our view: We the people, through the Constitution, delegate limited power to specific actors assigned to protect Americans' liberty.

#### A. *First Principles*

We trace our constitutional roots to British ground. Many lawyers and scholars view the 1787 Constitution as a logical outgrowth of the state charters and British practices that preceded it.<sup>13</sup> But though Blackstone, the British Constitution, and the various state constitutions provided fertile soil from which our Constitution grew, the ultimate harvest was a new crop. Our Founders did not simply copy—

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12. We do not claim to have discovered a novel view of the Constitution's text, structure, or context in this paper. Our view of the Constitution is largely based on Professor Natelson's work expanded on by Professors Lawson and Seidman. See *supra* note 3. And we recognize many have sought to critique or differently support this view. See also *Symposium: "A Great Power of Attorney": Understanding the Fiduciary Constitution by Gary Lawson and Guy Seidman*, 17 *GEO. J. L. & PUB. POL'Y* 2 (Summer 2019), <https://www.law.georgetown.edu/public-policy-journal/in-print-2/volume-17-number-2-summer-2019> [<https://perma.cc/MSU2-EU9U>]. We also caution a few caveats. First, Professor Lawson and Seidman have made plain that their work is not arguing for a theory of constitutional adjudication but merely describing what they see as the Constitution's original meaning. See Gary Lawson & Guy Seidman, *Authors' Response: An Enquiry Concerning Constitutional Understanding*, 17 *GEO. J. L. & PUB. POL'Y* 491, 492–494 (2019) [hereinafter Lawson & Seidman, *Symposium Response*]. Thus any consequents extrapolated from their work is our own and should not be attributed to them. Second, the constraints of the law review forum do not allow us to check every box while explaining the theory. That would literally take a book. See LAWSON & SEIDMAN, *supra* note 2.

13. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

or completely mimic—what the states and Britain had done. They paved a new path.

In fact, the Founders well understood that they were creating a governmental structure unique to the world. They deliberately sought to distance the new country from ineffective state constitutions and Parliamentary supremacy in England. By the time the ink dried on our founding documents, we lived in a world with a new conception of power—where it came from and who could wield it.

That matters. After all, constitutional meaning flows from text, context, and structure—and the structure makes sense only when one grasps the nature of the document and legal thinking that surrounded it. Why does Article I Section 8 specify Congress’s powers? Why do different Articles “vest” various branches with specific duties? Why was a Bill of Rights added? And just where did this power and these rights come from anyway?

Only context can answer those critical questions. And four features of the Constitution provide key insight to how America distinguished itself from previous forms of government: (1) popular sovereignty, (2) the enumeration of powers, (3) separation of powers, and, a bit later, (4) a bill of rights. These concepts all rose and fell together—one necessarily implied the next. And these tied-at-the-hip ideas found a new role only after a decade of evolution between 1776 and 1787.

Today, though, lawyers, judges, and scholars often downplay or ignore the interplay among these critical ideas when addressing legal disputes. Or, more importantly, many lawyers ignore the context in which these ideas emerged—and how they work hand in hand. They should not. Our Constitution emerges from a particular context, and one can understand the document and its implications only when one grasps that broader context. To that task we turn.

#### *B. A Delegation of Specific Power from “We the People” to the Agents of Government*

The U.S. Constitution has been subject to diverse interpretations and theories throughout its history, each seeking to clarify the document’s meaning and purpose. We do not offer a new theory or view of the Constitution but explain one we find particularly persuasive: the fiduciary Constitution. Under that view, the Constitution is fundamentally a grant of enumerated powers from a principal (the sovereign people) to agents (specific actors delegated duties and powers in the various clauses). It establishes a fiduciary relationship under which the people delegate certain defined powers to the federal government to exercise on their behalf and subject to the people’s ultimate control.<sup>14</sup> It requires governmental actors to govern in accordance with fiduciary principles of loyalty, care, impartiality, and accountability.<sup>15</sup> And even when the authorizing instrument does not

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14. Lawson *et. al*, *supra* note 3 at 415–16; Lawson & Seidman, *By Any Other Name*, *supra* note 3 at 1387.

15. See Lawson & Seidman, *supra* note 3 at 1387.

expressly specify these duties, fiduciary law presumes their existence as inherent in the principal-agent relationship.<sup>16</sup>

This conception flows first from the Preamble’s declaration that “We the People . . . do ordain and establish this Constitution,”<sup>17</sup> suggesting that all federal power derives from the people as ultimate sovereigns. As Professors Robert Natelson, Gary Lawson, and Guy Seidman—among others—have explained, the founding generation certainly was steeped in fiduciary legal concepts when they set out to draft the Constitution.<sup>18</sup> The Constitution’s drafters were predominantly attorneys familiar with fiduciary instruments, and the ratification debates are replete with references to the Constitution as a “great power of attorney,” a “trust,” and “delegation,” and to government officials as “servants,” “agents,” “guardians” and “trustees” of the people.<sup>19</sup>

The Constitution’s text and structure reflect the Preamble’s focus and the Framers’ knowledge. Indeed, the theme of delegated, defined powers runs throughout the document. Article I begins by declaring that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>20</sup> This language makes clear that Congress possesses only those powers “herein granted”—not an unbounded general legislative authority.<sup>21</sup> Article I goes on to enumerate the specific powers granted to Congress—for example, the power to regulate commerce, coin money, and establish post offices.<sup>22</sup> This careful delineation of legislative authority reflects the fiduciary principle that an agent’s powers are limited to those expressly conferred by the principal.<sup>23</sup>

Similarly, Article II vests the “executive Power” exclusively in the President.<sup>24</sup> And most important for this paper as explained below, Article III vests the “judicial Power” in the federal courts.<sup>25</sup> While these powers are in a sense broader, they are still specific power delegations—each to a distinct branch of government and to specific actors. This embodies the fiduciary concept of defined roles and responsibilities.<sup>26</sup> Just as a private law fiduciary’s duties are determined by the

16. *Id.* at 1393.

17. U.S. CONST. pmbl.

18. Lawson *et. al*, *supra* note 3 at 418; Natelson, *The Constitution and the Public Trust*, *supra* note 3 at 1088-1136.

19. Natelson, *The Constitution and the Public Trust*, *supra* note 3 at 1084-86, 1097-1114; LAWSON & SEIDMAN, *supra* note 2 at 13-28.

20. U.S. CONST. art. I, § 1.

21. See LAWSON & SEIDMAN, *supra* note 2, at 51-52; see *Dep’t of Transp. v. Ass’n. of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in judgment) (noting that Articles I, II and III of the United States Constitution do not “vest the Federal Government with an undifferentiated ‘government power.’” Instead, “the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.”).

22. U.S. CONST. art. I, § 8. There are, of course, other powers delegated to Congress. See *e.g.*, U.S. Const. art. IV. While those provisions have a unique role under the fiduciary Constitution, they should be viewed under that same principle. See GREAT POWER OF ATTORNEY, *supra* note 2 at 124-26.

23. Natelson, *The Constitution and the Public Trust*, *supra* note 3 at 1137-40.

24. U.S. CONST. art. II, § 1, cl. 1.

25. U.S. CONST. art. III, § 1.

26. To be sure, the Constitution blends some of these powers by explicitly delegating them to actors outside their assigned branch. For example, the President has an enumerated “veto” power that could be

instrument creating the relationship, each branch's powers and functions are specified by the Constitution's text.<sup>27</sup>

The Constitution's creation of separate legislative, executive, and judicial branches also reflects the fiduciary concern with accountability and divided power to protect a principal's interests. By ensuring that each branch acts as an independent agent of the people, the Constitution's structure guards against the consolidation of governmental power and the betrayal of public trust.<sup>28</sup> As James Madison explained in Federalist No. 51, this "division of power" among distinct departments is "essential to the preservation of liberty."<sup>29</sup>

Beyond these structural features, the Constitution's text includes specific provisions that reflect fiduciary obligations. The President's duty to "take Care that the Laws be faithfully executed,"<sup>30</sup> for instance, echoes the fiduciary duty of care and loyalty.<sup>31</sup> The Necessary and Proper Clause's delegation of supplemental power to Congress to make laws "necessary and proper for carrying into Execution"<sup>32</sup> the enumerated powers similarly tracks fiduciary law's recognition of limited incidental powers.<sup>33</sup> And the Supremacy Clause's description of the Constitution as the "supreme Law of the Land"<sup>34</sup> reflects the overriding nature of the principal's instructions to its governmental agents.<sup>35</sup>

Natelson and Lawson also point to compelling historical evidence that the Constitution was understood as a fiduciary instrument by those who drafted and ratified it. The Founders were familiar with fiduciary principles from several contexts, including the law of trusts, agency, and corporations.<sup>36</sup> Many of the Constitution's drafters, such as James Wilson, John Dickinson, and Gouverneur Morris, were accomplished lawyers who would have been intimately familiar with these concepts.<sup>37</sup>

The ratification debates, too, are replete with discussions of the proposed government in fiduciary terms. Federalists and Anti-Federalists alike spoke of the Constitution as a "great power of attorney," a "charter," or a "trust," and referred to government officials as "servants," "agents," "guardians," or "trustees" of the people.<sup>38</sup> These discussions, Natelson and Lawson argue, reflect a shared

considered legislative. But that only underscores that the Constitution is designed to specifically empower certain actors with certain duties.

27. See Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1125, 1138-40.

28. Lawson & Seidman, *supra* note 2, at 124-26.

29. THE FEDERALIST No. 51, at 318 (James Madison) (Clinton Rossiter ed., 1999).

30. U.S. CONST. art. II, § 3.

31. See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 57-60 (Gary Lawson et al. eds., 2010).

32. U.S. CONST. art. I, § 8, cl. 18.

33. See Natelson, *supra* note 31, at 80-82; Lawson & Seidman, *supra* note 2, at 76-104.

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

35. See Lawson & Seidman, *supra* note 2, at 65-67.

36. See Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1122-27.

37. See *id.* at 1136-37.

38. See *id.* at 1134-35.

understanding that the Constitution was creating a fiduciary relationship between the people and their government.<sup>39</sup>

This understanding also drew on a long tradition of viewing political authority in fiduciary terms. Locke's *Second Treatise of Government*, for example, described government as a "trust" conferred by the people for limited purposes,<sup>40</sup> while English oppositional writers had long characterized the king as a trustee bound to act for the people's benefit.<sup>41</sup> The Founders, steeped in this intellectual tradition, naturally reached for fiduciary principles in crafting their new constitutional order.

Taken together, the Constitution's text and structural features, along with historical evidence, make a compelling case for understanding the document as an instrument that establishes a fiduciary-like government. By vesting limited, enumerated powers in distinct branches and actors—all subordinate to the people's ultimate sovereignty—the Constitution creates a system of governmental agency constrained by fiduciary duties and accountability. Recognizing this fiduciary character is essential to maintaining the Constitution's careful balance of powers and preserving the people's ultimate control over their governmental agents.

## II. IMPLICATIONS OF THE FIDUCIARY CONSTITUTION

Viewing the Constitution through a fiduciary lens affects how one should interpret its provisions—from the scope of federal power, to who may wield it, to the protection of individual rights. In our view, viewing the Constitution as a fiduciary-like document suggests that each branch should construe the scope of its powers narrowly and strictly.<sup>42</sup> In fiduciary law—at least under some subsets—ambiguities in the scope of the agent's authority are generally resolved against the agent, reflecting the norm that delegated powers must be defined and the agent cannot unilaterally expand its authority.<sup>43</sup>

On this view, open-ended constitutional provisions like the Necessary and Proper Clause reflects the agency law view that incidental powers were included, but it is not a substantive grant of power. It confirms that the government's authority is limited to that enumerated and may only be supplemented with means and ends that are genuinely incidental (ministerial) to the enumerated powers. Similarly, potentially expansive enumerated powers with terms like "commerce," "general welfare," or "executive power" must be viewed considering background fiduciary principles that cabin the agent's discretion and preserve the principal's interests.

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39. See LAWSON & SEIDMAN, *supra* note 2, at 38–40.

40. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* § 149 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

41. See JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 28–33 (1989).

42. We recognize there is a debate over the level of deference afforded depending on the exact nature of the type of fiduciary instrument. See *Symposium* and *Symposium Response*, *supra* note 12.

43. See LAWSON & SEIDMAN, *supra* note 2, at 116–18.

*A. The Enumerated Powers Under the Fiduciary Constitution*

If the Constitution is a delegation of power from the people (the principal) to the certain federal government actors (the agents), the enumerated powers doctrine logically flows. And whether the government's actions are within those powers should always be the first question one should always ask when analyzing a constitutional issue. In other words, does the Constitution explicitly authorize the federal government to take the action it is seeking to take? In theory, this question should not be difficult. After all, the Constitution is short and specifically lists these powers. But that has not been the modern case. Courts have, since at least the early 20<sup>th</sup> Century, broadly construed federal powers over nearly all aspects of everyday life.<sup>44</sup>

Even so, almost everyone recognizes that the Framers set out to draft the Constitution as one of enumerated powers. One cannot forget the revolutionary nature of this idea. Before the founding, “enumerated powers” made little sense. No one needed to say what Parliament could do—only what it couldn't do. If it was not written down, the power stayed with the legislature.<sup>45</sup> State governments largely followed this approach, but the Constitution abandoned the state charters on that score.<sup>46</sup> For the first time, the government could do only whatever the people said it could.

This created a problem: States, many thought, remained sovereign, so how could the Founders create a lawmaking federal government?<sup>47</sup> Yes, the sovereign states had delegated power to the Confederation Congress, but the Founders wanted a government not controlled by the states. Yet the very notion of sovereignty prohibited a second legislature. There could be only one sovereign. Two lawmaking bodies, federal and state, in which neither was an agent of the other would result in *imperia in imperio*—a “solecism in politics.”<sup>48</sup> One could not be subject to two lawmaking bodies. That defied the principle of sovereignty. Whoever was the sovereign—the state or national government—was considered the “master” of the government, and it was “impossible to please two masters.”<sup>49</sup> This was a serious problem—one that plagued post-revolutionary Americans.<sup>50</sup>

44. See *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

45. For this reason, Montesquieu described the legislative power in England as “the general will of the state.” BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 158 (Anne M. Cohler et al. ed. & trans., Cambridge Univ. Press 1989) (1748). Montesquieu was simply describing the British model of Parliamentary sovereignty in which the legislature could do what it pleased (for the most part). That later changed, as we discuss below, and the idea that the legislative power in the U.S. Constitution was merely the “general will” of the state likely was not what many founders believed. *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 294 (2021) (arguing that the “legislative power” means “general will of the state” as reflected in Montesquieu).

46. See WOOD, *supra* note 13 at 373–376 (explaining how Americans quickly saw states and legislatures as tyrannical forces and finding “a way to control and restrict the elected representatives in their power[] dominated the politics and constitutionalism of the Confederation period.”).

47. *Id.* at 527 (the “logic of the doctrine of sovereignty required either the state legislatures or the national Congress to predominate.”).

48. See THE FEDERALIST No. 15 (Alexander Hamilton), at 103 (Clinton Rossiter ed., 1999).

49. WOOD, *supra* note 13 at 528.

50. See *id.* at 529–30 (the “problem of sovereignty was the most powerful obstacle to the acceptance of the new Constitution,” and it was “an imposing, scientific conception that could not be put down.”).

What to do? Enter James Wilson. The great Pennsylvanian redefined the concept of sovereignty.<sup>51</sup> As Wilson explained it, no longer were states sovereign. Instead, sovereignty remained with the people.<sup>52</sup> The people became the ultimate and uncontrollable power. Any power the federal government wielded was subject to the people who became the principal in an agency relationship. Our agents? The state and federal governments. Their power? Delegated by the people in such manner as the people chose. At the federal level, that meant limited, enumerated, specific powers vested in three distinct branches. Our agents in the federal government held certain powers, and others were retained by the people and their state governments.<sup>53</sup> *Imperia in imperio* no more.<sup>54</sup>

For the first time in history “the supreme, absolute, and uncontrollable power resides in the people at large. . . [T]hey ha[d] vested certain proportions of this power in the state governments; but . . . the fee-simple continues, resides and remains with the body of the people.”<sup>55</sup> This broke cleanly from the longstanding view of Parliamentary sovereignty across the pond. England accepted legislative supremacy; Americans did not, at least not in 1787. Americans tossed aside earlier state practices and colonial traditions after the Revolution. Indeed, Wilsonian popular sovereignty “evolved during the period between the Revolution and the adoption of the federal Constitution.”<sup>56</sup> Novel indeed.

This was no small move. Placing sovereignty with the people amounted to a “revolution in the[] conception of law, constitutionalism, and politics.”<sup>57</sup> It created a “radical redistribution of the powers of society within the government,” and a “total destruction of these powers and a shattering of the categories of government that had dominated Western thinking for centuries.”<sup>58</sup> No longer were legislatures simply a “reflection of the will of the people” or the “command of a superior sovereign.”<sup>59</sup> Instead, legislatures were merely “the act of the people’s agents.”<sup>60</sup>

51. *See id.* at 530 (James Wilson “developed the argument that would eventually become the basis of all Federalist thinking”—popular sovereignty.).

52. *See id.* at 530 (quoting James Wilson) (sovereignty “always stayed with the people-at-large”); *id.* at 531 (“under the new Constitution neither the state legislatures nor the Congress would be sovereign”); *id.* at 533 (quoting Madison) (the people were “the fountain of all power”).

53. *Seila Law LLC v. CFPB*, 591 U.S. 197, 223 (2020) (The people’s solution to governmental power was “simple: divide it. To prevent the ‘gradual concentration’ of power in the same hands, [the Framers] . . . ‘split the atom of sovereignty’ itself into one Federal Government and the States . . . [and] then divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.).

54. Kurt T. Lash, *Leaving the Chisolm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1592 (2009) (“In the United States . . . the struggles with the British Parliament had resulted in a different view of popular sovereignty, one in which the people existed wholly apart from their representatives in government.”).

55. *See* James Wilson, *Speech to the Pennsylvania Convention* (Dec. 4, 1787), <https://teachingamericanhistory.org/document/speech-to-the-pennsylvania-conventions-morning> [<https://perma.cc/HEG8-9BNS>].

56. Lash, *supra* note 54, at 1593.

57. WOOD, *supra* note 13, at 383.

58. *Id.* at 385.

59. *Id.* at 384–85.

60. *Id.* at 385.

Said otherwise: The concept of popular sovereignty had moved the “principal” from legislatures to the people—the legislators were now the people’s agent.<sup>61</sup> government became “agents of the people for certain limited purposes.<sup>62</sup> And “according to long-standing principles of agency law, an agent must exercise these powers on behalf of and subject to the control of the principal” because “the principal is the ultimate sovereign power in the relationship of principal and agent.”<sup>63</sup>

The constitutional conversation of 1787 abounds with the idea of a sovereign people, not parliament. As James Iredell put the point: “The people are known with certainty to have originated it themselves. Those in power are their servants and agents; and the people, without their consent may new-model their government whenever they think proper.”<sup>64</sup> Oliver Ellsworth saw things similarly: “all the power government now has is a grant from the people.”<sup>65</sup> And John Marshall told the Virginia Convention that “the people hold all powers in their own hands, and delegate them cautiously, for short periods, to their servants who are accountable for the smallest mal-administration.”<sup>66</sup> It was widely accepted that the governments were “agents and trustees of the people.”<sup>67</sup> But the people could always take back that power—after all, “all delegated powers are liable to be abused.”<sup>68</sup>

A sovereign people came with a corollary: enumerated powers. Under this enumeration principle, when the people are sovereign, only the people may delegate powers.<sup>69</sup> This was simply a logical conclusion of popular sovereignty: any

61. See *id.* at 388 (the sovereign people “remained outside the entire government, watching, controlling, *pulling the strings for all their agents* in every branch or part of the government.”).

62. *Id.*; see also Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1434 (1987) (“government officials” became “merely agents of principals who had prescribed limits on the agents’ power in the founding charter.”); *id.* (noting that “agency principles carr[ied] the bulk of the argument in key passages” of the Federalist papers); *id.* at 1436 (“Government officials were ‘representatives,’ ‘agents,’ ‘delegates,’ ‘deputies,’ and ‘servants’ of the people—but they were not the People themselves, virtually or otherwise.”).

63. Randy E. Barnett, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 63 (2016); see also LAWSON & SEIDMAN, *supra* note 2; Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1480, n. 1.

64. James Iredell, Speech to the North Carolina Convention (July 24, 1788) in 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS 12 (Jonathan Elliot, ed. 1836), <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-4> [<https://perma.cc/HT26-PL65>] [hereinafter Elliot].

65. Letter from Oliver Ellsworth to Landholders and Farmers (Dec. 10, 1787), <https://teachingamericanhistory.org/document/landholder-vi/> [<https://perma.cc/JR65-BSJV>] [hereinafter Landholder VI].

66. John Marshall, Speech to the Virginia Convention (June 10, 1788) in 4 Elliot, *supra* note 64, at 158, <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-3> [<https://perma.cc/WAQ2-2WYY>].

67. THE FEDERALIST No. 46 (James Madison), at 290–97 (Clinton Rossiter ed., 1999).

68. 3 ELLIOTT, *supra* note 64, at 154; *id.* at 159 (“It is the people that give power, and can take it back. What shall restrain them? They are the masters who give it, and of whom, their servants hold it.”); *id.* at 154 (the people “must trust to agents” in government); see also Letter from John Jay to George Washington (Jan. 7, 1787) (explaining how popular sovereignty was new to Americans: “It is not easy for those to think and feel as Sovereigns, who have always been accustomed to think and feel as Subjects”), <https://founders.archives.gov/documents/Washington/04-04-02-0427> [<https://perma.cc/J8D3-C3HR>].

69. See WOOD, *supra* note 13, at 540 (“all power is in the people, and immediately derived from them and whatever portion of this power the people did not transfer to the government was still reserved

power the people did not delegate, the government could not wield—precisely because the people were now sovereign.<sup>70</sup> This, James Madison said, was “obviously and self-evidently the case.”<sup>71</sup> For Madison, the question was simple: “Can the General Government exercise any power not delegated?”<sup>72</sup> And so was the answer: no. “Delegation alone warrants the exercise of any power.”<sup>73</sup> The people relinquished no power unless they delegated those powers to the federal government and its enumerated actors. In other words: the people could delegate powers to the federal government, but the government held only those enumerated powers—and nothing more.<sup>74</sup>

So what were the terms of the people’s delegation? The federal Constitution: “the legislative authority is subjected to . . . the control arising from the constitution” and the “bounds of the legislative power” are “distinctly marked in the system itself.”<sup>75</sup> Through ratifying conventions, the sovereign people delegated these powers to government agents. James Wilson emphasized that the people “can delegate [power] in such proportions, to such bodies, on such terms, and under such limitations as they think proper.”<sup>76</sup> But the federal government could exercise only the powers delegated by the people.

Others echoed Wilson. Archibald MacLaine in North Carolina put it this way: “the powers of Congress are expressly defined,” and the people “retain all those

and retained by the people.”; *id.* at 542 (“all power was partially and tentatively delegated”); *id.* at 545 (the people “are the master who give [power], and of whom their servants hold it”); *id.* at 546 (“the power given to the Congress by the Constitution was not granted by the people in a wholesale fashion to some detached and alien legislature but was parceled out in a partial and tentative way to responsible and limited servants.”); *id.* at 546 (“Once the people were regarded as the supreme and continuing repository of all political power, distributing some of it to . . . their agents [in government] it followed that all government powers, whatever its nature of function was something of a delegation by the people.”); *id.* at 599 (“The powers of the people were . . . never alienated or surrendered to a legislature.”).

70. Of course, *what* those powers were—and are—is open to some debate. Powers limited by enumeration does not necessarily mean that Congress lacks broad powers. It means instead that the people have ultimate control and the powers of Congress and the federal government are not limitless. “Limited” powers simply means just that. Where that limit lies is up for debate.

71. X DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1502 (James P. Kaminski, ed. 1976), <https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I/pages> [<https://perma.cc/B92F-YW33>] [hereinafter DHRC].

72. *Id.* at 1502.

73. *Id.*

74. See Lash, *supra* note 54, at 1594–96 (detailing how supporters of the Constitution argued that the federal government possessed only expressly delegated powers); see also THE FEDERALIST No. 39 (James Madison), at 236–43 (Clinton Rossiter ed., 1999) (arguing that the federal government’s power “extends to certain enumerated objects only, and leaves to the several States and residuary and inviolable sovereignty over all other objects”).

75. 1 COLLECTED WORKS OF JAMES WILSON 742–43 (Kermit L. Hall & Mark David Hall, eds. 2007), <https://oll.libertyfund.org/titles/hall-collected-works-of-james-wilson-vol-1> [<https://perma.cc/VV57-XQNN>].

76. WOOD, *supra* note 13, at 530 (quoting Wilson’s December 4, 1787, speech to Pennsylvania ratifying convention); see *id.* at 600 (quoting Wilson as stating, “A portion of their authority they [the people], indeed, delegate; but they delegate that portion in whatever manner, in whatever measures, for whatever time, to whatever persons, and on whatever conditions they choose to fix”).

rights which we have not given away to the general government.”<sup>77</sup> It was, MacLaine said, “as plain a thing as possibly can be, that Congress have no power but what we expressly give them.”<sup>78</sup> James Iredell agreed, stating that “in this Constitution . . . the people expressly declare how much power they do give and consequently retain.”<sup>79</sup> The Constitution was “a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given.”<sup>80</sup> To underscore the point, Iredell painted a poignant portrait:

Suppose, for instance, a man had lands in the counties of Anson and Caswell, and he should give another a power of attorney to sell his lands in Anson, would the other have any authority to sell the lands in Caswell?—or could he, without absurdity, say, ‘Tis true you have not expressly authorized me to sell the lands in Caswell; but as you had lands there, and did not say I should not, I thought I might as well sell those lands as the other.<sup>81</sup>

The conclusion couldn’t be clearer: The Constitution outlines specific enumerated powers delegated by a sovereign people. Anything missing had been left out.<sup>82</sup>

77. Archibald Maclaine, Speech to the North Carolina Convention (July 24, 1788) in 4 Elliot, *supra* note 64, at 99.

78. *Id.* at 99–100.

79. James Iredell, Speech to the North Carolina Convention (July 24, 1788) in 4 Elliot, *supra* note 64, at 104.

80. *Id.* at 104. Iredell later again invoked the “power of attorney” idea by comparing the Constitution to—but not directly stating the Constitution *was*—a power of attorney:

It would be the greatest absurdity for any man to pretend that, when a legislature is formed for a particular purpose, it can have any authority but what is so expressly given to it, any more than a man acting under a power of attorney could depart from the authority it conveyed to him.

*Id.* at 116. “[T]he future Congress can have no right to exercise any power but what is contained on that paper.” *Id.* at 116.

81. *Id.* at 104–05. Iredell was not the only one to use such an example. As the eminent historian Pauline Maier highlighted in her work, Nicholas “used a simple analogy to make James Wilson’s old argument that all powers not granted to Congress were reserved without Wilson’s bewildering language.” PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, 285 (2010). “If he had a thousand acres of land and sold half of it, Nicholas asked, did he need to declare that he keep the rest?” *Id.*; see DHRC, *supra* note 71 at 1328 (Nicholas asking “Do I grant the whole thousand acres when I grant five hundred unless I declare that the five hundred I do not give, belongs to me still?”). See also JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 304, 325 (1997) (quoting a western Massachusetts writer that “[t]o have made a formal declaration that all the rights and powers not mentioned nor defined are reserved, would have been as great an affront to common sense” “as if after having made a grant of a certain tract of land . . . in a deed or bill of sale, I should add a particular enumeration of my every other piece of land and article of property, with a declaration in form that none of these are meant to be granted”). These are only a handful of the many times the founders employed a private law analogy when thinking about how to interpret the Constitution, thus supporting Professors Lawson and Natelson.

82. Some have argued that limits on Congress’s power in Article I Section 9 and elsewhere show that enumeration played a limited role in preventing Congress from exercising power. After all, they argue, if the government’s powers really were limited by enumeration why would the Constitution place specific limits on things like bills of attainder and habeas corpus? See, e.g., Richard Primus, *The*

The idea became widely accepted, and many other constitutional actors sang in unison on this issue. As Edmund Pendleton put it, the people “delegate these powers” only to “our own representatives.”<sup>83</sup> “[T]he authority of the people to delegate power to agents, and to devise such government as a majority of them thinks will promote their happiness” was absolute.<sup>84</sup> Government must act as “servants of the people,” Theophilus Parsons said, “vested with delegated powers by popular elections . . . .”<sup>85</sup> Harry Lee in Virginia reiterated that the Constitution “goes on the principle that all power is in the people, and the rules have no powers but what are enumerated in that paper.”<sup>86</sup> In Virginia, a committee at the ratifying convention explained that “the powers granted under the proposed Constitution are the gift of the people, and every power not granted thereby, remains with them, and at their will.”<sup>87</sup> The powers not “specifically granted remained with the people and could not be canceled, abridged, restrained, or modified by Congress, the president, or any other officers of the United States except where the Constitution gave them the power to do that.”<sup>88</sup>

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Elephant Problem, 17 *GEO. J.L. & PUB. POL’Y* 373, 391 (2019) (“[T]he Philadelphia Convention’s proposed document plainly included affirmative limits on Congress, so the idea that specifying such limits would be out of place was transparently false.”). Delegates to the ratifying conventions answered this precise challenge, explaining why, despite the Constitution’s enumeration principle, the document contained limits on specific congressional powers: the restricted powers arguably *fell within* Article I’s enumerated powers. In Virginia, members of the convention proposed an amendment to clarify that any affirmative limit on congressional powers was not “to be interpreted so as to increase [Congress’s] power, but should be construed either as making exceptions to the specified powers or as inserted merely for greater caution.” Maier, *supra* note 81, at 308. In Pennsylvania, Smilie and Whitehill trolled James Wilson’s enumeration argument by pointing to Article I, Section 9’s restriction of congressional power. In response, Jasper Yeates made quick work of the argument: these “powers were enumerated,” so “it was necessary to specify any exceptions to them.” *Id.* at 109. Back in Virginia, Edmond Randolph made the same point: “every exception” in Article I, Section 9, was “an exception not from general powers, but from the *particular* powers therein vested.” DHRC, *supra* note 71, at 1348. Article I had *already* granted—or at least arguably granted—Congress these powers, and Randolph linked each Article I Section 9 restriction to a specific enumerated power. *Id.* Madison, too, supported the amendment that would clarify this point. Maier, *supra* note 81, at 449. Article I Section 9 exists, then, merely to provide belt-and-suspenders against congressional power—not in favor of it.

83. Edmund Pendleton, Speech at the Virginia Ratifying Convention (June 12, 1788), <https://teachingamericanhistory.org/document/edmond-pendleton-speech> [<https://perma.cc/A7Y6-3FU9>].

84. Archibald Maclaine, Speech to North Carolina Convention (July 29, 1788) in 4 ELLIOTT, *supra* note 64, at 112.

85. Theophilus Parsons, Speech to the Massachusetts Convention (Jan. 23, 1788) in 2 ELLIOTT, *supra* note 64, at 65, <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-2> [<https://perma.cc/PM5D-PBL2>].

86. Harry Lee, Speech to the Virginia Convention (June 9, 1788) in 3 ELLIOTT, *supra* note 64, at 128.

87. DHRC, *supra* note 71, at 1537 (Va. Ratifying Convention).

88. *Id.* at 1537–38 (“No right therefore of any denomination, can be cancelled, abridged, restrained or modified by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes.”). Other examples abound, and we only scratch the surface here. 4 ELLIOTT, *supra* note 64, at 286 (Pickney in SC Convention) (“The general government has no powers but what are expressly granted to it.”); DHRC, *supra* note 71, at 1457 (Stillman in Massachusetts Convention) (powers in Constitution “are great and extensive; but, sir, they are defined and limited, and in my judgment sufficiently checked”).

And what would happen if the government “were to make a law not warranted by any of the powers enumerated?” John Marshall explained: “it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void.”<sup>89</sup> It seems judicial review was on Marshall’s mind well before 1803.

Limiting the legislature to a list of powers left the longstanding British practice behind. Indeed, our 1787 charter flipped constitution-making on its head. Whereas prior documents protected rights of the people by saying what the government couldn’t do, our Constitution did the precise opposite. The Constitution, so said Oliver Ellsworth, contained “powers limited and defined” and so it “becomes now to the legislator and magistrate, what originally a bill of rights was to the people.”<sup>90</sup>

Pause to consider Ellsworth’s point. He tells us that the Constitution is to the government what the bills of rights used to be to the People: a document that establishes what the government may do. Prior to 1787, the government told the people what rights they had. Now, through the Constitution, the people told the government what powers it had. That broke with state constitutions under which the people “invested their representatives with every right and authority which they did not in explicit terms reserve.”<sup>91</sup> Harry Lee’s observation at the Virginia Convention is worth considering at length:

Mr. Lee then said, that, under the state governments, the people reserved to themselves certain enumerated rights, and that the rest were vested in their rulers; that, consequently, the powers reserved to the people were but an inconsiderable exception from what were given to their rulers; but that, in the federal government, the rulers of the people were vested with certain defined powers, and that what were not delegated to those rulers were retained by the people. The consequence of this, he said, was, that the limited powers were only an exception to those which rested in the people, and that they knew what they had given up, and could be in no danger. He exemplified the proposition in a familiar manner. He observed, that, if a man delegated certain powers to an agent, it would be an insult upon common sense to suppose that the agent could legally transact any business for his principal which was not contained

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89. DHRC, *supra* note 71, at 1431 (Va. Ratifying Convention); *see also* Amar, *supra* note 62, at 1427 (“[W]henver a government entity transgresses the limits of its delegation by acting *ultra vires*, it ceases to act in the name of the sovereign” people.); *id.* at 1436 (“[A]gency principles furnished Americans with the critical tools of analysis. As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. *Within the sphere of these delegated power*, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents *lacked authority* to go beyond the scope of their agency.” (emphases added)). *See also* Lash, *supra* note 54, at 1592–1605 (detailing the prevailing view in the ratifying conventions that the federal government held only those powers expressly delegated by the people and enumerated in the Constitution).

90. Landholder VI, *supra* note 65.

91. 1 WILSON, *supra* note 75, at 215 (State House Yard Speech, Oct. 76, 1787).

in the commission whereby the powers were delegated; but that, if a man empowered his representative or agent to transact all his business except certain enumerated parts, the clear result was, that the agent could lawfully transact every possible part of his principal's business except the enumerated parts; and added, that these plain propositions were sufficient to demonstrate the inutility and folly (were he permitted to use the expression) of bills of rights.<sup>92</sup>

And so the national charter fundamentally diverged from the prior state constitutions.<sup>93</sup> “[T]he new national Constitution,” Professor Wood has written, “was based on a fundamentally different principle from that of the earlier state constitutions.”<sup>94</sup>

But the national charter didn't break with just states. Popular sovereignty and enumerated powers separated America from Britain, too. John Marshall told the story: “Can any thing be more dissimilar than the relation between the British government and the colonies and, and the relation between Congress and the states? We were not represented in Parliament. Here we are represented.”<sup>95</sup> “[T]he government on your table,” Marshall told delegates, was “very much superior to” “the British Constitution.”<sup>96</sup> James Madison echoed Ellsworth's point when he wrote that while in Europe “charters of liberty have been granted by power,” America had “set the example . . . of charters of power granted by liberty.”<sup>97</sup> In other words, the Constitution now delegated power to government agents—rather than grant rights to individuals. This, Madison wrote, was a “revolution in the practice of the world.”<sup>98</sup> As Professor Caleb Nelson has written, “[t]he world had never

92. Harry Lee, Speech to the Virginia Ratifying Convention (June 9, 1788) in 3 ELLIOTT, *supra* note 64, at 128. This is another direct analogy to private law when discussing constitutional interpretation.

93. For another example, James Wilson highlighted the “striking difference” between legislative powers in Pennsylvania and the United States. Although the state was “vested with every power for a branch of the legislature of a free state,” the United States had no such power.” WILSON, *supra* note 75, at 870. “The reason is plain,” Wilson says: Pennsylvania has a legislature with “general” powers; Congress's powers are “enumerated.” *Id.* And again, in your author's eyes thankfully, the relationship between “We the People,” the states, and the federal government would later change to preserve our liberty from state governments through another delegation of power. *See generally* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021).

94. WOOD, *supra* note 13, at 539. *SEE ALSO* RAKOVE, *supra* note 81 at 304 (noting that under early state constitutions, the conception of enumerated powers “would have run counter to the general idea of legislation that the colonists inherited from Britain for no plausible object of regulation could lie beyond its reach.”).

95. John Marshall, Speech to the Virginia Ratifying Convention (June 10, 1788) in 3 ELLIOTT, *supra* note 64, at 154. The view that the people were represented in *all* branches of government was similarly new. WOOD, *supra* note 13, at 546 (“the entire government, president as well as Congress, became a responsible agency of the people.”); *id.* at 549 (people “regarded the president, Senate, and even the judiciary as well as the House of Representatives as somehow all equal agents of the people's will”).

96. John Marshall, Speech to the Virginia Ratifying Convention (June 10, 1788) in 3 ELLIOTT, *supra* note 64, at 159.

97. James Madison *National Gazette* (Jan. 18, 1792), <https://founders.archives.gov/documents/Madison/01-14-02-0172> [<https://perma.cc/6RAA-7TX4>].

98. *Id.*

before encountered a written constitution for a federal system based on the American concept of popular sovereignty.”<sup>99</sup>

This fresh take on sovereignty gained traction.<sup>100</sup> And, once more, James Wilson led the way: “The supreme power of the people,” according to Wilson “is a doctrine unknown and unacknowledged in the British system of government.”<sup>101</sup> Parliament had “omnipotent authority,” and so the “order of things in Britain is exactly the reverse of things in the United States. Here, the people are masters of the government; there, the government is master of the people.”<sup>102</sup> Wilson, like many others, understood that Parliament, as sovereign, had no limit to its power.<sup>103</sup> Wilson explained that Great Britain’s model “seems to exclude, rather than to imply delegated power,” unlike in the new American system.<sup>104</sup> Wilson flatly “rejected Blackstone’s doctrine of parliamentary sovereignty” and “made it abundantly clear that no mere copy of the British pattern of government was intended.”<sup>105</sup> James Madison, too, recognized the unique new government: The Constitution was “in a manner unprecedented: We cannot find one express example the experience of the world—It stands by itself.”<sup>106</sup>

And indeed it did. As James Iredell noted, in England there was “no written constitution . . . to be found.”<sup>107</sup> Iredell explained that the Magna Charta gave rights to the people but neither it “nor any other instrument . . . ever attempted to abridge the authority of Parliament, which is supposed to be without any limitation whatever.”<sup>108</sup> Indeed, Patrick Henry, an ardent opponent of the Constitution,

99. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555 (2003).

100. Not everyone was on board. Noah Webster, for example, may have accepted the then orthodox thinking that “the Legislature has all the power, of all the people.” WOOD, *supra* note 13, at 381 (quoting Webster). As Professor Wood writes, Webster believed there was “no power residing in the State at large, which does not reside in the legislature” because a legislature had “unlimited power to do right for the state.” *Id.* at 381–82. But Webster well knew that he was in the minority. He accepted that his ideas were “repugnant to the principles received by my countrymen.” Wood at 382; *see also* LAWSON & SEIDMAN, *supra* note 2, at 44–45 (noting that Webster recognized that the “[f]avorite idea[] in this country” included “that rulers are servants of the people”). Others opposed to the Constitution (such as antifederalists) similarly recognized that their view was a minority one that would not carry the day in the meaning of the Constitution. *See* RAKOVE, *supra* note 81, at 360 (“William Findley, the leading Pennsylvania Anti-Federalist now turned Republican, even found himself ironically reflecting that he did not ‘expect the sentiments of a minority, acting under peculiar circumstances of irritation, and consisting of but one-fifth of the members [at the Harrisburg convention] to be quoted as good authority for the true sense of the Constitution.’” (quoting V Annals of Cong. 591–92)).

101. 1 Wilson, *supra* note 75, at 718–19.

102. *Id.*

103. DHRC, *supra* note 71, at 361 (“The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain.” “The British constitution is just what the British Parliament pleases.”).

104. 1 Wilson, *supra* note 75, at 721. As Wilson went on to explain, in America all powers are “grants of the people.” “With us, no prerogative or government can be set up as coequal with the authority of the people.” *Id.* at 727–28. Even antifederalists understood the point. *See* III Annals of Cong. 449 (William Findley) (“Gentlemen are wrong in arguing from the old Government to the new; the old Government was not vested with powers.”).

105. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 174 (2d Ed. 1998).

106. DHRC, *supra* note 71, at 995 (June 6, 1787).

107. 4 Elliot, *supra* note 64, at 148.

108. *Id.*

understood that popular sovereignty—“we the people” rather than Henry’s preferred “we the states”<sup>109</sup>—became “a revolution as radical as that which separated us from Great Britain.”<sup>110</sup> But Henry well recognized “it [was] actually the case” that “the sovereignty of the States be relinquished” in favor of Wilsonian popular sovereignty.<sup>111</sup>

Early cases emphasized this transformation. While riding circuit, Justice William Paterson wrote that “in England, the authority of the Parliament runs without limits, and rises above control.”<sup>112</sup> The British Constitution “lies entirely at the mercy of the Parliament” where “there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested.”<sup>113</sup> But “[i]n America,” Justice Paterson explained, “the case is widely different.”<sup>114</sup> The United States adopted a written constitution which was “the work or will of the People themselves, in their original, sovereign, and unlimited capacity.”<sup>115</sup> “Whatever may be the case in other countries,” sovereignty in America remained with the people, so “every act of the Legislature, repugnant to the Constitution” was “absolutely void.”<sup>116</sup>

So, too, did the full Supreme Court issue opinions distinguishing the inchoate Constitution from the tradition. In one of the Court’s first famous cases—holding that no state sovereign immunity existed under the federal Constitution<sup>117</sup>—the Court viewed “the British” as having “a despotic Government” and “a Government without a people.”<sup>118</sup> “In that Government, . . . the sovereignty is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested.”<sup>119</sup> Parliamentary sovereignty led to a logical conclusion: “In the Parliament resides that incontrollable and despotic power, which, in all Governments, must reside somewhere.”<sup>120</sup> But in the nascent American Government, power rested instead with the “dignified and important . . . majesty of the people.”<sup>121</sup> And under the Constitution the “Legislative power is vested, Executive power is vested, Judicial power is vested.”<sup>122</sup> No branch held sovereign power; only the people did.

Similar thoughts arose in another early case, *Calder v. Bull*, several years later. For one thing, Justice Samuel Chase made clear that the enumeration principle came from the people—and it had real bite: “All the powers delegated by the

109. DHRC, *supra* note 71, at 951.

110. *Id.*

111. *Id.*

112. *VanHorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795). (opinion of Paterson, J.).

113. *Id.* at 308.

114. *Id.*

115. *Id.*

116. *Id.*

117. A holding which, in turn, brought about the passage of the Eleventh Amendment.

118. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462 (1793).

119. *Id.* at 462.

120. *Id.*

121. *Id.* at 463.

122. *Id.*

people of the United States to the Federal Government are defined and no constructive powers can be exercised by it.”<sup>123</sup> Chase might as well have been taking notes from Ellsworth, Marshall, and other Founders who long preached that the Constitution grants the government specific powers; it does not grant the people liberty.<sup>124</sup> Justice Iredell wrote separately, disagreeing with some of Justice Chase’s opinion. But he agreed with this key point: the Constitution lists specific powers the sovereign people delegated to their government, and British legislative sovereignty played no role in our constitutional order.<sup>125</sup>

That wasn’t the first time Justice Iredell triumphed America’s dismissal of British constitutionalism. He well knew that parliamentary sovereignty ruled the day across the ocean, writing in *Ware v. Hylton* that “[t]here is no doubt that an act of Parliament in Great Britain, would bind in its own country in every possible case in which the Legislature thought proper to act. Blackstone is precise as to that point, even in cases manifestly unjust.”<sup>126</sup> But no longer—much to Justice Iredell’s delight. “In this country,” he wrote, “thank God, a less arbitrary principle prevails. The power of the Legislatures is limited” by the Constitution.<sup>127</sup> England had its sovereign legislature. America its sovereign people.

The break with states and England was complete—and clean. No more legislative sovereignty. No more charters of liberty. America paved a new road—one built on a new theory of limited and enumerated powers delegated directly from a sovereign people. Courts today often forget the sovereignty revolution and its critical role in understanding the Constitution’s structure.<sup>128</sup> But it is hard to overstate its importance to the Founders and to the Constitution.

Some recent scholarship has challenged the enumerated powers doctrine on historic, textual, and “common law” constitutional grounds. For example, Professor Richard Primus argues that the Constitution’s enumeration of specific powers *could be* read in a way that shows there was no meaningful limitation on

123. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) (opinion of Chase, J.).

124. *Id.* at 388–89 (“To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be political heresy, altogether inadmissible in our free republican governments.”).

125. *Id.* at 399 (opinion of Iredell, J.) (“the people of the United States, when they framed the Federal Constitution, defin[ed] with precision the objects of legislative power” to guard against legislative supremacy). In Justice Iredell’s view, the Constitution acted to “restrain” the “exercise” of federal power “within marked and settled boundaries.” *Id.* And the legislature may act only under “the authority delegated to them” by the people “to whom alone they are responsible for the faithful discharge of their trust.” *Id.*

126. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796) (opinion of Iredell, J.).

127. *Id.*

128. Though there are recent signs of the court members recognizing the importance of popular sovereignty. *See Gamble v. United States*, 587 U.S. 678, 743 (2018) (Gorsuch, J., dissenting) (“The court seems to assume that sovereignty in this country belongs to the state and federal government, much as it once belonged to the King of England. But as Chief Justice Marshall explained . . . ‘sovereignty emanates from [the people].’”); *see Gundy v. United States*, 588 U.S. 128, 152 (2019) (Gorsuch, J., dissenting) (noting that the Preamble was “an assertion that sovereignty belongs not to a person or institution or class but to the whole people” and that the Constitution “vest[ed] the authority to exercise different aspects of the people’s sovereign power in distinct entities”).

federal power. Instead, he suggests that its list of powers could simply describe congressional authority without restricting it to only those powers.<sup>129</sup> In a similar vein, Professor David Schwartz contends that the Constitution's original meaning—its text, structure, and context—is inconclusive about whether the enumerated powers principle was originally understood as a substantive limit on federal power, and that the principle likely emerged as a post-ratification political construction.<sup>130</sup> These revisionist accounts fundamentally misread the Constitution's text and structure, contradicting both its plain meaning and the fiduciary principles that inform its design. While much of this paper refutes these assertions, a few words are in order.

First, the Constitution establishes a government of enumerated powers through clear text and context. As explained previously, Article I begins by vesting “[a]ll legislative Powers herein granted” in Congress.<sup>131</sup> This formulation, particularly the limiting phrase “herein granted” explicitly signals that Congress possesses only those powers specifically given from the people.<sup>132</sup> The Constitution does not vest “legislative power” generally, as it might have if the people intended to delegate an unlimited federal authority. Rather, it vests only those legislative powers specifically listed—a textual limitation that the critics’ accounts cannot adequately explain away. Indeed, the Constitution’s listing of specific powers through a series of precisely drafted clauses would be rendered superfluous if federal power were plenary. As Chief Justice Marshall observed, this enumeration “presupposes something not enumerated.”<sup>133</sup> The Constitution’s careful delineation of particular powers—to regulate commerce, establish post offices, raise armies—makes sense only if the enumeration serves a limiting function.

Second, the Constitution’s structure reinforces its textual and contextual limitations on power. The document distributes power among distinct branches through specific vesting clauses that carefully allocate authority to particular governmental actors. Again, this structure of separate, defined powers would be meaningless if any branch could exercise powers beyond those textually delegated.

The Tenth Amendment’s text further confirms the enumeration principle by explicitly stating that “powers not delegated to the United States by the

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129. See e.g., Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014) (arguing that enumeration was likely not intended as a meaningful internal limit on federal power); but see generally Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J. FORUM 180 (2014).

130. See, e.g., Andrew Coan and David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971 (2024); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 606–09 (2017) (contending that the enumeration principle developed primarily as post-ratification pretext).

131. U.S. CONST. art. I, § 1.

132. LAWSON & SEIDMAN, *supra* note 2, at 51–52; see also *Dep’t of Transp. v. Ass’n. of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring) (noting that the Constitution’s articles do not “vest the Federal Government with an undifferentiated ‘governmental power’”).

133. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>134</sup> While some might disagree about the amendment as merely clarifying rather than creating a limitation, it nonetheless reinforces that enumeration itself was understood as a limiting principle from the beginning. The amendment’s reference to powers “not delegated” presupposes that only certain powers have been delegated, which makes sense only within a framework of enumerated powers.

The critics’ position also cannot be squared with the Necessary and Proper Clause, which authorizes Congress to “make all Laws which shall be necessary and proper *for carrying into Execution* the foregoing Powers, and all other Powers vested by this Constitution . . . .”<sup>135</sup> Again, one can disagree about the clause’s scope and intended purpose, but it would be redundant if Congress possessed general legislative police power beyond its limited and enumerated powers. The clause’s reference to “foregoing Powers” also directly ties congressional authority to the specifically enumerated powers that precede it, reinforcing the textual limitation established by Article I’s vesting clause.

Early judicial interpretations confirm this textual and structural understanding. Justice Chase affirmed in *Calder v. Bull* that “[a]ll the powers delegated by the people of the United States to the Federal Government are defined, and NO CONSTRUCTIVE powers can be exercised by it . . . .”<sup>136</sup> Similarly, Chief Justice Marshall explained in *McCulloch v. Maryland* that the federal government is “acknowledged by all, to be one of enumerated powers[,]” meaning that it “can exercise only the powers granted to it . . . .”<sup>137</sup>

At bottom, accepting the arguments of enumerated powers critics ultimately requires a belief that the Constitution’s careful enumeration of specific powers, its explicit vesting of only those powers “herein granted,” and its structural division of authority among branches and between governments are all without meaningful limiting effect. This reading not only contradicts the document’s plain text and structure but also renders significant portions of the Constitution superfluous—a result at odds with basic principles of constitutional interpretation.

Returning to the subject at hand, the innovative constitutional concepts of sovereignty and enumeration worked in tandem as two sides of the same constitutional coin to revolutionize constitutional thought. Once We the People held all power, only the people could distribute it to their agents. And the people did so through enumerating—writing down—those powers and assigning them to specific agents. This innovation—new to the world—paved the path for yet another revolutionary concept to the post 1787 world: the separation of powers.

134. U.S. CONST. amend. X.

135. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

136. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) (opinion of Chase, J.).

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

*B. The Separation of Powers Under the Fiduciary Constitution*

What does the enumerated powers mean for the separation of powers? If the Constitution's fiduciary character results in an enumerated powers doctrine that grants power from the people to specific actors, then, logically, the question arises: To whom does the Constitution delegate that power? And is there any specific authorization in the Constitution for those actors to give that power away—to subdelegate it to another actor? This is not a trivial question. To the Framers, the limitation on who may exercise power was just as important for protecting liberty as what substantive power was delegated to those actors. In this way, the focus of this second question is “who.”<sup>138</sup>

Popular sovereignty and enumeration were not the Constitution's sole innovations. Their conceptual cousin, the separation of powers, underwent a revolution. Indeed, it must have done so—because, for the first time in history, the Constitution acted as a grant of power from a sovereign people, delegating specific, delineated powers to agents in government.

As Professor Wood explained, the concept of the separation of powers went through a “profound shift in the Americans' understanding of political power and the people's relationship to the government” during the 1780s.<sup>139</sup> Dividing powers among discrete branches of government was not a key insight before the 1787 Constitution. In fact, “only in the years after 1776, when the problems of politics seemed new and different from what had been expected” did “the idea of separation of powers assume[] major significance.”<sup>140</sup>

The new Constitution then ensured that departments were distinct and limited to wielding specific enumerated powers. Writing as a Supreme Court justice, James Wilson emphasized that the principle was “strictly observed by the Constitution of the United States.”<sup>141</sup> James Iredell, also writing as a justice riding circuit, agreed with Wilson: the “Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner” and “the ultimate basis for each is the constitution only.”<sup>142</sup> In *Hayburn's Case*, Congress attempted to give itself the power to review recommendations made by courts regarding pensions. That attempt, however, was struck down on separation of powers

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138. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1215 (2010); *Nat'l Federation of Independent Business v. Dep't of Labor, Occupational Safety and Health Administration*, 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring) (“Who decides?”).

139. WOOD, *supra* note 13, at 446–47.

140. *Id.* at 449; *id.* at 449, 451, 549 (In the 1780s separation of powers “magnified . . . into the dominant principle of the American political system” and became “an imposing doctrine” that “had become something far more important than what it had been in 1776, becoming in fact for many Americans an essential precondition in favor of liberty.”). *See also id.* at 550 (explaining how separation of powers was not taken seriously in state constitutions which, Madison believed, served as a mere “parchment barrier” for “maintaining in practice the separation delineate on paper.”). In Madison's view, the federal Constitution could not simply follow the path paved by states. That route failed to ensure separated powers. What mattered was constitution structure not constitutional *clauses*.

141. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

142. *Id.*

grounds. After all, Justice Iredell explained, courts exercise the judicial power; they cannot “exercise . . . any power not in its nature judicial.”<sup>143</sup> Allowing another branch to overturn judicial judgments would mean judges are not exercising the judicial power—that is, the power to address “cases” and “controversies”<sup>144</sup> and issue dispositive judgments.<sup>145</sup>

This was hardly surprising. After all, during ratification and discussion of the Constitution after 1787, the Founders were clear: the separation of powers was a vital safeguard of liberty. “Let us suppose the legislative and executive powers united in the same person: can liberty or security be expected?” James Wilson asked. The answer: “No.”<sup>146</sup> “[M]iserable indeed would th[e] case be” if “all the three powers of government . . . be united in the same man or body of men[.]”<sup>147</sup> So the Constitution separated powers. How? By enumerating what powers each branch could wield: What the legislative branch has been delegated cannot be held by the judiciary. What the executive has been delegated may not be held by the legislature. What the judiciary is delegated may not be held by the executive. Specific agents are authorized to wield specific powers.

This broke again with British and state practice.<sup>148</sup> James Wilson viewed Great Britain as having “a very improper mixture of legislative and judicial authority vested and blended in the same assembly[.]” something that was “entirely avoided in the constitution of the United States.”<sup>149</sup> Later, while riding circuit as a Supreme Court justice, Wilson wrote that “the people of the United States, in forming their constitution, have manifested the highest regard” for the “principle”

143. *Id.*

144. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L. J. 197, 208 (1983).

145. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990) (“[A] ‘judicial Power’ is one to render dispositive judgments.”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815 (2008) (“During the ratification of the Constitution and immediately afterwards, a wide range of constitutional scholars, jurists, and officers explained that the “judicial” power vested by this clause was the power to make authoritative and final judgments in individual cases.”).

146. WILSON, *supra* note 75, at 705. “Liberty and security in government depend . . . on the boundaries, within which their powers are circumscribed by the constitution.” *Id.* Nor could “legislative and judicial powers” be united because, Wilson explained, the “lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would . . . not be governed by any fixed or known principles of law.” *Id.* And, lest there be any doubt, a “union of the executive and judicial powers” would also run afoul of the Constitution. *Id.* at 706. Otherwise, “laws might be eluded or perverted; and the execution of them might become, in the hands of the magistrate or his minions, an engine of tyranny and injustice.” *Id.*

147. *Id.* at 706.

148. For a discussion of how state constitutions amounted to mere parchment barriers, see VILE, *supra* note 105, at 159–69. State governments routinely violated any separation of powers—even when constitutions specifically included a separation-of-powers clause. In fact, “[s]tate legislatures, in pursuit of political advantage, continued to exercise their power in a way that clearly showed that mere exhortation to remain within their proper function was not enough.” *Id.* at 167. “It was against the background of this experience with the separation of powers that the Federal Convention met in Philadelphia in 1787.” *Id.* at 167–68.

149. WILSON, *supra* note 75, at 736.

that “the judicial should be distinct from, and independent of, the legislative department.”<sup>150</sup> When, at the Virginia Convention, delegates discussed a potential separation-of-powers amendment, Madison emphasized that “there is too great a difference . . . to warrant the comparison” to the British Constitution.<sup>151</sup> Thus, Madison concluded, “the arguments drawn from that source were in a great measure inapplicable.”<sup>152</sup> Our 1787 Constitution was “widely different” from Britain.<sup>153</sup> Here, for the first time, the people granted powers to agents in government. So, in America, separation of powers meant: What powers did the people delegate to that branch? If the people had not delegated the power, the branch could not wield it.<sup>154</sup>

Early post-ratification history and practice supports the point. Returning to *Hayburn’s Case*, the Justices there immediately invalidated congressional legislation that would have violated enumeration and the separation of powers. A less-well-known case,<sup>155</sup> (that was for a time lost), though, may have done so as well. In *United States v. Yale Todd*, it appears that Congress attempted to use the circuit courts to address claims of Revolutionary War veterans by directing courts to examine the “nature and degree of disability and to certify to the Secretary of War the proportion of monthly pay of the applicant that would be equivalent to the degree of disability found by the court.”<sup>156</sup> The case was likely “the first to hold an Act of Congress unconstitutional.”<sup>157</sup> The statute again permitted the Secretary of War or Congress to revise judgments of the Courts. Thus, the Court “thought that the provisions of the statute were contrary to the Constitution in that: (1) the business directed by the act was not of a judicial nature, and (2) their judgments were subject to suspension by the Secretary of War and to revision by Congress.”<sup>158</sup>

*Hayburn’s Case* and *Yale Todd* show the immediate importance of the separation of powers and its intellectual in-law—enumeration. When Congress attempted to make courts undertake an act “not of a judicial nature,” then it “forms no part of the power vested by the constitution in the courts of the United States[.]” so the “court must, consequently, have proceeded without constitutional authority.”<sup>159</sup> In short, if

150. *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

151. 1 *Annals of Cong.* 453 (1789).

152. *Id.*

153. *Id.* at 453–54.

154. See Vile, *supra* note 105, at 150 (“The revolutionary concept of the delegation of power from the people to their agents in the various branches of government is deeply opposed to the ideas of the balanced constitution, in which important elements were independent of popular power, and able to check the representatives of that power.”); see *id.* at 152–53 (quoting “A.B.” in the *Pennsylvania Gazette* Apr. 28, 1784) (“In a government like ours, the authorities delegated by the freemen at large are distributed and lodged with three distinct branches, the legislative, the supreme executive, and the judicial. Each strongly marked and characterised.”).

155. *United States v. Yale Todd* from the Supreme Court’s February 1794 sitting was previously unreported and summarized in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851).

156. Wilfred J. Ritz, *United States v. Yale Todd* (1794), *WASH. LEE L. REV.* 220, 222 (1958).

157. *Id.* at 221.

158. *Id.* at 223.

159. *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

the Constitution does not vest the power with the branch of government, then the branch does not have that power—even if Congress attempts to give it to another branch or actor. Only the people (the principal) can give power to particular branches and actors (the agents).

If Congress disagreed with the courts' decisions in *Hayburn's Case* and *Yale Todd*—or thought that separation of powers and enumeration were inadequate grounds for striking down legislation—one might expect to see the evidence. The congressional record reveals the opposite. Indeed, both *Hayburn's Case* and *Yale Todd* came up in Congress, but lawmakers yawned. “[T]he Court thought the examination of invalids” at issue in *Hayburn's* was “a very extraordinary duty to be imposed on the Judges; and looked on the law which imposes that duty as an unconstitutional one.”<sup>160</sup> Courts “could not . . . accede to a regulation tending to render the Judiciary subject to the Legislative and Executive powers, which” the Constitution “kept carefully distinct.”<sup>161</sup> Congress recognized this as “the first instance in which a court of justice had declared a law of Congress to be unconstitutional,” which “produced a variety of opinions with respect to the measures to be taken on the occasion.”<sup>162</sup> But no one in Congress questioned the court's authority or ability to find the law invalid on separation-of-powers grounds.

In other words, Congress shrugged. A similar ho-hum reaction occurred two years later after *Yale Todd*.<sup>163</sup> The disinterested reaction would be surprising if Congress truly did not expect courts to declare laws void on separation-of-powers or enumeration grounds. Given this response, Congress may have well accepted the view that America's separation of powers and constitutional structure no longer tracked Great Britain and the states. Enumeration of distinct powers into separate branches truly limited government.

The view also explained key omissions in the Constitution. For one thing, it lacked a bill of rights. As to the bill of rights, “[g]iven Wilson's understanding that the federal government resulted from a partial delegation of the people's supreme power, a declaration reserving specific rights belonging to the people was both superfluous and absurd.”<sup>164</sup> For another, it lacked any “separation-of-powers” clause, something many at the time wanted. Why? After all, if the separation of powers was so important, why didn't the Founders include such a clause in the document? More importantly, a separation-of-powers amendment was *rejected*.

The answer was simple—and a return to the first principles discussed above: The Constitution was a grant of power, not of liberty.<sup>165</sup> It defined what the new national government could do, not what it *couldn't* do.<sup>166</sup> Thus, “[t]his search for

160. 3 Annals of Cong. 556 (1792).

161. *Id.*

162. *Id.* at 557.

163. 4 Annals of Cong. 458–59 (1794).

164. WOOD, *supra* note 13, at 540.

165. See Lawson, *supra* note 6, at 335.

166. See *id.*

an express” separation-of-powers clause “reflects a fundamental misunderstanding of the American Constitution.”<sup>167</sup> “The correct question is, ‘Does any clause of Constitution expressly or implicitly *permit*’ branches to exercise the power of the other?”<sup>168</sup> A clause requiring the separation of powers was beside the point. And, indeed, state practice proved this point. Madison well understood that “mere demarcation on parchment of the constitutional limits of the several departments”<sup>169</sup> was not adequate “for maintaining in practice the separation delineated on paper.”<sup>170</sup> “If a constitutional discrimination of the departments on paper were a sufficient security of each agst. encroachments of the others,” Madison believed, “all further provisions would indeed be superfluous.”<sup>171</sup> “But experience had taught us a distrust of that security, and that it is necessary to introduce such a balance of powers and interest, as will guarantee the provisions on paper.”<sup>172</sup> Structure—not mere parchment barriers—made all the difference to the separation of powers.

What does this all mean? Quite a bit, but for immediate purposes, the context surrounding the Constitution provides the scope through which we view the text. If our national government is one of limited and defined powers, then it is not enough to simply ask what in the Constitution *prohibits* the branch from taking a certain act. Instead, we must ask what permits the government to take such action—and what allows that particular branch or actor to do so.<sup>173</sup> Put a different way: The Constitution (with some narrow exceptions) tells the government what it can do. And the silence is deafening on this point. We the People delegated power to agents in government who may act only under our written instructions. And the people divided those powers among three coordinate branches that cannot exercise the powers of the other (again, except in enumerated situations). No two branches can legislate. Not all three branches may execute the law. And no more than one branch may exercise the judicial power of the United States. That structure flows from not just our separated powers, but from our enumerated powers too.<sup>174</sup>

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167. *Id.* at 336.

168. *Id.* at 337. And indeed at times the Constitution does expressly permit overlap of authority. It allows the Senate to hear impeachment trials. U.S. CONST. art. I, § 3, cl. 6. The President holds the veto power. U.S. CONST. art. I, § 7, cl. 2. And Congress declares war. U.S. CONST. art. I, § 8, cl. 11. These explicit examples prove the point: a branch of government can wander into the realm of another only when the Constitution permits as much.

169. THE FEDERALIST No. 48 (James Madison), at 318 (Clinton Rossiter ed., 1999).

170. THE FEDERALIST No. 48 (James Madison), at 308 (Clinton Rossiter ed., 1999).

171. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (Max Farrand ed., 1911) [hereinafter Farrand].

172. *Id.*

173. Whether the government must carry the burden of proving that the Constitution grants it the power it asserts is beyond the scope of this paper, but we are sympathetic to that view.

174. Some would locate an “enumerated power” for Congress to expand its substantive power (and the power to delegate away that power) in the Necessary and Proper Clause. U.S. CONST. Art 1, § 8, cl. 18. That topic is beyond this paper, but we are sympathetic to the view that this argument is quite implausible and in fact is backwards. See Lawson, *supra* note 6, at 376–77.

Taken together, the three central ideas—popular sovereignty, enumeration, and separation of powers—ensured that the federal government could not engage in the legislative despotism that many Founders feared. Professor Wood says it most clearly: “Once” it “was grasped” that all government agents represented the people, it became clear that the government’s “several powers, legislative, executive, and judicial, ‘must be so divided and guarded as to prevent those given to one from being engrossed by the other . . . .’”<sup>175</sup>

### C. *The Bill of Rights as Additional Fiduciary Constraints*

If, under a fiduciary understanding of the Constitution, enumeration and separation of powers are the primary bulwark against the federal government invading liberty, then what role, under the fiduciary Constitution, does the Bill of Rights play?

The Bill of Rights bolsters the enumerated, separated powers to protect individual liberty. But it was never, at least in the federal context, meant to be the front-line protection of liberty. The inclusion of a Bill of Rights in the original Constitution was the subject of fierce debate among the Founders.<sup>176</sup> Some viewed it as unnecessary at best and counterproductive at worst given the limited powers the people granted to government. “[W]hy declare that things shall not be done which there is no power to do?” Alexander Hamilton asked in *Federalist* 84.<sup>177</sup> “[I]t would furnish, to men disposed to usurp, a plausible pretense for claiming that power.”<sup>178</sup> For Hamilton, “stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince” have no place in a constitution “professedly founded upon the power of the people, and executed by their immediate representations and servants.”<sup>179</sup> Speaking at the North Carolina ratification convention, James Iredell observed, “Of what use, therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?”<sup>180</sup> That it is “not only unnecessary. . . but would even be dangerous.”<sup>181</sup>

Meanwhile, Patrick Henry warned that the failure to stipulate individual liberties that are protected would “rest[] our rights upon the contingency of our rulers being good or bad.”<sup>182</sup> An Antifederalist essay published by “Centinel” cautioned

175. WOOD, *supra* note 13, at 448–449 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., 1954) (1787)).

176. *See, e.g.*, THE FEDERALIST No. 84 (Alexander Hamilton), at 509–20 (Clinton Rossiter ed., 1999); George Mason, Objections to This Constitution of Government (Sept. 1787), in 2 FARRAND, *supra* note 171, at 637.

177. *The Federalist* No. 84 (Alexander Hamilton), at 578 (Clinton Rossiter ed., 1999).

178. *Id.*

179. *Id.*

180. James Iredell, Speech to North Carolina Ratifying Convention (July 28, 1788) in 2 ELLIOT, *supra* note 64, at 148.

181. *Id.* at 149.

182. Patrick Henry, Speech to Virginia Ratifying Convention (June 5, 1788), in 3 ELLIOT, *supra* note 64, at 59.

that the new national government would eclipse the state governments and their constitutions, which secured various individual liberties. Centinel wrote:

How long those rights will appertain to you, you yourselves are called upon to say, whether your houses shall continue to be your castles; whether your papers, your persons and your property, are to be held sacred and free from general warrants, you are now to determine. Whether the trial by jury is to continue as your birth-right, the freemen of Pennsylvania, nay, of all America, are now called upon to declare.<sup>183</sup>

While the Constitution's drafting was underway in the summer of 1787, Elbridge Gerry, Edmund Randolph, and George Mason proposed including a bill of rights, called for a second constitutional convention, and ultimately refused to sign the Constitution—with Mason declaring he “would sooner chop off his right hand than put it to the Constitution” without a bill of rights.<sup>184</sup> They may have lost that early battle, but as we know, they won the war. The First Congress proposed twelve amendments, ten of which became the Bill of Rights—including the Seventh Amendment—we know and celebrate today.<sup>185</sup>

Controversial though these early amendments may have been to some Founders, they provide judicially enforceable individual rights: a belt and suspenders protection for individual liberty. Rather than creating new rights—these were pre-existing rights after all—the Bill of Rights singled out certain individual rights that were considered “likely targets for an overreaching federal government[.]”<sup>186</sup> The amendments safeguarding these rights served as “exclamation points[.]” on the original Constitution, emphasizing the limited, enumerated powers the people granted to each branch.<sup>187</sup> Among them, the Fifth Amendment's prohibition on deprivations of life, liberty, or property without due process of law and the Seventh Amendment's guarantee of a right to a trial by jury in suits at common law, which work in tandem with Article III to ensure that when the federal government seeks to deprive life, liberty, or property, there must be “a fair trial in a fair tribunal.”<sup>188</sup> The people delegated to government the power to make these deprivations only if there was due process of law.

183. “Centinel,” Letter to the Freemen of Pennsylvania, Philadelphia Independent Gazetteer (Oct 5 1787), in *THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION* 13–20 (Herbert J. Storing, ed. 1985).

184. 1 Farrand, *supra* note 171, at 479.

185. The Ninth Amendment (“enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”) and the Tenth Amendment (“the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”) have served, unfortunately, as little more than parchment barriers to the national government. U.S. CONST. amends. IX, X; *see generally* RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2003) (discussing the Ninth and Tenth Amendments).

186. Lawson, *supra* note 9, at 514.

187. *Id.*

188. *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 141 (2024) (Gorsuch, J., concurring)(quoting *In re Murchison*, 349 U. S. 133, 136 (1955)).

And what is “due process of law”? Under its original meaning, the due process clause restrained the legislative, executive, and judicial branches of government.<sup>189</sup> As Professors Nathan Chapman and Michael McConnell explain, “If Congress is forbidden to pass laws authorizing a deprivation of life, liberty, or property without due process, and the other branches are limited to executing and interpreting the law, then the Constitution secures individual liberties against all three branches.”<sup>190</sup> The due process clause thus restrains “the legislative as well as . . . the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will.”<sup>191</sup> Thus, “any” process is not sufficient when the government seeks to deprive life, liberty, or property. When the Fifth Amendment was adopted, due process was synonymous with judicial process; to be legitimate, “a deprivation of rights had to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by jury.”<sup>192</sup> Justice Joseph Story wrote that the clause was “but an enlargement of the language of magna charta [sic] . . . affirm[ing] the right of trial according to the process and proceedings of the common law.”<sup>193</sup> St. George Tucker observed “[d]ue process of law must then be had before a judicial court, or a judicial magistrate.”<sup>194</sup> Therefore, the government’s only way to “operate on the interests [life, liberty, and property] is through the sole institution that can change private rights by applying the law of remedies: the judiciary.”<sup>195</sup>

Turning to the Seventh Amendment “exclamation point,” the jury right has long been venerated by Americans, even if juries today decide a vanishingly small number of civil cases. Juries have long been viewed as a fundamental check—as part of the separation of powers—on government power. Indeed, juries in the colonial period nullified unpopular laws, including seditious libel and customs taxes,<sup>196</sup> leading Parliament to dispense with juries for some disputes between the Crown and colonists.<sup>197</sup> This deprivation of “the benefits of Trial by Jury” was among the colonies’ grievances against the Crown listed in the Declaration of Independence.<sup>198</sup> Thomas Jefferson called the jury “the only

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189. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012).

190. *Id.* at 1723.

191. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856).

192. Chapman & McConnell, *supra* note 189, at 1679.

193. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, 661 (1833).

194. ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES 203 (1803).

195. John Harrison, *Public Rights, Private Privileges and Article III*, 54 GEORGIA L. REV. 143, 209 (2019).

196. See Renee Lettow Lerner, *The Troublesome Inheritance of Americans in Magna Carta and Trial by Jury*, in HAZELL R, MELTON J, EDS. *Magna Carta and Its Modern Legacy*. COMPARATIVE CONSTITUTIONAL LAW AND POLICY 77–98 (Cambridge University Press 2015).

197. See Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 314–15 (2012). For example, the Stamp Act authorized violators to be tried in admiralty courts without a local jury of peers.

198. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>199</sup> During ratification debates, an Antifederalist wrote that the jury trial “brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings.”<sup>200</sup> Even Alexander Hamilton, who vehemently opposed including a bill of rights in the original Constitution, admitted civil juries could provide “security against corruption[.]” of judges.<sup>201</sup>

Juries act as a check against overreach, corruption, and collusion by both the executive and judicial departments but their force has been eroded over time to the point that juries decide less than one percent of civil cases in federal court.<sup>202</sup> While the right to a jury trial remains an important safeguard, questions about agency adjudication should focus on the source and nature of the power asserted, rather than the individual right to a jury trial. After all, Article III, from the beginning was supposed to protect this right without the need for a constitutional amendment. Thus, the questions should be: Does Congress have the power to authorize such an adjudication and is the adjudication an exercise of executive or judicial power?

### III. PROTECTING THE JURY TRIAL RIGHT THROUGH THE FIDUCIARY CONSTITUTION

It is through this fiduciary lens we have discussed that one may begin to grapple with adjudication-by-agency and, we believe, fully protect the civil jury right. What power is being wielded? To whom did the sovereign people delegate that power? And do the enumerated powers in the Constitution permit a branch to do what the people have delegated to others to do? Moreover, can a branch of the federal government exercise a power the people did *not* delegate to it simply because a private individual has consented to that power? It is to these questions we now turn.

But before we do, it is worth taking stock of where we are with the “what” and “who” questions. For around 100 years after the founding, the federal government remained relatively small. It was not until the Progressive Era that the enumerated powers began to significantly erode—and with it the separation of powers and many individual rights. While the full story of what some have called a “bloodless constitutional revolution”<sup>203</sup> is beyond this paper,<sup>204</sup> it is worth briefly noting the modern administrative state wields so much power over everyday life that it would “leave [the framers] rubbing their eyes.”<sup>205</sup>

199. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in *THE PAPERS OF THOMAS JEFFERSON* 267 (Julian P. Boyd ed., 1958).

200. *Jarkesy*, 603 U.S. at 148 (Gorsuch, J., concurring) (citing Letter from a Federal Farmer (Jan. 18, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST* 320 (H. Storing ed., 1981)).

201. *THE FEDERALIST* No. 83 (Alexander Hamilton), at 494–509 (Clinton Rossiter ed., 1999).

202. Table C-4 of the Annual Reports of the Administrative Office of the U.S. Courts.

203. Lawson, *supra* note 44, at 1231.

204. For a fuller account see generally RICHARD EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

205. *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

As explained, one of the Fiduciary Constitution's primary bulwarks against an overreaching federal government is that it limits, or enumerates, the substantive powers that the People as principals have delegated to each actor (the agents). Thus, if one wanted to invert the Constitution's design, undoing that fundamental principle would be a pretty good place to start.<sup>206</sup> And that is exactly what happened in the Progressive Era.<sup>207</sup> While many of Congress's powers were expanded during this Era, one stands out for purposes of this paper. The Commerce Clause of the U.S. Constitution delegates Congress the power, among other things, to "regulate Commerce . . . among the several States[.]"<sup>208</sup> While this enumerated power was not toothless after the founding, the Supreme Court largely reviewed legislation passed pursuant to it with scrutiny ensuring that laws were truly regulating "interstate commerce."<sup>209</sup> But that radically changed in 1937.

While many view *Wickard v. Filburn* as the precedent that expanded Congress's commerce power,<sup>210</sup> that distinction really goes to *NLRB v. Jones & Laughlin Steel Corp.*, which upheld the National Labor Relations Act.<sup>211</sup> *Laughlin Steel* was one of several "test cases"<sup>212</sup> brought during the New Deal to overturn precedents preventing the "Wilsonian" (Woodrow; not James) view that "administrative expertise" was needed to take hold—a view that "reflected a deep disdain for the theory of popular sovereignty."<sup>213</sup> In upholding the NLRA, the Supreme Court held that Congress's commerce power not only extends to regulating interstate commerce, but also activities "affecting commerce."<sup>214</sup> This laid the groundwork for the "substantial effects" test that would later come in *Wickard*.<sup>215</sup> And after *Wickard*, with a few exceptions in the 1990s, the substantial effects test would turn the Commerce Clause into a "hey-you-can-do-whatever-you-feel-like Clause."<sup>216</sup> Thus, if someone

206. That is not to say there were no examples of the federal government going beyond its powers after the founding. Indeed, as any good Star Wars fan knows, wielding power can be a pretty tantalizing thing. <https://www.youtube.com/watch?v=SWwFogRQVnk> [<https://perma.cc/6DNA-7PQA>]. The Framers knew it too. "If men were angels, no government would be necessary." THE FEDERALIST No. 51 (James Madison), at 319 (Clinton Rossiter ed., 1999). It is thus no surprise that even right after the Constitution was ratified, Congress and other governmental actors sought to go beyond what powers they were delegated.

207. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 129 n.6 (2015) (Thomas, J., concurring) (recounting the Progressive Era's "move from the individualism that had long characterized American society to the concept of a society organized for collective action[]" and the "usher[ing] in" of "significant expansions of the administrative state, ultimately culminating in the New Deal").

208. U.S. CONST. art. 1, § 8, cl. 3.

209. See e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (finding the "Keating-Owen Child Labor Act" unconstitutional because it was a pretextual attempt to regulate the production of goods rather than the interstate shipping of goods).

210. 317 U.S. 111 (1942).

211. 301 U.S. 1 (1937).

212. See generally PETER H. IRONS, THE NEW DEAL LAWYERS 3–4 (2d ed. 1993) (discussing the litigation strategy of government lawyers pressing for the judiciary's acceptance of New Deal legislation).

213. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 129 n.6 (2015) (Thomas, J., concurring).

214. *Laughlin Steel*, 301 U.S. at 31.

215. 317 U.S. at 126.

216. Alex Kozinski, *Introduction*, 19 HARV. J. L. PUB. POL. 1, 5 (1995).

wants to begin addressing the “what” question, this would be a good place to focus. After all, if the doctrine of enumerated powers means anything—and it surely does under the Fiduciary Constitution as explained above—this would be a good place to start asking questions. After all, if many of the statutes that allow for federal agencies to conduct juryless administrative trials did not exist, then the civil jury right would not be an issue.

The Progressive Era’s expansion of Congress’s enumerated substantive powers did not come without consequences for the other parts of the Fiduciary Constitution implicating the “who” question. Once Congress had been given essentially a police power over every aspect of American life, it became highly improbable, while not impossible, for the legislative branch—which is the lawmaking agent of the People—to draft laws with specific enough detail under its newfound power. It became in some respects, if not necessary, easier to subdelegate away that power to the branch with more capacity to make decisions on a day-to-day basis. Yet before the New Deal, that was not feasible under the Supreme Court’s precedent. In both *Panama Refin. Co. v. Ryan*,<sup>217</sup> and *ALA Schechter Poultry Corp. v. United States*,<sup>218</sup> the Supreme Court declared acts of Congress unconstitutional under the nondelegation doctrine. The Court recognized, if not specifically, that the separation of powers does not allow subdelegations of governmental power not authorized by the Constitution. Yet not coincidentally in our view, after the Court expanded Congress’s power in *Laughlin Steel*, subdelegations of power between the branches became common place and the Court stopped meaningfully scrutinizing those subdelegations.<sup>219</sup> Thus, even if one were not to fully address the substantive enumeration of powers under the Fiduciary Constitution, the second place to start asking questions is here.

But what about our backstop? Surely even in the wake of these fundamental changes to our Constitution’s structure, the Bill of Rights survived. While in many ways it did, one key aspect, the one important to this paper, did not. For this we return to *Laughlin Steel*. The case not only addressed Congress’s power under the Commerce Clause but also addressed and rejected a claim that the NRLA violated the Seventh Amendment.<sup>220</sup> The Supreme Court would later rely on *Laughlin Steel* in *Atlas Roofing v. OSHC* to expand the public rights doctrine to cover essentially all statutes passed by Congress in connection with, among other enumerated powers, “interstate” commerce.<sup>221</sup> Because these “statutory rights” claims did not exist at common law, there was no need for a jury trial.<sup>222</sup> And while not addressed in *Atlas Roofing*, its holding that “statutory rights” are “public rights” logically foreclosed many challenges to agency adjudication under Article III of the Constitution—which at the very least applies to determinations concerning life, liberty, and property.

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217. 293 U.S. 388, 415 (1935).

218. See generally 295 U.S. 495 (1935).

219. See Lawson, *supra* note 44.

220. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937).

221. See 430 U.S. 442, 452–53 (1977).

222. See *id.*

Thus, if one takes a step back, it is not hard to see how addressing the “what” and “who” questions under the Fiduciary Constitution are essential to preserving the civil jury trial right. From at least the New Deal on, there was a fundamental reversal from a Constitution based on enumerated and separated powers from the people to the agents of government, to one where the agents were given essentially a blanket power to determine the rights of the principal. Getting the answer wrong to any of the key questions inevitably leads down a path where people can be hauled into administrative tribunals for violating laws passed under expansive congressional police powers and then be tried without an Article III judge or a jury under the Seventh Amendment. The question thus becomes at what point in the Fiduciary Constitution analysis is it both realistic and more protective in the immediate future to protect the people’s right to a civil jury trial.

The Supreme Court in *Jarkesy* began to restore some semblance of the Fiduciary Constitution by upholding the bill of rights and holding the federal government must prove its case to a jury before collecting civil penalties for violations of securities laws.<sup>223</sup> That’s a new and welcome development. Despite the Constitution’s jury guarantee,<sup>224</sup> agencies have for decades after the New Deal—but not always<sup>225</sup>—gone through an internal process, one outside of Article III’s independent judiciary, to adjudicate defendants liable. Often, a private citizen can find himself asking the very individuals who filed the complaint against him to exonerate him.<sup>226</sup> But many think the New Deal government by “administration” arrangement should be preserved, and many of those solutions are plausible if the civil jury right is merely upheld under the Seventh Amendment. But we think it is more protective of the principal to answer the second question of “who” and ensure that the government brings cases in an Article III court, where judges who have been assigned the “judicial Power” adjudicate rights over life, liberty, and property.

Indeed, *Jarkesy* prompted many academics and practitioners to conjure up different approaches to brace for the potential impact of the case’s outcome. One idea proposes that Congress establish a regime that would allow regulated parties facing administrative adjudications, where a Seventh Amendment jury trial right would attach, to “waive” their rights.<sup>227</sup> Or put differently, “consent” to having a constitutional actor not assigned certain powers to wield those powers. This theory raises the issue of whether the Constitution’s separation of powers under the Fiduciary Constitution allows an executive branch agency to adjudicate certain classes of cases—even if a regulated party “consents” to the adjudication. In

223. See *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 140 (2024) (Gorsuch, J., concurring).

224. U.S. CONST. amend. VII.

225. See William Yeatman & Keelyn Gallagher, *The Rise of Monetary Sanctions in Federal Agency Adjudication*, 76 ADMIN. L. REV. 857 (2024).

226. See, e.g., *Petition for Writ of Certiorari at 9, Leachco., Inc. v. Consumer Prod. Safety Comm’n, cert. denied*, 145 S. Ct. 1047 (2024) (mem.).

227. Jed Shugerman, *A Historical Case for a Substantive, Non-Remedial Seventh Amendment and Against Its “Public Rights” Exception*, add cite for GJLPP (2025).

other words, the “who” question. The answer is not obvious under current post-New Deal Supreme Court precedent. And parties may theoretically consent to deprivations of constitutional rights; and in another context, criminal defendants may waive their right to a jury trial. But parties may not “consent” to separation of powers violations—just like litigants may not “waive” subject-matter jurisdiction; courts may hear only cases and controversies as mandated under Article III.

Another proposal suggests allowing regulated parties to remove agency enforcement actions from administrative tribunals to federal court.<sup>228</sup> Proponents contend this right to remove would alleviate concerns about the legitimacy of agency adjudication while preserving the benefits of administrative expertise and efficiency.<sup>229</sup> Like the waiver proposal, removal sidesteps the Constitution’s allocation of specific powers to specific actors. As discussed above, the judicial power of the United States is vested exclusively in the Article III courts and, to an extent, juries.<sup>230</sup> These are structural protections of liberty. While these protections are bolstered and reaffirmed by the Seventh Amendment’s requirement that the right to a jury trial be preserved in suits at common law,<sup>231</sup> they are not waivable “individual rights” per se.

Together, Article III and the Seventh Amendment allocate the judicial power between judges and juries, reflecting the people’s grant of adjudicative authority to the courts and the people themselves as their agents.<sup>232</sup> The right to removal would allow regulated parties the ability to divest Article III judges and juries of their constitutionally mandated duties, and transfer those functions to executive branch actors. This reallocation violates the fundamental principle that the people’s delegation of powers to their governmental agents cannot be altered or overridden by those agents themselves.<sup>233</sup> Indeed, just as Congress cannot delegate its legislative power to the executive, it cannot sanction the transfer of the judicial power to the executive—even through consent of some individuals. The Constitution’s structure of separated powers is a constraint on governmental actors, not a set of default rules that can be rearranged by Congress through some private preferences.

And when the Seventh Amendment is understood in its original structural sense, combined with Article III, one understands why individuals cannot simply

228. Christopher J. Walker and David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1 (2024).

229. *Id.* at 3–4.

230. See U.S. Const. art. III, § 1. Again, we do not explore the full scope of the “judicial” or “executive” powers under the Constitution. See, e.g., *supra* note 136 for various sources. But the removal proposal presupposes that a case is in federal court—where the judicial power is to be wielded—and *the same case* then moves to an executive branch. Whatever “power” is being asserted in forum A, we doubt that that power changes merely because it moves to forum B. *Contra* City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) (stating that *any* power wielded by an agency—even if they “take ‘legislative’ and ‘judicial forms’” are “exercises of—indeed under our constitution structure they *must be* exercises of—the ‘executive Power.’” (emphasis in original)). If the nature of the power turned merely on who wields the power, then separating powers would make little sense.

231. U.S. CONST. amend. VII.

232. See Suja A. Thomas, *Essay on the Seventh Amendment, the Jury, and Legal Rights*, 64 VILL. L. REV. 361, 372–77 (2019).

233. See Natelson, *The Constitution and the Public Trust*, *supra* note 3, at 1137–42.

consent to agency adjudication of legal disputes without juries. To do so transforms the civil jury from an institutional expression of popular sovereignty and a check on the government into an optional procedure that can be discarded in favor of adjudication by executive branch bureaucrats.

The fiduciary theory of the Constitution provides a principled framework for assessing the proper scope of agency adjudication and its relationship to the judicial power. By recognizing that all governmental power is delegated by the people and must be exercised within the constraints of that delegation, the theory offers a basis for distinguishing legitimate administrative functions from unconstitutional encroachments on judicial power. And by understanding the Seventh Amendment as a structural protection of popular control over the judicial power—not just as a waivable individual right—the theory allows for a more nuanced analysis of the jury trial right’s application to agency proceedings.

We conclude that while consent may solve the *jury* issue, it cannot solve the broader structural constitutional issues at play and would contradict the fiduciary nature of the Constitution. When an executive branch adjudication would otherwise require the administrative agency to adjudicate private rights—traditionally the right to life, liberty, or property—those rights must be adjudicated in an Article III court. This claim reflects both the original meaning of the Constitution and preserves the foundational liberties protected by the fiduciary Constitution.

#### CONCLUSION

The fiduciary Constitution establishes a principal-agent relationship between “We the People” and the federal government, with the people delegating specific enumerated powers to each branch to protect liberty and prevent tyranny. Viewing constitutional issues through this fiduciary lens resolves many modern doctrinal confusions, including how to protect the civil jury right in the face of agency adjudication.

Under the fiduciary Constitution, the judicial power is delegated to judges and juries and provides a structural safeguard protecting the right to a jury trial in suits at common law. Article III courts and juries act as agents of the people, and the Constitution authorizes no one else—including executive branch adjudicators—to wield that delegated power. Therefore, the executive branch cannot exercise judicial power or abrogate the jury right, even with the consent of individual litigants, because that would improperly reallocate the power the people delegated to the judiciary in Article III.

The fiduciary theory provides a principled framework grounded in the Constitution’s original meaning for restoring the civil jury right and the upholding the separation of powers. It recognizes that all federal power derives from the people and must be exercised within the constraints of their delegation to each branch in the constitutional text. By understanding the Constitution’s structure and the Seventh Amendment as critical expressions of popular sovereignty, the fiduciary theory offers the surest safeguard for individual liberty. All litigants should raise these issues when facing executive branch adjudications and ensure that the Constitution’s broader context is considered.