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Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black's White Lectures

Richard C. Boldt

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CONSTITUTIONAL STRUCTURE, INSTITUTIONAL RELATIONSHIPS AND TEXT: REVISITING CHARLES BLACK'S WHITE LECTURES

*Richard C. Boldt**

Fundamental questions about constitutional interpretation and meaning invite a close examination of the complicated origins and the subsequent elaboration of the very structure of federalism. The available records of the Proceedings in the Federal Convention make clear that the Framers entertained two approaches to delineating the powers of the central government relative to those retained by the states. The competing approaches, one reliant on a formalist enumeration of permissible powers, the other operating functionally on the basis of a broad dynamic concept of state incompetence and national interest, often are presented as mutually inconsistent narratives. In fact, these two approaches can be understood, at the founding and at critical junctures along the way, as capable of coexisting in a complex, sometimes uncomfortable, arrangement that draws both upon structural and specific textual elements of grant or prohibition to police the line between central government powers and those retained by the states.

Some of the specific provisions of grant or prohibition in the Constitution have held up well over the course of our nation's history, but others have fallen out of alignment with the underlying economic, social, and political context within which the Constitution must operate. In those instances, significant pressure has been placed on the Necessary and Proper Clause to bring constitutional doctrine into alignment with contemporary circumstance and, indirectly, with the deeper structures and relationships that ground the constitutional order. Consistent with the insights offered decades ago by Professor Charles Black, this Article argues that the Supreme Court better serves the constitutional order when it draws inferences directly from those deeper structures and institutional relationships, which were embedded in the original Constitution and which have endured and been

* T. Carroll Brown Professor of Law, University of Maryland Francis King Carey School of Law. I thank Eileen Canfield, Dan Friedman, Mark Graber, Susan McCarty, Jana Singer, Maxwell Stearns, and Gordon Young for their invaluable assistance in the development of this Article. I also thank the participants of the University of Maryland Comparative Constitutional Democracy Colloquium for their insights and critiques.

reaffirmed over time, and avoids a strained reading either of the enumerated power itself or of the Necessary and Proper Clause.

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INTRODUCTION

Among Professor Charles Black's many contributions to the constitutional law literature, perhaps his most important is contained in a slight book, derived from his Edward Douglass White Lectures on Citizenship at the Louisiana State University, on the role that structure and relationship plays, and should play, in constitutional interpretation.¹ A centerpiece of Black's analysis was his discussion of Chief Justice Marshall's towering opinion in *McCulloch v. Maryland*,² and in particular, Marshall's treatment of the Necessary and Proper Clause.³ Professor Black's position was that Marshall did not rely on that specific bit of text as the basis for finding national government power to create a national bank, but instead considered it in order to dispel the argument, originally advanced by Thomas Jefferson and others during the debate over the first national bank,⁴ that the Necessary and Proper Clause actually serves a limiting function on the powers enumerated for exercise by Congress.⁵ Black powerfully demonstrated that Marshall's understanding of federal regulatory power was grounded in the broader structure of the whole constitutional system and in the institutional relationships set up in the Constitution. Black's view was that understanding federalism issues in this functionalist fashion frequently is superior to the more formalist, text-focused approach that the Court has from time-to-time adopted in the Commerce Clause area and elsewhere.⁶

1. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. See BLACK, *supra* note 1, at 13–15. The Necessary and Proper Clause provides that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

4. For a discussion of the arguments advanced by Thomas Jefferson in response to President George Washington's request that he and several other cabinet members provide an opinion on the constitutionality of the First Bank of the United States, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 195–96 (2003); see also J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 602 (discussing Marshall's refutation of Maryland's narrow construction of the term “necessary”).

5. See BLACK, *supra* note 1, at 14.

6. See *id.* at 22–23. For an overview of formalist and functionalist methods of constitutional interpretation in the federalism area, see Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

Recently, in *United States v. Comstock*,⁷ a case in which the federal government's authority to civilly commit so-called sexual predators was challenged on the ground that the authorizing statute exceeded the central government's enumerated and implied authority, the majority relied on the Necessary and Proper Clause as a distinct source of federal lawmaking power.⁸ That reading, and a similar approach in relatively recent Commerce Clause cases and others raising the question of federal authority,⁹ is in some tension with Professor Black's vision because it fails to exploit the interpretive potential of the broader structural values recognized in *McCulloch*.¹⁰ This Article argues that Professor Black's approach frequently is a superior way to think through difficult questions of federalism, and would, if adopted, promote candor and improved collaboration between the judiciary and the political branches.

A full consideration of the Necessary and Proper Clause implicates institutional questions, questions of interpretive methodology, and questions of meaning. Some recent scholarship has focused on the institutional question, arguing either that the Supreme Court should be deferential to Congress's assertions of authority under the Necessary and Proper Clause or that the Court should exercise a measure of independent judgment with respect to the reach of that provision.¹¹ On the question of the meaning of the Necessary and Proper Clause, provocative historical accounts have become available that seek to connect contemporary understandings of the Necessary and Proper Clause to eighteenth-century English usage derived from agency law, administrative law, and corporations

7. 560 U.S. 126 (2010).

8. *Id.* at 129–30. The Court read the Necessary and Proper Clause as conferring incidental lawmaking power beyond that provided in the other enumerated provisions in Article I, Section 8, but in support of those enumerated powers. For a further discussion of *Comstock*, see *infra* text accompanying notes 216–20.

9. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 33–35 (2005) (Scalia, J., concurring).

10. The *Comstock* majority opinion does show some ambivalence in this regard by referring at times to the effect of the Necessary and Proper Clause as “granting” power to Congress and at others as merely confirming the existence of such authority. See *infra* text accompanying notes 216–19.

11. Compare John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 9–10 (2014) (reading the Necessary and Proper Clause as conferring broad implementing authority on Congress to which the Court should show deference), with William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 46–47 (2014) (arguing that the text and historical practice permit greater judicial authority and require less deference to Congress).

law.¹² Implicit in these efforts is the notion that the constitutional phrase reflected, and likely was understood at the time to embody, existing pre-constitutional legal constructs having to do with the obligations of fiduciaries to exercise reasonable judgment in tasks otherwise assigned to them.¹³

This effort to uncover and describe older English legal constructs that likely were familiar to the Framers and other lawyers of their generation, in order to assist in the interpretation of the constitutional text as it was promulgated and ratified, implicates questions of interpretive methodology. Should the existence and scope of federal powers turn, in the first instance, on the best reading of specific constitutional language, including the Necessary and Proper Clause, or should the interpretive project be centered on structure and institutional relationship? And if constitutional text is the starting point, should the focus be on “passages of grant or prohibition,” or instead on passages that “recognize political and societal structures”?¹⁴ If specific text is to play a central role in the interpretive process, is original intention or original meaning¹⁵—perhaps informed by historical accounts of pre-existing private law constructs or by accounts of the deliberations that took place in the constitutional convention or during the ratification process¹⁶—the best or even a good way to engage the words on the page? And,

12. See GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 119 (2010).

13. Professor Natelson, for example, argues that the Necessary and Proper Clause drew upon principles of British agency law that included a requirement of reasonableness and other fiduciary obligations of good faith and due care. See *id.* John Manning points out, however, that the phrase “necessary and proper” appeared in a wide variety of other eighteenth-century public law contexts and that Natelson and his co-authors do not necessarily claim one uniform or consistent meaning for the phrase. See John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1373–74 (2012).

14. Vince Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176, 182 (1970) (reviewing CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969)).

15. On the differences between the “old originalism,” which focused on the “the concrete intentions of individual drafters of [the] constitution,” and the “new originalism,” which focuses instead on the “public meaning of the text that was adopted,” see Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599–613 (2004). For a careful parsing of the terms “meaning,” “intention,” and “understanding,” all of which are common in originalist analysis, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 7–11 (1996).

16. See generally Barnett, *supra* note 4, at 183–221 (exploring the “original public meaning of the Necessary and Proper Clause” and highlighting the difference between “the subjective original *intent* of the framers . . . [and] the original *meaning*”).

finally, does the evidence of original meaning support an analytic approach to federalism issues that focuses on the enumeration of powers found in Article I, Section 8, together with the Necessary and Proper Clause, or does that evidence encourage us to engage more attentively the consideration of constitutional structure and institutional relationships that Professor Black urges?

These fundamental questions about constitutional interpretation and meaning implicate the uncertain text and promulgation history of the Necessary and Proper Clause. With respect to the uncertainty of the language, Chief Justice Marshall pointedly noted in *McCulloch* that even if that clause were to be given independent linguistic and legal significance, the word “necessary” in that provision “has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words A thing may be necessary, very necessary, absolutely or indispensably necessary.”¹⁷ With respect to the clause’s promulgation history, the historical evidence is far from clear as to what motivated the convention participants to insert this provision and what it was meant to accomplish.¹⁸ Some scholars argue that the phrase was included to ensure that the central government’s express general powers would be supplemented by additional authority to enact implementing measures reaching beyond the strict limits of the enumerations.¹⁹ Others point to statements at the time indicating that the clause was regarded as redundant to, and at best confirming of, implied powers already conveyed in the constitutional arrangements the Framers had settled on.²⁰

In addition, however, these fundamental questions about interpretation and meaning also invite a closer examination of the complicated origins and the subsequent elaboration of the very structure of federalism at the foundations of the constitutional regime itself. The available records of the Proceedings in the Federal Convention make clear that the Framers entertained conflicting approaches to delineating the powers of the central government

17. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819). *But see* Barnett, *supra* note 4, at 204–05 (relying on notes from the Constitutional Convention to argue that the Framers’ choice of words in this respect was “considerably less deliberat[e]” than Marshall suggested).

18. Barnett, *supra* note 4, at 204–05.

19. *See* Manning, *supra* note 11, at 6–7.

20. *See* Barnett, *supra* note 4, at 185–86 (tracing this view to Federalist supporters of the Constitution, such as George Nicholas of Virginia).

relative to those retained by the states. In a series of debates and votes taken in May and July of 1787, the members of the Convention approved language granting generalized power to the federal government delimited functionally by reference to the incompetence of the individual states.²¹ Thus, on July 17, 1787, a majority of the delegates, voting by state, approved language that would permit the federal legislature “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”²² In August of 1787, however, the Committee of Detail presented a report to the full Convention that contained an enumeration of powers to be held by the legislature of the central government, and that contained at its conclusion a necessary and proper clause.²³ This formulation, of course, found its way into Article I, Section 8 of the version of the Constitution that was ultimately presented to the states and ratified.²⁴

Constitutional lawyers, academics, and others have offered competing interpretations of this history, which are relevant to the questions of constitutional interpretation and meaning raised by Professor Black’s appeal to reasoning from structure and relationship. By one account, “[t]he enumeration by the Committee of Detail, which the Convention employed as a basis for final action, should be construed to reach towards the same generalized grant of power to the national government which the Convention had earlier approved.”²⁵ This account fits most comfortably with an approach to federalism based on structural reasoning.²⁶ From another perspective,

21. See *Day-by-Day Summary of the Convention*, TEACHING AM. HIST., <https://teachingamericanhistory.org/resources/convention/summary/> (last visited Apr. 21, 2021).

22. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1937) [hereinafter THE RECORDS OF THE FEDERAL CONVENTION, VOL. 2].

23. *Id.* at 176, 181–82.

24. See *id.* at 181–82 (Madison’s Notes).

25. JONATHAN D. VARAT & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 107 (15th ed. 2017).

26. While Charles Black’s White Lectures describe one approach to reasoning from structure and relationship, other scholars have offered a broader account of structural constitutional interpretation. Brannon Denning and Glenn Harlan Reynolds, for example, have suggested that structural reasoning draws upon “inferences derived from related constitutional provisions, the overall structure of the Constitution, and the principles that animated its framing.” Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1089–90 (1997). Philip Bobbitt has explained that,

the structural approach, unlike much doctrinalism, is grounded in the actual text of the Constitution. But, unlike textualist arguments, the passages that are significant are not

however, “[t]he decision to enumerate the powers of Congress reflects a decision sharply to circumscribe national power.”²⁷ This perspective is much more difficult to square with a broad structural interpretive approach, and imposes on the Necessary and Proper Clause a potentially significant role in providing the constitutional basis for finding the incidental powers required by Congress.

These competing approaches to marking out the boundaries of the American federalist system, one reliant on a formalist enumeration of permissible powers, the other operating functionally on the basis of a broad dynamic concept of state incompetence and national interest, have been present from the very beginning of our constitutional order and often are presented as mutually inconsistent narratives. In fact, these two approaches can be understood, at the founding and at critical junctures along the way, as capable of coexisting in a complex, sometimes uncomfortable, arrangement; an arrangement which supports an interpretive approach that draws both upon structural and specific textual elements “directive of action” to police the line between central government powers and those retained by the states.²⁸

Some of the specific provisions in Article I, Section 8 have held up well over the course of our nation’s history, but others have fallen out of alignment with the underlying economic, social, and political context within which the Constitution must operate. In those instances, where a specific textual grant of power represents a

those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the requirements of the relationships among structures.

PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 80 (1982).

27. VARAT & AMAR, *supra* note 25, at 107.

28. BLACK, *supra* note 1, at 7. Jack Rakove has described “two complementary sets of meanings” with which Americans have “endowed” the Constitution since it was presented for ratification in 1787. RAKOVE, *supra* note 15, at 11. One meaning derives from the Constitution “[t]aken as a whole—which is how the ratifiers had to take it.” *Id.* The other is made up of a series of disputes about the import of individual clauses. *Id.* Rakove knits together these two meanings in the following terms:

The Constitution has thus always represented something more than the sum of its parts. But since 1789, most disputes about its meaning have necessarily centered on its individual clauses. No single clause or provision can be interpreted without considering its relation to the document as a whole. Yet in practice, the enterprise of interpretation often requires an intense analysis of key words and brief phrases that the Constitution itself does not define. . . . These two conceptions of the meaning of the Constitution are complementary, not contradictory.

Id. at 11–12.

miscalculation, significant pressure has been placed on the Necessary and Proper Clause to bring constitutional doctrine into alignment with contemporary circumstance and, indirectly, with the deeper structures and relationships that ground the constitutional order. This Article argues that the Supreme Court better serves the constitutional order when it draws inferences directly from those deeper structures and institutional relationships, which have endured and have been reaffirmed over time, and avoids a strained reading either of the enumerated power itself or of the Necessary and Proper Clause.

The remainder of this Article elaborates this alternative interpretive approach. The discussion proceeds as follows: Part I takes up Professor Black's theory of reasoning from structure and relationship and explores its operation relative to more conventional approaches to reading the Constitution. Part II examines the state incompetence principle and the turn to an enumerative approach in the Framers' adoption of Article 1, Section 8, and then offers an account of the Interstate Commerce Clause and the Necessary and Proper Clause that helps to reconcile these competing elements in our constitutional tradition. Part III explores the reasoning of the Rehnquist and Roberts Courts with respect to the Necessary and Proper Clause, which has been characterized as a new form of structuralism and has been linked to the interpretive approach set out in Charles Black's work, and argues that, while an accurate account of the modern Court's cases, this is a misreading of Black. The Article then concludes by applying Professor Black's theory of structure and relationship to some contemporary federalism cases in order to demonstrate how it might function to help reconcile notions of fidelity to an original constitutional master text with a coexisting "living discursive tradition" of constitutional elaboration and development.²⁹

29. Peter G. Danchin, *From Parliamentary to Judicial Supremacy: Reflections in Honour of the Constitutionalism of Justice Moseneke*, 17 ACTA JURIDICA 29, 36 (2017); see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) (describing a form of constitutional interpretation that "requires fidelity to the original meaning of the Constitution and to the principles that underlie the text," but which is "consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles").

PART I

A. Charles Black on Reasoning from Constitutional Structures and Institutional Relationships

In the first of three lectures delivered at the Louisiana State University in 1968 as the Edward Douglass White Lectures, Professor Black described the prevailing approach to interpretation in American constitutional thought in the following terms:

[I]n dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage considered as a direction of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.³⁰

To illustrate how this “preference of intellectual method”³¹ has operated over time, and to demonstrate the potential benefits of his proffered alternative, Professor Black marched onto center stage a series of Supreme Court decisions that would have been entirely familiar to students of constitutional law at the time. The illustrative cases are not all federalism decisions. They included, among others, an Equal Protection case,³² a First Amendment opinion,³³ a state action decision,³⁴ and, of course, *McCulloch v. Maryland*.³⁵ Black’s purpose in discussing each of these cases was not to dismiss the use of specific directive constitutional language as the basis for adjudicating constitutional conflicts, but to call into question the heavy reliance on that approach that has grown up in American constitutional law.³⁶ By contrast, Professor Black drew out of his selected cases a collection of “structures and relationships”—a

30. BLACK, *supra* note 1, at 7. Professor Black characterized this way of thinking as incomplete, due to its failure to develop a “full-bodied case-law of inference from constitutional structure and relation but even to a preference, among texts, for those which are in form directive of official conduct, rather than for those that declare or create a relationship out of the existence of which inference could be drawn.” *Id.* at 8.

31. *Id.* at 3.

32. *Carrington v. Rash*, 380 U.S. 89 (1965).

33. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

34. *Collins v. Hardyman*, 341 U.S. 651 (1951).

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

36. See BLACK, *supra* note 1, at 21. “Black is thus protesting not the exclusivity of the textual mode so much as the ‘stylistic preference’ by which judges . . . have come to employ the reasoning process of textual interpretation over that of structural and relational inference.” Blasi, *supra* note 14, at 180.

phrase he treated as something of a term of art—that he suggested the Court in each instance might have deployed as the anchor for an alternative analytic approach, often supporting the same outcomes that the majority decisions in fact reached on the basis of inference from narrower textual grounds.³⁷ Black’s catalogue of structures and relationships comprises a collection of constitutional principles that are “either established in some detail by the text of the Constitution or else . . . plainly envisioned by an important provision of that text.”³⁸ Three of these structural principles are of particular relevance to the ongoing struggle over the contours of federalism: (1) “the bare existence, irrespective of its character, of a federal government that is supreme over the state governments;” (2) “the economic structure of nationhood;” and (3) a structure of “national unity,” which, among other things, “warrants inference as to mobility of population.”³⁹

Professor Black was not cavalier in his identification of the structures and relationships he regarded as fundamental, and it is difficult to quarrel with his judgment that these principles are “soundly enough established to furnish a basis” for resolving constitutional disputes.⁴⁰ Indeed, he assembled a group of principles that virtually all constitutional lawyers would regard as essential elements of our constitutional tradition.⁴¹ Given this universality, Black argued, it is disappointing how infrequently these principles have been relied upon by the Supreme Court as the doctrinal foundation for individual decisions.⁴²

Black convincingly demonstrated that Chief Justice Marshall’s opinion in *McCulloch* is an exception to this pattern. Students of Marshall’s opinion are familiar with the essentially structural approach to the second issue in the case, the question whether the state of Maryland could impose a tax on the operation of a national instrumentality, the Second National Bank.⁴³ Clearly, Marshall’s emphasis on “the warranted relational proprieties between the

37. See BLACK, *supra* note 1, at 8–29.

38. Blasi, *supra* note 14, at 182.

39. *Id.*; BLACK, *supra* note 1, at 20–21, 28. In addition to these essential structural principles, Black also identified the central role that the electorate plays in the federal government, the availability of federal judicial forums for citizens’ grievances, and the concept of citizenship. See Blasi, *supra* note 14, at 182.

40. BLACK, *supra* note 1, at 23.

41. See Blasi, *supra* note 14, at 182–83.

42. See BLACK, *supra* note 1, at 31–32.

43. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819).

national government and the government of the states” and the “structural corollaries of national supremacy”⁴⁴ was dispositive of the issue.⁴⁵ But, Black argued, Marshall’s treatment of the first issue, whether the national government had the constitutional authority to charter a national bank, is also essentially structural, notwithstanding the Court’s familiar discussion of the Necessary and Proper Clause.⁴⁶ Black explained,

[a] reasonably careful reading shows that Marshall does not place principal reliance on this clause as a ground of decision; that before he reaches it he has already decided, on the basis of far more general implications, that Congress possesses the power, not expressly named, of establishing a bank and chartering corporations.⁴⁷

This process of drawing legally dispositive inferences from structures and relationships embedded in the whole Constitution rather than from individual constitutional provisions that grant power or set express prohibitions is not entirely foreign to American constitutional practice after *McCulloch*.⁴⁸ For example, Justice Douglas’s majority opinion in *Griswold v. Connecticut*⁴⁹ deployed structural reasoning to find a constitutional right to privacy as the basis for striking down a Connecticut statute forbidding the sale and use of contraceptives. Douglas wrote that:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . . The present case . . . concerns a relationship

44. BLACK, *supra* note 1, at 15.

45. *Id.* at 14. In particular, Chief Justice Marshall’s emphasis on the fact that the people in the states find representation in the national legislature and should not be obligated to rely on the good faith of state legislatures in which they are not formally represented. See *McCulloch*, 17 U.S. (4 Wheat.) at 428.

46. See *McCulloch*, 17 U.S. (4 Wheat.) at 411–23.

47. BLACK, *supra* note 1, at 14.

48. See BOBBITT, *supra* note 26, at 74–81; Denning & Reynolds, *supra* note 26, at 1089–120. In fact, David Schwartz has offered a historical account showing that, while *McCulloch* was not particularly influential in establishing nationalist constitutional principles in the first few decades after its publication, it did embed the essential idea that reading the Constitution requires something more than clause-bound statutory interpretation techniques. See DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019).

49. 381 U.S. 479 (1965).

lying within the zone of privacy created by several fundamental constitutional guarantees.⁵⁰

David Luban has explained that this passage from *Griswold* is amenable to two readings, both structural.⁵¹ The first, which he attributes to Robert Bork,⁵² understands Douglas to suggest that each of the textually identified guarantees in the Bill of Rights—the First, Third, Fourth, Fifth, and Ninth Amendments—carries with it a protective “buffer zone” that prophylactically ensures the vitality of the core right.⁵³ In this reading, these respective buffer zones of protection then “fuse” into a more general right to privacy.⁵⁴ This is structural reasoning, because it derives a broad principle of constitutional importance—privacy—from the combined contributions of a number of individual provisions in the written text.

While Bork was willing to accept the constitutional propriety of recognizing individual zones of protection around each rights guarantee,⁵⁵ he criticized Douglas’s approach because he understood the fusing of these zones into a new general right to privacy, which is the structural reasoning element here, as an unwarranted additional step too far removed from the textual provisions of grant or prohibition that are the source of the claimed constitutional protection.⁵⁶ Luban’s alternative reading of the famous language from *Griswold* is structural in a different sense. On this account the right to privacy identified by Justice Douglas was not derived from the protective zones around each textually specified guarantee but instead overhangs all of those provisions and is revealed by them, operating together. Luban explains that “*Griswold* does not use a two-step method to construct the right of privacy, with one step deriving penumbral rights and the next step fusing them, as Bork suggests.”⁵⁷ “*Griswold*’s method,” says Luban, “is instead a Platonic

50. *Id.* at 484–85 (citation omitted).

51. See David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7 (1999).

52. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95–100 (1990).

53. Luban, *supra* note 51, at 28–29.

54. *Id.*

55. This is somewhat analogous to reading the Necessary and Proper Clause as confirming the existence of implied powers created by the express enumerations of power contained in Article I, Section 8. See *infra* text accompanying notes 216–20 (discussing this analogous notion).

56. See Luban, *supra* note 51, at 29.

57. *Id.* at 36.

mirror-image of the activist derivation of penumbral rights.”⁵⁸ That is, instead of deriving rights penumbral to the specific rights in the Bill of Rights, Douglas understands each of those textual guarantees “as itself the penumbra of some principle that allows us to understand what it is doing in the Constitution.”⁵⁹ The right to privacy, then, does not grow out of the First, Third, Fourth, Fifth, and Ninth Amendments, but instead informs those specific guarantees and is revealed by them.⁶⁰

In his review of *Structure and Relationship*, which appeared in the *Yale Law Journal* several years after the book’s publication, Professor Vince Blasi noted that attention to constitutional language plays an important role in Professor Black’s method of reasoning, just as it does in the dominant approach that Black set up as his foil.⁶¹ Indeed, he makes clear that Black’s method was intended as “a supplement to, not as a substitute for, the dominant technique of textual interpretation.”⁶² Black encouraged a sort of dialogue between the two interpretive approaches, observing “a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.”⁶³ What is distinctive about Black’s approach is that his textual foundations are different. “[T]he departure points for [Black’s method of] reasoning are not the familiar textual passages of grant or prohibition, but rather other textual passages that recognize political and societal

58. *Id.*

59. *Id.*

60. See Denning & Reynolds, *supra* note 26, for additional discussion of *Griswold* as an example of the Court’s use of structural, or “penumbral,” reasoning. Mark Graber describes this form of constitutional reasoning as “aspirationalism.” Such arguments, he explains, “are based on the particular conception of justice underlying the Constitution. . . . Constitutional provisions are then interpreted and applied in light of these broader constitutional commitments.” MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 85 (2013). In Graber’s typography of constitutional arguments, aspirationalism is treated as distinct from structural reasoning, which “deduce[s] constitutional powers and limitations from the general arrangements of the constitutional order and the relationships between governing institutions.” *Id.* at 81. For present purposes, this Article regards both forms of constitutional reasoning as structural.

61. See Blasi, *supra* note 14, at 182–84.

62. *Id.* at 183.

63. BLACK, *supra* note 1, at 31. “Black is thus protesting not the exclusivity of the textual mode so much as the ‘stylistic preference’ by which judges—especially twentieth-century judges—have come to employ the reasoning process of textual interpretation over that of structural and relational inference.” Blasi, *supra* note 14, at 180.

structures and relationships without expressly delineating any rights and powers that flow therefrom.”⁶⁴ When we move from individual rights cases to contested questions about constitutional authority (and in particular questions about the allocation of power between the central government and the states), Black’s reliance on structural features and constitutionally derived institutional relationships may hold even greater potential to influence the analytic process. The question is what significance the shift away from provisions of grant or prohibition might have for the way these issues are framed and resolved.

B. Concerns About Judicial Discretion

Structure and Relationship was written during the Warren Court era, and Charles Black embraced that Court’s activism expressly.⁶⁵ Importantly, however, his activism took a distinct form. While his reach in identifying the structures and relationships that might qualify as the basis for constitutional decision making was reasonably cautious, he was far less restrained in his elaboration of the inferences that lead from those foundational structures and relationships to the doctrinal outcomes he urged in individual cases. This “free-wheeling” and “imaginative” aspect to Black’s constitutional analysis,⁶⁶ both in individual rights cases and in disputes regarding the authority of the federal government,⁶⁷ invited a familiar critique, that the adoption of structural reasoning by the Court would permit the exercise of “excessive judicial discretion.”⁶⁸

64. Blasi, *supra* note 14, at 182.

65. Black described himself as a “judicial activist proudly self-confessed.” BLACK, *supra* note 1, at 72.

66. Blasi, *supra* note 14, at 183.

67. A good example of Black’s approach in an individual rights case is his reworking of the Court’s rationale in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), which involved a challenge to a Nevada tax of a dollar a head on the exit of persons from the state. Black suggested “the fact that the United States is a single nation warrants inference as to mobility of population, quite aside from strictly governmental needs.” BLACK, *supra* note 1, at 27–28. He offered an equally “free-wheeling” approach to the state action issue presented in *Collins v. Hardyman*, 341 U.S. 651 (1951), by suggesting that Congress constitutionally ought to have the power “to make criminal any violent interference, whether by a state or by private persons, with the opinion-forming process that gives life to the national polity.” BLACK, *supra* note 1, at 50.

68. See MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 343 (3d ed. 2007); see also Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833 (2004) (noting the wide judicial discretion created

The concern was that the Justices, who were already seen by some to be using loose inferential reasoning to rationalize predetermined outcomes in controversial cases, would be further liberated to engage in even more unrestrained instrumental reasoning once their analyses were grounded not by express constitutional text but instead by abstract constructions regarding constitutional structure and institutional relationship.⁶⁹

Black offered several responses to this concern. First, he argued that his approach to constitutional reasoning was no less respectful of text (and no less liberated from the constraints of text) than the inferential reasoning from constitutional provisions of grant or prohibition that the Warren Court often deployed, especially with respect to constitutional passages of “high generality.”⁷⁰ Black explained that “[t]he question is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts.”⁷¹ Black’s view was that “the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation,”⁷² precisely because the structural principles he proposed as analytic anchors reflect genuine commitments embedded in the American constitutional order and not transient policy preferences that might ebb or flow with the shifting membership and political affiliations of the members of the Court. Indeed, some contemporary advocates of Black’s structural method have argued that his approach is “perhaps less susceptible to abuse” than other more familiar interpretive methods, precisely “because it ties the development of new principles to the overall structure and purposes of the Constitution.”⁷³

Moreover, Black asserted that reasoning from constitutional structure and relationship could improve the predictability and clarity of constitutional doctrine, and serve to introduce a much needed

by structural interpretation); John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 VA. L. REV. 1779, 1786 (2003) (book review) (same).

69. See Blasi, *supra* note 14, at 189.

70. BLACK, *supra* note 1, at 30–31.

71. *Id.* at 30.

72. *Id.* at 30–31.

73. Denning & Reynolds, *supra* note 26, at 1118 (emphasis omitted) (quoting Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1346 (1992)).

candor to the Court's work.⁷⁴ The Court's analysis, he suggested, likely would be more empirical and pragmatic and less likely to be stiffly formalist and removed from the real world interests at stake, if the question the Court was given to address was not what a particular clause or constitutional phrase might mean to a careful reader (or must have meant to one who encountered that text in the late eighteenth century), but rather what answer to the legal question would make the most sense in light of the larger constitutional project. Focusing the Court's work in this way on the practical features of a dispute rather than permitting its attention to be diverted to an often acontextual consideration of language or grammar, might not diminish uncertainty or drive out doctrinal indeterminacy, but it could serve to frame disagreements between the Justices or among advocates so that the interests in conflict, and the relative costs of selecting one outcome rather than another, would be made more apparent and thus more amenable to frank evaluation.⁷⁵

In his lectures, Black pressed this point about transparency and candor in the course of his discussion of *Brewer v. Hoxie School District No. 46*,⁷⁶ a case about the possible federal constitutional protections that might attach to actions by state officials implementing federal rights.⁷⁷ The facts of the case did not fit neatly into any familiar constitutional provision setting out specific powers

74. See BLACK, *supra* note 1, at 31–32.

75. This transparency may on occasion serve as an ameliorative to the problem noted by Alexander Bickel and others of the claimed counter-majoritarian illegitimacy associated with constitutional judicial review, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962), because it facilitates other actors in the constitutional system to engage the Court's work, both through related legislative measures and executive branch implementation of constitutional norms. Of course, Congress cannot reverse the Court's constitutional decisions by ordinary legislation and the executive branch cannot simply ignore the Court's prescriptions, but by modifying the sub-constitutional context within which constitutional doctrine is operationalized, the political branches often can influence the shape and direction of the broader constitutional regime. For a good discussion of this interactive process, see LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). On the general idea that the constitutional order operates throughout the various branches and levels of government, see GRABER, *supra* note 60, at 103–04, 121–39 (2013). “The pattern of constitutional authority that has resulted from these complex interactions among elected officials, political activists, and unelected justices more resembles the chaos of the local garage band than the precision of a Mozart symphony.” *Id.* at 103.

76. 238 F.2d 91 (8th Cir. 1956).

77. *Id.* at 91. The plaintiffs in this case were members of a local school board in Hoxie, Arkansas who were attempting to implement a policy to desegregate the local public schools. They sued in federal district court for injunctive relief against the defendants, who were seeking to interfere with the operation of the Hoxie schools on a desegregated basis. *Id.* at 93–94.

or prohibitions, but Professor Black offered a structural rationale for the federal appeals court's holding for the state officials, suggesting that the outcome ought to turn on a general understanding of the federal-state relationship and not on any specific clause or phrase in the constitution.⁷⁸ Directing his attention to the value of judicial candor, Black observed:

I think this an eminently sensible implication. You may not think so. If you do not, then we can and must begin to argue at once about the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting, or scanning utterances, contemporary with the text, of persons who did not really face the question we are asking. We will have to deal with policy and not with grammar. I am not saying that grammar can be sidestepped, or that policy can legitimately be the whole of law. I am only saying that where a fairly available method of legal reasoning, by its very nature, leads directly to the discussion of practical rightness, that method should be used whenever possible.⁷⁹

Two additional considerations help to shore up Black's response to the critics of his interpretive approach. Neither is expressly set out in *Structure and Relationship* or in Black's other published work on the subject, but both are clearly implied. The first is that the adoption of a structural approach, because it tends to reframe constitutional disputes into questions about the operation of governmental and other societal systems, has the potential to broaden the information that litigants are likely to bring to the adjudicative process and to broaden the perspective of the judges charged with evaluating the resulting claims. As Vince Blasi has explained: "To the extent that structural reasoning would result in a refashioning of lawsuits, with different information coming to the attention of judges," the approach "may well lead to judicial intuitions and preconceptions that can be considered to be more sophisticated and thereby, quite apart from the subjective desirability of the results that might ensue, improvements of 'process.'"⁸⁰ A reliance on specific sections and

78. See BLACK, *supra* note 1, at 17–19, 22.

79. *Id.* at 22–23.

80. Blasi, *supra* note 14, at 189–90. Blasi also notes that "the structural approach recognizes a much broader, more comprehensive set of constitutional norms," and thus "may facilitate a

clauses of constitutional text concerned with authorizing action or limiting authority necessarily pushes courts to evaluate constitutional claims in isolation one from another. “The complex, integrated injustices of the current age,” however, “do not fit easily into the pigeonholes of specific grants and prohibitions” and do not lend themselves to effective resolution solely through the elaboration of that species of constitutional language.⁸¹

C. Demonstrating Fidelity to the Written Constitution by Attending to Structures and Institutional Relationships

The final consideration operating in favor of Professor Black’s method of reasoning from structure and relationship sounds not as a pragmatic ground for adoption of his approach but as a ground based in principle, capable of contributing to the overall legitimacy of the system of judicial review. At least as conceived by Black, the structures and relationships that form the basis for his analysis derive in some demonstrable fashion from the “sovereign act of will,” and the resulting writing, by which the constitution was established and brought into effect through ratification.⁸² Difficult questions of “fidelity” necessarily arise whenever a contemporary approach to interpretation seeks some measure of grounding in the original founding of the constitutional order. If the obligations and prohibitions of the original written Constitution are taken to have express, specific, and literal ongoing force, the problem of the “dead hand”—the uncertain moral and political authority of a past group of decision makers to control the democratic choices of the present—

judicial response to citizen complaints that concern systemic shortcomings as well as those that involve particularized grievances.” *Id.* at 186.

81. *Id.* at 187. An article published in the run up to the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which the Court evaluated the constitutionality of the “individual mandate” provision of the Affordable Care Act of 2010, serves as a helpful example of the kind of information that can become relevant once a structural approach to constitutional interpretation is employed, but that might not be regarded by the Court as relevant in a more traditional interpretive model. In the article, Professors Leslie Meltzer Henry and Maxwell Stearns employ game theory to demonstrate in some detail why a state-level approach to regulating the health insurance market is bound to fail and thus why, on an incompetence of the individual states rationale, the federal government ought to be empowered to intervene in this national market. See Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO L.J. 1117 (2012). For additional discussion of *Sebelius* and the Meltzer Henry and Stearns’s article, see *infra* text accompanying notes 262–64.

82. Blasi, *supra* note 14, at 192; see also RAKOVE, *supra* note 15, at 11 (reminding that it was the Constitution as a whole and not its parts that was presented to the states and that was ratified).

necessarily must be confronted.⁸³ If, on the other hand, these formative commitments are treated not as literal or static, or conveyed directly in the Constitution's passages of grant and prohibition, but instead are found more generally in the Constitution's broadly embedded values and institutional arrangements, "whose meaning and context evolve over time,"⁸⁴ then constitutional interpretation becomes a task of construction as much as discovery, a task that the Founders (and state ratifying conventions) can be understood to have delegated to future actors, including succeeding generations of judges hearing constitutional claims. By this account, constitutional reasoning by inference from structure and relationship is neither freed entirely from the constraints of the decisions entered at the founding nor burdened completely by the literal terms of grant and prohibition contained in the original master text. Constitutional meaning is instead an amalgam of original design harmonized with ongoing reinvention and reinterpretation by contemporary actors operating within a constitutional tradition that each generation must remake and reauthorize on its own terms.⁸⁵ To be sure, the constitutional tradition in the United States is centered around a written text. From one perspective, this fact clearly distinguishes the American constitutional order from other constitutional systems based on an "unwritten" or "uncodified" constitution.⁸⁶ In constitutional systems without a written text, foundational authority is said to be located "not in a spontaneous act of autonomous sovereign will but in a living discursive tradition of historical legal thought and practice

83. See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 381–83 (1997).

84. Blasi, *supra* note 14, at 192.

85. One version of this dynamic process of constitutional (re)construction is the theory of constitutional "translation" suggested by Lawrence Lessig. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 n.32 (1993). Jack Balkin's proposed "method of text and principle," which conceives the task of interpretation as "look[ing] to original meaning and underlying principle and decid[ing] how best to apply them in current circumstances," is also applicable. See Balkin, *supra* note 29, at 293.

86. Danchin, *supra* note 29, at 35. On this account, the U.S. Constitution is "understood to be the result of an exceptional act of popular self-determination" and functions as a "master-text [that] is the expression of a super-majoritarian act of popular will." *Id.* at 37. "We have a sacred text—the Constitution—which we understand as the revelatory expression of the popular sovereign." Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 3 (2000). The role of the judiciary in this text-centric system, in turn, is "to articulate the meaning of the canonical constitutional master-text which is itself a 'remnant' of popular sovereignty." Danchin, *supra* note 29, at 38.

which precedes and shapes acts of sovereign will.”⁸⁷ Inherent in this distinction between written and unwritten constitutions is an embedded set of ideas about the normative basis of constitutional obligation.⁸⁸ Written constitutions command fidelity because of their origins, while unwritten constitutions have normative force because of their past reception and the ongoing engagement of “law-applying officials” with that tradition.⁸⁹ From this point of view, the job of a constitutional court in a system with a written constitution is to interrogate the written text, perhaps giving special significance to its original meaning, so as to effectuate the commitments that the sovereign people set at the moment of ratification.⁹⁰ In a constitutional system without a written constitution, by contrast, the judicial function is to nurture the “living discursive tradition,” essentially facilitating a “partnership among ‘those who are living, those who are dead, and those who will be born.’”⁹¹

It is possible, however, in considering the American constitutional order, to view both the question of constitutional normativity (the question of fidelity to an original set of constitutional commitments, reflected in a text made by an act of sovereign will at the founding) and the question of judicial function (the Court’s disposition toward the written text) in a way that borrows helpfully from the tradition of unwritten constitutionalism and that narrows somewhat the distinction between the operation of a written and an unwritten constitution. As Charles Black helpfully suggested, the entrenched obligations that derive from an original act of sovereign will may be structural and relational as much as they are directive and prohibitory.⁹² The commitments of the founding to which ongoing generations owe fidelity are those foundational arrangements that have endured and have been embraced, refined, and re-enacted over the long life of the constitutional regime. In that sense, the normative force of the written constitution, including the institutions and structures woven into its whole text, derives from its

87. Danchin, *supra* note 29, at 36.

88. For one influential view of the relationship between written and unwritten constitutional authority, see Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988).

89. Danchin, *supra* note 29, at 49.

90. *Id.* at 51.

91. *Id.* at 36.

92. See BLACK, *supra* note 1, at 30–31.

original history together with its long and useful tenure.⁹³ It is, as with the unwritten British constitution, a “partnership among ‘those who are living, those who are dead, and those who will be born.’”⁹⁴ The judicial function under a written constitution, then, need not be narrowly hermeneutical. Charles Black’s work on structure and relationship is not a repudiation of the importance of constitutional text, but a call to refocus the interpretive task to engage the text more holistically and to redirect the Court’s attention from narrow provisions of grant and prohibition to a broader consideration, when appropriate, of the Constitution’s foundational structuring language.⁹⁵

PART II

A. The Constitutional Convention and the Question of Federalism

When the delegates to the Constitutional Convention arrived in Philadelphia in the early summer of 1787, they faced a threshold question, how to designate the essential character and authority of the central government relative to the states. One possibility was to depart substantially from the design of the Articles of Confederation and adopt a scheme in which the states would be reduced to “the position of municipal corporations confined to the area of local self-government” while the legislature of the central government would be authorized to exercise general lawmaking powers.⁹⁶ Alexander Hamilton apparently favored this position, although his plan was never formally presented to the body.⁹⁷ A somewhat more measured version was prepared by Edmund Randolph, James Madison, and others in the Virginia delegation.⁹⁸ This Virginia Plan framed early discussion in the Convention and set the agenda for much of the participants’ work.⁹⁹

On the other side were proposals to retain a confederation of relatively powerful quasi-sovereign states, but to identify specific

93. Danchin, *supra* note 29, at 36.

94. *Id.*

95. See BLACK, *supra* note 1.

96. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 432 (1941).

97. *See id.* at 433.

98. *Id.*

99. *See id.* at 433, 436–37.

new powers, beyond those recognized in the Articles, to be given the central government in order to respond directly to the perceived failings of the then-existing arrangements.¹⁰⁰ Under these proposals, the states would be designated as “constituent members of a federal system,” and the central government’s power, although augmented in expressly designated areas, would remain significantly circumscribed in most others.¹⁰¹ Charles Pinckney of South Carolina and William Paterson of New Jersey offered proposals that reflected this perspective.¹⁰² Paterson’s plan was given careful consideration by the Delegates, but was not adopted.¹⁰³

At the heart of the constitutional system that ultimately emerged from the work of the Convention is a central government of limited but superior authority and individual states designated as repositories of residual authority. Notwithstanding the relative clarity of these essential structural features, a good deal of uncertainty attended (and continues to attend) the task of determining how to delineate the boundaries of the federal government’s superior authority (and of determining whether and to what extent that authority should be exclusive or concurrently shared with the states). The historical record shows that the delegates’ deliberations occurred in several discrete stages. First, proceeding as a “committee of the whole” they worked through a series of proposals, including those contained in the Virginia Plan and the New Jersey Plan, to determine which to retain on their agenda for more formal action by the Convention.¹⁰⁴ Next, the delegates returned systematically to the items they had approved as a committee of the whole, entertaining amendments and revisions, for the purpose of determining the measures they wished to forward to a “committee of detail.”¹⁰⁵ Finally, following a return

100. See *id.* at 433–34. Edmund Randolph offered the Convention a catalogue of the primary defects the country had experienced under the Articles of Confederation. They included, among others: “that the confederation produced no security against foreign invasion”; “that the federal government could not check the quarrels between states”; and “that the federal government could not defend itself against the incroachments from the states.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911) [hereinafter THE RECORDS OF THE FEDERAL CONVENTION, VOL. 1].

101. Abel, *supra* note 96, at 433.

102. See *id.* at 433, 434–35; see also THE RECORDS OF THE FEDERAL CONVENTION, VOL. 1, *supra* note 100, at 242.

103. See Abel, *supra* note 96, at 437; see also THE RECORDS OF THE FEDERAL CONVENTION, VOL. 1, *supra* note 100, at 33.

104. See Abel, *supra* note 96, at 436–37.

105. See *id.* at 437.

by the committee of detail later in the summer of 1787, the Convention debated that group's working draft and, with amendments and substitutions, finally approved the version of the constitution that was presented for ratification.¹⁰⁶ At each of these stages of the decision-making process, the record makes clear that some delegates favored a broad delegation of power to the central government (the position initially set out in the Virginia Plan) and others supported strictly enumerated limits on that authority (the view of Paterson and Pinckney). There are also formal markers indicating where the weight of opinion on this question stood at each critical juncture in the process.¹⁰⁷ These data points are difficult to align into a simple narrative in favor of one of the competing positions or the other; instead, they suggest a more complicated story about how to understand the nature of the federalist system that emerged from this process.

i. Conceptual Framing by the Committee of the Whole and the Convention Prior to the Referral to the Committee of Detail

The initial deliberations of the committee of the whole, which commenced on May 29, 1787, were organized around the Virginia Plan, presented to the Convention by Edmund Randolph.¹⁰⁸ On the question of the lawmaking authority of the central government, the Virginians' proposal was that

the National Legislature ought to be [e]mpowered to enjoy the [l]egislative [r]ights vested in Congress by the Confederation [and] moreover to legislate in all cases to which the separate [s]tates are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation¹⁰⁹

According to Madison's Notes,¹¹⁰ several delegates from South Carolina (Pinckney, Rutledge, and Butler) raised objections to the

106. See THE RECORDS OF THE FEDERAL CONVENTION, VOL. 2, *supra* note 22, at 176–89.

107. See Abel, *supra* note 96, at 436–38.

108. See THE RECORDS OF THE FEDERAL CONVENTION, VOL. 1, *supra* note 100, at 18–23 (Madison's Notes).

109. *Id.* at 21.

110. In her book *Madison's Hand*, Mary Sarah Bilder describes how Madison revised his Notes in the years following the Convention by making substantial revisions, additions, and deletions to the text. Bilder's work reminds us that Madison's Notes reflect not simply his impressions at the Convention but also his evolving perspective on the work of the founding over

“vagueness” of the individual state incompetence standard for delineating federal lawmaking power and suggested that they could not support it “until they should see an exact enumeration of the powers comprehended by this definition.”¹¹¹ Madison expressed a “bias in favor of an enenumeration [sic]” but also identified “doubts concerning its practicability.”¹¹² Randolph “disclaimed any intention to give indefinite powers to the national Legislature,” notwithstanding the articulation of a state incompetence standard rather than a precise enumeration of federal legislative powers.¹¹³ After considerable discussion, on May 31, 1787, the committee of the whole, voting by state, determined to advance the state incompetence formulation for further action by the Convention.¹¹⁴ The vote was nine states in favor, one state (Connecticut) divided, and none opposed.¹¹⁵ The committee of the whole also voted, in this case unanimously, in favor of the additional provision in the Virginia Plan that would empower the national legislature to act when “the harmony of the United States may be interrupted by the exercise of individual Legislation.”¹¹⁶

In mid-June of 1787, the committee of the whole, having completed its initial favorable review of the Virginia Plan, turned its attention to the alternative proposals that had been prepared by William Paterson of New Jersey, apparently in consultation with delegates from several other smaller states.¹¹⁷ After extensive discussions, the delegates rejected the New Jersey plan, “adhering to that of Randolph as the foundation for further action.”¹¹⁸ By mid-July, the delegates had reached the second stage of their process, in which they were now proceeding as a “convention as such.”¹¹⁹ The focus at this stage was to consider the proposals that the committee of the whole had placed on the agenda, for approval by the

time. See MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 49 (2015).

111. See *THE RECORDS OF THE FEDERAL CONVENTION*, VOL. 1, *supra* note 100, at 53.

112. *Id.*

113. *Id.*

114. *Id.* at 53–54.

115. *Id.* at 47.

116. *Id.*

117. Abel, *supra* note 96, at 437.

118. *Id.*; see also *THE RECORDS OF THE FEDERAL CONVENTION*, VOL. 1, *supra* note 100, at 313.

119. Abel, *supra* note 96, at 437.

Convention and consequent referral to a committee of detail.¹²⁰ When the discussion turned to the powers of the national legislature, Roger Sherman of Connecticut offered substitute language for that which had been approved in May by the committee of the whole.¹²¹ Sherman suggested that the legislature of the central government ought to be empowered “in all cases which may concern the common interests of the Union; but not to interfere with the [g]overnment of the individual [s]tates in any matters of internal police . . . wherein the [g]eneral welfare of the U[nited] States is not concerned.”¹²² This proposal was rejected by a vote of eight states to two,¹²³ and, on July 17, 1787, the Convention formally approved language, submitted by Gunning Bedford of Delaware, conferring on the new federal Congress legislative powers “in all cases for the general interest of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the U[nited] States may be interrupted by the exercise of individual [l]egislation.”¹²⁴ The vote, again, was eight states in favor and two opposed.¹²⁵

ii. The Committee of Detail’s Enumerations Approach

On July 24, 1787, the Convention delegated to a “committee of detail” the task of developing a draft document “conformable to the Resolutions passed by the Convention.”¹²⁶ In early August of that year, the committee of detail returned a “report” which included an enumeration of powers to be accorded the new legislature of the federal government.¹²⁷ This enumeration, as modified and renumbered, formed the basis for Article I, Section 8 of the final

120. *Id.*

121. *Id.*

122. THE RECORDS OF THE FEDERAL CONVENTION, VOL. 2, *supra* note 22, at 25.

123. *See id.* at 26.

124. *Id.*

125. *See id.* at 27; *see* Abel, *supra* note 96, at 435–36. The debate between proponents of a broad state incompetence formula and those who supported a more restrictive allocation of authority to the central government intersected a second debate, between delegates from the larger states who favored using population to determine representation in the legislature and those from smaller states who sought equal representation. In July of 1787, after the delegates had settled on a compromise under which there would be equal representation in the Senate, some delegates from smaller states, notably including Bedford of Delaware, turned their support in favor of the broad state incompetence approach, while others from larger states, including Randolph, cooled on the idea.

126. *See* THE RECORDS OF THE FEDERAL CONVENTION, VOL. 2, *supra* note 22, at 106.

127. *See id.* at 181–82.

version of the constitution approved by the Convention and ultimately ratified by the requisite number of state conventions. Significantly, Article I, Section 8, Clause 3 provides that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹²⁸ Article I, Section 8, Clause 18 states that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹²⁹

A leading constitutional law casebook has framed discussion of this history in the following way:

It is evident . . . that questions of large import are presented by the shift from a general and loosely-phrased grant of power to the national government, which the Convention initially approved on May 31 and July 17, to the itemized list of national powers embodied in the August 6 report of the Committee of Detail. Consideration should be given to two conflicting interpretations: (a) The enumeration by the Committee of Detail, which the Convention employed as a basis for final action, should be construed to reach towards the same generalized grant of power to the national government which the Convention had earlier approved; (b) The decision to enumerate the powers of Congress reflects a decision sharply to circumscribe national power.¹³⁰

Not infrequently, these “two conflicting interpretations” have been identified by justices on the Supreme Court, in majority opinions and dissents, as the framework within which to think through federalism questions, and in particular questions about the reach of the Interstate Commerce power held by Congress.¹³¹ On one side are Commerce Clause opinions from the late nineteenth century through the mid-1930s, as well as significant decisions from *United*

128. U.S. CONST. art. I, § 8, cl. 3.

129. *Id.* art. I, § 8, cl. 18.

130. VARAT & AMAR, *supra* note 25, at 107.

131. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (highlighting the contrasting positions taken in the controlling opinion of Chief Justice Roberts and the dissenting opinion of Justice Ginsburg). For further discussion of these distinct positions, see *infra* text accompanying notes 243–63.

*States v. Lopez*¹³² forward, in which the Court's majority has relied on a variety of formalist interpretations of the enumerative language in Article I, Section 8 to provide strict judicially enforceable limitations on the ability of Congress to regulate matters traditionally regarded as within the warrant of the states' police powers.¹³³ On the other side is an unbroken string of Commerce Clause decisions from the late 1930s until the mid-1990s, as well as forceful dissents in more recent cases, in which the justices adopted a practical, pragmatic approach to the question of federal powers, relying not on the literal terms of the enumeration but rather on an updated version of the Virginia Plan's notion that Congress should be free to intervene in all matters about which "the States are separately incompetent, or in which the harmony of the United States may be interrupted."¹³⁴

iii. Reconciling the Competing Narratives

While understanding the promulgation history of the Commerce Clause, the Necessary and Proper Clause, and the other provisions in Article I, Section 8 within the framework of these two competing narratives—two narratives that also appear to mark out the wavering and uncertain path of the Supreme Court's federalism

132. 514 U.S. 549 (1995).

133. Justice Kennedy's concurring opinion in *Lopez* contains a good overview of this history. See *id.* at 568–73. In *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court misapplied earlier cases involving the constitutionality of *state* laws, see, e.g., *Kidd v. Pearson*, 128 U.S. 1, 20 (1888), to support a formalist distinction between productive activities such as manufacture, agriculture, and mining and commercial activities subject to Commerce Clause authority. In this period prior to the Court Packing Plan, the Supreme Court also deployed a formalist direct-indirect test to limit federal regulatory authority. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 309–10 (1936). In *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Court's majority revived this formalist tradition by drawing a distinction between economic and noneconomic activities and by reinventing the direct-indirect test as a causation requirement that prohibits Congress from "pil[ing] inference upon inference" in order to show that a regulated activity substantially affects interstate commerce. *Lopez*, 514 U.S. at 567.

134. THE RECORDS OF THE FEDERAL CONVENTION, VOL. 1, *supra* note 100, at 21; see, e.g., *Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) ("In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. . . . We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."); see also *United States v. Darby*, 312 U.S. 100 (1941) (recognizing the incapacity of individual states to manage because of a regulatory race to the bottom); *Wickard v. Filburn*, 317 U.S. 111 (1942) (recognizing the practical empirical effects of home-grown commodities on the vitality of national markets). A similar anti-formalist approach is apparent in dissenting opinions in more recent Commerce Clause cases. See, e.g., *Morrison*, 529 U.S. at 641–43, 655 (Souter, J., dissenting); *Sebelius*, 567 U.S. at 589, 601–04 (Ginsburg, J., dissenting).

jurisprudence—is sensible, a closer look at the work of the Convention history suggests a third slight variation instead. This alternative perspective, in turn, invites a reconsideration of Charles Black’s method of reasoning from structure and relationship in the context of Commerce Clause disputes and other federalism matters, by placing the Constitution’s narrow textual passages of grant and prohibition into an analytic context that brings into view the broader commitments embedded in the whole Constitution.

Albert Abel, a constitutional law scholar writing in the early 1940s, offered a helpful account of the decision-making process by which the delegates to the Constitutional Convention moved from approval of a broad state incompetence standard to adoption of the enumerations approach that found its way into the final document.¹³⁵ Crucially, after consulting the available historical evidence in considerable detail, Abel concluded that the decision of the delegates to adopt a version of the itemized list of powers developed by the committee of detail did not represent a shift from, or repudiation of, their earlier endorsement of a broad standard for federal legislative authority, nor was their adoption of the enumerations language intended simply to be absorbed into that previously approved standard.¹³⁶ Rather, their intention was to describe the boundaries of the newly reconceived central government “within the double limitation of standard and item.”¹³⁷ The “standard” embraced by the Convention delegates (avoiding state incompetence and promoting the harmony of the United States) and the “items” approach they endorsed (the enumerations set out in Article I, Section 8) each performed a distinct function in the design of the constitutional order they devised.

For Abel’s account to be coherent, we must understand constitutional text to operate at two levels. The individual passages of grant and prohibition, including most importantly, the enumerated powers of the federal legislature set out in Article 1, Section 8, do

135. See Abel, *supra* note 96, at 438–40.

136. *Id.* at 438 (noting that the delegates “had twice approved” the state incompetence standard, “once as a committee of the whole and once as a convention” and had rejected twice, “once tacitly, in ignoring the Pinckney plan, and again expressly, in their disposition of the Patterson proposals,” a straightforward enumerations approach “unaccompanied by a declaration of standards appropriate for the determination of their scope and reach”).

137. *Id.* at 440 (“The sense of the convention seems clear enough. The evident purpose was to give power over neither a congeries of independent unrelated subjects, nor yet over some misty and uncertain area of undefined extent . . .”).

important work in conveying the Convention's understanding of the role they expected Congress to play in the newly revised federalist system.¹³⁸ But the broader sweep of constitutional text, including provisions creating the very institutions of the central government, providing for the election of incumbents in the political branches and the selection of judicial officers for the federal courts, situating these institutions one to another and to their coordinate partners in the governments of the states—the textual sources from which Professor Black derived the foundations for his reasoning from structure and relationship—also play a key role in shaping American constitutional federalism.¹³⁹ In essence, the delegates likely understood that their early work operating as a committee of the whole, and their somewhat later deliberations prior to their referral to the committee of detail, was the work of conceptual framing, of creating the constitutional structures and relationships that would serve to ground later, more specific efforts, reflected in other more directive provisions of grant and prohibition.¹⁴⁰ In late May through mid-July of 1787, the Convention participants were building the foundations and framing out the structure of the constitutional house they were building.¹⁴¹ The work of the committee of detail and its subsequent adoption by the Convention later that summer was, in effect, the application of bricks and shingles onto the structure to which they had already committed themselves, not its repudiation.¹⁴²

The creation of essential structures and relationships, conveyed by the broad sweep of constitutional language, was the Convention's effort to embed permanently the fundamental values and commitments that support the American constitutional order. The enumeration of powers in Article I, derived from the report of the committee of detail, as well as the articulation of other provisions of grant and prohibition elsewhere in the document, represented the delegates' best understanding of how those fundamental

138. *See id.* at 439.

139. *See generally* Charles L. Black, Jr., *Foreword: The Myth and Reality of Federalism*, 9 UNIV. TOL. L. REV. 615, 617 (1978) (discussing that the unique allocation of power between the federal government and the states means that “American federalism is non-exportable”); Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469, 470 (1984) (discussing the worry that government powers have become too broad).

140. *See* Abel, *supra* note 96, at 439; *see also* RAKOVE, *supra* note 15.

141. Abel, *supra* note 96, at 436–37.

142. *See id.* at 439–40.

commitments would be operationalized for the then-foreseeable future.¹⁴³ There is good reason to treat as legitimate the fundamental values—the commitment to institutional arrangement and to essential constitutional structure—that the Framers put in place at the Convention. Those values and institutional arrangements have largely endured over the many decades of our constitutional history and have been embraced by succeeding generations.¹⁴⁴ Some of the more specific provisions of grant and prohibition have also worn well over time and thus remain vibrant markers for purposes of constitutional decision making today.¹⁴⁵ But others clearly have fallen out of alignment with the underlying economic, social, cultural, and political context within which the Constitution must operate. In those instances, the deeper structures and relationships that ground constitutional practice should predominate and the precise textual mandate of the individual constitutional passages that no longer fit the needs of the polity should not.

*B. The Interstate Commerce Clause and the Framers’
Miscalculation*

Importantly, the Interstate Commerce Clause,¹⁴⁶ the enumerated power that has proven the most fertile source of federal government power over the years, may be the best example of an individual provision of grant and prohibition whose original conception is most divergent from contemporary understandings and from the needs of contemporary society and twenty-first century economic realities. Once again, Professor Abel’s canvassing of the historical record provides a rich picture of the intentions and expectations of the

143. *See id.*

144. *See* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1067–69 (1981) (“Judges, or others who wish to appeal to the Constitution, must demonstrate that the principles upon which they propose to confer constitutional status express values that our society does hold to be fundamental. One way in which that can be done is by showing that those values are rooted in history, that they are not merely the result of the interests or passions of the moment.”); *cf.* JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF GOVERNMENT* (2001) (arguing that a constitution is the institution by which a people holds itself to its fundamental political commitments over time). *But see* SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) (presenting a sustained argument that essential constitutional structures and institutional arrangements have proven dysfunctional and should be replaced).

145. Some examples include the Foreign Commerce Clause, U.S. CONST. art. I, § 8, cl. 3., the provision governing the creation of federal bankruptcy law, U.S. CONST. art. I, § 8, cl. 4., and the provision creating the basis for intellectual property law, U.S. CONST. art. I, § 8, cl. 8.

146. U.S. CONST. art. I, § 8, cl. 3.

delegates to the Convention of 1787 with respect to the enumerated power to regulate commerce “among the several states,” and demonstrates how far removed from that original understanding we find ourselves today.¹⁴⁷ That the original conception of the Interstate Commerce Clause is so far removed from our contemporary reality is reason enough to relax reliance on that specific text as the basis for determining federal regulatory powers now and in the foreseeable future and instead to consult Professor Black’s reasoning from structure and relationship as a superior methodology for making federalism decisions. On this question of assigning domestic regulatory authority to the federal government, the Framers’ expectations have not been borne out by subsequent developments. But their broader foundational work, reflected in essential constitutional structures and relationships, remains relevant to the task, and indeed provides the basis for ongoing development in this area.

The Framers clearly did not expect the Interstate Commerce Clause to be a general source of legislative authority governing economic activity within and between the states.¹⁴⁸ Instead, they intended this provision to serve merely a “negative and preventive” function, to limit the effects of commercial competition between the states.¹⁴⁹ By contrast, the delegates to the Convention envisioned the Foreign Commerce Clause as potentially a broad grant of affirmative power to the new national legislature, and expected that this enumerated power would support significant regulatory activity.¹⁵⁰

Abel points out that, unlike the regulation of foreign commerce, which was debated at length by the delegates, control by the central government over commercial activity between the states “seems to have been mentioned only nine times” during the Convention’s formal deliberations.¹⁵¹ More importantly, on all nine of these occasions, the delegates’ focus was on ensuring that the new national legislature would be able to enact measures to prevent or ameliorate the obstructive effects of state regulations, tariffs, or exactions on

147. See Abel, *supra* note 96, at 465–81.

148. See *id.* at 472.

149. *Id.* at 469 (quoting Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (Max Farrand ed., 1911)).

150. See *id.* at 468–69.

151. *Id.* at 470.

commerce across state lines.¹⁵² Not once was the “grant of power over commerce between the states . . . advanced as the basis for independent affirmative regulation by the federal government.”¹⁵³ Indeed, while modern Commerce Clause jurisprudence treats the regulation of “instrumentalities” of domestic commerce as a quintessential subject matter for federal government regulation,¹⁵⁴ the Framers’ discussions regarding the development (and protection) of internal waterways, harbors, roads, bridges, and the like “uniformly assumed that control over such transportation facilities was to remain with the states, and not to be devolved upon the general government. No more was claimed for the commerce clause than that it might prevent states through which interstate streams ran from levying toll for their use.”¹⁵⁵

The Framers’ intention, that the Interstate Commerce Clause would play a “purely negative function of vetoing state-imposed barriers . . . to interstate trade,” and that it was at best a provision ancillary to the Foreign Commerce power, fairly quickly proved to be a miscalculation.¹⁵⁶ This miscalculation inhered principally in the inability of the original parsimonious conception of the domestic commerce power to accomplish the broader goal the Framers also had adopted, which was to empower the central government to promote the harmony of the Union by legislating when the states individually were incompetent. In a series of decisions from *Gibbons v. Ogden*¹⁵⁷ forward, the Supreme Court reconceived the Interstate Commerce Clause to provide a range of affirmative legislative powers to the federal government.¹⁵⁸ Of course, the scope of this judicial reworking has been subject to considerable dispute from the

152. *See id.* at 470–71.

153. *See id.* at 471. As further evidence of the extremely limited scope that the delegates imagined for the Interstate Commerce Clause, Abel notes that most matters affecting the flow of commerce between the states were debated in isolation from the Commerce Clause and generally were made subject to separate provisions in the constitutional text. Thus, Congress was separately given the power to coin money and to punish counterfeiting, and independent provisions were directed toward prohibiting the impairment of contract by states and providing a federal judicial forum for inter-state commercial disputes by way of diversity jurisdiction. *Id.* at 476–78.

154. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 558 (1995).

155. Abel, *supra* note 96, at 478.

156. *Id.* at 480–81.

157. 22 U.S. (9 Wheat.) 1 (1824).

158. Abel, *supra* note 96, at 480 (“For the first thirty years of its life the commerce clause was lost in silence, and since then it has been lost in words. It has not been missed, however, for the courts have supplied a fine large substitute; whereas the original now turns out to have been so small that it was naturally hard to keep track of.”).

very start and remains a source of vexatious contest moving forward.¹⁵⁹ But overhanging this judicial project of reconstruction has been a broad constitutional commitment to ensuring that the federal government is equipped to manage challenges of public policy that are beyond the ken of the states when acting in their individual capacities. The methodological point put by Charles Black in his White Lectures goes to the persistence of this broad constitutional commitment, embedded in the constitution's essential structures and relationships.¹⁶⁰ In Black's account, significant advantages, in achieving doctrinal clarity and candor, are available when the interpretive project is centered not on constitutional provisions of grant and prohibition that are misaligned with America's fundamental constitutional structures and relationships, but on those structures and relationships themselves.¹⁶¹

PART III

If the Supreme Court were to take up Professor Black's invitation to consider reasoning from structure and relationship in at least some disputes involving federal authority, and if lower federal courts and state courts followed that lead, the importance assigned to the highly stylized parsing of narrow constitutional text would diminish.¹⁶² Disagreements over what constitutes "commerce" (or "economic activity"), for example, could be deemphasized in favor of more productive deliberations over the relative advantages and disadvantages of relying on federal interventions to address difficult problems of public concern, particularly when those problems

159. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

160. See generally BLACK, *supra* note 1.

161. *Id.* at 22–23.

162. Blasi, *supra* note 14, at 183 (noting that it is important to emphasize that Black's method of reasoning contemplates a role for textual analysis and was intended "as a supplement to, not as a substitute for, the dominant technique of textual interpretation"); see also *supra* text accompanying notes 61–63. Given the economic consequences of virtually all activity potentially subject to federal regulation, however, a commerce clause jurisprudence reliant primarily on the close parsing of terms such as "commerce" and "economic activity" is not likely to be effective in delineating the boundaries of the federalist system. In the case of the Interstate Commerce Clause, the logic of Professor Black's approach pushes toward a consideration of the broader structural components of the written constitution and away from narrow bits of text derived from the specific enumerated power.

present intractable coordination difficulties for individual states.¹⁶³ Under a judicial regime that seriously entertained Black’s method of constitutional interpretation, legitimate disagreements about how best to calibrate the balance of American federalism would be more transparently addressed, and proxy fights waged through stylized arguments over narrow text could be avoided.¹⁶⁴

In addition, adoption of Black’s interpretive method would significantly recast the Court’s treatment of the Necessary and Proper Clause. On occasion, the Court has relied on the Necessary and Proper Clause as a tool for extending the legislative authority of Congress beyond the boundaries thought to be set by the enumerated powers that precede it.¹⁶⁵ The Justices in these cases treat the Necessary and Proper Clause as “granting” powers to Congress beyond those conveyed by the other enumerated provisions.¹⁶⁶ On

163. On the Commerce Clause and problems of state coordination, see Maxwell L. Stearns, *Constitutional Law’s Conflicting Premises*, 96 NOTRE DAME L. REV. 447 (2020) [hereinafter *Conflicting Premises*] and Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1 (2007) [hereinafter *Game Theoretical Perspective*]. In his dissent in *Morrison*, Justice Breyer observes that “[w]e live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories” *Morrison*, 529 U.S. at 660 (citation omitted).

164. This perspective is consistent with Hamilton’s position in *Federalist* 23 and 31. See THE FEDERALIST NOS. 23, 31, at 123–26, 165–68 (Alexander Hamilton). In *Federalist* 23, for example, Hamilton asserts:

[T]he adversaries of the plan promulgated by the convention would have given a better impression of their candor if they had confined themselves to showing that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. They ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers.

Id. at 126.

In *Federalist* 31, Hamilton concludes his discussion by observing:

[I]t is by far the safest course to . . . confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments.

Id. at 168.

165. See, e.g., *Sabri v. United States*, 541 U.S. 600, 605 (2004) (explaining that Congress has authority under the Necessary and Proper Clause to prevent public corruption that undermines its exercise of authority under the Spending Clause).

166. See *id.*; see also *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (“[T]he Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”).

the other side, some of the Justices have looked to the Necessary and Proper Clause as the textual basis for limiting Congressional undertakings, particularly by holding that the challenged legislation is not “proper.”¹⁶⁷ Taken together, these cases, some pushing in favor and some against Congressional authority, have prompted a renewed academic discussion about how to properly interpret the Necessary and Proper Clause.¹⁶⁸

A. The New Structuralism and the Renewed Debate Over the Necessary and Proper Clause

Professor John Manning, in his 2014 *Harvard Law Review* Foreword, has characterized the reasoning of the Rehnquist and Roberts Courts with respect to the Necessary and Proper Clause as a “new structuralism,” and has linked this contemporary form of structuralism to the interpretive approach set out in Charles Black’s work.¹⁶⁹ While an accurate account of the current Court’s cases, this is a misreading of Black.

On one hand, Manning argues that the post-New Deal Supreme Court “treated the Necessary and Proper Clause as a broad source of congressional authority,” and consequently accorded significant deference to Congressional decisions.¹⁷⁰ By contrast, he understands the new structuralism of the Rehnquist and Roberts Courts to have “transform[ed] the Necessary and Proper Clause into a delegation of power to the courts to define abstract structural policies.”¹⁷¹ Manning is troubled by this interpretation of the Necessary and Proper Clause, which he regards instead as a “master provision” directed specifically to Congress and conveying a clear delegation of discretion to that body “to compose the government and prescribe the means of constitutional power.”¹⁷²

167. See, e.g., *Printz v. United States*, 521 U.S. 898, 923–24 (1997); see also Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–333 (1993) (urging the Court to read federalism limits into the term “proper” in the Necessary and Proper Clause); Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2068–81 (2014) (observing that the Court has used the Necessary and Proper Clause in some recent cases to limit Congress’s power).

168. See Baude, *supra* note 11; Beck, *supra* note 4, Barnett, *supra* note 4; Manning, *supra* note 13.

169. Manning, *supra* note 11, at 30–32.

170. *Id.* at 6.

171. *Id.*

172. *Id.* at 6–7.

Professor Black's method of reasoning from structure and relationship, while consistent with the post-New Deal Court's approach in cases involving federal power, has less to do with the new structuralism of the Rehnquist and Roberts Courts. Cases purporting to use structural reasoning to support an expansion of state sovereign immunity under (or through) the Eleventh Amendment,¹⁷³ or limiting efforts at cooperative federalism on Tenth Amendment "anti-commandeering" grounds,¹⁷⁴ are not consistent with Black's approach because they do not identify grounds for decision that derive fundamentally from constitutional text. In the case of state sovereign immunity, the Court's majority has claimed reliance on a principle said to pre-exist the 1787 constitution,¹⁷⁵ whereas the anti-commandeering rationale is linked to particular notions of electoral transparency.¹⁷⁶ There may be a story to tell that could connect these rationales to essential constitutional structures or basic institutional relationships central to our constitutional system,¹⁷⁷ but none of these cases provides that grounding and none

173. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996); *Alden v. Maine*, 527 U.S. 706, 728–29 (1999).

174. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

175. The Court's analysis in *Seminole Tribe* and *Alden v. Maine* considers, in addition to the original, unamended constitution, the text of the Eleventh Amendment, the text of the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the text of its decision in *Hans v. Louisiana*, 134 U.S. 1 (1890). None of these texts, however, is claimed as the basis for the sovereign immunity the Court recognizes. Instead, the Court concludes that the states' immunity from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden*, 527 U.S. at 713 (emphasis added). Essentially, following the logic of *Hans*, the Court's majority in *Seminole Tribe* explained that this sovereign immunity exceeds the plain language of the Eleventh Amendment, because that constitutional text was intended merely to correct the error the Court committed in *Chisholm* by permitting diversity suits against a state in federal court. *Seminole Tribe*, 517 U.S. at 69.

176. See *New York v. United States*, 505 U.S. at 168–69 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

177. In his majority opinion in *Printz*, Justice Scalia acknowledged that "there is no constitutional text speaking to the precise question whether congressional action compelling state officers to execute federal laws is unconstitutional." *Printz*, 521 U.S. at 898, 905. Instead, he explained, "the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Id.* When he turned to structural reasoning, however, Justice Scalia's argument was focused on grounding a theory of residual state sovereignty generally rather than the anti-commandeering principle more particularly. In his discussion of state sovereignty, Justice Scalia drew from a variety of constitutional provisions, including some that go beyond grant and prohibition. Thus, he asserted

identifies with sufficient precision the textual basis for claiming those foundations.¹⁷⁸

that, in ratifying the constitution, the states retained a “residuary and inviolable sovereignty,” *id.* at 919, that is

reflected throughout the Constitution’s text, *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which “presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights,” *Helvering v. Gerhardt*, 304 U.S. 405, 414–415 (1938). Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Id. (omission and alteration in original). By contrast, the anti-commandeering principle that Justice Scalia derived from this theory of residual sovereignty is not similarly grounded in structural reasoning tied to constitutional text. Instead, Justice Scalia, like Justice O’Connor in *New York v. United States*, 505 U.S. at 163–66, supported the anti-commandeering prohibition by historical arguments about the Framers’ preference for the Virginia Plan over the New Jersey Plan and by conclusory assertions as to attributes he assigned to the notion of state sovereignty. *Printz*, 521 U.S. at 918–22. Fundamental to residual state sovereignty, he explained, is the “[p]reservation of the States as independent and autonomous political entities.” *Id.* at 928. The difficulty, of course, is that none of the provisions that Justice Scalia employed as the basis for finding retained state sovereignty necessarily leads to the further conclusion that the States are properly understood as fully independent and autonomous entities, let alone that they cannot be required in some circumstances to assist in the deployment of federal undertakings. Indeed, as Justice Story pointed out in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the independence and autonomy of the states as political entities was limited from the start, in Article I, section 10 and elsewhere in the Constitution. Story thus notes that the Constitution “is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives.” *Id.* at 343. One reasonably could take the view that the sovereignty retained by the states includes the power of their respective legislatures to consider and pass on policy initiatives favored by the central government, which is the feature of independence and autonomy at issue in *New York v. United States*, and one might seek to build a case that residual state sovereignty even includes ministerial executive branch functions like those challenged in *Printz*. But the Court’s majorities in both cases, adverting to a theory of electoral transparency espoused by academic commentators, see *New York v. United States*, 505 U.S. at 168–169 (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61–62 (1988); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. UNIV. L. REV. 577, 639–65 (1985)), simply fail to demonstrate that such powers necessarily are grounded in the essential structures and relationships created by the text of the Constitution.

178. U.S. CONST. amend. XI. The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” *Id.* This text does bar some suits arguably within the original

The majority opinions in *Seminole Tribe of Florida v. Florida*¹⁷⁹ and *Alden v. Maine*,¹⁸⁰ for example, do offer a story about the foundations of state sovereign immunity, but it is not an account that relies on constitutional text, considered either narrowly or holistically. Once the majority in *Seminole Tribe* and *Alden* conceded that broad sovereign immunity is not conferred by the Eleventh Amendment, they had only the pre-Eleventh Amendment constitution and pre-constitutional English legal history with which to work. But they did not read such immunity in the text of the original constitution either; rather, they read it in the Constitution's English history and its subsequent judicial interpretation.¹⁸¹

Moreover, the story the Court tells gets wrong the English history on which it depends. The *Alden* Court explained that "essential principles of federalism" dictate that the "Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."¹⁸² The Framers, they claimed, "thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'"¹⁸³ This notion, that the Framers intended the states to be invested with sovereign immunity, in turn derives from a presumption that the Framers were applying essential principles of English common law and political theory.¹⁸⁴

grant of federal judicial power, which "extend[s] to all Cases, in Law and Equity, arising under [the] Constitution [and] the Laws of the United States" as well as "to Controversies . . . between a State and Citizens of another State," U.S. CONST. art. III, § 2, but leaves intact federal judicial power premised on a federal question. In order to find immunity from suit in cases falling within the arising under jurisdiction of the federal courts, the majority in *Seminole Tribe* and *Alden*, therefore, were forced to draw from outside the text of the Constitution itself. "To rest on the words of the Amendment alone," they warned, "would be to engage in [a] type of ahistorical literalism," which has been rightly "rejected." *Alden*, 527 U.S. at 730. Thus, the *Seminole Tribe* majority asserted that "the Eleventh Amendment reflects 'the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III.'" 517 U.S. at 64 (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984)), but does not expressly confer that protection from suit. "[T]he sovereign immunity of the States," the *Alden* majority explained, "neither derives from, nor is limited by, the terms of the Eleventh Amendment." 527 U.S. at 713.

179. 517 U.S. 44 (1996).

180. 527 U.S. 706 (1999).

181. See *Seminole Tribe*, 517 U.S. at 69; *Alden*, 527 U.S. at 748.

182. 527 U.S. at 748.

183. *Id.* (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

184. See *id.* at 733, 748.

In the English tradition, sovereign dignity belonged, of political, social, and legal necessity, to the person of the sovereign. According to Blackstone, sovereignty grounded the king's prerogative, the bundle of rights that the king alone possessed.¹⁸⁵ Significantly, however, the awful dignity of the king had two aspects: magisterial and servile.¹⁸⁶ The former, the *Seminole Tribe* and *Alden* majorities translate from king to republican state; the latter, they ignore. To the extent that the magisterial aspect of sovereign dignity exalts the king, its inseparable servile aspect limits him. Indeed, the restriction justifies the king's exaltation. The law exalts the king (and by extension republican states) above all others only if, and so far as, the king submits to the law. "The principal duty of the king," says Blackstone, "is, to govern his people according to law. . . . And this . . . has always been esteemed an express part of the common law of England, even when prerogative was at the highest."¹⁸⁷ Therefore, when the king has done what he is not allowed to do, when he has broken the law and injured any of his subjects, sovereign dignity obligates him to waive his immunity from suit, so that the injury may be redressed (and his sovereign dignity restored). The Supreme Court's half-translation of sovereign dignity from monarch to republican state thus accords the personified state the privilege of immunity without the concomitant, assumed obligation of consent to suit.

But, beyond this misreading of English legal history, and beyond the problematic assignment of the Rehnquist and Roberts Courts' unmoored form of structural analysis to Charles Black's legacy, there is an even more fundamental problem with Professor Manning's invocation of Black's work. Manning's basic premise, that the Necessary and Proper Clause is somehow a "master provision" that, considered on its own, "allocates decisionmaking responsibility"¹⁸⁸ simply is inconsistent with Black's account. Black

185. 1 WILLIAM BLACKSTONE, COMMENTARIES *239.

186. *Id.* at *234 n.1.

187. *Id.* at *233–34. Blackstone then quotes Bracton, who asserted:

The king, . . . ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others, dominion and power: for he is not truly king, where will and pleasure rules, and not the law.

Id. at *234.

188. Manning, *supra* note 11, at 7.

did not view the clause as granting power to any particular institution, whether it be Congress or the courts. Indeed, his reading of *McCulloch* was that Chief Justice Marshall had already determined the constitutional allocation of authority at issue in that case, based on more general reasoning, before he even got to the Necessary and Proper Clause.¹⁸⁹ Black, like Marshall, sought to ground his work in the broad structures and relationships created by the whole document (or large portions of it) and not on individual passages, including the precise text of the Necessary and Proper Clause. To be sure, the Necessary and Proper Clause conceivably might be one ingredient, contributing alongside numerous other provisions in the rich textual stew supporting the Court's identification of essential structures and relationships embedded in the whole Constitution, but standing alone, that bit of text is not, under Black's method, a source of congressional authority, whether it be incidental implementation authority or plenary general authority.¹⁹⁰

B. Structural Reasoning and Judicial Restraint

Manning's account of the Court's approach to questions of Congressional power over the past eighty-five years is, however, instructive in advancing our understanding of the distinct strains of structural reasoning in constitutional law. At the heart of Manning's analysis is his identification of a "paradox of contemporary structural constitutional law."¹⁹¹ The paradox is that the Supreme Court increasingly has adopted a "new textualism" in matters of statutory construction, which has resulted in an approach that is highly deferential to Congress's legislative choices, while simultaneously demonstrating less deference to Congress's exercise of authority in cases raising constitutional questions of federal regulatory authority.¹⁹² Thus, the Rehnquist and Roberts Courts' new structuralism has smuggled general principles of limitation into the Tenth Amendment in anti-commandeering cases like *New York v. United States*,¹⁹³ into the Eleventh Amendment in state sovereign

189. See BLACK, *supra* note 1, at 14.

190. See *id.*

191. Manning, *supra* note 11, at 4.

192. See *id.*

193. 505 U.S. 144 (1992).

immunity cases like *Seminole Tribe*,¹⁹⁴ and into the Necessary and Proper Clause in cases like *National Federation of Independent Business v. Sebelius*.¹⁹⁵ As Manning properly points out, all of these new doctrines result from a “free-form version” of structural reasoning that is not tied to constitutional text, and, as elaborated and applied, provides very few limits on judicial discretion.¹⁹⁶

By contrast, Manning’s account of the Supreme Court’s post-New Deal approach to federalism questions makes clear that those cases, although also characterized as rooted in structural reasoning, deployed decisional principles derived from the written Constitution and were expressly much more deferential to the decision making of the political branches.¹⁹⁷ On Manning’s telling, the Court’s version of structural reasoning in this period was informed by Chief Justice Marshall’s opinion in *McCulloch*, and resulted in the Court acting like a “gentle Thayerian in structural constitutional cases.”¹⁹⁸ Like Marshall in *McCulloch*, the post-New Deal Justices conceived of the constitutional order as “unfinished” and resting on “a frame of government ‘intended to endure for ages’ and ‘to be adapted to the various crises of human affairs.’”¹⁹⁹ This work of adaptation, at least in cases involving the scope of federal power, was understood as falling within the ken of Congress. Thus, notwithstanding the enumerative language in Article 1, Section 8, both Marshall and his intellectual heirs on the Court in the post-New Deal era understood that “in matters of implementation” Congress had to be accorded wide latitude in fashioning legislative policies, and that the Court’s job was simply to ensure that those implementation decisions comported broadly with the frame of government conveyed by the broad structural language of the constitution.²⁰⁰

194. 517 U.S. 44 (1996).

195. 567 U.S. 519 (2012).

196. Manning, *supra* note 11, at 31–32.

197. *Id.* at 10–12.

198. *Id.* at 3, 10–12. Professor Manning’s reference here is to James Bradley Thayer, whose 1893 article urging judicial restraint in the exercise of the Court’s constitutional judicial review authority influenced a generation of constitutional scholars and judges, and ultimately formed the foundations for Alexander Bickel’s work. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

199. Manning, *supra* note 11, at 10 (quoting Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

200. *Id.* at 11.

Manning reads the post-New Deal federalism cases as relying on the Necessary and Proper Clause as the constitutional basis for finding this broad congressional authority to determine questions of implementation, and argues that that clause ought to serve as a textual toehold for the current Court to adopt a similar stance of judicial deference towards Congress's exercise of significant incidental powers.²⁰¹ Absent the anchoring effect of the Necessary and Proper Clause, Manning is concerned that "free-form" structural reasoning would permit unnecessarily broad judicial discretion that potentially could place the Court in a position of unwarranted activism of the sort he attributes to the Rehnquist and Roberts Courts' Tenth and Eleventh Amendment adventures.²⁰² The Court's deference in these matters, however, can be just as effectively grounded in the Constitution's essential structures and relationships as in a particular reading of the text of the Necessary and Proper Clause or any other particular constitutional text taken on its own. In fact, when the Court embraces Thayerian modesty on broad grounds derived from constitutional structure and relationship, its decisions avoid the sort of judicial instrumentalism often evident in the Court's highly subjective interpretations of the Constitution's various provisions of grant or prohibition that "afford reasonable people plenty of room to strike the balance in different ways between federalism and nationalism or separation and interdependence."²⁰³

i. *Garcia v. San Antonio Metropolitan Transit Authority*

*Garcia v. San Antonio Metropolitan Transit Authority*²⁰⁴ provides a good example of the Court grounding a commitment to judicial deference in the Constitution's broad structures and relationships. In repudiating the Court's more assertive stance in *National League of Cities v. Usery*²⁰⁵ that the Tenth Amendment provides a limit on the federal government's authority to impose regulations on the states, Justice Blackmun's majority opinion in *Garcia* systematically examined and rejected a range of judicial approaches for determining whether a federal statute trenches on a

201. *See id.* at 6.

202. *See id.* at 31–32.

203. *Id.* at 32.

204. 469 U.S. 528 (1985).

205. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

“traditional governmental function,” the standard that had developed from *National League of Cities*.²⁰⁶ For good reason, Blackmun concluded that looking to tradition and settled state practice would be “unworkable” in distinguishing sovereign from proprietary state functions, given the evolving and varied roles that state and local governments have played over time.²⁰⁷ He also rejected doctrinal formulations derived from tort sovereign immunity cases and from tax immunity precedent²⁰⁸ before concluding that

there is a more fundamental problem at work here The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. . . . Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.²⁰⁹

In place of judicially enforceable limitations on Congress’s exercise of its Commerce Clause authority over the states, Justice Blackmun and his colleagues in the Court’s majority adopted an explicit stance of deference to Congress’s legislative choices, noting that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”²¹⁰ By identifying the various means by which state interests are safeguarded in the very design of the federal system, the Court repudiated the Tenth Amendment judicial activism of the *National League of Cities* majority and avoided the essentially insoluble problem of determining, through the parsing of constitutional text or otherwise, the shape and extent of state immunity from federal laws of general application.²¹¹

206. *Garcia*, 469 U.S. at 538–47.

207. *Id.* at 543–47.

208. *Id.* at 541–43, 545.

209. *Id.* at 545–46.

210. *Id.* at 550.

211. *Id.* at 547–48 (“We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’[s] Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.”).

ii. The Necessary and Proper Clause Alternative

While structural reasoning thus can be a sound basis for the Court's embrace of judicial modesty, the Court's more recent Tenth and Eleventh Amendment cases suggest that, in its more free-form manifestations, this approach may not reliably lead to judicial restraint.²¹² Manning's alternative is to offer up the Necessary and Proper Clause as the main textual source of Congress's broad power to adopt incidental measures to implement the plenary general authority held by the central government under the constitution.²¹³ While Manning's approach seems compelling, it is not clear that it is likely to be any more effective in limiting the Court's unwarranted incursions into Congress's exercise of its constitutional authority. Manning's strategy, to rely on the Necessary and Proper Clause to limit judicial discretion by recognizing Congress's broad implementing authority, necessarily locks in the enumerative language of Article I, Section 8 as the principal source of the federal government's plenary general authority subject to Congress's implementation.²¹⁴ As discussed earlier, however, while some of the specific provisions of grant and prohibition in Article I's enumeration have worn well over time, others have fallen out of alignment with the underlying economic, social, cultural, and political context within which the Constitution must operate.²¹⁵ In those instances, where the enumeration represents a miscalculation, significant pressure is placed on the Necessary and Proper Clause to bring constitutional doctrine into alignment with contemporary circumstance and, indirectly, with the deeper structures and relationships that ground the constitutional order. Not surprisingly, because of ongoing contests over the meaning and scope of some of the most important enumerated powers, the Court's characterization of (and reliance on) the Necessary and Proper Clause has not been a model of consistency.

212. See Manning, *supra* note 11, at 31–39.

213. See *id.* at 63–65. Manning notes that the Necessary and Proper Clause operates not only by reference to other express powers held by Congress under the constitution but also upon “all the ‘Powers’ vested by the Constitution anywhere in the government.” *Id.* at 63.

214. See *id.* Manning is careful to say that the powers conferred on Congress by the Necessary and Proper Clause, while broad and extensive, are incidental to and meant to implement the general plenary powers conveyed by other provisions in the Constitution.

215. See *supra* text accompanying notes 146–58.

Thus, in *Comstock*, which involved a constitutional challenge to a federal statute permitting the civil commitment of individuals in the custody of the Federal Bureau of Prisons upon a finding that those individuals have a serious mental disability or disorder and are “sexually dangerous,” Justice Breyer, writing for a seven-person majority, offered two apparently inconsistent formulations of the so-called “sweeping clause.”²¹⁶ On the one hand, he asserted that “the Necessary and Proper Clause *grants* Congress broad authority to enact federal legislation.”²¹⁷ On the other hand, he noted that “the Necessary and Proper Clause *makes clear* that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”²¹⁸ In elaborating his “makes clear” language, Breyer quoted Marshall in *McCulloch*, noting that Congress’s broad implementing powers are drawn from a “vast mass of incidental powers which must be involved in the constitution.”²¹⁹ This distinction between “granting” power versus “making clear” its availability may seem an unimportant semantic difference with little practical doctrinal significance, but the ambiguity in Justice Breyer’s varying characterizations does signal a deeper problem with the Court’s practice of linking its understanding of the Necessary and Proper Clause to its (unstable) treatment of the Commerce Clause and other provisions within the enumerations in Article I, Section 8. If the enumerated general power is construed narrowly, significant pressure is placed on the Court, at least in those instances where the federal regulatory effort is otherwise welcomed by the Justices, to read the Necessary and Proper Clause as a specific textual source for additional constitutional authority. If, however, the enumerated power is read broadly—or interpreted pragmatically to go beyond its literal terms—then the Necessary and Proper Clause commands less attention from the Court and becomes, at best, a confirmatory textual basis for that result.²²⁰

216. *United States v. Comstock*, 560 U.S. 126, 129–30 (2010); cf. Lawson & Granger, *supra* note 167 (referring to the Necessary and Proper Clause as “the Sweeping Clause”).

217. *Comstock*, 560 U.S. at 133 (emphasis added).

218. *Id.* at 133–34 (emphasis added) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)).

219. *Id.*

220. In *Kinsella v. Singleton*, 361 U.S. 234 (1960), for example, a disagreement among the Justices about the meaning of Article I, Section 8, Clause 14, which directs Congress “[t]o make

This dynamic can be seen most clearly in the contrast between Justice Stevens's majority opinion in *Gonzales v. Raich*²²¹ and Justice Scalia's concurrence.²²² The issue in *Gonzales* was whether the federal statute regulating drugs, the Controlled Substances Act

Rules for the Government and Regulation of the land and naval Forces,” in turn led the Court to disagree on the very question of whether the Necessary and Proper Clause conveys any authority at all to Congress. The case concerned the constitutional validity of peace time court martial trials of civilians “accompanying the armed forces outside the United States” who were “charged with noncapital offenses under the Uniform Code of Military Justice.” *Kinsella*, 361 U.S. at 235. In the course of considering whether the due process clause was implicated by the procedural limitations of the military trials offered the civilians, Justice Clark for the majority observed:

Nor do we believe that due process considerations bring about an expansion of Clause 14 through the operation of the Necessary and Proper Clause. If the exercise of the power is valid it is because it is granted in Clause 14, not because of the Necessary and Proper Clause. *The latter clause is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted “foregoing” powers of § 8 “and all other Powers vested by this Constitution”* As James Madison explained, the Necessary and Proper Clause is “but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.”

Id. at 247 (first emphasis added) (omission in original).

In dissent, Justice Harlan took issue with the majority's reading of Article I, Section 8, Clause 14, and of the due process implications of trying civilians according to the procedural rules of the Uniform Code of Military Justice. Writing for himself and for Justice Frankfurter, Harlan stated:

Of course, the Necessary and Proper Clause cannot be used to “expand” powers which are otherwise constitutionally limited, but that is only to say that when an asserted power is not appropriate to the exercise of an express power, to which all “necessary and proper” powers must relate, the asserted power is not a “proper” one. But to say, as the Court does now, that the Necessary and Proper Clause “is not itself a grant of power” is to disregard Clause 18 as one of the enumerated powers of § 8 of Art. I.

Id. at 254–55 (Harlan, J., dissenting).

In part, this inconsistent understanding of the Necessary and Proper Clause derives from the Court's inconsistent treatment of the enumerative language of Article 1, Section 8 as either formally setting the boundaries of federal government power or as the starting point for a more practical, empirical understanding of federalism. When the Court veers towards formalism, it is more inclined to lean heavily on the Necessary and Proper Clause as a workaround. When, on the other hand, the Court's reading of the Commerce Clause and other provisions of grant and prohibition are capacious, their need for and reliance on the Necessary and Proper Clause is reduced. Professor Black would argue that this dynamic, which produces doctrinal inconsistency, compare *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under the Commerce Clause to enact a section of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence), with *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding Congress possessed authority under the Commerce Clause to extend the Controlled Substances Act to the cultivation and possession of marijuana for medical use), and undermines judicial candor, could be avoided by reverting to reasoning from structure and relation.

221. 545 U.S. 1 (2005).

222. See *id.* at 33 (Scalia, J., concurring).

(CSA),²²³ as applied to the intrastate possession of medical marijuana pursuant to a valid state law, exceeded Congress's Commerce Clause authority.²²⁴ Justice Stevens framed the question as a "modest one," which was whether Congress had a rational basis for concluding that possession of locally produced medical marijuana, in the aggregate, substantially affects interstate commerce.²²⁵ Given the comprehensive closed regulatory scheme that Congress had adopted in the CSA, Stevens and his majority colleagues determined that Congress could rationally have concluded that medical marijuana authorized under State law might be drawn into the regulated interstate market for illegal marijuana, and on that basis could be prohibited by the federal statute.²²⁶

Crucially, given that the Court was working within the modern Commerce Clause framework it had established in *Lopez* and *United States v. Morrison*,²²⁷ the question whether the regulated activity itself was economic in nature became an issue essential to determining the reach of the Commerce Clause.²²⁸ Justice Stevens addressed this element of the *Lopez/Morrison* framework by explaining that "the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.'" ²²⁹ Noting that the CSA regulates the production, distribution, and consumption of drugs, and that the intrastate consumption of medical marijuana falls within that broad definition, the majority determined that the *Lopez/Morrison* requirement, that the substantial effects prong of the Commerce Clause test be limited to economic activities, had been satisfied.²³⁰

223. The Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904 (2018), is Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1242 (1970).

224. *Gonzales*, 545 U.S. at 5.

225. *Id.* at 22.

226. *See id.* at 27–29.

227. 529 U.S. 598 (2000).

228. *Gonzales*, 545 U.S. at 24–26; *see also* *United States v. Lopez*, 514 U.S. 549, 560 (1995); *Morrison*, 529 U.S. at 610–13.

229. *Gonzales*, 545 U.S. at 25–26 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

230. *See id.* at 26. While Justice Stevens mentions the Necessary and Proper Clause in passing, it is clear that the opinion does not place primary, or even significant, reliance on that provision as the basis for finding congressional authority in this case. *See id.* at 5.

Justice Scalia, concurring in the judgment, based his conclusion that the CSA, as applied, was constitutional on grounds he characterized as, “if not inconsistent with that of the Court, at least more nuanced.”²³¹ Scalia’s “more nuanced” approach placed much greater emphasis than did Justice Stevens on the Necessary and Proper Clause as the principal source of the federal government’s authority to regulate local medical marijuana and did so precisely because he defined the terms of the *Lopez/Morrison* limitation of the Commerce Clause to economic activities more narrowly.²³² Scalia rejected the majority’s characterization of consumption as an economic activity and thereby concluded that the possession and use of medical marijuana at issue in *Gonzales* was noneconomic,²³³ but he nonetheless determined that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”²³⁴ Thus, because, in Scalia’s view, Congress derives authority from the Necessary and Proper Clause to legislate with respect to activities not otherwise within their enumerated power, when reaching those noneconomic activities is an essential “means” to accomplishing a legitimate constitutional “end,” the application of the CSA to the possession and use of medical marijuana that had been sanctioned by state law was permissible.²³⁵

What this dispute over the dictionary definition of the term “economic” obscures,²³⁶ and what is also missed in the indirectly linked disagreement over whether the Necessary and Proper Clause confers implementing federal regulatory authority or merely confirms its existence, is a more fundamental question concerning the capacity of individual states to manage difficult problems of public policy, the effects of which reverberate through national (and global) markets. Instead of consulting Webster’s Third for the meaning of a term such as “economic,” the Court would be well served to consider the respective institutional competences of the

231. *Id.* at 33 (Scalia, J., concurring).

232. *See id.* at 34–36.

233. *See id.* at 40.

234. *Id.* at 37.

235. *Id.* at 37, 39–41.

236. Not to mention the Court’s shifting practice of insisting either that the regulated activity must be economic or alternatively, as in *Wickard*, merely that the effects of that activity in the aggregate must be economic. *See Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

competing regulators (state legislatures and administrative agencies versus Congress and associated federal agencies) in any given instance, and the challenges presented as a result of state coordination problems;²³⁷ the need for policy experimentation in the context of varying state and local conditions;²³⁸ and the gains and losses in electoral responsiveness when questions are addressed at the state or federal level.²³⁹ In her dissent in *Gonzales*, Justice O'Connor raised some of these core questions, but she did so in an abbreviated fashion given that her opinion was constrained by the limited framing offered by *Lopez* and *Morrison*.²⁴⁰ The Court's analysis in *Comstock* also engaged some of these questions respecting the relative capacity and willingness of individual states versus the federal government to manage the particular problem at issue there, although the discussion toggled uncomfortably between a formalist consideration of the Necessary and Proper Clause and a more practical, empirical discussion of the particular shortcomings in individual state-level responses to the problem of sexually dangerous persons released from federal custody that had led Congress to intervene in the first place.²⁴¹

237. See *Game Theoretical Perspective*, *supra* note 163, at 26–56; *Conflicting Premises*, *supra* note 163, at 468–71.

238. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing a model in which “subnational” units of government are free to set goals and craft strategies for implementing them). *But see* David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (offering critique of democratic experimentalism).

239. *Cf.* *New York v. United States*, 505 U.S. 144, 168–69 (1992) (“But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

240. See *Gonzales*, 545 U.S. at 42–57 (O'Connor, J., dissenting).

241. See *United States v. Comstock*, 560 U.S. 126, 144–46, 176–78 (2010). Justice Breyer emphasized that the challenged federal statute “requires accommodation of state interests,” because it mandates notice to the state in which a federal prisoner “is domiciled or was tried” and requires that the prisoner be released to state custody if the state wishes to take responsibility, but is nonetheless necessary because many states do not take such responsibility given that lengthy federal incarceration often severs an individual's ties to his or her home state. *Id.* at 144–46. Justice Thomas disagreed that the statute respects the authority of state civil commitment authorities and with the premise that states would not be available to take charge of a dangerous person upon his or her release from federal prison. See *id.* at 176–78 (Thomas, J., dissenting).

C. Professor Black's Pragmatism

If the Justices in these cases and others like them were to take seriously Charles Black's method of reasoning from structure and relationship instead of becoming consumed in flights of formulaic reasoning centered on narrow constitutional provisions of grant and prohibition, this distracting doctrinal noise could be minimized or even eliminated. There likely would continue to be considerable subjectivity in the Court's reasoning, but working from structural premises and the perceived exigencies of institutional arrangements would tend to emphasize the features of constitutional disputes, especially disputes over the power of the federal government, that actually motivate the competing positions on the Court.²⁴²

Comparing Chief Justice Roberts's controlling opinion in *Sebelius* with Justice Ginsburg's separate opinion helps to make this point.²⁴³ At issue in *Sebelius* was the constitutionality of the so-called individual mandate in the Affordable Care Act, which required most Americans to maintain "minimum essential" health insurance or pay a penalty to the Internal Revenue Service.²⁴⁴ A majority of the Justices determined that the individual mandate in the ACA was beyond Congress's Commerce Clause authority, although a differently configured majority upheld the mandate as a permissible exercise of the taxing authority.²⁴⁵ On the Commerce Clause issue,

242. As Professor Blasi points out, the Court's adoption of Black's method could also impact the way some disputes are framed from the inception and thereby change the nature of the information that is made available to judges.

To the extent that structural reasoning would result in a refashioning of lawsuits, with different information coming to the attention of judges, Black's structural approach may well lead to judicial intuitions and preconceptions that can be considered to be more sophisticated and thereby, quite apart from subjective desirability of the results that might ensue, improvements of "process."

Blasi, *supra* note 14, at 189–90. Moreover, the more common use of reasoning from structure and relationship could shift the focus of potential litigants and courts from "particularized grievances" to "complaints that concern systemic shortcomings." *Id.* at 186. These shifts in information, issue framing and systems analysis, in turn, could impact "even the lawsuits that are brought." *Id.* at 185.

243. Compare *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547–58 (2012) (asserting the individual mandate of the ACA is beyond Congress's Commerce Clause powers because it does not regulate existing commerce), with *id.* at 604–08 (Ginsburg, J., concurring in part and dissenting in part) (asserting that the ACA instead regulates inevitable market participation).

244. 26 U.S.C. § 5000A(a)–(b) (2018). More recently, in *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), the Fifth Circuit upheld a district court ruling that the ACA's individual mandate is unconstitutional because it no longer carries a tax penalty that generates tax revenues but declined to find the entire statute unconstitutional. *Id.* at 390, 393.

245. See *Sebelius*, 567 U.S. at 558, 563–66.

the Chief Justice relied on two principal grounds for concluding that the Commerce Clause does not support the imposition of a federal obligation to purchase health insurance. The first ground centered on the word “regulate” in the Commerce Clause.²⁴⁶ Roberts’s highly formalistic analysis reasoned that, while the text confers upon Congress the power to regulate commerce among the states, it does not grant Congress the power to create the activity or class of activities to be regulated. “The power to *regulate* commerce,” he explained, “presupposes the existence of commercial activity to be regulated.”²⁴⁷ To support this conclusion, the Chief Justice noted that constitutional text grants Congress the power both to “coin Money” and to “regulate the Value thereof,” and to “raise and support Armies . . . and naval Forces” and to “make Rules for the Government and Regulation of the land and naval Forces.”²⁴⁸ From these features he concluded that, if the power to regulate includes the “power to bring the subject of the regulation into existence,” then the provisions governing money and the armed forces would be superfluous, thus violating the rule against surplusage.²⁴⁹

In addition to this extraordinarily literal textualist argument centered on one word in a provision of grant or prohibition, Chief Justice Roberts also mounted an argument that the individual mandate exceeds Congress’s authority because it undermines broad notions of state sovereignty inherent in American federalism and operationalized through the requirement that authority exercised by Congress pursuant to the Necessary and Proper Clause must be “proper.”²⁵⁰ While nominally a ground for decision based on specific text—the word “proper” in the Necessary and Proper Clause—Professor Manning argues that Roberts’s elaboration of the principles of state sovereignty and federalism in this instance is an example of structural reasoning of the sort he regards as problematic.²⁵¹ The Chief Justice signaled his intention to draw upon broad constitutional

246. *See id.* at 547–58.

247. *Id.* at 550.

248. *See id.* (discussing U.S. CONST. art. I, § 8, cls. 5, 12–14).

249. *Id.* Notably, Justice Ginsburg and the other justices joining her dissent argued that the action/inaction distinction itself is suspect in this context. In their view, the ACA’s individual mandate does not force activity but instead regulates inevitable market participation. *See id.* at 604–08 (Ginsburg, J., concurring in part and dissenting in part).

250. *See id.* at 559–61.

251. *See* Manning, *supra* note 11, at 41–42.

principles to support his position by pointing out early in his opinion the following features of the American constitutional system: first, Congress's powers are limited by the terms of the enumeration in Article I, Section 8;²⁵² second, the Constitution is not the source of the states' police powers, which remained in the states as a residuum after limited federal powers were conferred by way of the written Constitution;²⁵³ and third, the state sovereignty thus retained is a source of individual liberty, because it ensures that "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed" and "also serves as a check on the power of the Federal Government."²⁵⁴

Justice Ginsburg's separate opinion, by contrast, is also based primarily on reasoning from structure and relationship.²⁵⁵ But Ginsburg announced a very different set of constitutional principles to ground her analysis. First, she identified the individual state incompetence principle, which she described as central to the Framers' response to the failures of the Articles of Confederation.²⁵⁶ The Articles, she reminds, "proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole."²⁵⁷ Consequently, their "solution" was to give Congress "authority to enact economic legislation 'in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.'"²⁵⁸ Next, Justice Ginsburg explained that, because "[t]he Framers understood that the 'general Interests of the Union' would change over time, in ways they could not anticipate," they devised a written constitution intended to serve

252. See *Sebelius*, 567 U.S. at 534 ("The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (alteration in original))).

253. *Id.* at 535–36.

254. *Id.* at 536.

255. See *id.* at 599–604 (Ginsburg, J., concurring in part and dissenting in part). In addition to setting out an analysis based on broad principles, Justice Ginsburg also responds to the Chief Justice's narrow argument centered on the meaning of the word "regulate" and the distinction he draws between action and inaction. See *id.* at 609–14.

256. *Id.* at 599–600.

257. *Id.* at 600.

258. *Id.* (quoting THE RECORDS OF THE FEDERAL CONVENTION, VOL. 2, *supra* note 22, at 131–32).

as “a ‘great outlin[e],’ not a detailed blueprint.”²⁵⁹ And finally, Ginsburg urged an interpretive approach to the Commerce Clause that is based on “‘practical’ considerations, including ‘actual experience,’”²⁶⁰ and suggested that this “pragmatic approach,” rather than Roberts’s formalist reading, was “[c]onsistent with the Framers’ intent.”²⁶¹

Writing in the *Georgetown Law Journal* before the Supreme Court announced its decision in *Sebelius*, Professors Leslie Meltzer Henry and Maxwell Stearns argued that the ACA’s individual mandate “fits well within those cases for which congressional commerce power is justified to avoid the risk that competing state policies will force other states into a problematic separating game, thereby undermining the selected regulatory policy.”²⁶² Justice Ginsburg’s analysis, grounded in the basic principles she identified, adopted the intuition suggested by Meltzer Henry and Stearns. Thus, she concluded:

States that undertake health-care reforms on their own thus risk “placing themselves in a position of economic disadvantage as compared with neighbors or competitors.” Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests. Congress’ intervention was needed to overcome this collective-action impasse.²⁶³

One could certainly conclude that Chief Justice Roberts’s judgment (that public health policy is better determined at the state level where decision makers are closer to their constituents) was superior to Justice Ginsburg’s evaluation (that the dynamics of the national market for health care services and health insurance render individual states suboptimal policy makers), but it is difficult to see how the Justices’ strained arguments over the meaning of the phrase “to regulate,” or their arcane disagreements over whether the

259. *Id.* at 601 (second alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

260. *Id.* (quoting *Nat’l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937)).

261. *Id.* at 601–02.

262. Henry & Stearns, *supra* note 81, at 1118.

263. *Sebelius*, 567 U.S. at 595 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted).

regulated subject of the ACA's individual mandate was "action" or "inaction," advanced any of the real interests at stake. Reasonable people can certainly differ over these fundamental questions, and over the prior question of which institution (Congress or the Court) ought to have the final word on the matter, but pretending that the narrow textual provisions of grant and prohibition developed by delegates to the constitutional convention are the best, or even a good, way to resolve these questions disserves the very enterprise of maintaining and operating a workable constitutional order.²⁶⁴

CONCLUSION

Charles Black's central insight was that candor and clarity in the project of constitutional interpretation are advanced when the Supreme Court and other courts exercising the power of judicial review frankly embrace a methodology of reasoning from constitutional structure and institutional relationships. Notably, Black taught that the appropriate use of reasoning from structure and relationship is a form of textual construction, not a repudiation of text. He insisted that the Court should embrace "a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."²⁶⁵

Black certainly understood that clause-bound textual interpretation had been and would continue to be a significant component of the work of the Court. "[S]o long as we continue to look on our Constitution as a part of the law applicable in court, just so long the work of sheer textual interpretation will be a great part—probably the greatest part—of judicial work in constitutional law."²⁶⁶ Even the parsing of individual provisions of grant or prohibition, however, requires the exercise, more or less, of interpretive

264. On this account, constitutional interpretation and implementation occur throughout the government, and indeed outside of government, as well as in the courts. An approach to constitutional judicial review that highlights underlying structural principles and institutional relationships instead of focusing on sterile bits of text considered in isolation is likely to facilitate the interactive process by which these various actors engage one another and, in the process, recommit to the constitutional order. For a fuller account of the operation of constitutionalism outside of the courts, see GRABER, *supra* note 60.

265. BLACK, *supra* note 1, at 31.

266. *Id.*

judgment. Often, the rules by which individual passages of grant or prohibition are decoded derive from broader structural and relational directives that in turn can be traced to other portions of the written constitution (or to the constitutional text taken as a whole).²⁶⁷

Professor Black's recognition of this essential dialogue between text and structure, both in cases involving relatively narrow prescriptive constitutional passages, as well as in cases that expressly implicate the institutional relations that derive from broad constitutional structure, distinguishes his approach from the new structuralism of the Rehnquist and Roberts courts. His notion of dialogue invites us to read constitutional language in context and moves us toward an understanding of constitutional practice that, while rooted in the written text, also draws insight from the tradition of unwritten constitutional development.

Provisions that have served to advance the broader objectives of the American constitutional enterprise are entitled to greater fidelity and should be relied upon in determining the outcome in specific instances of constitutional controversy. Others that have receded in practical importance because of their misfit with ongoing circumstances or that have essentially been rewritten or reimagined by subsequent decisions should be accorded an appropriately reduced weight, given that diminished practical importance and/or revision over time. On those occasions where it is plain that a provision of grant or prohibition, such as the Commerce Clause, was the product of significant miscalculation,²⁶⁸ it is appropriate for the Supreme Court and other reviewing courts to look to the broader constitutional principles embedded in the document's structures and institutional relationships to resolve ongoing questions of national importance. The repeated endorsement by the delegates to the Constitutional Convention of the principle that the federal government should exercise authority when the states individually cannot was not displaced by the enumerative language of Article I, Section 8. The

267. All texts, including constitutional texts, must be read according to an agreed upon set of rules. Ian Bartrum, drawing broadly on the language theory of Ludwig Wittgenstein, has explained that "language is something we *do*, not something that we *have*. Further, like a game, language is a rule-governed activity; which is to say that it is *rules*, not *instruments* (e.g. pieces or balls) that give a particular action or utterance a particular 'meaning.'" Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism*, 10 WASH. UNIV. JURIS. REV. 29, 35 (2017).

268. See *supra* text accompanying notes 145–57.

enumerations, including the Commerce Clause, are surely part of the text—the Constitution as law—with which courts and others charged with constitutional interpretation must work, but these provisions should be read in context and in the light shed by history and experience, and according to a process of reasoning from constitutional structure and institutional relationships.