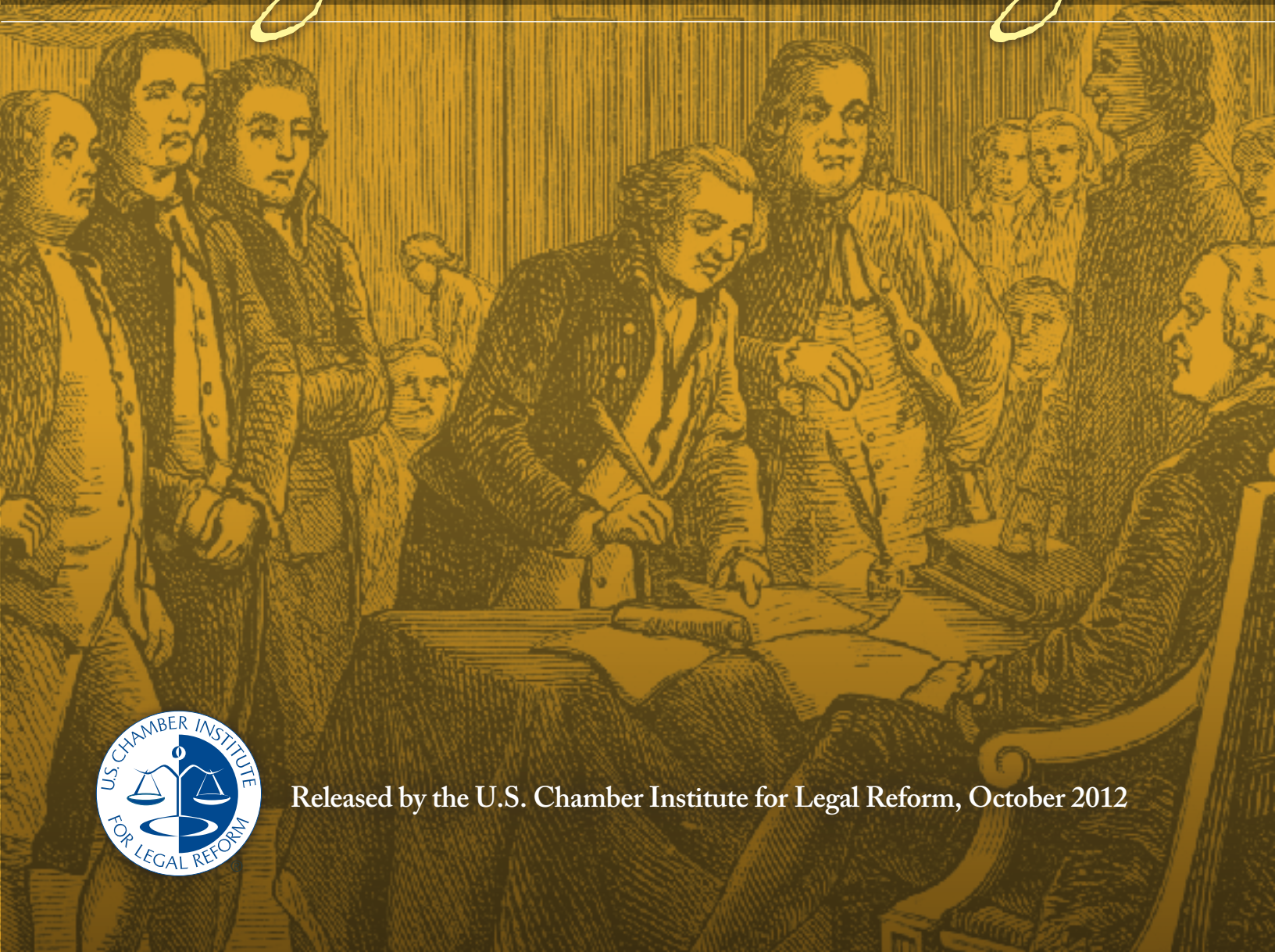


# FEDERALISM, THE FRAMERS, *and* FEDERAL LEGAL REFORM *Setting the Record Straight*



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# FEDERALISM, THE FRAMERS, and FEDERAL LEGAL REFORM

## *Setting the Record Straight*

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By Paul D. Clement

## Introduction

Congress has from time to time acted to address what it perceives to be the excesses of state tort systems—such as unpredictable punitive damages awards or novel class action rules.

Almost invariably these efforts at federal legal reform have prompted critics to suggest that there are unique federalism

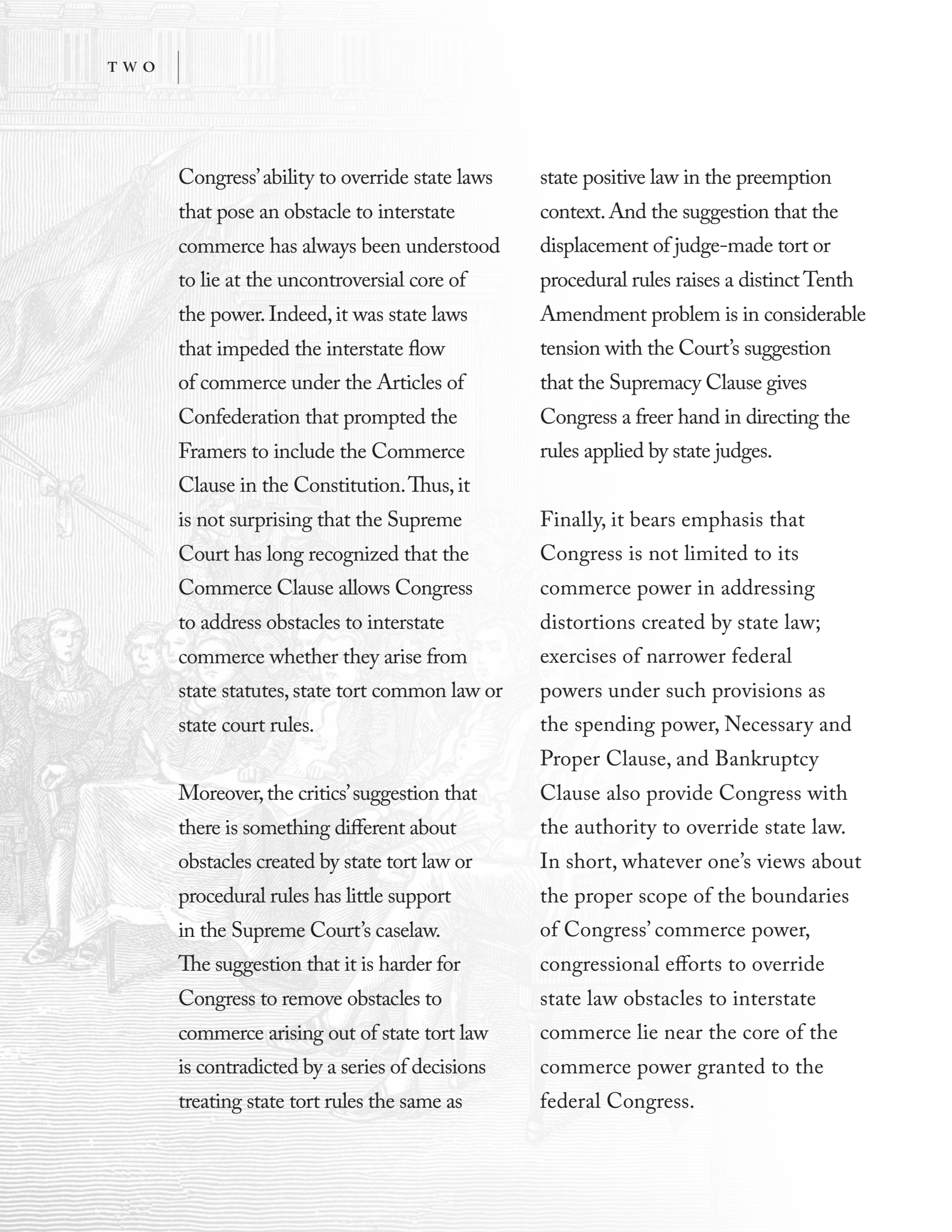
or Tenth Amendment difficulties with such federal efforts. Needless to say, the specifics of each effort need to be evaluated individually, but in general, the Supreme Court's cases

provide remarkably little support for the argument that federal efforts at legal reform are verboten. Instead, the Court's cases indicate that Congress has wide latitude to address and

*“the Supreme Court’s cases provide remarkably little support for the argument that federal efforts at legal reform are verboten.”*

remove obstacles to interstate commerce whether they arise from state positive law, state common law or even state

procedural rules. This paper examines the relevant precedents and principles. Although there has been much debate about the outer boundaries of Congress' Commerce Clause power,



Congress' ability to override state laws that pose an obstacle to interstate commerce has always been understood to lie at the uncontroversial core of the power. Indeed, it was state laws that impeded the interstate flow of commerce under the Articles of Confederation that prompted the Framers to include the Commerce Clause in the Constitution. Thus, it is not surprising that the Supreme Court has long recognized that the Commerce Clause allows Congress to address obstacles to interstate commerce whether they arise from state statutes, state tort common law or state court rules.

Moreover, the critics' suggestion that there is something different about obstacles created by state tort law or procedural rules has little support in the Supreme Court's caselaw. The suggestion that it is harder for Congress to remove obstacles to commerce arising out of state tort law is contradicted by a series of decisions treating state tort rules the same as

state positive law in the preemption context. And the suggestion that the displacement of judge-made tort or procedural rules raises a distinct Tenth Amendment problem is in considerable tension with the Court's suggestion that the Supremacy Clause gives Congress a freer hand in directing the rules applied by state judges.

Finally, it bears emphasis that Congress is not limited to its commerce power in addressing distortions created by state law; exercises of narrower federal powers under such provisions as the spending power, Necessary and Proper Clause, and Bankruptcy Clause also provide Congress with the authority to override state law. In short, whatever one's views about the proper scope of the boundaries of Congress' commerce power, congressional efforts to override state law obstacles to interstate commerce lie near the core of the commerce power granted to the federal Congress.

# I. Background Principles

## *The Birth of the Commerce Clause*

Congress, of course, may act only pursuant to its enumerated powers. While debate continues over the outer boundaries of Congress' Commerce Clause power, the Supreme Court has long held that Congress has the power to regulate the "channels of interstate commerce" and the "instrumentalities of interstate commerce," and to remove obstacles to the free flow of interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Indeed, the need for Congress to have the power to remove state-law obstacles to interstate commerce is the *raison d'être* for the Commerce Clause and an initial driving force behind the entire Constitutional Convention. "If there was any one object riding over every other in the adoption of the constitution, it was to keep the

commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring).

Under the Articles of Confederation, States enacted laws, typically revenue provisions, that obstructed the free flow of goods throughout the fledging republic and made it impossible to present a unified front in foreign commerce. Those "iniquitous laws and impolitic measures" were "the immediate cause, that led to the forming of a convention." *Id.* at 224. In January of 1786, the General Assembly of Virginia named commissioners and proposed their meeting with other States' representatives in order "to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; [and] to consider



how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony.” *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation marks omitted). That effort culminated in the Constitutional Convention, *id.*, during which James Madison stated that the “want of a general power over Commerce led to an exercise of this power separately, by the States,” which “not only proved abortive, but engendered rival, conflicting and angry regulations,” *id.* at 534.

Following the Convention, the Framers championed the commerce power as a new, but uncontroversial, power of the federal government to remove obstacles to the internal market and to invigorate our foreign commerce. For example, Justice Johnson in his *Gibbons* concurrence emphasized that the classic regulation of commerce is the removal of obstructions, and

the power is exercised “generally with a view to the removal of some previous restriction.” 22 U.S. at 228. Moreover, in the *Federalist*, Alexander Hamilton argued that “[a]n unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets.” The *Federalist* No. 11, at 89 (Clinton Rossiter ed., 1961). He further remarked that “[w]hatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control.” The *Federalist* No. 80, at 477-78 (Clinton Rossiter ed., 1961); *see also Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (observing that Commerce Clause reflected Framers’ belief that “in order to succeed, the new Union would have to avoid ... tendencies toward economic Balkanization”).

Given this original understanding of the Commerce Clause, it is thus unsurprising that “[f]or the first century” of the Nation’s history, “the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible.” *Raich*, 545 U.S. at 16. The Court has long recognized that the power to regulate commerce “must include the authority to deal with obstructions to interstate commerce.” *United States v. Ferger*, 250 U.S. 199, 203 (1919). And to the modern day, the Supreme Court has continued to recognize that guarding against state interference with interstate commerce is the “core purpose of the Commerce Clause.” *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 (1980).

## *The Dormant Commerce Clause*

The classic role of the Commerce Clause is also reflected in the Supreme Court’s well-established “dormant Commerce Clause” jurisprudence, which derives from the Court’s recognition that the Constitution’s “express grant to Congress of the power to ‘regulate Commerce ... among the several States’” contains “a further, negative command.” *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (citation omitted). That “negative command” prevents a State from “jeopardizing the welfare of the Nation as a whole” by “plac[ing] burdens on the flow of commerce across its borders.” *Id.* at 180. Thus, “[i]n a long line of cases stretching back to the early days of the Republic,” the Court has held that “the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on

interstate commerce.” *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652 (1981); *see also Am. Trucking Ass’ns, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005); *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Gibbons*, 22 U.S. at 1. This rule is “essential to the foundations of the Union.” *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

Notably, the Court’s dormant Commerce Clause cases underscore Congress’ authority because they assess “the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act.” *Lopez*, 514 U.S. at 568-69 (Kennedy, J., concurring). Put differently, the Court’s acknowledged power under the dormant Commerce Clause to invalidate state laws that “interfere with or impose burdens on interstate commerce” is premised

upon Congress’ power to eliminate those same obstacles by affirmative federal law it enacts pursuant to the Commerce Clause. *See, e.g., Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979) (upholding federal statute invalidating state tax as valid exercise of Commerce Clause because state tax “interfered with interstate commerce” and Congress “selected a reasonable method to eliminate that interference”). Indeed, Congress’ power to remove state-law obstacles is even broader than the courts’ authority under the dormant Commerce Clause. In one of the early dormant Commerce Clause cases, Chief Justice Marshall rejected a challenge to a state law authorizing a dam to be built across a navigable creek, but noted that if Congress had acted, “we should feel not much difficulty in saying, that a state law coming in conflict with such act would be void.” *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 245 (1829).



## Other Enumerated Powers

To the extent legal reform legislation targets state laws that pose an obstacle to interstate commerce by making operation in a particular jurisdiction prohibitively expensive or causing national companies to distort design decisions for fear their products may find their way to a particular jurisdiction, it would appear to fall within the core of Congress' commerce power as recognized by the Court. It is important to recognize, however, that such legislation may also be authorized by other enumerated sources of congressional power. For example, the Bankruptcy Clause allows Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4; *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006); *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 671 (1935) (noting the "very striking ... capacity of the

bankruptcy clause to meet new conditions ... as a result of the tremendous growth of business and development of human activities from 1800 to the present day").

Congress also has the ability to expand or contract the jurisdiction of the federal courts, *see, e.g., Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187-88 (2010); *Kline v. Burke Const. Co.*, 260 U.S. 226, 233-34 (1922), and as long as the constitutionally required federal issue or minimal diversity is present, Congress can provide a federal forum for particular claims. In addition, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take," *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999), so long as the exercise is in pursuit of the general welfare, the conditions are stated unambiguously, the conditions are related to the stated federal

interest, and the inducement is not “so coercive as to pass the point at which pressure turns into compulsion,” *South Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-07 (2012) (Roberts, C.J.). And all these more specific enumerated powers are supplemented by the Necessary and Proper Clause, which while not granting Congress any “great substantive and independent power[s],” *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819); *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591 (Roberts, C.J.), permits Congress to pass legislation that is “rationally related to the implementation of a constitutionally enumerated power,” *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

It is also well-established that where Congress has validly acted under an enumerated power, federal legislation may preempt conflicting state law pursuant to the Supremacy Clause.

Indeed, given Congress’ authority to remove state-law obstacles to federal objectives, it is hardly surprising that Congress’ ability to legislate generally includes the power to displace contrary state law. *See* Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In*, *Legal Times*, June 19, 2000. Moreover, the Supreme Court has steadfastly refused to distinguish between state judge-made common law and state positive law in this context, permitting preemption of both so long as applicable federal law evinces such an intent. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 69-70 (2002).

## ***Understanding the Tenth Amendment***

Needless to say, Congress cannot exercise its enumerated powers in a manner that offends an affirmative limit on Congress’ power. Thus, for example, no matter how well established Congress’ authority

to remove state-law obstacles to interstate commerce, it cannot remove an obstacle in a manner that violates the First Amendment. The relationship between Congress' enumerated powers and the Tenth Amendment is more nuanced. The Supreme Court has generally suggested that the Tenth Amendment reinforces limits on Congress' enumerated powers, rather than suggesting that the Tenth Amendment imposes a restriction on powers affirmatively granted to Congress. In other words, when the Court has invoked the Tenth Amendment, it generally does so to fortify a conclusion that particular legislation was not within Congress' enumerated powers in the first place.

The Court has done this most prominently in its “anti-commandeering” cases. The Court has recognized that neither Congress' enumerated powers nor the Tenth Amendment permits Congress to “commandeer” state legislative

processes or executive officials to carry out federal regulatory schemes. Congress cannot “issue directives requiring the States to address particular problems,” nor can it “command the States' officers . . . to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court has twice invalidated federal law on “commandeering” grounds. In *New York v. United States*, 505 U.S. 144 (1992), it invalidated a provision of federal law that “direct[ed] the States to provide for the disposal of . . . radioactive waste generated within their borders.” *Id.* at 188. And in *Printz*, it invalidated a provision of federal law that required state and local officials to conduct background checks on prospective handgun purchasers. 521 U.S. at 935. Notably, the Court in *New York* recognized that Congress could have directly regulated the disposal of radioactive waste under the Commerce Clause, or it could have preempted state radioactive waste



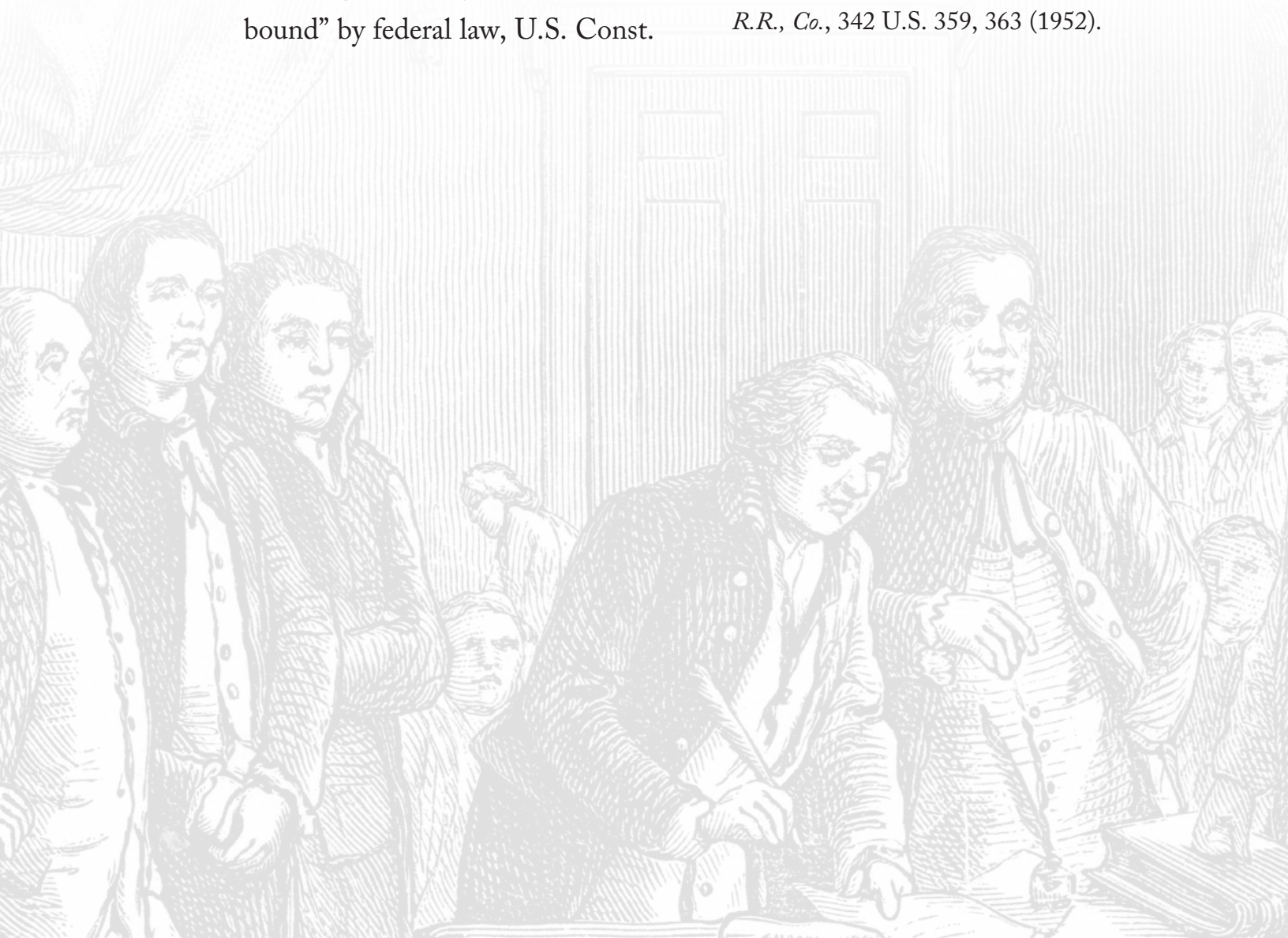
law. 505 U.S. at 159-60. But, the Court held, Congress could not regulate “in the way it ha[d] chosen”—by using the “States as implements of regulation.” *Id.* at 160-61.

Importantly, both those cases went out of their way to exempt state courts and judges from this anti-commandeering principle. Because the Supremacy Clause mandates that “the Judges in every State shall be bound” by federal law, U.S. Const.

art. VI, cl. 2, Congress has the power to require state courts to enforce federal causes of action. *New York*, 505 U.S. at 178-79; *Printz*, 521 U.S. at 928-29; *Testa v. Katt*, 330 U.S. 386 (1947).

Congress may also prescribe procedural rules that state courts must follow in enforcing federal causes of action, if those rules are “part and parcel” of the federal cause of action.

*See Dice v. Akron, Canton & Youngstown R.R., Co.*, 342 U.S. 359, 363 (1952).



## II. Legal Reform and Federalism

While each particular piece of federal legislation naturally requires its own evaluation, Supreme Court authority suggests that as a general matter, Commerce Clause and Tenth Amendment objections to federal legal reform measures are misplaced and any legal challenges are not likely to succeed.

### A. Constitutional Objections to Legal Reform

Congressional efforts at legal reform efforts have rather predictably drawn objections that such federal efforts are in excess of Congress' constitutional authority or violate the Tenth Amendment. *See, e.g.*, J. Lloyd Snook, III, *Tort Reformers Are Trashing the Constitution*, Blog of Snook & Haughey, P.C. (Sept. 29, 2011), <http://www.snookandhaughey.com/personal-injury/tort-reformers-are-trashing-the-constitution> (arguing that

“proposed tort reform would clearly be unconstitutional”); David Nather, *Tort Reform Bill Hits Speed Bump*, Politico, February 9, 2011 (noting doubts from GOP congressmen that “the federal government has the power to [enact legal reform] under the Commerce Clause” and concerns about “states’ rights under the 10th Amendment”); Michelle Widmann, *Constitutional Conservatives: Federal Tort Reform Violates States’ Rights and the 10th Amendment*, Fighting for Justice (Mar. 13, 2012), <http://www.fightingforjustice.org/content/constitutional-conservatives-federal-tort-reform-violates-states%E2%80%99-rights-and-10th-amendment> (collecting comments).

Two aspects of this opposition are worth noting. *First*, such criticism is nothing new; prior legal reform measures have prompted similar concerns. For example, in the late 1990s, Congress considered legislation implementing a global settlement to suits brought by state Attorneys General against the tobacco industry. Under the settlement, the tobacco industry, in exchange for accepting strict advertising limits and paying substantial sums of money, would have received three forms of legal protection applicable to all civil suits, whether in state or federal court: (1) immunity from punitive damages; (2) prohibition of class actions, joinder of parties, aggregation of claims, and consolidation of actions; and (3) caps on annual settlements and judgments. *See* National Tobacco Policy

and Youth Smoking Reduction Act, S. 1415, 105th Cong. (1998). During hearings on the legislation, Professor Laurence Tribe stated: “For Congress directly to regulate the procedures used by state courts in adjudicating state law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.” *A Review of the Global Tobacco Settlement: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 160 (1997) (statement of Laurence H. Tribe).<sup>1</sup>

The Class Action Fairness Act of 2005 prompted similar Tenth Amendment objections. Indeed, a minority report addressing the Senate version of the bill reprised Professor Tribe’s statement above.

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<sup>1</sup> The proposed legislation ultimately did not become law, though its demise appears attributable to political differences, not any constitutional concerns. *See, e.g.*, William Neikirk, *Stalled Deal Over Tobacco Has Congress in a Quandary*, Chi. Trib., March 12, 1998, at 15.



*See* S. Rep. No. 109-14, at 93 (minority views of Sens. Leahy, Kennedy, Biden, Feingold, and Durbin). The report further asserted: “This bill does not merely operate to preempt state laws; rather, it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. . . . The courts have previously found that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment Federalism concerns and should be avoided.” *Id.* at 92-93. Opponents invoked the same theme on the floor. *See* 151 Cong. Rec. H748 (daily ed. Feb. 17, 2005) (statement of Rep. Nancy Pelosi) (“This bill also runs counter to the principles of federalism that my colleagues on the other side of the aisle claim to support.”); *id.* at H736 (statement of Rep. Mel Watt) (deeming the House bill “inconsistent with any kind of consistent philosophy about federalism”). Plaintiffs’ attorneys joined in the chorus. *See* Jerome Ringler, *The Unfairness of the Class Action Fairness Act*, L.A. Lawyer, March 2006, at 52 (“The act also destroys a

sacrosanct principle among conservatives—federalism. . . . Simply stated, it is hypocritical to brandish the Constitution and publicly recite the Tenth Amendment while simultaneously erasing important rights among the individual states.”). And with respect to an earlier version of the legislation, a group of 95 law professors wrote Senators Frist and Daschle to claim that because of Tenth Amendment problems, “litigation over the constitutionality of the bill is likely to embroil the courts for years and is yet a further reason to oppose the enactment of this misguided legislation.” Letter from Richard L. Abel et al. to Hon. William Frist and Hon. Tom Daschle (June 3, 2003), *available at* [http://www.consumersunion.org/pub/core\\_product\\_safety/000191.html](http://www.consumersunion.org/pub/core_product_safety/000191.html).

Notably, such litigation concerns never materialized; there appear to have been only two passing constitutional challenges to the Class Action Fairness Act. One was summarily rejected, *see West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F.



Supp. 2d 441, 455-56 (E.D. Pa. 2010); the other was deemed unnecessary to address, *see Lester v. Exxon Mobil Corp.*, 2007 WL 1029507, at \*1 (E.D. La. Mar. 29, 2007).

*Second*, as with past opposition, the current criticism of federal legal reform is long on assertions but short on details. As with objections to the Class Action Fairness Act, opponents of current legal reform cite Commerce Clause or Tenth Amendment “concerns,” “implications,” or “principles,” but rarely cite cases or observations of the Framers. In reality, much of the criticism simply appears to be nothing more than policy objections couched in constitutional rhetoric. In this regard it is telling that while many invoked Tenth Amendment “concerns” about CAFA during its consideration, after its passage almost no one bothered to file a lawsuit, which demands constitutional precedent, not just political rhetoric. Once the Court’s cases and the concerns that motivated the

Commerce Clause are examined, it becomes clear that a legal challenge to federal legal reform would face serious obstacles in the courts.

*“In reality, much of the criticism simply appears to be nothing more than policy objections couched in constitutional rhetoric. In this regard it is telling that while many invoked Tenth Amendment ‘concerns’ about CAFA during its consideration, after its passage almost no one bothered to file a lawsuit, which demands constitutional precedent, not just political rhetoric.”*



## B. Congress Has Broad Power to Enact Legal Reform

Congress possesses a number of enumerated powers under which it may validly pass legal reform, foremost among them the Commerce Clause. Indeed, even many critics of legal reform acknowledge the breadth of Congress' authority to address the subject pursuant to the Commerce Clause under the Supreme Court's jurisprudence. For example, Professor Michael Dorf has stated: "Folks like me, who think that Congress has broad latitude to regulate under the Commerce Clause, have no difficulty seeing the package of federal limits as constitutional, even if we don't think it's desirable policy." Mike Dorf, *Tort Reform Versus the 10th Amendment*, Dorf on Law (Feb. 10, 2011), <http://www.dorfonlaw.org/2011/02/tort-reform-versus-10th-amendment.html>. In fact, to the extent Congress acts to overcome aspects of state tort law or procedural rules that pose obstacles to interstate commerce, its actions represent the classic use of the Commerce Clause. The Framers of course were most concerned about state revenue laws that impeded the free flow of commerce, but there is nothing to suggest that only revenue laws or other positive law could provide the requisite obstacle.

Moreover, more recent Supreme Court precedent has upheld federal legislation overriding state-court procedural rules as valid Commerce Clause legislation. Thus, for example, in *Pierce County v. Guillen*, 537 U.S. 129 (2003), the Court considered the constitutionality of 23 U.S.C. § 409, which prohibits the disclosure in state court proceedings of traffic safety data collected by local authorities in order to qualify for federal funding. The federal law privilege against disclosure applies



even if state procedural law would otherwise compel disclosure in state court proceedings involving tort and other purely state-law claims. Congress adopted this federal law privilege out of concern that the federal objective of channeling federal funding to the most dangerous stretches of roads would be frustrated if information collected by local authorities for federal purposes could be used against them in state-court proceedings. *Id.* at 133-34. The Court unanimously held that the federal privilege was a valid exercise of the Commerce Clause because Congress had sought to “improv[e] safety in the channels of commerce and increas[e] protection for the instrumentalities of interstate commerce.” *Id.* at 146-47.

*Pierce County* is noteworthy in several respects. First and foremost, it demonstrates that there is nothing sacrosanct about federal law trumping state laws used by state courts in adjudicating state-law claims if federal law does so to

pursue legitimate federal objectives. Importantly, neither the fact that the state laws that would otherwise demand disclosure could be characterized as procedural, nor the fact that the underlying state-law claims were tort claims, mattered to the Court. Second, *Pierce County* involved a classic use of the commerce power: federal legislation designed to protect the channels of interstate commerce. The Framers could hardly have anticipated the modern day system of highways or the federal government’s extensive involvement in funding them. But the Framers knew about the importance of protecting the channels of interstate commerce and granted the new federal government the power to do so. When Congress deemed it appropriate to trump state-court procedural rules in order to protect the channels of interstate commerce, the Court unanimously upheld its exercise. Finally, it is particularly noteworthy that the Supreme Court’s unanimous decision in *Pierce County* was

authored by Justice Thomas—the Court’s leading critic of the breadth of the Court’s modern Commerce Clause jurisprudence. His authorship underscores that concerns about the proper scope of the boundaries of the commerce power do not translate into concern about a use of one of the Commerce Clause’s core powers to trump state law.

*“When Congress deemed it appropriate to trump state-court procedural rules in order to protect the channels of interstate commerce, the Court unanimously upheld its exercise.”*

It is also worth noting that in *Pierce County*, the Solicitor General asserted that two other enumerated powers gave Congress the authority to enact the federal law in question—powers that also provide a means for enacting federal legal reform. The Solicitor General argued that the law was a valid exercise under the Necessary and Proper Clause of Congress’ power “to ensure that its spending programs for highway safety remain effective.” Brief for the United States at 42, *Pierce*

*County* (No. 01-1229). It is “necessary and proper,” the Solicitor General stated, “for Congress to ensure that local jurisdictions are not chilled from being candid and thorough in utilizing federal funds out of a concern that doing so might effectively subject them to liability for damages in a tort action.” *Id.* The Solicitor General also asserted that

the law was a proper exercise of Congress’ spending power, since “it is a legitimate incident of the national program to improve transportation safety by providing funds to the States for amelioration of hazardous highway conditions.” *Id.* The State of Washington had chosen to accept those funds and thus had “expressly assented to the conditions incident to that program.” *Id.* at 43. Having upheld the law as a valid exercise of the commerce power, the Court did not address

these additional arguments. 537 U.S. at 147 n.9.

The Supreme Court also invoked the Commerce Clause to uphold federal legislation displacing state-court rules in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). There, the Court held that under the Federal Arbitration Act (FAA), state courts were required to enforce arbitration agreements. *Id.* at 10. In so holding, the Court cited *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395 (1967), where it had observed that the FAA is a valid exercise of the Commerce Clause, 465 U.S. at 11 (citing 388 U.S. at 400, 405). The *Southland* Court held that these statements regarding the Commerce Clause “clearly implied” that the FAA was “to apply in state as well as federal courts.” *Id.* at 12. Notably, the Court reached its conclusion notwithstanding Justice O’Connor’s dissenting opinion stating that in requiring state courts to enforce arbitration agreements under the FAA, the Court was implicitly holding that “state courts must follow

procedures specified in” the FAA. *Id.* at 22 (O’Connor, J., dissenting).

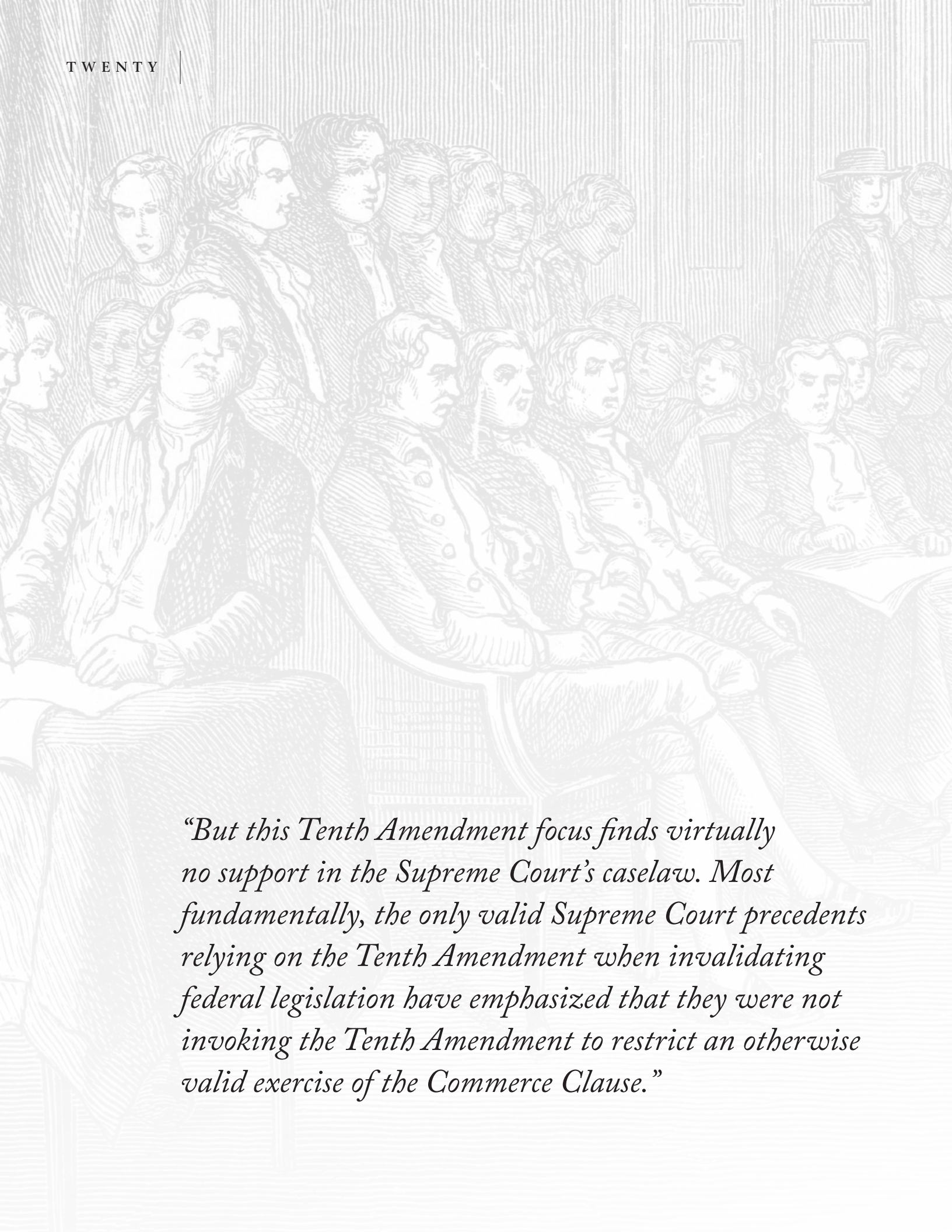
Congress has also repeatedly passed legislation affecting state statutes of limitations, notwithstanding that such laws have the effect of forcing state courts to hear claims that they might otherwise dismiss as time-barred. In the CERCLA amendments of 1986, for example, Congress established a uniform standard for determining accrual dates of personal injury or property damage claims due to exposure to hazardous substances—even if, under state law, the accrual date would be earlier in time. *See* 42 U.S.C. § 9658(a)(1), (b)(4)(A). This provision has been upheld as a valid exercise of the Commerce Clause because it “is an integral part of the regulatory scheme established by CERCLA [and] further[s] CERCLA’s goals in various ways.” *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 203 (2d Cir. 2002), *cert. denied*, 538 U.S. 998 (2003).



Other federal legislation affecting state statutes of limitations has been upheld under the Necessary and Proper Clause. In *Jinks v. Richland County*, 538 U.S. 456 (2003), the Supreme Court addressed the constitutionality of 28 U.S.C. § 1367(d), which requires a state statute of limitations to be tolled for the period during which a plaintiff's cause of action is pending in federal court. The Court held that this provision did not exceed Congress' enumerated powers because it was "necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the supreme Court" and to ensure

"that those tribunals may fairly and efficiently exercise '[t]he judicial power of the United States.'" *Id.* at 462 (quoting U.S. Const., Art. I, § 8, cl. 9 and Art. III, § 1). The Court cited an earlier case, *Stewart v. Kahn*, 78 U.S. 493 (1870), in which it upheld a federal statute tolling limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War. 538 U.S. at 461-62. There, the Court held that the tolling provision was a necessary and proper exercise of Congress' "powers to make war and suppress insurrections." 78 U.S. at 506-07.





*“But this Tenth Amendment focus finds virtually no support in the Supreme Court’s caselaw. Most fundamentally, the only valid Supreme Court precedents relying on the Tenth Amendment when invalidating federal legislation have emphasized that they were not invoking the Tenth Amendment to restrict an otherwise valid exercise of the Commerce Clause.”*

## C. Tenth Amendment Considerations

Whether because of a recognition of the breadth of the Supreme Court’s modern Commerce Clause precedents or out of a recognition that removing obstacles to interstate commerce is a core and uncontroversial aspect of the commerce power, many critics of federal legal reform have couched their criticisms in Tenth Amendment rather than enumerated power terms. But this Tenth Amendment focus finds virtually no support in the Supreme Court’s caselaw. Most fundamentally, the only valid Supreme Court precedents relying on the Tenth Amendment when invalidating federal legislation have emphasized that they were not invoking the Tenth Amendment to restrict an otherwise valid exercise of the Commerce Clause. In *New York*, for example, the Court’s first

anti-commandeering case, the Court observed that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” 505 U.S. at 156. Describing the Tenth Amendment as “essentially a tautology,” the Court observed that “the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’” *Id.* at 156-57 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)); *see also, e.g., Bond v. United States*, 131 S. Ct. 2355, 2366 (“The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it.”).

Thus, for example, in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), the Court rejected a Tenth Amendment challenge to a banking regulation by noting that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of



that power to the States.” *Id.* at 22 (quoting *New York*, 505 U.S. at 156). Because “[r]egulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses,” the Court held, “[t]he Tenth Amendment ...is not implicated here.” *Id.*

The foregoing authorities demonstrate that once it is conceded that Congress has authority to enact legislation under one of its enumerated powers, the Court’s Tenth Amendment precedents do not pose an independent basis for objecting to the legislation. To be sure, the Court has never foresworn the possibility that the Tenth Amendment could pose such an independent objection, but challengers would literally

*“The foregoing authorities demonstrate that once it is conceded that Congress has authority to enact legislation under one of its enumerated powers, the Court’s Tenth Amendment precedents do not pose an independent basis for objecting to the legislation.”*

have no precedent on which to rely. What is more, the Court’s Tenth Amendment precedents affirmatively undermine the

contention that interference with state courts or state court procedures, if done pursuant to a valid enumerated power, raise distinct Tenth Amendment problems.

Only twice in recent decades has the Supreme Court relied on the Tenth Amendment in invalidating federal legislation, and in both cases the improper legislation involved Congress’ “commandeering” of State legislatures or executives. *See Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188. In both cases, the majority confronted the objection that there was nothing problematic about commandeering state officials because Congress “commandeered”



state judges all the time by enacting laws that state courts must enforce pursuant to the Supremacy Clause. In response, both opinions expressly excised state courts from the anti-commandeering principle. Because the Supremacy Clause mandates that “the Judges in every State shall be bound” by federal law, the “commandeering” test is inapposite to state judges. See *Printz*, 521 U.S. at 928-29 (observing that “state courts cannot refuse to apply federal law”); *New York*, 505 U.S. at 178-79 (“Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”).

Thus, the Court’s leading Tenth Amendment cases provide no support for the proposition that trumping state court rules or interfering with the law applied by state court judges raise particularly acute Tenth Amendment concerns. Indeed, the cases suggest the

opposite. And efforts to extend the anti-commandeering cases to other contexts have not fared well. In *Reno v. Condon*, 528 U.S. 141 (2000), for example, the Court upheld the federal Driver’s Privacy Protection Act against a Tenth Amendment challenge. The Court held first that the law was a proper exercise of Congress’ authority under the Commerce Clause, *id.* at 148-49, and then that the law did not “violate[] the principles of federalism contained in the Tenth Amendment,” because, in contrast to *New York* and *Printz*, it did not require states “to enact any laws or regulations” or compel state officials “to assist in the enforcement of federal statutes regarding private individuals,” *id.* at 149, 151. Likewise, in *Jinks*, the Court held that 28 U.S.C. § 1367(c) was constitutional, first because it was “necessary and proper for carrying into execution Congress’s power ‘[t]o constitute Tribunals inferior to the supreme Court,’” and second

because it did not violate the “principles of state sovereignty” set forth in *Printz*. 538 U.S. at 462-65.

But if the Supreme Court has indicated that Congress has, if anything, greater power to commandeer state court judges consistent with the Tenth Amendment, what is left about federal legal reform that could raise distinct Tenth Amendment concerns under the Court’s precedents? The fact that federal legal reform often targets state tort law rather than positive state regulatory law would seem to make no difference under the Court’s cases. It is well-established that Congress can preempt both state positive law and judge-made law under the Supremacy Clause. *See Bates*, 544 U.S. at 443; *Sprietsma*, 537 U.S. at 62-63, 69-70.

Likewise, the fact that federal legal reform sometimes targets state procedural devices—like the class action rules—does not seem like a distinguishing factor. To be sure,

the Court in *Jinks* cautioned that “we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts.” 538 U.S. at 465. But that is far different from saying that where Congress has enumerated power to remove obstacles to commerce, state procedural rules are off limits. Although the Court in *Pierce County* ultimately reserved the Tenth Amendment question, it had no difficulty concluding Congress had validly exercised its commerce power in displacing state procedural rules governing disclosure in state-court litigation. Likewise, the failure of serious constitutional challenges to CAFA suggests that Congress does not cross any constitutional line when it invokes its enumerated powers to address the distorting effects of state procedural rules. Furthermore, the Court in *Jinks* itself expressed doubt that “a principled dichotomy” could even be drawn “between federal laws that regulate state-court ‘procedure’ and laws that

change the ‘substance’ of state-law rights of action.” *Id.* at 464.

Moreover, as noted, Congress has passed a number of laws affecting state-court procedures for state-court claims, and there has been no significant, let alone successful, challenge to their constitutionality. Indeed, without specific reference to the Tenth Amendment, the Court has held constitutional the use of the Federal Arbitration Act for state-law claims in state courts, notwithstanding that the Act requires courts to undertake certain procedures. *See Southland*, 465 U.S. at 10-16. And as far back as *Stewart*, the Court was not swayed by a challenger’s claim that “[a]s Congress cannot create the State courts...it cannot prescribe rules of proceeding for such State courts.” 78 U.S. at 498. *See also* Brief for the United States at 41 n.31, *Pierce County* (No. 01-1229) (arguing that Congress “has the authority under Article I to bar the discovery of evidence that would be

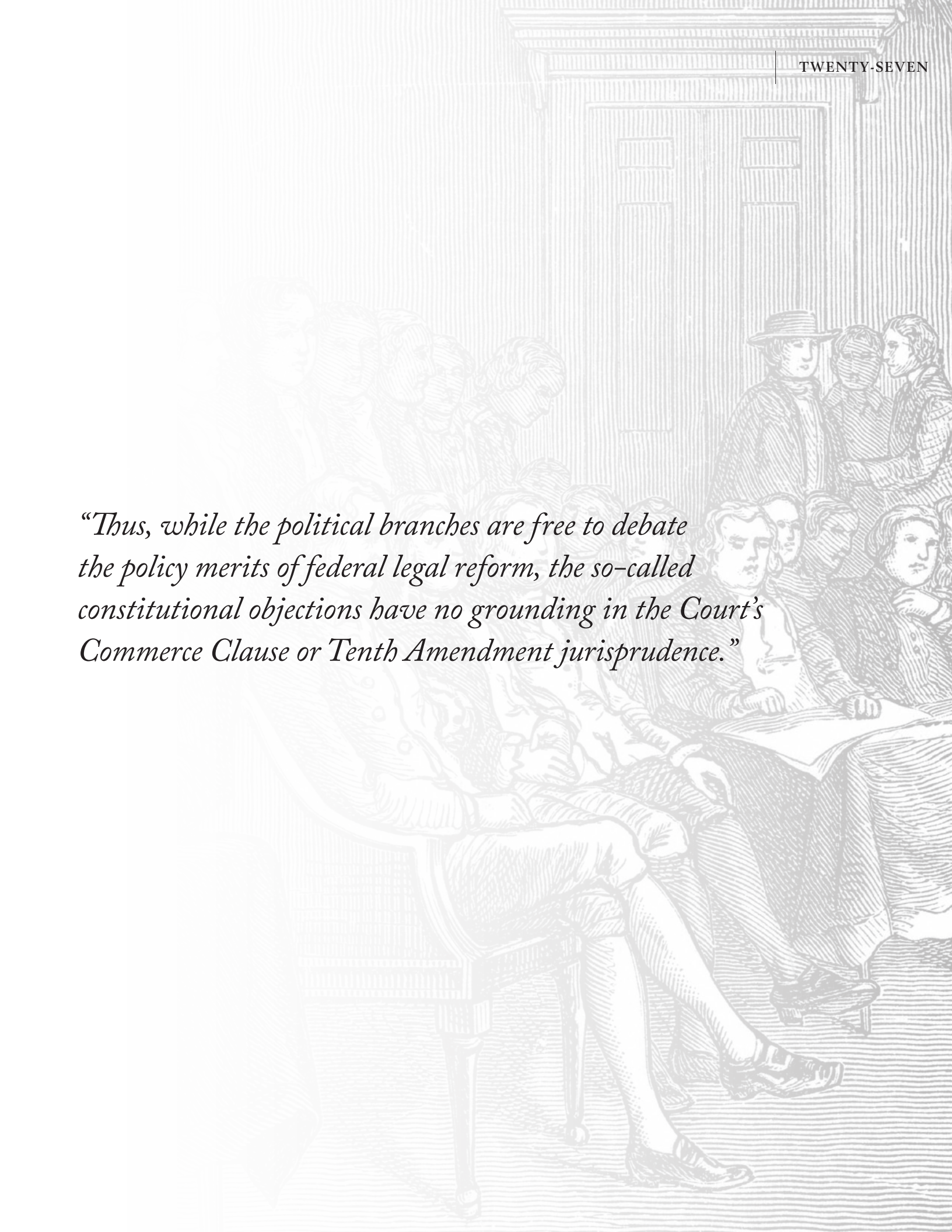
relevant to a state-law cause of action in state court, if such discovery would impair federal regulatory objectives”).

Two final points are worth noting. First, while the Supreme Court has never squarely held that, as a general matter, laws enacted pursuant to more specific powers than the Commerce Clause present reduced Tenth Amendment concerns, its caselaw suggests that the exercise of a more targeted federal power further undermines the argument that the power was reserved to the States. For example, if Congress validly acts pursuant to its spending power, the Tenth Amendment is not offended, even if the purpose of the law is to impact state conduct or powers reserved to the States. *See New York*, 505 U.S. at 167; *Dole*, 483 U.S. at 210. The Supreme Court has also suggested that laws enacted pursuant to the Bankruptcy Clause are particularly unlikely to fail Tenth Amendment scrutiny. In a case predating—but



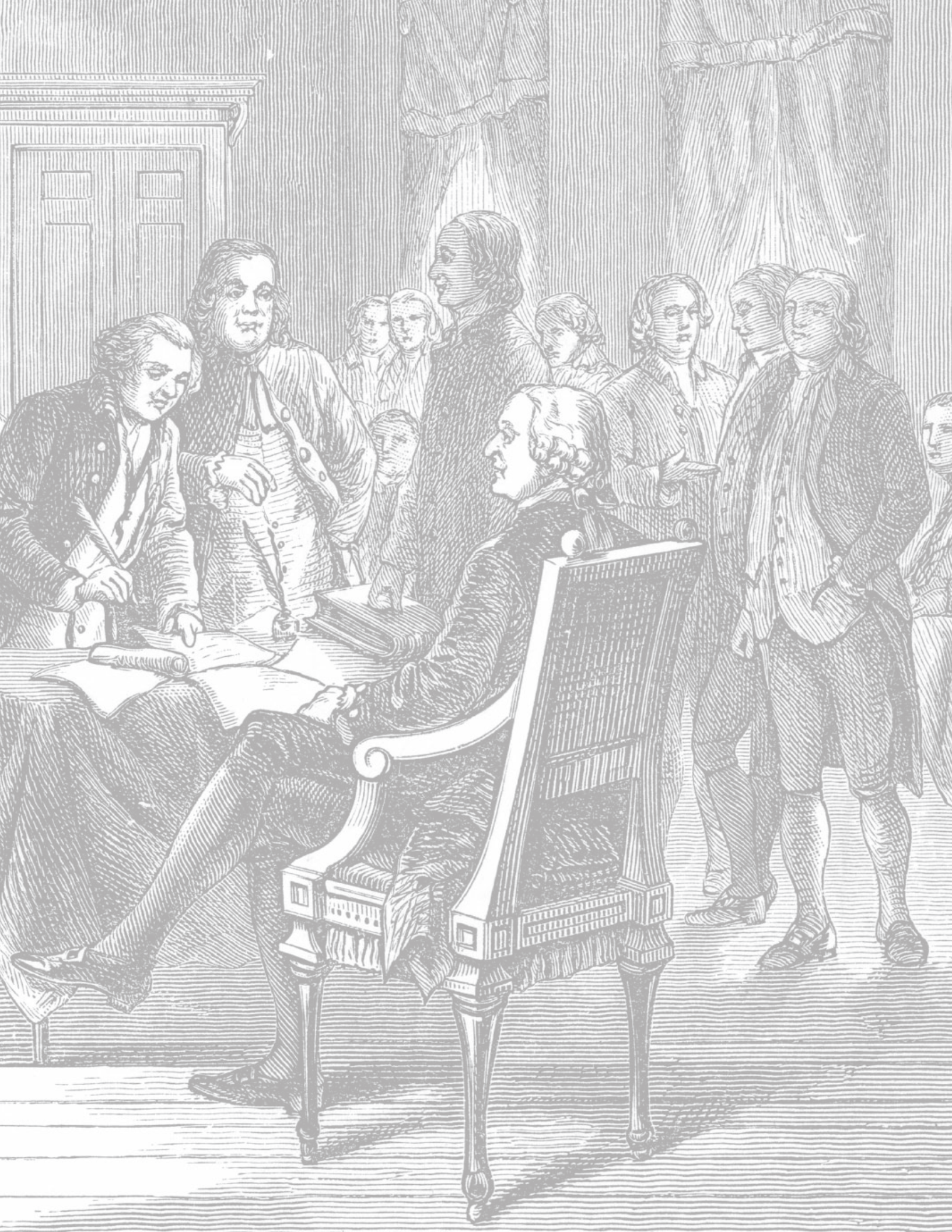
consistent with—its modern Tenth Amendment jurisprudence, the Court observed that when a “law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment.” *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 516 (1938). Second, both the Supreme Court and the federal courts of appeals have uniformly rejected Tenth Amendment claims where a party simply contends that an otherwise valid exercise of Congress’ enumerated powers infringes on an area of “traditional state concern”—an argument frequently invoked by opponents of federal legal reform. *See, e.g., Reno*, 528 U.S. at 149-50; *Richardson v. Comm’r*, 509 F.3d 736, 743 (6th Cir. 2007); *Freier*, 303 F.3d at 195; *Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir. 2000); *Sw. Bell Wireless Inc. v. Johnson Cnty. Bd. of Cnty. Comm’rs*, 199 F.3d 1185, 1993 (10th Cir. 1999).

In sum, while opponents often invoke federalism or Tenth Amendment “principles,” an examination of the relevant caselaw provides little support for the notion that if Congress acts pursuant to its enumerated powers, there is a distinct Tenth Amendment concern with displacing state procedural rules or state tort law. Moreover, to the extent Congress perceives state tort law or procedural rules to provide an obstacle to interstate commerce, the removal of such obstacles is a core—if not the core—exercise of the Commerce power. And when the Court confronted an effort to use the Commerce power to displace state procedural rules in state court for state law claims in *Pierce County*, the Court unanimously found the legislation to be valid. Thus, while the political branches are free to debate the policy merits of federal legal reform, the so-called constitutional objections have no grounding in the Court’s Commerce Clause or Tenth Amendment jurisprudence.



*“Thus, while the political branches are free to debate the policy merits of federal legal reform, the so-called constitutional objections have no grounding in the Court’s Commerce Clause or Tenth Amendment jurisprudence.”*











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