

## The 2019 Wisconsin Discussion Group on Constitutionalism

Presents a round-table workshop and discussion on:

### *Enumerationism and its Discontents*

Enumerationism, the doctrine that the Constitution limits federal powers to those enumerated, is taken to be an axiom of American constitutionalism. In civics-lesson style, Chief Justice John Roberts explained in *NFIB v. Sebelius* (2012), the Affordable Care Act case, that “rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.... The Constitution’s express conferral of some powers makes clear that it does not grant others.”<sup>1</sup> A decade earlier, Chief Justice William Rehnquist contended in *United States v. Morrison* (2000) that “the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.”<sup>2</sup>

But is enumerationism the best reading of the Constitution’s delegation of powers to the federal government? Does it accurately capture how the Constitution has been interpreted over the course of U.S. history? Or is the Constitution viably interpreted to empower the federal government to address all national problems, whether or not they fit into enumerated-powers pigeonholes? To what extent have questions of constitutional politics, particularly those involving slavery and race, or economic laissez faire, driven an ideology of limited enumerated powers?

An emerging body of scholarship has questioned the assumptions of enumerationism as a matter of constitutional text, structure, history, and original intent. Recent research into founding era history suggests that the enumerationist position was contested; other recent scholarship has contended that constitutional limits may be general or contingent, rather than categorical; and still other scholars have pointed to a robust constitutional tradition of honoring limited enumerated powers more in the breach than the observance.<sup>3</sup>

Please join us for a vigorous round-table discussion of these issues. Participants will include scholars in law, history, and political science, bringing a broad range of

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<sup>1</sup> *National Federation of Independent Business v. Sebelius*, 519, 534–35 (2012).

<sup>2</sup> *United States v. Morrison*, 529 U.S. 598, 618 n. 8 (2000).

<sup>3</sup> Robert Reinstein, “The Implied Powers of the United States” (forthcoming 2019); Richard Primus, “The Essential Characteristic”: *Enumerated Powers and the Bank of the United States*, 117 Mich. L. Rev. 415 (2018); John Mikhail, *Fixing the Constitution’s Implied Powers*, Balkinization Blog, Oct. 25, 2018, <https://balkin.blogspot.com/2018/10/fixing-constitutions-implied-powers.html>; Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

perspectives, including constitutional theory, legal history, racial justice, presidential power, comparative constitutionalism, and more.