

The Dubious Enumerated Power Doctrine

Calvin H. Johnson*

Abstract: The enumerated power doctrine maintains that Congress may only act for the activities specially mentioned in the text of the Constitution. Even the necessary and proper clause at the end of the enumeration of Congressional powers and the tax clause that precedes it were at one time said not to expand Congress's power beyond the enumeration.

The claim that the enumeration is exhaustive, however, has never reflected our actual practice. When activities necessary for the common interest arise, we generally find that they are authorized although not enumerated. Sometimes the unenumerated power is implied without any basis in text. In the ratification debate, the federal passport system was said to be allowed although not expressed. Jefferson found that the power to purchase Florida and Louisiana were not within the enumeration, but still implied. Thus the enumeration is said to be exhaustive, except when it is not.

We also have allowed powers for the exigencies of the Union to be covered by the enumeration by stretching the words to fit the desired power. Thus "necessary and proper" was expanded to cover a national bank, against the opposition of the Jeffersonians. The power to regulate commerce was a very modest power in the 1787 debates, but it has exploded in the twentieth century.

The Constitution in clause 1 of article I, section 8 gives Congress the power "to provide for the common Defence and general Welfare of the United States." The phrase is a synonym for the supposedly mandatory Convention resolution, allowing Congress to "legislate for the common interests of the Union." While clause 1 is a tax clause, the necessary and proper clause allows other instrumentalities to advance the common defense and general welfare wherever tax is allowed. The Founders would have no serious objection to federal regulation once federal taxation was allowed.

* Andrews & Kurth Professor of Law, University of Texas. The author wishes to thank Douglas Laycock, Sanford Levinson, Dennis Drapkin, Brenda Clayton, Dean Burnham, and David Robertson of the University of Missouri- St. Louis for helpful comments on prior drafts and Kristin Konschnik for talented research assistance.

A general power to provide for the common defense and general welfare is consistent both with the text of the Constitution and with our actual constitutional practices. The common defense and general welfare standard tells us how far to stretch the words of the enumeration and tells us when implied powers are appropriate. The enumerated powers are illustrative of the appropriate national sphere, but not exhaustive. We must reject the enumerated power doctrine and restore a general federal power to provide for the common Defence and general Welfare.

I. Introduction

The enumerated powers doctrine holds that the federal government has no unexpressed or general powers. Article I, section 8, of the Constitution defines the powers of Congress in eighteen clauses. Clauses 2 through 17 allow Congress, for example, to borrow money; to regulate commerce; to enact nationwide laws for bankruptcies, patents, copyrights, and naturalization; to establish post offices, post roads, federal courts, and a federal city: and to raise and support an army, navy, and militia.¹ Under the enumerated powers doctrine, the powers listed in these clauses are exhaustive. “The powers delegated by the proposed Constitution to the Federal Government, are few and defined,” Madison famously said in *Federalist No. 45*. “Those which are to remain in the State Governments are numerous and indefinite.”²

In the strictest Jeffersonian form of the argument, neither taxation nor the “necessary and proper” clause extend the range of the congressional powers beyond the list of sixteen in clauses 2 through 17. Clause 1 of Article I, section 8 allows Congress to lay and collect taxes “to provide for the common Defence and general Welfare” and clause 18 allows Congress to “enact all Laws necessary and proper” to other powers. When the Jeffersonians and the Hamiltonians

¹ U.S. CONST. art. I, § 8, cl. 2-17.

² FEDERALIST No. 45, at 315 (Madison)(Jan. 26, 1788).

split into adverse camps, however, the Jeffersonian branch insisted that both taxation and “necessary and proper” must be understood narrowly so as to keep the federal government within the boundaries of the enumeration. The tax clause was construed to mean only taxes necessary to accomplish the subsequently listed powers of clauses 2 through 17. The “necessary and proper” clause was construed to cover only those instrumental or administrative activities, too numerous and detailed to be included in a Constitution, that were strictly necessary for the accomplishment of the goals enumerated in clauses 2 through 17.³ “The tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare,” Jefferson wrote in 1811, “is almost the only landmark which now divides the federalists from the republicans.”⁴

The first difficulty is that we have never maintained the enumerated powers doctrine consistently. Whenever the polity has decided that an unenumerated federal activity falls appropriately within the national sphere, interpreters of the Constitution have concluded that the activity is allowed by the Constitution by implication. Sometime terms are stretched to allow the good national activity, and sometimes the activity is allowed without any connection to constitutional text.

From the start, the Framers found accepted some unenumerated federal powers. While the Framers often told the ratifiers that the enumeration was exhaustive, they also announced that the division between state and federal sphere would be set in the future by political competition.

³ See, e.g., James Madison, Speech in the Virginia Ratification Convention (June 16, 1788), in 3 ELLIOT’S DEBATES 438 (saying that the necessary and proper clause “gives no supplementary power, [but] only enables them to execute the delegated powers); *id.* (“It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it.”).

⁴ Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 12 JEFFERSON PAPERS 71.

They also said that the federal passport system was to be allowed, although it was not on the list. The Framers asserted both sides of the inconsistency, that is, that the enumeration was both exclusive and not exclusive.

Indeed, the text of the Constitution the Framers were advocating cannot fairly be read as adopting an exclusive enumeration. The Framers used the Articles of Confederation as a model, but in carrying over the Articles' wording and structure, they removed old Article II's limitation in that Congress would have only powers "expressly delegated" to it. When questioned about the removal, the Framers explained that the expressly delegated limitation had proved "destructive to the Union" and that even the passport system had been challenged.⁵ Proponents of the Constitution defended the deletion of "expressly" through the passage of the Tenth Amendment, at least to allow the federal passport. That history implies that Congress was to have all of the powers it had under the Articles of Confederation plus some new powers, but that not everything about federal power needed to be written down.

The pattern of finding unenumerated, but legitimate federal powers continued in the early republic. Thomas Jefferson was plausibly the most important advocate of limiting the federal government to the enumerated powers, but even Jefferson was willing to find implied powers, without any textual foundation, for things he wanted. Jefferson was unwilling to find the purchases of Louisiana and Florida territories to be within any enumerated power, even plausible

⁵ Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES 600-601. Randolph's statement has a special credibility because he served on the five-man Committee of Detail at the Philadelphia convention, *see* 2 FARRAND'S RECORDS 97, which was the committee that removed the "expressly delegated" language from the Constitution. Randolph's statement was also a kind of declaration against interest because it is not the kind of understatement of the Constitution's impact that the Federalists used to secure ratification.

ones. He also thought the purchases fell legitimately within the federal sphere. He therefore thought the purchases were implied by “sovereignty” or “necessity” without need for a justification from the text. In the area of providing for the common defense, we have continued Jefferson’s decision by finding unenumerated powers, without need for support in the constitutional text.⁶ The powers of Congress were all enumerated, according to Jefferson, except where a power that he wanted was not enumerated.

We have also found appropriately national but unenumerated powers through tolerantly expansive interpretations of the words. Justice John Marshall in 1813 in *McCulloch v. Maryland*⁷ declared the enumerated power limitation to be triumphant,⁸ but he simultaneously allowed the necessary and proper clause to justify a national bank. A national, central bank is a convenient instrument for supplying paper money, collecting taxes, and facilitating government borrowing, but it is not an enumerated power. The Jeffersonians, as the coalition that formed the Constitution was splitting apart, had concluded that the national bank was not sufficiently related to the enumeration to be necessary and insisted that the bank intruded upon the exclusively and protected state sphere.⁹

The twentieth century has found appropriately national activities to be legitimate by an explosive expansion of the third clause of section 8, the power to regulate commerce. In 1787,

⁶ See *infra* text accompanying notes 210-232.

⁷ *McCulloch v. Maryland*, 17 U.S. 316 (1819)

⁸ *Id.* at 405 (saying that the government is “acknowledged by all to be one of enumerated powers” and that “[t]he principle, that it can exercise only the powers granted to it, [is] now universally admitted”).

⁹ See, e.g., Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 JEFFERSON PAPERS 275. See also James Madison, Speech in the House of Representatives (Feb. 3, 1791) 1 ANNALS 1949, 1st Cong., 3d Sess. (denying that “necessary and proper” clause could cover the bank).

the power to “regulate commerce” was a modest even trivial power, covering mercantilist programs involving deep-water shipping. The programs covered by “regulation of commerce” turned out to be programs that the majority of the country did not want. Interstate commerce was not a significant part of the debate. The explosive expansion of the power to regulate commerce during the New Deal is best understood as allowed by the principle, respected since the founding, that Congress would have the power to undertake activities appropriate to the national sphere.

Once we accept overtly unenumerated powers and the broad interpretation of malleable terms of powers that the Constitution does state, we can not longer take seriously the residual enumerated powers doctrine. The doctrine serves mainly for use on an ad hoc basis against programs one does not like for political, nonconstitutional reasons or against one’s enemies because they are enemies. That does not seem to be an appropriate role for constitutional law. Whatever the enumerated powers doctrine does, in any event, it cannot to be taken literally as prohibiting *all* implied or unexpressed powers or *all* broad readings of malleable terms.

A better reading of the Constitution is that the enumerated powers of clauses 2 through 17 are illustrative of what Congress may do, within an appropriately national sphere, but are not exhaustive. Under this reading, the appropriate maxim of construction is not the hard-edged *expressio unius est exclusio alterius exclusio* (to express one thing excludes all others), but the gentler maxim of *ejusdem generis* (of the same class or kind). *Ejusdem generis* means that unstated items covered by a general standard must be of the same class as the enumerated items, but the enumerated items are not exclusive.¹⁰ The phrase, “to provide for the common Defence

¹⁰ See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188-200 (5th ed. 1992). While *ejusdem generis* cases are often ones in which the general standard follows enumerated items, it applies as well to

and general Welfare,” in the first clause of section 8 provides the general standard that both the enumerated and the unexpressed powers must have in common. There is no necessary agreement on what is appropriately “common” or “general” interest, but once it is decided that an activity advances the common defense or general welfare, Congress may undertake it. Under this reading, the Constitution expresses a principle that governs the federal sphere and not just a list of petty powers.

Clause 1 allows the federal government to provide “for the common Defence and general Welfare” by taxation. Once taxation is allowed for the common defense and general welfare, however, the broad clause 18 then allows Congress to enact “all Laws necessary and proper” to the “common Defence and general Welfare.”¹¹ As Marshall said in *McCulloch v. Maryland*, “Let the end be ... within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”¹² In 1830 Madison feared that the necessary and proper clause would transform the first tax clause “to provide for the common Defence and general Welfare,” into a justification for achieving the common defense and general welfare by

cases in which the general standards precede the enumerated items. *Id.* at 188. *Ejusdem generis* accomplishes “the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions ... to everything embraced in that class, though not specifically named by the particular words.” *National Bank of Commerce v. Estate of Ripley*, 161 Mo. 126, 131, 61 S.W. 587, 588 (1901) cited in SINGER, *supra* at 189.

¹¹ U.S. CONST. art. I, § 8, cl. 1 & 18.

¹² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.).

any instrument.¹³ Madison dreaded that interpretation, but he could see no viable stopping point beyond taxation once taxation was allowed for the common defense and general welfare. The interpretation that Madison dreaded is in fact faithful to the text, to our values and to our practices.

Finding a general power to provide for the common defense and general welfare, beyond taxation, is consistent with the Founders' values. The Convention's mandate was to devise such provisions to render the federal constitution federal government "adequate to the exigencies of Government and the preservation of the Union."¹⁴ The proponents of the Constitution did often describe the Constitution as allowing Congress only enumerated powers, but they also used more general descriptions that Congress had the powers beyond the bounds of any particular state, or and as having powers competent to every national object or national purposes. Madison and Hamilton both said that the division between the national and state sphere would be set by a political competition for the loyalty of the people.

The Founders, moreover, would not have drawn an important distinction between "taxation" and "regulation." Indeed, they often switched the words as if "taxation" and "regulation" were near synonyms. Regulation at the time of the founding was generally considered a lesser included power that the federal government of course could exercise as a matter of course, once it commanded the paramount power of federal taxation.

The standard, "to provide for the common Defence and general Welfare" does limit the federal government within the boundaries of those things appropriately within the national, the

¹³ James Madison, Supplement to the letter of November 27, 1830, to Andrew Stevenson, *On the Phrase "Common Defence and General Welfare,"* in 2 THE FOUNDERS CONSTITUTION 453, 458 and 9 MADISON WRITINGS 411, 427.

¹⁴ Resolution of Congress (Feb. 21, 1787) 32 JCC at 74.

“common” or the “general” sphere. The phrase entered the Constitution as a synonym for “necessities” or “exigencies of the Union.” The Convention resolution that was supposed to bind the committees that drafted the constitutional language allowed Congress “to legislate in all Cases for the *general* Interests of the Union.” The phrase, “for the *common* Defence and *general* Welfare of the United States” was brought over from the Articles of Confederation to empower the federal government continuous power to provide for the “necessities,” the “exigencies,” and “the general interests” of the union.

The “common Defence and general Welfare” standard preserves the most important aspect of the enumerated power doctrine, in that it confines the federal government to properly national goals. James Madison had proposed to allow Congress to protect rights and federal interests by vetoing state laws “in any case whatsoever,”¹⁵ but the Constitutional Convention had rejected his plan.¹⁶ Some governmental functions, all of the Framers considered to be solely for the states. Hamilton in *Federalist No. 17* presumed that “the ordinary administration of criminal and civil justice” would be run by the states.¹⁷ In *Federalist No. 33*, he said that it would be federal usurpation if Congress attempted “to vary the law of descent in any State” or “abrogate a

¹⁵ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 212; see also Letter from James Madison to George Washington (Apr. 16, 1787), in 9 MADISON PAPERS 382-85 (proposing a veto in “all cases whatsoever”); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 MADISON PAPERS 368-71; Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 MADISON PAPERS 317-22.

¹⁶ Voting outcome, July 17, 1787, in 2 FARRAND’S RECORDS 28 (defeating the negative 2 states to 7 states), August 23, 1787, in 2 FARRAND’S RECORDS 390-391 (defeating the negative 5 states to 6 against).

¹⁷ THE FEDERALIST NO. 17, at 107 (Dec. 5, 1787).

¹⁸ THE FEDERALIST NO. 33, at 206 (Jan. 2, 1788).

¹⁹ James Wilson, Address to a Meeting of the Citizens of Philadelphia, Oct. 6, 1787 in 3 FARRAND’S RECORDS 101.

land tax imposed by the authority of a State.”¹⁸ “[T]he business of the foederal constitution was not local, but general,” Wilson said before Independence Hall, so that for instance the Convention saw no need to specify when a jury trial would be required in noncriminal cases.¹⁹ Madison argued that “the great mass of suits in every State lie between Citizen & Citizen, and relate to matters not of federal cognizance.”²⁰ Anti-Federalist James Monroe wrote that “[t]he obvious line of separation is that of general and local interests.”²¹ Anti-Federalist Melancton Smith mocked the proposed Constitution as leaving to the states only the power “to make laws for regulating the height of your fences and the repairing of your roads,”²² but even in that he was expressing the consensus that the new federal government would function only in the sphere of the general. Limiting the federal government to the common sphere leaves state power whole

²⁰ Letter from James Madison to George Washington (Oct. 18, 1787), in 13 DOCUMENTARY HISTORY 408 (arguing that he could not see how George Mason thought that the federal judiciary would have dangerous tendencies given that the great mass of suits would be purely state issues.)

²¹ James Monroe, *Some Observations on the Constitution* (1788), reprinted in 5 STORING 290; accord *Fallacies of the Freeman Detected by a Farmer*, PHILADELPHIA FREEMAN’S J. (April 1788) (saying that “[t]he perfection of a federal republic consists in drawing the proper line between those objects of sovereignty which are of a general nature and which ought to be vested in the federal government, and those of a more local nature and ought to remain with the particular governments”) reprinted in 3 STORING 18.

²² Melancton Smith, Speech to the New York Ratification Convention, June 25, 1788, in 2 ELLIOT’S DEBATES 312

and preserved as to the rest. That is plausibly more important than the specifics of the sixteen enumerated powers.

Under the original intent, what qualifies for “common defense and general welfare” might not be a justiciable issue. Hamilton told the New York Convention that the division between the federal and state government was not a constitutional question: The division is “the proper business of the legislation: it would be absurd to fix it in the Constitution, he said, both because it would be too extensive and intricate, and because alteration of circumstances must render a change of the division indispensable.”²³ Both Madison and Hamilton argued that the division between the federal and state would be governed by a political competition of the federal and local levels for the loyalty of the people.²⁴ Modern commentators have made the same argument.²⁵ Combining “common Defence and general Welfare” with deference to the

²³ Alexander Hamilton, Speech to the New York Ratification Convention, June 28, 1788 in 2 ELLIOT’S DEBATES 364,

²⁴ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 205, 210-11 (arguing that there will be “a continual struggle between the head and the inferior members, until a final victory has been gained in some instances by one, in other by the other of them”); THE FEDERALIST NO. 37, at 237 (Madison) (Jan. 11, 1788) (arguing that neither the local nor the general government would entirely yield to the other, “and consequently that the struggle could be terminated only by compromise”); THE FEDERALIST NO. 46, at 317 (Madison) (Jan. 29, 1788) (arguing that the people in future will become more partial to the federal than to the State governments only if the federal level offers “manifest and irresistible proofs of a better administration”); THE FEDERALIST NO. 31, at 8 (Hamilton) (Jan. 1, 1788) (arguing that it would be “vague and fallible” conjecture as to where politics would set the line).

²⁵ Modern advocates of the view that limitations on the federal scope are to be found in the political competition between state and local governments for the loyalty of the voter, without the intervention of judicial review, include Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection*

people implies that there are only weak constraints on the reach of the federal government, except prohibitions protecting individual rights. If the people should decide that an activity is appropriately in the national sphere, then the Constitution, properly read, allows it.

Still, the decision to defer to a political decision is severable from the definition of the “common Defence and general Welfare” standard. If the polity decides that the limits of the federal government are to be strictly enforced by judicial review, then the common defense and general welfare standard allows that.²⁶ Proponents of the Constitution sometimes argued that “general welfare” standard would confine the federal government to activities of a properly federal nature. “Civis” told South Carolina: “You may observe, that their future power is confined to provide for the *common defence* and *general welfare* of the Untied States. If they apply money to any other purposes, they exceed their power.”²⁷ Noah Webster argued to

of the National Government, 54 COLUM. L. REV. 543 (1954); Jesse H. Choper, *Scope of the National Powers: The Dispensibility of Judicial Review*, 86 YALE L.J. 1552 (1997); Larry Kramer, *Putting the Politics Back into the Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

²⁶ See, e.g., George Nichols (Federalist), Speech to the Virginia Ratification Convention, (June 16, 1788), in 3 ELLIOT’S DEBATES 443 (saying that if Congress “exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void”); John Marshall, Speech to the Virginia Ratification Convention, (June 20, 1788), in 3 ELLIOT’S DEBATES 553 (saying that judges would guard the Constitution by voiding Congressional acts not within enumerated powers).

²⁷ Civis, *To the Citizens of South Carolina*, CHARLESTON COLUMBIAN HERALD (Feb. 4, 1788) (emphasis in the original), reprinted in 16 DOCUMENTARY HISTORY 22; accord, A NATIVE OF VIRGINIA: OBSERVATIONS UPON THE PROPOSED PLAN OF THE FEDERAL GOVERNMENT (Apr. 2, 1787), reprinted in 9 DOCUMENTARY HISTORY 655, 667 (observing that “all taxes and imposts &c are to be applied only for the common defence and general welfare”)

²⁸ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE CONVENTION 27, reprinted in

Pennsylvania that “the idea that Congress can levy taxes at pleasure, is false and the suggestion wholly unsupported: ... [I]n the very clause which gives the power of levying duties and taxes, the purpose to which the money has to be appropriated, are specified, viz. to pay the debts, and provide for the common defense and general welfare.”²⁸

Reading our Constitution as giving a general federal power over the common defense and general welfare fixes the self-contradiction of maintaining both that all powers must be enumerated and that some good powers need not be enumerated. Even a constitution cannot repair a logical contradiction such as “exhaustive but not-exhaustive.”

Reading the Constitution to find a general power to provide for the necessities of the national sphere also rationalizes our actual interpretative approach. We have stretched the necessary and proper clause and the commerce clause to allow the federal government to provide for common interests, by hook or by crook. Indeed, we will continue that tradition. We need, for example, to have the federal government when we face a nation-wide epidemic of Ebola or some even worse new disease. We need to rein in pollution on the national level, in those cases in which states or localities decide to pollute their neighbors for self-serving reasons. We should not need to find that either Ebola or pollution has an impact on interstate “commerce.” We may need to find power to draft for the Air Force or even a space force to provide for the common defense, without shoehorning a draft for a military force in air or space into enumerated powers to provided for a military force on *land* or a naval force on *water*. Reading a general power will replace an awkward stretch of words like *land force* or *commerce* into exercise of a federal

PAMPHLETS 25, 50.

²⁹ 2 FARRAND’S RECORDS 27.

power that is in fact perfectly constitutional. “*Common Defence and general Welfare*” explains the scope of the federal government that we in fact believe in.

Reading a general power to provide for the common defense and general welfare, moreover, will also discipline some implied powers. When Jefferson wanted to legitimize the purchases of Louisiana and Florida, he espoused an implied power in the federal government from its sovereignty or implied by necessity that lacked any connection with the text of the Constitution. What power can not be implied under those standards? Finding a power without any textual connection is the stuff of coups d’etat. Yet a coup is unnecessary if in fact the acquisition of new territory fits within the scope of common defense or the general welfare. Why go to a nontextual basis, when legitimacy can be found in the constitutional text?

Reading the general federal power to provide for the common defense and general welfare, finally, has a considerable amount of support in the original text of the Constitution. Indeed, some might conclude that the general power to provide for the common defense and general welfare is the better reading of the paramount text.

II. The Uneasy Textual Case for the Enumerated Powers Doctrine.

The Framers generally described the proposed Constitution as one giving the federal government only a list of specifically defined powers. Yet that description fits neither the text of the Constitution nor what we know of its drafting history. The Framers had deleted the “expressly delegated” limitation, so as to allow the federal passport system, and they defended that deletion through to the end of the debates. The resolution of the Convention that the drafting committees were supposed to express was that Congress would have all of the powers it had under the Articles of Confederation plus the power “to legislate in all Cases for the general

Interests of the Union”²⁹ The language actually used, the Articles’ language “to provide for the common defense and general welfare,” is plausibly read as a synonymous phrase loyal to the governing resolution.

A. The Claim for Enumeration

When the Framers emerged from the secret convention that drafted the Constitution, they announced, almost uniformly, that the proposed document gave the federal government only a list of defined powers. In what is probably the most important speech of the ratification process, James Wilson addressed a crowd in front of Independence Hall, where the Constitution had been drafted. Wilson argued that the states had plenary powers, but the federal government did not. “The congressional authority is to be collected, not from tacit implication,” he said, “but from the positive grant expressed in the” proposed Constitution. The states, he argued, could have powers not mentioned in any document. For the federal government, however, “everything which is not given, is reserved.”³⁰

Delegates from other states repeated the argument. Roger Sherman and Oliver Ellsworth of Connecticut reported that the Constitution vested some additional powers in Congress, but that “[t]hose powers extend only to matters respecting the common interests of the union, and are *specially defined*, so that the particular states retain their sovereignty in all other matters.”³¹

Charles Pinckney told the South Carolina House that in the federal government, “no powers

³⁰ James Wilson, *Speech to Public Meeting in Philadelphia* (Oct. 6, 1787), in 13 DOCUMENTARY HISTORY 339; *see also* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 143-46 (1996) (describing the importance of Wilson’s speech within the entire ratification process).

³¹ Roger Sherman and Oliver Ellsworth, *To The Governor Of Connecticut* (Sept. 26, 1787), in 3 FARRAND’S RECORDS 99 (emphasis added).

could be executed, or but such as were *expressly delegated*.”³² In January 1788, Madison gave his famous version of the argument: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”³³ Federalist James Iredell told North Carolina, in a very Protestant mode, that every citizen could himself test the legitimacy of the new Congress against the written instrument:

If the Congress should claim any power not given them, it would be as bare a usurpation as making a king in America. If this Constitution be adopted, it must be presumed the instrument will be in the hands of every man in America, to see whether authority be usurped; and any person by inspecting it may see if the power claimed be enumerated. If it be not, he will know it to be a usurpation.³⁴

³² Charles Pinkney, Speech to the South Carolina House of Representatives, (Jan. 16, 1788) in 4 ELLIOT’S DEBATES 259 (emphasis added).

³³ THE FEDERALIST No. 45, at 315 (Madison)(Jan. 26, 1788). Madison repeated the argument, in the attempt to defeat the national bank in 1791. James Madison, Debate in the House of Representative, 1 ANNALS 1945, 1st Cong., 3d Sess. (1791) (saying the Constitution “is not a general grant, out of which, particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands”). See also James Madison, *Address to the People of Virginia* (Jan. 23, 1799), in 6 WRITINGS OF JAMES MADISON 333-36:

For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution of undefined powers. ... [T]he preamble would admit a reading which would erect the will of Congress into a power in all cases, and therefore limited in none, [but] the objects for which the Constitution was formed were attainable only by a particular enumeration and specification of power granted to the Federal Government; reserving all others to the People, or to the States.

³⁴ James Iredell, Speech before the North Carolina Ratification Convention (July 29, 1788), in 4 ELLIOT’S DEBATES 172.

Mixed in with the descriptions of the enumeration as exhaustive, are more general descriptions by proponents saying that the federal government would be able to address the national needs or that the sphere of the federal government would be fixed by political competition in the future. John Jay's *Address to the People of New York*, which was described as having an "astonishing influence in converting Antifederalists,"³⁵ promised the people of New York that "the Convention concurred in opinion with the people that a national government *competent to every national object*, was indispensably necessary."³⁶ James Wilson described the Constitution to Pennsylvania Ratification Convention as giving Congress the objects of government that extend "beyond the bounds of a particular state."³⁷ Oliver Ellsworth told the Connecticut convention that the Constitution was based on the "the necessity of combining our whole force, and, as to *national* purposes, becoming one state."³⁸ Abraham Baldwin of Georgia described the Convention as unanimous in believing that a federal government "should comprehend all Things of common foederal Concern."³⁹ As noted, moreover, both Madison and

³⁵ Letter from Samuel Webb to Joseph Barrell (April 27, 1788) *quoted in Editorial Note*, 17 DOCUMENTARY HISTORY 101, 103; *see also* sources cited in Editorial Note, *id.* at 101, 107. Editor John Kaminski also calls the John Jay address far more important than *The Federalist* in getting New York to ratify. John Kaminski, *New York: The Reluctant Pillar*, in THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 72 (Stephen L. Schechter ed., 1985).

³⁶ A Citizen of New York (John Jay), *Address to the People of the State of New York* (April 15, 1787), in 17 DOCUMENTARY HISTORY 101, 111 (emphasis in original).

³⁷ James Wilson, Speech to the Pennsylvania Ratification Convention (Nov. 26, 1787), in 2 ELLIOT'S DEBATES 424.

³⁸ Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 4, 1787) in 2 ELLIOT'S DEBATES 186 (emphasis added).

³⁹ Ezra Stiles, *Diary* (Dec. 21, 1787), in 3 FARRAND'S RECORDS 168-169.

⁴⁰ See *supra* notes 24 & 24.

Hamilton argued that the division between the federal and state was a legislative or political question that would be set in the future by competition between the federal and local governments for the loyalty of the people.⁴⁰ The descriptions of the Constitution as giving general national powers or leaving the limitations to future politics existed side by side with the descriptions that the enumerated powers were exhaustive.

One difficulty with the enumeration argument is that is the text of the proposed Constitution neither said nor was intended to say that the listed powers were exclusive. The Framers had deleted the “expressly delegated” limitation in their model in order to allow at least one unexpressed power, the passport, and had not replaced the limitation. Given the removal of the phrase “expressly delegated,” Pinckney should not have claimed that there were no powers except that were “expressly delegated.” Indeed, if the text does not provide that the listed powers are exclusive, Iredell should not have said that every man could read the instrument and see a usurpation. The Protestant mode in which Iredell spoke does say that the text trumps interpretation by a pope or priesthood,⁴¹ but the claim that the enumeration is exhaustive critically depends on the authority of a priesthood – the Federalist proponents of the Constitution. But skepticism about the Federalist claims for the list’s exclusivity rests critically on skepticism of what the text was drafted to say, which is the next subject I will address.

B. The Deletion of the “Expressly Delegated” Limitation.

1. Drafting the Constitution

⁴¹ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889-92 (1985)

We know a fair amount about the drafting of the Constitution, both from its inputs and end product and from the notes, best of all Madison's Notes, kept on the debates at the Convention. The Convention proceedings were kept secret to encourage uncensored debate and the records of the debates were not published until long after ratification.⁴² Once he became a Jeffersonian, Madison claimed that interpretation should resolve textual ambiguities by looking solely to the ratification conventions which empowered the Constitution and not to the secret Convention, which merely proposed a draft.⁴³ But Madison did not hesitate to cite the

⁴² The Rules of the Federal Convention provided that "nothing spoken [within the convention] be printed, or otherwise published, or communicated without leave. Rules of the Federal Convention, May 29, 1787, 1 FARRAND'S RECORDS 17 (Madison notes). The sparse *Journal* was published in 1819 and Madison's Notes were not published until 1840. 1 FARRAND'S RECORDS at xi-xii, xv.

⁴³ James Madison, Speech in the House of Representatives (Apr. 6, 1796), in 3 FARRAND'S RECORDS 374 (saying that if we were to look "for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed the Constitution, but in the State Conventions which accepted and ratified it); see also Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 FARRAND'S RECORDS 447-48:

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, and as a source perhaps of some lights on the Science of Government the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recorded all the authority which it possesses.

Convention debates for his own purposes, even when the conclusion he drew from the secret debates was highly contestable.⁴⁴

My own posture is that every scrap of historical evidence available to us should be used to shed light and resolve ambiguities. The best defense against counterfeited or manipulated evidence is more evidence. To distinguish between prevailing and defeated minority views, we should carefully marshal all the evidence. I also think that we learn more about a Porsche or a constitution by asking the engineers who designed it than we will learn by asking the owner who bought the Porsche or the people whose votes ratified the Constitution. Both the owner and the people are sovereign, and they can reject the whole. It is just that neither “sovereign” knows very much about the internal mechanism of a Porsche or the internal logic of a constitution.

The surviving evidence does establish that the Framers removed “expressly delegated” language that would have made the enumeration exhaustive. The best reading of the evidence is that the enumerated powers doctrine was defeated within the walls of the Convention and that language of the Constitution that offered for ratification was written to give the Congress a

⁴⁴ Compare James Madison, Speech in the House of Representatives (Feb. 2, 1791), in 1 ANNALS 1896, 1st Cong., 2d Sess. (using the Convention’s rejection of a express power to grant charters of incorporation to deny congressional power to charter the national bank) with Letter of James Madison to Professor Davis (1832), 3 FARRAND’S RECORDS 520 (concluding that protective tariffs were allowed even if a specific authorization was defeated in the Convention because the failure to adopt the power might have occurred because the motion was in a bad form or not in order;; because it blended other powers with the particular power in question; or because the object had been, or would be, elsewhere provided for); cf. Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb 23, 1791), 3 FARRAND’S RECORDS 364 (arguing that no inference could be drawn from failure to enumerate because some thought it unnecessary to specify the power, and inexpedient to give another target for objecting to the Constitution).

general power “to legislate in all cases for the general interests of the Union,” that is, to “provide for the common Defence and general Welfare.”

The Framers adopted the structure and much of the language of the Constitution’s description of the powers of Congress from the preexisting fundamental charter, that is, the Articles of Confederation. Article IX of the Articles gave Congress a list of powers, including the power to raise and support an army and navy, to establish post offices, to fix weights and measures, to coin money, and to regulate trade with the Indians.⁴⁵ Separately, Article VIII allowed Congress to defray expenses “incurred for the common defense or general welfare” from the common treasury.⁴⁶ Article II provided that each state “retains every Power, Jurisdiction and right, which is not by this confederation *expressly delegated* to the ... Congress.”⁴⁷ The Constitution carried over all of the enumerated powers of old Article VIII and adds to the enumeration. It carried over the power to provide for the common defense and general welfare. The Constitution did not, however, carry over the “expressly delegated” limitation of old Article II.

The actual language of the Constitution was drafted by a series of committees, which were instructed to draft language “conformable to the Resolutions passed by the Convention.”⁴⁸ The drafting committees were not to effect policy, according to Washington, but to “arrange, and

⁴⁵ Articles of Confederation, article IX, 19 JCC 219 (March 1, 1781).

⁴⁶ *Id.* at 217.

⁴⁷ *Id.* at 214 (emphasis added).

⁴⁸ July 24, 1787, in 2 FARRAND’S RECORDS 106.

⁴⁹ George Washington, *Diary* (July 27, 1787), in 3 FARRAND’S RECORDS 65

⁵⁰ Letter from Hugh Williamson to James Iredell (July 22, 1787), in 3 FARRAND’S RECORDS 61.

draw into method & form the several matters which had been agreed to by the Convention.”⁴⁹

The role of the drafting committees, alternatively stated, was to ensure that the Constitution was “properly dressed.”⁵⁰ The first drafting committee was called the “Committee of *Detail*” denominating that its authorization was confined to details.

The binding resolution on the scope of the federal government was a version of the Virginia Plan, as augmented by a motion offered by Gunning Bedford of Delaware. Bedford’s resolution gave Congress all the powers it had under the Articles of Confederation and authorized Congress further “to legislate in all cases for the general interests of the Union.”⁵¹ The full scope of the federal power under the governing resolution of the Convention, as augmented by the Bedford’s motion, was that “the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases 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 Resolution.”⁵²

Some participants in the debate at the Convention favored an exhaustive listing or enumeration of the powers of Congress, but they seem to have lost in the votes on the Bedford resolution. John Rutledge of South Carolina called for an enumeration of powers early in the Convention⁵³ and South Carolina voted against both the Bedford resolution and the whole Virginia Plan once the Bedford Resolution was added. Roger Sherman had spoken in favor of an

⁵¹ Gunning Bedford, *Motion of July 17, 1787*, 2 FARRAND’S RECORDS 26.

⁵² Resolutions Presented to the Committee of Detail, *in* 2 FARRAND’S RECORDS 131-32.

⁵³ May 31, 1787, 1 FARRAND’S RECORDS 53.

enumeration⁵⁴ and Connecticut voted against the Bedford resolution, but then voted for the whole Virginia plan once the Bedford resolution was added. Late in the Convention when the language was in place, Edmund Randolph and George Mason of Virginia objected that the Constitution gave the national government general powers of indefinite extent.⁵⁵ The Virginia delegation also voted by majority against the addition of the Bedford resolution, but then voted for the full language of the Virginia Plan resolution as amended by the Bedford resolution. Overall, the Bedford amendment passed by six states to four⁵⁶ and the full Virginia plan language as amended by the Bedford resolution then passed by eight to two, with only South Carolina and Georgia now dissenting.⁵⁷ As far as we can tell from the surviving evidence, the exhaustive enumeration argument remained a minority position behind the closed doors of the Convention.

The first of the drafting committees, the Committee of *Detail*, adopted the structure of the Articles of Confederation as a model. Committee of Detail brought all of the powers enumerated in old Article IX into article I, section 8 of the Constitution, and added some more powers, but it omitted old Article II limitation, confining Congress to powers expressly delegated to it. None of the surviving early drafts offered to the Committee of Detail by Edmund Randolph and James Wilson contained the expressly delegated limitation.⁵⁸

The phrase “to provide for the common Defence and general Welfare” in the Constitution’s description of the powers of Congress comes from Article VIII of the Articles of

⁵⁴ July 17, 1787 2 FARRAND’S RECORDS 26.

⁵⁵ See discussion *infra* note 71-76.

⁵⁶ *Id.* at 27. Connecticut, Virginia, South Carolina, and Georgia were the dissenting states.

⁵⁷ *Id.*

⁵⁸ 2 FARRAND’S RECORDS 129-175.

Confederation, which allowed Congress to charge expenses for the common defense and general welfare to the common treasury. The phrase was added to Constitution on September 4, very late in the Convention, by a committee of Eleven, chaired by David Brearly of New Jersey, *after* the enumerated powers structure of what became clause 2-18 were already in place.⁵⁹ The phrase replaced the term, “necessities of the Union,” in Randolph’s earlier draft present to the Committee of Detail. Randolph’s draft had provided that the Congress would have, first, the power to “raise money by taxation, unlimited as to sum, for the past or future debts and *necessities of the union.*”⁶⁰ The resolutions authorizing the Convention, moreover, had told the Convention to devise such provisions “as shall appear to them necessary to render the constitution of the Federal Government adequate to the *exigencies of the Union*”⁶¹ and the enabling congressional resolution described the Convention’s mission that of makin proposals to render the federal Constitution “adequate to the *exigencies of Government* and the *preservation of the Union.*”⁶² In context, moreover, “to provide for the common Defence and general Welfare” is a plausible synonym for the Bedford resolution, which the drafting committees were supposed to follow, that Congress would have the power “to legislate in all cases for the *general interests of the Union.*” The final phrase, “for the common Defence and general Welfare of the United States,” is a plausible synonym for “necessities,” exigencies” or “general interests” of the Union.

⁵⁹ *Id.* at 497.

⁶⁰ 2 FARRAND’S RECORDS 142 (emphasis added).

⁶¹ Report of the Commissioners assembled at Annapolis Convention, 31 JCC 680 (Sept. 20, 1786) (emphasis added)

⁶² 32 JCC 74 (Feb. 21, 1787) (emphasis added).

The “common Defence and general Welfare” language had appeared earlier than the Bready Committee report of September 4 within a motion that the Convention had defeated. On August 25, 1787 Roger Sherman of Connecticut proposed to add to the tax clause in what became Article I, section 8, clause 1, the language “for the payment of said debts and for the defraying of the expences that shall be incurred for the common defence and general welfare.”⁶³ The Convention had just adopted a Randolph motion that debts would be “as valid against the United States under the Constitution, as under the Confederation,”⁶⁴ which survived to become Article VI, clause 1 of the Constitution. Sherman’s motion was overwhelmingly defeated, 1 state for, and 10 states against, apparently because it was “unnecessary” apparently because of the first half, tying tax to paying the existing Confederation debts, had just been established by the Randolph motion. Madison in 1830 said that the Bready insertion would never have happened, except for the connection with old debts.⁶⁵ But the Sherman motion had two halves, one for tax to pay past debts and one for tax to pay for future expenses for the common defense and general welfare. The second independent half of the motion says that taxes are to provide for the common defense and general welfare in the future. In any event, something must have been attractive about the Sherman language, notwithstanding the overwhelming defeat of his motion, because Sherman’s motion, with the unnecessary first half dropped, is the Bready Committee’s addition on September 4.

Using language from the Articles instead of a synonymous phrase, such as “necessities,” “exigencies” or “general interests” of the Union, was apparently a way of maintaining continuity

⁶³ 1 FARRAND’S RECORDS 414 (emphasis added).

⁶⁴ *Id.*

⁶⁵ *See* Letter from James Madison to Andrew Stevenson (Nov. 17, 1830) in 3 FARRAND’S RECORDS 485-86 and 2 THE FOUNDERS’ CONSTITUTION 454.

with the existing constitution, the Articles of Confederation. There was a consensus at the Convention that Congress would have all of the powers it had under the Articles of Confederation and acquire some new ones. As James Wilson told the Convention, “It has never been a complaint agst. Congs. that they governed overmuch. The complaint has been that they have governed too little.”⁶⁶ “The evils suffered and feared from weakness in Government,” Madison told Jefferson, “have turned the attention more toward the means of strengthening the [government] than of narrowing [it].”⁶⁷ The Constitution gave the federal government the power to tax for the first time, without recourse to requisitions from the states. As Madison said in *Federalist No. 45*, “[t]he change relating to taxation, may be regarded as the most important” of the Constitution, but “the present Congress [has] as compleat authority to require of the States *indefinite* supplies of money *for the common defence and general welfare*.”⁶⁸ The phrase, “common Defence and general Welfare,” Madison later said, was copied from the “the terms of the old Confederation”⁶⁹ and the “similarity in the use of these phrases in the two great federal charters, might well be considered, as rendering their meaning less liable to be misconstrued.”⁷⁰

⁶⁶ James Wilson, Speech at the Federal Convention, July 14, 1787, in 2 FARRAND’S RECORDS 10.

⁶⁷ Letter of James Madison to Thomas Jefferson (Feb. 4, 1790) in 16 JEFFERSON PAPERS 146, 150; see also Roger Sherman & Oliver Ellsworth to Governor Samuel Huntington, *The Report of Connecticut’s Delegates to the Constitutional Convention* (Sept. 26, 1787), in 13 DOCUMENTARY HISTORY 471 (saying that the states’ principal object in authorizing the convention was to vest some *additional* powers in Congress) (emphasis added).

⁶⁸ THE FEDERALIST NO. 45, at 314 (Madison)(Jan. 26, 1788) (emphasis altered).

⁶⁹ Letter from James Madison to Joseph C. Cabell (Oct. 30, 1828), in 9 WRITINGS OF MADISON 324, 325.

⁷⁰ James Madison, *Report of 1800 on the Virginia Resolutions* (Jan. 7, 1800), in 17 MADISON PAPERS 303, 313. Accord Roger Sherman & Oliver Ellsworth to Governor Samuel Huntington, *The Report of Connecticut’s Delegates to the Constitutional Convention* (Sept. 26, 1787), in 13 DOCUMENTARY HISTORY 470, 471 (“[T]he objects for

When the description of the federal powers was complete, George Mason and Edmund Randolph of Virginia both argued that the Constitution had gone too far in giving the federal government a general power. In August 1787, George Mason wanted alterations so that “the object of the National Government, [would] be expressly defined, instead of indefinite power, under an arbitrary Constitution of general clauses.”⁷¹ Mason’s objections tell us that he thought that the Committee of Detail had not avoided “general clauses” in favor of an enumeration.⁷² After the Brearly Committee added the phrase “to provide for the common Defence and general Welfare” to clause 1, Governor Edmund Randolph refused to sign the Constitution because of “the latitude of the general powers,”⁷³ and because the “cover of general words” allowed the Congress to swallow up the states.⁷⁴ Randolph ultimately supported the Constitution. When it came down to this or nothing, Randolph was very much in favor of this Constitution to preserve

which Congress may apply monies are the same mentioned in the eighth article of the confederation, viz for the common defence and general welfare.”)

⁷¹ George Mason, *Alterations Proposal* (Aug. 31, 1787) in SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION 25 (James H. Hutson ed., 1987).

⁷² The Committee of Detail also drafted what came to be called the “much dreaded sweeping clause,” that is, the “necessary and proper” clause. See, e.g., Edmund Randolph, Speech in the Virginia Ratification Convention (June 10, 1788), in 3 ELLIOT’S DEBATES 206.

⁷³ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) in 10 MADISON PAPERS 205, 215 (describing Randolph as opposing the Constitution because of “the latitude of the general powers”).

⁷⁴ Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787) in 8 DOCUMENTARY HISTORY 260, 273.

the Union⁷⁵ and he defended the proposed document as ably as anyone else in the Virginia ratification convention.⁷⁶ Still, until he changed his mind on the overall issue of union versus disunion, he opposed the Constitution, he said, because he believed it gave a general power. Mason and Randolph, at least, thought the text of the Constitution provided a general federal power rather than an exclusive enumeration.

A contemporary commentator has argued that the Committee of Detail shifted the Constitution toward less federal power, and away from the supposedly binding resolutions.⁷⁷ A better reading of the evidence, however, is that the final language carried out the mandate of the Bedford resolution, at least once the Brearly Committee had brought “to provide for the common Defence and general Welfare” over from the Articles. With the addition, the Constitutional text does seem to allow the federal government to “legislate in all cases for the general interests of the Union” as the Bedford resolution had allowed.

A consensus in principle that the federal government should have powers appropriate to the exigencies of the Union does not, however, imply that a consensus as to what fell appropriately within that national sphere. When the Convention debated restrictions on slavery on August 22, 1787, for example, Abraham Baldwin of Georgia protested he had conceived that “only national objects were before the Convention” and that slavery was of a local nature:

⁷⁵ See, e.g., Edmund Randolph, Speeches to the Virginia Ratification Convention (June 6, 9, 10, 1788), in 3 ELLIOT’S DEBATES 65-71, 188-94, 194-207 (urging the preservation of the union).

⁷⁶ See also, e.g. Edmund Randolph, Speeches to the Virginia Ratification Convention (June 24, 1788), in 3 ELLIOT’S DEBATES 600-601 (defending the deletion of the “expressly delegated” limitation so as, for instance, to protect the passport); (June 10, 1788), in 3 ELLIOT’S DEBATES 206 (defending the necessary and proper clause).

⁷⁷ See John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in the Balance of State and Federal Powers*, 100 YALE L. J. 765 (1990).

“Georgia was decided on this point.”⁷⁸ Baldwin assumes the principle that national objects were under consideration. The specific question of whether slavery was a local or a national issue, as it turned out, was settled only by civil war.

Finally, on the third to last day of the three-and-half month assembly, the Convention discussed whether to add more powers to the enumeration and voted not to. It is difficult to see which way the discussion cuts, however, because the discussion is consistent with an exhaustive enumeration or with a view that added enumerations were unnecessary because powers were implied. On September 14, 1787, Benjamin Franklin proposed to add a power to cut canals to clause 7, which allows Congress to build post roads and post offices.⁷⁹ Roger Sherman of Connecticut objected that “[t]he expence in such cases will fall on the U-- States, and the benefit accrue to the places where the canals may be cut.”⁸⁰ Sherman’s objection implies that he thought that canals were not within the national sphere even under a general welfare standard. Madison then wanted an enlargement of the motion so it would give Congress a power to grant charters of incorporation. Rufus King of Massachusetts thought a federal power to incorporate would raise prejudiced and partisan objections: “In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.”⁸¹ The Convention defeated the canals proposal by

⁷⁸ Abraham Baldwin, Speech to the Federal Convention (Aug, 22, 1788) in 2 FARRAND’S RECORDS 372.

⁷⁹ (Sept. 14, 1787) 2 FARRAND’S RECORDS 615.

⁸⁰ *Id.*

⁸¹ *Id.* Indeed the Philadelphia-based Bank of North America was a controversial issue dividing Pennsylvania. See, e.g., Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 66-67 (1999) (3rd Ser.).

three states to eight. It never considered the apparently more controversial questions of enumerating the incorporation of banks and mercantile monopolies.⁸²

It is probable that the federal government already had the power to incorporate banks and mercantile monopolies and to pay for canals even without the proposed changes. It was a consensus that Congress would have all of the powers it had had under the Articles, plus some new ones. During the Confederation, Congress had authorized the incorporation of a bank, the National Bank of North America, driven by the dire necessity of paying the Continental Army.⁸³ If a bank could be implied under the Articles, which had an expressly delegated limit, it could be implied under the Constitution, which had none. George Mason claimed on September 14 that Congress did not have the power to grant mercantile monopolies, but on the next day, September 15, he objected that Congress did have the power and tried to get an amendment to restrict it.⁸⁴ Thus his final interpretation beyond his tactical claim was that the Constitution did include the power to grant mercantile monopolies.

⁸² *Id.*

⁸³ December 31, 1781, in 21 JCC 1186-90. Madison acquiesced, apparently because of the desperate needs of the war overcame any doubts about congressional power. Editorial note, in 4 MADISON PAPERS 21. Janet Reisman, *Money, Credit and Federalist Political Economy*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128, 138-149 (Richard Beeman et. al. eds. 1987) has a fine description of Robert Morris's plans and the far more modest results that the Bank of North America was able to achieve.

⁸⁴ 2 FARRAND'S RECORDS 631 (objecting to Congress's power by bare majority to give a monopoly to American ships for the transportation of American commodities on the ground that it would allow "a few rich merchants in Philada N. York & Boston, to monopolize the Staples of the Southern States & reduce their value perhaps 50 Per Ct").

The Continental Congress had also undertaken at least the precursors to public works projects such as the canals in paying for maps and surveys.⁸⁵ It would have probably paid for more if it had the money.⁸⁶ The language of the Constitution that was about to be released for ratification allowed taxation for the general welfare, just as the Articles had allowed projects for the general welfare. The exiting language thus allowed canals, *if* canals were sufficiently “general” in impact (notwithstanding Sherman’s objection that the benefits would be too local).

If Congress did already have the proposed powers, then the September 14 debate about adding them to the list merely involved appearances, with the proponents seeking to promote the proposals and the opposition deciding not to publicize unnecessarily potentially controversial activities. Alexander Hamilton argued later that some thought it “unnecessary to specify the power, and inexpedient to furnish an additional topic of objection to the Constitution.”⁸⁷ If banks, corporations, and canals were authorized even without the enumeration, the September 14 debate is consistent with the expectation that Congress had a general power to provide for common interests. Listing these powers was not especially important because the enumeration was not exclusive. The defeat of the proposals thus deprived Congress of nothing.

⁸⁵ July 25, 1777, *in* 8 JCC 580; July 11, 1781, *in* 20 JCC 738 (appointing a “Geographer of the United States” to survey the roads and to take sketches of the country and the seat of war); May 20, 1785, *in* 28 JCC 375 (ordering that the land north of the Ohio River be surveyed, mapped, and broken down into plots).

⁸⁶ October 23, 1783, *in* 25 JCC 711 (reporting that a map of the middle states would be much desired, but that “such a work cannot in prudence be undertaken at the public expence in the present reduced state of our finances”). *Accord*, Letter of Rufus King to George Washington, (June 18, 1786) *in* 23 LETTERS OF DELEGATES 364 (saying that the Treasury Board has declared its “utter inability to make [a] pitiful Advance’ of \$1,000 to transport ammunition to American posts along the Ohio River).

⁸⁷ Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb 23, 1791) *in* 3 FARRAND’S RECORDS 364.

On the other hand, the September 14 debate might be read as showing that the debaters took the enumeration seriously because it mattered. Even if the proposals were justified under an existing enumerated power, then enumeration could still matter. James Wilson argued that the power to establish mercantile monopolies was already included in “the power to regulate trade.”⁸⁸ On the same day, Madison and Pinckney proposed a federal power “to establish an University.” Gouverneur Morris of Pennsylvania said that he did not think that listing was necessary since the federal government would have the power to establish a university already under its power to establish a capital city.⁸⁹ The motion to enumerate the power to establish a university was defeated 4 states to 6, with one divided.⁹⁰ If the motions for additions to the enumeration were defeated because another enumeration already allowed them, then the defeats, even if of powers Congress already had, would be consistent with the exclusivity of the enumeration. Of course, just because Wilson and Morris used other enumerated clauses to conclude that no new expression would be needed does not mean that either of them would have been unwilling to find an implied power in absence of an enumeration.

In the end, the proper interpretation of the September 14 proposed additions depends too much upon interpreter’s underlying premises. If the Congress had the powers without enumeration, then the September 14 vote defeating the additions can be understood as consistent with that premise. If Congress did not have the powers without the proposed additional language, which was rejected, then the September 14 discussion can be understood as consistent

⁸⁸ 2 FARRAND’S RECORDS 615 (Madison’s Notes).

⁸⁹ *Id.* at 616.

⁹⁰ *Id.*

with the premise that enumeration was necessary. Evidence consistent with either interpretation does not resolve a conflict between them.

A fair reading of the text and history of the document, in any event, permits an interpretation that the text of the adopted Constitution allows a general power to provide for the common defense and general welfare. At a minimum, we may take from the drafting history of the Constitution that Congress was to have all of the powers it had under the Articles of Confederation plus some new powers. *Whatever* the Articles meant by “common defense and general welfare,” so means the Constitution. But the “expressly delegated” limitation did not appear in the Constitution. Therefore in the Constitution, unlike in the Articles, not everything about federal power had to be written down.

2. The Enumerated power in the Ratification

When Thomas Jefferson first heard of James Wilson’s argument that the Constitution prevented unenumerated federal powers, he dismissed it as a gratuitous remark:

To say, as Mr. Wilson does that ... all is reserved in the case of the general government which is not given ... might do for the Audience to whom it was addressed, but is surely *gratis dictum*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which declared that in express terms.⁹¹

⁹¹ Letter from Thomas Jefferson to James Madison (Dec. 10, 1787), in 10 JEFFERSON PAPERS 439, 440. LATIN WORDS AND PHRASES FOR LAWYERS (B.S. Vasani ed., 1980) translates *gratis dictum* as a “voluntary statement or assertion to which a person may not be legally bound.”

Given Jefferson's later position as the major advocate of the enumerated powers doctrine, his first reaction is ironic. But his first reaction is fair to the text and drafting history.

The Anti-Federalists devastated Wilson's exhaustive enumeration argument when it first arose. "Let us compare Wilson's claim that all powers not granted are reserved," said a Republican in New York, "with the sense of the framers, as expressed in the instrument itself."⁹² In his first essay, Brutus noted especially the absence of the "expressly delegated" limitation and concluded from its absence that "[t]his is as much one complete government as that of New York or Massachusetts [and] has as absolute and perfect powers to make and execute all laws."⁹³ Brutus also labelled Wilson's argument that all which is not given is reserved as "rather specious than solid." "[T]he powers granted to the general government by this constitution," he said, "are complete."⁹⁴ Centinel in Philadelphia said that the Constitution did not limit Congress to powers expressly delegated by proper authority and instead made laws of Congress paramount to all State authorities.⁹⁵ "If this doctrine is true," said "A Democratic Federalist" in Pennsylvania, "it at least ought to have [been] clearly expressed in the plan of government."⁹⁶ Arthur Lee wrote in

⁹² A Republican I: To James Wilson, Esquire, *NEW YORK J.* (Oct. 25, 1787), reprinted in 13 *DOCUMENTARY HISTORY* 477, 478.

⁹³ Brutus I, *NEW YORK J.* (Oct. 18, 1787), reprinted in 13 *DOCUMENTARY HISTORY* 411.

⁹⁴ Brutus II, *NEW YORK J.* (Nov. 1, 1787), reprinted in 13 *DOCUMENTARY HISTORY* 524, 526.

⁹⁵ Centinel II, *PHILADELPHIA FREEMAN'S J.* (Oct. 24, 1787), reprinted in 13 *DOCUMENTARY HISTORY* 457, 460. See also Cincinnatus I, *To James Wilson, Esquire, NEW YORK J.* (Nov. 1, 1787) (arguing that the Articles said at the outset that what is not expressly given is reserved, but the Constitution makes no such reservation, such that the framers of the proposed constitution presumably did not mean to subject it to the same exception) reprinted in 13 *DOCUMENTARY HISTORY* 529, 530.

⁹⁶ A Democratic Federalist, *PENNSYLVANIA HERALD* (Oct. 17, 1787), reprinted in 13 *DOCUMENTARY HISTORY* 386, 387; accord, An Old Whig II, *PHILADELPHIA GAZETTEER* (Oct. 17, 1787) (arguing that the powers were not

Virginia that “Mr. Wilson’s sophism has no weight with me when he declares ... that in this Constitution we retain all we do not give up, because I cannot observe on what foundation he has rested this curious observation.”⁹⁷

The Anti-Federalists also deduced the falsity of Wilson’s doctrine of reserved powers from the specific limitations on Congress found in the section that follows the grant of powers. Section 9 of Article I prohibits Congress, for instance, from enacting ex post facto laws or bills of attainder, from giving titles of nobility, and from limiting the importation of slaves before 1808. The Anti-Federalist deduced that there was no need for the express prohibitions of section 9 unless Congress had an implied power to do these things without the prohibitions.⁹⁸ “Where is the power [to give of titles of nobility] expressly given to Congress by the new constitution?” asked A Republican, “[I]f is not, [and it is not], then the exceptions must be to guard against an incidental or implied power?”⁹⁹ “[P]ermit me, sir, to ask,” Cincinnatus asked Wilson

enumerated or reserved by the Constitution and Congress may judge what is necessary and proper in all cases whatsoever) *reprinted in* 13 DOCUMENTARY HISTORY 399, 402.

⁹⁷ Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), in 13 DOCUMENTARY HISTORY 505, 506.

⁹⁸ Letter from Thomas B. Wait to George Thatcher (Jan. 8, 1788), in 15 DOCUMENTARY HISTORY 284, 285 (pointing to prohibitions on suspension of Habeas Corpus, ex post facto laws, bills of attainder, titles of nobility, and payment from Treasury without appropriation as powers that must have been in the power of Congress by implication because they are specifically prohibited); Brutus II, NEW YORK J. (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 524, 528 (asking, “If everything which is not given is reserved, what propriety is there in these exceptions [no bill of attainder, title of nobility and etc]?”); Patrick Henry, Speech to the Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 461 (saying that Congress being able to suspend habeas corpus in circumstances where not prohibited, “destroys their doctrine” of no implied powers).

⁹⁹ See, e.g., A Republican I, *To James Wilson, Esquire*, NEW YORK J. (Oct. 25, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 477, 479. The Articles of Confederation, article VI, also barred Congress from giving

rhetorically, “why any saving clause was admitted into this constitution, when you tell us, every thing is reserved that is not expressly admitted?” Which do we believe, sir, you or the constitution? The text, or the comment? If the [text], ... then implied powers were given, otherwise the exception[s] would have been an absurdity.”¹⁰⁰

The specified limitations in section 9 also imply that there is no general limitation. Patrick Henry argued that the section 9 limits were “sole bounds intended by the American government.”¹⁰¹ Indeed, had the limitation of old Article II been intended, section 9 would have been the natural place to put it. The existence of specific limitations in section 9 is inconsistent with a general limitation required by the enumerated powers doctrine, under the same *expressio unius est exclusio alterius* maxim on which the enumerated powers doctrine must rely in the first place. As William Riker has argued, Wilson got what he deserved: sophistry in rejoinder to a sophistry.¹⁰²

The “expressly delegated” language of old Article II that failed to survive from the Articles was also apparently necessary to limit the federal level, given the background law. In a 1779 decision, the Supreme Court of Pennsylvania had reasoned that the United States was a plenary government by the mere act of the states coming together:

titles of nobility (19 JCC 216 (March 1, 1781)) without a predicate enumerating that titles of nobility would be allowed without the bar. Republican’s conclusion that that prohibition implied a general power seems an invalid syllogism in the Articles, given that Article II limited of Congress to powers expressly delegated. If the syllogism is invalid as to the Articles, its seems equally nonforcing as to the Constitution.

¹⁰⁰ Cincinnatus II, *To James Wilson, Esquire*, NEW YORK J. (Nov. 8, 1787) reprinted in 14 DOCUMENTARY HISTORY 11, 12.

¹⁰¹ Patrick Henry, Speech to the Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 461.

¹⁰² WILLIAM RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 88 (1996).

From the moment of their association, the United States necessarily became a body corporate: for there was no superior from whom that character would otherwise be derived. In England, the king, lords & commons are certainly a body corporate; and yet there was never any charter or statute by which they were expressly created.¹⁰³

For most of the duration of the Revolutionary War, Congress directed the conduct of the war, acting as a government, even though it lacked a written charter. In May, 1776, two months before the Declaration of Independence, Congress told the “respective assemblies and conventions of the United Colonies” to take power from the Crown authorities and “to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”¹⁰⁴ Before the Articles of Confederation were ratified, Congress acted as a governmental power to finance and fight a major war with only a vaguely defined mandate to serve the public good.¹⁰⁵ The Articles

¹⁰³ *Respublica v. Sweers*, 1 U.S. 41, 44 (Pa. 1779) (upholding an indictment for forgery and fraud on the United States); *see also* *Penhallow v. Doane's Adm'rs*, 3 U.S. 54 (1795) (holding that the Continental Congress had the authority, before the Articles of Confederation were ratified, to institute a tribunal for determining prizes at sea and to hear appeals). Ironically, the rule of *Respublica v. Sweers* that the United States government was plenary by mere association of the states appeared near the time of the debates, as far as I can tell, only in the work of James Wilson. JAMES WILSON, *CONSIDERATIONS ON THE BANK OF NORTH AMERICA* 12 (Philadelphia, 1785) (arguing that Congress’s authorization to charter a national bank in 1781 was an implied power that arose from the mere joining together of the states, the “same as that of several voices collected together, which by their union, produces harmony, that was not to be found separately in each”).

¹⁰⁴ Resolution of the Continental Congress, 4 JCC 341.

¹⁰⁵ *See* JACK RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS* 288 (1979)(arguing that the adoption of the Articles threatened to impose rather than remove obstacles to federal power “by substituting a written charter for the less precise mandate of the public good” that Congress had had before them”).

of Confederation, the first constitutional document for the United States, were not ratified until March 1, 1781, which was not many months before Cornwallis's surrender at Yorktown on September 19, 1781 ended the major fighting.¹⁰⁶

When the Articles of Confederation were ultimately ratified, Article II provided that Congress had only the powers “expressly delegated” to it.¹⁰⁷ That language presumably settled the powers of Congress under the Articles. Still, it is plausible that the default rule was that the Congress of the United States was a plenary government by its seizure of power from the Crown or by the assembling of states, except by reason of Article II. When the Constitutions of 1787 omitted the limitation of old Article II, the default rule --that there was no limitation—cam back into force.

3. The Unenumerated Passport Power

The Constitution omitted the “expressly delegated” limitation of old Article II apparently to allow some implied powers, especially the federal passport system. In the Virginia ratification convention, the Anti-Federalists challenged the omission of the “expressly delegated” restriction. Edmund Randolph defended the omission of “expressly delegated” because the limitation had proved to be “destructive” to the Union. Even the passport system, Randolph said, had been challenged because it was not expressly authorized.¹⁰⁸

¹⁰⁶ See JAMES THOMAS FLEXNER, *GEORGE WASHINGTON AND THE AMERICAN REVOLUTION* 461 (1968).

¹⁰⁷ ARTICLES OF CONFEDERATION, art. II, 19 JCC 214 (March 1, 1781). The “expressly delegated” limitation of Article II of the Articles of Confederation arose from a motion by Thomas Burke of North Carolina. See Letter from Thomas Burke to Governor Richard Caswell of North Carolina (Apr. 29, 1777), in 6 *LETTERS OF DELEGATES* 672.

¹⁰⁸ Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), in 3 *ELLIOT'S DEBATES* 600-601. Edmund Randolph had served on the five-man Committee of Detail at the Philadelphia Convention, see 2 *FARRAND'S RECORDS* 97, which was the committee that took the “expressly delegated” language out of the

In a conflict between federal and state power under the Articles of Confederation, which was well known at the time, the validity of the federal passport had been confirmed. In late 1782, a group of Pennsylvanians seized goods from the ship, *Amazon*, as enemy contraband. The *Amazon* was traveling under a federal passport issued by General Washington to carry supplies across the lines of war for British and Hessian prisoners of war held at Lancaster, Pennsylvania.¹⁰⁹ Congress, led by a committee that included Madison objected to the seizure on that ground that the *Amazon*'s passport had been a valid exercise of war by the Commander in Chief.¹¹⁰ Ultimately, the Pennsylvania Legislature sought the advice of the Pennsylvania Supreme Court. The Pennsylvania court and legislature concurred that the federal passport was valid, concluded that the Pennsylvania law requiring seizure of contraband was unconstitutional

Constitution. Because Randolph's statement is also not the kind of understatement of the Constitution's impact that the Federalists used to get the document ratified, it is a credible expression of the drafters' official intent.

The proponents of the Constitution also wanted Congress to have unexpressed or implied powers to enforce requisitions by force if necessary. See, e.g., Edmund Randolph, *Reasons for not Signing the Constitution* (Dec. 27, 1787), in 8 DOCUMENTARY HISTORY 260, 263 (arguing that the absence of implied federal powers prevented the federal government from compelling requisitions).

¹⁰⁹ The seizure occurred after the provisional treaty of peace, and long after Yorktown, but before the proclamation of cessation of arms. Cornwallis surrendered on September 19, 1781. See FLEXNER, *supra* note 106, at 461. The provisional treaty of peace was signed in Paris on November 30, 1782, although cessation of arms was not announced by the Continental Congress until April 11, 1783. 24 JCC 238.

¹¹⁰ Madison Notes of the Continental Congress Debates (Jan. 24, 1783), in 19 LETTERS OF DELEGATES 608 (reporting that a committee of Rutledge, Madison, and Wolcott had concluded that the power to grant passports for the feeding of the prisoners was inseparable from the power of war); Letter of Oliver Wolcott to Matthew Griswold, Jan. 22, 1783, 18 LETTERS OF DELEGATES at 601 (saying that if Pennsylvania law allows such an atrocious violation of the principles of the confederation, no one would trust the passport); John Mercer (Pa.), *Debate in the Congress of the Confederation* (Feb. 20, 1783), in 3 ELLIOT'S DEBATES 54.

as applied to the *Amazon* because the federal passport was supreme over Pennsylvania law, and ordered that the seized goods should be returned.¹¹¹ The Pennsylvania decision is an early quasijudicial precedent establishing the enforceable supremacy of federal law over state law.

Passports started as a special act of Congress for named individuals. Between 1776 and 1781, Congress issued several resolutions allowing specifically identified individuals facing hardship to cross the lines of war¹¹² or to bring their families and household goods from outside

¹¹¹ John Dickinson, *Report to the Pennsylvania General Assembly* (Jan. 20, 1783), in MINUTES OF THE FIRST SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 783 (reporting conflict between the passport and Pennsylvania law); MINUTES OF THE SECOND SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 834 (Feb. 18, 1783) (resolving also that Pennsylvania citizens should be reimbursed for their costs because the seizure had been an exercise of a 1782 Pennsylvania law); *Debate in Continental Congress* (Feb. 20, 1783), in 25 JCC 906, n. 1 (“The Legislature in consequence having declared the law under which the goods were seized to be void as contradictory to the federal Constitution.”); Elias Boudinot (New Jersey), *Speech to the House of Representative* (Feb. 4, 1791), in 1 ANNALS 1975-1976, , 1st Cong., 3d Sess. (reporting that Pennsylvania judicial officers declared the confiscation invalid because Congress was given the power over passports with the power to declare war); James Madison, *Notes of the Continental Congress Debates* (Feb. 25, 1783), in 19 LETTERS OF DELEGATES 68 (reporting that Madison had been told that Pennsylvania legislature had settled the business by deciding that Pennsylvania law was unconstitutional in so far as it interfered with passports). The author has not been able to locate the opinion of the Pennsylvania Supreme Court to the Pennsylvania legislative committee if it has survived in either the Pennsylvania State Archives in Harrisburg or the Pennsylvania Historical Society archives in Philadelphia.

¹¹² Resolution (May 9, 1776), in 4 JCC 341 (granting a passport to Mrs. Bellevs to come to Philadelphia); Resolution (May 24, 1776), in 4 JCC 385 (granting a passport to Mrs. Grant to return to her husband in London); Resolution (May 5, 1778), in 11 JCC 458 (granting a passport to Mrs. Prevost to return to Europe); Resolution (Apr. 25, 1780), in 16 JCC 391 (granting a passport to allow Mrs. Ridley and family to travel from London to New York);

the United States.¹¹³ During the war, passports issued by Washington for provisions for prisoners of war fell comfortably within Article IX of the Articles, which expressly allowed Congress to direct the operations of and to make the rules for land and naval forces. Prisoners of war are particularly a wartime phenomenon. Congress continued passports in peacetime, however, and the system was even expanded in peacetime to require passports co-signed by the Superintendent for Indian Affairs for travel among the Indians.¹¹⁴

The passport would have been considered a legitimate federal activity even in peacetime because passports for foreign travel fell on the federal side of everyone's line between federal and state authority. In the drafting of the Articles of Confederation, foreign relations were conceded to be an issue of exclusively federal concern, even by those who most ardently wished to restrain the federal government.¹¹⁵ In the ratification debates, even the Anti-Federalists

Reference (Oct. 3, 1781), *in* 21 JCC 1033 (referring a proposal for passport to allow Mrs. Webb to travel to Connecticut to the War Board for approval on the condition that the British also approve a passport).

¹¹³ Reference (June 3, 1779), *in* 14 JCC 678-679 (referring to the Marine Committee a petition from Robert Harris to bring goods from Nova Scotia into the United States); Resolution (Aug. 23, 1781), *in* 21 JCC 906 (allowing the War Board to decide whether to grant a passport to Muscoe Livingston to move his family and goods from Jamaica).

¹¹⁴ In 1786, Congress adopted an ordinance allowing non-United States citizens to travel among the Indians only with a passport approval by the Superintendent for Indian Affairs of the district. Ordinance for Dealing with the Indians (June 1786), *in* 30 JCC 371.

¹¹⁵ See, e.g., Thomas Burke, *Notes on the Articles of Confederation* (Dec. 18, 1777), *in* 8 LETTERS OF DELEGATES 435 (“The United States ought to be as one Sovereign with respect to foreign Powers, in all things that relate to War or where the States have one Common Interest”); *see also* Letter of Thomas Burke to Governor Thomas Caswell, (Apr. 29, 1777), *in* 6 LETTERS OF DELEGATES 672 (arguing that Congress should have power enough to “call out the common strengths for the common defense”): See RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS*, *supra* note

conceded that “[t]hose powers respecting external objects can be lodged no where else, with any propriety, but in the general government.”¹¹⁶ Under the enumerated powers doctrine, however, even a power that Congress should have, like the passport, needed to be enumerated and passports were not on the list.

Clause 1 of the Constitution carried over the phrase, “common defense and general welfare,” from the Articles. If a Congressional activity was justified under the Articles as an exercise of the general welfare power, then it should be legitimate under the Constitution. The passport system operated continuously from the Articles to the Constitution. When the new Constitution came into effect, the staff of Congress’s Office of Foreign Affairs, which handled passports, became staff in the State Department without interruption of activities.¹¹⁷ Even if the peacetime passport lacked justification under the Articles, the Constitutional debates assumed its legitimacy. This assumption made the peacetime passports legitimate under the Constitution.

In the Virginia ratification convention, the Virginia Anti-Federalists apparently accepted the argument for the necessity of the federal passport. Anti-Federalists in other states had offered an amendment to the proposed Constitution to limit Congress to “expressly delegated”

105, at 154 (concluding that the most important powers and probably least controversial powers given to Congress by the Articles of Confederation were control over war and peace and diplomacy).

¹¹⁶ Federal Farmer, “Letters to the Republic III,” (Oct. 10, 1787) *reprinted in* 14 DOCUMENTARY HISTORY 10, 17; *see also* Federal Farmer, “Letters to the Republic I” (Oct. 8, 1787) (arguing that to let the general government should have power extending to all foreign concerns, while leaving internal police of the community exclusively to the state) *reprinted in* 14 DOCUMENTARY HISTORY 24; A Farmer, PHILADELPHIA FREEMAN’S J., April 23, 1787 (conceding that Congress should have powers over peace, war, and treaties with other nations) *reprinted in* 17 DOCUMENTARY HISTORY 133, 138.

¹¹⁷ *See* U. S. PASSPORT OFFICE, THE UNITED STATES PASSPORT: PAST, PRESENT, FUTURE 8-9 (1976).

powers, as in old Article II. In Virginia, however, the Anti-Federalists acceded to the deletion of “expressly delegated,” apparently in reliance on Randolph’s argument that if a government without unexpressed powers could not even issue passports. Madison, in any event, argued in the House of Representatives in the debated over the Bill of Rights that the Anti-Federalists’ failure to offer the “expressly delegated” limitation amounted to acquiescence in implied powers, particularly the passport.¹¹⁸

The Tenth Amendment provides that the states and the people shall have the powers not delegated to Congress. The Tenth Amendment to the Constitution was presented to Congress in 1789 as a part of the Bill of Rights after the Constitution had been ratified by enough states to come into effect. The Tenth Amendment, however, is apparently allows unexpressed or implied powers, especially the passport. The Tenth Amendment is a gesture toward the Anti-Federalists’ objections to eliminating old Article II, which limited Congress only to powers “expressly delegated,”¹¹⁹ but the amendment adopted neither old Article II nor the Anti-Federalists’

¹¹⁸ James Madison, Speech in the House of Representatives (Aug. 18, 1789), *in* 1 ANNALS 790, 1st Cong., 1st Sess. (successfully resisting the insertion of the word “expressly” into the Tenth Amendment). The list of Anti-Federalist amendments in Virginia is at Virginia Ratification Convention (June 17, 1788), *in* 3 ELLIOT’S DEBATES 659. The Massachusetts (2 ELLIOT’S DEBATES 131), New York (2 ELLIOT’S DEBATES 406), Maryland (2 ELLIOT’S DEBATES 550) and North Carolina ratification conventions (4 ELLIOT’S DEBATES 249) recommended an amendment providing that “all powers not expressly delegated to Congress are reserved to the several states.”

¹¹⁹ *See, e.g.*, Centinel II, PHILADELPHIA FREEMAN’S J. (Oct. 24, 1787) (objecting that the Constitution had not limited Congress to powers expressly delegated by proper authority, and had made laws of Congress paramount to all State authorities) *reprinted in* 13 DOCUMENTARY HISTORY 457, 460; Cincinnatus I, *To James Wilson, Esquire*, NEW YORK J. (Nov. 1, 1787) (observing that the Articles said that what is not expressly given is reserved, but the Constitution makes no such reservation, so the presumption is that the framers of the proposed constitution did not mean to subject Congress to the same exception) , *reprinted in* 13 DOCUMENTARY HISTORY 529, 530.

proposals. Anti-Federalists in Congress objected to the proposed language of the Tenth Amendment and argued that the word “expressly” needed to be inserted. Under the proposal, the Constitution would track the old Article II, so that Congress would be limited to only the powers “expressly delegated” to it. The Federalists opposed the insertion, arguing that it was impossible to delineate all the powers that Congress might need by implication. Madison also recounted the history of the passport and the absence of the “expressly delegated” amendment in the Virginia ratification convention as demonstrating Anti-Federalist acquiescence there.¹²⁰ Roger Sherman, who had advocated the enumerated powers doctrine at the Convention,¹²¹ argued that all corporate bodies are supposed to possess the powers incident to a corporate capacity, even if those powers were not absolutely expressed.¹²² The Anti-Federalist proposal to insert “expressly” was rejected overwhelmingly.

The proposed insertion was rejected, Justice Marshall would later say, because “it would strip the government of some of its most essential powers.”¹²³ “The men who drew and adopted [the Tenth] amendment,” Marshall wrote, had “experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those

¹²⁰ August 18, 1789, 1 ANNALS 790, 1st Cong., 1st Sess.

¹²¹ July 17, 1787, 2 FARRAND’S RECORDS 26 (saying that Sherman “in explanation of his ideas read an enumeration of powers”).

¹²² 1 ANNALS 790, 1st Cong., 1st Sess. See also August 21, 1787, in 1 ANNALS 797, 1st Cong., 1st Sess. (Elbridge Gerry’s proposal to add “expressly delegated” to the 9th Amendment defeated, 17-32, without debate).

¹²³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 384 (1819).

embarrassments.”¹²⁴ Under this interpretation, the Tenth Amendment allows some unexpressed or implied powers, especially the peacetime passport.¹²⁵

The peacetime passport is a significant government power. The passport has been described as the means by which the government monopolizes the legitimate means of movement of individuals, much as the government is described as monopolizing the legitimate means of violence.¹²⁶ Patrick Henry protested that if the federal government could require passports by implication, it would emancipate the slaves by implication.¹²⁷ Given how passports restrict movement, there is merit to Henry’s argument. Given its significance, it is difficult to treat the peacetime passport as incidental to some enumerated powers. The peacetime passport is not enumerated in clauses 2-17 nor reasonably accommodated as a necessary and proper instrument of any of the specific clauses.

The federal passport is, however, comfortably encompassed by the language of Article I, section 8, clause 1, which empowers Congress to provide for the common defense and general welfare. The passport is a necessary and proper instrument to advance the common defense or the national welfare, akin, for instance, to the express power over naturalization of citizens and the express power to make treaties with foreign nations.¹²⁸ The language, “common Defence and

¹²⁴ *Id.* at 406-407.

¹²⁵ See Charles A. Lofgren, *The Origins of the Tenth Amendment*, in *CONSTITUTIONAL GOVERNMENT IN AMERICA* 331 (Ronald Collins, ed. 1980) (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

¹²⁶ See JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 4 (2000).

¹²⁷ See Patrick Henry, Speech to the Virginia Ratification Convention (June 24, 1788), in 3 *ELLIOT’S DEBATES* 446.

¹²⁸ U.S. CONST., art. I, §8 (naturalization), cl. 4, art. II, §2, c. 2 (treaties).

general Welfare,” captures the arena of foreign concerns that the Framers by consensus gave to the federal government. The peacetime passport is an issue of foreign relations.¹²⁹

C. The Settlement of *McCulloch*

In the 1819 case of *McCulloch v. Maryland*,¹³⁰ the Supreme Court speaking through Chief Justice John Marshall endorsed the doctrine of limited or enumerated power. “This government is acknowledged by all to be one of enumerated powers,” Marshall said, and “[t]he principle, that it can exercise only the powers granted to it, [is] now universally admitted.”¹³¹ Marshall’s opinion settled the course of constitutional law. The exhaustive enumerated powers argument is now settled doctrine.

McCulloch, however, simultaneously interpreted the necessary and proper clause expansively to allow Congress room to achieve national goals. In the ratification debate, the Anti-Federalists argued, for example, that the necessary and proper clause would allow Congress to undertake “any power Congress may please.”¹³² Madison responded that the necessary and

¹²⁹ With exceptions during the War of 1812 and the Civil War, passports were not mandatory until 1918 and it was not until 1978 that passports were required by statute in nonemergency peacetime. *See Haig v. Agee*, 453 U.S. 280, 293 n. 22 (1981). By the 20th Century, the Courts had given the executive plenary control over foreign affairs, beyond any enumeration, under the doctrine of *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 315-320 (1936). *See Haig*, 453 U.S. at 292-293.

¹³⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹³¹ *Id.* at 405.

¹³² George Mason, Speech in the Virginia Ratification Convention (June 16, 1788), in 3 ELLIOT’S DEBATES 442; *see also* John Tyler, Speech in the Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 455 (arguing that Congress by the necessary and proper clause may call in foreign troops to declare a king.).

proper clause could not extend the government beyond the enumerated clauses, 2-17. The necessary and proper clause, he said,

“gives no supplementary power, [but] only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it.”¹³³

McCulloch v. Maryland agreed that the necessary and proper clause allowed only instruments for enumerated goals, but then interpreted “necessary” as an indulgent test, more akin to “appropriate and helpful” than to strict necessity.¹³⁴ Marshall held that Congress could charter a national bank, even though chartering was not an enumerated power, because the bank was an instrument “necessary and proper” to the great powers given to Congress.¹³⁵ “Let the end be ... within the scope of the constitution,” Chief Justice John Marshall said,” and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”¹³⁶ A national bank is a convenient thing to produce a controlled supply of government debt that can be used as currency, to

¹³³ James Madison, Speech in the Virginia Ratification Convention (June 16, 1788), in 3 ELLIOT’S DEBATES 438.

¹³⁴ *Cf. Commissioner v. Tellier*, 383 U.S. 687, 689 (1966)(interpreting “ordinary and necessary” standard for tax deductions for business expenses as meaning “appropriate and helpful” for the development of taxpayer’s business.)

¹³⁵ 17 U.S. (4 Wheat.) at 421. Madison had said that Congress had no power to charter corporations and that Congress claiming the power might use it to charter religious or manufacturing corporations. James Madison, *The Bank Bill, Speech to the House of Representatives* (Feb. 2, 1791), 13 MADISON PAPERS 372, 375. The Court’s resolution in *McCulloch* did not give Congress a general power to charter, but only a power to charter as a tool for its enumerated powers.

¹³⁶ 17 U.S. (4 Wheat.) at 421

facilitate government borrowing, and to coordinate the collection of taxes, but it is not an enumerated power. Madison had argued when the bank bill was debated that the necessary and proper clause could not stretch to allow a *bank*:

If implications thus remote and thus multiplied can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of the political economy.¹³⁷

Jefferson found no credible connection between the national bank and any of the enumerated clauses.¹³⁸ The bank could not have been an exercise of a taxation power, Jefferson argued, or its origin in the Senate would have condemned it.¹³⁹

Marshall by the time of *McCulloch* operated in a world very different from the fervent nationalism of 1787-1788 under which the Constitution was adopted. Jefferson consistently sought to confine the federal government to foreign issues alone and to favor the state because, he claimed, the states gave “the surest balance against anti-republican tendencies.”¹⁴⁰ By 1819, the Jeffersonians were in full power and the Federalists had shrunk to permanent minority status and were about to be extinguished as a political organization. Marshall, the last of the great Virginia Federalists, is trying to persuade Jeffersonian Justices to join him in a Jeffersonian political world. *McCulloch* is cunning politics in a very different world from the one in which

¹³⁷ James Madison, Speech in the House of Representatives, Feb. 3, 1791, 1 ANNALS 1949, 1st Cong., 3d Sess..

¹³⁸ Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 19 JEFFERSON PAPERS 275, 276.

¹³⁹ *Id.* U.S. CONST., art I, § 7 cl. 1 requires that all bill for raising revenue must originate in the House of Representatives.

¹⁴⁰ Thomas Jefferson, *First Inaugural Address* (March 4, 1801) in BASIC JEFFERSON 641.

the Constitution was adopted. Marshall in *McCulloch* conceded the high Jeffersonian principle that the federal government had only enumerated powers, but then approved the national bank, the specific program that the Jeffersonians had condemned. Marshall's decision also avoided the participation of the Jeffersonian Congress and presidency because the decision merely denied a lawsuit and was self-effecting. Madison criticized Marshall's decision not because the enumeration was inadequate for the national concerns, which Madison felt strongly in 1787,¹⁴¹ but because Marshall gave too much discretion to Congress to determine what means are necessary and proper.¹⁴² Madison had changed, the world had changed, and Marshall adapted.

A federal government limited to the enumerated powers is a limited government. Indeed, a federal government limited to providing for the *common* defense and *general* welfare by any necessary and proper means is also a limited government. With a broad enough reading of the necessary and proper clause, however, the government has powers to satisfy the common interests. Still, under Marshall's resolution of the issue, the implied powers allowed by the rejection of "expressly delegated" must fall within the scope of the "necessary and proper" clause. If we could go back to the fork and take the other path, there is support in the traditional values and constitutional text to allow the federal government to provide for the common defense

¹⁴¹ See, e.g., Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 MADISON PAPERS 163-64 ("I hazard an opinion ... that the plan, should it be adopted, will neither effectually answer its national object, nor prevent the local mischiefs which everywhere excite disgusts agst. the State Governments"); James Wilson, *Debate in the Federal Convention* (June 16, 1787) 1 FARRAND'S RECORDS 277 (Yates Notes), at 252 (Madison's notes) (criticizing the New Jersey Plan as vesting Congress with additional powers in a "few inadequate instances" and praising Madison's Virginia Plan for allowing Congress to legislate "on all national concerns").

¹⁴² See generally, CHARLES HOBSON, *THE GREAT CHIEF JUSTICE: JAMES MADISON AND THE RULE OF LAW* 209-211 (1996).

and general welfare by any means. That path would require less linguistic twisting. Still, as long as the necessary and proper clause is properly read to allow activities for advancing the common interests, the enumerated powers doctrine that Marshall adopted it does little harm.

III. Tax and Beyond

A. Confining taxation within the enumeration.

1. The Jeffersonian claim

Perhaps the most important constitutional battle of the early republic contested whether taxation for the general welfare would be allowed. Thomas Jefferson consistently maintained that the proper division between the general and state governments is that national government would have power over foreign concerns and the states would have power over domestic concerns.¹⁴³ It was important to the Jeffersonian party that the first, or tax clause of section 8 should be limited in scope to the purposes enumerated in clauses 2-17.

The first clause of section 8 gives Congress the power to tax “to provide for the common Defence and the general Welfare.” The language, the Jeffersonians argued, was a mere preface, given a more specific meaning by following clauses. It was as if the tax clause said that Congress could tax “for common defense and general welfare, *specifically* or *namely* for the powers of clauses 2-17.’ In *Federalist No. 41*, Madison argued that “[n]othing is more natural or common than first to use a general phrase,” namely, common defense and general welfare, “and then to explain and qualify it by a recital of particulars.”¹⁴⁴ In the debate over the national bank

¹⁴³ Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 10 JEFFERSON PAPERS 603; *accord* Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), in WRITINGS OF THOMAS JEFFERSON 1079 (Paul Leicester Ford, ed. 1892-99) (saying that the true theory is that states are independent as to everything within themselves and general government is reduced to foreign concerns only).

¹⁴⁴ THE FEDERALIST NO. 41, at 277-78 (James Madison) (first published Jan. 19, 1788).

in 1791, Madison argued that no additional federal power was given by the terms, “common defence, and general welfare” in clause 1, because those terms were themselves “limited and explained by the particular enumeration subjoined.”¹⁴⁵ The subsequent enumerated powers, as Jefferson put it, give an “exact definition” of the general welfare language.¹⁴⁶

Madison cared considerably about limiting spending to the objects enumerated in clauses 2 through 17. As President in 1817, Madison vetoed federal financing of canal construction on the grounds that canals were not an enumerated power.¹⁴⁷ Madison had previously advocated and signed bills for spending on internal improvements.¹⁴⁸ Even his veto message stated that the power to build roads and canals was “justly ranked among the greatest advantages ... of good Government.”¹⁴⁹ In preparation for the Constitutional Convention, Madison had listed canal-building as a project of “general utility” that was defeated under the Articles of Confederation by “the perverseness of particular States whose concurrence is necessary.”¹⁵⁰ But as Jefferson’s

¹⁴⁵ James Madison, Speech in the House of Representatives (Feb. 3, 1791), in 1 ANNALS 1946, 1st Cong., 3d Sess.; see also Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), in 3 FARRAND’S RECORDS 494 (“Common defence and general welfare [are used] as general terms, limited and explained by the particular clauses subjoined to the clause containing them.”).

¹⁴⁶ Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 12 JEFFERSON PAPERS 71-73 (referring to “the exact definition of powers immediately following” the general welfare clause).

¹⁴⁷ Veto Message (March 8, 1817), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 584-85 (James D. Richardson ed., 1908).

¹⁴⁸ See Stuart Leibiger, *Cumberland Road*, in JAMES MADISON AND THE AMERICAN NATION @@, 105-06 (Robert A. Rutland ed., 1994).

¹⁴⁹ Veto Message (March 8, 1817), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 584-85 (James D. Richardson ed., 1908).

¹⁵⁰ James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 MADISON PAPERS 351.

heir, President Madison found spending for canals justified only by the general welfare to be unconstitutional.

Opposition to federal financing of internal improvements justified only by the “general welfare” became a keystone of Jeffersonian and Southern politics through the Civil War.¹⁵¹ Southerners denounced the claimed “general welfare” power as a Northern rationalization for supporting development that served parochial Northern interests.¹⁵² John C. Calhoun argued that only the sovereign states, and not the federal Congress, could ascertain the general welfare.¹⁵³ After secession in 1861, the Confederate States adopted a constitution that followed the United States Constitution, albeit with corrections that the South judged necessary. The Confederate Constitution, for instance, protected the “right of property in any Negro slave.”¹⁵⁴ One of the Southern “corrections” was to strip power to provide for the “general welfare” out of the section conferring powers to the Confederate Congress and out of the preamble to the Confederate constitution.¹⁵⁵ Just to make sure, the Confederate Constitution also prohibited any subsidy or

¹⁵¹ Cf. Forrest McDonald, *Tenth Amendment*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 862 (Kermit L. Hall ed., 1992)(“[F]rom the presidency of Jefferson to that of Abraham Lincoln, the consensus was that Jefferson had been right in calling the Tenth Amendment the foundation of the constitutional union.”)

¹⁵² MARSHALL DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* 93-94 (1991).

¹⁵³ JOHN C. CALHOUN, *A DISEASE INTO THE CONSTITUTION*, in *1 WORKS OF JOHN C. CALHOUN* 350-51 (Richard K. Cralle ed., 1851).

¹⁵⁴ Confederate Constitution, art. 1, sec. 9, cl. 4, in DEROSA, *supra* note 152, at 141.

¹⁵⁵ DEROSA, *supra* note 152, at 139; *see also* CHARLES ROBERT LEE, JR., *THE CONFEDERATE CONSTITUTION* 45 (1963)(reporting that the “general welfare” power was excluded in deference to states rights).

tariff to promote or foster any branch of industry and prohibited appropriation for any internal improvements.¹⁵⁶

2. Justification of tax for the “General Welfare.”

a. The textual arguments. Madison’s textual arguments for limiting the tax power to the enumerated purposes in clauses 2-17 are not persuasive. Madison argued, first, that under the Articles of Confederation, from which the standard was taken, “common defense and general welfare” was never understood as a general grant of power, but only as a power to tax for things specifically enumerated in the Articles.¹⁵⁷ What would it have been thought, Madison asked rhetorically, if the Continental Congress had disregarded “the specifications which ascertain and limit their import [and] exercised an unlimited power of providing for the common defense and general welfare?” He thought the argument contained “its own condemnation.”¹⁵⁸

The Articles, however, seem more to rebut than to support Madison’s claim. Congress under the Articles, for instance, had undertaken projects of the sort that the Jeffersonians were condemning, including chartering a national bank. Congress had paid for maps and surveys, which was at least the precursor to public works projects. The old confederation had been destitute and destitution does impose its limitations. Interpreting the scope of the Congress’ power under the Articles does require answering a counterfactual question: What would Congress have done if it had money? At least on paper, though, the Articles did give Congress

¹⁵⁶ Confederate Constitution, art. 1, sec. 8, in DEROSA, *supra* note 152, at 140.

¹⁵⁷ James Madison, *Report of 1800 on the Virginia Resolutions* (Jan. 7, 1800), in 17 MADISON PAPERS 303, 313-14 (saying that “general welfare” was never understood in the Articles as a general power to authorize money for the general welfare, except in the cases afterwards enumerated, and that the enumerated powers “explained and limited” general welfare).

¹⁵⁸ THE FEDERALIST NO. 41, at 278 (Madison) (Jan. 19, 1788).

the power to charge expenses for the common defense and general welfare to the general treasury. Madison wrote that the Convention failed to include an explicit reference to the subjoined powers within the general welfare clause because of “an inattention to the phraseology, occasioned doubtless by its identity with the harmless character attached to it in the instrument from which it was borrowed.”¹⁵⁹ The primary purpose of the Constitution as a whole was to end exactly that kind of “harmlessness” caused by the destitution of the Congress under the Articles.¹⁶⁰

In *Federalist No. 41*, Madison argued that the fact that the phrase, “common Defence and general Welfare,” in article I, section 8, clause 1 was not “separated by a longer pause than a semicolon” from the enumerated powers of clauses 2-17 was evidence that the enumerated powers specified what was within the general welfare.¹⁶¹ In the Articles of Confederation from

¹⁵⁹ Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 3 FARRAND’S RECORDS 483, 486 and 9 WRITINGS OF MADISON 411, 418; *see also* 3 FARRAND’S RECORDS 487, 9 WRITINGS OF MADISON 411, 418-19 (“these terms copied from the Articles of Confederation, were regarded in the new as in the old Instrument merely as general terms, explained & limited by the subjoined specifications; and therefore requiring no critical attention or studied precaution”); James Madison, *Report of 1800 on the Virginia Resolutions* (Jan. 7, 1800), in 17 MADISON PAPERS 303, 313-14 (saying that under the Articles, the phrase “common defense and general welfare” was understood as covering only “the cases afterwards enumerated which explained and limited their meaning....”)

¹⁶⁰ *See, e.g.*, Letter from Phineas Bond to Lord Carmarthen (July 2, 1787), in 3 FARRAND’S RECORDS 52 (describing the Constitution as giving the federal government “energy and consequence”).

¹⁶¹ THE FEDERALIST NO. 41, at 277 (Madison) (Jan. 19, 1788); Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 4 MADISON PAPERS 120. *See also* 2 THE FOUNDERS’ CONSTITUTION 453, 456 (“Memorandum not used in letter to Mr. Stevenson”). Madison also spent a great deal of time worrying about whether “common defense and general welfare” might have been separated by commas or colons, rather than semicolons, from the enumeration. The resolution of the issue in the text treats all that punctuation as beside the point.

which the structure was copied, however, the general welfare and enumerated powers paragraphs did not abut each other. Old Article VIII allowed Congress to charge expenses for the common defense and general welfare to the common treasury. The first three long paragraphs of Article IX were devoted to state-border disputes and other unrelated matters. Article IX then listed the enumerated powers that were brought into the Constitution, but only after three intervening paragraphs. The Articles' enumerated powers were not plausibly linked with the more general "common defense and general welfare." They were not "subjoined" or "separated by a semicolon" or connected in any other way. Indeed, in the text of the Articles of Confederation, Article VIII, on charging expenses for the general welfare to the common treasury, and Article IX, the enumerated powers, seem to hold equal weight.

In trying to argue that "general welfare" had no independent meaning, Madison also asserted that the general standard came first and that the assumption of the Convention was that the language would be reduced "later in the session" by "proper limitations and specifications."¹⁶² But the language "to provide for the common defense and general welfare"

¹⁶² Madison claimed that the "general terms or phrases used in the introductory proposition ... were never meant to be inserted in their loose form in the text of the Constitution. ... It was understood by all that they were to be reduced by proper limitations and specification into a form in which they were to be final and operative, as was actually done in the progress of the session." Letter from James Madison to Robert S. Garnett (Feb. 11, 1824), *reprinted in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 313 (James H. Hutson, ed. 1987); *cf.* Undelivered Letter from James Madison to John Tyler, *in* 3 FARRAND'S RECORDS 524, 526-527 (arguing that the Virginia Plan's language for federal jurisdiction where states were incompetent or harmony of the states required it was understood not as final language but as phrases which, if adopted, would "be reduced to their proper shape & specification"). JOSEPH LYNCH, NEGOTIATING THE CONSTITUTION 236 n. 21 (1999) (arguing that the letters represent a practicing politician trying to get himself off the hook). LANCE BANNING,

was inserted into clause 1 by a Brearly Committee of Eleven report on September 4, 1787.¹⁶³ Most of the enumerated powers were already in place, since the Committee of Detail report on August 6. Madison’s interpretation that “general welfare” had no independent meaning makes no sense for a later-added clause. If the “common defense and general welfare” power was intended to be nugatory language for a section that already expressed the Convention’s entire intent, why would a committee and full convention go out of their way to add it?

In his *Commentaries on the Constitution*, Joseph Story concluded that Madison’s argument needed a better textual base to be persuasive. The clause does not say, Story wrote, “to ‘provide for the common defence, and general welfare, in manner following, viz.,’ which would be the natural expression, to indicate such an intention.”¹⁶⁴ If the enumeration were to be considered an “exact definition” of the general welfare, the power to provide for the general welfare in clause 1 needed to have a word such as “namely” or “specifically” after it to tie it to the listed powers that followed.

b. *The Federalists’ broad descriptions.* During the ratification debate, proponents of the Constitution also defended a very broad federal power to tax for the common defense and general welfare. “That their powers are thus extensive is admitted,” James Wilson told the Pennsylvania ratification convention, “and would any thing short of this have been

SACRED FIRE OF LIBERTY 157-64 (1995) takes Madison seriously on the 1833 claim. *But see contra*, RALPH KETCHAM, JAMES MADISON (1990); CLINTON ROSSITOR, THE CONSTITUTIONAL CONVENTION (1956).

¹⁶³ Report of the Brearly Committee of Eleven (Sept. 4, 1787), in 2 FARRAND’S RECORDS 497 (Madison notes).

¹⁶⁴ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 908, 910, 911 (1833).

sufficient?”¹⁶⁵ “I may venture to predict,” he said, “that the taxes of the general government ... will be more equitable, and much less expensive, than those imposed by state governments.”¹⁶⁶

The Federalists especially defended a broad power of federal taxation to provide for the common defense. “Wars have now become rather wars of the purse than of the sword,” Ellsworth told Connecticut. “A government which can command but half its resources is like a man with but one arm to defend himself.”¹⁶⁷ “The circumstances that endanger the safety of nations are infinite,” Hamilton said similarly, “and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”¹⁶⁸ “[P]rovide for the common defence, promote the general welfare,” ... “can be no other than an unlimited power of taxation, if that defence requires it,” one J. Choate told Massachusetts.¹⁶⁹ “The idea of restraining the Legislative authority, in the means of providing for the national defence,” Hamilton said, “is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened.”¹⁷⁰ Even the most ardent advocates of state power believed that

¹⁶⁵ James Wilson, *Speech before the Pennsylvania Ratification Convention* (Dec. 4, 1787), in 2 ELLIOT’S DEBATES 466; see also James Wilson (Dec. 1, 1787), in 2 ELLIOT’S DEBATES 444 (arguing that the Constitution drew its power from the people because that was the only safe system of power “sufficient to manage the general interest of the United States”).

¹⁶⁶ James Wilson, *Speech before the Pennsylvania Ratification Convention* (Dec. 4, 1787), in 2 ELLIOT’S DEBATES 467-68.

¹⁶⁷ Oliver Ellsworth, *Connecticut Ratifying Convention* (Jan. 7, 1788), in 2 ELLIOT’S DEBATES 191.

¹⁶⁸ THE FEDERALIST NO. 23, at 147 (Hamilton) (Dec. 18, 1787).

¹⁶⁹ J.Choate, *Speech to the Massachusetts Ratification Convention*, Jan. 23, 1788, 2 ELLIOT’S DEBATES 79.

¹⁷⁰ THE FEDERALIST NO. 26, at 164 (Hamilton) (Dec. 22, 1787); see also THE FEDERALIST NO. 31, at 196 (Hamilton) (Jan. 1, 1788) (saying that the duties of national defense and of securing the public peace against foreign or domestic violence have no limit, “no other bounds than the exigencies of the nation and the resources of the community.”);

Congress should have enough power to “call out the common strengths for the common defense.”¹⁷¹

The full phrase, “to provide for the common defence and general welfare,” also links a broad interpretation of the common defense with a broad interpretation of the general welfare. Hamilton was explicitly argued that taxation should have a broad range of goals, that is, for the general welfare:

Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power therefore to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.¹⁷²

Why, in any event, the Federalists asked, would any man “choose a lame horse, lest a sound one run away with him?”¹⁷³ In 1791 in defending his plan to subsidize American manufacturing,

Edmund Randolph, *Debate in Virginia Ratifying Convention* (June 6, 1788), in 3 ELLIOT’S DEBATES 115 (“Wars cannot be carried on without a full and uncontrolled discretionary power to raise money in an eligible manner.”)

¹⁷¹ Letter from Thomas Burke to Governor Thomas Caswell, (Apr. 29, 1777), in 6 LETTERS OF DELEGATES 672.

¹⁷² THE FEDERALIST NO. 30, at 188 (Hamilton) (Dec. 28, 1787); *see also id.* at 191 (arguing that a government always half supplied can provide for security or advance prosperity).

¹⁷³ A Citizen of Philadelphia, *Remarks on the Address of Sixteen Members* (Oct. 18, 1787), reprinted in 13 DOCUMENTARY HISTORY 297, 301; *see also* James Wilson, *Summation and Final Rebuttal in the Pennsylvania Ratification Convention* (Dec. 11, 1787), in 1 DEBATE ON THE CONSTITUTION 839 (arguing that it would be very unwise for the convention to refuse to adopt the Constitution, because it grants Congress power to lay and collect taxes for the purpose of providing for the common defense and general welfare); Edmund Randolph, *Speech before the Virginia Ratifying Convention* (June 7, 1788), in 3 ELLIOT’S DEBATES 122 (arguing that the power of imposing taxes “has been proved to be essential to the very existence of the Union”).

Hamilton argued that “[t]he phrase [common defense and general welfare] is as comprehensive as any that could be used” The constitutional authority of the Union to tax, he said, should not have been restricted within limits any narrower than the ‘General Welfare.’”¹⁷⁴

Thus, both the text of the Constitution and the arguments of the proponents support a general power to tax for the common defense and general welfare, even beyond the enumeration. It is also now settled legal doctrine that Congress can tax and spend for the common defense and general welfare beyond the range of the specifically enumerated clauses that follow clause 1.¹⁷⁵

C. General Welfare Beyond Tax?

In clause 1 of the Constitution’s recitation of the powers of Congress, the phrase “to provide for the common Defence and general Welfare” modifies the power to tax. Clause 1 provides that Congress shall power the power to collect taxes to pay the debts and provide for the common defense and general welfare of the United States. In the Articles of Confederation, from which the phrase was copied, the phrase described Congress’s power to charge expenses to the common treasury.¹⁷⁶

¹⁷⁴ Alexander Hamilton, *Report on the Subject of Manufacturers* (Dec. 5, 1791), in 10 HAMILTON PAPERS 230, 303. I WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 402 (1953) argues that Hamilton is not conceding that the common defense and general welfare standard is restricted to tax).

¹⁷⁵ *See* *United States v. Butler*, 297 U.S. 1, 65-66 (1936) (holding, in a case of first impression, that clause 1 gives Congress the power to tax and appropriate for the general welfare and not just for the enumerated powers in the following clauses); *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (saying that the power of Congress to authorize the expenditure of public moneys for public purposes is not limited to enumerated grants).

¹⁷⁶ ARTICLES OF CONFEDERATION, art. VIII (saying “All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury....”)

Nevertheless, in the text of the Constitution, the necessary and proper clause appears to convert a tax power into a power to provide for the common defense and general welfare by any means. Clause 18 of article I, section 8 authorizes Congress to “*make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.*” As Justice Marshall said in *McCulloch v. Maryland*,¹⁷⁷ “[l]et the end be ... within the scope of the constitution, and all means which are appropriate, ... which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”¹⁷⁸ The object of clause 1 is the common defense and general welfare, and taxation is just an instrumentality to that goal. Clause 18 allows other nontax instrumentalities. Madison thought that the necessary and proper clause extended clause 1 beyond taxation. Although Madison disliked that conclusion in 1830 and used it to show that even the tax power had to be confined to the enumerated powers and could not extend to general welfare,¹⁷⁹ the argument that Madison feared is plausible. The necessary and proper clause allows the federal government to operate within the appropriately national or common sphere by any means.

Clauses 1 and 18 can be read together to convert a tax power into a general power partly because the Founders would not have drawn an important distinction between tax and other

¹⁷⁷ 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

¹⁷⁸ *Id.* at 421.

¹⁷⁹ James Madison, Supplement to the letter of November 27, 1830 to Andrew Stevenson, On the Phrase “Common Defence and General Welfare,” in 2 THE FOUNDERS CONSTITUTION 453, 458 and 9 WRITINGS OF MADISON 411, 427; see also AN OLD WHIG II, PHILADELPHIA GAZETTEER (Oct. 17, 1787), reprinted in 13 DOCUMENTARY HISTORY 399, 402 (finding that Congress may judge what is necessary and proper in any cases whatsoever and so avoid an enumeration limitation).

instruments. Once federal taxation was allowed, all other powers would follow as a matter of course. If the people will trust the Congress on matters of money and revenue, Roger Sherman told the Convention, “they will trust them with any other necessary powers.”¹⁸⁰ Tax was the most feared instrument of government. “Regulation” would be swept into the federal power if taxation were allowed. For example, James Monroe, an Anti-Federalist in the debates, thought that the federal government should have the power to regulate commerce, but also thought that the federal government should not get the revenue from the taxes on commerce unless the states specifically ceded that revenue.¹⁸¹ The “celebrated Montesquieu establishes it as a maxim,” Centinel said, “that legislation necessarily follows the power of taxation.”¹⁸² Other opponents of the Constitution also said that the “common Defence and general Welfare” language allowed the federal legislature to “pass any law which they may think proper”¹⁸³ and to have power “co-extensive with every possible residuum of human legislation.”¹⁸⁴

¹⁸⁰ Roger Sherman, *Speech to the Federal Convention* (June 20, 1787), in 1 FARRAND’S RECORDS 342.

¹⁸¹ Letter of James Monroe to Thomas Jefferson (Dec. 14, 1784), 22 LETTERS OF THE DELEGATES 72 (saying that Congress will distinguish between taxation and regulation of commerce, “the former unless ceded by the State to go to the State”); *see also* Letter of Charles Thomson (Pennsylvania) to John Dickinson (Dec. 25, 1780), 16 LETTERS OF THE DELEGATES 492 (disapproving of taxes for revenue, but approving of taxes “on foreign articles of luxury which we can well do without” as a “regulation of trade”).

¹⁸² CENTINEL [SAMUEL BRYAN] I, PHILADELPHIA INDEPENDENT GAZETTEER (Oct. 5, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 53, 57.

¹⁸³ John Williams, Debate in the New York Ratification Convention (June 26, 1787), in 2 ELLIOT’S DEBATES 330; *see also id.* at 338.

¹⁸⁴ LETTER FROM RICHARD HENRY LEE TO GOV. EDMUND RANDOLPH, PETERSBURG VIRGINIA GAZETTE (Dec. 6, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 364, 368.

Taxation was commonly treated as the whole issue. Even if its “common Defence and general Welfare” were limited to tax, Congress could use taxation to turn a federation into a consolidated government: “The assumption of this power of laying direct taxes does, of itself,” Mason told Virginia, “entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it.”¹⁸⁵ If Congress were granted the paramount power to tax, Brutus wrote, Congress would draw all other powers after it.¹⁸⁶ Patrick Henry looked with horror upon the power to provide for the common defense and general welfare as yet another chance to free the slaves:

Have they not power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power? This is no ambiguous implication or logical deduction. The paper speaks to the point: they have the power in clear, unequivocal terms, and will clearly and certainly exercise it.¹⁸⁷

The proponents of the Constitution would not have drawn a meaningful line between tax and regulation. In his initial explanation of the Constitution to Jefferson, Madison said that the “line between the power of regulating trade and that of drawing revenue from it, which was once

¹⁸⁵ George Mason, Debate in the Virginia Ratification Convention (June 4, 1788), in 3 ELLIOT’S DEBATES 29).

¹⁸⁶ Brutus I, NEW YORK J. (Oct. 18, 1787), reprinted in 13 DOCUMENTARY HISTORY 411, 415.

¹⁸⁷ Patrick Henry, Debate in the Virginia Ratification Convention (June 24, 1787), in 3 ELLIOT’S DEBATES 590.

considered as the barrier to our liberties was found on fair discussion, to be absolutely undefinable.”¹⁸⁸

The debaters, on both sides, often switched words as if “regulation” and “taxation” were near synonyms. For example, Nathaniel Gorham called New York state’s tax on imports through New York harbor a “regulation of trade,”¹⁸⁹ and *Federalist No. 7* called all state taxes on imports “opportunities, which some States would have of rendering others tributary to them, by commercial regulations.”¹⁹⁰ *Federalist No. 12* espoused a federal tax on “ardent spirits,” which it called a “federal regulation.”¹⁹¹ Anti-Federalist Rawlins Lowndes labeled a 1783 proposal to give Congress the power to tax imports a power “to regulate commerce.”¹⁹² In October 1787, before the Constitution was ratified, John Jay, as Secretary of Foreign Affairs, gave his legal opinion that Congress had no power to establish a “regulation,” such as a proposed impost on seamen’s wages to raise money for ransoming American seamen held captive in Algiers.¹⁹³ The proposal Jay called a “regulation” was in fact a tax to raise revenue. Taxation was sometimes a power within the power to regulate commerce¹⁹⁴ and regulation was sometimes a subset of the

¹⁸⁸ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 205, 211.

¹⁸⁹ Nathaniel Gorham, *Speech before the Federal Convention* (July 23, 1787), in 2 FARRAND’S RECORDS 90,

¹⁹⁰ THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 17, 1787) (emphasis added)..

¹⁹¹ THE FEDERALIST NO. 12, at 78 (Hamilton) (Nov. 27, 1787).

¹⁹² Rawlins Lowndes, *Debate in the South Carolina Legislature* (Jan. 16, 1788), in 2 DEBATE ON THE CONSTITUTION 22.

¹⁹³ Letter of John Jay, Secretary of Foreign Affairs to John Paul Jones (Oct. 6, 1787) in 33 JCC 636.

¹⁹⁴ Letter of Samuel Johnson to Stephen Mix Mitchell (Aug. 25, 1786) (“The Regulation of Trade is as essential a point to be obtain’d as the Impost, the former will eventually include the Latter and ought to be urged with as much pathos.”) reprinted in 23 LETTER OF DELEGATES 525; HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA (NOV. 8, 1787), printed in THE DAILY ADVERTISER (NEW YORK) (Feb. 25 – 27, 1788) (saying that sundry regulations

power to tax.¹⁹⁵ The easy switches between tax and regulation may seem strange to modern ears, but they indicate that the Founders would not have drawn a legally significant line preventing federal regulation once federal tax for the same end was allowed.

In the Virginia Ratification Convention, Edmund Randolph denied that the power to provide for the common defense and general welfare could extend beyond taxation. Patrick Henry had just argued that the power to provide for the common defense and general welfare was yet another opportunity for Congress to free the slaves,¹⁹⁶ and Randolph replied that the power could not be used to free the slaves:

“They can only raise money. ...No man who reads it can say it is general, as [Patrick Henry] represents it. You must violate every rule of construction and common sense, if

of commerce will give the government power not only to collect vast revenue, but also to secure the carrying trade in the hands of citizens in preference to strangers), *reprinted in* 2 DEBATE ON THE CONSTITUTION 231; THE FEDERALIST NO. 22, at 137 (Hamilton) (Nov. 27, 1787) (arguing that if the Constitution is not ratified, the states might increase their “interfering and unneighborly” *regulations* and pointing to the German *taxes* on river commerce to illustrate the danger); THE FEDERALIST NO. 84 (Hamilton) (May 28, 1788) (arguing that national legislature will be able to acquire enough information to regulate commerce, even for internal collections of tax); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 9 WRITINGS OF MADISON 316, 334 (arguing that Congress may “regulate Commerce, not just to raise revenue, but also to encourage domestic manufacture”).

¹⁹⁵ Edmund Randolph, *Draft of the Constitution, Committee of Detail*, *in* 2 FARRAND’S RECORDS 142-43 (outlining congressional “regulation of commerce” as a subdivision of the power to raise money by taxation).

¹⁹⁶ Patrick Henry, Debate in the Virginia Ratification Convention (June 24, 1787), *in* 3 ELLIOT’S DEBATES 590:

Have they not power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power? This is no ambiguous implication or logical deduction. The paper speaks to the point: they have the power in clear, unequivocal terms, and will clearly and certainly exercise it.

you sever it from the power of raising money, and annex it to any thing else, in order to make it that formidable power which it is represented to be.”¹⁹⁷

Under the pressure of the context, Randolph inflated a distinction that no one else would have taken seriously at the time. The Virginia Anti-Federalists sought to defeat ratification of the Constitution foremost with the argument that ratification would allow the nonslave states in the majority to would abolish slavery. The Virginia ratification convention debated the Constitution clause by clause, and Patrick Henry found proof clause by clause that the Congress would end slavery upon ratification. Congress would use its power over commerce, according to Henry, to end the slave trade after 1808.¹⁹⁸ Congress would use its power over war to say that every black man must fight and then free him.¹⁹⁹ Congress would use its power to provide for the general defense and welfare to emancipate all slaves,²⁰⁰ and Congress could use its tax power to tax the slaves to manumission.²⁰¹ “We ought to possess [slaves] in the manner we have inherited them

¹⁹⁷ Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1787), in 3 FARRAND’S RECORDS 599-600.

¹⁹⁸ U.S. CONST. art. I, sec. 9, cl. 1. Patrick Henry thought the power to end the slave trade rebutted the doctrine of enumerated powers; see *Speech Before The Virginia Convention* (June 17, 1788), in 3 ELLIOT’S DEBATES 455 (“Where then was their doctrine of reserved rights?”). Deep water shipping is at the center of the power to regulate commerce, so it is difficult to see why the prohibition of the slave trade would not be within the enumerated commerce power.

¹⁹⁹ Patrick Henry, *Speech before the Virginia Ratification Convention* (June 24, 1788), in 10 DOCUMENTARY HISTORY 1476.

²⁰⁰ *Id.*

²⁰¹ Patrick Henry, *Debate in the Virginia Convention* (June 17, 1788), in 10 DOCUMENTARY HISTORY 1341-1342 (arguing that Congress might lay such heavy taxes on slaves, amounting to emancipation, such “that this property would be lost to this country”).

from our ancestors,” Patrick Henry told Virginia, “as their manumission is incompatible with the felicity of the country.”²⁰²

The Virginia Federalists denied that Congress could end slavery, even when Patrick Henry correctly described Congress’s power. Madison argued that if Congress attempted to free the slaves, it would be a usurpation of power: “There is no power to warrant it, in that paper.”²⁰³ Some of his arguments are unsupportable. Madison, for example, argued that the Congress could not tax slaves to manumission because direct taxes had to be apportioned. The Constitution requires that “direct taxes,” --that is, internal taxes in the nature of requisitions upon the states-- must be collected from the states in proportion to population, counting slaves at three-fifths.²⁰⁴ Both representation in the House and direct tax must be apportioned according to the same formula. The formula was extended from representation in the House to direct taxes because the North feared that allowing votes, and only votes, in the House to depend on slaves could cause the South to enslave more Africans. Taxes on slaves moderated the South’s incentives to add more slaves.²⁰⁵ But Madison flipped the intent and found protection for slavery. Congress could not annihilate slavery by taxation, Madison claimed, because the

²⁰² Patrick Henry, Debate in the Virginia Ratification Convention (June 24, 1788), in 2 ELLIOT’S DEBATES 591.

²⁰³ James Madison, Speech to the Virginia Ratification Convention (June 24, 1788) in 3 ELLIOT’S DEBATES 621-22.

²⁰⁴ U.S. CONST. art. I, § 9, cl. 4; § 2, cl. 3.

²⁰⁵ See, e.g., Gouverneur Morris, Aug. 8, 1787, 2 FARRAND’S RECORDS at 222 (“The admission of slaves into the Representation comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damens them to the most cruel bondages, shall [thereby] have more votes in a Govt. instituted for protection of the rights of mankind.”); see also Rufus King, Aug. 8, 1787, 2 FARRAND’S RECORDS at 220 (objecting strenuously to counting slaves in representation if importation of slaves were not limited). See Calvin Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WILLIAM & MARY BILL OF RIGHTS J. 1, 99-101 (1998).

“taxation of the State [is to be] equal only to its representation.”²⁰⁶ Other Virginia Federalists adopted the argument that Congress could not tax slaves at so high a rate as to amount to emancipation because “taxation and representation were fixed by the Constitution according to the census,” so that Congress could not tax the slaves out of existence “without ruining free people in other states.”²⁰⁷

Anti-Federalists Patrick Henry and George Mason replied, quite correctly, that they could see how apportionment protected slavery. Each state’s quota of an apportioned or direct tax was to be determined in proportion to population, they argued, but Congress alone determined the objects to be taxed. Once a state’s quantum was fixed, Congress could require the full amount to be laid upon slavery alone.²⁰⁸ Mason and Henry correctly read the text; Madison was wrong. The apportionment formula affects only the allocation of taxes among states and it has no effect on rates or objects of taxes within a state. Congress could have required that Virginia pay its entire quota from a tax on slaves. Madison erred in arguing that the apportionment of tax was

²⁰⁶ James Madison, Debate in the Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 453 (arguing that apportionment would prevent Congress from imposing oppressive taxes on tobacco or slaves that Northern states would escape); see also James Madison, Debate in the Virginia Ratification Convention (June 12, 1788), in 3 DOCUMENTARY HISTORY 1204 (arguing that Virginia was protected because its proportion of direct tax would be commensurate to its population); James Madison, Debate in the Virginia Ratification Convention (June 17, 1788), in 3 DOCUMENTARY HISTORY 1342-43 (arguing that the census was intended to introduce equality into the burdens to be laid on the community).

²⁰⁷ George Nicolas, Speech to the Virginia Ratification Convention (June 17, 1788) in 3 Elliot’s Debates 457 (arguing that two-fifths of all slaves are exempted from tax under the Constitution); “THE STATE SOLDIER IV,” VIRGINIA INDEPENDENT CHRONICLE (Mar. 19, 1788), 8 DOCUMENTARY HISTORY 509, 511.

²⁰⁸ Patrick Henry, *Debates in the Virginia Ratification Convention* (June 17, 1787) in 3 ELLIOT’S DEBATES 457; George Mason, *Debates in the Virginia Ratification Convention* (June 17, 1787) in 3 ELLIOT’S DEBATES at 458.

intended to favor slavery; the point was to tax the South more if it had more slaves so as to offset the incentive that the inclusion of slaves in representation gave to the South to increase its slaves. Congress did not in fact free the slaves before the Civil War, but the Constitution does seem to have allowed the federal government to free the slaves by heavy taxes, by setting free slaves drafted as soldiers, and by other tools. Randolph's statement that "common defense and general welfare" could not be extended beyond tax was like other soothing things the Virginia Federalists said to appease the slaveholders so they would not vote against ratification. They were arguments in the heat of the moment made without justification from the text and they probably should not be taken seriously.

It is now settled doctrine, however, that the federal government may tax for the general welfare, but that general welfare does not justify government instruments beyond tax. Allowing federal legislation for the general welfare beyond tax is said to transform the federal government into one of unlimited range.²⁰⁹ "Common Defence and general Welfare," however, is a synonym for "exigencies," "necessities" or "general interests" of the Union; if that standard applied beyond tax, it would not allow activity outside of a sphere considered appropriately "common," "general" or national. Still, the settled law holds that the common defense and general welfare standard does not apply beyond taxation.

IV. Implied and Exploding Powers

The doctrine of enumerated powers would strictly prohibit federal activities not included within the Constitution's list of powers. Nonetheless, the doctrine has been interpreted to allow the federal government powers over foreign affairs that are not the list. The doctrine, moreover,

²⁰⁹ United States v. Butler, 297 U.S. 1, 64 (1936)

accommodates to the exigencies of the union by allowing an explosively broad interpretation of the power to regulate commerce.

A. Implied Powers.

1. Acquisition of Territory.

Jefferson argued that the enumerated powers were exhaustive and not enhanced by either the tax clause or the necessary and proper clause, but he also took the position that the federal government had implied powers, without textual basis, when enumerated powers did not support activities he wanted to undertake. As President, Jefferson wanted to acquire new land and peoples for the United States by the Louisiana Purchase and by the purchase of Florida. He was embarrassed in both cases, however, in that he had argued that Congress had no powers that were not enumerated and that the power to acquire added territory was not within a strict construction of the enumerated powers.²¹⁰ To allow the acquisitions of new territory, Jefferson used two extraordinary doctrines: first, the “laws of necessity” and, second, that acquisition was inherent in the nature of federal sovereignty. Both necessity and inherent sovereignty purport to arise from authority beyond strict adherence to constitutional text. The internal logic of both “necessity” and “sovereignty” could compass everything.

In the fall of 1805, while Congress was not in session and had appropriated no money, President Jefferson agreed to purchase Florida from Spain for \$2 million.²¹¹ After his retirement from the Presidency, Jefferson wrote that the purchase of Florida had been justified by the “law

²¹⁰ See Letter from President Thomas Jefferson to Kentucky Senator John Breckinridge (Aug. 12, 1803), in 10 WORKS OF JEFFERSON 7 (“The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union”).

²¹¹ See DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 236 (1994).

of necessity” and “self preservation,” which was paramount to the “obligation to give strict observance of written law.”²¹² Jefferson likened the purchase of Florida to Washington’s firing cannons at a private house in the battle of Germantown after having receiving fire from the house.²¹³

Jefferson passed over some alternative rationales for the constitutionality of the purchase. The purchase of Florida raised the same issue as the Louisiana Purchase: how the federal government had the power to acquire new territory and people in the absence of an express grant. Jefferson’s Secretary of the Treasury, Albert Gallatin, had given Jefferson a legal opinion that the Louisiana Purchase was justified by a combination of the President’s power to make treaties with approval of two-thirds of the Senate²¹⁴ and the power to administer and dispose of territories and property owned by the United States.²¹⁵ Jefferson rejected both arguments, saying that “[t]he Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union.”²¹⁶ Jefferson had worried that Gallatin’s “broad” interpretation would make the Constitution “a blank paper by construction.”²¹⁷ In 1810, he relied

²¹² Letter from Thomas Jefferson to John B. Colvin, September 20, 1810, BASIC JEFFERSON 683.

²¹³ *See Id.*

²¹⁴ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

²¹⁵ U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

²¹⁶ Letter from Thomas Jefferson to John Breckinridge (Senator from Kentucky (Aug. 12, 1803), in 10 WORKS OF JEFFERSON 7.

²¹⁷ Letter from Thomas Jefferson to William Gary Nichols, Sept. 7, 1808, 8 WRITINGS OF JEFFERSON 247-248. *See* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 244-251 (1994).

on the law of necessity, rather than a reading of the treaty and territorial powers that were too broad for his taste.

If anything, the “law of necessity” rationale Jefferson ultimately used seems even more problematic than Gallatin’s solution, especially if his fundamental objection was that the federal government should not be given a blank piece of paper.²¹⁸ Indeed, Jefferson’s “necessity” does not seem all that compelling. “Suppose,” he said in 1810,

it had been made known to the Executive of the Union in the autumn of 1805, that we might have the Floridas for a reasonable sum, that that sum had not indeed been so appropriated by law, but that Congress were to meet within three weeks, and might appropriate it on the first or second day of their session. Ought he, for so great an advantage to his country, to have risked himself by transcending the law and making the purchase? The public advantage offered, in this supposed case, was indeed immense; but a reverence for law, and the probability that the advantage might still be legally accomplished by a delay of only three weeks, were powerful reasons against hazarding the act. But suppose it foreseen that a John Randolph would find means to protract the proceeding on it by Congress, until the ensuing spring, by which time new circumstances would change the

²¹⁸ David Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WILLIAM & MARY L. REV. 1441 (1998) concludes that Jefferson had the express power to acquire Louisiana and Florida: “It is very hard today, even for one who shares their general approach to federal authority, to find merit in the remarkably cramped reading that Jefferson in his most self-effacing moment offered of the explicit authorization to make treaties.” *Id.* at 1474. Indeed, finding a slightly looser construction of the enumerated powers would be far less threatening to Jefferson’s general claim that the enumerated powers were exhaustive than an unstated power from necessity that Jefferson ultimately adopted. The choice was Jefferson’s, however.

mind of the other party. Ought the Executive, in that case, and with that foreknowledge, to have secured the good to his country, and to have trusted to their justice for the transgression of the law?²¹⁹

With all due respect, Jefferson did not make a very good case that the purchase of Florida was a necessity that required him to go above the law. The administration might well have told Spain that the United States would accept the offer, subject to approval by Congress, or if this is viewed as a treaty, subject to approval by two-thirds of the Senate.²²⁰ If Spain had offered the Floridas for \$2 million, it was likely to have continued the offer for roughly the same price for a few weeks. Jefferson cited the trouble that his political antagonist, John Randolph, might have made, but in a democracy, opposition is part of the process and not a justification for going above the law. This seemed to be a matter of executive convenience, and not necessity, especially for the Jefferson who had previously argued that a national bank was not a necessary federal instrument, but only a convenience.²²¹ Jefferson's rationale amounts to a claim superior to the Constitution, and if "necessity" extends to such conveniences as this one, it difficult to see how anything else could stop it.

Another extraordinary rationale, offered with respect to the Louisiana Purchase, was that the power to make federal acquisitions arose from the nature of federal sovereignty. In 1803,

²¹⁹ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) in BASIC JEFFERSON 682, 683.

²²⁰ U.S. CONST., Art. II, §2, cl. 2.

²²¹ Thomas Jefferson, *Opinion on the Constitutionality of a Bill for Establishing a National Bank* (Feb. 15, 1791), 19 JEFFERSON PAPERS 275, 278; accord, James Madison, *The Bank Bill, Speech to the House of Representatives* (Feb. 2, 1791) reprinted in 13 MADISON PAPERS 372, 376-77 (saying that "conducive" and "give facility to" are not synonymous with "necessary and proper").

Napoleon offered all the French-controlled territory west of the Mississippi to surprised American representatives, who had come to Paris looking only to purchase access to the sea through New Orleans for American commodities grown in the Mississippi River watershed *east* of the river.²²² There was a long debate in Congress on the constitutionality of the Louisiana Purchase,²²³ and the predominant justification was that the acquisition of territory was a power inherent in government without any need for enumeration. Senator Samuel Mitchill, a Jeffersonian from New York, argued that the power to acquire territory was “inherent in independent nations.” The United States had acquired property through a number of treaties with the Indians, he argued, and if the Louisiana Purchase was invalid, so were all the Indian treaties.²²⁴ John Smilie, a Jeffersonian from Pennsylvania, argued that the acquisition was constitutional because the right of annexing territory is incidental to all governments.²²⁵ Across

²²² For descriptions, see MARSHALL SMELSER, *THE DEMOCRATIC REPUBLIC, 1801-1815*, at 83-103 (1968); EVERETT S. BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812*, at 14-35, 62-83 (1920).

²²³ Senator Roger Griswold, a Federalist from Connecticut, thought that the Louisiana Purchase was not Constitutional without the concurrence of the original states. He argued that the United States was based originally on a co-partnership between the original colonies and that it made no sense for the Executive and the Senate to use the treaty power to admit other states to the co-partnership without the approval of states already in the union. (Oct. 28, 1803) *in* 8 ANNALS 461-463, 8th Cong., 1st Sess.

²²⁴ Samuel L. Mitchill (Jeffersonian, N.Y.) (Oct. 25, 1803) *in* 8 ANNALS 477-481, 8th Cong., 1st Sess.

²²⁵ John Smilie (Jeffersonian, Pa.) *in* 8 ANNALS 457-8, 8th Cong., 1st Sess. (Oct. 25, 1803). Smilie and also Joseph H. Nicholson (Jeffersonian, Maryland)(Oct. 25, 1803) *in* 8 ANNALS 467-68, 8th Cong. 1st Sess. argued that all rights not reserved to the states were given to the general government, that the right to acquire territory was not retained by the states, and that therefore the power must be resident in the general government. This position was starkly inconsistent with the general Jeffersonian and the Tenth Amendment position that all powers not delegated to the federal government were retained by the states.

party lines, James Elliot, a Federalist from Vermont, argued that the ability to acquire territory was based on the law of nations.²²⁶

The best justification was, of course, the argument by Senator Caesar A. Rodney, a Jeffersonian from Delaware, who argued that the Louisiana Purchase fell within the power of Congress “to provide for common Defence and general Welfare.” “To provide for the general welfare!” he said, “The import of these terms is very comprehensive indeed.”²²⁷ Acquisition of the Floridas and the Louisiana Territory seems fully justified as one of those activities a national government may properly undertake “to provide for the common Defense and general Welfare.” The power to acquire territory, moreover, could be said to be one of those powers carried over from the Confederation. Congress, under the Articles of Confederation, had taken cessions of Western land from the states to help in its revenue needs.²²⁸ Since powers of the old Congress carried over into the new, Congress under the Constitution has the power to acquire new territory and citizens.²²⁹ Thus it is not the power to acquire territory that is surprising but rather the claims that no textual support is needed.

Notwithstanding Rodney’s fine argument, however, the law ultimately settled on the argument that acquisitions were inherent in sovereignty, without need for enumeration. In *Cross*

²²⁶ James Elliot (Federalist, Vt.) (Oct. 25, 1803) in 8 ANNALS 447-49, 8th Cong. 1st Sess.

²²⁷ Senator Caesar A. Rodney (Jeffersonian, Del.) (Oct. 25, 1803), in 8 ANNALS 472, 8th Cong. 1st Sess.

²²⁸ Report of a Committee of Carroll, Gorham, etc. 24 JCC 104 (Jan. 30, 1783) (reporting the states’ cession of western lands as a revenue measure).

²²⁹ John Randolph, House of Representatives, Oct. 25, 1803, Annals of Cong., 8th Cong. 1st Sess. 436 (justifying the Louisiana Purchase by saying that since the Confederation, “a loosely connected league,” had settled its borders by acquiring territory and citizens, so could the United States under the Constitution).

v. Harrison,²³⁰ the Supreme Court held in 1853 that the cessions of California to the United States by Mexico was Constitutional, saying that “[t]he power... of the United States to acquire new territory does not depend upon any specific grant in the Constitution to do so, but flows from its sovereignty over foreign commerce, war, treaties, and imposts.”²³¹ By the twentieth century, the Supreme Court decided that the enumerated powers doctrine applied only to internal affairs. For international affairs, the federal government had power arising from “sovereignty” that pre-existed the Constitution and arose upon independence from Great Britain.²³² Foreign affairs fell on the federal side of everybody’s line between federal and state spheres, so the conclusion is not surprising. Still, the plausible default position is that federal government had powers of sovereignty from the mere coming together of the states for domestic reasons as well.²³³ Once the Court begins to find extra-Constitutional powers from federal “sovereignty,” why does it not extend to domestic issues?

There is, of course, no need to go beyond the text of the Constitution to justify the federal power over foreign issues. As Cesar Rodney argued in 1803, Congress has the power to provide for the common defense and general welfare. Foreign affairs are, by consensus, issues within the “common” or “general” sphere, that is, the national sphere. To go beyond the writing and beyond the Constitution is literally an *outlaw* claim. Undoubtedly a dire enough necessity can require an agent to go outside of the written instructions, but why is that the first resort, when a power within the writing seems so reasonable? Indeed, I argue that the enumerated powers are merely illustrative, which civilizes Jefferson’s claim. On the *ejusdem generis* or illustrative

²³⁰ 57 U.S. 164 (1853).

²³¹ *Id.* at 173.

²³² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-19 (1936).

²³³ *Respublica v. Sweers*, 1 U.S. 41, 44 (Pa. 1779) discussed in text accompanying *supra* note 103.

argument, the powers of the federal government need to fall within what is considered the appropriately national sphere. The claim for unenumerated powers over foreign issues, in any event, belies the Jeffersonian claim that clauses 2-17 are exhaustive. There is no such thing as partially exhaustive. A constitution cannot be both exhaustive and not exhaustive at the same time.

B. Exploding Powers: The Commerce Power²³⁴

The third clause of the Constitution's description of federal powers allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."²³⁵ The commerce clause is now usually considered to be the most general power of the federal government and the frontier most likely to mark the outer boundaries of the federal range.²³⁶ But in the constitutional debates, the power to "regulate commerce" was a modest, even trivial power. "Regulate commerce" was most importantly a verbal cover for two mercantile programs that did not have sufficient support for passage, even once the new Constitution allowed Congress to act. "Regulate commerce" was also a synonym for nationalizing the state tariffs or imposts, but that is a tax or revenue issue covered by other

²³⁴ This section is a short summary of Calvin Johnson, *The Original Intent of the Commerce Clause*, WM & MARY BILL OF RIGHTS J. (forthcoming 2004).

²³⁵ U.S. CONST., art. I, § 8, cl. 3.

²³⁶ See, e.g., BERNARD SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* 105 (2d ed. 1979) (saying that commerce clause is "plenary" and the "source of the most important powers that the Federal Government exercises.") For a recent review of the judicial history of the scope of the commerce clause, see, for example, Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1100-13 (2000).

constitutional clauses. There was no substantial issue or debate in 1787-88 within the category of *interstate* commerce.

It is, of course, perfectly consistent with the values of the Founders that congressional power should expand to cover the necessities and the common interests of the union. The path the expansion took, however, within the commerce clause, is best understood as a channel around the dam erected by the enumerated powers doctrine. The commerce clause exploded in importance from its trivial original meaning only because the best reading of the Constitution - a general power to provide for the common defense and general welfare - was blocked by the interpretation that clauses 2 through 17 were exhaustive. Common needs were satisfied not within the most natural channel - the general power to provide for the common defense and general welfare - but by an explosive expansion of a trickle-size channel, the commerce power, which the enumerated powers doctrine allowed.

In its original meaning, the power “to regulate commerce” was a cover of words for only three programs, all involving deep-water shipping. The first program was to nationalize the New York harbor’s “impost” or tariff, and other similar state imposts, so that a federal impost could be used to pay the debts of the Revolutionary War. That program was called a “regulation of commerce” at the time but it was also a tax program, authorized by clause 1, which allows Congress to tax. The other two programs would have regulated commerce in ways consistent with the mercantilist economics of the times, which held that the wealth of the nation would be improved by rigorous government regulation. Interstate commerce does not show up in the debates, except as an afterthought, and there were no real proposed programs associated with interstate commerce. Words do have a penumbra beyond the programs their proponents were trying to accomplish, but the words of any historical document are always actions attempting to

find allies to accomplish a program. To understand the words' penumbra of words, one must first understand the core programs.²³⁷

1. The Navigation Acts.

“Regulation of commerce” commonly referred to a plan to impose a retaliatory impost or embargo on foreign ships coming into American ports in order to convince foreign powers to open their ports to American ships.²³⁸ The core grievance was that the British Navigation Act granted a monopoly to British vessels for entry into British possessions in the West Indies in an attempt to capture shipping profits for its own nationals. When the American states were still colonies, the purpose of giving incentives to British shipping by granting British shipping an exclusive franchise included stimulating American shipping. In the colonial period, there was a

²³⁷ See, e.g., Quentin Skinner, *Meaning and Understanding the History of Ideas in MEANING AND UNDERSTANDING: QUENTIN SKINNER AND HIS CRITICS* 3, 55-65, 260 (James Tully, ed., 1988) *reprinting the original*, 8 *HISTORY AND THEORY* 3 (1969).

²³⁸ See, e.g., Letter from James Monroe to James Madison (July 26, 1785), in 8 *MADISON PAPERS* 329 (Virginia congressional delegate explains that Congress has proposed to be granted the power to regulate commerce to obtain reciprocity from other nations); Edmund Randolph, Speech at the Federal Convention (May 29, 1787), in 1 *FARRAND'S RECORDS* 19 (saying that among the advantages that the U. S. might acquire are “counteraction of the commercial regulations of other nations”); John Rutledge, Speech at the Federal Convention (Aug. 29, 1787), in 2 *FARRAND'S RECORDS* 452 (saying that gaining access to the West Indies is the “great object” of regulating commerce); Edmund Randolph, *Reasons for not Signing the Constitution* (Dec. 27, 1787), in 8 *DOCUMENTARY HISTORY* 260, 265 (saying that individual states can not organize retaliation against foreign nations and that what is needed is “exclusion ...opposed to exclusion, and restriction to restriction”); *NEW JERSEY JOURNAL* (June 18, 1788), *reprinted in* 18 *DOCUMENTARY HISTORY* 185 (saying that “[t]he moment the English know we can retaliate, that moment they will relax in their restrictions on our commerce”); William R. Davie, *Speech to North Carolina Ratification Convention* (July 24, 1788), in 4 *ELLIOT'S DEBATES* 18 (arguing that the United States should be empowered to compel foreign nations into commercial regulations and counter British insults).

very active trade between the West Indies and American ports. When America achieved independence, however, Britain decided that there was no reason to let American vessels into its West Indian ports.²³⁹

The grievance against the British was generalized to include the power to retaliate against France and Spain for similar exclusions. All great trading nations were said to have tried “to secure to themselves the advantages of their carrying trade.”²⁴⁰ John Jay complained that because of our “imbecility,” all the empires imposed “commercial restraints upon us” so that there is not one English, French or a Spanish island or port in the West-Indies to which an American vessel can carry a cargo of flour for sale.²⁴¹

A retaliatory impost or embargo required a uniform policy for all American ports. When Massachusetts tried to impose a retaliatory tax on British ships to force Britain to open the ports of the British West Indies, other states undercut Massachusetts by welcoming British ships into their ports.²⁴² A state embargo or impost would be ineffective if a neighboring state provided an easy end run around it.

²³⁹ See LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE UNITED STATES 264-65 (6th ed. 1784), *described in* JOHN E. CROWLEY, THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION 81-83 (1993); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 69 (1993).

²⁴⁰ Thomas Russell, *Speech to the Massachusetts Ratification Convention* (Feb. 1, 1788), *in* 2 ELLIOT’S DEBATES 139.

²⁴¹ JOHN JAY, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK 7 (Sept. 17, 1787), *reprinted in* PAMPHLETS 67, 73

²⁴² Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne (Feb. 2, 1788), *in* 16 DOCUMENTARY HISTORY 13 (saying that Massachusetts and New Hampshire had both attempted to exclude British ships to punish Britain for its strictness against American commerce, but had suspended the attempt because competing ports in other states would not join the embargo and thereby got the advantage of British ships newly attracted to their ports.)

The proposal to impose a retaliatory impost against the British, however, came to naught. When Madison proposed retaliation against the British in the first session of the new Congress, the Senate, lead by the New York delegation, stripped the anti-British features from the 1789 impost bill.²⁴³ Great Britain was allowing American ships into the British home ports without restriction or discrimination, and opponents of retaliation feared that Britain might retaliate in turn if faced with American port restrictions.²⁴⁴ Madison's plan for discrimination against the British was not included in the enacted impost.²⁴⁵

A retaliatory impost against British shipping probably never was a good idea. There were not very many British ships coming into American ports against which to retaliate because American shipping was on its way to monopolizing transatlantic shipping by successful competition and good American oak. By 1796, American ships were carrying over 90 percent of transatlantic commerce.²⁴⁶ A penalty against British ships would not have been much of an economic stick, even if it extinguished the last of them. Penalties would also have angered the British, perhaps into retaliation against American ships going into British ports. American shipping could not afford a trade war with Great Britain. The British West Indies' prohibitions

²⁴³ See ELKINS & MCKITRICK, *supra* note 239, at 766 n. 66 (collecting the evidence showing the New York merchants opposed discrimination).

²⁴⁴ *Editorial note*, in 12 MADISON PAPERS 55; *Editorial note*, in 12 JEFFERSON PAPERS 521-526. Cf. John Laurence, Speech in the House of Representatives (Apr. 21, 1789), in 1 ANNALS 192, 1st Cong., 1st Sess. (arguing that England does not now discriminate against American vessels coming into England.)

²⁴⁵ An Act for Laying Duties on Goods, Wares and Merchandise Imported in the United States, July 4, 1789, 1 STAT. 24-27. May 16 and May 26, 1789, in 1 ANNALS 365-66, 409, 1st Cong., 1st Sess. (5% impost passes but discrimination defeated.)

²⁴⁶ ELKINS & MCKITRICK, *supra* note 239, at 414 (93%).

on American ships, moreover, were porous; the islands themselves were happy to encourage evasion around the prohibitions on American ships.²⁴⁷

A second reference of the phrase, “regulation of commerce,” was to a proposal to give Congress the power to imitate the same British Navigation Act that offended the Framers. An American Navigation Act would have required that all American commodities would be exported only on American ships.²⁴⁸ The Constitution was written long before Adam Smith,

²⁴⁷ See, e.g., *id.*, at 131 (finding a treaty opening West Indies would just confirm what was already accessible informally.)

²⁴⁸ See, e.g., THE LANDHOLDER VI, CONNECTICUT COURANT (Dec. 10, 1787), *reprinted in* 3 FARRAND’S RECORDS 164 (arguing that George Mason opposed the Constitution because a navigation act would exclude foreign bottoms from carrying American produce to market and throw a monopoly of the carrying business into Northern hands); Thomas Dawes, *Speech to Massachusetts Ratification Convention* (Jan. 21, 1788), *in* 2 ELLIOT’S DEBATES 58 (objecting that without the Constitution’s regulation of commerce, a vessel from Halifax “finds as hearty a welcome with its fish and whalebone at the southern ports, as though it was built, navigated, and freighted from Salem or Boston”); James Bowdoin, *Speech in the Massachusetts Ratification Convention* (Feb. 1, 1788), *in* 2 ELLIOT’S DEBATES 129 (arguing that well being of trade depends upon the proper regulation of it and unregulated trade has ruined rather than enriched those who carry it on); Thomas Russell, *Speech in the Massachusetts Ratification Convention* (Feb. 1, 1788), *in* 2 ELLIOT’S DEBATES 139 (arguing that Congress should confine shipping to American vessels); HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA, NOVEMBER 8, 1787, PRINTED IN THE DAILY ADVERTISER (NEW YORK) (Feb. 25 – 27, 1788), *reprinted in* 2 DEBATE ON THE CONSTITUTION 227, 231 (saying that by regulations of commerce, Congress can “secure the carrying trade in the hands of citizens in preference to strangers”); Alexander Hamilton, Debate in New York Ratification Convention (June 20, 1788), *in* 2 ELLIOT’S DEBATES 236 (saying that it was in the interest of the Northern States that Congress be able “to make commercial regulations in favor of their own, and in restraint of the navigation of foreigners”).

laissez faire and free trade came to dominate economic philosophy.²⁴⁹ The Founders were arch-mercantilists. In true mercantilist terms, James Madison traced most of our political and moral errors to an absence of regulation of foreign commerce and an unfavorable balance of trade, which drained us of our precious specie.²⁵⁰ Hamilton denounced the argument that trade would regulate itself as a “wild speculative paradox[] ... contrary to the sense of the most enlightened nations.”²⁵¹ Madison denounced those who were “decoying the people into a belief that trade ought to be left to regulate itself.”²⁵² In 1784, in the mercantilist spirit, Madison sponsored a port bill in the Virginia Assembly, which would have required trade between Virginians and foreign ports had to be conducted out of a single Virginia port.²⁵³ The port preferences have been said to be the “economic centerpiece” of the Madisonian coalition out of which the Constitutional movement arose.²⁵⁴ Both Thomas Jefferson²⁵⁵ and George Washington²⁵⁶ supported the port monopoly proposal.

²⁴⁹ See, e.g., DOUGLAS IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 80 (1996) (observing that Adam Smith’s ideas on free trade did not begin to get cited as orthodoxy among economists until at least a quarter century after they were published in 1776). It is not uncommon to find descriptions of the Madisonian Constitution as “a part of the liberal, free trade tradition,” see, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 527 (2000), but those descriptions have to be understood as solely aspirational and not as descriptions of the times.

²⁵⁰ Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 8 MADISON PAPERS 500, 501.

²⁵¹ Alexander Hamilton, *Continentalist V* (Apr. 18, 1782), in 3 HAMILTON PAPERS 75, 76.

²⁵² See Letter from James Madison to James Monroe (Aug. 20, 1785), in 8 MADISON PAPERS 102.

²⁵³ See Letter from James Madison to James Monroe (June 21, 1785), in 8 MADISON PAPERS 306, 307.

²⁵⁴ See BRUCE A. RAGSDALE, *A PLANTERS' REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA* 269 (1996).

²⁵⁵ See Letter from Thomas Jefferson to James Madison (Nov. 11, 1784), in 8 MADISON PAPERS 127.

As with retaliation against the British exclusions, nothing came of the suggestion for an American Navigation Act. The Constitution itself eviscerated an American Navigation act by prohibiting Congress from imposing any tax on exports.²⁵⁷ The prohibition on export tax meant that Congress could not give a tax preference to American ships in the carrying of Southern commodities. Congress would have had to take the far more radical step of banning foreign ships from carrying American exports entirely. Congress never seriously considered a complete prohibition. On the import side, where tax was allowed, Congress did discriminate for a while against imports on foreign ships. The first tonnage fees imposed a tax of 6 cents per ton on American owned ships, but 50 cents per ton on foreign-owned ships.²⁵⁸ Discrimination was gutted by the Jay Treaty of 1786 with Great Britain, however, which obligated the United States and Great Britain to stop imposing higher taxes on each other's ships,²⁵⁹ and it seems to have been ended for all foreign ships in 1799 when general impost rates were raised to 10%.²⁶⁰ The call for a monopoly for American ships to carry American commodities never had enough

²⁵⁶ RAGSDALE, *supra* note 254, at 149.

²⁵⁷ U.S. CONST. art. I, § 9, cl. 5.

²⁵⁸ An Act for imposing duties on tonnage, 1st Cong., 1st Sess. ch. 3, 1 Stat. 27 (July 20, 1789) renewed, An Act imposing duties on the tonnage of ships or vessels, ch. 30, 1 Stat. 135 (July 30, 1790).

²⁵⁹ Treaty of Amity, Commerce and Navigation [Jay Treaty], Art. III, XV (concluded Nov. 12, 1794, ratified Feb. 1795, and promulgated Feb. 29, 1796), in SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 333-34 (1921).

²⁶⁰ An Act to regulate the collection of duties on imports and tonnage, ch. 22, § 61 (March 2, 1799) (imposing tax of 10% of cost). Imports from beyond the Cape of Good Hope were taxed at 20% of cost (*id.*), presumably because they would have a far larger mark up than imports, e.g., from Europe, and the statute was using cost as an estimate of value.

support even to get debated in Congress. Proposals that came to naught by reason of insufficient support, even once permitted, do not enhance the modest commerce clause.

2. Nationalizing the state imposts

“Regulation of commerce” was also a synonym for nationalizing state imposts so that the revenue from import taxes could be used to pay war debts and not be limited to exclusively state purposes. New York State’s impost on goods entering through New York harbor was especially hated. New York had vetoed a 1783 proposal to give the federal government a tax of its own, the 5 percent impost.²⁶¹ New York would veto again if given the chance, so as to tax her neighbors “by the regulation of her trade.”²⁶² In Connecticut, the proponents of the Constitution warned that those “gentlemen in New York who receive large salaries ... know that their offices will be more insecure ... when the expenses of government shall be paid by their constituents, than while paid by us.”²⁶³ New Jersey repudiated the 1786 requisition based on the argument that New Jersey had paid enough tax already because it received its imports through New York and Philadelphia.²⁶⁴ New Jersey, placed between Philadelphia and New York, was “a Cask

²⁶¹ JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 89-96 (1993). New York, in form, merely set new conditions on approval, including a New York state officer being appointed to collect the revenue and New York paper money being accepted for the tax, but the conditions were understood on both sides to be tantamount to a veto. New York paper would not help pay Dutch or French or Pennsylvanian creditors.

²⁶² Nathaniel Gorham, Speech at the Federal Convention (July 23, 1787), *in* 2 FARRAND’S RECORDS 90.

²⁶³ EDITORIAL, *NEW ENGLAND CONNECTICUT COURANT* (Dec. 24, 1787), *reprinted in* 15 DOCUMENTARY HISTORY 80, 82.

²⁶⁴ *See* VOTES AND PROCEEDING OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 12, Sess. 10, 2d sitting (1786); *see* RUTH BOGIN, *ABRAHAM CLARK AND THE QUEST FOR EQUALITY IN THE REVOLUTIONARY ERA, 1774-1794*, at 127-31 (1982).

tapped at both ends.”²⁶⁵ As Hamilton explained in *Federalist No. 7*, New York had rendered Connecticut and New Jersey tributary to New York by its “commercial regulations,” meaning tax.²⁶⁶ Federalizing the imposts was the feature of the commerce clause that generated almost universal assent --outside New York.²⁶⁷

In *Federalist No. 42*, Madison said that the object of the power to regulate commerce was relief for the “[s]tates which import and export through other States from the *improper* contributions levied on them by the latter.”²⁶⁸ In *Federalist No. 40*, he said that “[a]n acknowledged object of the Convention and the universal expectation of the people was that the *regulation of trade* should be submitted to the general government in such a form as would render it an immediate source of general revenue.”²⁶⁹ Imposts were relatively popular taxes under the mercantilist economics of their times, which disapproved of imports that drained specie. We need a controlling Union government to regulate commerce, George Washington wrote, to balance against the “luxury, effeminacy and corruption” introduced by foreign trade.²⁷⁰

In 1829, Madison would claim that the imposts were the only “commerce” issue and that the clause was intended, not as a positive grant of power, but rather as a negative by which to

²⁶⁵ James Madison, *Preface to Debates in the Convention of 1787* (c. 1830), in 3 FARRAND’S RECORDS 539, 542.

²⁶⁶ THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 17, 1787).

²⁶⁷ Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 451 (1941).

²⁶⁸ THE FEDERALIST NO. 42, at 283 (Madison) (Jan. 22, 1788) (emphasis added).

²⁶⁹ THE FEDERALIST NO. 40, at 262 (Madison) (Jan. 18, 1788).

²⁷⁰ See, e.g., Letter from George Washington to James Warren (Oct. 7, 1785), in 3 PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 298, 299-300 (W. Abbott ed., 1994).

prevent injustice among the States themselves.²⁷¹ That ignores the Navigation Act issues that never came to anything, but it is a judgment about the importance of issues under the commerce clause as Madison viewed them retroactively.

The commerce clause was not necessary, however, to nationalize the state imposts. Clause 1 of article I, section 8 gives Congress the power to tax and lists imposts as one of the taxes that Congress may impose, provided only that the rates are uniform across the states. The Constitution also separately prohibits states from imposing their own imposts, except with the permission of Congress.²⁷² We now also tend to call a tax on imports a tax issue, rather than an issue under “regulation of commerce,” although the legitimate usage of the times often treated tax and regulation of commerce as synonyms.

3. Interstate commerce

The important programs under the commerce clause were deep-water shipping issues, involving the British and American Navigation Acts and the state taxes on imports. The commerce clause, however, also gives Congress the power to regulate commerce with the Indian tribes and among the several states. It is commonly said that the major purpose of the commerce clause was to prevent protectionist economic policies among the states and to establish a common market with free trade across state borders.²⁷³ Interstate commerce, however, was in fact not important in the constitutional debates.

²⁷¹ Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 FARRAND’S RECORDS 478.

²⁷² U.S. CONST. art. I, §10, cl. 2.

²⁷³ *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533, 535 (1949)(saying that a “chief occasion” of the commerce clause was “the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation” and that the *sole* purpose for which Virginia initiated the movement which ultimately

Reducing barriers on interstate trade is not an important part of the constitutional debates, mostly because the goal had already been accomplished. The Articles of Confederation had already prohibited any state from imposing a “duty, imposition or restriction” on any out-of-state citizens that it did not impose on its own inhabitants.²⁷⁴ The states seem to have largely followed the norm, well enough that the issue did not number among the issues the debaters were most concerned about. Consistent with the norm and with the mandate of the Articles, the state imposts almost always exempted American source goods from tax.²⁷⁵ The New York impost that was a major irritant to its neighbors exempted goods and merchandise of American “growth and manufacture.”²⁷⁶ The Pennsylvania impost, which also drained New Jersey, also exempted goods of American “growth, produce or manufacture.”²⁷⁷ The Massachusetts impost had the

produced the Constitution was to allow Congress to examine the trade of the states and consider a uniform system of commercial regulation); Winkfield F. Twyman, Jr., *Justice Scalia and Facial Discrimination: Some Notes on Legal Reasoning*, 18 VA. TAX REV. 103, 108 (1998) (arguing that the Articles of Confederation had been unable to stem disruptive protectionism among the several states, thus threatening the life of the infant republic).

²⁷⁴ ARTICLES OF CONFEDERATION, art. IV (providing that the people of each state shall have “free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively”).

²⁷⁵ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 18 (1985) (saying that sister states were exempted from restrictions against foreigners); Edward Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 9, 18-19 (A. Dan Tarlock ed., 1981) (saying that the only example of a discriminatory state tax was New York’s attempt to prevent end runs around its anti-British tax); William Frank Zarnow, *New York Tariff Policies, 1775-1789*, 37 NEW YORK HISTORY: PROCEEDINGS OF THE NEW YORK HISTORICAL ASSOCIATION 40, 47 (1956) (describing New York exemptions).

²⁷⁶ 1 Laws of the State of NY (1774-84), March 22, 1784, p. 599, ch x, II.

²⁷⁷ Act of December 23, 1780, ch. 190, section 21, First Laws of the Commonwealth of Pennsylvania 427 (1984).

same exemption.²⁷⁸ Virginia had a 1 percent impost on goods from “any port or place whatsoever,”²⁷⁹ but Virginia was shamed into giving the usual exemption for goods of American growth or manufacture in January 1, 1788, at which time it also increased the rate to 3 percent.²⁸⁰ Virginia’s 1 percent impost, before its amendment, seems to have been the most serious violation of the norm against interstate tolls.

Protecting out-of-state individuals against discrimination by a state was an established and important norm in the debates, but the norm shows up almost entirely in issues other than interstate barriers. In the Constitutional debates, the constitutional prohibition on paper money issued by states²⁸¹ was said to be necessary to prevent “aggressions on the rights of other States”²⁸² and “injury to the citizens of other States.”²⁸³ Paper money was a trick, Gouverneur Morris explained, “by which Citizens of other States may be affected.”²⁸⁴

Hamilton did use the specter of trade barriers to scare voters toward ratifying the Constitution. In *Federalist No. 22*, Hamilton argued that if the Constitution were not ratified, the various states would impose multiple duties on interstate transportation, much as the separate

²⁷⁸ Act and Laws of the Commonwealth of Massachusetts, 1783, ch. 12, p. 17.

²⁷⁹ 11 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 38, §14 p. 70 (1781).

²⁸⁰ 12 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 1, §5 p. 416 (1788).

²⁸¹ U.S. CONST. art I, § 10, cl. 1.

²⁸² James Madison, *Vices of the Political System of the United States* (April 1787) in 9 MADISON PAPERS 350.

²⁸³ THE FEDERALIST NO. 44, at 301 (Madison) (Jan. 25, 1788) (arguing if states were given the power to issue money “the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured; and animosities kindled among the States themselves.”)

²⁸⁴ Gouverneur Morris (July 17, 1787), in 2 FARRAND'S RECORDS 26 (Madison Notes).

German states imposed tolls on the great rivers that flow through Germany.²⁸⁵ The thrust of the complaints, however, is not to the barriers under the Articles, but rather as a threat of what might happen if the unity of the United States fell apart. Hamilton’s example of inter-state barriers came from the German states, not from America. Tolls on inter-state commerce would require not just a failure to ratify the Constitution, under Hamilton’s argument, but also a repeal of the Articles of Confederation’s prohibition on interstate barriers, as well as an overriding of the “genius of the American people.”²⁸⁶ Interstate tolls is a goblin the closet that Hamilton used to scare the ratifiers.

As one superb review of the evidence put it, “the thing that strikes one’s attention in seeking reference to interstate commerce is their paucity.”²⁸⁷ The commerce clause was “a modest little power.”²⁸⁸ When Madison recorded the Convention’s agreeing to the commerce clause, without discussion or opposition, on August 16, 1787, he described the clause as the “[c]ause for regulating commerce with foreign nation and &c.”²⁸⁹ Regulation of commerce among the states shows up only within the “&c.”

²⁸⁵ THE FEDERALIST NO. 22, at 137 (Hamilton) (Dec. 14, 1787); *accord*, PUBLICOLA: ADDRESS TO THE FREEMEN OF NORTH CAROLINA, STATE GAZETTE OF NORTH CAROLINA (Mar. 27, 1788) (saying that if North Carolina did not ratify, then the other states would “treat us as foreigners” and preclude commerce with them or impose imposts that would annihilate our trade) *reprinted in* 16 DOCUMENTARY HISTORY 495.

²⁸⁶ THE FEDERALIST NO. 22, at 137 (Hamilton)(Dec. 14, 1787)..

²⁸⁷ Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 470 (1941).

²⁸⁸ *Id.* at 481.

²⁸⁹ 2 FARRAND’S RECORDS 308.

Given its modest original size, the modern importance of the commerce clause comes, much like a panda's thumb, because of evolutionary growth. A panda's thumb is apparently not a thumb at all, but is rather an evolutionary development from a once-tiny wrist bone, which evolved over time into a sharp tool to strip bamboo.²⁹⁰ So similarly, the commerce clause, authorizing Congress to adopt some deep-water shipping restrictions the nation did not really want, was once a small power, not much bigger than a wrist bone. Its humble roots do not mean that it is illegitimate. Pandas, for example, do need their bamboo-stripping "thumbs" for survival. The growth of the commerce clause was driven by "the common interests of the union." Still the meaning of the commerce clause in historical context was modest. The better textual explanation for the expanse of the commerce clause under current law is found in clause 1, which allows Congress to provide for the common defense and general welfare.

IV. Conclusion

The enumerated power doctrine maintains that Congress may only act for the activities listed in clauses 2 through 17 of article I, section 8. Even the necessary and proper clause at the end of the enumeration and the tax clause that precedes it were at one time said not to expand Congress's power beyond the enumeration.

The claim that the enumeration is exhaustive has never reflected our actual practice. When activities necessary for the common interest arise, we generally find that they are authorized although not enumerated. Sometimes the unenumerated power is implied without any basis in text. In the ratification debate, the federal passport system was said to be allowed although not expressed. Jefferson found that the power to purchase Florida and Louisiana were

²⁹⁰ See STEPHEN JAY GOULD, *THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY* (1980).

not within the enumeration, but still implied. Thus, the enumeration is said to be exhaustive, except where it is not.

We also have allowed powers for the exigencies of the union to be covered by the enumeration by stretching the words to fit the desired power. Thus “necessary and proper” was expanded to cover a national bank, against the opposition of the Jeffersonians. The power to regulate commerce was a very modest power in the 1787 debates, but it has exploded in the twentieth century to cover many of the necessities of the union.

The Constitution in clause 1 of its description of the federal range gives Congress the power “to provide for the common Defence and general Welfare of the United States.” The phrase is a synonym for the governing Convention resolution, which allowed Congress to “legislate for the common interests of the Union.” While clause 1 is a tax clause, the necessary and proper clause allows other instrumentalities to be used for the common defense and general welfare once tax is allowed. The Founders would have drawn no serious line to deny federal regulation once federal taxation was allowed.

An enduring Constitution should consist only of general provisions, Hamilton told the New York Ratifying Convention. It would be absurd to fix the division between federal and state objects in a Constitution, he said, because the text would then be too complicated and intricate. An alteration of circumstances, moreover, would make a change in the division indispensable.²⁹¹ The enduring principle intended by the founders was that the new federal government would undertake only things for the common or general interest, leaving local issues to the states where they could be of service. The detailed federal powers to provide for an army

²⁹¹ Alexander Hamilton, Speech to the New York Ratification Convention (June 28, 1788) in 2 ELLIOT’S DEBATES 364.

or navy or uniform immigration system were programs the federalists wanted to accomplish but they were also detailed illustrations of a general principle. The enumerated powers were not intended as restrictions on the necessities of the union, by way of petty limitations, and they are also the grand principle itself. It is after all a Constitution that we are interpreting.

The principle that Congress has a general power to provide for the common Defence and general Welfare is consistent with both the text of the Constitution and with our actual constitutional practices. The common defense and general welfare standard tells us how far to stretch the words of the enumeration and when implied powers are appropriate. The enumerated powers are illustrative of the appropriately national sphere, but not exhaustive. We need to go back to the fork in the road where we went down the path adopting the enumerated powers doctrine. We need to read our Constitution as allowing the federal government to provide for the common Defence and general Welfare of the United States.