

# A QUESTION PERPETUALLY ARISING: IMPLIED POWERS, CAPABLE FEDERALISM, AND THE LIMITS OF ENUMERATIONISM

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*The American constitutional order embodies a tension between two irreconcilable ideas. Enumerationism holds that federal powers are limited to those expressly enumerated in the Constitution, plus whatever implied powers are necessary and proper to execute them. What I call capable federalism asserts that the Constitution creates a national government fully empowered to address all national problems. Enumerationism rejects the idea that the federal government has general powers, or that it has implied powers of equal or greater dimension than those expressly listed. Capable federalism is a general power by definition, and it is fully compatible with formal recognition of implied “great” powers. Although the two theories are incompatible, our constitutional doctrine tries to harmonize them by claiming to adhere to enumerationism while evading its strictures. We find various constitutional tricks and cheats to accommodate the structural imperative that any federalist system must ensure that all societal problems can be addressed by at least one level of government. Still, an ideological overlay of enumerationism continues to suppress any formal recognition of capable federalism.*

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*This Article argues that enumerationism is an ideology far more than it is a viable constitutional theory. Lacking a compelling claim to our constitutional fidelity as a matter of text or history, enumerationism is also lacking as a principle. Its purported logical premises—that a limited grant of power requires enumeration, and that an enumeration must always be interpreted as exclusive—are both false. The inability of enumerationism to explain implied powers undermines its logical consistency. And by requiring as an axiom that we accept a regulatory gap—potential subjects of national regulatory concern that cannot be adequately addressed by any level of government in our federal system—enumerationism may impose social costs that constitutional fidelity does not require. Not surprisingly, our constitutional practice, over the long run from ratification to the present, has been reflective of capable federalism: some way will be found to accommodate a federal power to address national legislative problems.*

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[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

— Chief Justice John Marshall, *McCulloch v. Maryland*<sup>1</sup>

The people are as much interested, their liberty is as deeply concerned, in preventing encroachments on [the U.S.] government, in arresting the hands which would tear from it the powers they have conferred upon it, as in restraining it within its constitutional limits.

— John Marshall, pseudonymous editorial defense of *McCulloch v. Maryland*<sup>2</sup>

## INTRODUCTION

Our constitutional order embodies a tension between two irreconcilable ideas. One is that the U.S. Constitution creates a government of enumerated, and therefore limited, powers. The other is that the Constitution creates a national government fully empowered to address all national problems. For reasons that will be made clear, I call the former idea *enumerationism*, and the latter idea *capable federalism*.

By *enumerationism*, I mean the doctrine which holds that the Constitution limits federal powers to those enumerated. Enumerationists see limited powers and enumerated powers as implying each other as a matter of logic and history. According to enumerationism, the fact that the Constitution expressly lists specified powers necessarily limits the federal government to those powers. And conversely, such a limiting enumeration is logically necessary—so enumerationists contend—in order to implement the general principle that the powers of the federal government are limited. To maintain limits, the enumerated powers must be

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1. 17 U.S. (4 Wheat.) 316, 405 (1819).

2. John Marshall, *A Friend of The Constitution*, ALEXANDRIA GAZETTE, June 30 – July 15, 1819, reprinted in GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH v. MARYLAND* 159–60 (1969).

subjected to two interpretive constraints. The first holds that powers must be interpreted to stop short of a complete “police power.”<sup>3</sup> The second is the *expressio unius* canon, which guarantees that the list of enumerated powers cannot be added to.<sup>4</sup> Putting these two constraints together, enumerationism makes it axiomatic that there must be some matters that cannot be addressed by the federal government, even if the states are not capable of regulating them adequately. The acceptance of such a regulatory gap—a “No Man’s Land of final futility” in Franklin Roosevelt’s words<sup>5</sup>—is implicit in enumerationism.

*Capable federalism* is my descriptive term for the rejection of this regulatory gap. Capable federalism holds that the federal government is fully empowered to address all national problems, in particular those that cannot be adequately addressed at the state or local level. This idea was encapsulated in the Constitutional Convention’s directive to the Committee of Detail which drafted the Constitution’s enumerated powers:

[T]hat the National Legislature ought to be impowered [sic] to enjoy 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 to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.<sup>6</sup>

Capable federalism thus construes the enumeration of powers as an illustrative, not an exhaustive, list of powers under a broad power to legislate for the general welfare.<sup>7</sup> This does not mean that federal power is unlimited. Rather the limit is a general one—Is the asserted exercise of power for national rather than local purposes?—instead of one defined by a checklist of subject-specific express powers.

From the beginning of the Republic, our constitutional order has practiced capable federalism while more often than not purporting to adhere to enumerationism. If enumerationism were truly the foundational doctrine of the Constitution’s distribution of powers between the federal and state governments, we should be able to come up with several examples in which the federal government cannot constitutionally address some regulatory problem in spite of that problem’s national character. To be sure, there are a handful of examples where this occurred on a *temporary* basis. For example, manufacturing,

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3. See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578–81 (2014).

4. See Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016).

5. See *infra* note 45 and accompanying text.

6. Journal entry for July 17, 1787, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

7. In a similar vein, Calvin H. Johnson has argued that the best reading of the Constitution is that it grants the federal government a general power to legislate for “the general welfare”; in contrast, “[t]he enumerated powers doctrine holds that the federal government has no general powers and no unexpressed powers . . .” Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 25–26 (2005).

agriculture, infrastructure projects, and labor relations were all deemed beyond the scope of federal regulation at one time or another. Yet eventually federal regulatory power over these matters was recognized *without constitutional amendments*.<sup>8</sup> Only on one set of issues did constitutional amendment grant national powers to resolve a dispute over congressional authority: on the question of slavery and race relations.<sup>9</sup>

If this historical interpretation is correct, it tells us two things. First, enumerationism is not our law.<sup>10</sup> Second, the primary impetus for enumerationism was to protect slavery from federal abolition. Telling that historical narrative would be an epic undertaking beyond the capacity of a single law-review article, and it is not my purpose to undertake that here. This Article is, in essence, a prologue to that larger story: I argue that enumerationism is a non-binding ideology rather than a binding principle because (1) it lacks coherence; (2) it lacks a clear constitutional command; and (3) constitutional interpretation has developed in ways to systematically avoid it.

Enumerationism lacks coherence because its underlying premises are false and it cannot explain the limitations actually imposed on the federal government in our constitutional order. To begin with, the twin premises—enumerationism implies limits and limits imply enumerationism—are both false. An enumeration of powers need not be limited, and delegated powers can be limited in general terms. Moreover, a key axiom of enumerationism—that we must be willing to accept a regulatory gap that no level of government can effectively

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8. See, e.g., *United States v. Butler*, 297 U.S. 1, 77–78 (1936) (agriculture); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (employment); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–18 (1895) (manufacturing); David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1, 50 & n.267 (2015) (describing constitutionally-based vetoes of internal improvements bills by Presidents Madison and Monroe).

9. See *infra* Section IV.B.5.

10. But see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2363–65 (2015). Baude employs an “inclusive originalism” approach to argue that constitutional practices offer dispositive evidence of constitutional meaning. For analysis and critique of this type of argument, see Andrew Coan, *Foundations of Constitutional Theory*, 2017 WIS. L. REV. (forthcoming 2017) (manuscript at 54–64), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2822530](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822530) (describing this argument as “positivist originalism”). This type of originalist would respond to my argument by confession and avoidance: assuming a history of capable federalist constitutional *practice*, our continued *ideological* adherence to enumerationsim demonstrates that the latter is indeed “our law.” But such an argument is highly problematic. As Richard Primus observes, it uses the term *law* in a way that lacks the binding, constraining quality we usually associate with the idea of *law*. Further, it rests on the dubious assumption that our constitutional discourse is more authoritative than our constitutional practice—that what we say is the law, and what we do is not. See Richard A. Primus, *Is Theocracy Our Politics*, 116 COLUM. L. REV. SIDEBAR 44, 51–52 (2016). I would add that inclusive or positivist originalism offers no basis to distinguish between legal fiction or false ideological consciousness, on the one hand, and core ideals on the other. And at some point, the sheer weight and number of practices that “violate” the purported legal ideal create an untenable burden of overlooked illegality.

regulate—is not required by fidelity to the Constitution. Finally, enumerationism has failed to provide a coherent account of implied powers: there is no logical way to reconcile the recognition of implied powers with the application of *expressio unius* to the enumerated powers. The most ambitious effort to reconcile implied powers with enumerationism—the Great Powers theory recently suggested by Chief Justice Roberts and a handful of legal scholars—is an analytical failure. I lay out these arguments in Parts I and III, below.

Enumerationism lacks a clear constitutional mandate because the text, structure, and interpretive history of the Constitution do not compel enumerationism to the exclusion of capable federalism. Both ideas find support in the Constitution. This argument is presented in Part II.

Finally, I argue that constitutional interpretation throughout history has avoided enumerationism by crafting interpretive techniques that in effect have permitted the national government to exercise a general power to legislate for the common defense and general welfare. Examples of these interpretive avoidance techniques are discussed throughout this Article, but are the centerpiece of Part IV. Enumerationists have made frequent objections throughout constitutional history to various assertions of congressional power, and have won numerous battles. But as these examples show, enumerationism has lost the war. Many implied powers that are entrenched in our constitutional consensus violate the tenets of enumerationism.

While enumerationism has begun to come under critical scrutiny by a handful of legal scholars, it retains a powerful ideological hold. Despite its incoherence as a principle or theory, enumerationism has been so ideologically dominant that its supporters have never felt the need to go beyond reliance on truisms to explain its virtues or account for its flaws. As one prominent defender acknowledges, enumerationism is “a doctrine long taken for granted but never fully explained.”<sup>11</sup> Even critics of enumerationism tend to adhere to the notion that federal power must flow from the enumeration. Despite recognizing that the enumerated powers doctrine does little in modern constitutional law to limit federal power, most critics nevertheless stop short of claiming that the Constitution’s distribution of federal and state powers is based on something other than the enumerated powers.<sup>12</sup>

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11. Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J.F. 180, 181 (2014), <http://www.yalelawjournal.org/forum/the-sum-of-all-delegated-power>.

12. See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 2, 49–50 (2011) (arguing that original understanding of Commerce Clause empowers Congress to legislate, in effect, for the general welfare, within the framework of enumerated powers); Coan, *supra* note 4, at 1990, 2000, 2006 (arguing that the Supreme Court is obligated “to balance the Constitution’s commitment to internal limits with its equally apparent commitment to effective national government”); Primus, *supra* note 3, at 581 (arguing that the *enumeration principle* is consistent with a federal police power); Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMPLE L. REV. 1, 89–92 (2016) (rejecting Madison’s theoretical effort to reconcile limited enumerated powers with implied powers, but arguing for a liberal interpretation of enumerated powers).

Still, if the constitutional order has created a *modus vivendi* in which we are enumerationists in name but capable federalists in action, why should we care about a mere name change? Intellectual dishonesty aside, there is a certain danger in continuing to pay lip service to enumerationism, as that ideology continues to rear up from time to time with potentially damaging consequences. The Supreme Court in 2000 struck down a key provision of the Violence Against Women Act and in 2012 came within a hair's breadth of wrecking national health reform on the basis of enumerationism.<sup>13</sup> Three Supreme Court justices recently relied on enumerationism to suggest that Congress has significant gaps in its ability to legislate to comply with U.S. treaty obligations.<sup>14</sup> The Court's receptiveness to arguments based on the internal logic of enumerationism has encouraged commentators to advocate bending or discarding long-established constitutional interpretation.<sup>15</sup> Thus, if enumerationism is not our true constitutional understanding, it is worth being candid and consistent about that.

## I. ENUMERATIONISM VERSUS CAPABLE FEDERALISM

### A. *The Two Theories*

#### 1. *Capable Federalism*

If we were redesigning a federal system from scratch, dividing powers between the national government and the states, it would be perfectly sensible to authorize the national government to legislate on all matters where reasonably necessary to advance the general interests of the nation, to address problems beyond the capacity of the individual states, or to maintain harmony among different states or sections of the nation. The scope of capable federalism might best be captured in the idea of the general welfare, which includes the three categories identified in the Committee of Detail resolution quoted above: the power to legislate for the "general interests" of the nation, to redress state

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Calvin Johnson is a prominent exception, having boldly argued that the enumerated powers doctrine (enumerationism) is wrong. *See* Johnson, *supra* note 7, at 26–33. Though differing in some particulars, and suggesting different analytical pathways, I am in fundamental agreement with Professor Johnson's conclusions. Another exception is John Mikhail, who has made persuasive historical and textual arguments to the effect that the enumeration of powers was not intended to be exhaustive. *See* John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1090–97 (2015) [hereinafter Mikhail, *Language*]; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1057 (2014) [hereinafter Mikhail, *Clauses*].

13. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000); *see* Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 539 (2012).

14. *See* *Bond v. United States*, 134 S. Ct. 2077, 2102 (2014) (Thomas, J., concurring).

15. For example, William Baude has recently argued from enumerationist premises that the federal government lacks a power of eminent domain and even a power of military conscription. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1746–60, 1818–21 (2013).

incapacity, and to promote interstate harmony or coordination.<sup>16</sup> State incapacity, it should be noted, can arise not only from interstate externalities and market failures, but also from other state institutional failures. Examples include lobby groups that can overawe legislatures or bureaucracies at the state level more easily than the federal level, or the decline of media and oversight mechanisms that operate at the state level.<sup>17</sup> But state incapacity is just one test of what would fall in the domain of national power to legislate for the general welfare.

I call this version of federalism, based on such a general but limited grant of national power, *capable federalism*, because it assumes both a federal and a capable government. Because there is no predetermined, “internal” constitutional limit to the scope of legislative power,<sup>18</sup> at least one of the two levels of the federal government will be constitutionally capable of addressing all societal problems. While broad, the general welfare is not unlimited. These three facets of general welfare legislation (advancing the interests of the nation, state incapacity to address the problem, and promoting interstate harmony) stake out a limiting principle: the subjects of federal legislation must be national, not local.

The limit is not fixed or immovable, and I recognize that it creates operational challenges. But my task in this Article is to argue for the recognition of capable federalism as an embedded constitutional principle. How capable federalism should be operationalized, though an important question, is not one that has to be answered to establish its constitutional roots. The operational question has two elements, which I will merely identify here. First, what institutions are responsible for implementing capable federalism? Perhaps courts should define and apply the principle, or perhaps they should defer to congressional judgments. Second, what are the details of legislating for the general welfare, beyond national interests, state incapacity, and interstate harmony? There is certainly a broad range of societal problems that could, in theory, be regulated at either the federal or state level, or both through some version of cooperative federalism. The distinction is a moving target: subject matter might be best handled locally in some times and places and nationally at others. And there is no strict dichotomy making the two categories distinct even at a particular time: many problems could be handled either nationally or locally. Determining whether a regulatory problem is best handled at the national level requires a complex balancing of such matters as state incapacity and interstate externalities against the advantages of localism. The answer to the second question will more likely than not be debatable and perhaps indeterminate. Suffice it to say here that the answers to these questions in principle

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16. See *supra* note 6 and accompanying text. This concept undoubtedly includes, but may be broader than, the theory of “collective action federalism,” recently advanced by Robert Cooter and Neil Siegel. They argue that the enumerated powers of Congress should be interpreted expansively to authorize the federal government to solve those problems arising from interstate externalities and other national market failures. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 119–20 (2010); see also *id.* at 118 (“A federal constitution ideally gives the central and state governments the power to do what each does best.”).

17. See *id.* at 119–20; Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. (forthcoming 2017) (manuscript at 39–45), <https://ssrn.com/abstract=2927234>.

18. See *infra* note 61 and accompanying text.

are no more elusive than any other purported federalism limit applied in a close case.

## 2. Enumerationism

Enumerationism is the idea that by enumerating governmental powers, the Constitution necessarily limits them to what is expressly listed. Enumerationists are fond of quoting (out of context, as it happens) Chief Justice Marshall's famous dictum that "[t]he enumeration presupposes something not enumerated."<sup>19</sup> "So formulated, the enumeration principle is a special case of the *expressio unius* canon: to express one thing (enumeration) is to exclude the other (a general federal police power)."<sup>20</sup>

In its "strictest Jeffersonian form," enumerationism holds that the powers of Congress are limited to clauses 2 through 17 of Article I, Section 8,<sup>21</sup> plus a smattering of other powers expressly delegated to Congress outside Article I. The Taxing and Spending Clause and the Necessary and Proper Clause had to be interpreted so as not to "extend the range of the congressional powers beyond the list of sixteen in clauses 2 through 17" of Article I, Section 8.<sup>22</sup> Implied powers had to be confined to those that are "strictly necessary," without which the express power would be "nugatory."<sup>23</sup>

As should be apparent, this strict Jeffersonian enumerationism has not commanded an enduring constitutional consensus. While it has had occasional majorities in the political branches and a few invocations in Supreme Court opinions, its Necessary and Proper Clause prong was rejected in *McCulloch v. Maryland*.<sup>24</sup> The so-called Hamiltonian interpretation of the spending power prevailed over the Jeffersonian interpretation long before the Supreme Court acknowledged that fact in *United States v. Butler*.<sup>25</sup> Throughout our history, the

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19. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). The aphorism is quoted as if Marshall said this about the powers of Congress as a whole. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534–35 (2012) (opinion of Roberts, C.J.). In fact, Marshall was referring only to the Commerce Clause. To say that a particular enumerated power is limited to what is enumerated involves an analytically different statement from saying that the sum total of delegated power is limited to what is enumerated. *See Primus, supra* note 3, at 604.

20. Coan, *supra* note 4, at 1988.

21. Johnson, *supra* note 7, at 26.

22. *Id.*

23. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275, 275–78 (Julian P. Boyd ed., 1974); *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 367 (1819) (argument of counsel for Maryland) (*necessary* means "indispensably requisite").

24. 17 U.S. (4 Wheat.) at 413–16.

25. 297 U.S. 1, 66 (1936). Even staunch enumerationists like Presidents James Monroe and Andrew Jackson acknowledged a congressional power to spend for truly national purposes. James Monroe, *Views of the President of the United States on the Subject of Internal Improvements*, in 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 163–67 (1898); Andrew Jackson, *Veto Message, May 27, 1830 (Maysville Road bill)*, in 2 RICHARDSON, *supra*, at 483, 487.

federal government has found ways to legitimize departures from strict enumerationism—even by Jefferson himself.<sup>26</sup>

The enumerationism that has come down to us via the post-New Deal constitutional settlement and the post-1995 “federalism revival” of the Rehnquist and Roberts Courts has been revised to embrace *McCulloch*’s understanding of the Necessary and Proper Clause and a much-broadened understanding of the commerce, taxing, and spending powers. But modern enumerationism still adheres to the core idea that “[t]he Constitution’s express conferral of some powers makes clear that it does not grant others . . . . If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted . . . .”<sup>27</sup> Putting it slightly differently, modern enumerationism finds expression in the idea that limited enumerated powers deny the federal government a general “police power.”<sup>28</sup>

The systematic validity and logic of enumerationism have yet to be well-explained. Instead we see repeated, undertheorized invocations of enumerationism in arguments that take the form “there must be some limit,” or “if we accept the argument for the constitutionality of statute X, we can envision no statute that would not be within the powers of Congress” or more fuzzily, “accepting argument X would destroy the distinction between what is truly national and what is truly local.”<sup>29</sup> We know we’re dealing with enumerationism whenever an argument suggests that there must be “something we can point to” that falls outside federal power.

### 3. False Enumerationism

Modern enumerationists, then, insist on the existence of identifiable limits within a broader framework of accepting the main feature of the post-New Deal settlement: a broad interpretation of the Commerce Clause and a flexible interpretation of the spending power that allows the federal government to create and administer the modern welfare state.<sup>30</sup> This version of enumerationism is certainly watered down in comparison with its pre-New Deal and nineteenth-century versions, but at least it is more or less sincere.

The more widespread viewpoint today, however, is probably best characterized as “capable federalism in enumerationists clothing,” or more simply

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26. See *infra* Part IV.

27. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534–35 (2012) (opinion of Roberts, C.J.).

28. See, e.g., United States v. Morrison, 529 U.S. 598, 618 (2000) (“We can think of no better example of the police power, which the Founders denied the National Government and reposed in the states, than the suppression of violent crime and vindication of its victims.”); United States v. Lopez, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power . . . .”).

29. See, e.g., Lopez, 514 U.S. at 564 (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”).

30. See, e.g., *id.* at 574 (Kennedy, J., concurring) (stating that stare decisis forecloses the Court “from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries”).

what I call *false enumerationism*. Under this view, whose traditions go back to the early days of the Republic, enumerationism is little more than an interpretive game. While taking capable federalism for granted, the constitutional interpreter must craft an argument attaching the proposed federal power to some enumerated power—any power, or combination of powers—through “liberal” construction or some other interpretive technique to avoid the strictures of enumerationism.<sup>31</sup> Perhaps “game” is unduly disrespectful. Richard Primus has analyzed false enumerationism as a more dignified thing, calling it a “continuity tender,” by which he means a purely ceremonial exercise whose function is to link the present with a tradition whose substance has drained away.<sup>32</sup>

Not only has false enumerationism always been a significant mode of constitutional discourse, it is the dominant mode of discussing enumerated powers today. Many early congressional debates were characterized by casting about for various enumerated powers that would purportedly authorize the bill in question, without any clear agreement about which power did the trick.<sup>33</sup> The Supreme Court relied on this mode of argument in *McCulloch v. Maryland*,<sup>34</sup> in which Chief Justice Marshall famously avoided linking the implied power to incorporate a national bank to any specific enumerated power.<sup>35</sup> Today, four members of the Supreme Court and most members of the legal academy are capable federalists who are ready, willing, and able to find any federal legislation that supports the general welfare to be authorized by some enumerated power.<sup>36</sup> (When it comes to prohibiting marijuana, additional members of the Supreme Court become capable federalists.<sup>37</sup>) In the legal academy, an exemplar of false enumerationism is Jack Balkin’s ambitious attempt to demonstrate that the original public meaning of the Commerce Clause was to authorize the national government to legislate for the general welfare. According to Balkin, the term *commerce* in eighteenth-century usage encompassed essentially all human interaction.<sup>38</sup> Balkin’s effort to avoid the strictures of enumerationism through liberal construction of the enumerated powers is a technique that dates back to Alexander Hamilton’s memo to President

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31. See *infra* Part IV.

32. Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 13, 20 (2016).

33. See *infra* Part IV.

34. 17 U.S. (4 Wheat.) 316 (1819).

35. See Schwartz, *supra* note 8, at 57–63 (identifying and explaining this omission).

36. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 589–99 (2012) (opinion of Ginsburg, J., joined by Breyer, Sotomayor, and Kagan); Cooter & Siegel, *supra* note 16, at 118–20 (arguing for general welfare theory of federal power); Balkin, *supra* note 12, at 15–16 (implying that commerce power functions as a general welfare power).

37. Justice Kennedy joined the majority and Justice Scalia concurred in the judgment in holding mere possession of marijuana to be either an interstate economic activity, or necessary and proper to economic regulation. *Gonzales v. Raich*, 545 U.S. 1, 4 (2005); see *id.* at 33 (Scalia, J., concurring).

38. Balkin, *supra* note 12, at 15–16.

Washington in support of the constitutionality of the First Bank of the United States.<sup>39</sup>

Without necessarily committing himself to false enumerationism as a principle, Richard Primus explains its inner logic. According to his deceptively simple yet striking insight, enumerated authorizations of power are not necessarily “more limiting in practice than general authorizations.”<sup>40</sup> He illustrates with this homespun example:

[I]s “you can have chocolate, vanilla, or strawberry ice cream for dessert” more limiting in practice than the general authorization “you can have ice cream for dessert”? The answer on any given day might be yes or it might be no. It depends on the contents of the freezer.<sup>41</sup>

Thus, the enumeration of powers doesn’t logically imply the “internal-limits canon”—the interpretive rule central to enumerationism, stating that there must be “things Congress cannot do, even without reference to affirmative prohibitions like those in the Bill of Rights.”<sup>42</sup> The internal limits on the powers of Congress are contingent on the state of the world at a given time. If all of society’s problems present themselves as interstate commerce problems, for example, then Congress could legislate on all of society’s problems, exercising something very closely resembling a general police (i.e., unlimited) power.<sup>43</sup>

Surely, Primus is right that our Constitution’s enumeration of powers is not limiting in a state of the world where all regulatory problems can be characterized as commerce. But in such a state of the world, enumerationism is drained of all substantive content. Most modern constitutional interpreters in fact argue, with some plausibility, that we live in just that state of the world—literally all human activity (and inactivity) has economic ramifications.<sup>44</sup> That was in essence the argument made, and rejected in *Lopez* and *Morrison*, and accepted in *Raich*. But if that’s the world we live in, enumerationism is false. It becomes meaningless to speak of the enumerated powers as effectively limiting federal power to the stated subjects.

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39. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 105 (Harold C. Syrett & Jacob E. Cooke eds., 1965) (government powers “ought to be construed liberally, in advancement of the public good”).

40. Primus, *supra* note 3, at 581.

41. *Id.*

42. *Id.* at 578.

43. *See id.* at 578–79.

44. *See, e.g.*, Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 802 (1995) (“Any first-year law student can show by cumulating individually insignificant effects that any given congressional regulation of commerce rationally might be based on the belief that a state activity was generating significant external effects on other states and thus on interstate commerce.”).

### *B. Logic and Structure*

Both enumerationism and capable federalism are structural ideas about the Constitution's division of power between the federal government and the states. This Section explores the internal logic of those structural ideas to make two basic points. First, enumerationism necessarily rejects what I call *the structural imperative*—the idea that the national government must be empowered to address all national problems, which is the defining feature of capable federalism. Second, enumerationism requires that we live with the possibility—really, the likelihood—that there are some social or regulatory problems that no level of government can solve. For enumerationism, rejecting the structural imperative is necessary to make the idea of limited power operational, and doing so makes enumerationism incompatible with capable federalism.

#### *1. The Structural Imperative*

In a March 4, 1937 Victory Dinner speech, the day after his second inaugural, Franklin Roosevelt took the Supreme Court to task for striking down key New Deal legislation the previous year. Roosevelt said that a majority of the Supreme Court had determined “that we live in a Nation where there is no legal power anywhere to deal with its most difficult practical problems—a No Man’s Land of final futility.”<sup>45</sup> One of the cases Roosevelt attacked in the speech was, of course, *Carter v. Carter Coal*,<sup>46</sup> which had struck down the Bituminous Coal Preservation Act. There, the Court had explicitly rejected “[t]he proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally . . . cannot adequately deal . . .”<sup>47</sup> Roosevelt picked up this gauntlet thrown down by the Court; his peroration comprised a litany of problems facing the country: “Here is one third of a nation ill-nourished, ill-clad, ill-housed—*now!* Here are thousands upon thousands of farmers wondering whether next year’s prices will meet their mortgage interest—*now!*” The list concluded: “If we would keep faith with those who had faith in us, if we would make democracy succeed, I say we must act—*now!*”<sup>48</sup>

Roosevelt was plainly expressing the structural imperative in the U.S. Constitution. The national government must have the constitutional authority to address all national problems. The “No Man’s Land” in which “there is no legal power anywhere” to address national problems was unacceptable. The *Carter Coal* Court was equally plain in rejecting the structural imperative, precisely because of its fundamental incompatibility with enumerationism: it, along with “the related notion” that Congress “may enact laws to promote the general welfare,” was “in direct conflict with the doctrine that this is a government of enumerated powers.”<sup>49</sup>

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45. 6 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 118 (Samuel I. Rosenman ed., 1941); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 375–76 (2010).

46. 298 U.S. 238, 317 (1936).

47. *Id.* at 291.

48. 6 ROOSEVELT, *supra* note 45, at 121.

49. *Carter Coal*, 298 U.S. at 291, 293.

The No Man's Land was a fact of life mandated by the Constitution: "There are many subjects" in which state legislative disharmony or incapacity "have resulted in injurious confusion and embarrassment," but the only "constitutional way" to address such problems is through "preparing and securing the passage by the several states of uniform laws."<sup>50</sup> The Court offered no analysis of whether a uniform-state-laws approach was feasible; presumably, if it weren't, that would just be too bad. *Carter Coal* is an enumerationism manifesto, just as Roosevelt's speech is a capable federalism manifesto.

The New Deal settlement is thought to have represented a victory for Roosevelt and the structural imperative.<sup>51</sup> To be sure, the structural imperative has been largely accommodated under the umbrella of enumerated powers, primarily through an expansive interpretation of the Commerce Clause.<sup>52</sup> But while *Carter Coal* is no longer good law in its crabbed interpretation of interstate commerce, its discussion of enumerationism lives on. The victory of capable federalism is thus incomplete, as illustrated by cases like *Morrison* and *National Federation of Independent Business* ("NFIB"). In those cases, factors justifying national solutions to legislative problems—such as interstate externalities, the national scale of the problem, or state inability or unwillingness to act effectively—were deemed irrelevant and insufficient to justify Commerce Clause regulation of problems that were held not to be commerce.<sup>53</sup> At the same time, the enumerationism requirement to shoehorn all national problems into a definition of commerce, however broad, is absurd and potentially dangerous. To paraphrase Calvin Johnson, we should not have to beseech the Supreme Court to find that contagious diseases or pollution or natural disasters are "interstate commerce" in order to permit federal disease abatement, pollution control, or disaster relief.<sup>54</sup> The Court might say no.<sup>55</sup>

Another facet of the structural imperative is the idea that the federal government should not be dependent on the states for the performance of its core functions. This was the driving force behind the central political theory that the federal government could act directly on the people—tax them without having to rely on the states as intermediaries, regulate their interstate commerce, and the like. This idea was forcefully expressed by Marshall in *McCulloch v. Maryland*: "No trace is to be found in the [C]onstitution of an intention to create a dependence of the government of the Union on those of the States, for the

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50. *Id.* at 292–93.

51. *See, e.g.*, Balkin, *supra* note 12, at 2–3.

52. *See, e.g., id.*

53. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 589–99 (2012) (Ginsburg, J., concurring) (arguing that Chief Justice Roberts seems to ignore state inability to regulate the "immense" health care market in holding that healthcare is not interstate commerce).

54. Johnson, *supra* note 7, at 34; accord Cooter & Siegel, *supra* note 16, at 120 (identifying "environmental problems and contagious diseases" as examples of noncommercial interstate problems).

55. *See, e.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (Rehnquist, C.J.) (suggesting that environmental protection is not commerce regulation).

execution of the great powers assigned to it.”<sup>56</sup> Perhaps Marshall overstated things a bit: there seem to be some intended interdependencies, such as reliance on militia rather than a federal standing army for emergency defense, state management of elections, and others. But no such dependencies should be lightly implied, and Marshall’s statement suggests an interpretive principle that doubtful cases should be resolved in favor of self-sufficient federal power.

## 2. *The Logic of Limits*

A key tenet of enumerationism is the purportedly axiomatic connection between the Constitution’s enumeration of powers and the consensus principle that the national government has limited powers. To enumerationists, enumeration implies limits: the purpose and meaning of enumerating powers is to limit them. At the same time, enumerationism maintains the converse, that limits imply enumeration. To have a limited delegation of power, enumerationism contends, there must necessarily be a list of powers subject to the *expressio unius* canon. Yet, on closer inspection, neither implication is necessarily true.

Some conceptual terminology requires explanation before proceeding. The idea of unlimited power has been referred to as a *police power* as far back as the 1830s, at least.<sup>57</sup> It captures the idea of a lack of presumptive subject-matter limitations on granted legislative power. According to enumerationists, our constitutional order has attributed this type of power to the states and withheld it from the national government.<sup>58</sup> This arrangement is frequently associated with Madison’s statement in *The Federalist No. 45* that “[t]he 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.”<sup>59</sup> Various scholars have labeled the presumptive limits on federal power as *internal limits*, distinguishing them from two other types of constitutional limits. *External limits* are those external to the grant of power, and are found in express limitation provisions such as Article I, Section 9, or the Bill of Rights. *Process limits* are the nonjudicial checks and balances built into the governing (particularly legislative) process set out in the Constitution.<sup>60</sup>

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56. 17 U.S. (4 Wheat.) 316, 424 (1819).

57. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 13–17 (1996).

58. See *id.* at 12–15, 243; see also *United States v. DeWitt*, 76 U.S. 41, 45 (1869) (states but not federal government have police power). Technically, a police power is a general implied power over all *internal* legislation without the requirement of specific grants. States have long been deemed to hold police powers, yet even Antifederalists rarely if ever assumed a state power over external matters like war and foreign affairs. See JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 355–62 (1996); Johnson, *supra* note 7, at 42–43.

59. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961); see, e.g., *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (quoting *id.*).

60. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 297 (2000); Primus, *supra* note 3, at 579. The “check” of judicial review is not a process limit, since it requires the application of an internal or external limit to the legislation under review.

To say that enumeration implies limits means that an enumeration of powers will always produce discernable *internal* limitations on powers. But, as Primus has demonstrated, this axiom of enumerationism doesn't hold. There are plausible states of the world in which this is untrue.<sup>61</sup>

Andrew Coan has approached the problem slightly differently to uncover another conceptual problem with enumerationism. According to Coan, the "enumeration principle" can be operationalized in a meaningful way only if the chosen limits bear some logical relationship to the constitutional policies that purport to justify the enumeration of powers. But while enumerationism insists that "federal power as a whole must be subject to *some* internal limit," the doctrine in fact supplies no criteria to choose among a "universe of potential limits" that is "practically infinite."<sup>62</sup> And as many observers have previously commented, the particular limits the Court has chosen from time to time appear somewhat random and unrelated to the stated justifications of protecting state autonomy, localized decision-making, or individual rights.<sup>63</sup> To date, the limits haven't fit the justifications. Moreover, it isn't even clear whether they can, without merging into something very much like a general power to legislate on national concerns.<sup>64</sup>

These analyses are fruitful in challenging the *enumeration implies internal limits* axiom of enumerationism. But neither analysis exposes the full extent of the conceptual problems that undermine enumerationism. Primus demonstrates that enumerationism cannot prove the existence of actual substantive limits as a purely logical, a priori matter. He thus discredits arguments in the form of "X can't be commerce, because if it were, there would be a general federal police power." Primus points out that there are one or more possible states of the world in which all regulatory problems take a form that falls within the enumerated powers. But that doesn't leave enumerationists with nothing to say; it merely shifts the argument from a purely logical one to an empirical or definitional one. An enumerationist need only argue that we are not in one of those states of the world. This is something that enumerationist arguments do all the time, and it is very easily done. Simply by arguing that possession of a gun in a school zone (or violence against women) is not in fact commerce, an enumerationist has implicitly asserted that we are not in one of Primus's posited states of the world. At the end of the day, Primus tells enumerationists only that they must add a premise to their axiom. They must now say "enumeration implies limits if, and only if, at least some regulatory problems take a form that falls outside the enumerated powers."

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61. See *supra* text accompanying notes 40–43.

62. Coan, *supra* note 4, at 1994 (emphasis added).

63. See *id.* at 1998 (questioning whether enumeration serves individual liberties). For instance, as Coan observes, the enumerationist argument in *NFIB* claimed to be protecting our liberties against a definition of power that would *force* us to eat broccoli, but did so by asserting a rule that nevertheless would empower Congress to *prohibit* us from growing or consuming "this delicious vegetable." *Id.*

64. *Id.* at 1990, 2000, 2007 (arguing that the Court has failed to grapple with the difficult question of "how to balance the Constitution's commitment to internal limits with its equally apparent commitment to effective national government").

Despite their cogent critiques of the *enumeration implies internal limits* axiom, Coan and Primus seem to go along with—or at least fail to contest fully and explicitly—the converse axiom that *internal limits imply enumeration*. That axiom, by assuming that internal limits must be specific and enumerated, implies that we must choose between enumerated powers and a police power. But that’s a false dichotomy. Significantly, there is a major middle ground between a federal police power and enumerationism. A power to legislate for *the general welfare*—that is, when national rather than purely local interests are at stake—is a *limited* grant of power, even though it is a general and not an *enumerated* grant.<sup>65</sup>

This distinction is hugely important. The ideological dominance of enumerationism owes much to the consensus bedrock principle that the federal government is a government of powers that are not only delegated or granted, but also defined and limited. But both delegations *and* limitations of power can be made in general terms.<sup>66</sup> A consolidated national government could legislate on all matters; a federal constitution authorizing the national government to legislate only on matters of national concern is comparatively limited. Thus, Coan’s suggestion that limited enumerated powers and effective government “may, in modern economic circumstances, be fundamentally irreconcilable”<sup>67</sup> is true as far as it goes, but overlooks the possibility that our Constitution’s commitment is to limited *general* powers rather than limited *enumerated* powers. Even Madison’s famous aphorism is ambiguous: a general power to legislate for the general welfare may not be an enumerated power properly understood, but it is a delegated power that is both “defined” and “few” (just one).<sup>68</sup> Enumerationism falsely assumes that constitutional limits must be enumerated rather than general.

### 3. *The Regulatory Gap Inherent in Enumerationism*

As we saw above, enumerationism raises the problem of a regulatory gap—Roosevelt’s No Man’s Land of final futility—in which a societal problem falls outside the limits of enumerated powers, but also falls outside the state’s ability or willingness to address it. This regulatory gap is more than a matter of historical contingency: it is almost, though perhaps not quite, a logical consequence of enumerationism.

Enumerated powers could be construed so elastically that all problems falling into the regulatory gap are absorbed into broad interpretations of federal powers. Something very close to this has been done with the Commerce Clause. This strategy is what I have already identified as false enumerationism. And since it fills the regulatory gap by expanding federal powers to the point at which they are indistinguishable from capable federalism, the strategy is not one that can be adopted in good faith by a true enumerationist. Indeed, as noted above,

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65. See Cooter & Siegel, *supra* note 16, at 119; Johnson, *supra* note 7, at 31–32.

66. Primus makes this point about general delegations at some length, though he does not discuss general limitations are a corollary to this. See Primus, *supra* note 3, at 636–37.

67. Coan, *supra* note 4, at 2011.

68. Whether Madison meant it exactly that way is somewhat beside the point. See *supra* note 59 and accompanying text; *infra* note 186 and accompanying text.

enumerationists reject this idea by arguing in effect that there must be some identifiable subjects outside of federal competence to demonstrate that the federal government is not exercising an unlimited police power.

True enumerationism has two ways of dealing with the regulatory gap. One is denial of its existence. An enumerationist can argue that the only truly national regulatory matters are those identified by the enumerated powers. This argument can be tautological: “the enumerated powers identify national problems by definition: if it’s not interstate commerce, bankruptcy, treason, etc., it’s not a national problem.” Or the argument can be factually contentious: “regulatory problems falling outside the enumerated powers can be adequately addressed by the states, so, therefore, there is no regulatory gap as a matter of historical fact.” In either form, the denial poorly explains our constitutional and regulatory history, in which problems arguably falling outside the enumerated powers were not, and perhaps could not have been, adequately addressed by state regulation. Denial of the existence of a regulatory gap seems to be at least a mild form of denial of reality.

The other available enumerationist response is “that’s too bad.” If a problem falling outside the limits of enumerated powers is one that cannot be adequately addressed by the states, we must accept that as a constitutional fact of life. Maybe the regulatory gap is not so bad; whatever the states can accomplish has to be good enough. This was in essence the response of the *Carter Coal* Court.

Either way, enumerationism is logically committed to accepting whatever regulatory gap may exist. Unless we cling to some formula denying the reality of a regulatory gap, we can go a step further and say that a regulatory gap, with all its attendant social costs, is an inherent feature of enumerationism.

## II. ENUMERATIONISM VERSUS CAPABLE FEDERALISM IN TEXT AND HISTORY

Limited enumerated powers are accepted so axiomatically as a feature of our constitutional order that it would be reasonable to expect a clear enumerationist mandate in the text or history of the Constitution. In fact, the Constitution’s text and history are ambiguous, lending support to both capable federalism and enumerationism. The ambiguity—indeed, ambivalence—was captured early in the Constitutional Convention in an interchange between two members of the Virginia delegation in proposing the so-called Virginia Plan. Resolution 6 of the Virginia Plan proposed

that the National Legislature ought to be impowered [sic] to enjoy the Legislative Rights vested in the Congress by the Confederation & moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation . . . .<sup>69</sup>

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69. 2 FARRAND, *supra* note 6, at 131. This language differs notably from the final instructions given to the Committee of Detail, which added the phrase “for the general interests of the union, and also in those . . .” immediately after “in all cases.” See *supra* text accompanying note 6.

Speaking to this resolution from his own delegation, Edmund Randolph said that he “disclaimed any intention to give indefinite powers to the national Legislature” and that “his opinion was fixed on this point.”<sup>70</sup> James Madison, according to his own convention notes, responded that he

had brought with him in the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but he had also brought doubts concerning its practicability. . . . [He] should shrink from nothing which should be found essential to such a form of Govt. as would provide for the safety, liberty and happiness of the Community. This being the end of all our deliberations, all the necessary means of attaining it must, however reluctantly, be submitted to.<sup>71</sup>

Given this beginning, it is unsurprising to find the text and history of the delegated powers of the national government to waver between enumerationism and capable federalism. Without agreeing that originalism supplies the controlling methodology, or entering the intramural dispute between original-intent and original-public-meaning originalists,<sup>72</sup> I review evidence that should be relevant to those approaches, as well as to interpretive methodologies that view history as relevant even if not binding.

#### A. Text

The enumerationist argument commonly begins with the enumeration itself.<sup>73</sup> But importantly, the mere fact of enumeration does not compel enumerationism. The debate concerns how we interpret the enumeration, not whether the enumeration exists—clearly it exists. Enumerationism is an *approach* to interpreting the enumeration, specifically by applying the *expressio unius* canon to conclude that the enumeration is exhaustive.<sup>74</sup> Every list raises some version of this exhaustive-or-not problem, and it is well established that a mild presumption in favor of applying *expressio unius* is overcome by context suggesting that the list is nonexhaustive.<sup>75</sup> Here, on the face of the document, we have language suggesting the application of the *ejusdem generis* canon, which in effect would interpret the enumeration as nonexhaustive.<sup>76</sup> Right from the outset, enumerationists are forced to yield the high ground of clear constitutional text, and we are required to look outside the listed powers themselves to decide whether the enumeration is best understood as exhaustive.

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70. Journal entry for May 31, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., 1911).

71. *Id.*

72. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–9 (2015).

73. See *infra* text accompanying note 77.

74. See Coan, *supra* note 4, at 1988.

75. See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 582–84 (2000); WILLIAM N. ESKRIDGE, JR., ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 1091 (2014).

76. See *infra* text accompanying note 113.

*1. Powers “Herein Granted”*

Enumerationists have always asserted that the concept of limited-enumerated powers is somehow made clear by Article I, Section 1’s statement that “[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .”<sup>77</sup> Yet this interpretation is question-begging. To be sure, *herein granted* implies some sort of limitation on legislative power regarding the Constitution. But particularly considering the conscious and celebrated omission of the word *expressly* which modified the grant of powers to Congress under the Articles of Confederation,<sup>78</sup> the phrase *herein granted* does not plainly negate implied or general powers. A general power to legislate on all matters concerning the general welfare of the nation, that promote interstate harmony, or as to which the states are incompetent, can be “granted” in a written document. Implied powers can also be granted by a written document—by implication.<sup>79</sup> Were that not so, the word *expressly* in *expressly granted* would be redundant.

Because the linguistic meaning of *herein granted* does not negate implied or general powers, the enumerationist herein-granted argument is thus often framed as an intertextual one. The powers “herein granted” must, it is said, be compared to the grant of powers “vested” in the President by Article II, Section 1. Specifically, according to this argument, these phrases mean that Congress’s power is limited to enumerated topics, while the President enjoys implied powers not limited to those enumerated in Article II, but inherent in the nature of executive power.<sup>80</sup> Yet this argument for enumerationism is problematic, and in

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77. See, e.g., *United States v. Lopez*, 514 U.S. 549, 592 (1995) (“Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers ‘herein granted’ by the rest of the Constitution.”); D. A. Jeremy Telman, *A Truism That Isn’t True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 150 (2001) (“[H]erein granted” language, “read together with the explicit enumeration in Section Eight of Article I, indicates the Framers’ intention to limit the Legislature to those powers . . . .”); see also Mikhail, *Language*, *supra* note 12, at 1080 (discussing examples in which “many commentators” understand “herein granted” to say that Congress is textually limited to its enumerated powers”).

78. “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION of 1781, art. II.

79. John Mikhail provides a sophisticated and persuasive linguistic analysis reaching the same conclusion. See Mikhail, *Language*, *supra* note 12, at 1080–81 (arguing that the *herein granted* language does not entail limitation to the enumerated powers by its direct linguistic meaning, and any implication that it does can be cancelled by other language or context implications).

80. See *Zivotovsky v. Kerry*, 135 S. Ct. 2076, 2097–98 (2015) (Thomas, J., concurring) (“By omitting the words ‘herein granted’ in Article II, the Constitution indicates that the ‘executive Power’ vested in the President is not confined to those powers expressly identified in the document.”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570 (1994) (“There are many reasons why the Vesting Clause of Article II must be read as conferring a general grant of the ‘executive Power’ . . . .”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001) (arguing that Article II’s Vesting Clause “must” be a grant of power because Article I refers only to those powers herein granted).

some ways self-defeating. The Necessary and Proper Clause authorizes Congress “[t]o make all laws which shall be necessary and proper for carrying into execution . . . all other powers *vested* by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>81</sup> If *vesting* suggests the grant of implied or inherent powers in a way that *herein granting* doesn’t, well then Congress has “vested” powers too. At a minimum, Congress has powers to pass laws necessary and proper to the exercise of implied or inherent powers outside Article I, including those purportedly vested in the President.

## 2. *The Preamble*

Enumerationism derives its impetus from a world view in which powerful governments are assumed as a sort of natural default state, and constitutions are written to impose limits. That idea undoubtedly had some purchase in the Revolutionary and Founding eras.<sup>82</sup> A natural place to state this principle of limited government would have been the Preamble. But the Preamble says this:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.<sup>83</sup>

As Sotirios Barber has insightfully observed, “the Preamble mentions no ideas relating to the arrangement of governmental offices and powers,” and it “therefore suggests that the mere maintenance of constitutional institutions, including federalism, is not an end for which the Constitution was established.”<sup>84</sup> The Preamble could easily have been written to add a phrase like “while limiting government to prevent tyranny,” but it wasn’t. Like specific institutional arrangements, checks on national power are means—and not ends—of U.S. constitutional government. Barber points us to “a neglected passage” of *The Federalist No. 45*, in which Madison writes, “the public good, the real welfare of the great body of the people is the supreme object to be pursued.” Moreover, “as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.”<sup>85</sup>

To the eighteenth- and early-nineteenth-century mind, historian William Novak tells us, the government’s overriding obligation was to promote a well-

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

82. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 47–58 (2003).

83. U.S. CONST. pmbl.

84. SOTIRIOS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS* 3 (2013). It would be a stretch to read “secure the blessings of Liberty” to limit the powers of the general government. As the Marshall epigraph at the start of this Article suggests, liberty also involves effectuating the will of the people through government action. See Marshall, *supra* note 2 and accompanying text.

85. BARBER, *supra* note 84, at 3 (quoting THE FEDERALIST NO. 45, at 309 (James Madison) (Jacob E. Cooke ed., 1961)).

regulated society guided by the twin maxims *salus populi suprema lex est* (the welfare of the people is the supreme law) and *sic utere tuo ut alienum non laedas* (use your own so as not to injure another).<sup>86</sup> As Novak painstakingly demonstrates, the well-regulated society in both theory and practice involved comprehensive and dense regulation of property and conduct. To be sure, most of this regulation took place at the local level of government. Yet as Novak makes clear, the idea of plenary power to legislate for the general welfare was baked into many theorists' idea of government.<sup>87</sup> While Novak's emphasis was on state and local regulation, some theorists seemed to take these ideas to the national level. For instance, James Wilson, a leading architect of the Constitution and key drafter of the legislative powers, conceived of a general-welfare power at the national level: "A nation should aim at its perfection. The advantage and improvement of the citizens are the ends proposed by the social union."<sup>88</sup> These ideas tell us that when speaking of the *ends* of government in the Constitution, at least some of its interpreters were thinking broadly of the common defense and the general welfare. This is not to deny that great importance was placed on limiting the national government, but to suggest that the limit may have been, for some, the flexible limit of general welfare.

This background enables us to make sense of what might otherwise have seemed a far-fetched argument offered by William Pinkney, the lead lawyer for the Bank of the United States in *McCulloch v. Maryland*. For Pinkney, any power could be implied so long as it served the ends of government; but unlike Marshall's equation of "ends" of government with "great powers," Pinkney argued thus:

Has Congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power, than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the [C]onstitution, and have no limits but the [C]onstitution itself. A more perfect union is to be formed; justice to be established; domestic tranquility insured; the common defence [sic] provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude.<sup>89</sup>

Pinkney, in other words, identified the ends of government as those stated in the Preamble, whereas the enumerated powers were all mere means.

The enumerationist way of dealing with the Preamble is simply to treat it as having no legal or interpretive significance. This view was stated by the

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86. NOVAK, *supra* note 57, at 42.

87. *Id. passim*.

88. *Id.* at 45–46 (quoting 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON, 400 (Kermit L. Hall & Mark David Hall eds., 2007)).

89. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 381 (1819) (argument of Mr. Pinkney).

Supreme Court at the turn of the twentieth century<sup>90</sup> and is the dominant view in contemporary legal doctrine.<sup>91</sup> Yet a plausible, and in my view better, reading of the Preamble is to treat it as an interpretive principle to be applied to the body of the Constitution, if not as a grant of powers.<sup>92</sup> Under that principle, ambiguities would be resolved in favor of constructions that promote the general welfare. This principle would prefer a capable federalist reading of the enumerated powers over an enumerationist reading that would disable government from solving particular national problems.

### 3. *The General Welfare and Necessary and Proper Clauses*

A plain-text argument for enumerationism also encounters difficulties in the enumeration itself. Nowhere in Article I is there any word or phrase suggesting the Section 8 list is exhaustive, but we do have language suggesting that it isn't—in the General Welfare Clause and the Necessary and Proper Clause.

Article I, Section 8, Clause 1 empowers Congress “to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .” There are at least two linguistically plausible readings of this language. The prevailing interpretation maintains that Congress can tax *to* pay the United States's debts and to spend on “the common defense and general welfare.”<sup>93</sup> This Taxing–Spending interpretation treats the clause as dealing solely with the inflow and outflow of revenue; the references to debt-paying and federal largesse are reduced to two aspects of a single power involving the outflow of revenue.

Yet there are two nettlesome problems with this interpretation. To begin with, this interpretation gives the word *provide* a narrow, almost idiosyncratic meaning that is unique in the text of the Constitution. To be sure, *provide* can mean *spend*, as the Taxing–Spending interpretation says, but that is an indirect and exceedingly narrow application of the dictionary definition of *provide* to mean

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90. *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905) (“[The Preamble] has never been regarded as the source of any substantive power.”).

91. William Crosskey famously argued in the mid-twentieth century that the Preamble gave the national government plenary power to legislate for the general welfare. See WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION* 374–79 (1953). However, his argument has been dismissed as eccentric and has largely been forgotten. See, e.g., Robert C. Power, *Book Review: The Textualist, A Review of the Constitution of 1787: A Commentary*, 84 NW. U. L. REV. 711, 713 (1990); see also Irving Brandt, *Mr. Crosskey and Mr. Madison*, 54 COLUM. L. REV. 443, 443 (1954) (calling Crosskey's work “one of the strangest combinations of fact and fancy ever put before the public”).

92. See Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 148 (1990) (concluding that the common-law method requires judges to consider the Preamble when interpreting ambiguous constitutional provisions).

93. See, e.g., *United States v. Butler*, 297 U.S. 1, 64 (1936) (taxing power grants only “the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare”).

furnish or supply.<sup>94</sup> The verb *provide* appears nine times in the Constitution, and only once—here—is it claimed to mean only spend. *Provide* can also mean to “stipulate” or “settle terms” beforehand.<sup>95</sup> In the legislative context, this means establishing a rule through legislation, and this is the meaning for which *provide* is used in six of the other eight instances the word appears in the Constitution, including three other times in Article I, Section 8: “provide for the punishment of counterfeiting”;<sup>96</sup> “provide for calling forth the militia”;<sup>97</sup> “provide for organizing, arming, and disciplining, the militia.”<sup>98</sup> *Provide* can also mean furnish or supply, as in “provide . . . a Navy”<sup>99</sup> and “provide for the common defence [sic].”<sup>100</sup> These imply spending, but are not limited to spending: they include the notion of establishment by law. On the other hand, where the Constitution refers merely to spending per se, it uses other terms and contextual language: “raise *and support* Armies, but no *appropriation for that use* shall be for a longer term than two years”;<sup>101</sup> “provide *and maintain* a Navy”;<sup>102</sup> “money drawn from the treasury” and “expenditures of all public money.”<sup>103</sup>

Further, the Taxing–Spending interpretation assumes an incomplete account of federal governmental spending needs. The national government has numerous expenses other than paying its debts; to construe “pay the debts” to mean *pay the bills* would indicate that all government spending must be on credit, implying absurdly the absence of a power to make cash purchases.

Why mention debt at all, among the great powers of government? A highly plausible reason to do so is that debt-paying is an important power of government. A great debate was already brewing over whether the United States should assume the Revolutionary War debt of the states.<sup>104</sup> If “pay[ing] the Debts” is viewed as an important power commensurate with the Assumption debate, then

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94. See, e.g., *Provide*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *Provide*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (second definition).

95. See *Provide*, www.wordreference.com (last visited Feb. 12, 2017); *Provide*, WEBSTER’S AMERICAN DICTIONARY (1828), *supra* note 94; JOHNSON’S DICTIONARY (1785) (defining *stipulate* as “to settle terms”).

96. U.S. CONST. art. I, § 8, cl. 6.

97. *Id.* art. I, § 8, cl. 15.

98. *Id.* art. I, § 8, cl. 16. Three other instances of *provide* to mean stipulate or establish by rule include Article I, Section 5, Clause 1 (“under such penalties as each House may provide”), Article II, Section 3, Clause 6 (“Congress may by Law provide for the Case of Removal . . . of the President”), and Article II, Section 2, Clause 2 (“Appointments are not herein otherwise provided for”).

99. *Id.* art. I, § 8, cl. 13.

100. *Id.* pmbl. In a tenth appearance not pertinent to the discussion, the word *provided* was used to mean *so long as* in the Treaty Clause: “provided two thirds of the Senators present concur[.]” *Id.* art. II, § 2, cl. 2.

101. *Id.* art. I, § 8, cl. 12 (emphasis added).

102. *Id.* art. I, § 8, cl. 13 (emphasis added).

103. *Id.* art. I, § 9, cl. 7.

104. See STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 118–23 (1993).

it is at least equally plausible, and certainly linguistically permissible, to read the entire clause as a list of three important powers:

- (1) “to lay and collect taxes . . .
- (2) “to pay the debts . . .
- (3) “and [to] provide for the common defense and general welfare of the United States . . . .”<sup>105</sup>

While a modern-day enumerationist might argue that the entire clause is best understood as thematically limited to the flow of revenue, there is reason to believe that the original public meaning of this text was far broader.<sup>106</sup> Debt-paying and taxation were not merely two sides of the same coin. Though related, the two are independent in logic and importance. Paying debt was and is essential to government borrowing power, and debts could be paid from other revenue sources, such as sale of public lands. In the late eighteenth-century world, the collection of taxes was viewed as the most significant regulatory power of a national government, and not merely a means of supplying cash flow to the government.<sup>107</sup> The distinction between taxing and regulation was a twentieth-century doctrinal innovation.<sup>108</sup>

The same can be said about spending and regulation. Our constitutional doctrine treats “spending” as an autonomous power that is constitutionally distinct from other regulatory powers. Under this view, a power to spend has to be enumerated if the federal government is to have that power; this in turn pushes interpreters to construe “provide” in Article I, Section 1 to mean *spend* rather than *regulate*. But there is reason to believe that this spending/regulation distinction was also a doctrinal innovation, albeit one launched in the antebellum period. Early on, Jefferson and Madison construed “provide for the common defense and general welfare” as a limitation on the other enumerated powers, especially the taxing power, and not as an independent grant of power.<sup>109</sup> They read the general welfare clause as an express guarantee that all federal regulation under the rest of the enumerated powers would be limited to general (that is, national) rather than local purposes. Under this view, spending is simply an implied power: a particular means of regulation, no different from a criminal law or any other execution of an enumerated power. Here, again, it is significant that the word *provide* means both spend and regulate. All exercises of federal power would require an inextricable combination of spending and other regulatory forms. For example, as Marshall explained in *McCulloch*, establishing post offices needed regulatory support in the

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105. See U.S. CONST. art. I, § 8, cl. 1.

106. For a definition and discussion of original public meaning, see, for example, Solum, *supra* note 72, at 27–28.

107. EDLING, *supra* note 82, at 47–58; Johnson, *supra* note 7, at 28 (“[R]egulation at the time of the founding was generally considered a lesser included power that the federal government could exercise as a matter of course once it commanded the paramount power of taxation.”).

108. See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

109. Johnson, *supra* note 7, at 59–61.

form of criminal laws against robbing the mails,<sup>110</sup> but establishing post offices would also require expenditures.

The most prominent early argument for a distinction between spending and regulation came from President James Monroe. He offered it as a sly compromise between Jeffersonian traditionalists who opposed a federal power over internal improvements (federal infrastructure projects), and National Republicans who fervently wanted internal improvements.<sup>111</sup> In 1822, Monroe argued for having it both ways: the federal government could pay for the building of new roads, but could not collect tolls or gain any other regulatory jurisdiction over the new roads, because, he argued, Section 8, Clause 1 created a power to spend but not regulate.<sup>112</sup> If this historical sketch is correct, *provide* would thus have taken on a narrower meaning in what we now know as the Spending Clause, as a matter of *post-hoc* political expediency rather than original public meaning.

Linguistically, then, “to provide for the common defense and general welfare of the United States” can be read as a general grant of power. And as Calvin Johnson has argued, adopting this reading triggers the doctrine of *ejusdem generis*, which would call for the enumeration of powers to be exemplary or illustrative, rather than exhaustive.<sup>113</sup> *Ejusdem generis* (of the same kind, class, or nature) is a canon of construction providing that where general words either precede or follow specific words in a statutory enumeration, the general words will be construed to imply “only objects similar in nature to those objects enumerated.”<sup>114</sup> Generically, *ejusdem generis* is thought of as a limiting canon—limiting the general words. But in some contexts it broadens the interpretation of the listed terms by contradicting a presumption of *expressio unius*. Such is the case here. Rather than functioning as limitations by operation of *expressio unius*, the enumeration illustrates the nature of the general grant of a power to regulate for the general welfare.

In Article I, Section 8, *ejusdem generis* is triggered by general language following, as well as preceding, the enumeration. In a pair of recent articles undertaking both linguistic and historical analyses of the Necessary and Proper Clauses,<sup>115</sup> John Mikhail points out that Article I, Section 8, Clause 18 consists of three legislative authorizations, which should be numbered as follows:

[The Congress shall have power . . . ] [t]o make all laws which shall be necessary and proper for carrying into execution [1] the foregoing powers, [2] *and all other powers vested by this*

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110. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819).

111. *See* Schwartz, *supra* note 8, at 81–84.

112. *See* Monroe, *supra* note 25, at 163–66.

113. Johnson, *supra* note 7, at 28.

114. ESKRIDGE, ET AL., *supra* note 75, at 455 (quoting 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.17).

115. *See* Mikhail, *Language*, *supra* note 12; Mikhail, *Clauses*, *supra* note 12.

*Constitution* in the government of the United States, or [3] in any department or officer thereof.<sup>116</sup>

As Mikhail forcefully argues, these “sweeping clauses” further serve to negate the inference of *expressio unius* in interpreting the enumeration.<sup>117</sup> Focusing for the moment on the plain language, it is difficult to avoid the conclusion that the “all other powers” provision refers to powers other than “the foregoing powers” of Article I, Section 8.<sup>118</sup>

One could interpret the “all other powers” provision to refer only to the various express authorizations to Congress outside Article I. The Constitution enumerates at least eight important congressional powers in Articles II through V.<sup>119</sup> A ninth power, the Guaranty Clause, grants “the United States” the power to “guarantee to every state a republican form of government”—a power which the Supreme Court has said resides in Congress.<sup>120</sup> Yet the most natural reading of the “department or officer” provision would seem to make the legislative jurisdiction of Congress extend beyond the sum of express delegations to Congress to include also the powers granted to the executive and judicial branches, limited only by separation-of-powers, and not federalism, concerns. Even if the “any department or officer” provision were entirely accounted for by express congressional powers in Articles II through V, we still have the remaining provision, “all other powers . . . vested in the government of the United States.” What might those be? An enumerationist would have to argue that this provision refers solely to the Guaranty Clause, which vests power in “the United States.” Such an argument implausibly suggests that a broadly worded sweeping clause functions solely to incorporate a single specific clause found later in the document. It is at least equally plausible to suppose that “the government of the United States” was understood to possess at least some implied sovereign powers that Congress was authorized to execute through legislation.<sup>121</sup> In any event, if “the foregoing

116. U.S. CONST. art. I, § 8, cl. 18 (emphasis added); see Mikhail, *Clauses*, *supra* note 12, at 1046–47 (arguing that the Necessary and Proper Clause is best understood as three clauses).

117. See Mikhail, *Clauses*, *supra* note 12, at 1046–47.

118. See Mikhail, *Language*, *supra* note 12, at 1092.

119. In addition to its housekeeping powers, the legislative process itself, and impeachment, the only Article I power that precedes the “foregoing powers” provision of the Necessary and Proper clause is the power to alter state regulations for federal elections. See U.S. CONST. art. I, § 4, cl. 1. For powers of Congress following Article I, Section 8, see *id.* art. II, § 1, cl. 4 (setting day and time of choosing presidential electors); *id.* art. II, § 2 (creation of federal offices); *id.* art. III, § 2, cl. 2 (exceptions and regulations clause); *id.* art. III § 3, cl. 2 (punishment for treason clause); *id.* art. IV, § 1 (interstate recognition of state acts, records and proceedings); *id.* art. IV, § 3, cl. 1 (admission of new states); *id.* art. IV, § 3, cl. 2 (regulation of territories); *id.* art. V (proposal of amendments).

120. See *Texas v. White*, 74 U.S. 700, 728–29 (1868) (affirming congressional reconstruction acts under guaranty clause); *Luther v. Borden*, 48 U.S. 1, 42 (1849) (“Under [the Guaranty Clause] it rests with Congress to decide what government is the established one in a State.”).

121. This was Hamilton’s view. See Hamilton, *Opinion on Constitutionality*, *supra* note 39, at 129–31; see also *The Legal Tender Cases*, 79 U.S. 457, 535, 545 (1870) (finding implied sovereign power to issue paper money).

powers” include a power to “provide for [make rules establishing] the common defence [sic] and general welfare,” such efforts to shoehorn the sweeping clauses into an enumerationist reading become moot.

#### 4. *Intertextual Difficulties*

The enumeration of legislative powers in the U.S. Constitution does not look like a list designed to be exhaustive when the document is viewed as a whole. Ideally, an exhaustive list of legislative powers would be found all in one place, and would begin or end with language explaining that the list was indeed exhaustive: “The Congress shall only have power to,” followed by the list; or a necessary and proper clause stating that “the Congress shall have the following powers, and no others.” Neither of these things are the case. The Congressional powers are scattered throughout Articles II through V, and the limiting language is absent.

Even if such drafting niceties are too much to expect from a Constitution, it is not too much to demand care and consistency in an exhaustive specification of powers, because the stakes of careless omission are high. No significant power should be simply assumed or left to implication. Yet the enumeration of powers, particularly in Article I, Section 8, is notably slapdash. Madison conceded in the House debate over the First Bank that “not . . . every insertion or omission in the constitution is the effect of systematic attention.”<sup>122</sup> For example, as explained further below, the Framers appear to have simply forgotten to enumerate a governmental power to make war, and an overarching power to conduct foreign affairs. To be sure, several subsidiary or related elements of these powers are enumerated, but these subsidiary enumerations do not add up to the sum total of general war or foreign relations powers.<sup>123</sup> There can be no doubt that the Framers *intended* the national government to have a general war and a general foreign affairs power, but enumerationism fails to account for that intention: those explicit powers are not written into the Constitution, and thus have to be implied.

A second intertextual problem for an enumerationist reading of the Constitution is the enumeration’s inclusion of powers at different levels of generality and importance. An enumeration designed to be exclusive should include items of similar importance and generality; otherwise, conflicts and insoluble interpretive problems result. Suppose John Rutledge hires a cook, and gives him the following written authorization:

You shall have only the following powers:

- (1) To prepare dinners for my family;
- (2) To cook beefsteaks for the main course;
- (3) To make salads;
- (4) To fry potatoes;

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122. See Baude, *supra* note 15, at 1752 (quoting Madison); see also Reinstein, *supra* note 12, at 27 (quoting Edmund Randolph arguing to President Washington that the Constitution should not be read as if its “[s]tyle or arrangement” were “logically exact”).

123. See *infra* Sections IV.B.1 & 2.

(5) To do all things necessary and proper to executing these powers.

“To prepare dinners” is a more general power than the authorizations to make specific dishes in clauses (2) through (4). Taken by themselves, clauses (1) and (5) would imply an authorization to cook any reasonable main course. But the introductory “*only* the following powers” mandates an *expressio unius* interpretation of the list; thus, enumerating the cooking of beefsteak implies the absence of similar unexpressed powers to cook other entrees, e.g., chicken or fish. To admit an implied power to cook other main courses under clause (1) would negate the exclusive effect of the Beefsteak Clause, making that clause merely illustrative of other powers. Clauses (3) and (4) raise similar issues: an exclusive enumeration implies that the cook cannot prepare a side dish other than potatoes. And since two courses have been identified—a main course and a salad—the exclusive enumeration implies the absence of a power to serve an appetizer or dessert course.

Applying *expressio unius* to a list that mixes general with specific terms as if they were parallel creates two types of interpretive problems. First, it places the general and specific terms in tension. The general terms carry implications that are contradicted by the negative implication of the specific terms. Second, it creates an ambiguity as to the intention of the whole: Is the cook supposed to make meals according to a broader and recognized conception, or a more specific but somewhat arbitrary and even idiosyncratic one? And what is the cook to do if beefsteak, salad greens, and potatoes are unavailable?

It might be argued that enumerationism requirements are met so long as any accepted implied power is subservient to at least one enumerated power. Here, one could say the cook has an implied power to make a chicken entrée and a dessert, because neither are expressly prohibited and both are reasonably conducive to the dinner-making power. Does this turn the enumeration of a steak-making power into “mere surplussage”? No, it might be answered, because the Steak Clause usefully signals the cook that he should not assume the household wants to avoid red-meat meals. This defense of enumerationism is a version of the Great Powers theory I discuss below.<sup>124</sup> For now, suffice it to say this: such a defense abandons the idea that all enumerated powers are meant to exclude others not listed, and allows that some can be reduced to mere illustrations, but does so without giving us a principle to determine which ones. This defense of enumerationism applies *expressio unius* inconsistently.

These sorts of problems run through the enumeration of legislative powers in the Constitution. For example, the Bankruptcy Clause, the Patent Clause, and especially the Coinage Clause could all be necessary and proper means of executing the commerce power. But it would not be plausible to argue that these were designed to be the exclusive means of regulating commerce—so *expressio unius* doesn’t apply to them. At the same time, the Coinage Clause was read by many important constitutional interpreters to mean that Congress lacked the power to issue paper money—despite paper money’s obvious conduciveness to

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124. See *infra* Section III.C.

regulating interstate commerce.<sup>125</sup> So *expressio unius* was applied by some enumerationists to the Coinage Clause. The “calling forth the militia” clause was read to imply that a regular national army should not be used to suppress insurrections, and that the militia could not be deployed outside the United State. So *expressio unius* applied to the “calling forth the militia” clause.<sup>126</sup> But *expressio unius* apparently does not apply to the three criminal-lawmaking powers enumerated in the Constitution—counterfeiting, piracy and international law violations, and treason<sup>127</sup>—since Congress is recognized to have a general implied power to execute its enumerated powers with criminal laws.<sup>128</sup> The failure to enumerate powers at a consistent level of generality has not surprisingly resulted in a haphazard—or opportunistic—and very inconsistent application of *expressio unius* to the enumerated powers.

These drafting problems belie the idea that the framers gave us the sort of “finely wrought, exhaustively considered”<sup>129</sup> list of powers in Article I, Section 8 that supports reading the enumerated powers as exclusive. That, in turn, casts doubt upon the enumerationist argument. Drafters who write exhaustive lists take pains. Drafters who do not take pains, conversely, permit themselves to insure against omissions from a list by employing catchall clauses to make clear that the list is not exhaustive, signaling later interpreters to apply *ejusdem generis* rather than *expressio unius*. As John Mikhail has demonstrated, and as I discuss further below, that is exactly the function of the “all other powers” provision of the Necessary and Proper Clause.<sup>130</sup>

The mild presumption in favor of an *expressio unius* interpretation of the enumerated powers is further offset by the fact that the enumeration serves a purpose other than—and contrary to—exhaustively listing governmental powers. As Robert Reinstein has insightfully observed, the enumeration of powers effectuates the separation of powers between Congress and the President.<sup>131</sup> This intention was clearly present in the decision to change the Committee of Detail’s proposed congressional power to *make war* to a power to *declare war*. As argued further below, this change can only be sensibly understood, and has been understood, as a way of distributing war powers between Congress and the President—not as a way of limiting the aggregate war powers of the national government.<sup>132</sup> Various other Article I, Section 8 powers relating to the military

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125. See *infra* Section IV.B.6.

126. See MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR: THE ARMY NATIONAL GUARD, 1636–2000*, at 39–76 (2003).

127. See U.S. CONST. art. I, § 8, cl. 6 (punishment of counterfeiting); *id.* art. I, § 8, cl. 10 (“define and punish” piracies and international law violations); *id.* art. III, § 3, cl. 2 (treason).

128. See *infra* Section IV.B.8.

129. In *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983), the qualities “finely wrought, exhaustively considered” were offered as a sufficient justification for accepting the inefficiencies resulting from a formalistically limiting reading of the “bicameralism and presentment” clauses. We should expect no less from an exhaustive enumeration of powers.

130. See *infra* text accompanying notes 144–47.

131. Reinstein, *supra* note 12, at 86–88.

132. See *infra* Section IV.B.1.

and foreign affairs are most sensibly understood as creating congressional control over matters that might have otherwise been assumed to belong to the executive (either alone or to the exclusion of the House, through the treaty power): making rules for the land and naval forces, regulating foreign commerce, defining international-law crimes, granting letters of marque, and others.<sup>133</sup> This separation-of-powers function is at cross-purposes with enumerationism, for it assumes that the national government has an overarching war power and an overarching foreign affairs power—yet the Constitution expressly grants neither.<sup>134</sup>

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In sum, reading the Constitution as an enumerationist text is neither inevitable nor the clearly best interpretation, because it requires a number of contentious interpretive choices: (1) interpreting *provide* to mean “spend” and not “regulate;” (2) erasing the “all other powers” provision from the Necessary and Proper Clause; (3) treating the Article I, Section 8 enumeration as exhaustive even though several important powers are listed elsewhere and others are entirely missing; (4) ignoring the preamble; (5) applying *expressio unius* haphazardly to the enumerated powers; and (6) ignoring the absence of any clear statement of an intent to treat the enumeration as exhaustive. The affirmative textual case for enumerationism requires (7) over-interpreting the phrase *herein granted* and (8) interpreting the Tenth Amendment and the enumeration itself as determinative when they are in fact question-begging. These may well be defensible interpretive choices, but they lack the sort of certainty that forecloses a capable federalism reading, one that recognizes a congressional power to legislate for the general welfare.<sup>135</sup>

### **B. History**

This Section considers what light, if any, the early history of the Constitution sheds on the tension between enumerationism and capable federalism. The evidence creates considerable room for a capable federalist understanding of the enumeration of powers.

#### *1. Framers' Intent*

On July 17, 1787, the Convention approved a resolution to instruct a drafting committee, the Committee of Detail, on how to write up the powers of Congress. Put forward by Gunning Bedford of Delaware, the resolution amended

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133. Reinstein, *supra* note 12, at 86–88.

134. See *infra* Sections IV.B.1 & 2.

135. Several scholars have advanced sophisticated historical arguments suggesting that enumerationism is supported by proper understandings of the Necessary and Proper Clause. See, e.g., GARY LAWSON, ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010). Without doing full justice to these arguments here, two broad rejoinders suffice for present purposes. First, these arguments do not purport to address the full range of textual problems weighing against an enumerationist interpretation. Second, the need to rely on arcane historical evidence to make the enumerationist case detracts from the view that enumerationism is self-evidently established by the Constitution. See *id.* at 1 (claiming to “excavat[e] the buried foundations of the Necessary and Proper Clause”).

the original Resolution 6 from the Virginia plan<sup>136</sup> with the language indicated in italics:

[T]hat the National Legislature ought to be impowered [sic] to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases *for the general interests of the union, and also in those* to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.<sup>137</sup>

Pursuant to these instructions, the Committee of Detail on August 6 produced most of the familiar list of enumerated powers of Congress that became Article I, Section 8.<sup>138</sup> With relatively little debate, the full convention approved the Committee draft after adding a handful of additional powers; there was no suggestion that the Committee had flouted its instructions to empower Congress to legislate, in essence, for the general welfare.<sup>139</sup> How do we explain this disconnect?

Two answers have been suggested, and enumerationist ideology has decisively embraced one of them. The standard (enumerationist) story is that John Rutledge of South Carolina dominated the Committee and forced it to produce a limited-enumerated-powers version of congressional powers to protect slavery from federal legislative encroachment.<sup>140</sup> Without a peep, the full convention instantly recognized the need to make this devil's bargain with the slave states, and voted to approve limited enumerated powers in lieu of capable federalist powers. This account is beset by reasons for doubt. To begin with, no concessions to slavery went without comment during the Convention debates. While slavery was ultimately accommodated in various respects, several of its opponents made their record at the convention.<sup>141</sup> More broadly, the notion that the full Convention would meekly accept a clear violation of its instructions by a committee is hard to believe.<sup>142</sup> The Convention's rules from the outset denied committees the authority to make substantive variations from the will of the Convention expressed in its motions and resolutions.<sup>143</sup>

A second explanation that fits the evidence better is that the Committee of Detail draft was written "not to *displace* the [Bedford Resolution] principle but to *enact* it."<sup>144</sup> Recent historical research strongly confirms this revised view.

136. See *supra* text accompanying note 69.

137. 2 FARRAND, *supra* note 6, at 21 (emphasis added).

138. *Id.* at 177, 181–83.

139. *Id.* at 312–20; see RAKOVE, *supra* note 58, at 178; Mikhail, *Clauses*, *supra* note 12, at 1084–85, 1105.

140. Mikhail, *Clauses*, *supra* note 12, at 1093–94.

141. See RAKOVE, *supra* note 58, at 72–74, 93.

142. "[T]he fact that it went unchallenged suggests that the committee was only complying with the expectations of the convention." *Id.* at 178.

143. See Johnson, *supra* note 7, at 47.

144. Balkin, *supra* note 12, at 11. But see Kurt T. Lash, *Resolution VI: The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2138–40 (2012) (arguing that the Framers did not view Article I, Section 8 as implementing the Bedford Resolution).

Johnson's well-documented 2006 account argues with some force that "the exhaustive enumeration argument remained a minority position behind the closed doors of the Convention."<sup>145</sup> More recently, John Mikhail's meticulous research has shown that the final version of the Necessary and Proper Clause was drafted by James Wilson, an ardent nationalist, to serve as a sweeping clause "to cancel the inference that Congress's other enumerated powers were exhaustive," and to implement the Bedford Resolution.<sup>146</sup> Mikhail shows that Wilson had the final say over the Necessary and Proper Clause, adding the "all other powers" provision to Rutledge's draft of a "foregoing powers" version that would have merely expressed the doctrine of incidental powers. "It seems probable," argues Mikhail, "that Wilson's primary purpose in drafting the All Other Powers Provision was to ensure that the Constitution would expressly recognize the implied and inherent powers of the United States that he and the nationalists had labored so extensively to defend under the Articles of Confederation."<sup>147</sup> In so doing, the nationalists on the Committee defeated Rutledge's apparent attempt to cut and paste in the highly restrictive "expressly delegated" language from the Articles of Confederation.<sup>148</sup>

Why would the Committee of Detail have bothered to enumerate powers if its intention was to implement the Bedford Resolution's general capable-federalism power? The enumeration serves three functions consistent with a power to legislate on all matters of general concern. First, the enumeration demonstrates compliance with the Convention's instruction to grant powers conferred by the Articles, while offering concrete examples of added powers. Second, it avoids the negative implication that might have arisen had powers expressed in the Articles been omitted from the Constitution.<sup>149</sup> Third, it preempts arguments about whether certain powers are entailed by a power to legislate for the general welfare. The problem with any general authorization is that it can produce arguments about its application to many, perhaps even most, specific cases. The enumeration explains the scope of the general authorization by example, and at the same time obviates the need to argue about, for instance, whether interstate commercial regulation qualifies as an issue of legitimate national concern. Any drafter of legal instruments or statutes understands that an *ejusdem generis* list of examples is a useful, and perhaps essential, means of explaining the contours of a general authorization.<sup>150</sup>

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145. Johnson, *supra* note 7, at 48–50.

146. Mikhail, *Clauses*, *supra* note 12, at 1055–56.

147. *Id.* at 1123.

148. *Id.* at 1095–96, 1123. Articles of Confederation, Article II, provides: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

149. Reinstein, *supra* note 12, at 87 ("The Convention largely avoided this problem of negative implication by transporting almost all of the Articles' powers into the Constitution.").

150. See Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 170–71 (2015). Parchomovsky & Stein argue that the use of "catalogs"—illustrative lists of items having "a common denominator or unifying characteristic"—is

## 2. *The Ratification Debates*

Even if the text and Framers' intent favor, or permit, a capable-federalism reading of the Constitution, it could be argued that the Constitution was ratified on the understanding that it is an enumerationist document. Whatever the words on the page of the Constitution or the intentions of the Framers may have been, perhaps the Constitution was understood by the public as establishing a government whose powers were limited to those enumerated.

There is plenty of evidence of enumerationist interpretations during the ratification debates, but this argument has significant flaws. A major difficulty is summed up by John Manning's observation that determining the Ratifiers' intent on any given point requires disentangling the intentions of "so many distinct multimember institutions [that] one could never make that sort of showing."<sup>151</sup> Even if those intentions could be known,<sup>152</sup> there are insoluble theoretical problems about which votes determine meaning. If 35% of state convention delegates voted to ratify based on a capable-federalist reading of the Constitution, and ratification was put over the top by another 20% who believed in enumerationism, what is the intention of that State? And what weight do we give to the understanding of a state like New York, which ratified only after the Constitution had been ratified by nine states and had therefore gone into effect?<sup>153</sup> With respect to enumeration, these questions are especially perplexing. It requires us to disentangle the thoughts of convention delegates who voted for ratification because they believed it was an enumerationist document from those who may have preferred enumerationism but accepted capable federalism, either as the price to be paid for "a more perfect union" or because they would get a bill of rights as a compromise.

The enumerationist argument relies most heavily on statements by "Federalists" (at this point in history, the self-appointed name for the pro-ratification forces, and not necessarily the same people as the later Federalist party) that the Constitution limited the proposed government to its enumerated powers. In his October 1787 speech kicking off the first ratifying convention—Pennsylvania's—James Wilson argued that a Bill of Rights was unnecessary because the federal government's powers were limited to those enumerated and therefore protected individual rights; there was no enumerated power to regulate

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socially optimal "when the cost of formulating a spot on rule and the costs of the unpredictability associated with standards are prohibitively high." *Id.* at 169, 171.

151. John Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1352 (2012).

152. The evidence for those intentions is murky, relying on inferences from a handful of convention floor speeches combined with the assumption that newspaper editorialists' views mapped onto those of convention delegates. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 214 (2008).

153. Madison seems to have originated the claim that the understandings of the Ratifiers are more important than those of the Framers, and perhaps even binding, since the Constitution was merely a nonbinding proposal until ratified. But that logic would make the "intentions" of the last four ratifying conventions irrelevant, or less relevant, to constitutional interpretation. I thank John Mikhail for alerting me to this last point.

the press, for example, or to establish religion.<sup>154</sup> Some version of Wilson's enumerationist argument was repeated in many times and places by the Federalists.<sup>155</sup> Hamilton repeated these arguments in *Federalist No. 84*.<sup>156</sup>

It is tempting to overinterpret what was undoubtedly a strategic talking point in the political campaign over ratification. It seems clear that the Federalist speakers didn't believe their own enumerationist rhetoric. Indeed, in some conventions, Federalists went so far as to claim that the federal government was limited to "expressly granted" powers—a revealing example of the Federalists' willingness to make interpretive misstatements to advance their cause.<sup>157</sup> Wilson's argument was preposterous,<sup>158</sup> and so out of keeping with the entire course of his theorizing on governmental powers, that it simply cannot be taken at face value. To be sure, Federalists like Wilson and Hamilton probably believed that amendments were unnecessary, but not because of enumerated powers. Rather, they believed that political process safeguards—frequent elections, equal state suffrage in the Senate, and the elite qualities of large-district congressmen—together with the flexible general-welfare limitation, would suffice to restrain central government overreaching.<sup>159</sup> Their professions of enumerationism are best understood as strategic "disinterpretation."

More importantly—if one takes an original-public-meaning perspective—no one bought the argument at the time. Antifederalists and others skeptical of the federal powers apparently granted by the Constitution continued to believe that amendments were necessary and either voted against the Constitution or voted to ratify it on a gentleman's agreement that the first Congress would vote out a bill of rights.<sup>160</sup> The Constitution's critics uniformly read the document as conferring general and implied powers that exceeded the enumeration.<sup>161</sup> While some of these arguments were no doubt themselves tactical exaggerations, in effect a mirror image of the Federalist's enumerationist arguments, plainly others believed that a good-faith reading of the Constitution conferred a general-welfare legislative power. George Mason and John Randolph of the Virginia delegation to the Constitutional Convention refused to sign the document in large part for this very reason: neither had an incentive to fabricate a false general-welfare interpretation

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154. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 78–79 (2010).

155. *Id.* at 80, 93–94.

156. THE FEDERALIST NO. 84, *supra* note 59, at 513 (Alexander Hamilton) (arguing that a bill of rights "would contain various exceptions to powers which are not granted").

157. See Johnson, *supra* note 7, at 35–36.

158. See MAIER, *supra* note 154, at 81–82 ("Wilson's speech provoked a cascade of refutations."); see also Baude, *supra* note 15, at 1755 ("Hamilton's claim seems ridiculous to modern eyes.").

159. See EDLING, *supra* note 82, at 224–26 (arguing that anti-statist political pressures would restrain federalists from more disliked forms of taxation); Johnson, *supra* note 7, at 46.

160. See Primus, *supra* note 3, at 617.

161. See Johnson, *supra* note 7, at 35–39.

to justify their views at that time.<sup>162</sup> The ratification debates, in the end, appear to be equivocal on the question of whether the Constitution was an enumerationist or capable-federalist document.

### 3. *Post-Ratification*

The post-ratification historical record appears to continue the ambiguity of the framing and ratification. One finds significant indications of important constitutional interpreters on both sides of the question acknowledging, conceding, or endorsing capable federalism, in theory or practice or both. An early famous example is Hamilton's opinion letter to President Washington in support of the constitutionality of the Bank of the United States. After citing various enumerated powers, Hamilton took "an aggregate view of the [C]onstitution" to argue that "it is the manifest design and scope of the [C]onstitution to vest in [C]ongress all the powers requisite to the effectual administration of the finances of the United States."<sup>163</sup> Numerous other examples from the early years of the Republic are discussed below.<sup>164</sup> To be sure, after Jefferson's election, professions of enumerationism were more apt to predominate, and assertions of capable federalism tended to be more encoded in enumerationist terms.<sup>165</sup> Yet the nation continued to recognize implied sovereign powers or general-welfare justifications from time to time when the enumerated powers proved inconveniently narrow. As late as 1817, Jefferson wrote that "[t]he tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare . . . is almost the only landmark which now divides the [F]ederalists from the [R]epublicans."<sup>166</sup> In other words, the original public meaning of the Constitution's enumeration continued to be contested throughout the early years of the Republic.

## III. THE IMPLIED POWERS PROBLEM FOR ENUMERATIONISM

The existence of any implied powers, at first blush, stands in tension with the enumerationist precept that grants of power must be express, or else they are excluded. Enumerationism must therefore explain how powers can be implied in a way that doesn't add powers to those enumerated. As the root of word *enumerate* suggests, the enumerated powers are a list limited to a definite number and scope

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162. *See id.* at 51–54. At the end of August 1787, Mason proposed alterations to the Constitution so that "the object of the National Government, would be expressly defined, instead of indefinite power, under an arbitrary Constitution of general clauses." In other words, Johnson explains, Mason did not read the enumeration as exhaustive and limiting. *Id.* at 53 (quoting George Mason, *Alterations Proposal*, in JAMES H. HUTSON, SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION 25 (1987)). Randolph refused to sign because he viewed the "common defence [sic] and general welfare" language in section 8, clause 1 as conferring broad general powers on the national government. Johnson, *supra* note 7, at 54.

163. 8 THE PAPERS OF ALEXANDER HAMILTON 132 (Harold C. Syrett & Jacob & Jacob E. Cooke, eds. 1965) (1791).

164. *See infra* Part IV.

165. *See generally* 2 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 *passim* (2001).

166. Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *quoted in* Johnson, *supra* note 7, at 26–27.

of powers that cannot be augmented. If enumerationism is a meaningful idea, it must mean that all powers of a substantial magnitude must be expressed, and the expression of some powers is the exclusion of those implied powers having equal or greater magnitude. This is the *expressio unius* principle at work, at least in partial or modified form. Once we admit the validity of implied powers of a magnitude equal to or greater than those expressed, then it becomes impossible to intelligibly formulate the category of powers excluded by the enumeration. *Expressio unius* breaks down and the approach to the Constitution's enumeration of powers is transformed into a patchwork of *eiusdem generis* and *expressio unius* interpretations.

While implied powers present a significant conceptual problem for enumerationism, they do not do so for capable federalism. Under capable federalism, the enumerated powers are illustrative examples of the general power to legislate for the general welfare, and in theory any similar powers can be implied. There is no need to have a consistent explanation of the relationship between implied and enumerated powers that renders all implied powers subordinate to enumerated powers.

#### *A. The Unavoidable Need for Implied Powers*

The need to account for implied powers is captured by Chief Justice Marshall's deceptively simple insight in *McCulloch v. Maryland*: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code . . ." <sup>167</sup> Therefore, while its "great outlines" and "important objects" will be stated expressly, the means to implement them must be "deduced." <sup>168</sup> In other words, implied powers are a necessary or unavoidable feature of a written constitution.

The unavoidability of implied powers can be readily seen by trying to envision how the granted legislative powers could be executed without them. A tax on whiskey might be said to be a direct exercise of the enumerated power to "lay and collect taxes." <sup>169</sup> Congress's enactment of the Articles of War in 1806 seems to be a clear exercise of its enumerated power "[t]o make rules for the government and regulation of the land and naval forces." <sup>170</sup> The whiskey tax is a specific case of taxing, and the Articles of War a specific instance of military rulemaking. If all legislation were so obviously a specific case of an enumerated power, we might have no implied powers questions. But once we move beyond these specific instantiations to the details of their implementation, implied powers questions quickly emerge. How is the whiskey tax to be collected? The hiring of federal tax collectors may well be implicit in the power to collect taxes, but it is not simply a specific case of tax collection—it is easier and more logical to conceive it as an implied power than to characterize it as a direct implementation of the taxing power. The same can be said about the creation of military courts and prosecutors

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167. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

168. *Id.*

169. U.S. CONST. art. I, § 8, cl. 1.

170. *Id.* cl. 14.

to enforce the Articles of War. Denying the existence of implied powers makes legislative implementation unduly difficult, if not logically impossible.

Thus, even strict Jeffersonian enumerationists acknowledged the existence of implied powers. The problem for them was how to rein in the implied powers to maintain the integrity of their conception of limited enumerated powers. The Antifederalist wing of the Jeffersonian party argued that express legislative powers could be implemented by only those laws *strictly necessary* to exercising the express grant. They defined *strict necessity* as that without which the express power would be nugatory.<sup>171</sup> Wholly aside from the rejection of this argument in *McCulloch v. Maryland*,<sup>172</sup> we can see that the argument tends to collapse in on itself logically. A tax on whiskey might be a direct implementation of the taxing power, and one could say the power to impose an excise on a commodity is strictly necessary for the exercise of the taxing power. But opponents of Hamilton's whiskey tax might have argued that the power to tax whiskey is not strictly necessary because the taxing power could be exercised, and revenue raised, by an excise tax on carriages or by customs duties. That argument creates a paradox, in that it could be used to defeat any legislation that selected one of multiple means to execute a granted power. Marshall made this point in *United States v. Fisher*,<sup>173</sup> the Court's first effort to construe the Necessary and Proper Clause and thus a precursor to *McCulloch*. "Where various systems might be adopted for [a legislative] purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means."<sup>174</sup>

### ***B. The Straight Means-Ends Solution***

The standard story of how we reconcile implied powers with enumerationism is to characterize implied powers as legitimate if they are necessary and proper means to one or more enumerated ends.<sup>175</sup> I call this the *straight means-ends solution* because it treats all enumerated powers as ends, and all implied powers as means. This means-ends solution only even arguably works if the powers thus implied are subordinate to the enumerated powers.<sup>176</sup> *Subordinate* connotes not simply lesser rank or importance, but an obligation of the lesser to serve the greater. In determining the subordinate quality of an implied power, it is necessary to read the enumeration as a whole. Where either of these elements—lesser in importance or serving the greater—is absent, a purported

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171. See *supra* text accompanying note 23.

172. 17 U.S. (4 Wheat.) at 413–19.

173. 6 U.S. (2 Cranch) 358, 393 (1806).

174. *Id.* at 396.

175. See, e.g., John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1104 (2011) ("The Necessary and Proper Clause is about means-ends connections. . . . Usually, Congress is authorized to pursue some primary goal by a provision of the Constitution other than the Necessary and Proper Clause, frequently one of its other enumerated powers.").

176. See, e.g., Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 119 (2010) (arguing that implied or "incidental" powers must be subordinate to express powers, as was the practice in eighteenth-century corporate charters).

implied power fails the test: it necessarily adds a power comparable in scope to those listed. Counsel for Maryland in the *McCulloch* oral argument summed up this aspect of the enumerationist position aptly: “to make the implied powers greater than those which are expressly granted” is “to change the whole scheme and theory of the government.”<sup>177</sup>

But the straight means-ends solution fails this subordination test. We have already seen part of the reason why. The enumeration was not carefully drafted to list all its powers at a similar level of generality and importance. As a result, applying *expressio unius* to the enumerated powers occurs only haphazardly, without regard to any notion of consistently enforcing enumerationism.<sup>178</sup>

When the powers are stated at different levels of generality, applying *expressio unius* to more specific enumerated powers should block many powers that might otherwise be implied as necessary and proper to a more general power. This point was made by Chief Justice Roger Taney, the most famous enumerationist to sit on the Supreme Court, in an unpublished legal opinion contending that the Union’s 1863 military draft law was unconstitutional. According to Taney, because the militia was plainly understood as an organization based on compulsory military service, while the national army was not, “the plain and specific provisions in regard to the militia” nullified any implied power to raise armies by conscription.<sup>179</sup> Taney specifically applied what might have been a general rule of interpreting the enumerated powers: “No just rule of construction can give any weight to inferences drawn from general words, when these inferences are opposed to special and express provisions, in the same instrument.”<sup>180</sup>

A committed enumerationist should apply Taney’s reasoning across the board. To be sure, enumerationists have throughout history argued for various “implied disabilities” of national government power. Implied disabilities are negative implications from the enumerated powers, implications that deny the legitimacy of implied powers which would otherwise be useful means to execute an enumerated power. Arguments against the First Bank and against paper money took this form.<sup>181</sup> The question of free versus slave labor, whose regulation would plainly have a major impact on the nation’s commerce, was widely considered a purely state-law question from the rejection of the Quaker Memorials to the House of Representatives in 1792 until the adoption of the Thirteenth Amendment.<sup>182</sup> This, too, was an implied disability of the national government, at least insofar as the commerce, taxing, or spending powers might have been construed to permit regulation of slave labor.

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177. *McCulloch*, 17 U.S. (4 Wheat.) at 376 (argument of Mr. Jones, counsel for Maryland).

178. *See supra* Section II.A.4.

179. Roger B. Taney, *Thoughts on the Conscription Law of the United States* (unpublished legal opinion, 1863), reprinted in MARTIN ANDERSON, *THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION* 207, 213 (1982).

180. *Id.*

181. *See infra* Section IV.B.

182. *See infra* Section IV.B.5.

Yet this implied-disabilities principle is not viable, and has been followed more in the breach than in the observance. As discussed above, our constitutional order accepts as legitimate several implied powers that are equal or superior to at least some enumerated ones. For example, by any reasonable definition of “great and inferior powers” or “ends and means,” the power to create a national bank is plainly superior to the power to punish counterfeiting. Indeed, President Jefferson signed a law to punish the counterfeiting of the First Bank’s securities, as a means to making its issuance of banknotes more effective.<sup>183</sup> The power to create an exclusive federal regime of admiralty law, whether implied from the Commerce Clause or the Article III Admiralty Clause,<sup>184</sup> is at least equal to the power to create other areas of law, such as naturalization or bankruptcy. Further, the power to create federal admiralty law is clearly greater than the enumerated power to “make [r]ules concerning [c]aptures on . . . [w]ater,” which is merely a subdivision of admiralty law.<sup>185</sup> Other examples of this problem include the issuance of paper money or the creation of federal criminal laws.<sup>186</sup>

The existing enumeration defies the application of Taney’s principle across the board. There is no principle that is both viable and consistent that can tell us when *expressio unius* should be applied to block implied powers that are subordinate to one enumerated power yet which transgress a limitation implied by another. For this reason, the straight means-ends approach fails to provide an adequate enumerationist account of implied powers.

### C. The “Great Powers” Solution

An important attempt to solve the implied powers problem for enumerationism is the theory of “Great Powers.” As articulated by Chief Justice Roberts and its leading academic commentator William Baude, the Great Powers theory holds that the Constitution requires us to distinguish between *great* and *inferior* powers when considering the validity of a claimed implied power. As Baude explains, while a minor power that is “incidentally necessary to effectuating some explicit constitutional power” can be implied, “some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, even if they might help effectuate an enumerated power.”<sup>187</sup> Not all the enumerated powers in the Constitution are great powers, but all great powers possessed by the federal government must be enumerated. The powers of the federal government thus consist of three incompletely overlapping sets: enumerated “great” powers; enumerated “inferior” powers; and implied “inferior” powers. What the Constitution excludes, according to this Great Powers version of enumerationism, is “implied great powers.”

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183. See 2 CURRIE, *supra* note 165, at 250–51.

184. See *infra* text accompanying note 362.

185. U.S. CONST. art. I, § 8, cl. 11.

186. See *supra* text accompanying notes 110–13; see also *infra* Part IV.

187. Baude, *supra* note 15, at 1749; accord *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012).

The idea was first advanced by then-congressman James Madison in his House speech leading the opposition to the First Bank.<sup>188</sup> According to Madison, when considering the existence of an implied power, “not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.”<sup>189</sup> Baude sums up Madison to be saying that the usefulness of an implied power to executing an enumerated power is “relevant, but not dispositive. If the power was important enough, it was one that the Constitution would be expected to grant explicitly, if at all.”<sup>190</sup>

The Great Powers solution seems to offer two advantages over the straight means-ends solution. First, it presents something of a confession and avoidance to the *expressio unius* problem. Since only some of the enumerated powers are great, we need not be troubled by the constitutional acceptance of some implied powers that are similar in nature to, or greater than, some of the lesser enumerated powers. For example, if the power to punish counterfeiting is inferior rather than great, then the power to punish violations of other federal laws can be deemed inferior and thus suitable for implication. Second, the Great Powers approach claims an excellent historical pedigree. It is not only traceable to Madison’s House speech, but it also—so its proponents claim—rests on the correct reading of *McCulloch v. Maryland*.<sup>191</sup> The Great Powers approach thus lays claim to the authority and prestige of both Madison and Marshall. I will consider these two claimed advantages in turn.

### 1. *The Theoretical Inadequacies of “Great Powers”*

While it has surface plausibility, the Great Powers argument is a mere tautology. Its proponents tell us in circular fashion that “great powers” are too “important” to be implied, and then proceed to focus on the example at hand as a case in point. For Madison, incorporating the First Bank was an exercise of a great power; for Roberts, it was requiring a person to buy health insurance; for Baude, it is eminent domain.

Neither Madison nor Roberts offers any explanation of greatness. Baude gestures toward an explanation by offering a syllogism: eminent domain is probably a great power because taxation is plainly a great power, and eminent domain functions “like the power to tax.”<sup>192</sup> Taxation is undoubtedly a great

188. For an excellent, comprehensive, and critical summary of Madison’s argument in its full historical context, see Reinstein, *supra* note 12, at 10–13, 22–33, 57–59.

189. Baude, *supra* note 15, at 1751 (quoting James Madison, Speech on Feb. 2, 1791, reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39, 42 (photo. reprint 2008) (1832)).

190. Baude, *supra* note 15, at 1751.

191. See *id.* at 1753 (arguing that Great Powers theory “was endorsed in *McCulloch*”); see also *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 557 (citing *McCulloch*).

192. See Baude, *supra* note 15, at 1752, 1756–57. Professor Reinstein offers a different critique of Madison’s Great Powers theory. According to Reinstein, “Madison confused the *constitutional inferiority* of the incidental powers with *the degree of their importance*.” Reinstein, *supra* note 12, at 24. In essence, Reinstein argues that what I have called the straight means-ends solution is the correct one. But that solution has its own

power, and presumably eminent domain functions as a kind of tax because it takes property. But so does regulation of all kinds. Bankruptcy laws take property from creditors. Patent and copyright laws function “like the power to tax” by imposing monetary premiums on competitors of the rights-holders. Laws regulating captures at sea take property from either the capturer or the captured. Great Powers proponents might say that these are great powers too, but that would undermine their argument that some enumerated powers are not great. In any case, property is also taken by accepted implied powers, such as regulations of commerce that cut into profits or inflationary means of government borrowing, so we’re still left wondering why some tax-like regulations can be implied and some can’t. Furthermore, the syllogism offers an unworkable principle for identifying great powers: any unenumerated power that is “like” an acknowledged “great” power is too important to be left to implication. That would mean that laws regulating things “like” *commerce* are also too great to be implied—manufacturing, for instance. This notion would quickly return us to pre-New Deal jurisprudence. In sum, Baude’s syllogism fails to supply a viable theory of Great Powers.

The closest thing to a non-circular definition of Great Powers is found in the discussion in *McCulloch*, on which Baude and Roberts place heavy reliance. The familiar core of *McCulloch*’s analysis is that Congress has implied powers, which are not specified in the Constitution. Baude reads *McCulloch* as saying that when an asserted governmental power “is merely ‘incidental,’ it can be implied, but there are other powers that are so great that they cannot be found in the Necessary and Proper Clause.”<sup>193</sup> This interpretation relies on two passages in *McCulloch*.<sup>194</sup>

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget, that it is a constitution we are expounding.

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problems, as I note above. Further, Reinstein’s argument is less a refutation of Madison than an alternative definition of “inferior.” Nevertheless, I completely agree with Reinstein’s conclusion that legislation and treaties from early Congresses “provide[] an impressive body of evidence rejecting the proposition that Congress’s implied powers are constrained by the degree of their importance.” *Id.* at 77; *see infra* Part IV.

193. Baude, *supra* note 15, at 1754; *see Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 557.

194. Marshall uses the phrase “great powers” five times in *McCulloch*, *see* 17 U.S. (4 Wheat.) 316, 407, 415, 421, 424 (1819); and elsewhere uses synonymous phrases five times. *See id.* at 400 (“the great operations of the government”); *id.* at 404 (“great and sovereign powers”); *id.* at 407 (“great outlines”); *id.* at 411 (“great substantive and independent power”); *id.* at 418 (“great objects”). Only two of these uses are in contexts distinguishing great powers from inferior or implied powers.

Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government.<sup>195</sup>

And secondly:

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.<sup>196</sup>

Chief Justice Roberts selects phrases from this latter passage in *NFIB* to assert that the Necessary and Proper Clause “does not license the exercise of any ‘great substantive and independent power[s]’ beyond those specifically enumerated.”<sup>197</sup> His limited analysis offers no further insight into a Great Powers restriction on implied powers.

Let’s assume for the moment that these passages mean what Roberts and Baude contend. Since not all enumerated powers are great (e.g., punishment of counterfeiting), enumeration is not the test of “greatness.” This places us at a fork in the analytical road. Enumerationists must understand Marshall either as whittling down the list of great powers to a “short list” of just four: revenue (taxation and borrowing), war, commerce regulation, and foreign affairs. Or they must take Marshall to mean that the great powers include a slightly larger, though unspecified subset of the enumerated powers. Again, the whole purpose to reach for a Great Powers theory is to avoid the problem of randomly applying *expressio unius* to the full list of enumerated powers. But either path at this fork is problematic for enumerationism.

The short-list approach creates as many analytical difficulties as it resolves. To be sure, the powers over revenue, war, commerce, and foreign affairs are a highly plausible “short list” of great powers. In eighteenth-century thought, the nation–state was primarily an institution for raising revenue (through taxation and borrowing) to support the conduct of war and foreign affairs.<sup>198</sup> Commerce was by then also seen as of comparable importance to the strength of nations.<sup>199</sup> But that “short list” doesn’t leave much room to identify comparably great implied powers that are too important to leave to implication. If enumerated powers like creating courts, regulating and disposing of territories, putting down insurrections, and admitting new states are not on this four-power short list, then it is hard to see

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195. *McCulloch*, 17 U.S. (4 Wheat.) at 407–08.

196. *Id.* at 411.

197. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 557.

198. *See, e.g.*, EDLING, *supra* note 82, at 47–57.

199. *See generally* ADAM SMITH, *THE WEALTH OF NATIONS* (1776).

how Baude and Roberts's two prime examples could be said to partake of greatness on par with those on the short list. Eminent domain and the health insurance mandate are plainly inferior to at least one short-listed great power. Land within the states might be condemned to build military bases, customs houses, interstate highways, or port facilities on navigable waters. And Roberts conceded that the health insurance purchase mandate was useful to regulating the healthcare market.<sup>200</sup> Indeed, eminent domain and the health insurance mandate are decidedly inferior to many of the enumerated powers that the short-list approach denominates as not great. In other words, a short-list version of the Great Powers theory undermines the specific arguments for which its proponents conjured it into existence.

Indeed, Marshall's discussion of great powers does not fit an enumerationist analytical scheme. Marshall seems to conceive of the great powers somewhat abstractly, treating explicit enumerations as ingredients in a brew that gives off a vapor of related but more comprehensive powers. Thus, the power to "declare war" becomes the power to "declare and conduct" war, or more broadly, "the sword"; the power to regulate commerce morphs into a power over "no inconsiderable portion of the industry of the nation"; and a power over "all the external relations" is "intrusted" to the national government even though it is not enumerated.

If the great powers "short list" is not a promising interpretation of *McCulloch* for enumerationists, the alternative—that the great powers are an undisclosed subset of the enumerated powers—doesn't fare much better. For starters, we still don't know, beyond the "four Great Powers," which other enumerated powers are great and which aren't. This puts us back into a vague "I know it when I see it" standard for determining when an implied power is impermissibly great. Moreover, the difficulties of the means-ends approach creep back in: there would be many recognized implied powers equal to or greater than at least some enumerated powers, thereby undermining the *expressio unius* tenet of enumerationism.

To this point, I've assumed for argument's sake that Roberts and Baude read *McCulloch* correctly. But in fact, they don't. On the contrary, *McCulloch* really gives us no categorical test for identifying "great" powers per se. Instead, Marshall relies on the purely functional test of ends versus means: a power is not "great" so long as it is not exercised for its own sake, or as an end in itself.<sup>201</sup> Marshall's use of the modifiers *substantive* and *independent*, seized on by Chief Justice Roberts, appears to confirm this point. As we've already seen, however, the means-ends test offers such a moving target that it fails to serve enumerationist purposes. We can assume that war is a substantive power, but it is never an end in itself: it is a means of preserving national independence, acquiring territory, or promoting trade. But trade helps build national power, including military power. Taxation and borrowing can be used to fund wars, but also to promote commerce which, when promoted, increases the economic basis for more taxes. The great

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200. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559.

201. 17 U.S. (4 Wheat.) at 420–21.

powers are interdependent, not independent, and they aren't really ends in themselves.

Thus, the Great Powers theory does not supply a coherent basis to confine implied powers within the premises of enumerationism. This isn't surprising. Madison never developed the theory. Marshall, for his part, appears to have borrowed and morphed Pinkney's argument that the great ends of government were those stated in the preamble, and the enumerated powers were means to those ends.<sup>202</sup> While Pinkney's argument holds up—since the ends of government in the Preamble are alike in nature and generality—his argument does not translate into Marshall's version, where the ends of government are “great” enumerated powers.

## 2. *The Sketchy Historical Pedigree of “Great Powers”*

It's important not to be dazzled by the association of the Great Powers idea with The Father of the Constitution and The Great Chief Justice to the point that we lose sight of the flaws in that theory. For the reasons that follow, the Great Powers theory is not established constitutional law, and we are free to evaluate it on its own (lack of) merit. As Marshall said in the *McCulloch* opinion itself (speaking of *The Federalist Papers*), “the opinions expressed by the authors . . . have been justly supposed to be entitled to great respect in expounding the constitution . . . but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained.”<sup>203</sup>

The notion that Madison was “the Father of the Constitution” is increasingly coming under question by legal historians,<sup>204</sup> but even if that moniker were fitting, it is not the case that his every utterance should be taken as an authoritative explanation of the Constitution's meaning. As evidence of original intent or public meaning, Madison's statements must be viewed with some care. He changed his mind a lot.<sup>205</sup> A great thinker and statesman he undoubtedly was, but he was also a politician and a man of action, one of the great motivated reasoners of his or any age, and not above opportunism and self-contradiction. Take his First Bank opposition speech itself. There he asserted that the Convention's rejection of a resolution to include an enumerated power to create corporations demonstrated that the Framers intended to withhold that important power.<sup>206</sup> Five years later, speaking in opposition to the Jay Treaty, Madison

202. See *supra* text accompanying note 89.

203. *McCulloch*, 17 U.S. (4 Wheat.) at 433.

204. See, e.g., MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 15 (2015) (suggesting that Madison was not the father of the Constitution); Mikhail, *Clauses*, *supra* note 12, at 1071–76 (suggesting that Wilson's influence on the Constitution's delegation of powers exceeded that of Madison). Jack Rakove, despite his insistence on Madison as the key figure in the framing of the Constitution, nevertheless presents a narrative in which Madison's two primary objectives—resisting state representation in the Senate and obtaining a federal veto over state legislation—were both defeated. See RAKOVE, *supra* note 58 *passim*.

205. See, e.g., RAKOVE, *supra* note 58, at 347 (in the years following ratification, “events led Madison to rethink [his] fundamental premises”).

206. 2 ANNALS OF CONGRESS 1945 (1791).

asserted that the Convention proceedings were irrelevant to interpretation because the Constitution was a mere proposal prior to ratification.<sup>207</sup> As president, Madison acknowledged that the First Bank was constitutional after all, and repeatedly asked Congress to present him with a bill to charter a second national bank.<sup>208</sup>

Most significantly—especially for a positivist originalist, such as Baude<sup>209</sup>—Madison’s argument against the First Bank was roundly rejected by his contemporaries and by subsequent constitutional law and practice. As Professor Reinstein has shown, Edmund Randolph—himself an enumerationist and opponent of the Bank—rejected Madison’s Great Powers theory, endorsing instead what I have called the straight means-ends solution.<sup>210</sup> Madison’s House colleagues rejected his arguments by approving the First Bank bill by a lopsided 39–20 vote.<sup>211</sup> Constitutional opposition to a national bank among mainstream Jeffersonian Republicans melted away by 1816.<sup>212</sup> And of course, *McCulloch* rejected Madison’s conclusion that a national bank was unconstitutional.<sup>213</sup>

Ironically, given Roberts and Baude’s reliance on *McCulloch*, the case presents a huge problem for the Great Powers theory. It is hard to reconcile the Great Powers enumerationism argument with *McCulloch*’s principal holding, sustaining the Second Bank of the United States. Baude finesses this issue without attempting to explain it.<sup>214</sup> In fact, there is no good explanation. Once we start casting about to define great powers by essential qualities—that there is some external measure of greatness—it becomes very difficult to make the case that incorporating a Bank of the United States, either in its First or Second manifestation, is an inferior power. In addition to its role as banker to the federal government, the Bank exercised central banking functions for the entire economy, exerting control over the money supply and ultimately controlling the credit practices of over 300 state-chartered banks by 1819. It had branches in several states, its notes were protected by special counterfeiting laws, and its capitalization was substantial.<sup>215</sup> Andrew Jackson could with reason nickname the Bank a “monster.”<sup>216</sup> Jackson’s veto of the bill to renew its charter became a major issue in the 1832 presidential race;<sup>217</sup> and as late as 1858, Stephen A. Douglas would assert in his debates with Lincoln that the Bank was one of the three or four great issues that separated the Democratic and Whig parties until the emergence of the

207. RAKOVE, *supra* note 58, at 362.

208. Schwartz, *supra* note 8, at 42–43.

209. See Baude, *supra* note 15, at 5 (claiming positivist approach to originalism based on constitutional practice).

210. Reinstein, *supra* note 12, at 26–29.

211. See 1 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 80 (1997).

212. See Schwartz, *supra* note 8, at 38–42.

213. 17 U.S. (4 Wheat.) 316, 422 (1819).

214. Baude, *supra* note 15, at 1753 (the Great Powers theory “was endorsed in *McCulloch* even as the Supreme Court concluded that the Bank was constitutional”).

215. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 145, 197–200, 256, 300 (1957).

216. Schwartz, *supra* note 8, at 70.

217. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 366–70 (2007).

slavery question at the end of the 1840s.<sup>218</sup> The Bank was a bigger, more controversial, and more far-reaching exercise of power than most of the enumerated powers, and easily greater than an eminent domain power.

Marshall argued that incorporating a bank was not a great power, but this does not mean that he adopted the Great Power theory advanced by Baude and Roberts. In fact, the latter's Great Power theory is a misinterpretation of *McCulloch*. Roberts and Baude's conception of great powers implies an absolute measure, based on an external, albeit elusive, criterion of importance of the power. This implies further that there is something that can be identified as a great power and thus denied to the federal government *in all cases*—even where it could be used as a means to execute a granted power. But this was not Marshall's test in *McCulloch*; instead, his was a functional test. Rather than identifying powers as inherently *great* or *inferior*, Marshall viewed an implied power as inferior (and thus suitable to be implied) if it were means to an end. Although not completely clear on this point, Marshall seems to have defined a power as great, substantive, and independent if it was being used as an end in itself, rather than as means to an end:

Had it been intended to grant this power [to create corporations], as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.<sup>219</sup>

Thus, a power that might be deemed too “great” to imply “in any case whatever,” can be legitimately implied in *some* cases—if used as a means to an enumerated end. Marshall says a power is not great if it can be used as a means. Enumerationists flip this equation around to say: a power cannot be used as a means if it is great. Despite using the phrase “great powers,” *McCulloch* in essence adopts the straight means-ends solution, with all its attendant problems. Baude and Roberts simply misread *McCulloch*.

There is a crucial difference in purpose between *McCulloch* and the enumerationist's failed efforts to construct a Great Powers theory. Marshall, at the end of the day, did not seem particularly concerned to present a coherent theory of limits on implied powers. *McCulloch*'s Bank discussion takes on two objectives: (1) to justify the constitutionality of the Bank, and (2) to reject a strict constructionist approach to interpreting congressional power in general, and a “strictly necessary” approach to implied powers in particular. What Marshall did not need to do was to establish a theory by which future implied powers claims, not before the Court, could be *rejected* and *limited*. Yet enumerationists try to read

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218. See Stephen A. Douglas, *First Debate with Abraham Lincoln at Ottawa, Illinois* (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 2 (Roy P. Basler ed., 1953) (“While the Whig and Democratic parties differed in regard to a bank, the tariff, distribution, the specie circular and the sub-treasury, they agreed on the great slavery question which now agitates the Union.”).

219. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–22 (1819).

*McCulloch* as if that were its main thrust. To be sure, a complete theory of implied powers should define the limits of those powers. But Marshall did not go beyond a vague and general acknowledgment that limits existed somewhere—that at some outer limit the Court would have to face the “painful duty . . . to say, that such an act was not the law of the land.”<sup>220</sup> His task in *McCulloch* did not require him to provide a complete and coherent enumerationist theory of implied powers, and he didn’t do so.

#### IV. AVOIDING ENUMERATIONISM: A CONSTITUTIONAL TRADITION

The avoidance of enumerationism even while paying lip service to it goes back to the beginning of the Republic. Constitutional interpreters throughout history have developed several methods to work around enumerationism, and justify virtually any assertion of federal power to address a national regulatory problem. The most well-known workaround is the elastic interpretation of the Commerce Clause, followed closely by the conditional spending power. The Commerce Clause supplies a widely accepted constitutional foundation for something approaching a federal power to regulate for the general welfare. As the term *commerce* expanded from trade and navigation to encompass the economy, the Commerce Clause became the prime locus for the structural imperative of capable federalism. Most human activity in the United States, at least most human activity of regulatory concern, revolves around, filters through, or interacts with the economy. To a lesser but important degree, something similar happened with the spending power: by making more of a distinction between spending and regulation than enumerationists should find quite right, cooperative-federalism spending programs can, as a practical matter, fill any general welfare gaps left by the commerce and other enumerated powers. The tension between these ideas and enumerationism has not gone unnoticed by at least some rigorous enumerationists.<sup>221</sup> The historical trend and doctrinal pressures leading to this state of affairs make up one of the more thoroughly discussed aspects of American constitutional law, and I won’t attempt to replicate the well-worn points here. Suffice it to say that these developments are assumed to be part of the New Deal settlement.

Instead, in this Section, I attempt to demonstrate that the avoidance of enumerationism is not limited to the expansive interpretations of the commerce and spending powers following the New Deal turnaround. I identify and analyze the various interpretive techniques that have been used throughout our constitutional history to imply powers that violate the Great Powers and means-ends approaches to enumerationism. I then discuss eight examples of such implied great powers.

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220. *Id.* at 424.

221. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 701 (2012) (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting); *United States v. Lopez*, 514 U.S. 549, 588–89 (1995) (Thomas, J., concurring) (pointing out that if the Framers intended for the Commerce Clause to extend to all matters which “substantially affect” commerce many other powers in Article I would be superfluous); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196–97 (2001) (arguing that the Framers did not intend for Congress to have a plenary power of the purse).

Because my focus is on implied powers, I do not emphasize the technique of liberal construction, by which an enumerated power is interpreted with a breadth that undermines the limiting effect of an *expressio unius* enumeration. This approach can obviate the need to talk about implied powers in particular circumstances, because the asserted legislative power is swept into the definition of the enumerated power. For example, if consuming vegetables is commerce, then Congress can regulate marijuana consumption as a direct application of its commerce power without discussing implied powers.<sup>222</sup>

#### A. Avoidance Techniques

Throughout history, various interpretive techniques and arguments have been successfully employed to violate enumerationism while paying lip service to it. We can define *lip service* more precisely: it means showing a connection—any connection—between an asserted exercise of regulatory power and some enumerated power, but doing so without regard to the two more specific requirements of enumerationism. To conform to enumerationism, the implied power must (1) be subordinate to an identified enumerated power *and* (2) not run afoul of implied disabilities resulting from the application of *expressio unius* to more specific enumerated powers.

The following description identifies four techniques that have been used to work around enumerationism. The techniques may overlap somewhat. But each of them justifies an implied power that is greater than or equal to various enumerated powers, thus violating one or both of the specific conditions of enumerationism.

##### 1. Metonymy

*Metonymy* is a figure of speech in which a thing is referred to, not by its own name, but by the name of a related thing, typically one that is more specific or smaller.<sup>223</sup> For example, the deployment of military land forces might be referred to as “boots on the ground,” “crown” might be used to signify the institution of monarchy, or “Washington” might be used to mean the combined institutions of the U.S. government. In theory, metonymy could be used in constitutional interpretation. For example, if the (unenumerated) power to issue paper money is said to be granted to Congress by the enumerated power to coin money, metallic coin is being interpreted as a metonym for money of all sorts. Likewise, metonymy is used when the power to establish a uniform rule of naturalization is construed to authorize the power to deport aliens or create immigration law more generally. Deriving powers metonymously from enumerated powers is in essence a form of *eiusdem generis*—interpreting listed items to include like items not listed—and thus violates the *expressio unius* tenet of enumerationism.

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222. Compare *Gonzales v. Raich*, 545 U.S. 1, 26 (asserting that consuming commodities is commerce), *with id.* at 36–37 (Scalia, J., concurring) (asserting that noncommercial marijuana activities can be regulated as necessary and proper to the regulation of the interstate marijuana market).

223. See *Metonymy*, AM. HERITAGE DICTIONARY 1108 (5th ed. 2011).

## 2. Synergy

*Synergy* is the interaction of component elements to produce an overall effect, one that may in some cases be greater than the sum of the elements individually.<sup>224</sup> A constitutional interpretation using synergy in the context of governmental power would imply a power from a complex of lesser related powers. For example, a power to wage war might be implied from the powers to declare war, grant letters of marque, and raise and support armies. The powers to coin money and to punish counterfeiting of government securities, combined with the denial to states of the powers to coin money or issue paper money, might be interpreted synergistically to confer a federal power to control the nation's money supply. In the *Legal Tender Cases*, for example, the Court referred several times to powers implied by reading "an aggregate" of express powers together.<sup>225</sup>

Synergistic interpretation overlaps with metonymous interpretation, and raises a similar problem for enumerationism. Synergistic interpretation of enumerated powers violates enumerationism by implying powers greater than the enumerated powers from which they are purportedly derived. This subverts the means-ends relationship that an implied power must have with the enumerated powers under the principles of enumerationism.

## 3. Sovereignty

Some powers have been attributed to Congress or to the U.S. government, not because they are enumerated, but because they are aspects of sovereignty that are assumed to inhere in any national government. The idea that the U.S. government has inherent sovereign powers—unenumerated powers flowing from the nature of government—was embraced by the Supreme Court in the late nineteenth century and persists to the present day.<sup>226</sup> Yet, contrary to some claims, it was not invented by the late-nineteenth-century Court. Inherent-sovereign-powers arguments were made by prominent constitutional interpreters from the beginning.<sup>227</sup> In any event, it is clear that such powers are implied and not derived from the enumeration.

## 4. Means-Ends Reversal

From the first Congress to the present day, even supposed enumerationists appear often to have been satisfied with legislation justified by the technique I call *means-ends reversal*—using an enumerated power as means to regulate an end that is not enumerated. Congress has no enumerated power to regulate health, safety, or morals; indeed, such regulation is an archetypal example of state police powers. Consider, then, the regulation of marijuana by the Controlled Substance Act. It is hard to deny that the primary purpose of

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224. See WORDREFERENCE.COM, <http://www.wordreference.com/definition/synergism> (defining *synergism* or *synergy*).

225. The *Legal Tender Cases*, 79 U.S. 457, 535–37, 546 (1871).

226. See, e.g., *Arizona v. United States*, 567 U.S. 387, 394 (2012); *The Legal Tender Cases*, 79 U.S. at 535–37, 546.

227. See *infra* text accompanying note 287 and Sections II.C.2 & IV.B.3 (referring to first National Bank debate of 1790 and Alien Act debate of 1798).

criminalizing marijuana distribution and possession is to regulate health, safety, and morals.<sup>228</sup> One could characterize this law as the regulation of a black market—the nation’s commerce should be free of illegal goods—and the Court has done so.<sup>229</sup> But this characterization is somewhat circular: the market is black because marijuana has been made illegal, for reasons of health, safety, and morals. The commerce (market) regulation is means to an end of eradicating the use—not simply the buying and selling—of marijuana in society. The technique of means-ends reversal, which became prominent in the *Lochner* era, created numerous logical inconsistencies between cases upholding federal commerce regulation of health, safety, and morals and cases claiming that commerce regulation could not be used to accomplish unenumerated purposes, such as regulation of manufacturing and employment.<sup>230</sup> *Hammer v. Dagenhart*,<sup>231</sup> for example, is fundamentally a case rejecting means-ends reversal on behalf of an enumerationist interpretation of federal power.

Many modern-day constitutional interpreters seem completely comfortable with means-ends reversal.<sup>232</sup> Some might argue that the inherent difficulty in distinguishing ends from means makes it fruitless to pin constitutional significance on the distinction. For example, the regulation of commerce can always be characterized as a means to something else, like promoting economic prosperity. Or, in support of a congressional power to prohibit private race discrimination under the Commerce Clause, it might be said that reducing racial discrimination is in fact a means to regulate (improve) commerce as well as the other way around. It might therefore be argued that the doctrine of limited-enumerated powers is served so long as *either* the ends *or* the means are listed in the Constitution. Congress can regulate health, safety, or morals, for example, even though those ends are not among the enumerated powers, provided that it does so through, for example, commerce regulation, bankruptcy, or naturalization law. According to this argument, enumerationism serves its power-limiting or federalism-protecting function even when it permits the pursuit of unenumerated goals, so long as the means fall within the enumeration.

But it is hard to see why these arguments should be acceptable to a committed, as opposed to a false, enumerationist. To begin with, treating the

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228. See, e.g., Controlled Substances Act, 21 U.S.C. § 801(2) (1970) (“The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”).

229. *Gonzales v. Raich*, 545 U.S. 1, 10, 19 (2005) (characterizing Congress’s purpose for passing the Comprehensive Drug Abuse Prevention and Control Act); *id.* at 39–40 (Scalia, J., concurring) (same).

230. See, e.g., 2 DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 97–98 (1994) (stating that “[i]t is hard to believe that the [Court] found its own distinctions persuasive[]” when it invalidated a federal law prohibiting interstate shipment of child-made goods (*Hammer v. Dagenhart*) while upholding federal prohibition of interstate shipment of lottery tickets (*Champion v. Ames*)).

231. 247 U.S. 251 (1918).

232. See, e.g., Reinstein, *supra* note 12, at 5, 13, 93 (arguing that “inversion” of means and ends is proper constitutional interpretation, albeit inconsistent with Great Powers theory of implied powers).

enumerated powers as means undermines the effort to make sense of implied powers. But the serious analytical problems for enumerationism extend beyond that. Limited enumerated powers have always been understood to create at least some implied disabilities. Recall my fanciful example in which Rutledge's cook has the power to cook beefsteak. Suppose the cook makes a gift of Rutledge's cattle, in the form of steak dinners, to Rutledge's neighbors. Rutledge would say (quite angrily) that the cook's generally worded steak-dinner power was not meant to imply a power to feed other families. Permitting the use of enumerated powers for unenumerated ends overwhelms the supposed limits. To illustrate further: using commerce regulation as a mere means, Congress could require a license for engaging in any economic activity substantially affecting interstate commerce. By attaching conditions to that license—for example, denying the license to someone who refused to purchase health insurance or making it a crime for a licensee to carry a gun in a school zone—a purportedly limited-enumerated means could be bootstrapped into a general police power, one not even limited by a general-welfare principle. True enumerationism must therefore reject means-ends reversal, and from time to time it essentially has by striking down regulations insufficiently connected to commerce.<sup>233</sup>

### *B. A Constitution of Implied Great Powers*

The following is a selected list of unenumerated powers that have long been accepted as legitimate implied powers. Each of them is derived by one or more of the four techniques for avoiding enumerationism. Together, these examples tend to demonstrate the lack of a sincere commitment to enumerationism in our constitutional order. This list is illustrative, not exhaustive, and there are many others one could think of.

#### *1. War and National Defense*

There is no doubt whatsoever that the Constitution grants the U.S. government the power to make war. Congressional debates, Supreme Court decisions, and scholarly commentary throughout U.S. constitutional history have referred to an unquestioned federal war power, and even at times a broader power of national defense.<sup>234</sup> A more difficult question is how that power is conferred. The Constitution grants Congress the power to *declare* war.<sup>235</sup> Inconveniently for enumerationism, the Constitution nowhere enumerates a power to “make,” “conduct,” or “wage” war.

The Framers appear to have distinguished between declaring and making war. The Committee of Detail's original draft of what became the Article I,

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233. Although somewhat obliquely, *McCulloch* seems to have spoken disapprovingly of means-ends reversal: the power to create a corporation, Marshall wrote, “is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) (emphasis added).

234. See, e.g., *The Legal Tender Cases*, 79 U.S. 457, 546 (1871); *McCulloch*, 17 U.S. at 407.

235. U.S. CONST., art. I, § 8, cl. 11.

Section 8 enumerated powers gave Congress the power “to make war.”<sup>236</sup> In a brief debate at the end of the day on Friday, August 17, 1789, the convention voted to substitute “declare” for “make” war.<sup>237</sup> The record of the debate is somewhat enigmatic, and of the eight or so members who spoke, there was no clear agreement on what the terms meant. However, the general tenor of the debate is that *declare* was narrower than *make* and therefore less than a complete war power. According to Madison’s notes, he along with Elbridge Gerry moved this change of language, to “leav[e] to the Executive the power to repel sudden attacks.” And Rufus King persuaded Oliver Ellsworth to support the motion by arguing that “‘make’ war might be understood to ‘conduct’ it which was an Executive function.”<sup>238</sup>

The nineteenth-century Supreme Court also distinguished declaring and making war. In *McCulloch v. Maryland*, Marshall stated that the power “to declare and conduct a war” was found “among the enumerated powers of government.”<sup>239</sup> Thus Marshall drew a linguistic distinction between *declare* and *conduct* war, though he described the power as enumerated—curiously, since “conduct war” is found nowhere in the Constitution. Significantly, he locates the power in the “government,” rather than Congress, further suggesting that *declare* is not a complete source of war power. In the *Prize Cases*,<sup>240</sup> decided at the height of the Civil War, all nine justices—including the four dissenters—seemed to distinguish between the conduct of war and a declaration of war. A declaration of war was necessary to initiate war and to redefine various legal relationships, but the conduct of war was something undertaken by the President.<sup>241</sup>

Declaring and waging war are also distinct as a matter of historical fact. According to one estimate, the United States has engaged in over 90 “significant military conflicts” since 1789, but has fought only 5 formally declared wars.<sup>242</sup> In addition to campaigns against Indian tribes, the United States fought four undeclared wars in the first quarter century of the republic, beginning with the “Quasi War” against France (1798–1801).<sup>243</sup> The practice of undeclared wars continues to the present day and is institutionalized in the War Powers

236. 2 FARRAND, *supra* note 6, at 177, 182.

237. *Id.* at 318–19.

238. *Id.*

239. 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

240. 67 U.S. 635 (1863).

241. *Id.* at 668 (distinguishing the roles of the President and Congress regarding war); *id.* at 694 (Nelson, J., dissenting) (contending that Congress alone has the power to declare war, while recognizing the President’s power to wage “personal” war).

242. Mark E. Brandon, *War and the American Constitutional Order*, in MARK TUSHNET ET AL., *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 32–35 (2005). The declared wars are the War of 1812, the Mexican War, the Spanish-American War, and World Wars I and II. Some of these—for example, the Civil War and some of the Indian wars—could be characterized as “suppress[ing] insurrections and repel[ling] invasions,” which an enumerationist might say are authorized by a different clause. But many military actions involved sending troops abroad, without a declaration of war. *Id.*

243. *Id.*

Resolution.<sup>244</sup> That law, enacted over President Nixon's veto in 1973, acknowledges the President's power to "introduc[e] United States Armed Forces into hostilities" with the aspiration that the President will first "consult with Congress."<sup>245</sup> The Resolution further acknowledges engagement in armed conflict "in the absence of a declaration of war" and allows Congress to extend the Resolution's time limit on hostilities initiated by the President *either* by a declaration of war *or* an "exten[sion] by law."<sup>246</sup> Whatever else the War Powers Resolution does, it acknowledges the constitutional reality of undeclared war and strongly suggests the existence of constitutional war powers that are not fully encompassed by the power to *declare* war.

The distinction between *declaring* and *making* war has given rise to a long-running constitutional debate over the placement of war powers in the Constitution's separation of powers.<sup>247</sup> The debate may be roughly characterized as staking out a *Presidentialist* and a *Congressionalist* position. Presidentialists argue the President has the power both to initiate war without congressional authorization, as well as to conduct it, subject only to Congress's specified powers over appropriations, military lawmaking, and the appointment of high-ranking officers. Congressionalists assert that Congress has a greater role, including at least a sole power to initiate war.<sup>248</sup> My argument for capable federalism does not require taking a position on the merits of this controversy. Suffice it to say that all participants in the debate agree that a power to wage war is located *somewhere* in the Constitution. I merely argue that no one who accepts that point can be a good enumerationist.

The Presidentialist view, whatever its merits as a separation-of-powers argument, does not support enumerationism. Presidentialists argue that *declare war* was a term of art with a strict meaning in international law: it referred only to a legislative pronouncement that a state of war existed, thereby putting the world on notice that various peacetime legal rights and duties would be supplanted by wartime ones. This enumerated power, they argue, gives Congress no power either to conduct *or initiate* war. Instead, they argue, waging war is an implied power inhering in the concept of executive power.<sup>249</sup> Presidentialists do not, and cannot, argue that the power to wage war is expressly given to the President: no express power to "make" war was cut and pasted from the Committee of Detail's original language directly into executive powers. Article II, which provides only that the President "shall be commander-in-chief of the Army and Navy of the United

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244. H.J. Res. 542, 87 Stat. 555 (1973), 50 U.S.C. § 1541 (2012).

245. *Id.* § 3.

246. *Id.* § 5(b).

247. See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 170–71 nn.1–2 (1996) (citing sources); *id.* at 260–64 (discussing Constitutional Convention's "make"/"declare" debate).

248. See Cameron O. Kistler, Comment, *The Anti-Federalists and Presidential War Powers*, 121 YALE L.J. 459, 459–61 (2011); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–98 (1997) (summarizing the debate in the legal academy).

249. See, e.g., Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850–51 (1972); Yoo, *supra* note 247, at 167, 295.

States,” is a means to an unenumerated end of making war, not the reverse. Thus, while the Presidentialists are strict enumerationists when it comes to congressional power, they happily refer to unenumerated powers when it comes to the President. In doing so, they have made much of the purported distinction between “legislative powers herein granted” which are “vested” in Congress, and “the executive power” “vested” in the President.<sup>250</sup> Presidentialists have offered no reason why a Constitution purporting (to enumerationists) to limit the powers of *the government* should offer broad unenumerated powers to the President while denying them to Congress. Indeed, as noted above, the enumerationist character of the argument is self-defeating, for the Necessary and Proper Clause extends legislative power “[t]o make all laws which shall be necessary and proper for carrying into [e]xecution . . . all other powers vested by this Constitution in the [g]overnment of the United States, or in any [d]epartment or officer thereof.”<sup>251</sup>

Congressionalists have not been good enumerationists either. Some Congressionalists have argued that the enumerated power to *declare* war implies a power to *make* war.<sup>252</sup> Consider what this means. “[T]he war power of the Federal Government,” as summarized by the Supreme Court “is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.”<sup>253</sup> So this version of the Congressionalist argument requires us to analyze vast and unspecified war powers as somehow inferior and subordinate to the more specific declare-war power. This is quite a stretch, and offers a clear example of either means-ends reversal or implication by metonymy. Either way, it is not consistent with good-faith enumerationism.

One could try to construct an original-public-meaning argument that *declare war* actually means to *make war* or to have a plenary war power. One proponent of this argument asserts that several Antifederalist opponents of the Constitution construed *declare war* in this way during the Ratification debates, objecting that the war power was thus placed exclusively in the hands of Congress and therefore lacked the salutary check of separating and dividing the war power between Congress and the President.<sup>254</sup> One might add to this evidence the fact that even staunch Jeffersonians in early congressional debates over the Alien Act of 1798 attributed penumbral national-security powers—specifically, a power to

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250. U.S. CONST. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1. See Prakash & Ramsey, *supra* note 80, at 256–57 (arguing that Article II’s vesting Vesting Clause must be a grant of power because Article I refers only to those powers *herein granted*); Calabresi & Prakash, *supra* note 80, at 570 (“There are many reasons why the Vesting Clause of Article II must be read as conferring a general grant of ‘executive Power’ . . .”).

251. U.S. CONST. art. I, § 8, cl. 18; see *supra* text accompanying notes 80–81.

252. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 67 (1996) (“[T]he power to declare war implies the power to wage war and supports what is necessary and proper to wage war successfully[.]”).

253. Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 426 (1934); accord Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (“[The war power] extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense . . .”).

254. Kistler, *supra* note 248, at 253.

deport enemy aliens during wartime—to the declare-war power.<sup>255</sup> At most, this argument demonstrates *an* original public meaning, and not *the* original public meaning. We have already seen that the Framers did not seem to think *declare* included *make*, and indeed other early enumerationists saw the declare-war power as so limited that it could not have been read to imply powers to raise armies or call out the militia.<sup>256</sup> If anything, this argument suggests that the Antifederalists were themselves bad enumerationists, willing to engage in “liberal” or metonymous construction or means-ends reversal to make a strategic point.

A more plausible Congressionalist argument acknowledges that declaring war is not the same as waging it, and asserts that the power to wage war is not expressly given to either the President or Congress; instead, its scope and its distribution within the separation of powers must be implied from some combination of sources in addition to the declare-war power.<sup>257</sup> This argument refers to the complex of war powers given to Congress in Article I, Section 8, together with the denial of war powers to the states in Article 1, Section 10. This analysis is probably correct, but it is not enumerationism. Instead, this form of argument works around enumerationism by applying a synergistic interpretation.

The twentieth-century Supreme Court has taken a non-enumerationist approach to the power to make war. Perhaps out of a reluctance to decide what it has generally viewed as a political question, the Supreme Court has avoided taking a clear position in the separation-of-powers debate over war powers, and at times has referred to a broad war power without identifying an enumerated source. In *United States v. Curtiss-Wright Export Corp.*, the Court stated that

the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.<sup>258</sup>

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255. See 1 CURRIE, *supra* note 211, at 259 (statement of Representative Albert Gallatin). Gallatin was a Jeffersonian loyalist and an enumerationist, who would go on to serve as Treasury Secretary in both the Jefferson and Madison administrations. See Schwartz, *supra* note 8, at 35–37.

256. See Reinstein, *supra* note 12, at 82 (arguing that Edmund Randolph advised President Washington that the standing army and militia clauses were independent powers that could not be implied from the declare war power).

257. See, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 75–76 (1990); Mark E. Brandon, *War and the American Constitutional Order*, in MARK TUSHNET ET AL., THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 23–24 (2005); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 674–83 (1981).

258. 299 U.S. 304, 318 (1936).

Notably, the focus of criticism of that controversial opinion has been its Presidentialism, not its departure from enumerationism.<sup>259</sup> The closest the Court has come to linking the war power to an enumerated power is in this passage from *United States v. MacIntosh*:

The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to “provide for the common defense.” In express terms Congress is empowered “to declare war,” which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and “to raise . . . armies,” which necessarily connotes the like power to say who shall serve in them and in what way.<sup>260</sup>

Here, the Court refers to the declare-war power as express, but not exclusive or inclusive. The power connotes a broad war power: this is metonymy, rather than a means-ends implied powers analysis. It is also worth observing that this language suggests—probably unintentionally—the idea that the Article I, section 8, clause 1 power to “provide for the common defense” is a broad enumerated war power. Note how such an argument would defeat enumerationism even as it seeks an enumerated basis for the war power: it suggests that “provide” in the Spending Clause actually means “regulate” and therefore would authorize Congress likewise to regulate “for the general welfare.”

This conflict between an acknowledged war power and the enumerated powers only intensifies if one believes that the Constitution conveys a broader and more amorphous power of national defense. This broader power, whatever it is, involves regulatory matters and not just spending. Thus, it is unavailing for an enumerationist to point to the common-defense language in the spending clause as a source of war and national defense regulatory powers when arguing at the same time that *provide* in that clause means spend *but not* regulate.

In sum, the power to make war is not seriously questioned. It has been assumed by the Framers and everyone since then. Yet it is not a lesser included power of any enumerated war power, such as the power to declare war, the Commander-in-Chief Clause, or any of the military clauses in Article I, Section 8. If the term *great power* is constitutionally significant, waging war is clearly a great power. But it is not enumerated, and is thus necessarily implied, either as an inherent attribute of sovereignty, metonymously from one or more of the various references to war, or synergistically from all of them.

## 2. Foreign Affairs

A similar problem arises with foreign affairs. The Constitution does not expressly grant an overarching foreign affairs power. Instead, constitutional provisions give us glimpses—some broader, some narrower—of that general power. “Although [the Constitution] explicitly lodges important foreign affairs

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259. See, e.g., KOH, *supra* note 257, at 75–76; Lofgren, *supra* note 257, at 674–83.

260. *United States v. Macintosh*, 283 U.S. 605, 622 (1931), *overruled on other grounds* by *Girouard v. United States*, 328 U.S. 61 (1946).

powers in one branch or another of the federal government, and explicitly denies important foreign affairs powers to the states, many [foreign affairs powers] are not mentioned.”<sup>261</sup> Article I, Section 8 grants the powers to regulate foreign commerce, naturalize aliens, punish violations of international law, and declare war.<sup>262</sup> The President has the power to “receive [foreign] ambassadors,” and with the Senate’s advice and consent, appoint ambassadors and make treaties.<sup>263</sup> But this doesn’t exhaust the realm of foreign affairs, which also includes the following: recognizing foreign states, granting or withholding foreign aid, negotiating or fighting with non-state forces (e.g., pirates, terrorists), making threats or deploying troops short of war, declaring neutrality, or proclaiming national interests to other nations.<sup>264</sup> The Constitution provides an “anomalous, ‘spotty’ treatment of foreign relations” concludes Louis Henkin, and it “assumes rather than confers foreign relations powers . . . .”<sup>265</sup>

Several unenumerated foreign affairs powers were exercised during the early years of the Republic. From then to now, a broad foreign affairs power has simply been assumed, and the controversies have centered around separation-of-powers, not enumerated powers, issues. The first Congress in 1789 created three federal departments, including a Department of Foreign Affairs (soon renamed “Department of State”) with a Secretary authorized to treat with ambassadors and conduct “such other matters respecting foreign affairs’ as the President should direct.”<sup>266</sup> When President Washington issued his 1793 proclamation of neutrality regarding the war between Great Britain and France, some argued that he had exceeded his power as Executive, but no one objected that the government as a whole lacked the power to proclaim neutrality.<sup>267</sup> Yet the proclamation was not a treaty or declaration of war, did not entail sending or receiving ambassadors, and was not entirely a regulation of foreign commerce. The same can be said for the proclamation of the famous Monroe Doctrine in 1823.<sup>268</sup> In a 1798 debate over the Alien Act, Massachusetts Representative Samuel Sewall argued that only a general authority over foreign affairs—which he derived from the Preamble—could adequately explain all that Congress had done in the foreign affairs field, which seemed to extend beyond express constitutional provisions.<sup>269</sup>

Whether it would be possible to cobble together something close to a complete foreign affairs power from the various provisions touching on it, it is

261. HENKIN, *supra* note 252, at 13.

262. U.S. CONST. art. I, § 8, cls. 3, 4, 10, 11.

263. *Id.* art. II, § 2, cl. 2.

264. HENKIN, *supra* note 252, at 14. As detailed by Calvin Johnson, the issuance of peacetime passports was another significant foreign affairs power omitted from the Constitution, but widely assumed to be possessed by the U.S. government. Johnson, *supra* note 7, at 39–42.

265. HENKIN, *supra* note 252, at 16.

266. 1 CURRIE, *supra* note 210, at 36 n.204. Currie concludes that “the First Congress appeared to share the modern conviction that a general authority over foreign affairs was either implicit in the unpromisingly drafted specific powers or the general provisions vesting executive power in the President or inherent in the office itself . . . .” *Id.*

267. *Id.* at 174.

268. See 2 CURRIE, *supra* note 165, at 207–09.

269. See 1 CURRIE, *supra* note 211, at 259.

clear by now that the Supreme Court has found a comprehensive foreign affairs power either by metonymy or as an inherent sovereign power. The debate over this question concerns whether the foreign affairs power is extraconstitutional.<sup>270</sup> The archetypal statement of the extra-constitutional view is *Curtiss-Wright*.<sup>271</sup> Paradoxically, a major impetus to resort to an extra-constitutional explanation is the hold that enumerationism has on constitutional thinking; a good-faith enumerationist reading of the Constitution has to acknowledge the absence of an expressly granted foreign affairs power. But a capable federalist would have no problem deriving a general foreign affairs power from the Constitution itself. In any event, the fact that a general foreign affairs power is located somewhere in the government is not a matter of dispute. Even a severe critic of *Curtiss-Wright* acknowledges that “the United States possesses all the powers of a sovereign nation[,]” but rather than having an extra-constitutional basis, “[f]ederal power in foreign affairs rests on explicit and implicit constitutional grants and derives from the ordinary constitutive authority.”<sup>272</sup>

### 3. Immigration and Deportation

There is no constitutional provision expressly granting the federal government a power over immigration. The most pertinent constitutional text is the Article I, Section 8 power “[t]o establish a uniform [r]ule of [n]aturalization.”<sup>273</sup> But naturalization refers only to the process of granting citizenship to foreign-born persons. It does not entail other rules for allowing foreign-born persons to travel or reside in the United States, or the rules for deporting non-citizens.<sup>274</sup> Because it is immigrants who seek to naturalize as citizens, a power to regulate immigration might be plausibly defined to include naturalization, but not the other way around. The power to admit, exclude, or deport aliens is not necessary and proper to the power to establish citizenship requirements. The two powers overlap to some degree, but their importance is comparable. Thus, if the naturalization clause is the textual hook for an immigration power, that power is implied by metonymy or *ejusdem generis*.

A federal power over immigration and deportation, albeit initially controversial, has long been recognized, but it has never been subjected to a rigorous enumerationist analysis. The first exercise of a federal immigration power was the Alien Act of 1798, which authorized the President to deport “all such aliens as he shall judge dangerous to the peace and safety of the United

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270. See, e.g., Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 *passim* (2000).

271. See *supra* notes 258–59 and accompanying text.

272. CHARLES A. LOFGREN, “GOVERNMENT FROM REFLECTION AND CHOICE”: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 202 (1986).

273. U.S. CONST. art. I, § 8, cl. 4.

274. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 187 (4th ed. 1998) (“One might well distinguish between regulation of the *physical entry* of aliens into the *territory* of the United States and regulation of the entry into the *political community* of the United States through the extension of full political rights to naturalized citizens.”).

States . . . .”<sup>275</sup> The Act further provided that the President “may grant a license to . . . remain within the United States” to aliens who proved to the President’s satisfaction that they were not a danger.<sup>276</sup> Finally, the Act required the master of any vessel entering a U.S. port to make a written report to the customs officer identifying and describing all aliens on board.<sup>277</sup> Aside from their powerful civil-liberties and due-process objections, opponents advanced the enumerationist objection that Congress lacked the power to deport aliens other than enemy aliens in time of war.<sup>278</sup> Some proponents of the measure tried to hew more closely to enumerationist principles by citing the commerce and war powers, but these arguments were not plausible. The Act was proposed in response to a brewing diplomatic crisis with France, but no shooting war, declared or undeclared, had begun. Further, as Representative Albert Gallatin observed, the Act was not predicated on regulating alien merchants or commercial activities. Other arguments took capable federalist form, asserting the common-defense and general-welfare clauses of the Preamble, or the power of self-preservation “inherent in form of government.” The House passed the Act by a vote of 46–40.<sup>279</sup>

In the half century following the expiration of the Alien Acts in 1801, there was essentially no federal regulation of immigration, as federal policy left regulation of the admission of foreigners to state laws.<sup>280</sup> The primary concern of these laws was archetypal “police” regulation of health, safety, and morals. States were concerned about immigrants bringing diseases, immorality, or pauperism; they imposed health inspections, taxes, and bond requirements to deal with these concerns. These laws were occasionally challenged as prohibited by the Commerce Clause. But because federal immigration control was light or nonexistent, there was no need for courts inclined to uphold these state laws to revise the long-standing association between immigration and commerce that stemmed from colonial laws regulating indentured servants and the importation of slaves.<sup>281</sup>

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275. An Act Concerning Aliens, ch. 58, § 1, 1 Stat. 570, 571 (1798) (emphasis omitted).

276. *Id.* (emphasis omitted).

277. *Id.* § 3.

278. *See* 1 CURRIE, *supra* note 211, at 256–59. It is worth noting that even purported Jeffersonian enumerationists, like Albert Gallatin, viewed the declare-war power as the source of a general power of national defense. *Id.* at 254–55, 259.

279. *See id.* at 240–43, 258–59. No one was deported under the Alien Act before it expired under its three-year sunset provision. SUSAN F. MARTIN, *A NATION OF IMMIGRANTS* 80 (2011).

280. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987) (noting that, prior to 1875, federal immigration regulation was limited because Congressional policy encouraged immigration); Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 774–75 (2013) (“[U]ntil the 1870s the individual states engaged in substantial regulation of immigration under their traditional police powers.”).

281. *See* Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 745, 751, 761–66, 771–72 (1996).

In a series of nineteenth-century cases, the Supreme Court skirted the question of whether the Foreign Commerce Clause gave Congress plenary, or any, authority to regulate immigration. In *Gibbons v. Ogden*, the Court gave further impetus to an immigration–commerce connection by stating, ambiguously, that “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse.”<sup>282</sup> Because the case concerned passenger travel on a steamship, it is possible to see Chief Justice Marshall’s statements about *intercourse* as involving the migration of people, but ultimately the opinion was about the commercial enterprise of transportation, not about the act of immigrating. In alluding to foreign commerce in *Gibbons*, Marshall spoke of “the admission of *the vessels* of the one nation into *the ports* of the other”—not the admission of *the people* of one nation into *the land* of the other.<sup>283</sup> Similarly, in *Mayor of New York v. Miln*<sup>284</sup> and the *Passenger Cases*,<sup>285</sup> the Court considered whether state and municipal laws requiring identification of aliens entering specific U.S. ports, together with the posting of a bond or the payment of a head tax, violated Congress’s exclusive power over foreign commerce. *Miln* upheld the bond; the *Passenger Cases* struck down the head tax. In *Henderson v. City of New York* in 1875, the Court revisited the issue, striking down a bond requirement similar to what *Miln* had upheld.<sup>286</sup> Significantly, all these cases involved the business of transporting passengers, and thus none required the Court to consider the constitutional source of a plenary immigration power.

It is plain that the Foreign Commerce Clause is not an adequate enumerationist source for a plenary federal power over immigration in the modern sense—including laws setting quotas and conditions for entering and remaining in the United States, and laws establishing grounds and procedures for deportation. The above history, which concerned federal power over commercial transportation of immigrants, fails to establish a claim that an immigration power stands as a branch of commerce regulation. As the Court has recognized, immigration regulations “can affect trade, investment, [and] tourism,” but also “diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.”<sup>287</sup> One might add national security to this list. To say that immigration law is authorized as foreign-commerce regulation is either to engage in means-ends reversal or else to leave some aspects of immigration regulation outside of federal power. An argument construing the Commerce Clause broadly enough to include diplomatic relations and national security turns that clause into a general-welfare power.

As with foreign affairs, the late-nineteenth-century Court settled on inherent sovereign power over foreign relations as the primary source of an immigration power.<sup>288</sup> The modern Supreme Court has recognized that the

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282. 22 U.S. 1, 189 (1824).

283. *Id.* at 190 (emphasis added).

284. 36 U.S. 102, 122 (1837).

285. 48 U.S. 283, 392–93, 409–10 (1849).

286. 92 U.S. 259, 270–74 (1876).

287. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

288. *See Fong Yue Ting v. United States*, 149 U.S. 698, 722 (1893) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of

immigration power is not adequately captured in the Naturalization Clause and has not attempted to rely on the Commerce Clause as the source of power over immigration law. Instead, the Court has said that the federal government possesses a “broad, undoubted power over the subject of immigration and the status of aliens” that rests in part on the Naturalization Clause, and in part on “its inherent power as sovereign to control and conduct relations with foreign nations.”<sup>289</sup>

In sum, the immigration power does not fit the enumerationist model, whether through a Great Powers or straight means-ends theory. An immigration power is not enumerated. It is a significant implied power of greater dimension than several enumerated powers, but is not necessary and proper to executing any single enumerated power. It has been derived most consistently and persuasively from an inherent power of national sovereignty.

#### 4. Acquisition of Territories

When the Constitution was ratified, the territorial possessions of the United States extended to the Mississippi River, excluding Florida and “West Florida” (a western extension of the Florida panhandle to the Mississippi). North Carolina and Georgia ceded their Trans-Appalachian land claims to the United States as part of their entry into the Union, while lands north of the Ohio River and east of the Mississippi that formed the Northwest Territory had been ceded by other states to the United States under the Articles of Confederation.<sup>290</sup> Thus, all lands south of Georgia and those west of the Mississippi that are now part of the United States, including Alaska and Hawaii, were acquired by the United States at various times after ratification of the Constitution. In addition, the United States acquired various territories in the Caribbean and Pacific, most of which did not, and were probably never intended to, become states and some of which the United States still holds.<sup>291</sup>

The power to acquire new territories is nowhere expressly granted in the Constitution, so where does it come from? Strict enumerationists have expressed doubts about such a power. Jefferson claimed that a constitutional amendment would be necessary to authorize his acquisition of the Louisiana Territory. He acquired the land anyway, maintaining that he acted expediently but unconstitutionally.<sup>292</sup> When the treaty acquiring the territory was submitted to the Senate, Federalists objected on enumerated power grounds, but the objection was not taken seriously.<sup>293</sup> Treasury Secretary Gallatin supported the acquisition, arguing that “the existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties . . . .”<sup>294</sup> This is less

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the United States as a part of those sovereign powers delegated by the constitution . . . .”); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (quoting the same).

289. *Arizona v. United States*, 567 U.S. at 394–95 (citations omitted).

290. *See Dred Scott v. Sandford*, 60 U.S. 393, 433–36 (1857).

291. *See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 163–65 (2002).

292. 2 *CURRIE*, *supra* note 165, at 97–98; *Cleveland*, *supra* note 291, at 167–71.

293. 2 *CURRIE*, *supra* note 165, at 99–102; *see Johnson*, *supra* note 7, at 79–80.

294. 2 *CURRIE*, *supra* note 165, at 100 (alteration in original).

a treaty-power argument than a general-welfare or inherent-sovereign-power argument. Caesar Rodney of Delaware was more explicit, arguing that the treaty was justified by the power “to provide for Common Defence and general welfare.”<sup>295</sup>

Given that the Jeffersonian–Jacksonian political forces most apt to argue for strict enumerationism were also most in favor of a vigorous policy of westward expansion,<sup>296</sup> there was little incentive to contest the existence of a territorial-acquisition power. The Supreme Court finally settled the matter—if *settled* is the best word for putting a constitutional gloss on a broad consensus—in *American Ins. Co. v. Canter*,<sup>297</sup> a case holding that U.S. admiralty law applied automatically in the Florida territory upon its acquisition from Spain. Chief Justice Marshall stated flatly that “[t]he Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”<sup>298</sup> But wholly aside from the non-enumerationist description of war-making as “confer[red] absolutely,” this assertion is unconvincing as enumerationism. While there is no doubt that territories are acquired by treaties, either with or without a prior war, the argument that these powers imply a territorial-acquisition power proves too much for enumerationism. Simply put, territorial acquisition is not necessary and proper to the making of treaties or the waging of war—which is not an enumerated power anyway.<sup>299</sup> Rather the reverse is true: some treaties are made and some wars are waged as means to acquire territory.

It might be argued that treaties are never an end in themselves, but always a means to some other end; so that, for the treaty power to be meaningful, it should be read to imply the powers to do anything that may be accomplished by treaty. But, means-ends reversal undermines the limiting quality of enumerationism.<sup>300</sup> For that reason, “Jefferson and other Republicans” generally argued that “the constitutional scope of the treaty power was limited to objects within the enumerated powers.”<sup>301</sup> For an enumerationist, a treaty-power argument for territorial acquisition is pure bootstrapping. Modern enumerationists have made similar arguments regarding the treaty power.<sup>302</sup>

The power “to dispose of and make all needful [r]ules and [r]egulations respecting the [t]erritory . . . belonging to the United States”<sup>303</sup> likewise fails to

295. Johnson, *supra* note 7, at 79 (quoting statement of Caesar A. Rodney).

296. See DANIEL WALKER HOWE, *supra* note 217, at 106; JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 41 (1988).

297. 26 U.S. 511 (1828).

298. *Id.* at 542.

299. See *supra* Section IV.B.1.

300. See *supra* Section IV.A.4.

301. Reinstein, *supra* note 12, at 40.

302. See *Bond v. United States*, 134 S. Ct. 2077, 2103 (2014) (Thomas, J., concurring) (“[T]o interpret the Treaty Power as extending to every conceivable domestic subject matter . . . would also lodge in the Federal Government the potential for ‘a police power over all aspects of American life.’”) (internal quotations omitted).

303. U.S. CONST. art. IV, § 3, cl. 2.

support an implied power to acquire territory absent a metonymous reading of the clause, which violates enumerationism. Nor is it more promising for an enumerationist to argue that territorial acquisition is subordinate and necessary and proper to the power to admit new states into the union.<sup>304</sup> Such an interpretation forces us to adopt an artificial understanding of the purposes and politics of territorial expansion as envisioned by the Framers. The admission of new states was not the end for which territorial expansion was the means—not exactly. It was not always a foregone conclusion that acquiring particular territories would lead to statehood, and modern doctrine recognizes a national power to control territories without such an intention.<sup>305</sup> Other drivers of territorial acquisition arguably played more important roles at various times: for example, controlling trade routes, or containing Indian or European military threats.<sup>306</sup> Moreover, the cession of western land claims by some of the large coastal states was a key part of the constitutional bargain.<sup>307</sup> In other words, admitting new states was the flip side of a bargain that would permit expansion into western lands without exacerbating conflict among eastern states over competing territorial claims. Admitting new states can thus credibly be characterized as a means to facilitate acquiring territories rather than the other way around. This means that acquiring territories is at least as important as admitting new states. If the textual hook for territorial acquisition is the power to admit new states, the power to acquire territory is thus another example of implication by metonymy or *ejusdem generis*.

Territorial acquisition is at least as great a power as eminent domain, which is another means of acquiring territory, after all. The best argument for a power to acquire territories is as an inherent attribute of sovereignty or else, as implicit in a brew of major powers over war, foreign affairs, and commerce. It cannot be justified by enumerationism.

##### 5. *Prohibition of Private Race Discrimination*

Control over race relations was widely regarded as a state-law matter throughout the antebellum period. Despite the obvious connection between slavery and interstate commerce, and the fears of some and hopes of others that Congress could and would regulate and ultimately ban slavery in the states, the dominant view seemed to be that Congress lacked this power. In rejecting the Quaker Memorials, in which Benjamin Franklin and other Pennsylvania Quakers urged Congress to abolish slavery, the House of the first Congress passed a resolution stating “that [C]ongress have no authority to interfere in the emancipation of slaves or in the treatment of them within any of the states, it remaining with the several states alone, to provide any regulation therein . . . .”<sup>308</sup> Fifty years later, in *Prigg v.*

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304. See *id.* art. IV, § 3, cl. 1.

305. See *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901); Cleveland, *supra* note 291, at 181, 188–89.

306. The dominant foreign affairs issue from 1786 to 1787 was access to free trade along the Mississippi and out to the Gulf of Mexico through New Orleans, which was then controlled by Spain. See RAKOVE, *supra* note 58, at 27, 43–44.

307. See *Dred Scott v. Sandford*, 60 U.S. 393, 438–39 (1857).

308. GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 290–91 (2010).

*Pennsylvania*, Justice Story wrote for the Supreme Court that without constitutional safeguards to the institution of slavery, the southern states would never have signed on to the Constitution.<sup>309</sup> It was not just slavery that was protected from federal interference, but all laws relating to race. Numerous free states in the antebellum period had a host of racially discriminatory laws in force, ranging from school segregation, to interracial marriage bans, to race-based voting restrictions, to outright prohibition of free black persons residing in the state.<sup>310</sup> Mainstream constitutional opinion held all these to be proper questions of state law; for example, both Lincoln and Douglas espoused this view in their famous 1858 Senate debates.<sup>311</sup>

The post-Civil War Amendments abolished slavery and gave Congress certain powers to protect against state deprivations of civil rights and racial inequality. But shortly after the end of Reconstruction, the constitutional order accepted the idea that regulation of race relations in the so-called social, as opposed to civil, sphere had reverted to the states.<sup>312</sup> In 1883, the Supreme Court decided the *Civil Rights Cases*,<sup>313</sup> striking down the Civil Rights Act of 1875.<sup>314</sup> That statute barred discrimination in privately owned places of public accommodation—hotels, restaurants, theatres, carriages. The statute’s supporters claimed that the law fell within Congress’s enumerated power to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment. The Court rejected this argument, holding that Section 5 empowered Congress to regulate only state action that violated equal protection.<sup>315</sup> The defenders of the 1875 Civil Rights Act did not lose the case because they forgot to argue the Commerce Clause or some other enumerated power. They lost because Section 5 of the Fourteenth Amendment was the only plausible enumerated power to sustain the statute. As of 1883, the Fourteenth Amendment was the only change in the constitutional landscape to decades of enumerated powers doctrine that insulated first slavery and later racial apartheid from federal interference.

Our current constitutional order has overruled *Plessy v. Ferguson*,<sup>316</sup> meaning that state-sponsored racial apartheid is no longer tolerated under the Fourteenth Amendment. But private discrimination remains outside the purview of

309. 41 U.S. 539, 612 (1842) (“[I]f the constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits . . . . The clause was, therefore, of the last importance to the safety and security of the southern states, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the [C]onstitution . . . .”).

310. LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 16, 60, 65–92, 114 (1961).

311. See 3 *COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 218, at 46–47 (speech of Lincoln); *id.* at 52 (speech of Douglas).

312. See, e.g., PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 65–66 (2011).

313. 109 U.S. 3 (1883).

314. *Id.* at 25–26.

315. *Id.* at 10–11.

316. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

the Equal Protection Clause due to the state-action requirement.<sup>317</sup> So where does Congress get its power to prohibit private race discrimination? In 1964, the Supreme Court upheld Title II of the 1964 Civil Rights Act—even though it was indistinguishable in principle from the 1875 Civil Rights Act—as an exercise of the commerce power.<sup>318</sup> By 1964, the Commerce Clause had been reinterpreted to allow regulation of virtually any economic transaction, such as the purchase of a sandwich, and the racially discriminating defendant, Ollie’s Barbeque, sold sandwiches.<sup>319</sup> The *Civil Rights Cases* had reasoned that social relations between the races were a matter of local, rather than federal, concern. Notably, the Court in *Katzenbach v. McClung* declined the government’s request that it overrule the *Civil Rights Cases*;<sup>320</sup> the Court has still never recognized an implied or enumerated federal power to regulate private race relations per se. Instead, it is Congress’s power to regulate buying and selling sandwiches that allows it to prohibit private race discrimination.

This is an example *par excellence* of means-ends reversal and does not fit enumerationism. False enumerationists have no problem with it, of course. But the commerce-based prohibition of race discrimination offers a prime example of why means-ends reversal is incompatible with enumerationism. From Rutledge’s first draft of the enumerated powers for the Committee of Detail through the end of the Civil War, one of the cardinal purposes of the theory of limited enumerated powers—perhaps the primary purpose—was to protect the institution of slavery from adverse federal regulation, notwithstanding arguments for implied powers to regulate slavery under the Commerce Clause. By extension, other regulation of race relations was deemed a question of state law. The Constitution, according to the enumerationist view expressed in the *Civil Rights Cases*, only reaches state action, and the *Civil Rights Cases*’ holding is still good law, reaffirmed as recently as the year 2000 by the five-justice majority in *United States v. Morrison*.<sup>321</sup> True enumerationism does not have an account of how Congress has the authority to ban private race discrimination.

#### 6. The Money Supply and Legal Tender

The power to control the money supply was of great importance to the Framers. The states had nearly undermined the American economy during the Revolution by financing public expenditures through printing state paper money without levying sufficient taxes to back up the paper issues.<sup>322</sup> Before ratification, interstate commerce was hampered by the existence of separate monetary systems in each state. The Constitution addresses these problems in sporadic terms: Congress was authorized to coin money and regulate its value, to punish

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317. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621–22 (2000) (asserting that the *Civil Rights Cases*’ imposition of the state action requirement remains good law).

318. *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964).

319. The restaurant served food which had moved in interstate commerce, *id.* at 296–99, and “refusals of service to Negroes have imposed burdens . . . upon the interstate flow of food.” *Id.* at 303.

320. See *id.* at 298 n.1, 301–02.

321. 529 U.S. 598, 624 (2000).

322. See Schwartz, *supra* note 8, at 40–41, 44–45.

counterfeiting, and to borrow money on the credit of the government.<sup>323</sup> States were forbidden to “coin [m]oney; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.”<sup>324</sup> These provisions “showed strong distrust of allowing state legislatures to set money-supply policy . . . [and] determined that ultimate control of the money supply should be a matter of national policy . . . .”<sup>325</sup> Yet the enumerated money powers of Congress were not fully specified. Could Congress issue *paper* money, as opposed to coin? And if so, could it make that paper money legal tender—“a Tender in Payment of Debts”?<sup>326</sup> Such powers cannot be reconciled with enumerationism because they exceed the express grants of specific money-related powers.

These questions were not resolved for nearly a century and were highly contested. Commentators, as late and as distinguished as Holmes, argued that the federal government lacked the power to issue paper money as legal tender, claiming that the enumerated powers gave Congress only a power to issue metal coin as legal tender.<sup>327</sup> This was not a quibble, it should be noted, but a significant claim that the Constitution created a fixed national commitment to “hard-money” policy: that is, exclusive reliance on gold (and perhaps silver) as the only legal tender. The Supreme Court initially decided this question against federal power in the *Legal Tender Cases* before reversing itself a year later on the strength of the votes of two newly appointed justices.<sup>328</sup> More broadly, the Constitution says nothing about a power to control the national money supply or to regulate the intrastate circulation of banknotes by state-chartered private banks. By 1816, when Madison signed the Second Bank charter into law, there were some 250 state banks whose banknote issues and lending practices were causing serious problems of inflation and currency dis-uniformity.<sup>329</sup> The Second Bank was seen by some as a solution to this problem and in fact it was: by performing money supply regulatory functions of a central bank, it reined in the state banks.<sup>330</sup> Where in the Constitution did this federal power come from? Where do the powers of the Federal Reserve system come from now?

According to Hamilton, in advocating the First Bank, “an aggregate view of the [C]onstitution,” implied “[t]hat it is the manifest design and scope of the [C]onstitution to vest in congress all the powers requisite to the effectual

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323. U.S. CONST. art. I, § 8, cls. 2, 5 & 6.

324. *Id.* art. I, § 10, cl. 1.

325. JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970*, at 8 (1973).

326. These questions were important—gold and silver coin was always in short supply, and that, as Hamilton recognized, would place a drag on economic development. At the same time, paper money was so distrusted that the demand for gold and silver, either as actual circulating medium or as a guarantee of the value of paper money, persisted until the mid-twentieth century. *See id.*; Schwartz, *supra* note 8, at 29.

327. *See* Oliver Wendell Holmes, Jr., *The Legal Tender Cases of 1871*, 7 AM. L. REV. 146, 146–47 (1872).

328. *Hepburn v. Griswold*, 75 U.S. 603, 625 (1869) (holding the 1862 Legal Tender Act unconstitutional), *overruled by* *Knox v. Lee*, 79 U.S. 457, 532–33, 553 (1870).

329. *See* Schwartz, *supra* note 8, at 40, 44–45, 51.

330. HAMMOND, *supra* note 215, at 188–89, 198.

administration of the finances of the United States.”<sup>331</sup> Congressman John C. Calhoun—later to become the apostle of states’ rights, but a nationalist in his early career—advocated the Second Bank, asserting that the power to create a uniform national currency and control the money supply was “an attribute of sovereign power, a sacred and important right.”<sup>332</sup> The Supreme Court in 1884 finally agreed, finding that the power to issue paper money as legal tender was an implied attribute of national sovereignty.<sup>333</sup> In the early twentieth century, the Court upheld the Federal Reserve System,<sup>334</sup> and in a closely watched decision prior to the New Deal turnaround, the Court upheld the federal government’s power to abandon the gold standard on the same grounds.<sup>335</sup> So the law has been settled ever since: Hamilton and Calhoun’s theories that a money supply power is implied either from a synergistic reading of the Constitution’s money clauses or from an implied sovereign power have been borne out in practice and doctrine.

### 7. Eminent Domain

Eminent domain is Professor Baude’s exemplar of an implied great power that must be denied to the federal government.<sup>336</sup> He correctly points out that the Constitution does not expressly grant the federal government a power of eminent domain over property within a state. According to Baude, the government properly exercises a federal eminent domain power only over the territories and the nation’s capital.<sup>337</sup> But he asserts that the federal government lacks this power within the geographical jurisdiction of the states because it is an unenumerated great power.<sup>338</sup>

Baude’s argument rests largely on the sort of *expressio unius* reasoning that, I have argued, is an essential element of enumerationism. The Exclusive Legislation Clause of Article I, Section 8, Clause 17, authorizes Congress to

exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection

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331. Hamilton, *supra* note 39, at 132.

332. 29 ANNALS OF CONGRESS 1062 (1816).

333. See *Juilliard v. Greenman*, 110 U.S. 421, 459 (1884).

334. *First Nat’l Bank of Bay City v. Fellows ex rel. Union Tr. Co.*, 244 U.S. 416, 418–420 (1917).

335. *Norman v. Balt. & O.R. Co.*, 294 U.S. 240, 303 (1935).

336. Baude, *supra* note 15 *passim*.

337. *Id.* at 1759–60, 1792–96. Congress enumerated powers to “make all needful [r]ules and [r]egulations respecting” the territories, U.S. CONST. art. IV, § 3, cl. 2, and exercise “exclusive [l]egislation in all [c]ases whatsoever” over the District of Columbia. *Id.* art. I, § 8, cl. 17.

338. Baude, *supra* note 15, at 1795–96.

of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .<sup>339</sup>

Baude plausibly interprets this Clause to authorize Congress to acquire territory within a state in two situations: to obtain a cession of land for the national capital and to purchase land with state consent for federal installations.<sup>340</sup> The express grant of these two means of acquiring land within existing states, by virtue of *expressio unius*, would exclude other means—namely, eminent domain—even if those means are conducive to exercising some other enumerated power.

The fact that the federal government has a recognized eminent-domain power *in spite of* Baude’s argument is a major strike against enumerationism. The Supreme Court’s 1876 decision in *Kohl v. United States*<sup>341</sup> recognized a federal eminent-domain power operating inside the states as an implied element of national sovereignty. This understanding does not seem to have raised great historical controversy, as can be seen in the *Steel Seizure Case*, 75 years later.<sup>342</sup> There, denial of a federal eminent-domain power would have offered a clear basis to reach the majority’s result, rejecting seizure of the steel mills. But not a single justice—not even Frankfurter, the greatest *McCulloch*-promoter of the twentieth century—intimated that the federal government lacked an eminent domain power that would support commandeering the steel mills. Justice Douglas, concurring, expressly acknowledged a legislative eminent-domain power to seize the mills.<sup>343</sup> Congress apparently assumed it had this power as well.<sup>344</sup>

Baude counters that the U.S. government refrained for many years from exercising a power of eminent domain in the states, thereby demonstrating that it lacked the power.<sup>345</sup> Even assuming this claim is historically accurate,<sup>346</sup> the *meaning* of government forbearance from exercising a power is ambiguous. It may mean that the government lacks the power, but it also may mean that the government exercised self-restraint, forbearing from use of a heavy-handed power that would meet strong political opposition. The national government frequently restrains its exercise of powers it undisputedly has. Taxation is a prime example: Congress declined to impose income taxes until the Civil War, and it never taxed

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339. U.S. CONST. art. I, § 8, cl. 17. Baude and others refer to this as the “enclaves clause.” See, e.g., Baude, *supra* note 15, at 1759. That name seems to unduly tilt the interpretive argument in the wrong direction, as if the clause were primarily an authorization of land acquisition rather than a grant of exclusive jurisdiction.

340. Baude, *supra* note 15, at 1759–60.

341. 91 U.S. 367, 372 (1875).

342. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

343. *Id.* at 631 (Douglas, J., concurring) (“[The federal government] can condemn for any public purpose; and I have no doubt but that condemnation of a plant, factory, or industry in to promote industrial peace would be constitutional.”).

344. See *id.* at 600–02 (Frankfurter, J., concurring) (detailing seizure legislation).

345. Baude, *supra* note 15, at 1761–90.

346. But see Christian R. Bursset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CAL. L. REV. CIR. 187 *passim* (2013) (contesting Baude’s historical claim).

the importation of slaves despite undoubted authority to do both.<sup>347</sup> Baude also cites constitutional arguments against federal eminent domain advanced from time to time by important political figures in the antebellum period.<sup>348</sup> Here, too, the record is ambiguous, as there were important figures on both sides of the constitutional question—such as Henry Clay, arguing for an eminent-domain power—on the rare occasion in which it arose.<sup>349</sup>

At the end of the day, the record of historical practice before 1876 supports both the existence and absence of a federal eminent-domain power, and Baude simply chooses the historical interpretation he prefers. This seems like a weak basis on which to overrule an explicit 140-year-old constitutional consensus. Moreover, Baude's interpretation would make the federal government dependent on the states for the building of every fort, post office, lighthouse, customs house, and federal courthouse. The Supreme Court was undoubtedly right in *Kohl* that the federal government possesses a plenary power of eminent domain. Rather than demonstrating the absence of implied great powers, the case of eminent domain is evidence of their acceptance in our constitutional scheme.

#### 8. Federal Criminal Law

The Constitution does not enumerate a power to enact federal criminal laws. On the other hand, as noted above, it does expressly grant power to enact a specific and limited set of criminal laws: counterfeiting, piracy, felonies on the high seas, offenses against the law of nations, and treason.<sup>350</sup> There is little doubt that criminal prohibitions are necessary and proper to many forms of regulation, so a general implied power to enact federal criminal laws should not seem disruptive to enumerated powers. At the same time, two objections make this implied power hard to reconcile with enumerationism. First, it is an implied great power. Second, the application of *expressio unius* to the handful of expressly enumerated federal criminal powers should imply the absence of a power to enact other criminal laws. Jefferson made this argument in the Kentucky Resolutions in opposition to the Sedition Act.<sup>351</sup> Marshall rejected this argument in *McCulloch*. He noted that “[t]he right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases.” Nevertheless, he concluded, “All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of [C]ongress.”<sup>352</sup>

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347. See Anthony C. Infanti, *Tax as Urban Legend*, 24 HARV. BLACKLETTER L.J. 229, 236, 236 n.58 (2008); Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 TAX LAW. 311, 312 (2014). The Court's decision striking down the 1894 income tax in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) was an aberration; the Civil War income tax was believed to be constitutional at the time. See *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1866).

348. Baude, *supra* note 15, at 1765–68.

349. See, e.g., 2 CURRIE, *supra* note 165, at 276.

350. U.S. CONST. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 1.

351. Reinstein, *supra* note 12, at 58.

352. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819); *accord* *The Legal Tender Cases*, 79 U.S. 457, 535–36 (1870).

The first Congress had no problem violating enumerationism in enacting an array of federal criminal laws in the Crimes Act of 1790.<sup>353</sup> The first part of the new federal criminal code was not problematic for enumerationists. It enacted provisions defining and punishing counterfeiting, treason, piracy, felonies on the high seas, and “such offenses as murder, manslaughter, mayhem, and larceny” in places “under the sole and exclusive jurisdiction of the United States.”<sup>354</sup> These directly implemented the express constitutional provisions for criminal laws, as well as the provision giving Congress power to “exercise exclusive [l]egislation” over federal enclaves, such as forts, dockyards, and the national capital.<sup>355</sup> But the code went further than this, extending its granted jurisdiction to define crimes on the high seas to include crimes committed “in any river, haven, basin or bay, out of the jurisdiction of any particular state.”<sup>356</sup> If anything, this exemplifies capable federalism: it fills a regulatory gap between state powers and strictly enumerated federal powers.

In addition, the 1790 Crimes Act included penalties for interfering with the bodily dissection of executed criminals; stealing or falsifying court records; committing or suborning perjury; bribing federal judges; obstructing judicial process; and freeing federal prisoners.<sup>357</sup> The significance of these latter provisions is their disregard for *expressio unius*. The working assumption of the first Congress appeared to be that the Constitution authorized any federal criminal law that would be useful to executing an enumerated power, notwithstanding the glaring breach of *expressio unius*.<sup>358</sup> The extension of criminal jurisdiction to “any river, haven, basin or bay” shows an *eiusdem generis* or metonymous reading of the felonies-on-the-high-seas clause—treating *high seas* as though it applied to all waters not surrounded by a state. But an enumerationist should have read the “high seas” provision to preclude defining and punishing felonies on other waters. Nevertheless, these provisions appeared to have passed without constitutional objections.<sup>359</sup> Since 1790, there has been no serious, sustained argument that Congress may not enforce its enumerated powers with criminal laws notwithstanding the Constitution’s very limited enumeration of federal crimes.

#### 9. Additional Powers that Violate Enumerationism

The eight foregoing examples are purely illustrative. For those who take enumerationism seriously, there are many more examples that need to be accounted for. Clearly, the First and Second Banks of the United States reflect the exercise of an implied power that defies enumerationism; having discussed the Banks earlier, I did not mention them again among my list of eight. Here are four further examples that did not make my top eight. Authorities such as Daniel Webster and Chief Justice Roger Taney have argued that a federal power of

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353. 1 Stat. 112, 112 (1790).

354. 1 CURRIE, *supra* note 211, at 94 (quoting 1 Stat. 113, 115–16, §§ 3, 6, 7, 13, 16, 17).

355. U.S. CONST. art. I, § 8, cl. 17.

356. 1 CURRIE, *supra* note 211, at 95–96 (quoting 1 Stat. at 113, § 8).

357. 1 Stat. 112–116, §§ 5, 15, 18, 21–23 (1790).

358. 1 CURRIE, *supra* note 211, at 97.

359. *See id.* at 93, 95, 97.

conscription, while undoubtedly conducive to the enumerated power “to raise armies,” was nonetheless barred by implication. The argument was that obligatory military service was a defining and exclusive feature of the militia, and the militia clauses thereby impliedly barred an implied power of conscription into the national army.<sup>360</sup> The federal power of sovereign immunity appears to have been long recognized as an inherent power of sovereignty rather than an express constitutional power—a point recognized by “universally received opinion,” in John Marshall’s words.<sup>361</sup> The federal power over Indian tribes is not completely explained by the Indian Commerce Clause, but rather “[f]rom its earliest decisions, the Supreme Court established that national power over Indians derived in part from extraconstitutional, inherent powers . . . .”<sup>362</sup> Lastly, the Article III grant of admiralty jurisdiction is insufficient to explain the *exclusive* power of Congress and the federal courts to *make* admiralty law.<sup>363</sup> Since the Constitution enumerates a few specific powers that are subsets of admiralty law (to punish piracy and felonies on the high seas, to make rules concerning captures on water),<sup>364</sup> a general admiralty lawmaking power violates the *expressio unius* tenet of enumerationism even if an admiralty could be seen as necessary and proper to regulating commerce.

A sincere commitment to enumerationism cannot accept so many unenumerated powers of this scope. The fact that our constitutional order takes these powers as given undermines any serious contention that the Constitution’s enumeration of powers provides an exclusive list. Enumerationists might—indeed, must, if they are to be consistent—argue that this long history of judicial and legislative acceptance is unconstitutional. But in doing so, they take on a heavy burden of showing that an enumerationist interpretation somehow overcomes the force of longstanding ratification of these powers by all three branches of government. That requires at least, as Marshall said in the case of the Second Bank, that each of these examples be “a bold and daring usurpation” of power by the federal government.<sup>365</sup>

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360. See Daniel Webster, Webster’s Anticonscription Speech (Dec. 9, 1814), reprinted in *THE DRAFT AND ITS ENEMIES: A DOCUMENTARY HISTORY* 44–45 (John O’Sullivan & Adam M. Meckler, eds., 1974); Taney, *supra* note 179, at 212–15. William Baude has suggested that his Great Powers theory would, by itself, bar a federal power of conscription. See Baude, *supra* note 15, at 1818–19.

361. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 611 (4th ed. 2003) (sovereign immunity carried over by U.S. courts from English law without constitutional source); *THE FEDERALIST* NO. 81 (Alexander Hamilton) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”) (emphasis omitted).

362. Cleveland, *supra* note 291, at 25.

363. See *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 369 (1959) (holding that Congress has the implied power to make admiralty law); Ernest A. Young, *Preemption at Sea*, 67 *GEO. WASH. L. REV.* 273, 281 (1999) (emphasis added) (“Indeed, the Court has gone so far as to infer, from the mere grant of federal jurisdiction to adjudicate, an affirmative congressional power of lawmaking . . .”).

364. U.S. CONST. art. I, § 8, cls. 10, 11.

365. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

### CONCLUSION

I have argued that enumerationism is an ideology far more than it is a viable constitutional theory. Lacking a compelling claim to our constitutional fidelity as a matter of text or history, enumerationism is lacking also as a principle. Its purported logical premises—that a limited grant of power requires enumeration and that an enumeration must always be interpreted as exclusive—are both false. The inability of enumerationism to explain implied powers undermines its logical consistency. And by requiring as an axiom that there be acceptance of some regulatory gap—subjects of national regulatory concern that cannot be adequately addressed by any level of government in our federal system—enumerationism, if adhered to, imposes potentially heavy social costs. These costs require some countervailing justification that has yet to be advanced. Not surprisingly, our constitutional practice from ratification to the present has been reflective of capable federalism: some way will be found to accommodate a federal power to address national legislative problems.

Why has enumerationism proven so stubbornly enduring? An accurate and detailed history of the enumerationism versus capable federalism conflict in U.S. constitutional history remains to be written and can't be undertaken within the space limits of this Article. But such a history would help us understand why a capable federalist constitution has for so long gone under the name of an enumerationist one. The forces behind enumerationism are undoubtedly complex, including, over time, a mix of anti-monarchists, agrarian democrats, libertarians, laissez-faire capitalism advocates, state autonomy progressives, and others. But when that history is written, I suspect it will reveal the powerful, and perhaps dominant, presence of states-rightists who saw enumerationism as offering a constitutional shield for first slavery and later racial segregation. Whether that speculation is true, it is true that understanding enumerationism requires that we disentangle its ideological success from its constitutional foundations. Those two elements of a constitutional regime may overlap to a degree, but they differ and shouldn't be confused with each other.

The success of enumerationism as a predominant ideology tells us far more about our political culture than it tells us about our constitutional law. Historian William Novak exposed a parallel ideological conundrum in the disconnect between the reality of late-nineteenth-century regulation and the predominant ideological overlay of laissez faire. He quotes a turn-of-the-century observer of this point, Albert Shaw, who wrote:

The average American has an unequaled capacity for the entertainment of legal fictions and kindred delusions. He lives in one world of theory and in another world of practice. . . . Never for a moment relinquishing their theory [of laissez-faire], the people of the United States have assiduously pursued and cherished a practical

policy utterly inconsistent with that theory, and have not perceived the discrepancy.<sup>366</sup>

Enumerationism is a cousin to laissez faire, especially in its demand for recognition of some regulatory problems falling outside both the competence of states and the constitutional restraints on the federal government. Enumerationism finds expression in the demands of citizens who desire smaller federal government and generous federal disaster relief, or who protest against the Affordable Care Act with the slogan, “Keep your . . . government hands off my Medicare!”<sup>367</sup> The demand for a national government fully empowered to address national problems is what launched the Constitutional Convention in 1787, and it has not slackened since then. There is much to be said for aligning our constitutional theory and ideology with our constitutional practice.

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366. William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 753–54 (2008) (quoting Albert Shaw, *The American State and the American Man*, 51 CONTEMP. REV. 695, 696 (1887)).

367. Bob Cesca, *Keep Your Goddamn Government Hands Off My Medicare!*, HUFFINGTON POST: THE BLOG (Sept. 5, 2009, 5:12 AM), [http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme\\_b\\_252326.html](http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme_b_252326.html).