

LEAD ARTICLE

THE AGGREGATE AND IMPLIED POWERS OF THE UNITED STATES

ROBERT J. REINSTEIN*

The conventional understanding of McCulloch v. Maryland is that an act of Congress must be within the scope of specified enumerated powers or an appropriate means to carry those specified powers into effect. This now classical doctrine rests on a misunderstanding of McCulloch. It is also incomplete in failing to account for important exercises of national power that cannot readily be tied to specific enumerated powers or justified as means to effectuate those powers.

Several distinguished scholars, arguing that the classical means-ends approach is incorrect, assert that Congress possesses an expansive power to legislate for the national general welfare, or, as sometimes articulated, to address all national necessities or exigencies. They rely, inter alia, on the General Welfare Clauses of the Preamble and Article I, Section 8; conceptions of inherent national sovereignty; the actions of the Constitutional Convention concerning Resolution VI of the Virginia Plan; and the three provisions of the Necessary and Proper Clause. Although these scholars present valuable insights, their arguments for a national general welfare power are overbroad when evaluated according to constitutional text, structure, and history.

* Dean Emeritus and Clifford Scott Green Professor of Law Emeritus, *Temple University Beasley School of Law*. I am grateful to Tay Aspinwall, Randy Barnett, Daniel Birk, Ellen Cookman, Jeffrey Dunoff, Jack Goldsmith, Craig Green, Duncan Hollis, Michael McConnell, John Mikhail, Eric Nelson, Richard Primus, David Schwartz, Matthew Steilen, and Harwell Wells for their very helpful suggestions and criticisms. Of course, all errors in this article are mine. My thanks also to the participants at the Originalism Conference at the University of San Diego and the Writers' Workshop at Temple Law School for their comments. I appreciate the excellent research assistance of Kevin Todorow, Jude Joanis, and Catherine Cuff.

This Article advances a theory, original to the literature, of how the enumerated powers of the national government should be construed and applied in determining the scope of national power. The Constitution vests four great aggregate powers in the government of the United States—providing for the common defense; conducting foreign relations; preventing and resolving disputes between the States and the United States, and between the States themselves; and creating and maintaining a national economic union. Virtually all of the specific enumerated powers of the three branches are contained in these four clusters of power. These aggregate powers are “ends” of the national government, and legislation that carries these powers into effect are appropriate “means” of congressional authority.

*The framework presented in this Article is based on construing the Constitution as a whole and not as the collection of unrelated parts; the historical origin of the enumerated powers in the long-standing distribution of powers between the imperial British government and the colonial assemblies that was carried forward into the Constitution; Hamilton’s arguments on the scope of national power in Federalist 23 and the opinion on the Bank of the United States; Marshall’s adoption of those arguments in *McCulloch* and Story’s in his Commentaries; and Congress’s authority to carry into execution not only specified enumerated powers but also “all other Powers vested by this Constitution in the Government of the United States.” This framework explains the validity of national powers that are outside of the classical means-ends model. It respects federalism by giving Congress plenary authority over four discrete areas that are essential to the Union, while allowing for extensive legislative authority in the States and the people. And it has implications for the separation of powers and the extent to which Congress may expand the jurisdiction of the federal courts beyond the categories enumerated in Article III.*

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INTRODUCTION

McCulloch has governed constitutional law for the two centuries following its announcement. But the constitutional framework established in that decision was hardly stated with precision. Consider Chief Justice Marshall's famous pronouncement of the framework for judging the constitutionality of congressional legislation:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹

This Delphic injunction is fraught with ambiguity. Disputes have regularly arisen over whether implied powers chosen by Congress are “appropriate” or “plainly adapted” to executing a constitutionally prescribed end.² And there is a more fundamental ambiguity: *what are the “ends” and “means” of national power?* The decision has come to be understood as requiring that an act of Congress must either be within the scope of specified enumerated powers or must be legislation calculated to carry those specified powers into effect.³ In this formulation, the “ends” are specific enumerated powers, and the “means” are laws enacted to effectuate those powers.

This conventional understanding of *McCulloch* has gained strength and acceptance through repetition, and it has become the classical framework for determining the scope of congressional power. That framework is flawed because it errs in treating the enumerated powers as separate and distinct, and it cannot explain the validity of substantial and concededly valid exercises of legislative power and, paradoxically, of the decision in *McCulloch* itself.

This Article presents a “new” theory of national and congressional power. I use quotation marks advisedly: this theory is new in the sense of resting on a textual, structural, and historical construction of the Constitution that is original in the literature. But this theory is actually

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

2. The disputes over the individual mandate in the Affordable Care Act and the application of the Controlled Substances Act to state legislation authorizing medicinal marijuana are two important recent examples of whether the means adopted by Congress are plainly adapted or proper to carry out enumerated powers. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 532–37 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005). I explored these ambiguities in an earlier article. See Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1 (2016).

3. See *United States v. Kebodeaux*, 570 U.S. 387, 394 (2013); *United States v. Comstock*, 560 U.S. 126, 126 (2010).

quite old, having antecedents in pre-constitutional jurisprudence and the writings of Alexander Hamilton that so heavily influenced the Marshall Court. Instead of concentrating on specific enumerated powers, the doctrine advanced in this Article posits that the Constitution vests four aggregate powers in the government of the United States as a whole—providing for the common defense, preventing and resolving national and interstate conflicts, conducting foreign affairs, and creating and maintaining an economic union. Each of those aggregate powers, whose whole is greater than the sum of its parts, represents the legitimate “ends” of national power. Under the Necessary and Proper Clause,⁴ Congress is authorized to select all appropriate “means” that are designed to carry out those aggregate powers.

The theory presented in this Article represents a different way of construing and applying the constitutional grants of enumerated and implied powers in all three branches of the national government. This framework rejects the now conventional model’s arbitrary limits on the scope of congressional power. It explains the validity of otherwise anomalous national powers and provides a new reading of *McCulloch* that focuses on how, specifically, the Court upheld the constitutionality of the Bank of the United States. And, being centered on four clusters of power essential to union, it provides an alternative, grounded in federalism, to essentially indeterminate theories of a national regulatory power (or a general welfare power) that are advanced by scholars who have criticized limitations of the classical model.

The structure of this Article and a summary of my contentions are as follows: Part I of the Article examines a number of national powers that appear inconsistent with the classical framework—the general national powers over foreign affairs, immigration and deportation, recognition, passports, paper money as legal tender for all public and private debts, the inherent power of each House of Congress to adjudicate and punish non-members for contempt, the inherent power of the United States, without enabling legislation, to enter into contracts and sue for breach, and expansions of federal court jurisdiction beyond the enumerated Article III categories. Those powers are not listed in the Constitution as vested in any of the three branches of government and cannot readily be viewed as implied powers that are being used to carry out specified enumerated powers. Some of these powers appear to be objects of national power, or “ends” in themselves; others appear to be “means” to carry out those ends.

4. U.S. CONST. art. I, § 8, cl. 18.

This is an impressive list of national powers that seem to be independent of specific enumerated powers. Although the classical means-ends approach can work very well in most cases, these national powers collectively constitute a significant body of law that cannot be disregarded as minor variations of traditional doctrine. Moreover, these national powers are currently recognized and enforced by the Supreme Court and are generally accepted as representing “good” constitutional law. Even constitutional heirs of Thomas Jefferson are not prepared to wholly reject the reality of such national powers. Thus, one of the most prominent theorists of limited federal power states the dilemma with respect to a national power over immigration: although such a power cannot be derived from the specific enumerated powers, leaving immigration authority solely to the individual states would lead to intolerable results.⁵

As discussed in Part I, the Supreme Court continues to enforce these anomalous national powers but refuses to adjust the classical model to account for the fact that they are part of the reality of constitutional law. Instead, the Court has resorted to techniques of constitutional avoidance, by stretching the means-ends approach beyond any reasonable limit and by grasping at the extra-constitutional notion of inherent national sovereignty.

Part II of this Article examines the contributions of scholars who, observing that these anomalies are necessarily inconsistent with the prevailing means-ends doctrine, assert that this doctrine is incorrect in theory and practice. These scholars reject the doctrine that the specific enumerated powers are exhaustive and argue that it should be replaced by a congressional power to deal with all issues of national import—described variously as a general welfare power, or power to resolve problems beyond the cognizance of the individual States, power to address national “necessities” or “exigencies,” or powers that are said to inhere in national sovereignty. Although each scholar presents unique arguments, common threads include reliance on the General Welfare Clauses of the Preamble and Article I, Section 8, theories of sovereignty, the “all other powers” provision of the Necessary and Proper Clause, and Resolution VI in the Constitutional Convention.

These scholars present valuable insights, and I agree with many of their arguments, including that the specified enumerated powers are not exhaustive. However, I disagree with the conclusion that Congress possesses a general welfare power or its various equivalents. Such a

5. Richard A. Epstein, *Our Implied Constitution*, 55 WILLAMETTE L. REV. 295, 329–31 (2017).

national power is not supported by constitutional benchmarks of text, history, and structure. The means-ends approach to national power should not be entirely discarded. That approach is sound as far as it goes because implied powers as means to carry out specific enumerated powers would exist even if the Necessary and Proper Clause had been omitted from the Constitution.⁶ The reality and legitimacy of the otherwise anomalous national powers are powerful evidence that a more comprehensive doctrine of national power—one that builds on the classical model—is necessary.

My analyses of these scholarly arguments is extensive, both out of respect for their sophistication and because such analyses disclose historical and doctrinal propositions (particularly regarding the nature of sovereignty and the importance of the “all other powers” clause) that underlay an alternative, comprehensive doctrine of the scope of national power.

That comprehensive doctrine is proposed in Parts III and IV of this Article. Viewing the Constitution as a whole, the various powers of the government of the United States are related and inter-connected. Virtually all of the enumerated powers of the national government are contained in four clusters of national power that represent the central purposes of an effective Union—common defense, national and interstate relations, foreign affairs, and economic union. These four clusters of enumerated national powers, vested in all three branches of the government, are not only implicit in the text of the Constitution, they derive from the history and purposes of the grants of national power in the Constitution. With relatively few exceptions (the most important being taxation), the specific enumerated powers were components of the actual subject-matter distribution of powers in the old British Empire under which Americans had lived and thrived for more than a century. They were carried forward into the Constitution to fulfill the principal purposes of the Union.

In *Federalist 23*, Alexander Hamilton identified the principal purposes of the Union stated above.⁷ He then applied a methodology (and used language) that would reappear in his opinion on the constitutionality of the Bank of the United States and in *McCulloch*. Hamilton characterized

6. As Madison stated: “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.” THE FEDERALIST NO. 44, at 221 (James Madison) (Terence Ball ed., 2003).

7. THE FEDERALIST NO. 23, *supra* note 6, at 106 (Alexander Hamilton).

those purposes of the Union as the “ends” or “objects” of national authority and insisted that Congress must have all powers that are necessary as “means” to fulfill each of those purposes. In his Bank opinion, he argued that several of the specific enumerated powers, when viewed in the aggregate, created a more general fiscal power in Congress and that the Bank was Congress’s agent in carrying out this fiscal power.⁸

Hamilton’s theory of aggregate fiscal power was adopted in *McCulloch*. Instead of relating the Bank to specific enumerated powers, Marshall upheld the constitutionality of the Bank as an instrument for carrying out Congress’s general fiscal power. The theory of aggregate power advanced in this Article is consistent with this understanding of *McCulloch* and was the basis upon which Joseph Story, Marshall’s alter ego, justified the constitutionality of the Bank in his *Commentaries*.⁹ The classical reading of *McCulloch* circumscribes the scope of national powers in a manner that Hamilton, Marshall, and Story did not.

This aggregate approach to the enumerated powers respects the constitutional commitment to federalism by limiting the national government’s comprehensive powers to four areas of essential national concern while retaining a broad range of legislative authority in the States and the people. If this theory is correct, it explains and provides criteria for the scope and limits of congressional legislation. These four aggregate powers are vested by the Constitution in the government of the United States as a whole. They are “ends” of governmental power, and the enumerated and implied national powers are “means” by which Congress can effectuate these four comprehensive national powers. In the language of the Necessary and Proper Clause, Congress is empowered to enact all legislation that is necessary and proper “for carrying into execution . . . all other Powers vested by this Constitution in the Government of the United States.”¹⁰

Part V discusses the application of this theory of aggregate and implied powers to each of the national powers discussed in Part I. This part of the Article examines the scope of congressional powers over foreign and domestic affairs, the extent to which Congress may vest federal court jurisdiction beyond the enumerated Article III categories, and some of the separation of powers questions raised by the enforcement of aggregate national powers.

8. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 132 (Harold C. Syrett ed., 1966) [hereinafter Hamilton, Bank Opinion].

9. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1257–1266, at 130–48 (1833) [hereinafter STORY, COMMENTARIES].

10. U.S. CONST. art. I, § 8, cl. 18.

I. ANOMALOUS NATIONAL POWERS

In an impressive recent article, David Schwartz identified twelve congressional powers which have been validated and enforced by the Supreme Court but which, he claims, cannot be implied as means that are necessary to carry out any enumerated power.¹¹ My own list is different¹² but nevertheless substantial enough to call into question the general validity of the conventional mean-ends approach to federal power.

A. *A General National Foreign Affairs Power*

It seems self-evident that the national government should regulate and conduct foreign affairs, but no such general power is enumerated in the Constitution. To be sure, many *specific* powers relating to foreign affairs are vested in Congress, the President, and the Judiciary. However, these specific textual foreign affairs powers are not complete.¹³ Nor has the Supreme Court suggested otherwise. Instead, it asserted in *Curtiss-Wright* that the United States has a general foreign affairs power that exists by virtue of an inherent national sovereignty that is independent of the Constitution.¹⁴ This extra-constitutional doctrine, although questioned by eminent authorities, remains the basis of a general national power over foreign affairs.¹⁵ The Court has employed

11. David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 624–44 (2017).

12. I do not include in this list a number of powers that are identified by Professor Schwartz, namely acquiring territory by force or diplomacy, prohibiting private racial discrimination by businesses engaged in interstate commerce, exercising eminent domain, enacting federal criminal laws, imposing conscription, and legislating rules of admiralty. *See id.* These powers can be exercised under a moderately liberal means-ends approach. Professor Schwartz argues that such constructions represent a “false” theory of enumerationism because they disregard the *expressio unius tenet* and inappropriately invert constitutional means and ends. *Id.* at 644. For responses to these arguments, see Reinstein, *supra* note 2, at 71–86.

13. *See generally* MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007) (focusing on the text of the Constitution and arguing that foreign affairs powers are textually incomplete and divided among multiple independent power centers); Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 772–80 (2013) (discussing the Declare War Clause and immigration as examples of incomplete textual foreign affairs powers).

14. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–19 (1936).

15. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 13–15, 16–21 (2d ed. 1996). Professor Henkin understood that the traditional *McCulloch* approach could not explain many of the foreign affairs powers that were exercised by the United States. *Id.* at 13–15. He was also uncomfortable with embracing the *Curtiss-Wright* notion of extra-constitutional powers but did so reluctantly because it appeared

this inherent power to authorize derivative implied congressional and executive action in the sphere of foreign affairs. Examples of such derivative national powers over foreign affairs, discussed below, are immigration and deportation, recognition and passports.

B. Congressional Immigration and Deportation Powers

The practical need for a plenary federal power over immigration and deportation seems undeniable, but the Constitution does not explicitly vest either power in Congress. Through the Civil War, the voluntary migration of foreigners was largely left to the States.¹⁶ Whether a State could constitutionally impose taxes or other restrictions on immigration initially divided the Supreme Court but, after an inconclusive start,¹⁷ was then decided through the lenses of a dormant Foreign Commerce Clause.¹⁸

In 1875, Congress enacted the first major federal immigration law.¹⁹ As is well-known to those who study or practice immigration law, the problem is that the immigration laws lack clear textual support in the Constitution: “Some aspects . . . may be implied from the Naturalization Clause, the war powers clauses, the Foreign Commerce Clause, or perhaps even the Migration and Importation Clause, but Congress regulates a vast array of immigration-related matters and not all can be easily implied from these other substantive powers.”²⁰

The first seminal (and notorious) decision, the *Chinese Exclusion Case* in 1889,²¹ set the pattern. As the title and date of the decision suggest, this case involved the validity of a racist and nativist driven congressional statute enacted during the era of *Plessy v. Ferguson*.²² The statute abrogated a treaty with China and excluded new Chinese

to be the only doctrine that would support a general national foreign affairs power. *Id.* at 16–21. Justice Thomas and notable scholars have advocated a controversial alternative doctrine—that residual gaps in foreign affairs powers are filled by the Executive Vesting Clause. *See infra* notes 453–454 and accompanying text.

16. *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, 81–83, 98–99 (2002) (explaining how federal activity over immigration during the antebellum era was minimal).

17. *See* *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

18. Cleveland, *supra* note 16, at 107–09.

19. *See* Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); *see also* Cleveland, *supra* note 16, at 106.

20. Kent, *supra* note 13, at 775.

21. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

22. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

laborers from entering the United States.²³ Without explanation, the Supreme Court did not accept the government’s invitation to use the Foreign Commerce Clause—perhaps because the earlier cases involved the regulation of transportation (in particular, commercial navigation) rather than simply the movement of people, and prohibiting the voluntary entry of foreigners into the United States does not easily fit within the power to regulate “commercial intercourse”²⁴ “with foreign Nations.”²⁵ Instead, the Court imported language from a Marshall opinion that the law of nations gave every sovereign the right to determine what foreigners could enter its territory (while ignoring later statements in the opinion that this was a qualified right).²⁶ Having established this broad principle, the Chinese Exclusion Act was upheld on the bases of the inherent and unqualified sovereign power of any nation to exclude any citizen or subject of a foreign nation from its territory, and also on the inherent national power over foreign affairs.²⁷ Four years later, the Court relied on those implied powers to authorize plenary congressional authority to deport Chinese aliens.²⁸

23. *The Chinese Exclusion Case*, 130 U.S. at 589.

24. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (defining “commerce” as all forms of “commercial intercourse”).

25. U.S. CONST. art. I, § 8, cl. 3 (providing that Congress has the power “[t]o regulate Commerce with foreign Nations”); see Cleveland, *supra* note 16, at 133–34. Professor Cleveland suggests an additional reason: the Supreme Court might not have wanted to expansively construe the Foreign Commerce Clause because it was restricting the scope of the Interstate Commerce Clause during the same period. *Id.*

26. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 116, 136–37 (1812). This was a prize case decided under principles of the laws of nations on state-to-state relations in the absence of governing legislation or treaties. U.S. citizens claimed title to a French warship which, allegedly, the citizens had originally owned. Marshall acknowledged the right of every nation to determine which foreigners could enter its territory, but also said that the law of nations recognized certain exceptions to that general principle. *Id.* He then construed the law of nations as providing the French ship with an exemption from domestic court jurisdiction. *Id.* The delicacy of the case as it related to foreign affairs appears in the first sentence of the report:

THIS being a cause in which the sovereign right claimed by NAPOLEON, the reigning emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing in preference to other causes which stood before it on the docket.

Id. at 116.

27. *The Chinese Exclusion Case*, 130 U.S. at 604.

28. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners, who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

National sovereignty over territory and the conduct of foreign relations should be understood according to the jurisprudence of the time. In the early Republic, the law of nations, which dealt principally with the relations of nation-states, was considered part of the law of the United States.²⁹ The doctrines of the law of nations were drawn from the writings of continental theorists,³⁰ and both empowered and constrained the foreign relations powers of the United States.³¹ In the late nineteenth and early twentieth centuries, customary international law (a second-cousin descendent of the law of nations³²) was considered part of the law of the land,³³ and the exclusion and deportation of Chinese aliens certainly affected (negatively) foreign relations with China. To justify congressional exclusion and deportation statutes, the Supreme Court during this era departed from the *McCulloch* doctrine of enumerated powers and relied instead on two powers of indefinite scope as derived from the law of nations—national sovereignty over territory and foreign relations.³⁴

The source of national immigration law is now uncertain. International law becomes part of domestic law when it is a self-executing treaty or

29. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is part of the law of the land.”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 12–13 (1801) (“This court is now to decide by the law of nations, not by [foreign] municipal regulations.”). See generally David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 *Geo. L.J.* 1593, 1616–23 (2018) (explaining how the law of nations was part of the law of the land and was heavily relied on by the Founders).

30. The most important was Vattel. See EMER DE VATTEL, *THE LAW OF NATIONS* (Joseph Chitty ed., 1854) (1758).

31. *The Nereide*, 13 U.S. (9 Cranch) at 418–20 (holding that the law of nations prohibited the Executive’s seizure of cargo owned by a neutral on an armed British merchant vessel during the War of 1812); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (holding that the Executive’s seizure of non-military property of British nationals in the United States immediately following Congress’s declaration of war was not authorized by the law of nations or the Constitution).

32. The law of nations differed from customary international law in two important ways: the doctrines of the law of nations were drawn primarily from natural law, and they were independent sources of national authority as well as constraints on that authority. See *infra* notes 314–21 and accompanying text.

33. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

34. See *Cleveland*, *supra* note 16, at 156–58.

incorporated by a congressional statute.³⁵ But in an era when legal positivism exerts such a strong influence, the general enforceability of customary international law is a matter of serious doubt.³⁶ If international law is not the basis of a federal immigration power, what is?

Consider a significant modern Supreme Court decision on the conflict between national and state authority over immigration. *Arizona v. United States*³⁷ applied field preemption to hold unconstitutional Arizona statutes relating to foreigners who entered the United States illegally under federal immigration law.³⁸ In affirming Congress's plenary power over immigration as now "well settled,"³⁹ the Court explained the constitutional bases for congressional authority:

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, *in part*, on the National Government's constitutional power to "establish a uniform Rule of Naturalization," Art. I, § 8, cl. 4, *and* its inherent power as sovereign to control and conduct relations with foreign nations.⁴⁰

The national immigration power was thus based on the combination of an enumerated power (making a uniform rule of naturalization) and an implied national power (conducting foreign relations). Interestingly, the Court did not rely on an implied sovereign territorial power, perhaps because it was based on the law of nations. Nor did the Court rely solely on the newly-discovered Naturalization Clause, no doubt because, although there is a certain overlap, the Naturalization Clause affords to foreigners the full political rights of citizenship, while immigration and deportation statutes exclude them from or regulate their conduct within the country's territory.⁴¹ Thus, the Court added and emphasized the national

35. See *Medellin v. Texas*, 552 U.S. 491, 505 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 601–02 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109–366, § 7(b), 120 Stat. 2600, 2636 (2006).

36. See JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 236–48, 306 (4th ed. 2015); RICHARD FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 712–22 (7th ed. 2015) [hereinafter *HART & WECHSLER*]; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852 (1997).

37. 567 U.S. 387 (2012).

38. *Id.* at 395, 401, 403.

39. *Id.* at 395.

40. *Id.* at 394–95 (emphasis added).

41. See Schwartz, *supra* note 11, at 631. As Professor Schwartz explains more fully: [N]aturalization 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.

government's "inherent power as sovereign" to conduct foreign relations as a basis for the immigration laws.⁴²

C. A General National Recognition Power

In *Zivotofsky v. Kerry*,⁴³ the Supreme Court considered the authority of the national government to recognize foreign states and governments as an issue of the separation of powers.⁴⁴ Was a national recognition power shared by Congress and the President, or was it an exclusive prerogative of the President? The Court decided the latter.⁴⁵ But the Court never examined a necessary preliminary question: how does the Constitution vest a general power of recognition in the government of the United States? This is another situation in which the practical need for such a national instrument of foreign affairs seems overwhelming. But it is not enumerated in the Constitution.

The Court began by stressing the importance of recognition. Recognition can carry with it significant legal consequences—a

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.

Id.; see also THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 187 (4th ed. 1998) (distinguishing 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"). For an argument that the Foreign and Interstate Commerce Clauses could be the constitutional sources of most immigration laws, see Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653 (2018).

42. *Arizona*, 567 U.S. at 394–95. Justice Scalia rejected both the Naturalization Clause and an implied foreign affairs power as the constitutional bases for national immigration laws. *Id.* at 418, 422 (Scalia, J., concurring in part and dissenting in part) (naturalization power); *id.* at 423–24 (foreign affairs power). Instead, he endorsed a sovereign territorial power, derived from the law of nations, as the constitutional basis for both federal and state immigration laws, *id.* at 416–22, a seemingly peculiar approach for a justice who otherwise professed a jurisprudence of legal positivism on such issues. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739, 745 (2004) (Scalia, J., concurring in part and concurring in judgment) ("[T]he creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century . . . which applied the 'law of nations' . . ."). Scalia would have resolved these coordinate implied sovereign powers by requiring a direct conflict between the federal and state statutes. *Arizona*, 567 U.S. at 424.

43. (*Zivotofsky II*), 135 S. Ct. 2076 (2015).

44. *Id.* at 2081.

45. *Id.* at 2085.

recognized state or government may sue in United States courts, where it enjoys foreign sovereign immunity and the act of state doctrine, and it may make treaties and have commercial and diplomatic relations with the United States.⁴⁶ For inexplicable reasons, the Court ignored possible congressional power over recognition.⁴⁷ In fact, Congress has recognized foreign states or governments as necessary and proper to the powers to declare war⁴⁸ and regulate foreign commerce.⁴⁹ Focusing entirely on the Executive, the Court found three enumerated powers that supported a presidential recognition power—to receive foreign diplomats, to appoint diplomats to represent the United States in relations with other nations and governments, and to make treaties.⁵⁰

The Court's reliance on these executive powers is certainly questionable. The Reception Clause most probably imposed a ministerial duty on the President, as head of state, to receive diplomats from recognized states and governments, and the appointments and treaty powers of the President are shared with the Senate.⁵¹

My point here is not to question the separation of powers decision in *Zivotofsky II*, although I believe that it is incorrect. Rather, my submission is that the enumerated powers of Congress and the President (even as generously construed) do not amount to a general recognition power.⁵² Recognition is ordinarily accomplished through

46. *Id.* at 2084.

47. See Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 118–20 (2015).

48. Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 35–41 (2013) (discussing 1898 Joint Resolution recognizing the independence of the people of Cuba and directing the President to use military force to evict Spain from the island).

49. See *id.* at 15–18 (discussing the Haitian Non-Intercourse Act of 1806); see also *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811) (No. 2,838) (Washington, J.) (holding that, notwithstanding Haiti's declaration of independence and de facto control over its territory, the Non-Intercourse Act constituted a binding American recognition of the territory as a dependency of France).

50. *Zivotofsky II*, 135 S. Ct. at 2084–86.

51. See *id.* at 2113–14 (Roberts, C.J., dissenting); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 810–16 (2011).

52. Arguably, one might infer a general power of recognition from the Reception Clause plus the commerce, war and treaty powers and the Necessary and Proper Clause. The President's reception of a foreign diplomat is certainly public *evidence* that the diplomat represents a recognized government. But the decision to recognize that government necessarily preceded the reception. That is what happened in President Washington's famous reception of Genet. See Reinstein, *supra* note 48, at 9–14. As for the commerce and war and treaty powers, under the classical *McCulloch* doctrine

a simple declaration that, in the view of the United States, a foreign state is an independent member of the community of nations and/or that a government is the legitimate authority of that state.⁵³ The United States has recognized foreign governments without making treaties or having commercial or diplomatic relations with those governments (including the refusal of the President to receive their ambassadors), or giving them the unqualified rights of foreign sovereign immunity or the act of state doctrine. A contemporary example is Cuba.⁵⁴ Conversely, the United States does not recognize Taiwanese independence or the government in Taipei that enacts and enforces law in Taiwan. But Taiwan enjoys almost all of the benefits of a recognized state under the Taiwan Relations Act.⁵⁵

In short, recognition is an implied national power that is more general than any of the enumerated powers. What, then, is the source of a general recognition power? In the early Republic, presidents relied upon the authority of the law of nations.⁵⁶ With the apparent demise of customary international law as an integral part of federal law, a general recognition power became an instrument of the national power over foreign policy. And, although the Court in *Zivotofsky II* may have cut down the dicta in *Curtiss-Wright* of executive primacy in making foreign policy,⁵⁷ the Court did not question that decision's extra-constitutional doctrine of the United States' inherent sovereign power over foreign relations.

recognition can be used as an implied power to carry out those enumerated powers. But just as the creation of a national bank corporation to carry out Congress's fiscal powers did not denote a general national power to create corporations, the use of recognition to effectuate certain enumerated powers does not denote a general national power of recognition.

53. SATOW'S DIPLOMATIC PRACTICE § 6, at 71 (Sir Ivor Roberts ed., 6th ed. 2009); 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 73 (1906).

54. See, for example, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), which generally prohibits Cuba from invoking the act of state doctrine to contest expropriations of American property by the Castro regime.

55. 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)). The Court acknowledged as much. *Zivotofsky II*, 135 S. Ct. at 2094 (majority opinion). For a detailed discussion of this statute, see Reinstein, *supra* note 48, at 42–50.

56. See David Gray Adler, *The President's Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 133–57 (David Gray Adler & Larry N. George eds., 1996); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 422–24 (2012).

57. *Zivotofsky II*, 135 S. Ct. at 2089–90.

D. A General National Power over Passports

There is no enumerated power in the Constitution that authorizes the issuance of passports. But the Executive issued passports since the beginning of the Republic,⁵⁸ and Congress subsequently enacted passport legislation. The modern passport system serves multiple functions. As instruments of foreign policy, passports are official diplomatic communications requesting safe conduct for Americans abroad. They also regulate and constrain international travel. Moreover, as a condition for entry into the United States, passports help enforce national security and the immigration laws. Finally, passports are used as conclusive evidence of identity and citizenship.

In *Haig v. Agee*,⁵⁹ the Supreme Court upheld the national passport power on three bases.⁶⁰ First, relying on the extra-constitutional sovereignty doctrine of *Curtiss-Wright* and the dicta in that case on the pre-eminent authority of the President over foreign affairs, the Court stated that this was an inherent power in the Executive.⁶¹ Second, the Court concluded that Congress did not divest this implied executive power when it enacted passport legislation.⁶² Third, apparently recognizing an implied power in Congress over passports (albeit without examining the source of that power), the Court upheld the authority of the President to include non-statutory regulations in passports by relying on historical practice and congressional acquiescence.⁶³

This question over the source of the passport power was revisited in *Zivotofsky II*. Justice Kennedy's majority opinion operated on the assumption that such a power exists as incident to a national sovereign power over foreign relations. But four Justices were not satisfied with this assumption. Justice Thomas argued that the passport power could not be implied from any of Congress's specific enumerated powers.⁶⁴ According to Thomas, issuing passports was part of the President's residual power over

58. For a discussion of the military use of "safe conduct" passports within the United States during the War of Independence and their subsequent use during peacetime in the early Republic, see Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 39–42 (2005). The evolution of the passport system from its primitive origins to its present design is discussed more fully at text accompanying *infra* notes 445–54.

59. 453 U.S. 280 (1981).

60. *Id.* at 291–92, 296–99, 302.

61. *Id.* at 291–92.

62. *Id.* at 296–99.

63. *Id.* at 302.

64. *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2097, 2103–05 (2015) (Thomas, J., concurring in judgment and dissenting in part).

foreign affairs that was implicitly contained in the Executive Vesting Clause of Article II, Section 1.⁶⁵ Accusing Thomas of advancing a theory of executive power that was more suited to George III than to George Washington, Justice Scalia, joined by the Chief Justice and Justice Alito, tried to fit a congressional power over passports as incidental to five enumerated or implied powers of Congress.⁶⁶ Although Thomas and Scalia disagreed sharply on the source of the passport power, each agreed in this inconclusive debate that this power was somehow vested in the national government.

E. Paper Money as Legal Tender for All Public and Private Debts

The Constitution vested Congress with the power to coin money⁶⁷ and prohibited States from either coining money or issuing any paper currency as legal tender.⁶⁸ But the Constitution neither authorized nor prohibited Congress from issuing paper money as legal tender. In light of the abuses of paper money during the Confederation period, the lack of national authority appears to have been both understandable and deliberate; in fact, the Confederation Congress's power to issue bills of credit on the authority of the United States was one of the few legislative powers in the Articles that the Convention did not transfer to Congress.⁶⁹ But the Convention left a gap by not imposing an explicit prohibition on Congress.

The national government first issued paper money as legal tender during the Civil War. The extraordinary costs of the war quickly depleted the Treasury's specie reserves. Upon the urgent recommendation of Secretary of the Treasury, Salmon Chase, Congress authorized the issuance of hundreds of millions of dollars of paper money, which, not backed by specie, had no inherent value. By legislative fiat, Congress created that value by declaring this paper money to be legal tender for all private and public debts (that is, creditors were legally obligated to accept it as payments on debts).

65. *Id.* at 2097–103.

66. *See id.* at 2116–18, 2123–26 (Scalia, J., dissenting). Justice Scalia relied on the foreign commerce, naturalization and territorial powers, section 5 of the 14th Amendment, and the implied power over migration deduced from the 20-year ban on congressional prohibition of the international slave trade. *Id.*

67. U.S. CONST. art. I, § 8, cl. 5.

68. *Id.* art. I, § 10, cl. 1 (“No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts . . .”).

69. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 308–11 (Max Farrand ed., 1911) [hereinafter FARRAND] (recounting how the Convention struck the clause proposed by the Committee of Detail authorizing Congress to “emit bills on the credit of the United States” from the list of enumerated powers).

The constitutionality of these laws was tested after the Civil War, and these cases produced deep divisions in the Supreme Court. In the first such case, *Hepburn v. Griswold*,⁷⁰ the Court held the legal tender statutes unconstitutional by a 4-3 vote in a majority opinion written ironically by Chief Justice Salmon Chase.⁷¹ Chase used the *McCulloch* framework and held that the use of paper money as legal tender, particularly as applied to pre-existing private debts, was not necessary and proper for the execution of any enumerated congressional power (including the war powers).⁷²

The *Hepburn* Court had only seven Justices. After Ulysses Grant was elected president, he appointed two Justices, and, in *Knox v. Lee*,⁷³ the reconstituted Court reversed its earlier decision by a 5-4 vote and upheld the legal tender statutes.⁷⁴ Justice Strong's majority opinion adverted at length to the existence of unspecified powers of Congress that derived from national sovereignty, to the importance of interpreting congressional power consistently with the broad objects of the Constitution, and to the validity of applying the enumerated powers in the aggregate rather than individually.⁷⁵ Ultimately, however, Strong used a conventional *McCulloch* approach and upheld the statutes as necessary to sustain the Union's war efforts. The Court could not second-guess Congress's choice of means—that a national currency of paper money was necessary to support the war and would be more effective as legal tender for both future and pre-existing public and private debts.⁷⁶ However, the decision in *Knox v. Lee* was equivocal because Justice Strong's majority opinion, and Justice Bradley's key concurrence,⁷⁷ ultimately upheld the constitutionality of the legal tender statutes as incident to the war powers.⁷⁸

70. 75 U.S. (8 Wall.) 603 (1869).

71. *Id.* at 625.

72. *Id.* at 620–25. Foreshadowing the *Lochner* era, Chase wrote that the use of paper money as legal tender violated the spirit of the Constitution because it impaired the value of contracts and effectively took property without due process of law. *Id.* at 622–25.

73. (*Legal Tender Cases*), 79 U.S. (12 Wall.) 457 (1870) (deciding two cases—*Knox v. Lee* and *Parker v. Davis*—in a consolidated decision).

74. *Id.* at 553–54.

75. *Id.* at 531–39.

76. *See id.* at 540–44. Strong also rejected the claim that the statutes violated the spirit of the Constitution. The value of contracts and property were always dependent upon future events, including the effects of future legislation. *Id.* at 544.

77. *Id.* at 554 (Bradley, J., concurring).

78. *See id.* at 567 (providing the fifth affirmative vote, Bradley cautioned that the power of issuing paper money as legal tender was a “power not to be resorted to except upon extraordinary and pressing occasions, such as war or other public exigencies of great gravity and importance . . .”).

The general validity of paper money as legal tender was not resolved until 1884. In *Julliard v. Greenman*,⁷⁹ the Court held (8-1) that Congress had the unqualified power to issue paper money as legal tender—during times of peace as well as national emergency, and for all public and private debts, whether pre-existing or prospective.⁸⁰ Justice Gray adopted the approach suggested, but not ultimately used, by Strong and Bradley in *Knox v. Lee*. Under *McCulloch*, the Constitution should be viewed as a whole, and the enumerated powers should be construed in the aggregate and not independently of each other: “The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency”⁸¹ Combining the taxing and spending, borrowing, commerce, and coining powers with the Necessary and Proper Clause produced a general fiscal, monetary, and currency power in Congress. This meant that Congress could create a national currency and had the choice of means in deciding upon the nature of that currency. If required by national exigency, Congress could issue paper money as legal tender for all private and public debts. As for the determination of a national exigency, Gray again invoked *McCulloch*—that was a political question to be decided by Congress.⁸²

Julliard v. Greenman is a departure from the classical *McCulloch* doctrine of implied powers. The Court did not assert that paper money as legal tender was necessary and proper to carry out one or more specific enumerated powers. Instead, it aggregated certain of the enumerated powers to produce a broader and more encompassing fiscal and monetary power and then held that the legal tender statutes were appropriately related to that larger aggregate power.⁸³ This theory of aggregating enumerated powers is different than the classical understanding of *McCulloch*, and I will revisit it in Parts III, IV, and V of this Article as a central component of a theory that explains and justifies aggregate and implied national powers.

79. 110 U.S. 421 (1884).

80. *Id.* at 449–50.

81. *Id.* at 439.

82. *See id.* at 449–50. Sovereignty was mentioned only in relation to the common practices of other nations in having a currency of paper money with legal tender, which supported the appropriateness of this measure as carrying out a national fiscal and monetary policy. *See id.* at 447, 450. For a discussion of the legal tender decisions, see generally Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119 (2006).

83. *See Julliard*, 110 U.S. at 449–50.

F. The Marshall Court and Two Implied National Powers

The Marshall Court upheld two powers that involved the contractual rights of the United States. There is no enumerated power that authorizes the United States, without enabling legislation, to enter into contracts or to sue for damages and other relief in the event those contracts are breached. Of course, Congress may vest those powers in the Executive under the Necessary and Proper Clause. That is, if Congress enacts a tax or regulatory law within the scope of its powers, it may, under the Necessary and Proper Clause, authorize the Executive, acting in the name of the United States, to enter into whatever contracts are needed to effectuate that law and to sue and recover damages for breaches of those contracts. But what if Congress enacts such a tax or regulatory law, but does not authorize the government to make and enforce contracts in order to carry out that law? In *United States v. Tingey*,⁸⁴ the Court held that, even in the absence of such enabling legislation, the United States has the inherent right to make contracts that are otherwise within the scope of national power.⁸⁵ And in *Dugan v. United States*,⁸⁶ the Court held that the United States has the inherent rights, again without enabling legislation from Congress, to sue to enforce its contracts and to recover damages for breach of contracts to which it is a party.⁸⁷ The Court based both decisions on inherent national sovereignty.

G. Expansions of Federal Court Jurisdiction

The previous sections dealt with national powers that exceed enumerated legislative powers and cannot easily be justified as means to carry out those specific powers. The present Section discusses the analogous existence of national powers that exceed enumerated judicial powers.⁸⁸

The Supreme Court has repeatedly stated that neither Congress nor the Court itself may expand the judicial power of the United States to cases or controversies beyond the nine categories that are enumerated in Section 2 of Article III.⁸⁹ However, the Court has never invalidated an act of Congress on that ground. In several noteworthy situations, it has tortured the language of specific enumerations to effect that expansion.

84. 30 U.S. (5 Pet.) 115 (1831).

85. *Id.* at 127–28.

86. 16 U.S. (3 Wheat.) 172 (1818).

87. *Id.* at 181.

88. This Section builds on an excellent article by Gil Seinfeld, *Article I, Article III and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010).

89. The earliest expression of this principle appears to be *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 72 (1809). For a collection of the cases and scholarship discussing this principle, see Seinfeld, *supra* note 88, at 1408–11.

1. *Corporations as citizens*

Section 11 of the Judiciary Act of 1791⁹⁰ provided for federal trial court jurisdiction when the “suit is between a citizen of the State where the suit is brought, and a citizen of another State.”⁹¹ This statute implemented the Article III category of controversies between “Citizens of different States.”⁹²

Under the plain terms of the statutory grant and of Article III, corporations should not be able to invoke the diversity jurisdiction. In an 1809 contract action brought by the Bank of the United States, Chief Justice Marshall began by stating the obvious, that “a corporation aggregate, is certainly not a citizen,”⁹³ but then planted the seeds for a contrary result. Marshall posited that a corporation represents its owners and hypothesized that perhaps there might be complete diversity between all of the Bank’s owners and the opposing party. The case was remanded to determine whether this remote hypothesis was true.⁹⁴ Following a “long and tortuous evolution of the law”⁹⁵ during the antebellum era, the Court turned this hypothetical into a conclusive legal presumption that the owners were citizens of the State of incorporation.⁹⁶ The Court maintained that it was enforcing a policy of equal protection:

The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State. It is of importance also to corporations themselves that they should enjoy the same privileges, in other States, where local prejudices or jealousy might injuriously affect them.⁹⁷

90. Ch. 20, § 11, 1 Stat. 73, 78 (1789).

91. *Id.*

92. U.S. CONST. art. III, § 2; *see* Judiciary Act of 1791 § 11. The statutory grant of jurisdiction did not completely cover this Article III category of cases because it required the plaintiff to sue in his or her state of citizenship, contained an amount in controversy requirement, and appeared to require complete diversity between the parties.

93. *Deveaux*, 9 U.S. (5 Cranch) at 86.

94. *Id.* at 91–92.

95. *Nat’l Mut. Ins. v. Tidewater Transfer Co.*, 337 U.S. 582, 604, 618 n.12 (1949) (Rutledge, J., concurring).

96. The culminating decisions were *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314 (1853), and *Ohio & Mississippi Railroad Co. v. Wheeler*, 66 U.S. (1 Black) 286 (1861).

97. *Marshall*, 57 U.S. (16 How.) at 329.

These decisions have been characterized as resting on a “complete fiction,”⁹⁸ but they are still good law. The transformation of corporations into citizens was first accomplished by judicial fiat. This framework changed in 1958, when Congress declared that corporations are citizens, and sometimes citizens of more than one State.⁹⁹ The conversion of corporations into citizens for purposes of the Article III diversity jurisdiction is now based on congressional legislation.

2. Tidewater

In 1805, the Marshall Court held that the District of Columbia was not a State within the meaning of the diversity statute and of Article III.¹⁰⁰ Perhaps emboldened by a vague suggestion in that opinion that Congress might somehow correct this,¹⁰¹ Congress amended the diversity statute in 1940 to include citizens of the District of Columbia.¹⁰²

The 1940 statute was enacted to fill a perceived unfair gap in the diversity jurisdiction enumerated in Article III by providing citizens of the District of Columbia with the same access to the federal courts as was enjoyed by citizens of States.¹⁰³ In *Tidewater*,¹⁰⁴ a majority of the Supreme Court strongly endorsed this congressional policy but was unable to coalesce on a legal principle that would allow Congress to correct Article III’s apparent shortcoming.¹⁰⁵

The statute was upheld through an unusual confluence of minority opinions. Two Justices, in an opinion by Rutledge, would have held, in effect, that if the term “[c]itizens” in the Article III diversity clause could be interpreted to include corporations, then the term “State” in that same clause can be interpreted to include the District of

98. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 193–94 (1990).

99. See Act of July 25, 1958, Pub. L. No. 85–554, § 2, 72 Stat. 415 (codified as amended at 28 U.S.C. § 1332(c)(1) (2012)) (“[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”). Congress amended this statute in 2011 by changing “any State” to “every State and foreign state.” See 28 U.S.C. § 1332(c)(1).

100. *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452–53 (1805).

101. *Id.* at 453 (“It is true that as citizens of the United States . . . it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon *them*. But this is a subject for legislative not for judicial consideration.”).

102. See Act of Apr. 20, 1940, ch. 117, 54 Stat. 143.

103. See Charles W. Davidson, Comment, *Diversity Jurisdiction for Citizens of The District of Columbia*, 9 OHIO ST. L.J. 309, 313–14 (1948) (describing the purpose of the amendment to put D.C. citizens in the same position as those of States in regard to diversity jurisdiction).

104. *Nat’l Mut. Ins. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (plurality opinion).

105. *Id.* at 603–04; *id.* at 625–26 (Rutledge, J., concurring).

Columbia.¹⁰⁶ This argument would have effected less of an expansion in Article III jurisdiction than the corporation cases but was rejected by the majority because, well, one legal fiction did not justify another, particularly a new one that would overrule a Marshall Court decision. Three Justices, in an opinion by Jackson, would have held that Congress may vest subject matter jurisdiction in the federal courts over all cases involving conduct that could be, but was not, regulated under any of Congress's Article I powers.¹⁰⁷ This theory was rejected by the majority (including Rutledge) as violating the principle that Congress's authority to vest jurisdiction in the federal courts is limited by the Article III enumerations. As applied to Congress's plenary power over the District, Jackson's argument would modestly expand federal court jurisdiction beyond the Article III enumerations.¹⁰⁸ However, as applied to all of the Article I powers, particularly the commerce power, this theory would encompass innumerable cases involving conduct over which Congress had not legislated and was still governed by state law.¹⁰⁹ The result would be a massive and indefinite expansion of congressional power to vest jurisdiction beyond the supposed limits of Article III.

Jackson's and Rutledge's positions were rejected by a majority of the Court, but the respective minority votes combined to produce a decision in favor of the statute's constitutionality. The result was a congressional expansion of federal court jurisdiction beyond the specifically enumerated diversity and arising under categories.

3. *Osborn and its progeny*

*Osborn*¹¹⁰ was a case brought by the Bank of the United States in a federal circuit court. Ohio had imposed a confiscatory tax on the Bank and state officials then proceeded to seize its assets. The Bank sought an injunction against state actions that appeared unconstitutional under *McCulloch*. The initial question in the case was the extent to which the circuit courts had original jurisdiction over cases in which the Bank was a party.

106. *Id.* at 620–23 (Rutledge, J., concurring).

107. *Id.* at 590–94, 619.

108. Jackson's and Rutledge's arguments would also presumably apply to the Territories.

109. The classical decisions expanding the commerce power pre-dated *Tidewater*. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

110. 22 U.S. (9 Wheat.) 738 (1824).

Osborn itself involved a federal question that would almost certainly arise in the litigation—the constitutionality of Ohio’s tax and the seizure of the Bank’s assets. Although brought as a trespass action, this could be a strong case for arising under jurisdiction because the Bank would have to prove that state officials acted unconstitutionally to obtain the relief that it sought. The weakest case for the arising under jurisdiction was, as Marshall noted, a typical contract action such as *Osborn’s* companion case.¹¹¹ Over Justice Johnson’s dissent, the Court held the arising under jurisdiction extended to the unrestricted right of the Bank to enforce all of its contracts in federal trial courts.

There was an obvious need for a neutral federal court forum for cases in which the Bank was a party. The Ohio tax on the Bank and the seizure of its assets exemplified intense state hostility against this federally chartered corporation. Leaving the Bank at the mercy of state court judges and juries who shared those biases could endanger the Bank’s effectiveness and possibly its existence. But as in the corporation cases and *Tidewater*, it was easier to articulate a policy argument for original federal court jurisdiction than a defensible principle to uphold that jurisdiction.

Marshall’s major premise was that the Bank’s right to make and enforce contracts would not exist but for federal law. The congressional charter not only created the Bank but authorized it to make contracts and to sue for their enforcement:

The charter of incorporation not only creates [the Bank], but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. *This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States.* It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law.¹¹²

Charter provisions were thus said to form the “original ingredient[s]” of, and the Bank was “compelled” to prove charter authorization for, every contract claim.¹¹³ Marshall clinched this argument through his

111. *See id.* at 823 (“Take the case of a contract, which is put as the strongest against the Bank.”). The companion case of *Bank of the United States v. Planters’ Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), was a contract action brought by the Bank in a federal circuit court.

112. *Osborn*, 22 U.S. (9 Wheat.) at 823 (emphasis added).

113. *Id.* at 824–25.

common device of a rhetorical question: “Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the [federal charter]?”¹¹⁴

The answer to this rhetorical question is “yes,” because it is simply false that the Bank could “acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States.”¹¹⁵ Those were common law rights that existed independently of the charter or any other federal law.

Marshall would have the readers of his opinion believe that the Bank’s capacities to make contracts were expressly authorized by the charter. *There was no such clause in the charter.*¹¹⁶ Of course the congressional charter established the Bank as a corporation. But the Bank’s general contractual rights and obligations¹¹⁷ were no different than if it had been operated as a sole proprietorship or partnership: they were products of the common law. As the then-leading contemporary authority on corporate law stated, all corporations had the same inherent capacities as natural persons to make contracts and to sue for their enforcement.¹¹⁸ These capacities had been recognized by the common law at least since the 1600’s,¹¹⁹ and, based on a presumptive equation of corporate and natural rights, did not have to be authorized by charter.¹²⁰ The Supreme Court had already applied this

114. *Id.* at 823.

115. *Id.*

116. *See* Act of Apr. 10, 1816, ch. 44, 3 Stat. 266. The Bank’s charter contained a catch-all clause and a clause authorizing the Bank to purchase and sell real and personal property with an aggregate limit of \$55 million. § 7, 3 Stat. at 269. Those clauses did not constitute a general right to make contracts. *See* *Bank of Columbia v. Patterson’s Adm’r*, 11 U.S. (7 Cranch) 299, 306 (1813).

117. There were clauses in the charter authorizing certain contacts related to banking. Other clauses placed limitations on certain contacts, such as incurring debt up to \$35 million. *See* §§ 9, 11, 3 Stat. at 270–74. If the Bank’s directors or officers made a contract contrary to those charter provisions, they could be held personally liable; but such charter violations would not nullify the common law validity of the contract as against the party with whom the agreement was made. *Fleckner v. Bank of the U.S.*, 21 U.S. (8 Wheat.) 338, 353–55 (1823); *see Bank of Columbia*, 11 U.S. (7 Cranch) at 299.

118. 1 STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* 69–70 (1793). I use the term “capacities” rather than “rights” to include cases brought against the Bank.

119. Samuel Williston, *History of the Law of Business Corporations before 1800*, 2 HARV. L. REV. 105, 117 (1888).

[T]he conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person. To this consequence there is a necessary exception in regard to such rights and duties as require an actual person for their subject.

Id.

120. *Id.* at 120–21.

common law principle to corporations.¹²¹ Just as natural persons did not need statutory authority to make contracts or to sue to enforce those contracts, neither did the Bank of the United States.

The Second Bank's charter included a "sue and be sued" clause providing that:

[T]he subscribers to the said bank of the United States of America . . . by that name shall be . . . made able and capable, in law, . . . to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States . . .¹²²

The most natural reading of this clause is that it codified the Bank's common law juridical capacities to sue and be sued and identified the federal courts in which such actions could be heard (the circuit courts) and, by exclusion, those in which it could not (the district courts). This "sue and be sued" clause did not purport to vest jurisdiction, but Marshall converted it into a jurisdictional grant with an ingenious argument of legislative history.¹²³

Even if this generous construction of a "sue and be sued" clause was correct,¹²⁴ that simply raised the Article III arising under problem. A case does not arise under a jurisdictional statute. What law would a court with jurisdiction apply in deciding contract actions in which the Bank sued or was sued? In contract actions brought by or against the

121. *Bank of Columbia*, 11 U.S. (7 Cranch) at 306 ("The act incorporating the Bank of Columbia (*act of Maryland, 1793, ch. 30*) contains no express provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law, it might contract under its corporate seal."). *But see* Carlos M. Vásquez, *The Federal "Claim" in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731, 1740–41 (2007) (accepting Marshall's contention that in the absence of charter provisions the Bank would not have the capacity to make contracts, sue or be sued).

122. § 7, 3 Stat. at 269.

123. *Osborn*, 22 U.S. (9 Wheat.) at 817–18. The argument went as follows: The First Bank's charter contained a general sue and be sued clause, but the Court had held that this language was not specific enough for a congressional intent to vest original jurisdiction in federal trial courts. *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85–86 (1809). In the Second Bank's sue and be sued clause, Congress specifically included lawsuits in the circuit courts. This change in wording was construed to mean that Congress intended to vest original circuit court jurisdiction over all cases in which the Second Bank was a party.

124. *But see id.* at 878–79 (Johnson, J., dissenting). Justice Scalia argued that Marshall's construction of the Bank's sue and be sued clause was incorrect. Scalia adopted the more natural reading of the clause as affirming the Bank's juridical capacity to sue and be sued and specifying the particular federal court in which such actions could be brought. *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 271–72 (1992) (Scalia, J., dissenting).

Bank in federal trial courts, general common law principles would be applied.¹²⁵ Such common law rules of decision were not viewed as federal law and were not binding on state courts.¹²⁶ Thus, contract actions brought by or against the Bank in state courts would be governed by state common law. Most notably, contract actions brought against the Bank in state court, which were not removable, would be decided by local judges and juries applying state common law.¹²⁷

Strikingly, Marshall applied general common law principles to uphold the validity of the Bank's right to sue in *Osborn* itself. The defendants did not challenge the Bank's capacity to bring lawsuits—that challenge would have been frivolous. They did, however, challenge *this* lawsuit, on the ground that the Bank's attorneys had not proven that the corporation had authorized the action under seal. Marshall gave two responses: first, as a matter of general common law, the actions of corporations could be valid even when not under seal.¹²⁸ Second, the principle that the Bank could act only pursuant to charter authorization was immaterial to the Bank's right to bring this action: applying a common law equivalence, the proof necessary to sustain the Bank's lawsuits was deemed the same as in cases brought by natural persons.¹²⁹

The *Osborn* opinion is doctrinally inscrutable, but as a foundational constitutional interpretation by the great Chief Justice, it was prone, as

125. See *Bank of Columbia*, 11 U.S. (7 Cranch) at 306–07. This case was a breach of contract action brought in the Circuit Court for the District of Columbia. The defendant corporation asserted that it was not bound by a contract made by certain directors in non-compliance of the charter. After stating that the corporation had the inherent common law right to make contracts under seal, the Court interpreted general common law to provide that a contract made by officers of the corporation not under seal is binding on the corporation when otherwise made within the scope of their authority. See also *Mechs.' Bank of Alexandria v. Bank of Columbia*, 18 U.S. (5 Wheat.) 326, 337–38 (1820). In a decision issued one year before *Osborn*, the Court stated that this general common law principle of apparent authority applied to Bank of the United States contracts. *Fleckner v. Bank of the United States*, 21 U.S. (8 Wheat.) 333, 353–55 (1823). However, because the Bank's contract in *Fleckner* was made in Louisiana, the Court held that the Louisiana Civil Code and principles of the civil law governed (those turned out to be the same as general common law principles). *Id.* at 357–59.

126. See HART & WECHSLER, *supra* note 36, at 580.

127. See *id.* State statutes regulating contractual rights would supersede the common law in actions brought by or against the Bank in federal as well as state court. See *Fleckner*, 21 U.S. (8 Wheat.) at 359. On the non-removability of those actions, and its significance to theories of protective jurisdiction, see *infra* notes 476–79 and accompanying text.

128. *Osborn*, 22 U.S. (9 Wheat.) at 829 (citing *Bank of Columbia*, 11 U.S. (7 Cranch) at 299).

129. *Id.* at 829–31.

it were, to endure for ages to come. *Osborn* became the authority for upholding statutes interpreted as providing original jurisdiction in federal trial courts over all cases by or against federally-chartered railroads¹³⁰ and banks,¹³¹ the American Red Cross,¹³² and against foreign states and their instrumentalities under the Federal Sovereign Immunities Act.¹³³

The corporation cases, *Tidewater* and *Osborn* and their progeny, are inconsistent with the principle that Congress cannot vest the federal courts with jurisdiction that goes beyond the specific categories enumerated in Article III. Accepting the idea that these decisions are appropriate interpretations of the diversity and arising under enumerations comes at the cost of pretending that language does not matter. Corporations are not citizens, the District of Columbia is not a State, and lawsuits presenting no federal question do not arise under federal law. These jurisdictional statutes, still considered valid, are exercises of national powers that transcend specific enumerations.

This is a substantial list of powers that are generally viewed as within national authority but are not justified under the classical enumeration approach identified with *McCulloch*. The next part of this Article describes scholarly arguments that would jettison this classical approach in favor of a general national legislative power in Congress. Such a power would enable Congress to legislate for the general welfare, or, as alternatively expressed, for national purposes or exigencies.

130. See *Pac. R.R. Removal Cases*, 115 U.S. 1, 11 (1885).

131. See, e.g., *Fed. Intermediate Credit Bank of Columbia v. Mitchell*, 277 U.S. 213, 214 (1928); *Sowell v. Fed. Reserve Bank of Dallas*, 268 U.S. 449, 455–56 (1925).

132. See *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257 (1992).

133. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (holding that the need to interpret the jurisdictional provisions of the Foreign Sovereign Immunities Act vested arising under jurisdiction in every case brought under the act). *Verlinden* is more complicated than the typical circular argument that the interpretation of a jurisdictional statute makes a case arise under federal law. Foreign sovereign immunity arose out of the law of nations, see *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812), and evolved into judicially-created matters of comity. See *Verlinden*, 461 U.S. (7 Cranch) at 486. Although phrased in jurisdictional terms, FSIA adopted the restrictive scope of foreign sovereign immunity as a matter of substantive law. Nevertheless, the Supreme Court's assertion in *Verlinden* that substantive law must be interpreted in every FSIA case is incorrect. In some cases, the application of one of the Act's exceptions will be obvious; in others, it will have been waived by contract or litigation behavior. See *Seinfeld*, *supra* note 88, at 1423–25; *Vásquez*, *supra* note 121, at 1740–41.

II. SCHOLARLY THEORIES ON THE SCOPE OF NATIONAL POWER

A. *A National Regulatory Power?*

William W. Crosskey's treatise on American constitutional law was published in 1953. Crosskey asserted that Congress has a general national legislative power.¹³⁴ He argued that the enumerated powers of Congress must be viewed as a whole and not as discrete subjects;¹³⁵ that the list of enumerated powers is not exhaustive;¹³⁶ that "all legislative power [herein] granted" does not mean "only the legislative powers granted";¹³⁷ that the Tenth Amendment also does not preclude a general national legislative power because it omits the term "expressly";¹³⁸ that the Preamble states the "objects" of congressional legislation and that the enumerated powers are some, but not all, of the means necessary to carry those objects into effect;¹³⁹ that the "all other powers" portion of the Necessary and Proper Clause vests additional powers in the "*Government of the United States as a whole*";¹⁴⁰ and that the Common Defense and General Welfare Clause in Article I, Section 8 is a broad substantive grant of national regulatory power.¹⁴¹

Crosskey appears to be the first scholar to make a comprehensive argument that Congress has the power to legislate for the general welfare, but his theory did not leave an imprint on the development of constitutional law. In recent articles, distinguished scholars have taken up where Crosskey left off. Although their principal approaches and doctrinal arguments are somewhat different, David S. Schwartz,¹⁴²

134. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* ch. XIII, XIV (1953).

135. *Id.* at 375.

136. *Id.* at 375-78, 381-83.

137. *Id.* at 389.

138. *Id.* at 678-90.

139. *Id.* at 391-92.

140. *Id.* at 381-83, 391-93.

141. *Id.* at 394-97, 501-08.

142. Professor Schwartz rejects the doctrine of enumerated congressional powers as fatally flawed in theory and not followed in practice. Using constitutional practice as the guiding criterion, he advances a theory of "capable federalism" by which Congress can address all problems that are national in scope, particularly those beyond the capacity of individual States. Schwartz, *supra* note 11, at 626.

Robert Cooter and Neil Siegel,¹⁴³ Calvin Johnson,¹⁴⁴ Richard Primus,¹⁴⁵ Robert J. Kaczorowski¹⁴⁶ and John Mikhail¹⁴⁷ have advanced creative and well-thought constitutional theories to establish a congressional power to legislate for the general welfare. These scholars do not assert that Congress has unlimited legislative power of the kind possessed by the States. Their submission is that Congress can legislate for all national purposes or exigencies. For most of these scholars, the existence of anomalous national powers such as those described previously is important evidence that the traditional means-ends approach is incorrect and that Congress may legislate to address all issues of national import.

These thoughtful scholars have identified flaws in the classical theory of enumerated and implied powers. They offer several persuasive constitutional theses, and my views are closer to them than to those who hold that every act of Congress must be related to a specific enumerated power.

143. Professors Cooter and Siegel apply a law and economics approach to the problem of collective action and present a construct of federalism centered on the existence of harmful externalities caused by the actions of individual States that require a national resolution by Congress under the authority of the General Welfare Clause. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 119 (2010).

144. Professor Johnson argues that the General Welfare Clause, although a spending power, gives Congress the power to enact all laws that are national in nature when combined with the Necessary and Proper Clause. Johnson, *supra* note 58, at 62–74.

145. Professor Primus's thesis is that there is no sphere of state autonomy that is necessarily outside the scope of national power and the important constraints on national power are the process limits in the structure of the federal government and not the specifications of powers. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 579 (2014).

146. According to Professor Kaczorowski, the original understanding was that the national government possesses implied powers that derive from inherent national sovereignty, that the scope of those powers are determined by the ends or objects for which Congress was created, which are found in the Preamble as well as enumerated powers, and that Congress has the authority to address all national necessities or exigencies. Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 MINN. L. REV. 699, 701–02 (2016).

147. In two impressive articles, Professor Mikhail asserts that the source of implied national powers to provide for the general welfare is the “all other powers” provision of the Necessary and Proper Clause. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1068–69 (2015) [hereinafter Mikhail, *Entailment*]; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1055 (2014) [hereinafter Mikhail, *Necessary and Proper*].

First, as a matter of undeniable reality, national powers that go beyond specific enumerations do exist. Therefore, we need to look beyond the classical model under which the limit of congressional authority is the relation of a law to specific enumerated powers.¹⁴⁸ Second, the enumerated powers should be construed as a whole and not as discrete and unrelated powers, so that powers of the government of the United States are sufficient to fulfill the purposes of the Union.¹⁴⁹ Third, the text of the Constitution does not preclude the existence of such national powers. The “herein granted” term in the Legislative Vesting Clause simply begs the question of the extent to which non-enumerated and implied national powers are vested by the Constitution.¹⁵⁰ And, under Madison’s leadership, the First Congress rejected attempts to insert the term “expressly” in the Tenth Amendment. If unspecified legislative power can be implied as a means to effectuate specific enumerated powers, there is no *a priori* reason why other implied powers cannot also be vested in the national government. Fourth, a textual foundation for congressional power to enforce broad national powers is contained in the Necessary and Proper Clause. Congress is given the power to pass all laws that are necessary and proper to carry into effect not only the powers enumerated in Article I, Section 8, but “all other Powers *vested by this Constitution in the Government of the United States*, or in any Department or

148. See, e.g., Kaczorowski, *supra* note 146, at 701–02, 777–78; Mikhail, *Necessary and Proper*, *supra* note 147, at 1051–52; Primus, *supra* note 145, at 588–91, 634–42; Schwartz, *supra* note 11, at 624–44.

149. See, e.g., Cooter & Siegel, *supra* note 143, at 156–58; Kaczorowski, *supra* note 146, at 763–64; Mikhail, *Necessary and Proper*, *supra* note 147, at 1105–06, 1120–22, 1130; Primus, *supra* note 145, at 621–22.

150. The most natural reading of the term is that Congress (and not the President, the Judiciary, or either House of Congress) possesses those legislative powers that are listed in the Constitution. Although the absence of a “herein granted” term in the Executive Vesting Clause has been an argument for expansive executive power, I am not aware of an argument that its presence in the Legislative Vesting Clause is a limitation on congressional power.

In *Gibbons v. Ogden*, Marshall stated that “[t]he enumeration presupposes something not enumerated[.]” 22 U.S. (9 Wheat.) 1, 195 (1824). This enigmatic statement might mean that there are residual areas of state regulation that are always beyond national authority. See *United States v. Lopez*, 514 U.S. 549, 553, 566–67 (1995); David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 45 (2015). Read contextually, however, Marshall appears to have been referring to a concurrent state power over commerce. Richard Primus, *The Gibbons Fallacy*, 19 U. PA. J. CONST. L. 567, 568–70 (2017). Or the statement might simply be a truism: listing certain powers means that others are not listed. That says nothing about the extent of implied powers, which “depend[s] on a fair construction of the whole instrument.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

Officer thereof.”¹⁵¹ To the extent that such national powers—for example, the general national power over foreign affairs—are vested in the government of the United States, the “all other powers” clause provides for congressional enforcement.

However, acceptance of these principles does not establish that Congress possesses a general welfare power or, as it is also called, a power to deal with all national needs and exigencies. Although each scholar presents distinct arguments, there are common assertions that are presented to justify a national regulatory power—that such a power emanates from the General Welfare Clauses of the Preamble and/or Article I, inherent national sovereignty, the “all other powers” clause, or the adoption of Resolution VI of the Virginia Plan. These arguments are substantial, but I do not believe that they are supported by constitutional text, history and structure.

B. *The General Welfare Clauses*

There are two common defense and general welfare clauses in the Constitution. One is in the Preamble, and the other is in Article I, Section 8. Scholars who argue that Congress has the authority to legislate for the general welfare rely on either or both.¹⁵²

1. *The Preamble*

The Preamble to the United States Constitution states:

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.

The Preamble certainly states the goals (perhaps more precisely the hopes) that the members of the Convention sought to achieve when they proposed the Constitution. But the Constitution is a law, and the Framers, many of whom were well-trained attorneys, drafted that document with knowledge of the common law rules of construction

151. U.S. CONST. art. I, § 8, cl. 18 (emphasis added). *See generally* Mikhail, *Entailment*, *supra* note 147; Mikhail, *Necessary and Proper*, *supra* note 147.

152. *See, e.g.*, Cooter & Siegel, *supra* note 143, at 170–75 (relying on art. I, § 8); Johnson, *supra* note 58, at 62–74, 96 (same); Kaczorowski, *supra* note 146, at 763–64, 771–72 (relying on both); Mikhail, *Entailment*, *supra* note 147, at 1098, 1102–03 (relying on Preamble); Schwartz, *supra* note 11, at 594–98 (relying on both).

that governed the interpretation of laws.¹⁵³ One settled rule was that preambles to laws did not themselves create powers or rights.¹⁵⁴ That did not mean that preambles should be disregarded as mere rhetoric. A law with multiple provisions must be viewed as a whole,¹⁵⁵ and preambles should be consulted for the purpose of interpretation—to clarify any ambiguous terms in specific powers and rights contained in laws.¹⁵⁶

Even the nationalist Joseph Story, in his classic *Commentaries on the United States Constitution*, emphatically denied that the Preamble was a source of national power.¹⁵⁷ To Story, the Preamble lent support for liberally interpreting the general language of each enumerated power.¹⁵⁸ This is also how Hamilton's supporters employed the Preamble in the great debate in Congress over the constitutionality of his proposed Bank of the United States,¹⁵⁹ and how Marshall used the Preamble in *McCulloch* in asserting that the Constitution was created by the people of the United States, and not by the States.¹⁶⁰

2. Article I, Section 8, Clause 1

The first clause of Article I, Section 8 states:

The Congress shall have Power 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; but all Duties,

153. See, e.g., David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1324–37 (2009).

154. Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 125–27 (1990) (explaining the common law rule that preambles do not create powers or rights but should be used to interpret specific provisions of the Constitution).

155. 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

156. *Id.* *60.

157. See 1 STORY, COMMENTARIES, *supra* note 9, § 462.

158. *Id.*

159. 2 ANNALS OF CONG. 1909 (1791) (statement of Rep. Ames) (after justifying the Bank as a means to carry out enumerated powers, stating that the Preamble shows that the Bank is not “repugnant to the spirit and essential objects” of the Constitution); *id.* at 1921 (statement of Rep. Boudinot) (stating that the purposes of the Constitution as set out in the Preamble should be used in interpreting the specific powers vested in the national government); *id.* at 1950–51 (statement of Rep. Gerry) (applying Blackstone's rules to construction to argue that the purposes set out in the Preamble supported a liberal interpretation of the Necessary and Proper Clause). Hamilton, who was the oracle of Federalist constitutionalism, did not rely on the Preamble in his constitutional defense of the Bank. See *infra* notes 167–68, 264–68, 392–401 and accompanying text.

160. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–05 (1819). For a further discussion of the Preamble, see *infra* Section II.D.2.

Imposts and Excises shall be uniform throughout the United States.¹⁶¹

A version of Clause 1 was contained in the Articles of Confederation. Article VIII vested Congress with the following power:

All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States¹⁶²

One of the least controversial decisions of the Convention was to vest Congress with powers that the Confederation Congress possessed under the Articles.¹⁶³ Article VIII was plainly a spending power, and it was incorporated into Clause 1 of Article I, Section 8. The Convention made a momentous change by transferring the source of national revenues from the States to Congress. However, by vesting the taxing power in Congress, the Convention did not transform spending for the “common defense and general welfare” into a regulatory power. The argument that Clause 1 provides Congress with the regulatory authority to enact legislation for the general welfare—as opposed to being a purpose for which taxes may be used—is inconsistent with the origin of the clause.

During the ratification debates, some Anti-Federalists made the regulatory interpretation of the General Welfare Clause as part of their arsenal of worst-case scenarios by which the Constitution would lead to a consolidated national government. But no Federalist accepted this argument. In *Federalist 41*, Madison insisted that the Common Defense and General Welfare Clause was a spending power and adamantly denied that it provided a general regulatory power to Congress.¹⁶⁴ After the Constitution was ratified, Hamilton confirmed this understanding of the Clause. In his 1791 *Report on Manufacturing*,¹⁶⁵ Hamilton urged Congress to provide financial support (in the form of bounties) for the country’s nascent manufacturing sector. Hamilton located the constitutional basis for the bounties in the General Welfare Clause, but

161. U.S. CONST. art. I, § 8, cl. 1.

162. ARTICLES OF CONFEDERATION OF 1781, art. VIII, ¶ 1 (emphasis added).

163. 1 FARRAND, *supra* note 69, at 47; 2 FARRAND, *supra* note 69, at 21–22.

164. THE FEDERALIST NO. 41, *supra* note 6, at 201–02 (James Madison).

165. Alexander Hamilton, Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 230 (Harold C. Syrett ed., 1966) [hereinafter HAMILTON PAPERS].

he stressed that this clause did not vest Congress with regulatory power over manufacturing or anything else.¹⁶⁶

Hamilton's opinion on the constitutionality of the Bank is more important. It was a private letter addressed to one person, President George Washington, who happened to have chaired the Constitutional Convention. Hamilton's opinion to Washington, which later became the blueprint for *McCulloch*, stated, as his principal argument, "a criterion of what is constitutional and of what is not so":

This criterion is the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.¹⁶⁷

As applied to the incorporation of the Bank: "[I]t is affirmed that [the Bank] has a relation more or less direct to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the states; and to those of raising, supporting & maintaining fleets and armies."¹⁶⁸ Hamilton did not rely on the General Welfare Clause as constitutional authority for the Bank. Instead, he told Washington that this Clause stated the purpose of taxation. The Clause prevented Congress from applying national revenues for local purposes, but it was not limited to spending for carrying out express national legislative powers.¹⁶⁹

After the Constitution was ratified, Federalists and Republicans disagreed on the scope of the General Welfare Clause. Hamilton and Story asserted that Congress could spend for all national purposes.¹⁷⁰ Madison and Jefferson insisted that congressional spending must be

166. *Id.* at 302–04.

167. Hamilton, Bank Opinion, *supra* note 8, at 107.

168. *Id.* at 121.

169. *Id.* at 126–28. This should be a sufficient response to Professor Crosskey's unsupported accusation that Madison and Hamilton were being disingenuous in *Federalist 41* and the *Report on Manufacturing*, respectively. See 1 CROSSKEY, *supra* note 134, at 400–03, 406–07. Moreover, the Bank's supporters in Congress did not rely on the General Welfare Clause. See 2 ANNALS OF CONG. 1906–09 (statement of Rep. Ames) (arguing that the Bank was necessary and proper to execute the taxing, borrowing, commerce, war and army and navy powers); *id.* at 1911–12 (statement of Rep. Sedgwick) (same); *id.* at 1921–22 (statement of Rep. Boudinot) (same); *id.* at 1946, 1948 (statement of Rep. Gerry) (same). The clause is mentioned only in passing. See *id.* at 1912 (statement of Rep. Sedgwick) (stating that Congress could borrow money to pay the debts and provide for the common defense and general welfare); *id.* at 1948 (statement of Rep. Gerry) (Congress can tax to provide for the common defense and general welfare).

170. 2 STORY, COMMENTARIES, *supra* note 9, §§ 904–927, at 367–95.

limited to objects within the enumerated powers, although the third member of the Virginia Dynasty, President James Monroe, surprisingly adopted the Federalists' more liberal construction of the spending clause.¹⁷¹ But the common ground of this debate, which was ultimately resolved in favor of the Federalist position,¹⁷² was that the General Welfare Clause is a spending, and not a regulatory, power.

Does the text of the General Welfare Clause nevertheless support a regulatory interpretation? Only if the Clause is interpreted as vesting three unconnected powers in Congress: (1) “[T]o lay and collect Taxes, Duties, Imposts and Excises”; (2) “[T]o pay the Debts”; and (3) “[To] provide for the common Defence and general Welfare of the United States.”¹⁷³ However, textually, “to pay the Debts and provide for the common Defense and general Welfare of the United States,” is a single term. As such, it clearly appears to be a spending power because paying the debts cannot be interpreted otherwise. This provision becomes two powers only when commentators add the word “to” as a means of dividing this term into separate powers. And the regulatory power interpretation becomes even more problematic considering the final provision of Clause 1: “but all Duties, Imposts and Excises shall be uniform throughout the United States.”¹⁷⁴ A natural reading of Clause 1 as a whole is that Congress is given the power to lay and collect taxes with two limitations: those revenues may be used only for national purposes (paying the debts and providing for the common defense and general welfare), and certain taxes (duties, impost and excises) must be uniform throughout the United States.

Calvin Johnson presents a different argument. Acknowledging that the General Welfare Clause represents a purpose for which national revenues can be used, Johnson argues that the application of the Necessary and Proper Clause to the taxing and spending power

171. James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 at 152–55 (James D. Richardson ed., 1898) [hereinafter Richardson, MESSAGES].

172. *See, e.g.*, *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587–90, 598 (1937); *United States v. Butler*, 297 U.S. 1, 65–66 (1936).

173. *See* Schwartz, *supra* note 11, at 597. Or by restoring Gouverneur Morris's notoriously unsuccessful semi-colon, *see* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 182–83 (1913).

174. U.S. CONST. art. I, § 8, cl. 1.

produces a general regulatory power and that the enumerated powers are examples of this power.¹⁷⁵

There certainly is no wall that separates taxing, spending, and regulation. The taxing power can be used for regulatory purposes, as it was in one of the first acts of Congress, when differential duties were applied to imports in part to protect American manufacturing.¹⁷⁶ And the spending power, when combined with the Necessary and Proper Clause, can support national legislation that is beyond the scope of any other enumerated power.¹⁷⁷ But that does not mean that these powers can create a general national regulatory power, of which the enumerated powers are examples. Certain enumerated powers cannot reasonably be derived from taxing and/or spending powers, even when supplemented by the Necessary and Proper Clause—such as a power to “declare war,” a power to enact a “uniform Rule of Naturalization,”¹⁷⁸ or laws that “[secure] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁷⁹ And Johnson’s theory does not seem applicable to a general foreign affairs power or national powers of immigration, deportation, and recognition.¹⁸⁰

This analysis accounts for the relationship of the General Welfare Clauses in the Preamble and in Clause 1. Applying the Preamble as an interpretative device to resolve ambiguity in the scope of an enumerated power favors a broad construction of Clause 1. This would support the Hamilton-Story position that Clause 1 applies to spending for all national purposes, and not merely to funding the other enumerated powers. But Clause 1 is not ambiguous on whether it is a

175. Johnson, *supra* note 58, at 62–68, 69–75, 96.

176. Act of July 4, 1789, ch. 2, 1 Stat. 24.

177. See, e.g., Sabri v. United States, 541 U.S. 600, 607 (2004) (upholding, under the Spending and Necessary and Proper Clauses, a congressional statute that prohibited bribery of state and local officials of entities that receive at least \$10,000 in federal funds).

178. U.S. CONST. art. I, § 8, cl. 4, 11.

179. *Id.* art. I, § 8, cl. 8.

180. Patrick Henry played the slavery card in his penultimate oration in the Virginia Ratification Convention, asserting that the General Welfare Clause would empower Congress to abolish slavery. Edmund Randolph responded that the clause did not give Congress any power to emancipate slaves, and that it would “violate every rule of construction and common sense” to separate it from taxing and spending. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 599–600 (Jonathan Elliot ed., 2d ed 1836) [hereinafter ELLIOT’S DEBATES]; see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 296 (2010).

spending or regulatory power. The weight of historical evidence and the particular language of Clause 1 combine to eliminate any such ambiguity.

C. *Inherent National Sovereignty and Federalism*

1. *Sovereignty and governmental power*

Sovereignty was a principal feature of the Supreme Court's late nineteenth century jurisprudence. Most of the implied national powers that exist today have their origins in conceptions of national sovereignty that became important features of constitutional law during that period. Robert Kaczorowski asserts that inherent national sovereignty was not a latter-day invention of the Supreme Court but is a principle of constitutional law as originally understood and with roots in the Marshall Court.¹⁸¹

The idea of sovereignty as unlimited authority was developed by legal theorists beginning in the sixteenth century in response to the emergence of European nation-states.¹⁸² If sovereignty is defined in its usual sense of connoting unlimited authority,¹⁸³ the government of the United States is not a sovereign entity because the national government possesses limited powers. The state governments are also not sovereign entities because they do not have important powers that are attributes of sovereignty (such as engaging in war, raising armies and navies and making treaties). And the national and state governments together are also not sovereign in the sense of possessing unlimited power because every American constitution places prohibitions on the exercise of governmental power.

The writings of a number of European theorists strongly influenced American political thought on constitutionalism¹⁸⁴ and federalism,¹⁸⁵ with Vattel perhaps being the most influential.¹⁸⁶ But European theorists

181. Kaczorowski, *supra* note 146, at 705–06; *see also* Mikhail, *Necessary and Proper*, *supra* note 147, at 1074–78, 1096–1101.

182. Jean Bodin was the first major theorist of sovereignty and asserted that a state was truly sovereign only if it possessed unlimited power. Julian H. Franklin, *Sovereignty and the Mixed Constitution: Bodin and His Critics*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450–1700* at 307 (J. H. Burns ed., 1991).

183. This continues to be its usual definition. *See, e.g.*, James J. Sheehan, *The Problem of Sovereignty in European History*, 111 *AM. HIST. REV.* 1, 2 (2006).

184. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967).

185. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 124–26 (2010).

186. ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 33 (1935); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776–1814* at 11 (1993). American pamphleteers were attracted to Vattel, whose English-language edition of *The Law of Nations* was

disagreed on the sources of sovereignty, on whether sovereignty and government were coterminous, and, if they were not, on their proper relation.¹⁸⁷ To complicate matters further, modern philosophers disagree among themselves about what the historical theorists really meant.¹⁸⁸ The term “sovereignty,” which does not appear in the Constitution, is a peculiarly elusive concept when applied to the operations of government.¹⁸⁹

Nevertheless, this abstract term of political science significantly affected the development of American constitutionalism and federalism, a process that began during the crises that gave rise to the War of Independence.¹⁹⁰ The attempts to define and operationalize the concept of sovereignty and its relation to government continued through the Constitutional Convention and ratification of the Constitution. These debates, and their resulting conclusions, illuminate the origins of American federalism, the sources of the enumerated powers, the reasons why the specific enumerated powers were listed in the Constitution, and the constitutional basis for a doctrine of aggregate national powers.¹⁹¹

published 1759. Vattel emphasized that sovereignty meant the equality and independence of each state in its relations with other states. VATTEL, *supra* note 30, bk. I, §§ 4–6, at 2–3; *see* ONUF & ONUF, *supra*, at 16–18. He maintained that the inviolate right of a state to fully control its territory and inhabitants both internally and as against *external* forces was not a determinant of the *internal* structure of a state’s government. Vattel denied that the governing power must be vested in one person or entity: each state is free to allocate governing powers as it sees fit, VATTEL, *supra* note 30, § 26, at 8, and the allocation of those powers is expressed in the state’s constitution, which “determines the manner in which the public authority is to be executed.” *Id.* § 27, at 8–9.

187. For insightful and provocative analyses of these differences, see RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2015).

188. For example, scholars debate whether Bodin declared that unlimited power necessarily was concentrated in and identified with a single individual or entity. *See, e.g.*, Franklin, *supra* note 182, at 298–99 (arguing that this was Bodin’s position); TUCK, *supra* note 187, ch. 1 (arguing that it was not Bodin’s position).

189. For arguments that, as applied to the actual functioning of government, sovereignty is an abstraction that operates only to simplify or confuse arguments over the operation and allocation of governmental powers, see Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 2D 51, 56–59 (1999); Craig Green, *Creating American Land: A Territorial History from the Albany Plan to the U.S. Constitution* 21–28, 41–48 (2018) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

190. *See* Gordon S. Wood, *The Problem of Sovereignty*, 68 WM. & MARY Q. 573 (2011).

191. I am not claiming that the leaders of the American Revolution or the members of the Constitutional Convention or the Federalist supporters of the Constitution discovered the “correct” relationship of sovereignty to government. The narrative that follows is intended to highlight the theories of sovereignty and their relations to government that the revolutionary and founding generations used in developing and defending the Constitution.

2. *Sovereignty and the Revolution*

According to Forrest McDonald, “what broke apart the empire was an inability to agree on the locus and nature of sovereignty.”¹⁹² This view has been expressed by other leading American¹⁹³ and British¹⁹⁴ historians. Given the multiple causes of the Revolution, this is surely an overstatement. At the same time, the increasingly belligerent and intractable debates over sovereignty that arose during the crises beginning in the 1760s certainly helped to ignite the flammable disputes that resulted in a revolution and left a lasting imprint on American constitutionalism.

British imperial authorities (the King, ministers, and most members of Parliament) were unyielding that the central principle of the British constitution was the complete sovereignty of the Parliament at Westminster.¹⁹⁵ According to the imperial authorities, unlimited parliamentary power was established by the Glorious Revolution of 1688.¹⁹⁶ And unlimited power meant that any act of Parliament, applying anywhere in the Empire, was by definition constitutional.¹⁹⁷

However, the doctrine of unlimited parliamentary power diverged from the actual manner in which the American colonies were governed. As a matter of practice, the colonial assemblies managed the internal affairs of their colonies largely without parliamentary interference from the time of the settlements until the crises that began in the 1760s.¹⁹⁸ Whether out of indifference or the need to attend to greater priorities in governing Great Britain and the rest of a far-flung empire, Parliament had left control over the American

192. FORREST McDONALD, STATES’ RIGHTS AND THE UNION: *IMPERIUM IN IMPERIO, 1776–1876* at 4 (2000).

193. See, e.g., ANDREW C. McLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 163 (1932); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 208–28 (1986); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 344–45 (1998).

194. See, e.g., H. T. Dickinson, *The Eighteenth-Century Debate on the Sovereignty of Parliament*, in 26 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 189, 189 (1976) (“In the final analysis the most serious point at issue between the mother country and her colonies rested on a fundamental disagreement over the nature and location of sovereignty.”).

195. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 142 (1993).

196. BAILYN, *supra* note 184, at 198–202.

197. 1 BLACKSTONE, *supra* note 155, at *156–57.

198. See BAILYN, *supra* note 184, at 202–04; JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788 at 40–41 (1986).

colonies mainly to the prerogative powers of the Crown (that is, the King and his ministers).¹⁹⁹ Acting through royal governors and the Privy Council, the Crown vetoed or disallowed colonial legislation and issued “instructions” to the governors that were to be enforced as law.²⁰⁰ Americans resented such negations of self-government, particularly because a double standard was in operation. With the emergence of parliamentary supremacy, the royal prerogatives were constrained to a considerable extent within Great Britain, but those prerogatives were applied with full force in the colonies.²⁰¹ And the colonists knew from Blackstone and other sources that, whatever the actual strength of these prerogatives within Great Britain, the King continued to hold these discretionary powers throughout the Empire as a matter of law.²⁰²

Significantly, vetoes and disallowances of colonial legislation were not frequent,²⁰³ and royal instructions to the colonial governors were

199. GREENE, *supra* note 189, at 55.

200. A disallowance power applied to three colonies. Kinvin Wroth, *Documents of the Colonial Conflict Part I—Sources for the Legal History of the American Revolution*, 69 L. LIBR. J. 277, 280, 282–83 (1976).

201. The actual powers that the Crown could exercise through these prerogatives within Great Britain had substantially diminished in the decades following the Glorious Revolution. The emergence of parliamentary supremacy meant that the royal prerogatives became subject to law. In theory, the King could veto any legislation that infringed on his prerogatives, but as Parliament obtained supremacy over the Crown, the royal veto disappeared as a matter of political reality, if not legal theory, with the last royal veto of legislation occurring in 1707. ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 21–22 (2014). The situation in America was very different. Until the crises that began in the 1760s, Parliament largely ceded the administration of the colonies to the Crown. By royal assertion and parliamentary default, the political reality was that prerogative powers as they were practiced before the Glorious Revolution remained alive and well in the colonies.

202. 1 BLACKSTONE, *supra* note 155, at *144–46, *250–79. Even with the decline of actual prerogative power within Great Britain, Blackstone identified two methods by which the Hanoverian monarchs were nevertheless able to exercise substantial authority. First, the King appointed ministers who operated a vast patronage system that gave the Crown major influence over Parliament. *Id.* at *335–37. Second, the Crown commanded a permanent standing army. In the century between the Glorious Revolution of 1688 and the Constitutional Convention of 1787, Britain fought six wars over 48 years. The power that this army put at the disposal of the Crown was “more than equivalent to a thousand little troublesome prerogatives.” *Id.* at *336.

203. JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 176–77* (1994). Until 1760, only 265 cases were brought from all thirteen colonies to the Privy Council for review. These included appeals from the royal courts established in the colonies and inter-colonial disputes and compacts as well as challenges to colonial legislation. McLAUGHLIN, *supra* note 186, at 10.

successfully resisted.²⁰⁴ There were, however, sporadic major conflicts between colonial self-government and the prerogative to negative legislation. As loyal subjects of the King, Americans acknowledged the legality of the negatives and blamed abuses on ministerial corruption.²⁰⁵ Americans also accepted the King's broad prerogative powers over important external affairs (war and peace, army and navy, foreign affairs, inter-colonial conflicts, the western and crown lands and commerce).²⁰⁶ And, at least until the eve of the Revolution, Americans acquiesced in the several acts of Parliament affecting the colonies that regulated matters common to the Empire—navigation, commerce, piracy, the post office, naturalization, and currency—again blaming perceived abuses on ministers and royal governors.²⁰⁷ The net effect was that the colonial assemblies substantially regulated the internal affairs of the colonies, while their external affairs were controlled primarily by the Crown and intermittently by Parliament. The list of powers exercised by the metropolitan government over the colonies should look familiar. As discussed later, this list is remarkably similar to the enumerated powers vested by the Constitution in all three branches of the United States.

Before the crisis in the 1760s, the colonists were satisfied with governing their internal affairs and did not overtly challenge the abstract doctrine of parliamentary sovereignty.²⁰⁸ The colonies prospered under this

204. On the unwillingness or inability of the royal governors to exert control over the colonial assemblies, see GREENE, *supra* note 203, at 60, 172–73. One reason for this lack of real imperial authority was that the royal governors were dependent on the colonial assemblies for their salaries and for the expenses of colonial administration. Another was that the patronage system that was used by the Ministry in England to exert control on the House of Commons was not replicated in the colonies. *Id.* at 87.

205. NELSON, *supra* note 201, at 21–22.

206. McLAUGHLIN, *supra* note 186, at 13. The central authorities were also taking charge of Indian affairs and trade and were preparing to develop new colonies. Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 217 (1918) [hereinafter McLaughlin, *Background*].

207. BAILYN, *supra* note 184, at 208–10; McLAUGHLIN, *supra* note 193, at 143–45. The pre-crisis acts of Parliament that affected the colonies were the 1651 Navigation Acts (as amended through 1696); the 1700 Piracy Act; the 1708 act fixing the value of foreign coin; the 1710 establishment of the post office; the 1740 Naturalization Act; the 1741 application of the Bubble Act to the colonies (requiring corporations to be chartered by the Crown or Parliament, the act was aimed at trading companies); and the 1751 act prohibiting the issuance of paper money in New England. GREENE, *supra* note 198, at 36–37, 55–62; McLAUGHLIN, *supra* note 186, at 11–12. As late as 1774, the Continental Congress acknowledged Parliament's authority over external commerce "from the necessity of the case." McLAUGHLIN, *supra* note 193, at 144–45. Commerce was also regulated by the Crown independently of parliamentary legislation.

208. GREENE, *supra* note 203, at 70–71.

arrangement²⁰⁹ until it broke down when Parliament began imposing taxes and legislation upon the colonies. To defend their claims of autonomy over taxation and legislation against this new and powerful parliamentary threat, American leaders²¹⁰ engaged in a sustained discourse over sovereignty and power, resulting in the development and assertion of constitutional theories that were simultaneously archaic and radical.

American leaders knew that parliamentary supremacy had emerged in Great Britain from the Glorious Revolution and its aftermath, but they denied that it resulted in parliamentary sovereignty over the colonies.²¹¹ They claimed that the Glorious Revolution confirmed the historic principle of the English constitution that no government, including the King-in-Parliament, possessed unlimited (and therefore arbitrary) power. American leaders were fond of quoting from Vattel:

It is asked, whether [the legislators'] power extends to the *fundamental* laws—whether they may change the *constitution* of the state? . . . [T]he authority of these legislators does not extend so far, and . . . they ought to consider the *fundamental* laws as sacred, if the nation has not, in very express terms, given them power to change them. For the *constitution* of the state ought to possess stability In short, it is from the *constitution* that those legislators derive their power: how can they change it, without destroying the foundation of their own authority?²¹²

What, then, was the constitution that applied to the American colonies? Many American leaders asserted that the constitution under which they lived was the ancient constitution under which the King established the colonies in the seventeenth century through royal grants and charters.²¹³ Under those grants and charters, the settlers agreed to be subject to the royal prerogatives in return for the King's protection and his guarantee that they would forever be entitled to the

209. Adam Smith famously stated that the colonies operated autonomously in the British Empire and the “liberty to manage their own affairs [in] their own way, seem to be [one of] the two great causes of the[ir] prosperity.” 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 319 (C.J. Bullock ed., P.F. Collier & Son 1909) (1776).

210. I use the term “American leaders” to denote influential politicians and pamphleteers who defended American autonomy against imperial intrusions.

211. BAILYN, *supra* note 184, at 46–47.

212. VATTEL, *supra* note 30, bk. I, § 34, at 11; see McLAUGHLIN, *supra* note 193, at 122–23. Two early examples of American leaders quoting from Vattel are James Otis's ground-breaking 1764 pamphlet, *The Rights of British Colonies*, and Richard Bland's influential 1766 pamphlet, *Inquiry into the Rights of the British Colonies*. BAILYN, *supra* note 184, at 178 (Otis); LACROIX, *supra* note 185, at 79 (Bland).

213. BAILYN, *supra* note 184, at 224–26.

same fundamental rights as the subjects who lived in England.²¹⁴ Moreover, the British constitution developed historically through customary practices, which in turn made fundamental laws and rights.²¹⁵ Representation in the legislature was one of the most important English rights, and Americans were represented only in their colonial assemblies.²¹⁶

Although American constitutional arguments were somewhat inconsistent and were rejected by imperial authorities as inconceivable in denying the unlimited power of Parliament,²¹⁷ these arguments were nonetheless plausible.²¹⁸ The constitutional precedents upon which they frequently relied were Ireland and Scotland (the latter before the 1707 Acts of Union)—self-governing nations with their own parliaments connected to England by a common monarch.²¹⁹ The

214. *Id.* at 77–84; REID, *supra* note 193, at 132–35. Relatedly, under standard contract law, the people (i.e., the settlers) agreed to migrate to America in reliance on the King’s promise that they and their descendants would continue to enjoy all of the rights of English subjects. REID, *supra* note 193, at 139–53.

215. GREENE, *supra* note 203, at 25–35; *see also* BAILYN, *supra* note 184, at 68–69, 77–84, 182–83 (fundamental rights were not granted by government; they were immemorial as established by custom and secured by the constitution).

216. REID, *supra* note 195, at 84–87 (explaining how rationales for “virtual” representation in the House of Commons were inapplicable to the colonies); REID, *supra* note 193, at 45.

217. *Id.* at 218–19.

218. Scholars who support these constitutional assertions include: BAILYN, *supra* note 184, at 68–69, 77–84, 224–26; GREENE, *supra* note 203, at 25–39; GREENE, *supra* note 198, at 36–37, 40–41, 44–47, 144–47; LACROIX, *supra* note 185, at 14–18 (2010); MCLAUGHLIN, *supra* note 186, at 14–15; MCLAUGHLIN, *supra* note 193, at 99, 114–22; REID, *supra* note 195, at 35–36; REID, *supra* note 193, at 70–78, 135–42; Barbara A. Black, *Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976). Even after the Constitution was ratified, Americans argued that imperial authorities and apologists (such as Blackstone) misinterpreted the British constitution in asserting parliamentary sovereignty. 1 WORKS OF JAMES WILSON 159–88 (James D. Andrews ed., 1896) [hereinafter WILSON WORKS].

219. REID, *supra* note 195, at 87–90, 120–24. On the influence of the Scottish experience and the Scottish Enlightenment to colonial legal thought, see James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1631–42 (2011). These precedents confirmed the position of American leaders that the Glorious Revolution did not diminish their claims to legislative autonomy. That revolution had established legislative supremacy over the Crown. But which legislature? If the colonies were equivalent to Ireland and Scotland, as claimed according to the charter, custom and consent, the legislature would be the colonial assembly. And this legislative authority would operate in conjunction with the royal prerogatives because the King could veto any acts of the assembly. My thanks to Daniel Birk for this point.

foundation of pre-revolutionary constitutionalism thus became that legislative power over internal affairs was vested in the colonial assemblies, subject to the Crown's prerogatives, while the metropolitan government necessarily regulated matters relating to the empire as a whole.²²⁰

The American arguments over sovereignty presented an irreconcilable conflict with prevailing imperial doctrine. The notion of divided sovereignty defied the age-old axiom that "*imperium in imperio* is a solecism in politics."²²¹ There could be only one sovereign over the British Empire, and that sovereign was Parliament. Thus, the 1766 Declaratory Act proclaimed that Parliament had the unlimited power to tax and legislate over the colonists and their assemblies "in all cases whatsoever."²²² To imperial authorities, the American constitutional arguments, presented with increasing vehemence and absolutism as the crises unfolded, were plainly dangerous as rationales for independence.²²³

The American response was to decouple sovereignty from government. The people were sovereign, not the legislature;²²⁴ as a people, Americans had never consented to the taxing or legislative authority of any government entity except their own legislatures,²²⁵ which possessed the same authority as the parliaments of Ireland and pre-1707 Scotland.²²⁶ In 1774 and 1775, with separation not yet declared, American leaders such as James Wilson, John Dickinson, James Iredell, John Adams, and Thomas Jefferson asserted that the colonies were independent states, governed by their colonial legislatures and connected to the Empire through the broad and legitimate superintending authority of the King.²²⁷ According to this constitutional

220. BAILY, *supra* note 184, at 228; GREENE, *supra* note 203, at 39; McLAUGHLIN, *supra* note 186, at 14–15; REID, *supra* note 195, at 94.

221. LACROIX, *supra* note 185, at 14, 103.

222. *Id.* at 59.

223. GREENE, *supra* note 203, at 76. According to John Philip Reid, the taxes and the Coercive Acts (called the Intolerable Acts by Americans) were less important in their actual impact on the colonies than in the precedents they set for unlimited and arbitrary parliamentary authority. REID, *supra* note 193, at 228–29.

224. REID, *supra* note 193, at 70–71.

225. REID, *supra* note 195, at 153–56.

226. Vattel again proved useful: "Two sovereign states may also be subject to the same prince, without any dependence on each other, and each may retain all its rights as a free and sovereign state." VATTEL, *supra* note 30, bk. I, § 9, at 8.

227. LACROIX, *supra* note 185, at 87–90, 118–20.

doctrine, the British Empire was an “imperial federation of sovereign states sharing and establishing unity in a single monarch.”²²⁸

By claiming absolute power over the colonial assemblies, the Parliament at Westminster became the enemy of American autonomy and self-government. Many American leaders, adhering to the ancient constitution, wanted the King to reassert his prerogative powers (including the veto) and protect the rights of his British-American subjects from arbitrary parliamentary rule.²²⁹ But George III rejected those pleas, as would have any British monarch at that time, and declared the Americans in a state of rebellion and outside of his protection.²³⁰ “What made George III into the final target of American wrath was not his desire to fasten a royal autocracy upon his once grateful subjects, but rather his conscientious support for the claims of Parliament.”²³¹ In declaring independence, sovereignty in the people, and not in government, became the talismanic ideology of the Revolution.

3. *Sovereignty and the Confederation*

The Confederation was a transitional period during which the colonies became independent states without a consensus over sovereignty.²³² On May 15, 1776, the Continental Congress directed that new state governments should be formed through constitutions “under the authority of the people.”²³³ The eleven state constitutions in effect when the

228. BAILYN, *supra* note 184, at 224; *see also* GREENE, *supra* note 198, at 153–54; LACROIX, *supra* note 185, at 118–20.

229. NELSON, *supra* note 201, at 22–28. Eric Nelson also discusses how American leaders asserted two overlapping but conflicting constitutional theories during this penultimate period (representation and authorization). *Id.* at 148. *See also* REID, *supra* note 195, at 152–56.

230. REID, *supra* note 195, at 157–60.

231. Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 GREEN BAG 2d 35, 38 (1999); *see also* NELSON, *supra* note 201, at 108–10. Many Americans (Jefferson being a noteworthy exception) were deluded into believing that the King reluctantly acquiesced in enforcing parliamentary legislation over the colonies. As a British historian of the Revolution stated, George III “never wavered” from a determination to use coercion, including military force, to bring the colonies under imperial control. PIERS MACKESY, *THE WAR FOR AMERICA, 1775–1783* at 23 (John Shy ed., Bison Book ed. 1993).

232. ONUF & ONUF, *supra* note 186, at 135–36; *see also* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 516–17, 523 (1975) (stating that there was no consensus on the meaning of a “State” as the term was used in the Articles. For example, did “State” mean “people” or “government?”).

233. JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 148 (1979).

Constitutional Convention met authorized the general power of legislation, but each of those constitutions also imposed prohibitions on legislative power²³⁴—either in a Bill of Rights,²³⁵ in guarantees of specific rights in constitutional text,²³⁶ or in providing for a separation of powers that ensured the independent powers of the judiciary.²³⁷ Two other States (Connecticut and Rhode Island) did not enact written constitutions and instead continued under their original seventeenth century royal charters, which guaranteed forever to the inhabitants of those States the fundamental rights of the English law.²³⁸

However, the status of the state constitutions was uncertain. With two notable exceptions (Delaware and Massachusetts), the state constitutions were enactments of the state legislatures. As acts of the legislatures, it was far from clear that these constitutions were “fundamental law[s]” that were supreme to “ordinary” acts of legislation.²³⁹ Like English precedents that were also enacted by the legislature (such as the venerated English Bill of Rights), “these new constitutions implied nothing about any separation between ‘sovereign’ and ‘government’ . . . [T]he ‘government’ *was* the ‘sovereign,’ insofar as its acts constituted the fundamental rules of society.”²⁴⁰

The Confederation was an attempt at cooperative state sovereignty²⁴¹—a league of sovereign states joined together by treaty in which they ceded certain powers over external affairs to a central supervising authority. Viewing the Articles through the prism of law of nations, each State yielded a portion of its external sovereignty to Congress while retaining its internal sovereignty.²⁴² The Confederacy was a realization of Vattel’s vision of a federal republic:

[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of

234. See generally William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1893).

235. Delaware, Maryland, Massachusetts North Carolina, Pennsylvania and Virginia.

236. South Carolina, New York, New Jersey, Georgia and New Hampshire.

237. New Hampshire, Georgia, Delaware, Maryland and Virginia.

238. CHARTER OF CONNECTICUT, para. 7 (1662); CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, para. 1 (1663). Of course, the references to the King and England were removed from the Charters.

239. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 96–98 (1996).

240. TUCK, *supra* note 187, at 184.

241. McLAUGHLIN, *supra* note 186, at 119–20.

242. *Id.* at 126–29.

each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil engagements which he has voluntarily contracted.²⁴³

Thus, the Articles provided: “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.”²⁴⁴

But how would this federal republic be perpetual? Vattel thought that it would be held together by the consciences of member-states to honor their commitments and by a balance of power that would overcome individual self-interest.²⁴⁵ However, notwithstanding the terms of the Articles,²⁴⁶ the state governments claimed complete sovereignty and refused to obey congressional directives. With Congress lacking the power to enforce its decrees against the States, the balance of forces upon which Vattel’s confederation was predicated collapsed in the face of state dominance over Congress²⁴⁷ that, if left unchecked, could threaten the continued existence of the Union.²⁴⁸

Popular sovereignty reemerged in two ways during the Confederation period. First, the dominance of state sovereignty was undermined by state legislatures abusing their powers and engendering resentment and mistrust in their constituents, which in turn revived the attraction of popular sovereignty. “In the contest between the states and the Congress the ideological momentum of the Revolution lay with the states; but in the contest between the people and the state governments it decidedly lay with the people.”²⁴⁹

Second, judges contributed to the movement towards popular sovereignty by treating the state constitutions as superior to ordinary legislation. During the Confederation period the courts of four States

243. VATTEL, *supra* note 30, bk. I, § 10, at 8. On the relation of the Confederation to Vattel’s model confederacy, see ONUF & ONUF, *supra* note 186, at 1–26.

244. ARTICLES OF CONFEDERATION OF 1781, art. II.

245. ONUF & ONUF, *supra* note 186, at 14–16.

246. “Every State *shall abide by the determinations of the United States in Congress assembled*, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be *inviolably observed by every State . . .*” ARTICLES OF CONFEDERATION OF 1781, art. XIII (emphasis added).

247. McLAUGHLIN, *supra* note 186, at 134–35; ONUF & ONUF, *supra* note 186, at 132–34.

248. See 1 JOHN FISKE, *ESSAYS HISTORICAL AND LITERARY: SCENES AND CHARACTERS IN AMERICAN HISTORY* 118 (1902) (describing vividly the Confederation’s serious centrifugal problems and conflicts).

249. WOOD, *supra* note 193, at 362.

(New Jersey, New Hampshire, New York, and North Carolina) held legislation void as contrary to the state constitutions, and the courts of Rhode Island and Connecticut nullified state statutes as violating rights guaranteed by their charters.²⁵⁰ For these judges, “the very idea of a written constitution” meant that “[t]he sovereignty of the people was substituted for the sovereignty of the crown.”²⁵¹

4. *Sovereignty and federalism*

In actual operation, the British Empire can be viewed as an early precursor of federalism in the distribution of powers between the metropolitan government and the colonies. The Convention followed this subject-matter distribution of powers and, as will be discussed below, appears to have used the old British Empire as a model in the enumerations of national powers.

The Convention created a new form of federalism under which Congress and the state legislatures could independently and, each through the authority of their respective constitutions, enact laws that operated simultaneously on individuals. That concept was difficult to understand. In opposing ratification, Anti-Federalists resurrected the old imperial claim that there could be only one sovereign legislature exercising supreme power.²⁵²

The Federalist response was that under the Constitution, neither Congress nor the state legislatures are fully sovereign: the powers of both derive from the people. Although they were elitists, the Federalists accepted that government must be “strictly republican” and that the people were the only just source of all governmental power.²⁵³ As Marshall would later restate the Federalist position, the Constitution itself embodied popular sovereignty in declaring that it was ordained by “We the People of the United States,” and in being ratified by conventions elected by the people and not by the state legislatures.²⁵⁴ However abstract the doctrine might be, sovereignty of the people became the touchstone of Federalist arguments

250. These cases are discussed masterfully in William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 474–89, 509 (2005). In addition, the attorneys on both sides of the famous Virginia Prisoners Case, *Virginia v. Caton*, 8 Va. (4 Call) 5 (1782), accepted judicial review, and that doctrine was endorsed by three of the six judges (including George Wythe, one of the most prominent judges and teachers of law in the United States). Treanor, *supra* at 489–96.

251. Morey, *supra* note 234, at 31.

252. WOOD, *supra* note 193, at 527–29.

253. *Id.* at 518, 528–33.

254. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–04 (1819).

for ratification,²⁵⁵ and, as Gordon Wood has written, the Federalists thereby brought the ideology of the Revolution to fruition.²⁵⁶ The Convention's answer to the intractable problem of sovereignty was that the people possess ultimate power.²⁵⁷ This construction of sovereignty was used not only in *McCulloch*—with Marshall employing language that anticipated the Gettysburg Address²⁵⁸—but also in the frequently neglected last four words of the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁵⁹

The American theory of sovereignty thus became that the people, as the ultimate sovereigns, had established constitutions that vested certain sovereign powers in the national government and others in their state governments, while retaining the remainder to themselves.²⁶⁰ As stated before, the relation of sovereignty to government is elusive, and the doctrine chosen by the Convention was one of many that could have been used (and one that may not satisfy theorists upon whom the founding generation otherwise relied and/or modern-day political scientists).²⁶¹ But by locating ultimate sovereignty in the people, as opposed to political entities or governments, the Convention chose (or created) a doctrine that is the basis of American constitutionalism and, most significantly, that explains American federalism.²⁶² To the extent that national powers exist, they are not “inherent” in the national government independent of the powers vested by the people in the Constitution. The sources of all national powers must be expressly or impliedly the Constitution.

255. McLAUGHLIN, *supra* note 186, at 161–62; RAKOVE, *supra* note 239, at 103.

256. WOOD, *supra* note 193, at 562.

257. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 295–301, 338–40 (1993); GREENE, *supra* note 198, at 203–04; McLAUGHLIN, *supra* note 186, at 154–55; McLAUGHLIN, *supra* note 193, at 133, 161–62; WOOD, *supra* note 193, at 531–32, 599–600.

258. *McCulloch*, 17 U.S. (4 Wheat.) at 404–05 (stating that the United States Constitution was “ordained and established” in the name of the people, and the government that it created is “emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit”).

259. U.S. CONST. amend. 10 (emphasis added).

260. McLAUGHLIN, *supra* note 186, at 154–55, 161–62.

261. For example, Vattel asserted as first principles (as had Grotius) that sovereignty was invested in government and that every citizen is subject to that authority. VATTEL, *supra* note 30, bk. 1, §§ 1–2, at 1.

262. WOOD, *supra* note 193, at 599–600. On the relation of popular sovereignty to national obligations and powers under the law of nations, see *infra* notes 314–21 and accompanying text.

5. *The Bank and Marshall Court Opinions*

The preceding discussion emphasizes the difference between (1) the national government being inherently sovereign, and (2) the national government being vested by the Constitution with enumerated sovereign powers. As Marshall explained, each enumerated power appertains to sovereignty because it “may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”²⁶³

The Federalists understood this principle when they defended the constitutionality of the Bank of the United States in the first Congress. The principal argument of Hamilton and his supporters in Congress was that the Bank was necessary to carry into effect several of the sovereign powers that had been vested in Congress by the Constitution.²⁶⁴ Indeed, Hamilton went out of his way to refute Attorney General Randolph’s contention that the Bank’s supporters were relying on inherent national sovereignty:

To be implied in the *nature of the federal government*, says [Randolph], would beget a doctrine so indefinite as to grasp at every power.

This proposition it ought to be remarked is not precisely, or even substantially, that, which has been relied upon. The proposition relied upon is this, that the *specified powers* of Congress are in their nature sovereign—that it is incident to sovereign power to erect corporations; & that therefore Congress have a right, within the *sphere & in relation to the objects of their power, to erect corporations*.²⁶⁵

However, some of the Bank’s supporters in Congress referred to a general fiscal power in Congress, while the list of enumerated congressional

263. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824); *see also id.* at 197 (“[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects . . .”).

264. Reinstein, *supra* note 2, at 22–25, 29–33. The Bank’s supporters in the House addressed national sovereignty in response to the opponents’ claim that only a sovereign could charter corporations. Their answer was that Congress had been vested with *enumerated sovereign powers* and that, as shown by the use of national banks in other nations, the Bank would be an appropriate means of executing *those powers*. *See* 2 ANNALS OF CONG. 1905–06 (1791) (statement of Rep. Ames); *id.* at 1911–12, 1913–14 (statement of Rep. Sedgwick); *id.* at 1921–22 (statement of Rep. Boudinot); *id.* at 1929–30 (statement of Rep. Smith). As summarized by Representative Smith, one of the few Southern supporters of the Bank in the House, the Federalist position was not that Congress could do whatever was deemed necessary or expedient for the nation. Congress possessed the choice of means that were necessary to carry out its expressed powers, and the degree of necessity was to be determined by each member of Congress. *Id.* at 1936–37 (statement of Rep. Smith).

265. Hamilton, Bank Opinion, *supra* note 8, at 114.

powers does not include such a general power.²⁶⁶ Hamilton developed this as an alternative argument in his opinion to Washington, and it appears to be the basis upon which Marshall upheld the constitutionality of the Bank.²⁶⁷ Hamilton's doctrine, as apparently accepted by Marshall, was that the enumerated powers (that is, the specific sovereign powers vested in Congress) relating to public finance and currency should be considered in the aggregate and not individually. Viewing these enumerated powers that way, Hamilton argued that they combined to vest an aggregate fiscal power in Congress and that the Bank was Congress's agent for effectuating this power.²⁶⁸ This is a distinctive methodology for construing the scope of the enumerated powers, and I will discuss this methodology and its implications later in this Article.

Advocates of inherent national sovereignty rely on two other Marshall Court decisions, discussed above.²⁶⁹ Sovereignty was employed in decisions holding that the United States has the inherent right to enter into contracts and to sue for breaches and damages, all without enabling congressional legislation. These are implied powers of the United States, but they do not derive from notions of inherent national sovereignty. Governments are corporations and, as discussed previously, *all* corporations possessed those rights at common law in the early Republic. Those rights had everything to do with the common law equivalence of personal and corporate rights; they had nothing to do with inherent national sovereignty.²⁷⁰ Why, then, did the Supreme Court consider this power to be an attribute of sovereignty? Because if the state courts or legislatures allowed all corporations, including the States, to enter into contracts and sue for breach and damages, but

266. 2 ANNALS OF CONG. 1914–15 (1791) (Rep. Lawrence) (“[F]ull uncontrollable power to regulate the fiscal concerns of this Union”); *id.* at 1929 (Rep. Smith) (“[A]cknowledged right of Congress to control the finances of this country”); *id.* at 1946 (Rep. Gerry) (“[O]bjects of the [Bank] were to render the fiscal administration successful”).

267. Reinstein, *supra* note 2 at 33, 68–69.

268. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422–23 (1819); Hamilton, Bank Opinion, *supra* note 8, at 132; *see also* Reinstein, *supra* note 2, at 33, 68–69 (describing Hamilton's aggregate power argument); Schwartz, *supra* note 11, at 608 (same).

269. *See supra* Section I.F.

270. *See supra* notes 117–21 and accompanying text. The Judiciary Act of 1789 gave the lower federal courts jurisdiction over “all suits at common law where the United States” is a plaintiff, with amount in controversy requirements. Ch. 20, §§ 9, 11, 1 Stat. 73, 77.

denied those rights to the United States,²⁷¹ they would be discriminating against the United States in violation of the Supremacy Clause.²⁷²

The idea that national powers derive from the inherent sovereignty of the government of the United States is not supported by the Bank debate or the decisions of the Marshall Court. It is contrary to the theory of sovereignty that was used to create and defend the Constitution.²⁷³

D. *The “All Other Powers” Clause*

One of John Mikhail’s important insights is that the Necessary and Proper Clause consists of three separate and complementary clauses. The first, “foregoing Powers” clause, authorizes Congress to enact laws to carry into execution the enumerated powers in the first seventeen paragraphs of Article I, Section 8. The second authorizes the same congressional authority for “all other powers vested by this Constitution in the Government of the United States,” and the third authorizes that authority for all powers vested in “any Department or Officer

271. The Judiciary Act provided for concurrent jurisdiction in the state courts in cases where the United States is a plaintiff. Ch. 20, §§ 9, 11, 1 Stat. 73, 77.

272. For twentieth century applications of this non-discrimination doctrine, see, for example, *Testa v. Katt*, 330 U.S. 386 (1947); *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934); and *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1 (1912).

273. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), is sometimes cited as another Marshall Court opinion on inherent sovereignty. The Court held that the House of Representatives possesses the power to arrest, try and punish non-members who commit acts of contempt in the presence of the House. *Id.* at 234–35. Justice Johnson wrote that, although there was no express power given by the Constitution for either House to punish non-members for contemptuous conduct, the House did have the power to arrest and punish non-members who disrupted its proceedings. This was, he said, an implied power that was not “substantive and independent” but was incidental to a grant of power to the House. *Id.* at 225–26. But what was the principal constitutional power? To Johnson, the answer was obvious: the House of Representatives was given legislative power, the exercise of which required calm and thoughtful deliberation. To carry out its deliberative legislative duties, the House must necessarily be able to arrest non-members who disrupt its proceedings. This is the classic means-ends approach of *McCulloch*. The term “sovereignty” does not appear in the opinion, and Johnson stated that this principle applied to all legislative bodies and, for the same reason, to the courts—but not to the executive branch. *Id.* at 227–28, 233–34. The serious constitutional problem is not the House’s implied power to cite a non-member with contempt. It is the due process and separation of powers problem incident to the House adjudicating the case and enforcing its decision. Since the 1930’s, Congress has relied on the courts to adjudicate and enforce contempt citations.

thereof.”²⁷⁴ Mikhail’s focus is the second clause.²⁷⁵ According to Mikhail,²⁷⁶ and Crosskey before him,²⁷⁷ this “all other powers” clause necessarily refers to, and is the source of, powers in the government of the United States as a whole that constitute a general welfare power.

The “all other powers” clause relates to powers in the national government that are additional to the Article I, Section 8 powers vested in Congress alone (the “foregoing Powers”) or those vested by the Constitution elsewhere in Congress or in the Executive or Judiciary (“any Department or Officer thereof”). But I disagree that the “all other powers” clause creates such powers, that this clause proves that such powers exist, or that those powers amount to a national general welfare power. In my view, powers vested in the government of the United States as a whole are created independently of the “all other powers” clause. The clause is nevertheless important because, to the extent that such national powers exist, the “all other powers” clause provides a clear textual basis for congressional enforcement.

l. Powers vested in the “Government of the United States”

One premise of the argument that the “all other powers” clause is the source of implied national powers is that the Constitution does not explicitly vest *any* powers in the government of the United States, as opposed to Congress or any single branch.²⁷⁸ Unless the “all other powers” clause has no meaning, it must give Congress the power to carry into effect non-enumerated powers of the United States. Thus, the conclusion that the clause necessarily creates or confirms the existence of indefinite national powers. But the premise of this argument is incorrect. The Constitution vests four powers in the government of the United States. The first three are contained in the Guarantee Clauses and the fourth is the treaty power.

Article IV, Section 4 contains three guarantees:

The United States shall [1] guarantee to every State in this Union a Republican Form of Government, and shall [2] protect each of them against Invasion; and [3] on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

274. U.S. CONST. art. I, § 8, cl. 18.

275. Mikhail, *Entailment*, *supra* note 147, at 1083.

276. Mikhail, *Necessary and Proper*, *supra* note 147, at 1050.

277. *See supra* notes 136–41 and accompanying text.

278. Mikhail, *Entailment*, *supra* note 147, at 1096–97.

To be sure, the Supreme Court has interpreted the Republican Guarantee Clause as vesting power solely in Congress. But dismissing the Clause on this basis²⁷⁹ is anachronistic—it presumes that the Supreme Court’s latter-day interpretations of the Clause are correct. But these decisions are contrary to the Clause’s language and placement in the Constitution. The three Guarantee Clauses explicitly vest powers in “[t]he United States,” not in any single branch of the national government. And they are placed in Article IV, not in Article I, which sets forth powers of Congress. Article IV has seven clauses that set binding relations between the States themselves and between the States and the United States.²⁸⁰ The last three of these clauses (the Guarantee Clauses) obligate the United States to change the government of any State that is not republican in nature and to protect each State from foreign invasion or internal violence.

The Guarantee Clauses cannot plausibly be read as vesting power in Congress alone. Even the most strenuous objectors to presidential war powers concede that the President, as commander-in-chief of the armed forces, has the duty and power to use force without congressional authorization to repel foreign invasions.²⁸¹ And the Republican Guarantee is the only provision in the Constitution as ratified in 1788 that gave the national government direct authority to intrude into the internal operations of the States—even to the point of changing state governments that are not republican in form.²⁸²

279. Schwartz, *supra* note 11, at 598–99 (citing *Texas v. White*, 74 U.S. 700, 728–29 (1868), and *Luther v. Borden*, 48 U.S. 1, 42 (1849)). And, although the Guarantee Clauses impose obligations on the United States, Mikhail, *Entailment*, *supra* note 147, at 1096 n.105, constitutional duties imply constitutional powers, as, for example, the government’s duty to protect each State from invasion plainly implies power to provide that protection.

280. The first four are the Full Faith and Credit, Privileges and Immunities, Extradition, and Fugitive Slave Clauses. U.S. CONST. art. IV, §§ 1–2. These provisions were designed to prevent interstate conflict (although the Fugitive Slave Clause had exactly the opposite effect in practice). The fifth clause empowers Congress to admit new states by legislation, while guaranteeing the territorial jurisdictions of the States. *Id.* § 3, cl. 1. The sixth clause gives Congress the power to dispose of and regulate territory or other property “belonging to the United States,” while not prejudicing the claims of either “the United States, or of any particular State.” *Id.* § 3, cl. 2. And the seventh clause contains the three guarantees of the United States. *See id.* § 4.

281. *See, e.g.*, LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 311–12 (2014); *see also* *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J.).

282. At a minimum, the clause was seen as preventing military coups and monarchical or hereditary state governments. THE FEDERALIST NO. 43, *supra* note 6, at

Presidents have in fact used the Republican Guarantee Clause as a source of power. President Lincoln relied on the clause to authorize the extraordinary military measures that he took, without congressional authorization, following the attack on Fort Sumter.²⁸³ Lincoln also used the clause during the Civil War as a basis for presidential reconstruction,²⁸⁴ as did President Johnson following the war.²⁸⁵ And in 1872, President Grant issued a proclamation under the Republican Guarantee Clause ordering the end of widespread mob violence in Arkansas and recognizing one of two disputants as the State's governor.²⁸⁶ Moreover, the case law is not as tidy as described in *Baker v. Carr*.²⁸⁷ In any event, the text, placement, and purpose of the

211–12 (James Madison). For arguments that the clause also ensures “dynamic, not static, government,” because the necessary ingredients of republicanism (and the emergence of anti-republican forms of government) could change over time, see WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 76 (1972). See also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 276–80 (2005); JACK M. BALKIN, *LIVING ORIGINALISM* 241–42 (2011); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994). But see Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 619 (2018) (arguing for a much more limited scope of the clause).

283. See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 RICHARDSON, MESSAGES, *supra* note 171, at 20–31.

284. See Abraham Lincoln, Proclamation of Amnesty and Reconstruction (Dec. 8, 1863), in 6 RICHARDSON, MESSAGES, *supra* note 171, at 213–15 (this was Lincoln's famous 10 percent plan for Louisiana and Arkansas).

285. Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J.S. HIST. 192, 196 (1949); WIECEK, *supra* note 282, at 189–91.

286. WIECEK, *supra* note 282, at 223.

287. 369 U.S. 186, 213–29 (1962). *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), was a strange case with a convoluted history. See WIECEK, *supra* note 282, at 86–129 (providing a comprehensive look into the controversies and political climate leading up to *Luther* and analyzing the opinion). The Supreme Court did state that enforcement of the Republican clause was a political question for Congress. *Luther*, 48 U.S. (7 How.) at 56. But Congress had taken no action to recognize one of the competing governments of Rhode Island. *Id.* at 35. President Tyler unilaterally recognized one of the charter governments, and the Court held that the President had power to enforce the Guarantee Clause temporarily. *Id.* at 43–44. *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), rejected a challenge to the constitutionality of the 1867 Military Reconstruction Act. *Id.* at 730–31. To become republican, Texas had to amend its old constitution to take into account emancipation and providing for the security of African-Americans. *Id.* at 728–29. Applying *McCulloch*, the Court then held that Congress had broad discretion under the Necessary and Proper Clause to execute the Guarantee Clause, limited only by means that are “either prohibited or unsanctioned

Guarantee Clauses make clear that they were included in the Constitution as important powers of the government of the United States as a whole.

The treaty power is the other constitutional grant of authority to the government of the United States. That power can be viewed as vesting two separate powers in the President and Senate. But the language of the treaty power, which provides that the President makes treaties “by and with” the advice and consent of the Senate, requires the joint action of the President and the Senate. In this respect, the treaty power is different than the power to enact statutes. The latter power is vested solely in Congress because no affirmative action of the President is required for a congressional bill to become law. If the President takes no action within ten days, the bill is law, and if the President vetoes the bill, that veto can be overridden by Congress. On the other hand, a proposed treaty negotiated by the President is a legal nullity if the Senate takes no action or if a two-thirds majority is not mustered. Moreover, under the law of nations, the President and Senate act as the “Government of the United States” in making agreements with other countries that are in the name of the United States and are binding on the entire nation.²⁸⁸

The Convention also gave the third branch a central role in treaty enforcement. One of the most notable failures of the Confederation Congress was its inability to enforce treaties against recalcitrant state governments.²⁸⁹ This had fourfold effects during the Confederation period: drastically weakening the national authority of the Confederation Congress,²⁹⁰ creating the potential for individual States to embroil the United States into disputes (and perhaps wars) with foreign nations,²⁹¹ providing Great Britain with a wonderful excuse to reciprocally violate the Treaty of Peace by refusing to evacuate the Northwest military posts,²⁹² and presenting a serious obstacle for

by the Constitution.” *Id.* And the Court added that the President could provisionally enforce the Guarantee Clause until Congress acted. *Id.* at 730.

288. VATTEL, *supra* note 30, bk. II, § 154, at 192.

289. Golove & Hulsebosch, *supra* note 29, at 1598–609; RAKOVE, *supra* note 233, at 342–45; RAKOVE, *supra* note 239, at 25–29.

290. BEER, *supra* note 257, at 215; EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 252–53 (1988); RAKOVE, *supra* note 233, at 342–45.

291. THE FEDERALIST NO.3, *supra* note 6, at 10–13 (John Jay); ONUF & ONUF, *supra* note 186, at 125.

292. RAKOVE, *supra* note 239, at 27.

American diplomats to successfully negotiate treaties with other European nations.²⁹³ The constitutional solutions were to make all national treaties (including pre-existing ones) the supreme law of the land, to impose on state court judges the duty of enforcing treaties that conflicted with state constitutions and laws,²⁹⁴ and to vest the Supreme Court with appellate jurisdiction over “all Cases . . . arising under . . . Treaties made, or which shall be made, under [United States] Authority.”²⁹⁵ As John Jay wrote in *Federalist 3*: “The wisdom of the Convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government, cannot be too much commended.”²⁹⁶

This examination of the Guarantee Clauses and the treaty power is inconsistent with the claim that the “all other powers” clause must be the source of indefinite implied national powers. But that does not mean that “all other Powers vested . . . in the Government of the United States” are *limited* to these four explicit powers. Congress may also have been given the power to carry into effect other national powers that are impliedly vested, by other sources, in the government of the United States. The problem is to identify the sources and scope of those powers.

2. *The “sweeping” clause*

The corporate nature of the national government and the implied powers of corporations arguably support the theory that the United States has the inherent power to legislate for the general welfare of the nation.²⁹⁷ Under that theory, the national government has the inherent power of a corporation to fulfill its objectives, which are said to include the Preamble’s goal of promoting the general welfare²⁹⁸ and exercising the sovereign national powers (such as the inherent powers of the United States to enter into contracts and sue for breaches, control immigration, recognize foreign governments and issue paper money as legal tender).²⁹⁹

The “sweeping” clause was a familiar provision in corporate charters or by-laws that enabled the corporation, whether private or governmental, to

293. ONUF & ONUF, *supra* note 186, at 106–08, 120–21.

294. U.S. CONST. art. VI, cl. 2.

295. *Id.* art. III, § 2, cl. 1.

296. THE FEDERALIST NO. 3, *supra* note 6, at 10 (John Jay).

297. Mikhail *Entailment*, *supra* note 147, at 1068–69; Mikhail, *Necessary and Proper*, *supra* note 147, at 1098–1100.

298. Mikhail, *Necessary and Proper*, *supra* note 147, at 1098, 1102–05.

299. Mikhail, *Entailment*, *supra* note 147, at 1082–83.

take actions that were necessary to achieve the purposes of its establishment.³⁰⁰ Identifying those purposes for business, religious, or charitable corporations is usually not difficult. But governments are different. Returning to principles of construction at the time of the founding, the Constitution must be viewed as a whole to determine the purposes of the national government. The Preamble's broad aspirational language could apply to many forms of government. The Articles of Confederation, which created a purely federal government, had an aspirational clause that contained provisions similar to the Preamble.³⁰¹ The broader language of the Preamble could have applied to a revised Articles that provided Congress with the taxing and commerce powers. A consolidated national government with unlimited powers also could have been established with the same preamble. So might the government of Great Britain, with elections for the House of Commons and either parliamentary supremacy over the Crown or a mixed constitution. The purposes of national powers vested in the government of the United States cannot be determined through the generalities of the Preamble.

The sweeping clauses of state constitutions used the language of "all other powers necessary for the legislature."³⁰² That could certainly be a source of indefinite implied powers because state constitutions typically vested a general power of legislation, constrained only by negative prohibitions. But the national government was vested with limited powers. The Necessary and Proper Clause does not speak of "all other powers necessary for the legislature." It authorizes the Congress to carry into effect "all other Powers vested . . . in the Government of the United States." The Convention's decision to distribute governmental power between the national and state governments means that we should examine the reasons for vesting certain enumerated powers, and not others, in the government of the United States. This is an important step in identifying the source and identities of those "all other powers" that Congress is authorized to enforce.

300. Mikhail, *Necessary and Proper*, *supra* note 147, at 1121–23. During the Confederation period, three state constitutions contained sweeping clauses. *Id.* at 1124–25 (citing Pennsylvania, Delaware, and Vermont).

301. ARTICLES OF CONFEDERATION OF 1781, art. III ("The said States hereby severally enter into a firm league of friendship with each other, *for their common defence, the security of their liberties, and their mutual and general welfare*, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." (emphasis added)).

302. Mikhail, *Necessary and Proper*, *supra* note 147, at 1124–25.

3. *James Wilson and national powers*

James Wilson was one of the most strongly nationalist members of the Convention. During the Confederation period, Wilson defended Congress's actions that were not within its explicit powers under the Articles by maintaining that Congress had the inherent power to legislate for all objectives that were necessary for the nation.³⁰³ As the member of the Committee of Detail who drafted the "all other powers" clause, Wilson could have embedded that doctrine into the Constitution.³⁰⁴

However, there are several problems with this narrative. The actions of the Confederation Congress outside of the scope of its express powers were justified as matters of necessity but were of dubious constitutionality. Marshall apparently felt that way, as he conspicuously refused to rely on the national bank established by the Confederation Congress as a precedent for Hamilton's Bank of the United States.³⁰⁵ In the ratification debates, there was little if any support for Wilson's pre-constitutional theory of Congress possessing indefinite power for all national purposes.³⁰⁶ Instead, Federalists advocating for the ratification of the Constitution, led by Wilson himself, emphasized that the new national government did not have an indefinite general welfare power but was limited to exercising the enumerated powers.³⁰⁷ In his famous state house speech, which became a prototype of Federalist arguments for ratification, Wilson emphasized that, unlike the state governments, which could legislate on any matter that was not prohibited by their constitutions, the national government's legislative authority was limited to the powers vested by the Constitution.³⁰⁸ Wilson repeated this constitutional formulation at the Pennsylvania

303. Wilson made this argument most forcefully in defending the establishment of a national bank. See James Wilson, *Considerations, on the Power to Incorporate the Bank of North America*, in 1 WILSON WORKS, *supra* note 218, at 549.

304. Mikhail, *Necessary and Proper*, *supra* note 147, at 1096–1101.

305. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) ("Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers to obtain the advantage of a bank . . .").

306. See Cleveland, *supra* note 16, at 8–9.

307. RAKOVE, *supra* note 239, at 143–44; MAIER, *supra* note 180, at 78–81.

308. James Wilson, An Address to a Meeting of the Citizens of Philadelphia (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (Merrill Jensen ed., 1976).

ratification convention,³⁰⁹ and it provided the intellectual basis by which the Federalists reconciled sovereignty with federalism.³¹⁰

Without diminishing the importance of Wilson and the other most strongly nationalist delegates (which included Madison), it is also easy to overstate their influence in the Convention on highly contested issues. They lost on core structural proposals—proportional representation in the Senate, the election of Senators, and a congressional power to veto state laws. Wilson himself conceded that the Constitution was a product of “mutual concession and accommodation.”³¹¹ And, as discussed below, the Committee of Detail could have included Gunning Bedford’s resolution as an enumerated power.³¹² That would have been a straightforward way of explicitly granting a national regulatory power to Congress—as opposed to concealing such a power in the second of the necessary and proper clauses.

At the same time, Wilson did not reject the concept of implied powers, either as a means to carry into effect specified powers or substantively in a particular sphere of government. Wilson was a strong advocate of the law of nations being part of the law of the United States.³¹³ The consensus view of the founding generation—including the otherwise legally antagonistic Thomas Jefferson and Alexander Hamilton—was that the law of nations imposed mutual duties, and corresponding powers to fulfill those duties, upon all members of the community of nations on the principle of equal national sovereignty.³¹⁴ When the United States announced its entry as an independent member of the community of nations, it assumed those duties and powers.³¹⁵

309. 2 ELLIOT’S DEBATES, *supra* note 180, at 418–37. In his post-ratification Law Lectures, Wilson related the enumerated powers in Article I, Section 8, to the several goals in the Preamble. However, he prefaced those relationships by emphasizing the “striking difference” between state constitutions and the national constitution, with the latter limited to grants of enumerated power. According to Wilson, the congressional powers related to the Preamble’s goal of promoting the general welfare were contained in the Foreign and Indian Commerce Clauses and the Intellectual Property Clause. 2 WILSON WORKS, *supra* note 218, at 56–59.

310. MAIER, *supra* note 180, at 108–10.

311. *Id.* at 79.

312. *See infra* text accompanying notes 327–30.

313. *See* Mikhail, *Necessary and Proper*, *supra* note 147, at 1126–27.

314. *See* Golove & Hulsebosch, *supra* note 29, at 1616–23. Thus, Republicans conceded the constitutionality of the Alien Enemies Act as authorized by the law of nations, but they argued that the Alien Friends Act was not so authorized and therefore needed to be enacted pursuant to an enumerated congressional power. *Id.* at 1637–38.

315. DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). In his Law Lectures, Wilson strongly asserted that the law of nations imposed binding obligations and

During the Neutrality Crisis, the Washington administration, which then included Hamilton, Jefferson, and Randolph, consistently applied the law of nations as both a source of authority and a constraint on its actions, while recognizing that ultimate power was in Congress.³¹⁶ Because the doctrines of the law of nations were considered enforceable by the executive and the judiciary without implementing legislation, we would now refer to these doctrines as federal common law. Inasmuch as these powers and duties were vested in the government of the United States as a whole, perhaps Wilson had the law of nations in mind when he drafted the “all other powers” provision of the Necessary and Proper Clause.

However, would the law of nations as it existed at the founding authorize the implied national powers discussed in this paper? It would not. The law of nations was not a one-way street of enhanced governmental power. Even as related to its principal sphere of operation—state-to-state relations—it also imposed constraints on the exercise of national powers. For example, the law of nations would not authorize a discretionary recognition power as an instrument of foreign policy,³¹⁷ which is how that power has been used at least since the Wilson administration.³¹⁸ Indeed, the refusal of the United States to receive an ambassador from a recognized government (such as Cuba’s) would be a serious violation of the law of nations.³¹⁹ With respect to bans on immigration and transit, the law of nations did not clearly provide for a nation’s absolute right to exclude foreigners.³²⁰ Moreover, the attempt by the Washington administration and federal judges, including Wilson, to apply the law of nations *domestically* was an abject failure.³²¹ And nothing in the law of nations would even remotely authorize a national bank or paper money as legal tender.

corresponding powers on the United States. He reconciled this with popular sovereignty: in declaring independence and creating the Republic, the people had voluntarily assumed the law of nations, which is based on principles of natural law. 1 WILSON WORKS, *supra* note 218, at 129–41, 337–42. (This was Vattel’s “voluntary” law of nations).

316. See Reinstein, *supra* note 56 (discussing this in considerable detail).

317. See Adler, *supra* note 56, at 133–57.

318. See Green H. Hackworth, *The Policy of the United States in Recognizing New Governments During the Past Twenty-Five Years*, 25 AM. SOC’Y INT’L L. PROC. 120, 124 (1931).

319. Vattel, *supra* note 30, bk IV, § 78, at 462.

320. See Cleveland, *supra* note 16, at 83–84 (discussing Pufendorf and Vattel).

321. During the Neutrality Crisis, Secretary of State Jefferson instructed the United States Attorney to institute non-statutory prosecutions against individuals for committing hostile military acts against the belligerents (Britain, Spain and France) in violation of the law of nations. Justice Wilson, along with Chief Justice Jay and Justice Iredell, instructed grand juries to bring such indictments. These actions were

I began the discussion by complimenting Professor Mikhail's insight that the second "all other powers" clause potentially relates to implied national powers (which may well include strict adherence to the law of nations). But in determining what "all other powers" were vested in the government of the United States, we should examine the content and scope of the powers that *were* specifically enumerated. Why were certain powers, and not others, specifically enumerated as vested in the national government? What are the purposes of these powers? Do the reasons for which certain powers were enumerated, and their purposes, provide the bases for determining the content of "other powers" that were vested but not specifically listed? Answers to these questions require an examination of the fate of Resolution VI of the Virginia Plan in the Convention.

E. Resolution VI and Enumerated Powers

At the outset of the Convention, Edmund Randolph presented a series of resolutions that the Virginia delegation proposed as the framework of the new government. Resolution VI stated:

Resolved that each branch ought to possess the right of originating Acts; *that the National Legislature ought to be [e]mpowered to enjoy the Legislative Rights vested in 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;* to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst[] any member of the Union failing to fulfill its duty under the articles thereof.³²²

A common argument of scholars who seek to establish a national general welfare power is that the enumerated powers viewed as a whole are equivalent to the italicized portion of Resolution VI quoted above.³²³

The Convention modified or rejected every proposal in Resolution VI except for the italicized portion.³²⁴ No delegate objected to the

unsuccessful, as juries acquitted and grand juries refused to return indictments. This forced Washington to seek (and obtain) statutory crimes in the Neutrality Act. *See* Reinstein, *supra* note 56, at 434–40.

322. 1 FARRAND, *supra* note 69, at 21 (emphasis added).

323. *See* Cooter & Siegel, *supra* note 143, at 123–24; Johnson, *supra* note 58, at 49–51; Mikhail, *Necessary and Proper*, *supra* note 147, at 1051–52.

324. The Convention decided that all revenue acts must originate in the House of Representatives. U.S. CONST. art. I, § 7, cl. 1. The proposal that Congress could use force to obtain compliance with the Constitution had no traction, and it was replaced with the authority of Congress to legislate directly on individuals and not through the

portion of Resolution VI proposing that Congress should have the legislative powers of the Confederation Congress. The additional proposal for a general national legislative authority was debated sporadically in the Convention. Opponents of Resolution VI argued that it would provide Congress with indefinite power. Supporters argued that drafting a complete enumeration of the powers that Congress should possess was impracticable.³²⁵ The Convention held the matter in abeyance until an agreement was reached on representation in the House and Senate. Following the Great Compromise, the Convention returned to Resolution VI. As modified in a resolution offered by Gunning Bedford, Congress would be vested with the legislative powers contained in the Articles of Confederation and also the power “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the U[nited] States may be interrupted by the exercise of individual Legislation.”³²⁶

Bedford’s resolution passed by a vote of eight States to two.³²⁷ It was sent to the Committee of Detail, along with twenty-two other resolutions that the Convention had approved, with a direction that the committee frame a constitution in conformance with these resolutions. Within eleven days,³²⁸ the Committee reported out a draft constitution that contained an eighteen-paragraph list of enumerated powers in Congress.³²⁹ The Committee’s proposed enumeration of congressional powers and its exclusion of Bedford’s resolution apparently provoked no opposition, although the extent of some of the proposed

intermediacy of the States. RAKOVE, *supra* note 239, at 180. The proposed negatives in Congress and the Council of Revision (in Resolution VIII) were replaced by the more limited judicial review of state and national legislation. LACROIX, *supra* note 185, at 158–66.

325. Although Madison was an author of the Virginia Plan, he expressed ambivalence about which approach should be taken. *See* 1 FARRAND, *supra* note 69, at 53. For the argument that Madison consistently supported enumerating national power, see LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 160, 454–55 (1995).

326. 2 FARRAND, *supra* note 69, at 26.

327. 2 *id.* at 27.

328. McLAUGHLIN, *supra* note 193, at 153.

329. “To ‘the Legislative Rights vested in Congress by the Confederation,’ the [Committee of Detail] proposed to add the power to lay and collect taxes, regulate interstate and foreign commerce, establish a uniform rule of naturalization, subdue rebellion within individual states, raise an army without relying on the states for the recruitment of soldiers, and ‘to call forth’ the militia to enforce national laws and treaties and to ‘suppress insurrections, and repel invasions.’” RAKOVE, *supra* note 239, at 178–79.

powers was debated and changed.³³⁰ The Necessary and Proper Clause was approved unanimously.³³¹ With some later modifications, the committee's list of specific powers became Article I, Section 8.

Scholars are divided on the role of Resolution VI in the Convention.³³² As Jack Rakove states, the "open-ended language [of Resolution VI] may be viewed in two ways": either as an "authentic formula for a national government" that has no express limit on its legislative power, or a "textual placeholder to be" later "modified or . . . replaced by a list of particular powers."³³³

Which view is correct presents a puzzle.³³⁴ The Committee of Detail showed that it was practicable to enumerate the powers of Congress. But why would nationalist supporters of the Bedford Resolution, who opposed a specific list of congressional powers, accept the committee's enumerations?³³⁵

The Committee of Detail's proposed enumerations of national legislative powers was almost certainly a method of effectuating Resolution VI. Were it not, there surely would have been opposition to this approach in the Convention. However, just as the role of Resolution VI can be viewed in two different ways, so can the relationship of the proposed enumerated powers and Resolution VI.

330. *Id.* at 84–89. The contested issues were whether Congress could tax exports, whether a two-thirds vote in Congress should be required for navigation acts, and whether Congress could prohibit the international slave trade. The outcome, which emerged from a grand committee, was a prohibition on export taxes, rejection of a super-majority for navigation acts and the twenty-year grace period for the slave trade. *Id.*

331. 2 FARRAND, *supra* note 69, at 344–45.

332. Jack Balkin joins the scholars discussed in this Article who argue that the enumerated powers incorporated Resolution VI. BALKIN, *supra* note 282, at 145–46; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6–15 (2010). Scholars who view the enumerated powers as distinctive from Resolution VI include RAKOVE, *supra* note 239, at 178–80, MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 145–47, 203–04 (2016), and 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, 2133 (2012).

333. RAKOVE, *supra* note 239, at 177–78.

334. For advocates of the doctrine that the Constitution should be interpreted according to original public meaning, it should be immaterial which view of the delegates' intent is correct. The Convention held its deliberations in secret, and the debates over Resolution VI (and even the existence of that resolution) were not known to the public. What the public did know was that the Constitution listed specific powers in Congress. *See* Lash, *supra* note 332, at 2152–53, 2156–57.

335. Madison's notes are not helpful because they are particularly sketchy and unreliable for the latter stages of the Convention. *See* MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 141–54 (2015).

That is, the enumerated powers may be construed as a long-handed version of Resolution VI's sweeping language, thus amounting to a congressional power to legislate for the general welfare. Or the enumerated powers may represent the means selected by the Convention to enforce those discreet areas of governance in which "the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."³³⁶ My reasons for advocating the latter position rest on the origin and purposes the enumerated powers that are vested in all three branches of the national government.

In Part III of this Article, I will present and elaborate upon two assertions. First, the enumerated powers of the central (national) government appear to have originated in and were carried forward from the powers exercised by the central (imperial) government in the old British Empire and recognized as legitimate by American leaders until the outbreak of war. Second, those specific powers were not ends in themselves. Rather, the enumerated powers were known means to carry out the principal purposes of union—insuring the common defense, governing foreign affairs, preventing and resolving jurisdictional disputes, and regulating foreign and inter-state commerce.

Part IV of this Article examines constitutional structure and shows that the specific enumerated powers are contained in four clusters of power that correspond to the four principal purposes of the union stated above. As argued by Hamilton in *Federalist 23* and the Bank opinion and by Marshall in *McCulloch*, the Constitution should be construed as vesting these aggregate powers in the government of the United States. Part V discusses these four aggregate powers and the scope and limits of the implied powers of the United States that derive from these aggregate powers.

III. THE ORIGINS AND PURPOSES OF NATIONAL POWERS

A. *The Old British Empire as a Model*

How was it possible for the Committee of Detail to so easily enumerate the powers of the national government? Andrew C. McLaughlin, whom Jack P. Greene has called the "doyen" of American constitutional historians,³³⁷ provided an answer in an article published a

336. See 2 FARRAND, *supra* note 69, at 131–32.

337. GREENE, *supra* note 198, at 65.

century ago.³³⁸ The constitutional system of the old British Empire (that is, as it functioned before the crises beginning in the 1760s) operated as a precursor to federalism, in which power was distributed by subject-matter between the metropolitan authorities and the colonial assemblies. The colonists denied the imperial power to secure revenues from them by direct or indirect taxation. But if that power is added to the powers actually exercised by the imperial authorities and acknowledged as legitimate in the colonies up to the eve of the Revolution, there is a striking similarity with the powers vested in the national government by the Constitution.³³⁹ This apparent continuity in governance authority should not be surprising. Americans had thrived under this governmental structure and rebelled when imperial authorities moved to change it. The old British Empire provided a model for the distribution of power between the national and state governments. This model was partially adopted in the Articles of Confederation and then was completed in the Constitution.

B. Central Powers in the Empire and the Confederation

As James Madison would later observe, American leaders believed that “[t]he fundamental principle of the Revolution was, that the Colonies were co-ordinate members with each other and with Great Britain, of an empire united by a common executive sovereign, but not united by any common legislative sovereign.”³⁴⁰ To a considerable extent, the transition of colonies into states maintained the governance system that had actually existed in the colonies.³⁴¹ Even before the Articles of Confederation were drafted, the Continental Congress assumed most of the superintending jurisdiction that had been exercised by the Crown.³⁴² The Articles formalized this arrangement, giving Congress most of the powers that the Crown had

338. McLaughlin, *supra* note 206, at 215–17.

339. *Id.* at 217–18; *see also* McLAUGHLIN, *supra* note 186, at 154–55, 180; McLAUGHLIN, *supra* note 193, at 100. Greene agrees with McLaughlin’s thesis. GREENE, *supra* note 198, at 205. For the distribution of powers between the imperial center and the colonial assemblies, *see supra* notes 159–68 and accompanying text.

340. James Madison, Report on Resolutions, House of Delegates, Session of 1799–1800, Concerning Alien and Sedition Laws, *in* 6 THE WRITINGS OF JAMES MADISON 373 (Gaillard Hunt ed., 1906).

341. GREENE, *supra* note 198, at 165, 182.

342. PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787 at 7 (1983).

exercised over the colonies, according to the King's prerogative powers³⁴³ or by executing parliamentary legislation.³⁴⁴

The powers given to Congress in the Articles fell into the five categories of power that the Crown had exercised over the colonies: (1) common defense;³⁴⁵ (2) foreign relations;³⁴⁶ (3) other relations external to individual States;³⁴⁷ (4) controversies between the States;³⁴⁸ and (5) limited fiscal and monetary regulations.³⁴⁹ With respect to taxation, the Articles adopted the mechanism that colonial leaders had proposed to imperial authorities: Congress would issue revenue requisitions to the States, and the state legislatures would have the taxing authority.³⁵⁰

There were some notable omissions from the powers that the Crown had exercised to the list granted to the Confederation Congress. Congress was not given the power to veto or disallow state legislation. Similarly, Congress did not have the power to raise armies: it could set quotas, but recruiting was left to the States. Nor did Congress have the

343. See *supra* notes 199–207 and accompanying text.

344. McLAUGHLIN, *supra* note 186, at 11–13; McLaughlin, *supra* note 206, at 217.

345. These included the powers of determining war and peace, building and equipping a navy, appointing all superior officers in the army and all officers in the navy, making rules and regulations for the land and naval forces and directing their operations. ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 1, 4. Congress could also determine the number of land forces and set requisitions for each State, but raising the army was left to the States. *Id.* art. IX, para. 5. Similarly, Congress could spend for the common defense and make requisitions to the States, but securing the revenues was left to state taxation. *Id.* art. VIII.

346. These were the powers of sending and receiving ambassadors, making treaties and alliances, issuing letters of marque and reprisal in time of peace, making rules for captures on land and water and determining prize allocations, appointing courts to try piracies and felonies on the high seas, appointing appellate courts in prize cases, and determining war and peace. *Id.* art. IX, para. 1.

347. Congress could regulate the trade and affairs with Indians who were not members of any State, *id.* art. IX, para. 4, and admit other colonies into the Union. *Id.* art. XI. The Crown had assumed the former power and was preparing to exercise the latter. Congress could also establish and regulate the post office, a function that the Crown performed in executing parliamentary legislation. *Id.* art. IX, para. 4.

348. Congress could resolve all boundary and other disputes between two or more States and decide cases of conflicting land grants. *Id.* art. IX, para. 2. Those functions had been performed by the Privy Council.

349. These included the powers of coining money, regulating the value of national and state coin, and fixing uniform weights and measures. *Id.* art. IX, para. 4. Congress could also spend for the general welfare according to its own appropriations decisions, provided that the revenues would be raised by the States, *id.* art. VIII, and had the power to borrow money and emit bills on the credit of the United States (a parliamentary power). *Id.* art. IX, para. 5.

350. McLaughlin, *supra* note 206, at 239.

crucial power to regulate commerce, a power exercised by both the Crown and Parliament that American leaders acknowledged as legitimate until the eve of the Revolution. The unanimous consent of the States to vest the commerce power in Congress was not secured, probably because of special state interests in regulating commerce and in deriving substantial revenues from import, export, and tonnage duties.³⁵¹

Even with these omissions,³⁵² the powers that Congress possessed were formidable, at least on paper. During the debates over ratifying the Constitution, Anti-Federalists who opposed expanding congressional power pointed out that its existing authority was practically as extensive as the Crown's.³⁵³ The absence of congressional powers to tax and regulate commerce was critical to the Confederation's demise. But even if those powers had been granted, the Confederacy was doomed because of its governance structure.

C. National Powers in the Constitution

1. Additions and allocations of powers

The Convention rejected the Vattelien structure of a league of sovereign and independent states joined by treaty. The Convention's most important decision was to create a real government with the power to act directly on individuals. With executive and judicial branches empowered to directly enforce the Constitution and laws and treaties of the United States, the Convention changed the nature of federalism. American federalism now entailed not only continuing the subject-matter distribution of power between the national and state governments, but also distributing power within the branches of the

351. During the entire Confederation period, Congress was unable to secure the unanimous consent of the state legislatures to regulate commerce or impose taxes on imports. Such proposals were vetoed initially by Rhode Island and later by New York. RAKOVE, *supra* note 233, at 337–42, 345–52.

352. The Articles also did not give Congress authority over the western territories. However, in 1780, shortly before the Articles were ratified by all States, Congress assumed control over the western territories. Virginia and other States then ceded territory north of the Ohio River to the United States. This exercise of congressional power was of dubious constitutionality, but as a matter of necessity it received the acquiescence of the States. *Id.* at 339, 352–53. Joseph Story rationalized the unauthorized actions that Congress took prior to 1781, when the Articles became legally effective, as lawful by virtue of revolutionary necessity and of Congress then representing the people and not the States. 1 STORY, COMMENTARIES, *supra* note 9, § 216, at 206–07.

353. RAKOVE, *supra* note 233, at 383.

government and employing the federal courts as umpires to resolve conflicts that would arise through the concurrent application of national and state laws on individuals.

Every proposal for congressional power began with the assumption that the new Congress would be vested with all of the legislative powers of the Confederation Congress.³⁵⁴ That assumption was repeatedly ratified by the Convention without dissent, but that unanimity masked an underlying complication. Resolution VI of the Virginia Plan proposed that Congress would inherit the legislative powers of the Confederation Congress, but Resolution VII proposed that the executive powers of the Confederation Congress would be vested in a national executive. If viewed according to British theory and practice, most of the powers of the Confederation Congress corresponded to the historical prerogatives of the Crown.³⁵⁵ But the Convention did not follow British precedent in allocating power between the executive and legislative branches.³⁵⁶ James Wilson set the tone early in the Convention: “He did not consider the Prerogatives of the British Monarch as the proper guide in defining the Executive powers.”³⁵⁷ The Convention agreed and modified Resolution VII to give the Executive “power to carry into effect the national laws and appoint to offices in cases not otherwise provided for.”³⁵⁸ With some important exceptions, most of the powers of the Confederation Congress were vested in the national legislature.³⁵⁹ This effected a massive transfer to the legislature of powers that had been prerogatives of the Executive under the British constitution.

354. See *supra* notes 322, 326–27 and accompanying text. One important power possessed by the Confederation Congress—to emit bills on the credit of the United States—was struck from the list of enumerated powers late in the Convention. See *supra* note 69.

355. RAKOVE, *supra* note 233, at 383–84.

356. See Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 *BUFF. L. REV.* 557, 629–30 (2018).

357. 1 FARRAND, *supra* note 69, at 65.

358. *Id.* at 67 (internal quotation marks omitted).

359. The powers to make treaties and appoint judges and diplomats were vested in the President and the Senate. U.S. CONST. art. II, § 2, cl. 2. The duty to receive foreign diplomats was assigned to the President. *Id.* art. II, § 3. The Judiciary also shared in the foreign affairs power, being given jurisdiction in cases arising under the Constitution, laws and treaties, cases affecting foreign diplomats, the admiralty and maritime jurisdiction, and controversies between a State or its citizens and foreign states, citizens and subjects. *Id.* art. III, § 2. The Convention did not transfer to the new Congress the Confederation Congress’s power to direct the operations of the army and navy. Instead, the President was made Commander-in-Chief of the armed forces. *Id.* art. II, § 2. The adjudication of conflicts between national and state authority, as well as boundary and other disputes between two or more States, and controversies over conflicting land grants, were vested in the Judiciary. *Id.* art. III, § 2, cl. 1.

The Convention added essential enumerated powers. Congress was given the powers to lay and collect taxes on individuals, raise and support armies without the intermediacy of the States, regulate interstate and foreign commerce, and have plenary control over the territories.³⁶⁰ All but one of these (taxing the colonists) had been powers of the Crown in the old British Empire.³⁶¹ And, as the Convention drew to an end, several more national powers were added, deriving from historical antecedents of the old Empire,³⁶² experiences under the Confederation,³⁶³ or republican ideology.³⁶⁴

360. *Id.* art. I, § 8, cls. 1, 3, 12; *id.* art. IV, § 3, cl. 2.

361. The Crown had exercised the powers to raise armies and control the western lands; it also regulated commerce and executed parliamentary legislation on trade and navigation. Of the other powers that the Committee of Detail added to the pre-existing powers in the Articles, see *supra* note 299, all except nationalizing the militia had been exercised by the Crown over the colonies in the old empire.

362. The patent and copyright powers, U.S. CONST. art. I, § 8, cl. 8, had been shared by the Crown and Parliament. Statute of Monopolies 1623, 21 Jac. c. 3 (Eng.); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1271–73 (2001). The plenary powers over the nation's capital and all nationally-owned places, U.S. CONST. art. I, § 8, cl. 17, corresponded to the Crown's control of land owned by the King within the colonies. McLaughlin, *supra* note 206, at 218. The President's powers of appointment (shared with the Senate) and pardon, and his duties to receive foreign diplomats and faithfully execute the laws, U.S. CONST., art. II, §§ 2, 3, were all royal prerogatives and duties. The United States' obligation to protect each State from invasion and domestic violence, *id.* art. IV, § 4, tracked the King's fundamental duty under the British constitution to protect his subjects. The Convention also partially resurrected the Crown's prerogative to veto colonial legislation, by giving the President a qualified veto over congressional legislation, but no power to veto or disallow state legislation. *Id.* art. I, § 7.

363. In addition to the power to "call[] forth" the militia, Congress was given substantial authority to regulate the state militias. U.S. CONST. art. I, § 8, cls. 15, 16. Near the close of the Convention, Congress was given the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* cl. 4. Colonial assemblies and state legislatures had enacted bankruptcy and insolvency laws, but there is no consensus on what abuses precipitated the inclusion of this national power or what it meant when it was ratified. See Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 624–35 (2008).

364. U.S. CONST. art. IV, § 4 (Republican Guarantee Clause). I omit from this discussion powers relating to the internal structure of the national government, including the distribution of federal and state authority over the composition of the branches of the national government and the election or appointment of members to those branches. The old empire did not provide a model for the distribution of those powers, and the debates over those issues in the Convention and in the ratification debates were particularly contentious.

2. *The purposes of national powers*

The analysis presented above is consistent with Andrew McLaughlin's thesis that the Convention had a ready model for enumerating the powers of Congress. The predominance of enumerated powers that were derived from the old British Empire is so great that perhaps one should ask, not which powers were so derived, but which few were not. The first seventeen paragraphs of Article I, Section 8 vested twenty-five specific powers in Congress. Only four (taxation, the two militia clauses, and the bankruptcy clause) did not correspond to powers exercised by the central authorities in the old British Empire.

McLaughlin's thesis also provides an explanation for the broad acceptance of the enumerations presented by the Committee of Detail. The proposed national legislative powers would be dominant within specific spheres—common defense against external and internal threats, foreign relations, trade and commerce, and preventing and resolving conflicts between the States and between the United States and the States. Each of these national spheres of authority would in turn be supported by robust fiscal and monetary powers. This could satisfy the nationalists because the United States was given powers to achieve the principal purposes they sought to achieve in the Constitution, which Hamilton identified in *Federalist 23*:

The principal purposes to be answered by the Union are these—The common defen[s]e of the members—the preservation of the public peace as well as against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries.³⁶⁵

And Hamilton emphasized that national fiscal and monetary policy was an essential prerequisite for achieving the principal purposes that were at the core of Federalist ambition.³⁶⁶

Those concerned with preserving large areas of residual state autonomy could also be satisfied with the enumeration of powers because although the United States would possess enormous powers within certain spheres, those spheres were limited.³⁶⁷ The States would continue to have extensive authority over their internal affairs—

365. THE FEDERALIST NO. 23, *supra* note 6, at 106 (Alexander Hamilton); *see also id.* NOS. 11–13 (discussing these purposes as central to an effective union).

366. This is the essence of Alexander Hamilton's lengthy defense of virtually unlimited congressional taxing and borrowing powers. *See* THE FEDERALIST NOS. 30–36, *supra* note 6, at 137–68 (Alexander Hamilton).

367. RAKOVE, *supra* note 239, at 178–79.

including general tort, contract, property, family, and criminal law.³⁶⁸ The Convention reached a consensus that the way to promote the “common defense and general welfare of the United States” was to vest four discrete and formidable categories of powers in the government of the United States.³⁶⁹

IV. AGGREGATE POWERS OF THE UNITED STATES

A. *The Four Clusters of National Power*

Almost all of the specific powers vested in the national government are designed to fulfill the four central purposes of the Union as identified in *Federalist 23*. Many of the specific enumerated powers serve more than one of these purposes. The powers to secure adequate revenues through taxing and borrowing cut across every other national power. The regulation of foreign and interstate commerce was not only critical for economic prosperity, it also was an important instrument of foreign policy and necessary to prevent and resolve economic conflicts between competitive States. These and other powers not only overlap in purpose but are also interdependent. Americans were well aware of how Great Britain became the richest and most powerful nation in the world. “Before the era of free trade, commercial advantage was inseparably intertwined with military strength. Britain’s position both as a commercial and a military world power rested on command of the seas.”³⁷⁰ Federalists also understood commerce as “the most useful as well as the most productive source of national wealth”³⁷¹ and that a viable commercial republic was dependent upon credible foreign policies and an effective military.³⁷²

One can of course view each enumerated power separately and then debate its particular scope. Or one can view these powers collectively as

368. Responding to the abuses of state legislatures in issuing paper money as legal tender and enacting private bankruptcy laws, the Convention proposed limited restraints on the power of state legislatures to regulate contracts. See U.S. CONST. art. I, § 10.

369. RAKOVE, *supra* note 239, at 240 (stating that theory of federalism developed by the Constitution’s supporters “depended on a sharp distinction between the objects of general and state government and the recognition that the responsibilities of Congress were at once exalted but limited”). This theme was pressed in the ratification debates by such leading Federalists as John Dickinson, John Jay, Oliver Ellsworth, Edmund Randolph, and John Marshall. *Id.* at 240–41.

370. MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* 86 (2003).

371. THE FEDERALIST NO. 12, *supra* note 6, at 52 (Alexander Hamilton).

372. BEER, *supra* note 257, at 245–46 (emphasizing the interdependence of national power, commerce and economic prosperity); EDLING, *supra* note 370, at 83–87 (same).

constituting aggregate powers in the government of the United States. The unmistakable pattern of national powers is that they are clustered according to the essential purposes of the Union. There are four such clusters of national powers, and they are distributed in all three branches of the government. They are “other Powers” vested by the Constitution in the government of the United States and can be enforced by Congress pursuant to the second of the Necessary and Proper Clauses.

First, common defense. To protect national security against external and internal threats, the Constitution vested eleven military powers in Congress in nine clauses of Article I, Section 8,³⁷³ plus the President’s Article II power as Commander-in-Chief and the duties/powers of the United States government as a whole in two of the Article IV Guarantee Clauses. The purely national character of many of these powers was secured by prohibiting, or requiring congressional approval for, their concurrent exercise by the States.³⁷⁴

Second, foreign affairs. The national authority over foreign relations was vested in most of the military powers listed above, plus four other congressional powers in Article I, Section 8,³⁷⁵ three presidential powers/duties in Article II,³⁷⁶ and four categories of national judicial power.³⁷⁷ Again, this national authority was enhanced by prohibitions on concurrent authority in the States.³⁷⁸

373. See U.S. CONST. art. I, § 8, cl. 1 (taxing to provide for common defense); *id.* cl. 2 (borrowing money); *id.* cl. 11 (declaring war, granting letters of marque and reprisal, and making rules for captures); *id.* cl. 12 (raising and supporting the army); *id.* cl. 13 (providing for and maintaining the navy); *id.* cl. 14 (making rules to govern the military); *id.* cl. 15 (calling forth the militia); *id.* cl. 16 (regulating the militia); *id.* cl. 17 (exercising exclusive jurisdiction over national forts, magazines, arsenals and dockyards). I include the power to borrow money because it relates directly to effectuating the military powers. The Necessary and Proper Clause could be added to each cluster.

374. *Id.* art. I, § 10, cls. 1, 3 (letters of marque and reprisal, keeping an army or navy in peacetime, engaging in war).

375. *Id.* art. I, § 8, cl. 3 (regulating foreign commerce); *id.* cl. 5 (regulating value of foreign coin); *id.* cl. 10 (defining and punishing [1] piracy and felonies on the high seas and [2] violations of the law of nations).

376. *Id.* art. II, § 2, cl. 2 (making treaties and appointing diplomats with Senate approval); *id.* cl. 3 (receiving foreign diplomats).

377. *Id.* art. III, § 2 (cases arising under treaties, affecting foreign diplomats, admiralty jurisdiction and controversies between a State or its citizens and foreign states, citizens or subjects).

378. *Id.* art. I, § 10, cls. 1, 3 (treaties, alliances, confederation or any other agreements with a foreign power).

Third, national and interstate relations. To prevent and resolve controversies between the United States and the States, and between the States themselves, the Constitution vested seven powers in Congress³⁷⁹ and six categories of judicial power in the federal courts.³⁸⁰ These powers were supplemented by five requirements in Articles IV and VI that were designed to set the constitutional relationship between the United States and the States and ensure cooperation between the States,³⁸¹ and one restriction on interstate action.³⁸²

Fourth, national economic powers. The first eight clauses of Article I, Section 8 gave Congress sixteen fiscal, monetary, and commercial powers.³⁸³ The States were prohibited from exercising a number of these

379. *Id.* art. I, § 8, cl. 3 (regulating commerce among the States and with foreign nations and the Indian tribes); *id.* cl. 4 (uniform rule of naturalization); *id.* cl. 17 (exclusive jurisdiction of a capital outside of the territorial jurisdiction of any State); *id.* art. IV, § 2, cl. 1 (admission of new States); *id.* cl. 2 (control over United States territory and property).

380. *Id.* art. III, § 2 (cases arising under the Constitution, laws and treaties of the United States; controversies between two or more States, between a State and citizen of another State, between citizens of different States, and between citizens of the same State claiming under conflicting state land grants). These judicial powers mirrored the jurisdictional authority of the Privy Council in the old British Empire.

381. *Id.* art. VI, cl. 2 (supremacy of Constitution, laws and treaties of the United States); art. IV, §§ 1–2 (full faith and credit, privileges and immunities, extradition and capturing fugitive slaves). The last of these provisions was one of the great mistakes of the Convention. Instead of leading to cooperation between slave and free states, the enforcement of this clause became one of the precipitating causes of the Civil War. On the relationship between congressional powers and the anti-discrimination provisions of Article IV, see generally Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

382. U.S. CONST. art. I, § 10 (prohibiting interstate compacts or agreements without congressional consent). Intercolonial agreements had been made to settle territorial claims, but those agreements were subject to the approval of the Crown through the Privy Council. The practice of such intercolonial agreements continued during the Confederation period, and the Articles did not require congressional approval. The Convention restored the requirement of central approval apparently in response to interstate agreements that disadvantaged other States. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692–93, 730–34 (1925).

383. U.S. CONST. art. I, § 8, cl. 1 (taxing, paying the debts, and spending for the general welfare); *id.* cl. 2 (borrowing); *id.* cl. 3 (regulating commerce among the several states, with foreign nations, and with the Indian tribes); *id.* cl. 4 (bankruptcy); *id.* cl. 5 (coining money, regulating the value of domestic and foreign coin, setting weights and measures); *id.* cl. 6 (punishing counterfeiting); *id.* cl. 7 (post office); *id.* cl. 8 (patents and copyrights).

and other economic powers.³⁸⁴ These powers and prohibitions were reinforced by the Privileges and Immunities Clause of Article IV, the admiralty and maritime jurisdiction of the federal courts, and the power of the President to make commercial treaties with Senate approval.³⁸⁵

Each cluster is not simply a collection of individual powers. The specific powers in each cluster were drawn primarily from the operating distribution of powers in the old Empire, and to a lesser extent from experience in the Confederation. These powers were designed to operate in combination to achieve the central purposes of union as summarized in *Federalist 23*.

The Constitution vested four great aggregate powers (or comprehensive enumerated powers) in the government of the United States. As in geometry, a constitutional whole may be greater than the sum of its parts. This was a doctrine that Hamilton expressed in *Federalist 23* and his defense of the Bank of the United States. It was dispositive in *McCulloch*.

B. Hamilton's Theory of Aggregate Power

1. Federalist 23

Federalist 23 is Alexander Hamilton's essay on "[t]he necessity of a Constitution, at least equally energetic as the one proposed, to the preservation of the Union."³⁸⁶ The first step in determining the scope of national power is to determine "the objects to be provided for by a Federal Government."³⁸⁷ The essential tasks of the Constitution in a "compound" republic are "to discriminate the *objects*" that are the provinces of the national and state governments and provide each with "the most ample authority for fulfilling the objects committed to its charge."³⁸⁸ Hamilton then identified the four essential national purposes stated above and insisted that the realization of those purposes requires an aggregate approach to national power:

Shall the Union be constituted the guardian of the common safety? Are fleets . . . and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must

384. *Id.* art. I, § 10, cls. 1–3 (coining money, emitting bills of credit, issuing paper money as legal tender, impairing the obligations of contracts, and taxing imports, exports, or tonnage).

385. *Id.* art. IV, § 2, cl. 1; *id.* art. III, § 2, cl. 1; *id.* art. II, § 2, cl. 2.

386. THE FEDERALIST NO. 23, *supra* note 6, at 106 (Alexander Hamilton).

387. *Id.*

388. *Id.* at 108.

be the case, in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend Not to confer in each case a degree of power, commensurate to the end, would be
 . . . improvidently to trust the great interests of the nation to hands, which are disabled from managing them with vigour and success

. . .
 Every view we may take of the subject . . . will serve to convince us, that it is both unwise and dangerous to deny the Federal Government an unconfined authority, as to all those objects which are intrusted to its management.³⁸⁹

Thus, for each of these national purposes, “[t]he *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.”³⁹⁰ In this formulation, the “ends” are the purposes of governmental power, while the “means” are all of the powers necessary to fulfill those purposes. But why cannot those means be predetermined in relation to those ends? Hamilton’s answer, with his emphasis: “*Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent [and] variety of the means which may be necessary to satisfy them.*”³⁹¹ *Federalist 23* is the prescription for Hamilton’s Bank opinion and for Marshall’s opinion in *McCulloch*.

2. *The Bank Opinion*

In persuading Washington to sign the bill establishing the Bank of the United States, Hamilton began his discourse on the scope of national power by positing that the Constitution vested three types of power in the national government—the enumerated powers, implied powers that were means to effectuate the enumerated powers, and “resulting” powers.³⁹² The last category, he wrote, consisted of unspecified powers that derived from the “whole mass” of enumerated powers considered as a whole. His example: “[I]f the United States should make a conquest of any of the territories of its neighbours, they would possess sovereign jurisdiction over the conquered territory. This would rather be a result from the whole mass of the powers of the [national] government . . . than a consequence of either of the powers specially enumerated.”³⁹³

389. *Id.* at 108–09.

390. *Id.* at 107. This is the first appearance in *The Federalist* of the “ends” and “means” of governmental power, terms that would become famous in *McCulloch*.

391. *Id.* at 106–07.

392. Hamilton, Bank Opinion, *supra* note 8, at 100.

393. *Id.*

Hamilton’s principal argument relied on the first two types of powers—that the Bank was constitutionally an implied power that was a means “more or less direct” for carrying out several specific enumerated powers³⁹⁴—facilitating Congress’s power to “collect taxes” by creating a more “convenient medium” of exchange than metal species;³⁹⁵ being a source for Congress to borrow money, particularly for emergencies such as war (thus its role in raising and supporting armies and navies); and promoting interstate and foreign commerce by increasing the circulation of money throughout the United States.³⁹⁶ In Hamilton’s pithy phrase: “Money is the very hinge on which commerce turns.”³⁹⁷

Hamilton also presented an alternative constitutional argument founded on “aggregate” powers of Congress. That argument tracked *Federalist 23* and built on the statements of supporters in Congress that the Bank was necessary to carry out the general fiscal powers of Congress.³⁹⁸ Returning to the concept of “resulting” powers, Hamilton urged Washington to take an “aggregate view of the [C]onstitution.”³⁹⁹ The Constitution vested in Congress the powers to lay and collect taxes, appropriate those revenues for national purposes, borrow money, coin money and regulate its value, set the value of foreign coin and dispose of and regulate the properties of the United States. Viewing those powers in combination meant that Congress possesses an aggregate fiscal power: “That it is the manifest design and scope of the constitution to vest in [C]ongress all the powers requisite to the effectual administration of the finances of the United States.”⁴⁰⁰ National banks “are [an] usual engine in the administration of national finances, & an ordinary & the most effectual instrument of loans & one which in this country has been found essential”⁴⁰¹ Hamilton’s alternative argument

394. *Id.* at 121.

395. Madison argued that the Bank was not related to the taxing power because it would not impose any taxes. This was a trap into which even sophisticated scholars have fallen. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 26–27 (2012). The enumerated power is to “lay and collect taxes,” and Hamilton related the Bank to tax collection, not to tax imposition.

396. Hamilton, Bank Opinion, *supra* note 8, at 121–34.

397. *Id.* at 126.

398. See *supra* note 266.

399. Hamilton, Bank Opinion, *supra* note 8, at 132.

400. *Id.*

401. *Id.* The last reference in this quote is to the Bank of North America, which the Confederation Congress chartered in 1781. That bank was used by Robert Morris to ameliorate the disastrous economic consequences of the War of Independence. A

was that a cluster of enumerated powers relating to national finance created a more general fiscal power in Congress, and the Bank was a legitimate means of carrying out this general fiscal power. Under this theory, it was sufficient to relate the Bank to this aggregate power and not necessarily to any specific enumerated power.

C. *McCulloch and Aggregate Power*

Many scholars have observed that the portion of the *McCulloch* opinion dealing with the existence and scope of Congress's implied powers appears to be taken almost entirely from Hamilton's opinion,⁴⁰² which Marshall himself had publicized.⁴⁰³ But which of Hamilton's arguments on the Bank's constitutionality did Marshall adopt? He did recite, early in this portion of the opinion, the specific enumerated powers upon which Hamilton relied.⁴⁰⁴ Marshall then presented Hamilton's analysis of implied powers, including the breadth of congressional discretion in choosing the means to carry out its enumerated powers.⁴⁰⁵ One would expect that, following this general exegesis, Marshall would have upheld the Bank by relating it to the specific enumerated powers. He did not. Instead, here is Marshall's explanation, in a single paragraph of the lengthy opinion, of why the Bank is an appropriate means to carry out a constitutionally authorized power of Congress:

product of the war, its congressional charter was not renewed in 1785, but Pennsylvania made it a state-chartered bank.

402. See, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 599 (2010) (stating that Marshall could be accused of having "plagiarized" Hamilton's opinion); see also R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 292–93 (2001) (stating that Marshall "armed himself with Hamilton's nationalist essays" and drew upon his work in several opinions, including in *McCulloch*).

403. Marshall was the first person to publicize the Cabinet opinions on the constitutionality of the Bank, which had been private letters submitted by Jefferson, Randolph, and Hamilton to the President. 5 DUMAS MALONE, JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809, at 358 n.35 (1974). George Washington willed voluminous papers to his nephew, Justice Bushrod Washington, who collaborated with Marshall as the latter wrote a multi-volume biography of their mutual idol. Those papers included the Cabinet debate over the constitutionality of the Bank. Marshall summarized the debate in the text and appended a long note that quoted verbatim many of Jefferson's and Hamilton's key arguments. This is an example of journalism being the first draft of history. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 296–97 & app. n.3 (Philadelphia, G.P. Wayne 1807).

404. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (pointing to the taxing, borrowing, commerce, war, and army and navy powers).

405. See *id.* at 407–22.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, *if required for its fiscal operations*. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential *instrument in the prosecution of its fiscal operations*, is not now a subject of controversy. *All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity* The time has passed away when it can be necessary to enter into any discussion in order to prove *the importance of this instrument, as a means to effect the legitimate objects of the government*.⁴⁰⁶

The decision in *McCulloch* thus appears to rest on Hamilton's aggregation of specific enumerated powers of Congress into a general fiscal power and the relation of the Bank to that power. This is how Marshall understood Hamilton's argument,⁴⁰⁷ how he described the Bank's constitutional basis in *McCulloch* and in other decisions involving the Bank,⁴⁰⁸ and how Joseph Story, Marshall's alter ego, justified the constitutionality of the Bank in his *Commentaries*.⁴⁰⁹

Hamilton's aggregation theory relates the Bank to a group of specific enumerated powers that expresses a broader national purpose when considered collectively rather than individually. Under this conception, this group of enumerated powers creates a more comprehensive enumerated power—a general national fiscal and monetary power. In *McCulloch*, the Bank's constitutionality was not fastened on its relationship to any specific enumerated powers. The Bank's utility was a means of effectuating the more general power that the specific powers collectively serve.

406. *Id.* at 422–23 (emphasis added).

407. 5 MARSHALL, *supra* note 403, app. n.3 at 11 (stating that Hamilton had argued that the Bank was “a proper mean for the execution of the several powers which were enumerated, and also contended that the right to employ it resulted from the whole of them taken together”).

408. *See* *Weston v. City Council of Charleston*, 27 U.S. 449, 469 (1829) (“The bank of the United States is an instrument essential to the fiscal operations of the government”); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 861 (1824) (“Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *McCulloch v. The State of Maryland*. It is an instrument which is ‘necessary and proper’ for carrying on the fiscal operations of government.”).

409. 3 STORY, COMMENTARIES, *supra* note 9, § 1262, at 134–35 (asserting that the Bank was constitutional on the basis of Hamilton's aggregation theory).

D. *The Validity of Aggregating National Powers*

Hamilton's aggregation theory provides the basis for a comprehensive theory on the extent of national power and for an understanding of the source and scope of implied national powers. Marshall stated in *McCulloch* that the Constitution vests in Congress "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."⁴¹⁰ Immediately following this statement, Marshall recognized that these "great" powers were in turn part of a larger set of broader national powers: "The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government."⁴¹¹ The clusters of enumerated powers described above constitute four comprehensive powers in the United States: common defense, national and interstate relations, foreign affairs, and economic union. These four comprehensive powers account for virtually the entire jurisdiction of the government of the United States, and they cut across all three branches. Because these comprehensive powers are created through a combination of specific enumerated powers of each of the three branches of government, they constitute "other powers" vested in the government of the United States as a whole. They are "ends" or "objects" of national power and, under the "all other powers" provision of the Necessary and Proper Clause, Congress may enact laws that are "means" of carrying them into effect.

This constitutional methodology is normatively superior to the classical means-ends approach in setting the outer limits of national power for the following reasons:

First, although both approaches are consistent with theories of implied power that derive from the constitutional text, they differ in how the enumerated powers of the national government are construed and applied. The classical approach treats each enumerated power as distinct. Of course, if an act of Congress meets the classical criteria—either being within the scope of specific enumerated powers or an appropriate means of carrying out those powers—the law is constitutional. However, an act of Congress that does not meet those criteria is not necessarily unconstitutional. The aggregation approach uses the methodology of construing the Constitution as a whole, with the recognition that the enumerated powers are related and interdependent. Marshall correctly emphasized in *McCulloch* that precisely because "it is a

410. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

411. *Id.*

constitution we are expounding,” the scope of implied powers should “depend upon a fair construction of the whole instrument.”⁴¹²

Second, the clustering of virtually all of the enumerated national powers is a product of history and the essential purposes of the Union. The Constitution followed a revolution in which Americans *supported* the actual subject-matter distribution of power arising out of the ancient British constitution. Americans rebelled when imperial authorities refused to honor the categorical scope and limits of such power under which the colonies had prospered. That categorical distribution of power appears to be the model for the enumerated powers in the Constitution. This history explains the origins of the enumerated powers and strongly suggests that they should be applied in a categorical fashion. These four clusters of national power—common defense, foreign affairs, national and interstate relations, and trade and commerce—derive from and are indispensable to maintaining the principal purposes of the Union as stated in *Federalist* 23. This foundation in history and purpose is the basis of American federalism: the national government should be responsible for those matters that bear upon the essential purposes of the Union, while allowing for extensive legislative authority in the States and the people.

Third, the classical means-ends approach cannot explain the constitutional validity of national powers that may not have been perceived as necessary at the founding but are now acknowledged as essential means of achieving central purposes of the Union. This failure to make constitutional theory congruent with reality leads to either a jurisprudence of avoidance—of stretching the enumerated powers beyond recognizable limits or of calling forth the mystical spirit of inherent national sovereignty—or the creation of a national general welfare power. The comprehensive approach advocated in this Article provides an obvious alternative: those “new” powers are the clusters of enumerated powers vested in the government of the United States and appropriate means of carrying them into effect.

Finally, the aggregation approach is not a stranger to constitutional adjudication. The Supreme Court came very close to upholding the Legal Tender Acts under that approach in *Knox v. Lee*,⁴¹³ and then applied that approach in *Julliard v. Greenman*.⁴¹⁴ The strongest statement was by Justice Strong in *Knox*. After reciting the language from *McCulloch* that

412. *Id.* at 406–07.

413. 79 U.S. (12 Wall.) 457, 536 (1870).

414. 110 U.S. 421, 440 (1884).

Congress's powers must be adaptable to future exigencies, Strong emphasized that the power of the federal government may be deduced from one of the enumerated powers or from a combination, asserting that "[i]t is allowable to group together any number of [the powers] and infer from them all that the power claimed has been conferred."⁴¹⁵

Strong continued that "Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power"⁴¹⁶ and gave as one example the establishment of the Bank of the United States.⁴¹⁷

In *Julliard*, Justice Gray emphasized that "[t]he breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency."⁴¹⁸ Significantly, Gray included the interstate and foreign commerce powers as constitutive elements of this aggregate power.⁴¹⁹ Embracing congressional enforcement authority under the "all other powers" clause, the Court held that the Legal Tender Acts were "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."⁴²⁰

A similar approach has been taken by the Supreme Court in recognizing non-textual constitutional rights in the States. A premier example is *Printz v. United States*,⁴²¹ which held that Congress cannot require state officials to participate in the enforcement of federal law.⁴²² The Court pointed to the various provisions in the Constitution that vest or recognize rights in the States. None of these provisions explicitly or implicitly prohibited Congress from making state officials agents in federal law enforcement. However, the Court (per Justice Scalia) did not view the constitutional rights of the States individually. Instead, it held that collectively these rights created a broader residual zone of state sovereignty.⁴²³ Referencing historical tradition and the Convention's decision to act directly upon individuals, instead of through the intermediacy of the States, the Court found that this implied sphere of state sovereignty was broad enough to include independent decision-making in law enforcement.

415. *Knox*, 79 U.S. at 534.

416. *Id.* at 535.

417. *Id.* at 537.

418. *Julliard*, 110 U.S. at 439.

419. *Id.* at 448.

420. *Id.* at 450 (quoting, not quite correctly, the "all other powers" clause).

421. 521 U.S. 898 (1997).

422. *Id.* at 932-33.

423. *Id.* at 918-21.

The analogy to *Griswold*⁴²⁴ is also unmistakable. The Bill of Rights includes an enumeration of several specific associational and privacy rights. But the right claimed in that case—of married couples’ right to engage in intimate sexual behavior in their homes—is not enumerated, nor can it reasonably be implied from any of the specific guarantees. Instead of examining each of these specific guarantees individually, the Court (per Justice Douglas) viewed them collectively as creating a broader sphere of privacy. Considering the intensely private nature of the right being claimed, the importance of marital association and historical tradition, the Court held that the Constitution’s broader sphere of privacy protections encompassed this right.⁴²⁵

Of course, *Printz* and *Griswold* are controversial decisions. But they show that the aggregation approach is not unprecedented and has been utilized by Justices with very different constitutional ideologies.⁴²⁶

V. AGGREGATE AND IMPLIED POWERS: OF ENDS AND MEANS

A. *Common Defense*

The powers conferred on the national government to provide military protection against foreign and domestic violence or threats of violence are virtually complete.⁴²⁷ The Constitution appears to provide the government with all of the military powers possessed by the Crown and Parliament during the colonial period.⁴²⁸

However, there may be a gap in the enumerated powers relating to common defense. Congress has the enumerated power to “declare War,” but, as is well-known, the Convention substituted this term for “make War,”

424. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

425. The determination that the Constitution creates an implied zone of privacy in the home that insulates individuals from unjustifiable governmental intrusions had been previously articulated by Justice Harlan in his memorable dissent in *Poe v. Ullman*, 367 U.S. 497, 522, 549–54 (1961) (Harlan, J., dissenting). Harlan focused particularly on the protections for privacy in the home that are contained in the Third and Fourth Amendments. *Id.* at 549.

426. If one requires a holding that is almost universally regarded as correct (pace Justice Black), consider *In re Winship*, 397 U.S. 358 (1970). The Bill of Rights contains many procedural protections for criminal defendants. But the requirement of proof beyond a reasonable doubt is not an enumerated right, and it cannot be implied from any single enumerated guarantee. But if the procedural guarantees in the Bill of Rights are viewed collectively, they establish the common law accusatorial system of justice. Proof beyond a reasonable doubt is an essential component of that system.

427. See *supra* notes 373–74 and accompanying text.

428. Some of these powers have become obsolete. Letters of marque and reprisal have not been utilized since the nineteenth century, and the founding-era militia no longer exists.

which had been in an earlier draft of the Constitution. This raises two issues—whether Congress has the power to authorize military action that is less than a “war” in the context of international law, and, if it does not, whether the President as Commander-in-Chief of the armed forces possesses that power. If the answer to both questions is no, a serious gap exists in the Constitution.

In my view, no such gap exists because there is overwhelming evidence that the congressional power to declare war includes both a formal declaration and an authorization of military action against a foreign nation.⁴²⁹ This was the position taken by Chief Justice Marshall in his first Supreme Court opinion.⁴³⁰ That was also the consensus of the founding generation—and that includes Alexander Hamilton, who was hardly a shrinking violet concerning executive power.⁴³¹ This answers the revisionist advocates of the “declare” versus “make” war distinction. But even if such a gap in the enumerated powers existed, it could be filled through the doctrine of aggregate powers. The Constitution vested an aggregate common defense power in the government of the United States, and congressional authorization of military actions short of war is plainly a means that is necessary to carry that power into effect.

B. *Foreign Relations*

The propensity of States to defy the law of nations and international obligations pledged by Congress and the corresponding failure of the Articles of Confederation to provide Congress with the ability to control the foreign relations of the United States were major reasons for the creation

429. See, e.g., LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 308–20 (Stephen M. Sheppard ed., 2014); Kent, *supra* note 13, at 774; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 *CORNELL L. REV.* 45 (2007).

430. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (stating that war powers are vested in Congress for “general hostilities” or “partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed”).

431. When French naval vessels and privateers seized hundreds of American merchant ships in 1798, thereby starting the Quasi-War, the Secretary of War asked Hamilton what actions the Navy could take without congressional authorization. Hamilton responded that the President could act defensively by ordering the Navy to engage armed French ships within American territorial waters, convoy merchant ships on the high seas, and, if attacked, respond with force. That, according to Hamilton, was the limit of the Executive’s power to engage in military action; any additional military actions had to be authorized by Congress. Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 *HAMILTON PAPERS*, *supra* note 165, at 461–62.

of the Constitution.⁴³² The Convention provided the government of the United States with extensive powers over foreign affairs and prohibited the States from exercising many of those powers.⁴³³ When Marshall wrote that “all the external relations” of the United States are entrusted to the national government, he expressed the view of the founding generation.

However, the specified enumerated powers over foreign affairs are not complete, even when bolstered by the Necessary and Proper Clause. As discussed in this paper, they do not include national control over immigration, recognition, and passports. But the case for an aggregate national power over foreign affairs is exceptionally strong, and each of these subjects is integrally connected to that aggregate power.

The relationships of recognition and passports to the nation’s foreign relations are obvious. The national immigration laws also have a major, albeit not complete, relation to foreign relations. The decisions by the United States concerning the extent to which citizens or subjects of foreign countries will be allowed to enter our nation and how they will be treated upon entry are themselves issues of foreign relations. We should recall that significant national restrictions on immigration began with the Chinese Exclusion Act which abrogated a treaty with China. And perhaps there is no better example than the treatment of Japanese immigrants and citizens before World War II. In 1924, Congress enacted laws prohibiting Japanese immigration and denying the possibility of naturalized citizenship to those Japanese who had entered before the proscriptions were enacted.⁴³⁴ These laws sent a strong message to Japan that its citizens were considered members of an inferior race, and this provoked considerable hostility by the Japanese government towards the United States. More generally, Justice Kennedy outlined the various relations of the immigration laws to foreign policy in *Arizona v. United States*⁴³⁵:

Immigration policy can affect trade, investment, tourism, and 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 Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

432. See generally Golove & Hulsebosch, *Law of Nations*, *supra* note 29 (explaining how the necessity for the United States to comply with its treaty obligations and the law of nations was a principal and perhaps the most important reason for the drafting and ratification of the Constitution).

433. See *supra* notes 375–78 and accompanying text.

434. See *Hirabayashi v. United States*, 320 U.S. 81, 96 n.4 (1943).

435. 567 U.S. 387 (2012).

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States This Court has reaffirmed that ‘[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.’⁴³⁶

Of course, immigration statutes also prescribe the terms by which foreigners can become citizens of the United States, and this portion of the immigration power is more closely connected to the enumerated congressional power of making uniform rules of naturalization. Justice Kennedy was correct in upholding the immigration laws as necessary to effectuate the combination of the naturalization and foreign affairs powers. His mistake was to base the foreign affairs power on the erroneous concept of inherent national sovereignty.

Why would the Convention omit national powers over immigration, recognition, and passports? We do not have any convincing evidence of the reasons for those omissions. One plausible explanation is that there was no felt need to include these powers.

The Constitution’s omission of a general recognition power and the absence of any discussion about recognition in the Convention and ratification debates should not be surprising. The pressing goal of the infant and vulnerable Republic was to *be* recognized by European nations; the United States had neither the need nor the status to “recognize” longstanding European states or their monarchical governments.⁴³⁷ The Framers did not anticipate the post-ratification convulsions brought on by the French Revolution, the successful Haitian slave uprising, and the independence movement in Latin America, all of which forced the national government to make recognition decisions.⁴³⁸

As for immigration, the felt necessity was to *encourage* migration to a vast and sparsely populated country. If undesirable immigrants did enter the United States, their continued presence in the country could be safely left to the several States.⁴³⁹ And the colonial grievance was not that the imperial authorities had failed to enact restrictions on immigration. It was the opposite—imperial authorities had

436. *Id.* at 395 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

437. See Golove & Hulsebosch, *supra* note 29, at 1622–23.

438. Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141, 195–217 (2013).

439. See Cleveland, *supra* note 16, at 81–83, 98–99.

“endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”⁴⁴⁰ This grievance not only emphasized the importance of encouraging, and not restricting, immigration; it also showed how Americans viewed naturalization laws as instruments of foreign policy.

The Convention’s omission of a passport power is more difficult to explain because the lack of that power in Congress under the Articles of Confederation was a source of embarrassment and debate. This omission may also seem peculiar given the many governmental functions that the modern passport system serves—requesting safe conduct, regulating international travel, enforcing national security and the immigration laws, and proving identity and citizenship.⁴⁴¹ However, the passport system at the time of the founding bore little resemblance to the modern era. The connection with foreign policy was the one commonality, as passports always requested safe passage for the bearers.⁴⁴² But passports in the early Republic were not mandatory; they were issued at the request of applicants, and such requests and issuances were rare.⁴⁴³ Passports did not regulate international travel, nor were they required for entry into the United States.⁴⁴⁴ Moreover, until an 1856 statute gave sole authority to the Secretary of State, they were also issued by governors, mayors, and notaries public.⁴⁴⁵ Finally, passports were not identity documents because they did not contain the signature or description of the bearer,⁴⁴⁶ nor were they proof of citizenship.⁴⁴⁷ The rudimentary nature of passports and the essentially ministerial

440. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

441. *See supra* Section I.D.

442. CRAIG ROBERTSON, *THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* 26 (2010).

443. *Id.* at 92. Through the 1830’s, fewer than five hundred passports were issued annually. *Id.* at 128.

444. *Id.* at 16.

445. *Id.* at 131. The 1856 law also contained the first requirement that passports could be issued only to citizens. *Id.* at 140.

446. *Id.* at 59, 65.

447. *Id.* at 16; *see also* *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (holding that a passport issued by the Secretary of State is not by itself sufficient evidence of citizenship).

function performed by executive officials during peacetime⁴⁴⁸ may be the reasons that a passport power was not included in the Constitution.

Another plausible reason for the omission of these powers from the Constitution is that the law of nations, to which the early Republic was fused, governed recognition, immigration, and safe passage. Thus, when the Neutrality Crisis arose, Washington drew upon the authority of the law of nations, including in his decision to recognize the French revolutionary government.⁴⁴⁹ And when otherwise desirable foreign policy decisions towards Britain or France were not authorized by the law of nations, Washington refused to take them.⁴⁵⁰

These explanations are plausible but ultimately constitutionally irrelevant. A central teaching of *Federalist 23* and *McCulloch* is that the government of the United States must have the authority to use whatever implied powers are necessary “for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”⁴⁵¹ When national controls over immigration, recognition, and passports were considered necessary to effectuate the aggregate foreign affairs powers of the United States, Congress could enact legislation that is “plainly adapted” to legitimate constitutional ends pursuant to the “all other powers” provision of the Necessary and Proper Clause.⁴⁵²

This approach to national powers over foreign affairs militates against a prominent and controversial theory advanced by Justice Thomas and notable scholars.⁴⁵³ According to this theory, the President has a general “executive power” over foreign affairs, limited only by Article I powers vested in Congress. The residual powers of foreign affairs—those that are not authorized by specific enumerated powers—are embedded in the

448. The issuance of “safe conduct” passes during war is related to the Congress’s aggregate common defense powers and/or the President’s powers as Commander-in-Chief.

449. Reinstein, *supra* note 56, at 422–24.

450. *Id.* at 441–45.

451. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

452. I had trouble writing this sentence because immigration policies (state and national) have been infected by the illegitimate ends of nativism, religious bigotry, and racism from the earliest statutes and regulations through the present. Of course, it is a truism that all power can be abused. But that dismal history should at least caution that only principled legal constraints, such as taking seriously evidence of purposeful discrimination, and not unfettered political discretion, can prevent those viruses from doing yet more damage. *But see* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

453. *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2097 (2015) (Thomas, J., concurring in judgment and dissenting in part). Thomas relied heavily on Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231 (2001). William W. Crosskey has made a similar argument. *See* 1 *CROSSKEY, supra* note 134, at 415–19.

Executive Vesting Clause of Article II. This theory of residual presidential power over foreign affairs has been criticized,⁴⁵⁴ and I will not rehearse those criticisms here. However, if the analysis presented in this paper is correct, there are no “residual” foreign affairs powers beyond the cognizance of Congress. All such powers are vested in the government of the United States as a whole and can be carried into execution by Congress under the “all other powers” provision of the Necessary and Proper Clause.

C. *National and Interstate Relations*

The powers vested in the government of the United States to prevent and resolve disputes between the United States and the States, and between the States themselves, combine to create an aggregate power that is extensive.⁴⁵⁵ Adapting the practice of the Privy Council in the old Empire, the national judiciary was given a central role in providing an impartial forum for resolving and preventing disputes between national and state authority and between the States. Such conflicts can result from the local biases of state court judges and juries. As Justice Story stated with remarkable candor: “The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice.”⁴⁵⁶

However, the enumerated Article III jurisdictional categories do not comprehensively cover all cases and controversies that can produce national or interstate conflicts. As discussed previously,⁴⁵⁷ non-residents of a State are provided the neutral forum of a federal trial court under the diversity jurisdiction only when their cases are between “Citizens of different States.”⁴⁵⁸ Corporations are not “citizens,” and under the language of this enumeration, should not be able to invoke

454. Justice Thomas’s position was severely (even scornfully) criticized by Justice Scalia in *Zivotofsky II*, 135 S. Ct. at 2116–18, 2123–26 (Scalia, J., dissenting). The leading scholarly critique is Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). Two recent articles present additional originalist challenges to the Executive Vesting Clause theory. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173–74 (2019); Steilen, *supra* note 356, at 641–52.

455. See *supra* notes 379–82 and accompanying text.

456. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); see also *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 67 (1809) (referring to jurisdictional grants in Article III in cases “[w]here state tribunals could not be supposed to be impartial”).

457. See *supra* Section I.G.

458. U.S. CONST. art. III, § 2, cl. 1.

the diversity jurisdiction. Residents of the District of Columbia or national territories assuredly are not citizens of “States.” Their cases also seem necessarily outside of the Article III diversity jurisdiction. Similarly, lawsuits by or against the Bank of the United States and other federally created corporations do not appear to “arise under” federal law when the claims for relief and defenses are all issues of state law.

But the results of these cases are still considered good law, and they reflect the reality that the specifically enumerated judicial powers in Article III are not exhaustive—just as the specifically enumerated legislative powers in Article I are not exhaustive. The language of Article III does not require a contrary conclusion. The Article III Judicial Vesting Clause simply identifies the branch of government that exercises the judicial power of the United States. By omitting the term “herein granted,” it is, if anything, phrased somewhat more broadly than the corresponding Article I Legislative Vesting Clause. Article III also provides that the judicial power “shall extend” to nine categories of cases; it does not state that the judicial power “shall extend only” to those categories.

Under the aggregate theory of the enumerated powers proposed in this Article, Congress can vest the federal courts with jurisdiction over cases in which there may be substantial interstate or national bias in local tribunals. That is, the enumerated powers, taken as a whole, vest the national government with the authority to counteract local biases, which can engender friction between the States and between the United States and the States. A principal “object” or “end” of national power was to prevent such friction from undermining the Union. The most peaceful and effective means of realizing that end is utilizing the federal courts as neutral umpires. Congress therefore has the power under the Necessary and Proper Clause to vest the federal courts with original jurisdiction over such cases.

1. *Verlinden and Tidewater*

The Federal Sovereign Immunities Act (FSIA) is a very strong case for expanded federal court jurisdiction. The Act explicitly vests subject-matter jurisdiction in the federal courts over all cases brought against a foreign state or its instrumentalities. The Article III problem arose in litigation between foreign entities over contract claims that were not governed by federal law. In *Verlinden*,⁴⁵⁹ Chief Justice Burger maintained that all cases brought under FSIA necessarily requires the District Courts to decide whether one of the statutory exemptions to

459. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

foreign sovereign immunity applied and therefore arises under the FSIA.⁴⁶⁰ This argument is unpersuasive⁴⁶¹ and unnecessary. Nativist hostility towards foreign states and their instrumentalities—and particularly against certain countries—has been present in the United States since the Founding. The appearance that such prejudice infects the decisions of local courts could create friction between States and the United States and adversely affect the exercise of the aggregate national powers over foreign affairs. Burger suggested as much: “Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.”⁴⁶² FSIA is a necessary and proper means by which Congress effectuated two aggregate national powers.

*Tidewater*⁴⁶³ is also a strong case for expanded jurisdiction. One premise of Article III is that local prejudice against non-residents can subvert the administration of justice. This principle underlay the First Congress’s implementation of the diversity jurisdiction to include citizens of States and of foreign nations.⁴⁶⁴ Congress made a deliberate decision in 1940 to include the citizens of the District of Columbia within that principle.⁴⁶⁵ Of course, one can argue that the Founders’ concerns about local biases against non-residents are vestigial. I doubt that was true either in 1940, when this statute was passed, or in the present era of red and blue states and of a resurgence of “America First” nationalism. In any event, that is a decision for Congress to make.

In drafting Article III, the Convention addressed six categories of potential local biases that were known at the time of the Founding. It is difficult to imagine that the Convention gave deep thought to federal jurisdictional issues relating to the District of Columbia, which did not then exist except as a vague idea. Nor to the problems resulting from the intersection of foreign governments and entities, foreign affairs, and federal court jurisdiction. Interpreting the specific categories of Article III as being forever exclusionary imputes to the Framers clairvoyance or indifference to the authority of Congress to deal with new situations that call for the application of underlying constitutional values.

460. *Id.* at 498.

461. *See* note 133, *supra*.

462. *Verlinden B.V.*, 461 U.S. at 493.

463. *Nat’l Mutual Ins. v. Tide-Water Transfer Co.*, 337 U.S. 582 (1949).

464. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

465. *See* James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925 (2004).

2. *The corporation cases*

The antebellum corporation cases are wrong, but not because Congress lacked the power to provide a neutral federal court forum to counteract potential local biases for or against corporations. The problem was that Congress did not exercise that power. Whether the diversity privilege should be extended to corporations is a difficult policy decision. Proponents argue that it is necessary for a level playing field; opponents argue that it provides business interests with special preferences.⁴⁶⁶ The Supreme Court claimed that it was adopting the former policy and invented a legal fiction to override the statutes that Congress enacted. These are policy decisions for Congress to make. The Necessary and Proper Clause vests Congress, and not the Supreme Court, with the authority to vest the lower federal courts with jurisdiction beyond the Article III enumerations.

The separation of powers issue concerning corporations and the diversity jurisdiction was changed in 1958, when Congress declared that a corporation is a citizen of the States of its incorporation and principal place of business. This statute apparently responded to uncertain case law on the locus of corporate citizenship by creating the curious but pragmatic concept of dual state citizenship.⁴⁶⁷ Of course, Congress does not have the power to naturalize corporations or other business entities. But the statute represents a policy decision by Congress to apply federal court jurisdiction to cases that present the potential of local biases. Congress's aggregate power over interstate relations justifies extending the diversity jurisdiction to corporations.

3. *Osborn*

As discussed previously in Section I.G.3 of this Article, the *Osborn* decision is untenable as written. However, the situation confronting the Bank seemed to present an attractive case for protective jurisdiction. When Congress chartered the Second Bank of the United States, its advocates had substantial cause to anticipate biased fact-finding and applications of the law from state court judges and juries.⁴⁶⁸ By the time

466. See HART & WECHSLER, *supra* note 36, at 1530–31.

467. See *id.* at 1536. The Class Action Fairness Act is another example of a jurisdictional statute that resolved these competing policies in favor of corporations. See Pub. L. No. 109–2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1711–1715 (2012)).

468. The 1791 congressional vote on the First Bank's charter divided on North-South lines. Lingering hostility towards the First Bank was a factor in the failure of Congress to renew its charter in 1811. (That renewal was defeated in the Senate by the casting vote of Vice President George Clinton, whose Anti-Federalist credentials

that *Osborn* was before the Supreme Court, this potential became a reality. State-based assaults became so draconian that the Bank sorely needed the neutral forum of the federal courts as protection against hostile state legislatures and biased state tribunals.⁴⁶⁹ This rationale has frequently been advanced to explain *Osborn*.⁴⁷⁰

If a theory of protective jurisdiction (including the one presented in this Article) was so clearly applicable to the problems encountered by the Bank, why did not Marshall rely or even mention it?⁴⁷¹ Perhaps because holding in favor of the Bank on the basis of protective jurisdiction would have exposed the separation of powers issue that Marshall attempted to elide. Whether Congress had the protective power to vest the federal courts with jurisdiction over all cases in which the Bank was a party is a separate question from whether Congress had exercised that power.

There were two direct ways in which Congress could have protected the Second Bank from state court prejudices: (1) providing for exclusive federal court jurisdiction in all cases in which the Bank was a party; or (2) providing for original federal court jurisdiction in cases brought by the Bank and authorizing the Bank to remove cases brought against it in state court. The charter did neither. The “sue and be sued” clause did not refer to jurisdiction and, most significantly, did not interfere with common law contract, tort, or property actions against the Bank in state courts. The clause specifically codified the Bank’s capacity to be sued “in all state

stretched back to the 1788 ratification debates.). In the wake of the difficulties he encountered in funding the War of 1812, President Madison and other notable opponents of the First Bank came to realize that its demise was a huge mistake. Hostility to a national bank was substantially reduced but still dominant in pockets when Congress chartered the more powerful Second Bank in 1816. Two state constitutions were quickly amended to prohibit branches from being established. See Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 965–66 (1982).

469. The Second Bank enjoyed a brief period of greater acceptance, but overt and passionate state-based hostility towards the Bank erupted and spread in the wake of the Bank’s role in aggravating the national economic downturn starting in 1818. Six more States enacted legislation that threatened the Bank’s ability to operate in those jurisdictions. *Id.* at 966. As for the potential biases of state court judges, recall that Spencer Roane, the Chief Judge of the Virginia Court of Appeals, was one of the most strident opponents of the Bank and of national authority in general.

470. See Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 187–88 (1953); Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 373 (2002); Seinfeld, *supra* note 88, at 1414–15; Vásquez, *supra* note 121, at 1737–39.

471. Justice Frankfurter raised this question in challenging Professor Wechsler and Mishkin’s theories of protective jurisdiction. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460–84 (1957) (Frankfurter, J., dissenting).

courts having competent jurisdiction,”⁴⁷² and nothing in the charter or any other federal statute authorized the Bank to remove state court actions.⁴⁷³ The simple fact is that Congress did not enact a policy of protecting the Bank from the capricious behavior of state court judges and juries.⁴⁷⁴ By writing an opinion that concentrated on the Bank’s right to sue in federal circuit courts, Marshall avoided dealing with the problem at the core of protective jurisdiction—what happens when the Bank is sued in state court? Under the statutes then in effect, the dispositive law and facts would be decided by local judges and juries.

As in the antebellum corporation cases, the Supreme Court applied its own conception of public policy to expand federal court jurisdiction. However, by protecting the Bank as much as it could, Marshall’s court may have performed an act of “statesmanship.”⁴⁷⁵ That saving grace was not present in the antebellum corporation cases—or in *Osborn*’s progeny.

4. *Railroads, the Red Cross, and federal officers*

Suppose you are an attorney who is asked which of the following appear to be strong cases for federal court jurisdiction:

Case A: The congressional charters for intercontinental railroads provide that the corporations can sue and be sued in federal and state courts. A common law contract action is filed against one of the railroads in state court. There is no diversity. The railroad removes the case to federal district court under 28 U.S.C. § 1441 (a), which authorizes removal of any case over which the federal court would have original jurisdiction.

Case B: The congressional charter for the American National Red Cross provides that the charity can sue and be sued in any federal or state court. A slip and fall action is brought against the Red Cross in state court. Again, there is no diversity. The Red Cross removes the case to federal district court under § 1441 (a).

Case C: A federal tax collector is prosecuted for assault and battery in state court. The incident giving rise to the prosecution occurred while the defendant was investigating possible tax evasion. The tax collector removes the case to federal district court under 28 U.S.C. § 1442(a)(1), which authorizes the removal of any civil or criminal

472. Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269.

473. The general civil removal statute was enacted in 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

474. *But see* Segall, *supra* note 470, at 383 (asserting that Congress explicitly provided for federal court jurisdiction over all cases involving the Bank).

475. Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 405–06 (1936).

action against an officer of the United States for any act “under color of such office.”

Unless you have mastered the esoteric doctrines of federal court jurisdiction, you would probably think that Case C presents a strong case for federal court jurisdiction and that Cases A and B are very weak. The federal officers’ removal statute explicitly vests federal court jurisdiction, and local biases against federal officials acting under color of their authority have arisen throughout American history. On the other hand, the railroad and Red Cross charters did not contain explicit grants of federal court jurisdiction. One would also think that mega-corporations such as the inter-continental railroads could take care of themselves in state court. And the Red Cross needs special protection? Has a more sympathetic party existed? Even under a rational basis standard, the supposition that Congress was concerned that the Red Cross might be victimized in the state courts strains credulity.

If you thought the Supreme Court would have ruled these ways, you would be wrong. According to precedent, there would be no jurisdiction in Case C⁴⁷⁶ but jurisdiction in Case A⁴⁷⁷ and Case B.⁴⁷⁸ These seemingly upside-down results were reached as follows:

In the federal officers’ removal case, the Court applied a two-part formula. The first part narrowly construed the Article III arising under jurisdiction. A jurisdictional statute cannot by itself make a case arise under federal law; if there is no federal law defense, there does not appear to be any federal question. Consequently, the theory of protective jurisdiction, as applied to the enforcement of the removal statute as written, would raise “grave constitutional problems.”⁴⁷⁹ The second part of the formula narrowly interpreted (or rewrote) the removal statute to require the assertion of a federal defense, which avoided this constitutional problem.

The Court reached the opposite result in the railroad and Red Cross cases by using an exactly contrary two-part formula that was inspired by *Osborn*. Instead of narrowly construing the statutory and constitutional grants of jurisdiction, the Court broadly construed each. Thus, the first part of this formula converted charter “sue and be sued” clauses from simple affirmations of corporate juridical capacities into statutes vesting subject-matter jurisdiction. The second part of the

476. *Mesa v. California*, 489 U.S. 121 (1989).

477. *Pac. R.R. Removal Cases*, 115 U.S. 1 (1885).

478. *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247 (1992).

479. *Mesa*, 489 U.S. at 137.

formula broadly construed the Article III arising under jurisdiction: all common law actions by or against federally chartered corporations were deemed automatically to arise under federal law.⁴⁸⁰

The inter-continental railroad decision was a “triumph of mechanical logic.”⁴⁸¹ So too were the Red Cross and federal officers’ removal decisions.⁴⁸²

The approach presented in this Article rejects the oft-stated but never applied principle that Congress’s power over federal court jurisdiction is limited by the enumerated Article III categories. The Constitution vests the national government with the aggregate power to resolve and prevent conflicts between the States and between the States and the United States. When Congress acts to redress potential state court biases against non-residents or federal entities, that legislation appropriately effectuates that aggregate power. Focusing on aggregate powers and their underlying constitutional purposes, instead of the specific enumerations in Article III, sets the extent and limits of Congress’s power to vest protective jurisdiction in the federal courts.

D. *The Economic Union*

Hamilton’s aggregate fiscal power was based on a combination of the enumerated powers to collect taxes, borrow money on the credit of the United States, coin money, determine its value and the value of foreign coin, and dispose of and regulate the property of the United States. This aggregation is too modest because the economic powers vested in Congress include every element of a national fiscal, monetary, commercial, and customs union.⁴⁸³ The powers to lay and collect taxes and borrow money on the credit of the United States were foundations for a national fiscal policy. A national monetary policy was provided in Congress’s exclusive powers to coin money and set the value of all money. Congress’s plenary power to regulate foreign commerce authorized national standards for imports and exports of goods and services. The interstate and foreign commerce powers not only provided for national regulatory standards, but also gave Congress the

480. See *supra* notes 130–33 and accompanying text.

481. Shulman & Jaegerman, *supra* note 475, at 405–06.

482. Professor Weinberg calls the Red Cross decision an “intellectual muddle.” Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, 801. She is more sympathetic to the specific result in *Mesa* because the federal employees in that case did not make a claim of bias. *Id.* at 807. But Congress typically enacts over-inclusive laws to protect federal interests, and potential state court bias cannot realistically be ferreted out on a case-by-case basis.

483. See *supra* notes 383–85 and accompanying text.

power to nullify protectionist practices of the States. Only Congress could impose tariffs and duties on imports, and those tariffs and duties must be uniform throughout the United States. The prohibition of all state taxes on interstate transactions established a national customs union. And the Privileges and Immunities Clause guaranteed that citizens who travel to another State would have the same rights to live and work there as the citizens of that State.⁴⁸⁴ The creation of a national economic union was an astonishing accomplishment of the Convention,⁴⁸⁵ and this is the fourth aggregate power of the United States.

The old British Empire again provided a model for the Constitutional Convention in establishing an economic union. England and Scotland had been independent nations, governed by their own parliaments and subject to the superintending prerogative powers of a common monarch. The 1707 Acts of Union consolidated these nations into the United Kingdom governed by the King-in-Parliament at Westminster.⁴⁸⁶ Members of the Convention were knowledgeable of and influenced by the Scottish experience,⁴⁸⁷ from which they could draw negative and positive lessons. On the negative side, the elimination of the Scottish Parliament and the consolidation of the two nations extinguished Scottish autonomy. Scotland was allowed only forty-five members in the House of Commons.⁴⁸⁸ Through an inexorable process of legislation Parliament reduced Scotland to a subordinate province, which reinforced the Convention's commitment to federalism.⁴⁸⁹ However, the Acts of Union also provided a positive model for economic integration. All subjects of the Kingdom were guaranteed equal freedom of movement and rights of commerce, trade and navigation.⁴⁹⁰ With temporary exceptions during the transition to consolidation, the same regulations, prohibitions, and

484. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J.); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–55 (1982).

485. It is astonishing given that the individual colonies and States had independent authority over tariffs, duties, money and commerce for more than a century prior to the Convention.

486. The treaty was executed through the Union with Scotland Act 1706, 6 Ann, c. 11 (Eng.), and the Union with England Act 1707, c. 7 (R.P.S.) (Scot.) [collectively hereinafter ACTS OF UNION]. See J.D. Ford, *The Legal Provisions of the Acts of Union*, 66 CAMBRIDGE L.J. 106, 106 (2007).

487. See Pfander & Birk, *supra* note 219, at 1631–42.

488. ACTS OF UNION, *supra* note 486, art. XXII.

489. LACROIX, *supra* note 185, at 120–24.

490. ACTS OF UNION, *supra* note 486, art. IV.

restrictions of commerce and trade applied to both parts of the Kingdom.⁴⁹¹ Direct taxes would be based on a formula of proportionality, and excise taxes and customs and duties on imports and exports would be uniform throughout the Kingdom.⁴⁹² A common currency (the English coin) and its value would apply to the entire Kingdom,⁴⁹³ as would the same standards of weights and measures.⁴⁹⁴ The Acts of Union contained every element for a fiscal, monetary, customs, and commercial union, and these are almost precisely the provisions for economic union contained in the Constitution.⁴⁹⁵

The aggregate power of the United States to establish and maintain a national economic union can explain the validity of the Bank of the United States as an implied national power. Central fiscal and monetary policies are integral components of a complete economic union. Hamilton emphasized to Congress the intimate relation of the Bank to commerce and how the nation's fiscal powers could be used to increase the commerce and wealth of the United States.⁴⁹⁶ The Bank expanded national power by operating in a way that Congress could

491. *Id.* art. VI.

492. *Id.* arts. VII, VIII.

493. *Id.* art. XVI.

494. *Id.* art. XVIII.

495. The one exception was the prohibition on export taxes—a concession to the South. The Constitution does not require that all laws regulating interstate and foreign commerce must be uniform throughout the nation. However, navigation was the primary conduit of interstate and foreign commerce, and the prohibitions of duties on the interstate coastal trade and of regulatory or taxation preferences for “the Ports of one State over those of another” effected a substantial degree of uniformity. U.S. CONST. art. I, § 9, cl. 6.

496. In his report to the House of Representatives, Hamilton stressed the “two fold evidence” of why national banks were important: “[t]rade and industry, wherever [national banks] have been tried, have been indebted to them for important aid,” and national banks have assisted governments to overcome “dangerous and distressing emergencies.” Alexander Hamilton, Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Dec. 13, 1790), in 7 HAMILTON PAPERS, *supra* note 165, at 306 [hereinafter Hamilton, Report on a National Bank]. Hamilton told Congress that the Bank was needed to redress the most serious problem in the nation's economy—the dispersion and consequent shortage of money that could be used for productive purposes. The Bank's consolidated capital would “augment[] . . . the active or productive capital of a country” and have a multiplier-effect on trade and commerce. *Id.* “Banks in good credit can circulate a far greater sum than the actual quantum of their capital in Gold & Silver.” *Id.* at 307. And a profitable Bank would be a magnet for foreign investment in American industry. *See id.* at 309. *See also* Knox v. Lee, 79 U.S. (12 Wall.) 457, 537 (1870) (stating that the commerce power was employed in establishing the Bank).

not: as a private bank, it could make for-profit loans that were unrelated to any governmental transaction.⁴⁹⁷ Cumulatively, however, the Bank's loans could help realize the Federalists' vision of a prosperous economic union: "[B]y contributing to enlarge the mass of industrious and commercial enterprises, banks become nurseries of national wealth."⁴⁹⁸

An economic union also requires an effective national currency. The necessity of using paper money as that currency first became evident during the Civil War, when the Treasury quickly ran out of specie to support the war. That necessity continued into the post-war era when the economy grew at such an exponential rate that the United States surpassed Great Britain in having the largest economy in the world. This national economy could not be adequately supported by an insufficient supply of precious metals. The only pragmatic solution was to use paper money as the national currency. And for the currency to be credible and effective, it had to be backed by the credit of the United States as legal tender for all private and public debts. The legal tender cases present a second example of Congress using an implied power to maintain and enhance the economic union. In creating the Bank and in issuing paper money as legal tender, Congress was "carry[ing] into execution" powers "vested by this Constitution in the Government of the United States."

CONCLUSION

The specific enumerated powers of the national government are not separate grants of self-contained powers. In combination, they create four clusters of comprehensive powers in the national government—common defense, foreign policy, national and interstate relations, and economic union. These aggregate powers are "ends" or "objects" of national power, and the enumerated and implied powers of Congress can be "means" that are necessary and proper to effectuate those ends.

The theory presented in this Article explains the constitutional validity of certain non-enumerated national powers and of congressional legislation that has been used to carry those powers into effect. This aggregate view of the enumerated powers also respects

497. In *Osborn*, Ohio argued that it should be able to tax those for-profit transactions of the Bank that were not related to any governmental function or activity. Marshall's answer was that, pursuant to the Necessary and Proper Clause, those loans were integral to the Bank's ability to become a powerful institution and consequently more effective fiscal agent of Congress. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 861–64 (1824).

498. Hamilton, Report on a National Bank, *supra* note 496, at 309.

federalism by acknowledging the supremacy of national power in four discrete areas of essential importance to the Union. But if this theory is correct, other important issues are left open: Are other non-enumerated national powers (such as plenary congressional regulation of Native American tribes and federal sovereign immunity) justified as aggregate or implied powers? Are there deeper implications of this theory for the separation of powers? As related to the national economic union, would this theory expand or contract congressional power? How should the theory be reconciled with the enormous changes that have occurred in the national (and international) economy? What are the impacts of the Civil War Amendments, which profoundly changed federalism? Should the five clauses of Sections 1 and 5 of the Fourteenth Amendment be construed in the aggregate as creating an additional cluster of national power? These issues raise promising avenues for future scholarship.