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SOLA SCRIPTURA: SLAVERY, FEDERALISM AND THE TEXTUAL POWER TO PROVIDE FOR THE GENERAL WELFARE

Calvin H. Johnson[*t]

In the Virginia Ratification Convention, Patrick Henry opposed ratification on the ground that, by adopting this Constitution, the non-slave eastern states could and surely would end slavery.[1] Under this Constitution, Henry said, Congress could declare slavery to be against the general welfare using the Constitution's language that Congress may provide for the general welfare[2] and then free the slaves. Congress would also impose a tax on slaves so high as to amount to manumission,[3] and could also enlist slaves in the army and hence free them.[4] "We ought to possess

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[*] John T. Kipp Chair, University of Texas Law School. The author thanks Jonathan Gienapp, David Schwartz, and Scott Powe for helpful reads and suggestions, and to the helpful comments from the University of Texas Drawing Board series, and from the Conlawprof blog.

[t] Short form citations to frequently cited collections are collected for the convenience of the reader in an appendix.

[1] Debates in The Virginia Convention (June 17, 24, 1788), *in* 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1338, 1341, 1476 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DHRC].

[2] *Id.* at 1476.

[3] *Id.* at 1342; *see* Hylton v. United States, 3 U.S. (3 Dall.) 171, 182 (1796) (allowing a federal tax on carriages under a rationale that would allow a federal tax on slaves). Neither a requirement that taxes be uniform, nor apportionment of direct tax among the states would bar a prohibitive tax on slaves. George Mason, Debates in the Virginia Ratification Convention (June 17, 1788), *in* 10 DHRC, *supra* note 1, at 1342–43 (saying that Federalists misconstrued the apportionment clause and that Congress could choose to enact prohibitively high tax on slaves); William Grayson, Debates in the Virginia Ratification Convention (June 12, 1788), *in* 10 DHRC, *supra* note 1, at 1184, 1185–86 (arguing uniform rates do not prevent Northern States from laying a tax on slaves). Congress did in fact impose a tax of fifty cents per slave in 1798—about the value of a slave's work for a day under prevailing Southern wages, crediting the tax against the state's quota under an apportioned requisition. *See* Act of July 14, 1798, 1 Stat. 597, 598 (1798).

[4] Patrick Henry, Debates in the Virginia Ratification Convention (June 24, 1788), *in* 10 DHRC, *supra* note 1, at 1476. For expressions contemporaneous with the consideration of the Constitution of the principle that slaves once serving in the army were to be freed, *see, e.g.*, Letter from Alexander Hamilton to John Jay (Mar. 14, 1779), *in* 2 THE PAPERS OF ALEXANDER HAMILTON, 1779–1781, at 17–19 (Harold C. Syrett ed., 1961) (proposing to enlist slaves in the Continental Army so as to "give them their freedom with their muskets"); Arabas v. Ivers, 1 ROOT 92 (Conn. Super. Ct. 1784) (holding, over the master's objection, that a slave who had served in the Continental Army was free, by implied contract); WILLIAM

[slaves] in the manner we have inherited them from our ancestors," Henry said, "as their manumission is incompatible with the felicity of the country."[5]

Patrick Henry was wrong that Americans were ready to force emancipation—until the Union troops began to sing "John Brown's . . . soul goes marching on" near the start of the Civil War,[6] but Henry was right that the Constitution gave Congress the tools to abolish slavery by ordinary legislation immediately, that is, by tax, by enlistment, and under the general welfare power, had a majority of American white men had the will to do so. Abolitionist William Lloyd Garrison called the Constitution a covenant with death,[7] but it is the white Americans as a whole, and not the parchment, that bears the sin.

This Article argues specifically that under the text of the Constitution, Congress has the general power to provide for the welfare through tax and any other necessary and appropriate means.[8] Clause 1 of the description of powers of Congress in Article I, Section 8, gives Congress the power to tax and spend to provide for the common defense and general welfare.[9] Common defense and domestic welfare are parallel in the text and equally plenary, subject only to restrictions protecting individual rights. The final clause of Section 8 then allows Congress to reach the goal of

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WALLER HENING, XI THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 308–09 (1823) (freeing slaves who had enlisted in army in Virginia); BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 51–67 (1996) (describing slave enlistment in the Revolutionary War).

[5] Patrick Henry, Debates in the Virginia Ratification Convention, *in* DHRC, *supra* note 1, at 1477.

[6] According to George Kimball, *Origin of the John Brown Song*, 7 NEW ENG. MAG., 1889, at 374, the marching song was written informally by a Massachusetts battalion in 1861.

[7] Letter from William Lloyd Garrison to Rev. Samuel J. May (July 17, 1845), *in* 3 THE LETTERS OF WILLIAM LLOYD GARRISON 303 (Walter M. Merrill & Louis Ruchames eds., 1973).

[8] Prior pieces making an argument that Congress has the general power to provide for the general welfare include CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATE: THE MEANING OF THE FOUNDERS' CONSTITUTION 116–21 (2005) [hereinafter JOHNSON, RIGHTEOUS ANGER]; Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005) [hereinafter Johnson, *The Dubious Enumerated Power Doctrine*]. Closely allied arguments include David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 573 (2017) (arguing that "capable federalism" under the Constitution gives Congress full power to address all national problems); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014) (arguing that the Necessary and Proper Clause gives Congress power beyond enumerated clauses); Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 183–89 (2020) (earliest debates did not assume enumerated clauses were exhaustive); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2004 (2021) (delegates to the Federal Convention did not view the enumerated powers as a limitation on Congress).

[9] U.S. CONST. art I, § 8, cl. 1.

general welfare by any necessary and appropriate means, that is, by the lesser auxiliary powers beyond tax. The constitutional text is a loyal codification of the binding resolutions previously passed on the floor of the Constitutional Convention, which for this issue provided that the Congress would be able to *legislate* in any case for the general interests of the Union. Close reading of the text—combined with the drafting history now available, and the evidence of the expressed rationale for the text—supports the argument that the general power in the Constitution provides for the general welfare including the power to abolish slavery. If we are to treat the constitutional text alone, *Sola Scriptura*, as the exclusive source of constitutional authority, then Congress has the general power to provide for the general welfare.

The power to end slavery under Congress's power to provide for the general welfare, or indeed by any other tool, was anathema to the South. James Wilson in a speech in front of Independence Hall, shortly after the Constitutional Convention broke up, told the crowd that the Congress would have only enumerated powers, but no general power.[10] The South took up this [mis]description to save slavery: Charles Pinckney told the South Carolina legislature sitting as ratifying convention, that Congress had only powers "expressly delegated" to it, which did not include the power to end slavery.[11] Pinckney was in error. The enumerated power doctrine was discussed and defeated in the Constitutional Convention. The doctrine was included in a Pinckney proposed draft of the Constitution that went nowhere. The Committee of Detail, which by Edmund Randolph had written the first draft of the Constitution, used the Articles of Confederation as a first draft of powers, and then added to it, but the Committee had taken out the limitation that Congress had only the powers "expressly delegated" because the limitation had proven "destructive to [the Union]."[12]

To the North, the Constitution was more important than the abolition of slavery. As Roger Sherman of Connecticut put it, let us "leave the matter as we find it," and "dispatch [to our business]."[13] The Constitution was desperately needed to pay the war debts of the Revolutionary War and continuing payments were necessary because in the coming wars Congress would need to borrow again.[14] If the South did not ratify, the Constitution could not get the requisite three-quarters of the states necessary for the document to go into effect anywhere. So, the North acquiesced in the enumerated powers doctrine.

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[10] James Wilson, Address to a Meeting of the Citizens of Philadelphia on Oct. 6, 1787, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 101 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

[11] Charles Pinckney, Speech to the South Carolina House of Representatives (Jan. 16, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 253, 259 (Jonathan Elliot ed., 1891) [hereinafter ELLIOT'S DEBATES].

[12] Edmund Randolph, Speech at the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 601.

[13] 2 FARRAND'S RECORDS, *supra* note 10, at 369–70 (Madison's Notes, Aug. 22, 1787).

[14] See discussion in text accompanying *infra* notes 90–100.

So the enumerated powers doctrine prevailed, and the written general welfare power disappeared. There is, what Karl Mannheim called "the Sociology of Knowledge,"[15] which applied here means that politics overrides reading. Thomas Jefferson, elected in what he rightly called the Revolution of 1800, believed the federal government should be confined to foreign affairs and leave all domestic matters to the state.[16] At Jefferson's instigation, Congress repealed the 1798 federal tax of 50 cents per slave.[17] Jefferson said that "[O]ur tenant ever was, and, indeed, it is almost the only landmark which now divides the federalists from the [Jeffersonian] republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated."[18] By the time of Justice Marshall's 1819 opinion in *McCulloch v. Maryland*,[19] if not before, the enumerated powers doctrine had become the established understanding by consensus.

The competition between a general "general welfare" power in the text of Constitution and a narrower list of national powers remains to this day beyond the power over slavery. Indeed, the power to end slavery may no longer matter, so it is now only on the other issues that the battle between the general welfare power in the text and the nontextual enumerated powers limitation matters. Still, preservation of slavery was the most important issue of limiting the federal government from the founding through to the Civil War, and indeed preservation of Jim Crow restrictions was the primary states' rights issue beyond the Civil War.[20]

Proponents of "strict construction" often claim that the text of the Constitution keeps the federal government within the narrow corral of the fairly modest list of enumerated powers. The text of the Constitution, however, grants Congress the power to legislate for common defense and general welfare.[21] Constitutional doctrine has in fact not ever been restricted to reading text alone. The "Protestant" mode of interpretation is "*Sola Scriptura*,"—God speaks only the written scripture.[22] Our constitutional practice in fact is a more Catholic mode, which includes tradition and common law-like evolution as part of the binding interpretation.

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[15] KARL MANNHEIM, IDEOLOGY AND UTOPIA 67 (Louis Writh & Edward Shils trans., 6th ed. 1952).

[16] Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 62.

[17] Act of Apr. 6, 1802, ch. 19, 2 Stat. 148 (1802).

[18] Letter from Thomas Jefferson to Albert Gallatin (June 6, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON 70, 72 (Paul Leicester Ford ed., 1905).

[19] 17 U.S. (4 Wheat.) 316 (1819).

[20] Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 63.

[21] U.S. CONST. pmbl.

[22] *See, e.g.*, KEITH MATHISON, THE SHAPE OF SOLA SCRIPTURA 13 (2001) (Calvinist theologian contrasts the history of the Protestant mode, *sola scriptura*, and Catholic interpretations which allow room for tradition, but advocates a role for faith in interpreting the text). The Protestant Reformation was premised on the binding authority of scripture alone in that the Scripture gave no authority for the corruption of indulgences, nor for purgatory, nor a special role for a clergy, nor for celibacy of clergy, nor for male-only clergy, nor for a Pope.

Still, within the Protestant mode, the enumerated powers limitation is a corruption of the text, departing from the scripture, not unlike the indulgences, purgatory, or other things that the Protestants objected to of the Catholic Church, including, especially, a Pope. The claim that the Constitution limits Congress more narrowly than "for the general welfare," is not part of the original, Protestant-mode constitutional *Sola Scriptura*.[23] Restrictions on federal power, accordingly, do not rest on some higher Protestant source of authority than, say the guarantee of rights of unpopular minorities; they are equally legitimate under doctrine and history. If, moreover, the "precise wording of the constitutional text" is the most important factor in constitutional jurisprudence,[24] then this Congress may provide for the general welfare by any appropriate means. The constitutional scripture belongs to the "radical nationalists."[25] The "Framers," who participated in the writing of the text and the "Founders" who pushed the Constitution through to ratification were themselves radical nationalists because they bought into a radically nationalist text.

I. TEXT: THE PLENARY POWER OVER THE GENERAL WELFARE

The text of the Constitution gives Congress the broad power to provide for the general welfare. That is the best reading of the text, as explained in this section, because, first, the power to provide for the general welfare is parallel in text to the power to provide for the common defense, and the power over common defense is considered plenary. Second, the text is a faithful codification of the binding resolution from the floor of the Convention that stipulates Congress may legislate in all cases for the general interests. Third, Article I, Section 8, Clause 18 supplements the Clause 1 power to tax with the power to use all necessary and proper tools. Powers beyond tax were considered lesser, properly auxiliary powers. Fourth, the power to tax for the general welfare is not a preface, aspirational but ignorable, but in fact gives power to Congress for the general welfare. Fifth, under the earliest descriptions, the border between state and national governments would be set by politics. Lastly, constitutional interpretation over its history has swung from keeping the national government within a narrow corral, to an expansive allowance, and perhaps now back, without however any change in the constitutional text.

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[23] *See id.* (explaining that *Sola Scriptura* rests on "scripture alone," so as to not include outside interpretations).

[24] Brett Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1908 (2014) (saying that the precise wording of the constitutional text is the "anchor, the magnet, the most important factor" in constitutional jurisprudence).

[25] Alden v. Maine, 527 U.S. 706, 725 (1999) (calling James Wilson a "radical nationalist"). Wilson is probably the second most important delegate to the Constitutional Convention, although far behind Madison.

One implication from the textual power to tax for the common defense and general welfare is that Congress necessarily can spend the tax money it raises for the same common defense and general welfare. Just collecting money, but not spending it, would further neither common defense nor general welfare.[26]

A. General Welfare and Common Defense of Equal Weight

The text of the Constitution, Clause 1 of Section 8 of Article I, pairs the power to provide for the common defense with the power to provide for the general welfare.[27] From the beginning, the power to provide for the common defense was considered to be an unlimited power.[28] The power to provide for the common defense, one J. Choate told the Massachusetts ratification convention, "can be no other than an unlimited power of taxation, if that defence requires it."[29] "Wars have now become rather wars of the purse than of the sword," Oliver Ellsworth told the Connecticut convention: "A government which can command but half its resources is like a man with but one arm to defend himself."[30] Similar expressions are legion and uncontested.[31] Even ardent advocates of states' rights believed that Congress should have enough power to "call out . . . the common strength for the common defense."[32]

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[26] United States v. Butler, 297 U.S. 1, 65 (1936) (holding that the power to tax for the general welfare includes the power to spend for the general welfare lest the words be meaningless).

[27] U.S. CONST. art I, § 8, cl.1.

[28] *See infra* notes 29–32 and accompanying text.

[29] J. Choate, Speech in the Massachusetts Ratification Convention (Jan. 23, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 79.

[30] Oliver Ellsworth, Speech in the Connecticut Ratification Convention (Jan. 4, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 191.

[31] *See, e.g.*, THE FEDERALIST No. 23 (Alexander Hamilton) (writing on December 18, 1787, in response to concerns about the Constitution establishing a tyrannical government: "The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed"); THE FEDERALIST No. 26 (Alexander Hamilton) (writing on December 22, 1787, confronting arguments against a federal military: "The idea of restraining the Legislative authority, in the means of providing for the national defense is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened"); THE FEDERALIST No. 30 (Alexander Hamilton) (writing on December 28, 1787, in support of a federal tax power, asking "How is it possible that a government half supplied . . . can provide for the security . . . or support the reputation of the commonwealth?"); THE FEDERALIST No. 31 (Alexander Hamilton) (writing on January 1, 1787, in support of a federal tax power: "[T]he duties of superintending the national defense and of securing the public peace against foreign or domestic violence" have "no other bounds than the exigencies of the nation and the resources of the community"); Edmund Randolph, Speech in the Virginia Ratification Convention (June 6, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 115 ("Wars cannot be carried on without a full and uncontrolled discretionary power to raise money in an eligible manner.").

[32] Letter from Thomas Burke to Gov. Richard Caswell (Apr. 29, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 672, 673 (Paul H. Smith et al. eds., 1976–2000) [hereinafter LETTERS OF DELEGATES].

Within Clause 1 of Section 8, defining the scope of Congressional power, however, common defense and general welfare are parallel, of equal weight and indistinguishable as to their intended range: If defense is an unlimited power, so too is the parallel general welfare, looking at *Sola Scriptura*.

B. "Legislate in Any Case"

The constitutional text is a restatement by a series of drafting committees of binding resolutions passed on the floor of the Constitutional Convention as a whole. The Committee of Detail, the first of the drafting committees, set out the basic framework of Section 8, although the draft was revised. The Committee of Detail was instructed to draw up language "conformable" to the Resolutions previously passed by the Convention as a whole.[33] As Washington put it, the drafting committees were to "arrange, and draw into method & form the several matters which had been agreed to by the Convention."[34] The Resolutions from the floor of the entire convention determined substance and values; the role of the drafting committees was to ensure that the substance of the resolutions were "properly dressed."[35] John Rutledge, the chair of the Committee of Detail, reported back a constitution, he said, for the establishment of a national Government that was "conformable to these [whole-Convention] Proceedings."[36]

The binding resolution underlying the Section 8 powers of Congress was in a motion by Gunning Bedford of Delaware[37] that provided Congress "could *legislate* in all Cases for the general Interests of the Union."[38] "Legislate in all cases" includes both tax and any other helpful tool.[39] Regulation and other tools were not excluded.

The Committee of Detail draft of the Constitution, as reported to the Convention as a whole, gave the legislature the power "to lay and collect Taxes, Duties, Imposts and Excises" and also the power to make all laws "necessary and proper" for carrying into execution the powers vested in the Federal Government.[40] The Committee of

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[33] 2 FARRAND'S RECORDS, *supra* note 10, at 85–87, 95–97, 126 (Madison's Notes, July 23, 1787) (describing the motion by Elbridge Gerry (July 23, 1787) for the appointment of a committee to draw up a constitution "conformable thereto [the proceedings of the Convention]").

[34] George Washington, Diary (July 27, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 10, at 65.

[35] Letter from Hugh Williamson to James Iredell (July 22, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 10, at 61.

[36] 2 FARRAND'S RECORDS, *supra* note 10, at 176 (Journal, Aug. 6, 1787).

[37] *Id.* at 26 (Madison's Notes, July 17, 1787). The Bedford Amendment passed six states to four. *Id.* at 27 (Connecticut, Virginia, South Carolina, and Georgia were the dissenting states). The Virginia Plan passed eight states to two, with the Bedford Amendment incorporated in it. *Id.* (South Carolina and Georgia dissenting).

[38] Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 131 (emphasis added).

[39] Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 69.

[40] Committee of Detail, IX, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 167–68. The

Eleven later added that taxation was to "provide for the common defense and general welfare."[41] The Committee of Eleven carried over the wording for congressional power from the Articles of the Confederation, thus calling on existing authority to add to the legitimacy of the proposed replacement Constitution.[42]

The Bedford Resolution, that Congress would have the power to legislate in any case for the general interests, is extremely probative. To know what the scrivener's text says, it helps to know what the scrivener was instructed to say, was trying to say, and what the scrivener claimed to say. The framers were trying to polish for the public the expression of the substance set by the resolution. And the text, when the necessary and proper clause is included, indeed faithfully expresses the resolution in different words.[43] The text fits the Bedford Resolution.

The proceedings of the entire Convention were secret from the public. Under the secrecy rule, the Bedford "legislate in any case" standard was unknown to the public and to the delegates to the ratifying conventions. Still, the delegates to the Convention knew the Resolution. Two of Madison's staunchest and earliest allies in favor of a radically nationalizing constitution left the convention opposed to ratification because it gave too much power of a general nature to the new government.[44] George Mason of Virginia had been a staunch Madison ally in the Virginia battles leading up to replacement of the Articles of Confederation with a national government,[45] and had been a staunch nationalist at the start of the Convention.[46] He *left* the Convention as an Anti-Federalist opponent to ratification, however, because, he said, "the [o]bjects of the National Government, [should] be expressly defined,

role of the enumeration of powers in the same Committee of Detail drafting is discussed, *infra* notes 127–223.

[41] 2 FARRAND'S RECORDS, *supra* note 10, at 497 (Journal Sept. 4, 1787) (detailing the Committee of Eleven's report).

[42] In format, the addition of "to provide for the common defence and general welfare" to the existing Committee on Detail Draft, which just said the legislature has the power to tax, can be read as an added restriction. But if so, common defense and general welfare is not a meaningful restriction and indeed this Article just argues that Congress has the power to provide for the general welfare, not beyond. Given the emptiness of general welfare as a restriction, the use of the language calls forth the existing language for precedence adding legitimacy, but otherwise accomplishing nothing is the more plausible interpretation.

[43] Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, NOTRE DAME L. REV. 2123, 2152 (2012) (arguing "the convention had *not* adopted the general structural principle of Resolution VI when they abandoned that language in favor of the enumerated powers of Article I, Section 8"). The claim for an enumerated power limitation is examined and rejected *infra* notes 127–223.

[44] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON 205, 215 (Robert A. Ruthland et al. eds., 1962–1991) [hereinafter MADISON PAPERS].

[45] NORMAN K. RISJORD, CHESAPEAKE POLITICS 1781–1800, at 87 (1978).

[46] 1 FARRAND'S RECORDS, *supra* note 10, at 34 (Madison's Notes, May 30, 1787) (stating Congress should represent people, not states).

instead of indefinite powers, under an arbitrary Constructions of general [c]lauses."[47] Governor Edmund Randolph had been the nominal mover of the strongly nationalist Virginia Plan, but refused to sign the Constitution at the end of the Convention, because "the latitude of the general powers"[48] and the "cover of general words" allowed the Congress to swallow up the states.[49] Edmund Randolph later flipped once more to become a very effective spokesman for ratification—his statement of the case for ratification is among the best of the whole ratification debate[50]—but his refusal to sign because of "general powers" and "general words" is extraordinary, given that it is his draft that did it. Randolph and Mason with their opposition, even if only initial, are reading the Constitution as giving the national government the power to provide for the general welfare.

So too, when Madison and Wilson deny that the constitutional text gives a general power to prove for the general welfare by any means as discussed below, they are contradicting the binding resolution that everyone who attended the convention knew about. Indeed, we know about the Bedford legislation only because of Madison's notes on the proceedings of the convention.[51] The decision to mischaracterize Congress's powers more narrowly than "to legislate for the general interests" is an intentional, strategic decision to counter voices like Mason and Randolph.[52]

C. The Sweeping Clause

The first clause of Section 8 grants Congress only the power to tax and so spend for the common defense and general welfare, but the final "sweeping" clause of Section 8, best read, gives Congress the power to provide for the stated goals of common defense and general welfare by other tools, "all necessary and proper means," other than taxation.[53] Current Supreme Court doctrine interprets the Necessary and Proper Clause as allowing only power to further taxation and spending without extending to other tools.[54]

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[47] George Mason, Alterations Proposed (Aug. 31, 1787), *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION 251 (James H. Hutson ed., 1987).

[48] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS, *supra* note 44, at 215.

[49] Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DHRC, *supra* note 1, at 260–69 (emphasizing the need to pay the war debts).

[50] *See, e.g.*, Edmund Randolph, Speech to the Virginia Ratification Convention (June 4, 1785), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 25–26 (saying that he would rather have his arm lopped off than have the union be dissolved).

[51] 2 FARRAND'S RECORDS, *supra* note 10, at 26 (Madison's Notes, July 17, 1787).

[52] *See generally* Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 26–28.

[53] U.S. CONST. art. I, § 8, cl. 18 (Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

[54] United States v. Butler, 297 U.S. 1, 64 (1936).

That seems to understate the original power of the Necessary and Proper Clause. Clause 18, the Ordinary and Necessary Clause, was called the "sweeping clause" in the ratification debates[55] and its power should not now be trivialized. There was no one who voiced the position in the Convention, in letters or in the ratification debate, that while tax to provide for the general welfare is allowed, regulation or other tools need nonetheless to be prohibited. Other tools beyond tax are minor auxiliary powers. Tools to effect taxation are covered by the power to tax, so that the sweeping clause most naturally means tools beyond tax to provide for the general welfare if it is not to be meaningless or redundant. Indeed, the constitutional text conforms to the Bedford Resolution to allow Congress to legislate for the general interest, as required and as the Committee of Detail asserted, only when the power to provide for the general welfare includes both tax and all other necessary and appropriate means.

Regulation would have been considered a modest auxiliary power at the time. As the Constitution was formed and debated, the words "tax" and "regulation" were commonly treated as equivalents. While a distinction between tax and regulation can be made, the distinction was not commonly made in ordinary speech at the time. "Regulation" of an item, as the Constitution was considered, commonly meant to tax it.[56] Tax on an item was commonly said to regulate it. The Framers meant the "regulation of commerce" given by the new Constitution to the Congress to allow Congress both to tax imports to suppress them or restrict the carriage to U.S. ships and also to prohibit, "embargo" imports, unless they were carried on U.S. ships.[57]

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[55] Edmund Randolph, Speech in the Virginia Ratification Convention (June 10, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 206 (referring to the Necessary and Proper Clause as the "much dreaded" sweeping clause).

[56] *See, e.g.*, Letter of Samuel Johnson to Stephen Mix Mitchell (Aug. 25, 1786), *in* 23 LETTERS OF DELEGATES, *supra* note 32, at 525 (saying the regulation of imports includes the impost, a tax on imports); Letter of John Jay, Sec'y of Foreign Affairs, to John Paul Jones (Oct. 6, 1787), *in* 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 639 (Worthington C. Ford et al. eds., 1904–1937) [hereinafter JCC] (calling proposal to tax seaman's wages a "regulation"); 2 FARRAND'S RECORDS, *supra* note 10, at 90 (Madison's Notes, July 23, 1787) (calling New York State tax on imports through New York harbor, a "regulation of . . . trade."); THE FEDERALIST NO. 7 (Alexander Hamilton) (writing on November 17, 1787, calling all state taxes on imports "opportunities which some States would have of rendering others tributary to them, by commercial regulations"); THE FEDERALIST NO. 12 (Alexander Hamilton) (writing on November 27, 1787, calling for a tax on "ardent spirits" and calling it a "federal regulation"); THE FEDERALIST NO. 22 (Alexander Hamilton) (arguing on December 12, 1787, that if the Constitution is not ratified, the states might increase their "interfering and unneighborly" regulations and pointing to the German taxes on river commerce to illustrate the danger); Rawlings Lowndes, Speech in the South Carolina Ratification Convention (Jan. 16, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 11, at 273 (calling a 1783 proposal to give Congress the power to tax imports a power "to regulate commerce").

[57] *See, e.g.*, Hugh Williamson, *Speech at Edenton, North Carolina*, N.Y. DAILY ADVERTISER, Feb. 25–27, 1788, *reprinted in* 16 DHRC, *supra* note 1, at 204–05 (saying that "the sundry regulations of commerce" will give the government power "not only to collect vast

Tax and regulation were twin tools, mentioned in the debates on regulation of commerce to effect the mercantilist goal of suppressing imports.

Once tax was given, moreover, other tools followed: if the people will trust the Congress on matters of money and revenue, Roger Sherman told the Convention that "they will trust them with any other necessary powers."[58] Taxation was treated as the whole issue by opponents of the Constitution as well. If Congress was granted the paramount power to tax, Brutus wrote in opposition to ratification of the Constitution, Congress would draw all other powers after it.[59] "The assumption of this power of laying direct taxes does, of itself," Anti-Federalist George Mason told Virginia, "entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it."[60]

Tax and spending, moreover, are very powerful tools and usually sufficient. Regulation and outright prohibition of some behavior might be a convenient tool more complete than mere taxation of the behavior, but a tax punishing some behavior at a high enough rate and spending rewarding other behavior at a high enough level should, ordinarily, allow Congress to accomplish any program. Under current doctrine, denying necessary and proper tools beyond taxation, the federal government may enact a tax on activity it cannot otherwise control.[61] It may offer money to induce the states to adopt policies the federal government itself could not impose.[62] Indeed, the fact that regulations or prohibitions for the general welfare do not add much to the power to tax and spend for the general welfare makes it more comfortable to consider other tools for providing for the general welfare as just auxiliary, within the Necessary and Proper Clause extension of the Clause 1 tax power.

Tools to effect taxation, moreover, are fully covered by the power to tax. If the sweeping clause is not empty or redundant, it gives to tools to effect a broader power, the power to provide for the general welfare and not just a tool to effect a tool. The Necessary and Proper Clause, said Justice Marshall in *McCulloch v. Maryland*, allows all appropriate means to reach constitutionally permissible ends.[63] It seems

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revenue, but also to secure the carrying trade in the hands of citizens in preference to strangers"); *see* Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 18–21 (2004) [hereinafter Johnson, *The Panda's Thumb*] (collecting expressions of intent to suppress imports by tax or embargo to give a monopoly to U.S. ships, or to penalize the British so they could be convinced to open up West Indies ports to American ships).

[58] 1 FARRAND'S RECORDS, *supra* note 10, at 342 (Madison's Notes, June 20, 1787).

[59] *Brutus I*, N.Y. J., Oct. 18, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 411, 415.

[60] George Mason, Debate in the Virginia Ratification Convention (June 4, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 29.

[61] *See generally* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[62] *See id.* at 537.

[63] 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be . . . within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end,

more natural to define the ends reached by the Necessary and Proper Clause as the broad jurisdiction to "provide for the common Defense and general Welfare" by any tool, rather than to limit the means authorized just to some tools, tax, and spending.[64] The Necessary and Proper Clause allows Congress tools for the common defense and general welfare in addition to taxation. That interpretation is also necessary to bring the constitutional text into conformity with the binding resolution it was required to restate and was in fact claimed to restate. Between Clause 1, the tax power, and Clause 18, the sweeping Necessary and Proper Clause, Congress may "legislate in all Cases for the general Interests," or synonymously, may "provide for the common defense and general welfare" by both tax and regulations.[65] Without the tools necessary and proper to provide for the common defense and general welfare, the constitutional text is not in conformity with the binding resolution allowing legislation *in any case* for the general interest.

Professor John Mikhail also argues that the phrase "all other powers" within the Necessary and Proper Clause rebuts any argument that the powers listed in the prior Clauses 1–17 are exclusive.[66] The Necessary and Proper Clause provides that Congress shall have the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[67] The "all other powers" language says that the powers just enumerated are not the only powers of the national government. There are other powers outside the enumeration, which indeed may be implied and not expressed.[68] The Founders did believe in at least some implied powers beyond what was expressed, and they defeated attempts to limit the federal powers to those that are expressed.[69] Without disparaging Professor's Mikhail's argument, I find the linking of general welfare with plenary common defense in the first clause of Section 8, the triviality of the distinction between tax and regulation at the time, the defeat of enumeration on the floor of the Convention, and the mandatory Bedford Resolution to be more persuasive. The deletion of "expressly delegated" also says that the Framers did not want the powers listed to be exclusive.

In 1830, Madison feared that the Necessary and Proper Clause would transform the Taxation Clause into a justification for achieving the common defense and general

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which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[64] U.S. CONST. art. I, § 8, cl. 1.

[65] 2 FARRAND'S RECORDS, *supra* note 10, at 26 (Journal, July 17, 1787); Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 131.

[66] John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1084 (2015).

[67] U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

[68] Mikhail, *supra* note 66, at 1084.

[69] *See infra* notes 142–45 and accompanying text (detailing Randolph's argument for implied power over passports and implied power to enforce requisitions).

welfare by any instrument.[70] By 1830, Madison had hardened into a Jeffersonian, dedicated to narrow constraints on the national governments. Madison dreaded the interpretation that the Necessary and Proper Clause would expand federal power beyond the enumerated powers because it would lead to plenary national government—and no protection for slavery from a Congressional majority—but he could see no viable stopping point once taxation was allowed for the common defense and general welfare.[71] The interpretation that Madison dreaded in 1830 is in fact faithful to the text and grand design of the Constitution: indeed, Madison's grand design until he denied his masterwork.

D. Not a Preamble

The words, "common defence" and "general welfare" also show up in the preamble to the Constitution. The Preamble states that "We, the People" establish this Constitution "to form a more perfect Union, establish Justice, insure domestic Tranquility, *provide for the common defence, promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity. . . ."[72] The preamble describes the aspirations and spirit of the Constitution, but it has never been found to have a legal effect. It neither gives enforceable rights to individuals, for instance, to have "domestic tranquility" or the "blessings of liberty," nor gives the federal government any extra powers.[73] Clause 1 of Section 8 is not a preamble, however, it is the first listed power of the new government, which gives legal power to provide for the general welfare.[74]

E. The Political Authority over General Welfare

"*General* welfare" needs to be understood, as it was when the Constitution was drafted, as meaning issues that were appropriately national, dealing with the union and many states, and excluding issues of a purely local nature. Before the language settled on calling the new government the federal government or national government, the new government was commonly called the "general government," implying that "general" and "national" were synonyms.[75] The Federalist participants in the

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[70] Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *in* 2 THE FOUNDERS CONSTITUTION 453, 457–58 (Philip B. Kurland & Ralph Lerner eds., 1987).

[71] James Madison, Speech to the Virginia Ratification Convention (June 24, 1788) *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 620–22.

[72] U.S. CONST. pmbl. (emphasis added).

[73] Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (describing how the preamble is not the source of any substantive power conferred on the government of the United States); I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833) (describing that the preamble is not the legitimate source of any implied congressional powers).

[74] U.S. CONST. art. I, § 8, cl. 1.

[75] *See, e.g.*, Federal Farmer, *Letter I*, *in* Observations Leading to a Fair Examination of

ratification debate described the Constitution they advocated for as making a national government "competent to every *national* object,"[76] as "combining our whole force, and, as to *national purposes*, becoming one state,"[77] as unanimously reflecting the belief that a federal government "should comprehend all Things of common federal Concern,"[78] and as giving Congress whatever objects of government extend "beyond the bounds of a particular state."[79] The first draft of the Constitution, written in the Committee of Detail in the handwriting of Governor Randolph, stated Clause 1 as allowing taxation for the "necessities of the *union*."[80] Replacement of the "necessities of the union" in Clause 1 with "to provide for the general welfare" occurred only in a later drafting committee, the Committee of Eleven, as argued above, simply because the "provide for the common defence [and] general welfare" clause repeated the language from the Articles and thus drew from the existing Articles.[81] Bedford, explaining his successful motion giving power "to legislate in all cases for the general interest," said it was "not more extensive or formidable" than giving federal power where the states were incompetent, because "no State [was] separately competent to legislate for the general interest of the Union."[82]

"General" is not a word of effective limitation. It means "involving, or affecting, all, or nearly all." It means "completely or approximately universal within implied limits" as "opposed to partial or particular."[83] Madison said the general regulations

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the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican, *reprinted in* 14 DHRC, *supra* note 1, at 24–25 [hereinafter Federal Farmer] (arguing to let the "general government" have power extending to all foreign concerns, while leaving internal police of the community exclusively to the states); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955) [hereinafter JEFFERSON PAPERS]; *Brutus II*, N.Y. J., Nov. 30, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 524, 526; Federal Farmer, *Letter III*, *reprinted in* 14 DHRC, *supra* note 1, at 30, 34, 36–37, 40.

[76] John Jay, *An Address to the People of the State of New York, on the Subject of the Constitution, Agreed upon at Philadelphia, the 17th of September, 1787*, N.Y. PACKET, Apr. 15, 1787, *reprinted in* 17 DHRC, *supra* note 1, at 101, 111 (emphasis added).

[77] Oliver Ellsworth, Speech in the Connecticut Ratification Convention (Jan. 4, 1787), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 186 (emphasis added).

[78] Ezra Stiles, Diary (Dec. 21, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 10, at 168 (reporting on statement of Abraham Baldwin, delegate to the Constitutional Convention).

[79] James Wilson, Speech to the Pennsylvania Ratification Convention (Nov. 26, 1787), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 424–25.

[80] Edmund Randolph, Committee of Detail, IV, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 137 n.6, 142 (emphasis added).

[81] Report of Committee of Eleven (Sept. 4, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 10, at 497.

[82] 2 FARRAND'S RECORDS, *supra* note 10, at 26–27 (Madison's Notes, July 17, 1787).

[83] *Generally* OXFORD ENG. DICTIONARY, https://www-oed-com.proxy.wm.edu/view/Entry/77489?rskey=1iwE8v&result=1&isAdvanced=false&print [https://perma.cc/E95C-4DSY] (last visited Mar. 1, 2023).

would be referred to the "general government," and particular regulations referred to the state government, which is not very helpful. To say that the general government should have things of a general nature is a tautology, without a reference or foundation that limits its scope. If the purpose were to confine the national government to a narrow corral, the term "general" in "general welfare" does not provide a justiciable standard allowing enforcement by a court. It is now settled that Congress decides what is within the general welfare, without participation by the courts.[84] That is a delegation to the democracy to decide the border. Under this Constitution, the People are sovereign and the democracy decides.

In the first descriptions of the Constitution to Jefferson in far off Paris, Madison explained that the border between national and state government jurisdiction would be set by politics. Madison told Jefferson that there would be "a continual struggle" between the national head and the state inferior members, "until a final victory has been gained in some instances by one, in others, by the other of them."[85] In Federalist 37, Madison wrote that neither the local nor the general government would entirely yield to the other, "and consequently that the struggle could be terminated only by compromise."[86] The national government would prevail, he said in Federalist No. 46, only by offering "manifest and irresistible proofs of a better administration."[87] Consistently in Federalist No. 31, Hamilton wrote that it would be a "vague and fallible" conjecture as to where politics would set the line between national and state.[88] Under that perspective, it is the democracy that decides whether an issue is within the general welfare for the federal government to act, and not the unelected courts. The Constitution provides a framework for political contests separating national and state concerns, but not a wall.

Concerns viewed as entirely local from one perspective look appropriately national from another. Take for example a hurricane that does significant damage, but to only one state, perhaps Florida. One might view the issue as local, not appropriately within the national jurisdiction if the damage does not cross the Florida state lines. There were Jeffersonians who thought federal relief for a Savannah fire was unconstitutional in 1796,[89] because the fire was of local but not general concern.

On the other side, one might say that the national government is the ultimate pool of insurance responsible to help remedy emergency losses that occur across the

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[84] Buckley v. Valeo, 424 U.S. 1, 90 (1976) (per curiam) ("It is for Congress to decide which expenditures will promote the general welfare . . . .").

[85] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS, *supra* note 44, at 210.

[86] THE FEDERALIST NO. 37 (James Madison).

[87] THE FEDERALIST NO. 46 (James Madison).

[88] THE FEDERALIST NO. 31 (Alexander Hamilton).

[89] *See, e.g.*, 6 ANNALS OF CONG. 1717, 1724 (1796) (debating relief to Savannah after devastating fire, Representatives Nathanial Macon (N.C. Jeffersonian) and William Giles (Va. Jeffersonian) argue that Congress did not have the constitutional jurisdiction to do so).

country in many different forms: forest fire in California, flood in the Midwest, hurricane in the east. Or argue that giving relief in an emergency is what neighbors do within a united national polity. Whether the Federal Emergency Management Administration (FEMA) is a legitimate national function within the *general* welfare, or an invasion into local issues—"local police"—is a political or legislative decision, not a constitutional issue. The People are sovereign and decide.

Well into the 1790s, there were warring and wavering views as to whether the Constitution created set rules and hard borders or only provided a framework to work out the jurisdiction by politics.[90] As explained below, Jefferson ultimately prevailed in making the enumerated powers a hard border as a matter of court doctrine.[91] Still, the position that "general" welfare is a broad and forgiving border, indeed not even a court-enforceable border, has the best support in the original constitutional text and Madison's original understanding of his own handiwork.

F. Righteous Anger at the Wicked States

A literal reading of any text can be a mistaken interpretation, unless it fits the program the authors were trying to accomplish. All words are deeds, written to accomplish some program. The Constitution is a nationalist vector, written in the historical context of righteous anger at the wicked states. The full power to provide for the general welfare is consistent with the context in which the Constitution was written and the grand purpose of the document.

The change from confederate to national government was driven by the general level government's need to raise revenue to maintain payments on the debts of the Revolutionary War. Under the Articles of Confederation, Congress could raise revenue to pay the war debts only by requisitions on the states. When the Revolutionary War ended, the states stopped paying their requisitions. The requisition of 1786, the last before the Constitution, was based on a budget of $3 million, mostly to make payments on the Revolutionary War debts, but collected zero.[92] There were proposals in 1781 and 1783 to give the federal government its own tax, a tax on imports called the "impost," which, with sales of federal land, might have allowed the Congress to hobble on under the Articles of Confederation, but the proposals needed unanimous consent of the states under terms of the Articles.[93] Both the 1781 and 1783 proposal were vetoed by at least one state.[94]

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[90] *Cf.* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 125–45 (2018) (chronicling the fascinating intellectual history of the warring and wavering views that the Constitution provided set rules versus that the Constitution provided only for a framework to be finished later).

[91] *See infra* text accompanying notes 118–21.

[92] Board of Treasury Report (Sept. 29, 1787), *in* 33 JCC, *supra* note 56, at 572, 580.

[93] Calvin H. Johnson, *"Impost Begat Convention": Albany and New York Confront the Ratification of the Constitution*, 80 ALB. L. REV. 1489, 1490, 1493–94 (2016).

[94] *Id.* at 1494.

The Founders were desperate. The United States was a thin coastline country subject to attack by any one of three predator empires: England, France, or Spain. Congress had neither the funds to buy a sloop or a gun, nor the revenue to back borrowing for them. We hold the property we now hold "at the courtesy of other powers," John Rutledge told South Carolina.[95] In the coming inevitable war, Congress would need to borrow again from the Dutch, but to borrow more Congress needed to maintain payments to the Dutch.[96] The federal government was destitute; "imbecilic" and "impotent" in the language of the time.[97]

The righteous anger built up by the states' failure to pay their requisitions and veto of the best national tax finally welled up enough to burst the dam and replace the confederation form of government with a strong national government. The Framers' instructions had been to propose an amendment to the Articles of Confederation for unanimous approval of each state legislature,[98] but the Founders were too radical for their plan to be ratified by the states, so they created ratification by the People, meeting in conventions that bypassed the states as corporations.[99] The state officers would oppose the Constitution, as James Wilson put it, but the people would support us.[100]

Under the Articles of Confederation, the states were sovereign. The national government was just a "league of friendship," and Congress was a meeting of diplomats from sovereign states.[101] Each state had the power to recall its delegates, or any one of them, at any time.[102] Congress only had the powers expressly delegated to them. Congress had no power to raise taxes on its own nor to enforce the supposedly mandatory state payments of the state quota of a requisition.[103]

The Constitution replaced the confederation form with a strong three-part national government able to raise revenue without recourse to the states and to "legislate in all Cases for the general Interests," with law paramount over state law and state constitutions.[104] The president could nationalize the state militias and give

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[95] John Rutledge, Speech in the South Carolina Ratification Convention (Jan. 16, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 11, at 275.

[96] Johnson, *supra* note 93, at 1490.

[97] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 10, at 255 (Madison's Notes, June 16, 1787) ("[Edmund Randolph] painted in strong colours, the imbecility of the existing confederacy . . ."); *id.* at 551 (Madison's Notes, July 7, 1787) (calling the old government impotent).

[98] Resolution of Congress (Feb. 21, 1787), *in* 32 JCC, *supra* note 56, at 74.

[99] Calvin H. Johnson, *States Rights? What States' Rights?: Implying Limitations on the Federal Government from the Overall Design*, 57 BUFF. L. REV. 225, 248 (2009).

[100] 1 FARRAND'S RECORDS, *supra* note 10, at 379 (Robert Yates' Notes, June 22, 1787).

[101] ARTICLES OF CONFEDERATION of 1777, arts. III, V para. 1

[102] ARTICLES OF CONFEDERATION of 1777, art. V.

[103] ARTICLES OF CONFEDERATION of 1777, art. VIII.

[104] Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 131. U.S. CONST. art. VI, cl. 2 provides that United States law is the supreme law of the land, and the "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

them military orders.[105] The states were sovereign under the Articles, but they had forfeited their sovereignty by failing to pay their supposedly mandatory requisitions.[106] The Confederation rested on the sovereignty of the states, but the Constitution rests on the sovereignty of the people. The national government could walk on its own legs. Once the national government was not dependent on the state for their revenue, the states were no longer sovereign.

Within the context in which the Constitution was written, of righteous anger at the wickedness of the states, the Federalist authors of the Constitution, who were the Founders, saw no significant room for protection of the states. That was not the problem that the Philadelphia Convention met to address. As Madison had to explain to Jefferson, when Jefferson first returned to America, "[t]he evils suffered and feared from weakness in Government . . . have turned the attention more towards the means of strengthening the [national government] than of narrowing [it]."[107] The complaint was not that Congress "governed overmuch," as James Wilson put it, but that it governed too little.[108] If a general power over the general welfare reflects a radical nationalism of the constitutional text, that nationalism reflects the anger at the states under which the Constitution was written.

G. Amendment of the Constitution by Judicial Interpretation

Judicial interpretation is sometimes a faster and more thorough mechanism for change than an explicit constitutional amendment. The Federalists, in favor of plenary national power, won in the drafting of the Constitution, but the Anti-Federalists, in favor of a narrow corral for the national government, ultimately prevailed by interpretation, at least until the New Deal.

Thomas Jefferson opposed a reading of the Constitution that would give the text "to provide for the general welfare" a meaning greater than the powers enumerated after Clause 1. Between the first clause of Article I, Section 8, giving the power to provide for the common defense and general welfare, and the last, Clause 18, giving the power to effect all powers by necessary and proper means, there is a list of enumerated powers. Under the enumerated power doctrine that ultimately prevailed, the words, "general welfare," carry no weight.[109] All the federal power resides in the enumerated powers in Clauses 2–17.[110]

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[105] U.S. CONST. art. II, § 2, cl. 1.

[106] *See* ARTICLES OF CONFEDERATION of 1777, arts. II, VIII, IX.

[107] Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 16 JEFFERSON PAPERS, *supra* note 75, at 150.

[108] 2 FARRAND'S RECORDS, *supra* note 10, at 10 (Madison's Notes, July 14, 1787).

[109] *See, e.g.*, Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 18, at 72 (defining general welfare as limited by subsequent enumerated powers); THE FEDERALIST NO. 41 (James Madison).

[110] U.S. CONST. art. I § 8, cls. 2–17.

Jefferson favored allowing the Congress only power over diplomacy and war leaving all domestic issues to the states.[111] If the courts ever "countenance the sweeping pretensions which have been set up under the words 'general defense and public welfare,'" Jefferson said, "all limits to the federal government are done away."[112] The tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare, he wrote in 1811, "is almost the only landmark which now divides the federalists from the republicans. . . "[113]

Jefferson's thrust to limit the Congress to enumerated powers narrowly construed first arose in public debate in an attempt to prevent paper money issued by a national bank.[114] The drive to confine the federal government away from domestic issues, however, at least in the South, has to be understood as most strongly motivated by protection of slavery, against what might prove to be a congressional majority against slavery. Patrick Henry opposed ratification of the Constitution in Virginia on a platform arguing that if the Constitution were adopted, then the Eastern States could and would abolish slavery.[115] Among other things, Congress could use its power to provide for the general welfare to pronounce slavery against the general welfare and free the slaves.[116] But the enumerated power doctrine originated in a speech by James Wilson of Pennsylvania in front of Independence Hall, so the enumerated power limitation was not solely a Southern concern.[117]

Jefferson defeated Adams in what he justifiably called the "Revolution of 1800" and ultimately the Jeffersonians drove the Federalist party to extinction as a viable political party.[118] Under Jeffersonian judges, the enumerated power limitation was endorsed by the courts. In *United States v. Hudson and Goodwin*, decided in 1812,

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[111] Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *in* 9 MADISON PAPERS, *supra* note 44, at 210–11; Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), *in* 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 18, at 138–40 (saying federal government should be confined to foreign concerns only, leaving all domestic issues to the states); Letter from Thomas Jefferson to Edward Livingston (Apr. 4, 1824), *in* THE QUOTABLE JEFFERSON 52 (John P. Kaminski ed., 2006) (stating that in cases of doubtful construction, he assigned all domestic issues exclusively to the respective states); Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 18, at 72 (defining general welfare as limited by subsequent enumerated powers).

[112] Letter from Thomas Jefferson to Spenser Roane (Oct. 12, 1815), *in* THE QUOTABLE JEFFERSON, *supra* note 111, at 53.

[113] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 18, at 72.

[114] *See* Calvin Johnson, *Madison's Denial*, 34 CONST. COMMENT. 193, 205–09 (2019).

[115] A collection of Patrick Henry's protection of slavery arguments in the Virginia Ratification Convention can be found in JOHNSON, RIGHTEOUS ANGER, *supra* note 8, at 183.

[116] Patrick Henry, The Virginia Convention (June 24, 1788), *in* 10 DHRC, *supra* note 1, at 1476.

[117] *See* James Wilson, *Speech at a Public Meeting in Philadelphia* (Oct. 6, 1787), *in* 13 DHRC, *supra* note 1, at 339.

[118] *See* Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 60.

the Supreme Court speaking through a Jeffersonian majority denied that there were federal common law crimes, saying that the "powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve."[119] In *McCulloch v. Maryland*, decided in 1819, Justice Marshall said that "[t]he principle, that it can exercise only the powers granted to it, . . . [is] now universally admitted,"[120] but simultaneously held that the national bank, which was the first target of the limiting confines of the "enumerated powers" argument was covered by the listed powers.[121] With Jefferson's victory, a narrow constraint on the Federal power to the listed powers prevailed, at least until the New Deal.[122]

The pendulum subsequently swung back far away from Jefferson's narrow corral. The Commerce Clause has exploded beyond its modest roots into a justification for strong national power[123] filling in at least some of the space lost when the general welfare clause was eviscerated. The Commerce Clause started as a modest and mercantilist clause to allow Congress to tax imports to suppress them, to give protection for American shipping from foreign competition, and to punish the British for excluding our ships from the British West Indies.[124] Nothing else was worth mentioning. The Commerce Clause is now, however, described as "plenary" and as the single most important source of national power.[125] The expansion of the clause from its original modesty to plenary power occurred without any change in the exact words.

We might be in another swing of the pendulum. In *Alden v. Maine*, for example, the Court held that States had immunity from paying overtime that all other employers had to bear.[126] Whether the immunity expands enough to be full counter-revolution to federal power, or remains a small wrinkle, is too early to tell. Political history and constitutional doctrine sometimes move in cycles.[127]

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[119] 11 U.S. (7 Cranch) 32, 33 (1812).

[120] 17 U.S. (4 Wheat.) 316, 405 (1819). One can of course deny government authority to redefine crimes by common law, without constricting the general power of the federal government to provide for the general welfare.

[121] In David Schwartz, McCulloch v. Maryland *and the Incoherence of Enumerationism*, 19 GEO. J. L. & PUB. POL'Y 25, 70 (2021), Schwartz argues that the *McCulloch* doctrine is a "muddle," allowing neither state nor federal level sovereignty. The argument is entirely within doctrine, rather than text.

[122] *See id.* at 71.

[123] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120, 128–29 (1942) (finding that feed grown for farmers' own animals and not sold was within interstate commerce).

[124] *See* Johnson, *The Panda's Thumb*, *supra* note 57, at 1.

[125] *See* BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 105 (2d ed. 1979) (saying commerce clause is "plenary" and "source of the most important powers that the Federal Government exercises").

[126] *See* 527 U.S. 706, 712 (1999).

[127] *See* JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS

Both the Jeffersonian contraction of federal power and the New Deal expansion of federal power and the possible swing back have occurred without amendment of the constitutional text, and with little or no ties to the original meaning or constitutional scripture. Interpretation of the Constitution by the judiciary has determined the scope of federal power under our constitutional practices and not the exact wording of the text. Constitutional interpretation by tradition rather than text is plausibly fully legitimate. Still, the current anti-federalists need to understand that their stance to corral the federal government has the same jurisprudential grounding as the expansive interpretations of constitutionally protected unpopular minority rights they do not like. Neither set is locked in by the constitutional scripture.

II. THE STRANGE CAREER OF THE "EXPRESSLY DELEGATED" LIMITATION[128]

The Articles of Confederation limited Congress to the powers "expressly delegated" to it.[129] The drafters took out the expressly delegated limitation from the Constitution text, but then in ratification debates they argued as if the limitation was still there. But they refused in the Bill of Rights amendments to return the expressly delegated language. The omission of expressly delegated, then the Federalists' description of the text as if it were still there, followed by the refusal to put expressly delegated into the text makes for a strange career for "expressly delegated." In the end, however, it is a career that does affect the text.

A. The Omission of Expressly Delegated

The constitutional text, from its first draft, enumerates Congressional powers in eighteen separate clauses. Section 8 of Article I starts with taxation for the common defense and general welfare and ends with the Necessary and Proper Clause. In between the first and last clauses, Section 8 has sixteen clauses enumerating other powers given to Congress, some important, some less so.[130] The enumeration of powers was added in the first draft of the constitutional text, written in the Committee

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2–3 (2018) (describing how views of Anti-Federalists, Andrew Johnson and Barry Goldwater, ultimately prevailed, after an initial big loss).

[128] This Section repeats the core arguments made originally in Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 35–38.

[129] The Articles also had no sweeping clause giving Congress necessary and proper tools beyond the expressed powers. *See* Mikhail, *supra* note 8, at 1061 (discussing the All Other Powers Provision).

[130] U.S. CONST. art. I, § 8, cls. 2–17 (including the power to regulate commerce, establish uniform laws of naturalization and bankruptcy, coin money and punish counterfeiting, establish post offices and post roads, establish patents and copyrights, establish lower federal courts, punish piracy and other–high seas felonies, make rules concerning captures, declare war, support and make rules for armies and a navy, govern the state militias, and govern over the District of Columbia and federal arsenals and buildings).

of Detail and in the handwriting of Governor Edmund Randolph of Virginia.[131] The governing Resolution from the Convention as a whole provided that the new Congress was to have all of the powers it had under the Articles.[132] Randolph's enumeration took the powers Congress had under the Articles of Confederation and added to them.[133]

Randolph's draft is rough. There are cross-outs and insertions by carets.[134] The draft re-used the same number more than once for its numbered paragraphs.[135] Randolph used subparagraphs that did not make it into the final format;[136] exceptions to the powers were included in Randolph's draft as the powers were listed, whereas in the final Constitution, the exceptions were put into a separate Section 9 of Article I.[137] The Necessary and Proper Clause and the language of "provide for the commons defense and general welfare" were added later by a Wilson draft still within the Committee of Detail or by a later Committee of Eleven.[138] Still, Randolph's

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[131] Professor William Ewald has convincingly identified the first draft of the Constitution as in the handwriting of Randolph. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 206 (2012). The other members of the Committee of Detail were John Rutledge (South Carolina), who was chair, James Wilson (Pennsylvania), Oliver Ellsworth (Connecticut), and Nathaniel Gorham (Massachusetts). *Id.* at 202. We have no records of the procedure or deliberations of the Committee of Detail other than the drafts themselves, so we do not know to what extent Randolph acted independently or was influenced by other very capable members, or even merely recorded the ideas of others. *Id.* at 216–19. Randolph is also the nominal sponsor of the Virginia plan, which started the Convention debate, while Madison is the true author of the Virginia plan, using his governor to add support and power to the plan. Randolph, on the other hand, is himself a good writer. His *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DHRC, *supra* note 1, at 260–75 is, notwithstanding the title, one of the best expressions for why the Constitution had to be adopted. He was governor of Virginia and from a Virginia first family. All that makes me comfortable in calling the first draft of the Constitution the Randolph draft. At minimum, the handwriting is Randolph's.

[132] Resolution 8, Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 131.

[133] Article VIII of the Articles of Confederation gave the Confederation Congress power to charge expenses for the common defense and general welfare to the common treasury, which the states were supposed to supply. *See* ARTICLES OF CONFEDERATION of 1781, art. VIII. Article IX gave the Congress the power to coin money, and wage war. *See* ARTICLES OF CONFEDERATION of 1781, art. IX. The Constitution added powers to regulate commerce, establish post offices, create uniform laws of naturalization and bankruptcy, regulate patents and copyrights, and establish federal courts. U.S. CONST. art. I, § 8, cls. 2–4, 7–9.

[134] *See generally* Edmund Randolph, Committee of Detail, IV, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 137–50.

[135] *Id.* at 137 n.6 (explaining how the typed document represents handwritten edits).

[136] *Compare id.* at 137–50, *with* U.S. CONST.

[137] *See* Edmund Randolph, Committee of Detail, IV, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 142–43; U.S. CONST. art. I, § 9.

[138] Randolph's draft had no necessary and proper clause, which was added in the second "Wilson draft" of the Constitution in the Committee of Detail. *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239, 341 (2011). Randolph's first paragraph gave Congress

draft has the recognizable core format of the enumerated congressional powers described by the final Section 8.[139] The Randolph core enumeration stuck to the end. But his draft also took out the limitation that would have made the enumeration exhaustive, and Randolph defended the deletion in the Virginia Ratification Convention.[140]

The Articles of Confederation had provided that Congress would have only the powers "expressly delegated" to it.[141] The "expressly delegated" limitation was added to the Articles in the 1777 draft at the urging of Thomas Burke of North Carolina, who said it was necessary to prevent a "future Congress . . . [from explaining] away every right belonging to the States, and [making] their own power as unlimited as they please."[142]

Randolph copied the Articles' list of powers and added to them, but omitted Burke's "expressly delegated" limitation. Randolph later explained to the Virginia Ratification Convention that the expressly delegated limitation had proved destructive to the Union.[143] Even the federal passport, he said, which was not enumerated, was challenged prominently.[144] The Articles of Confederation, moreover, relied on

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the power to tax for the "necessities of the Union," and the Committee of Eleven later changed that tax "to pay the debts and provide for the common defense and general welfare of the U.S." 2 FARRAND'S RECORDS, *supra* note 10, at 496–97 (Madison's Notes, Sept. 4, 1787).

[139] Edmund Randolph, Committee of Detail, IV, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 143–44.

[140] *See* Edmund Randolph, The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 24, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 601.

[141] ARTICLES OF CONFEDERATION of 1781, art. II.

[142] Letter from Thomas Burke to Gov. Richard Caswell of North Carolina (Apr. 29, 1777), *in* 6 LETTERS OF DELEGATES, *supra* note 32, at 672. It is not clear Burke's "expressly delegated" limitation was needed for the reason he put forward: John Dickinson's 1776 drafts of the Articles, to which Burke was reacting, already had listed many Congressional powers but also said that Congress "shall never interfere . . . in the internal Police of any Colony (or Colonies) any further than such Police may be (expressly) affected by this . . . Confederation . . . ." John Dickinson, *Draft of the Articles of Confederation* (June 17, 1776), *in* 4 LETTERS OF DELEGATES, *supra* note 32, at 250. Still, at least Burke thought the "expressly delegated" limitation added something necessary.

[143] *See* Edmund Randolph, The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 24, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 601.

[144] *Id.* at 601. The federal passport had been challenged. In late 1782, Pennsylvania citizens seized the British ship *Amazon*, which had been travelling under George Washington's passport with supplies for the Hessian prisoners of war. Pennsylvania ultimately determined, on advice from its Supreme Court, that the passport was supreme over state capture law, but also voted to reimburse the Pennsylvania citizens who had seized the *Amazon. See* Letter from James Madison to Edmund Randolph (Feb. 25, 1783), *in* 19 LETTERS OF DELEGATES, *supra* note 32, at 734 (reporting that Madison had been told that Pennsylvania legislature had settled the business by deciding that Pennsylvania law was unconstitutional insofar as it interfered with passports).

requisitions on the states to supply funds for the congressional treasury, Randolph said, but had not expressed power to enforce the requisitions by any means.[145] If the Confederation Congress had had the implied power to enforce requisitions, we might not have needed the Constitution to pay for the War, and could have hobbled along in a confederation form at least to a future crisis.[146] It was the failure to allow implied powers to enforce requisition that required the strong national government created by the Constitution to pay the war debts and to replace the imbecilic central government of the confederation form.

On the Convention floor, there were two motions to limit Congress's enumerated powers. Both undoubtedly wanted a list of Congressional powers that would be exhaustive. Both motions failed overwhelmingly. Pinckney and Rutledge of South Carolina called for an "exact enumeration," which failed nine states to zero, with one state divided, in favor of a vaguer standard that Congress would the power to *legislate* where state legislatures were incompetent.[147] Roger Sherman of Connecticut called for an enumeration that did not include Federal power over direct tax, that is, tax on land, which failed eight states to two.[148] Randolph was giving a verbal gesture toward enumeration, but there was not enough support for enumeration in the Convention and his removal of the expressly delegated limitation prevented the enumeration he provided from being a limitation on the national government.[149]

With the removal of the expressly delegated limitation, and the failure to put in any replacement, the enumeration in Randolph's draft is compatible with the more general Bedford Resolution standard, that Congress would have the power to legislate in any case for the general interests of the Union, and with the final text that Congress would have power to provide for the general welfare. The drafters, specifically Randolph, the author of the first draft, were true to their mandate to draw up language conforming to the Resolutions passed on the floor of the Convention, as the Committee of Detail was instructed to do.

With the deletion of the expressly delegated limitation and the absence of any language making the list exhaustive, the appropriate maxim of construction for the powers of Congress is then not the hard-edged *expressio unius est exclusio alterius exclusio* (to express one thing excludes all others), but the gentler maxim of *ejusdem*

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[145] *See* Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DHRC, *supra* note 1, at 263.

[146] *See id.* at 263–64; *see also* JOHNSON, RIGHTEOUS ANGER, *supra* note 8, at 15–26, 85–88 (showing support for failure of requisitions as cause of the Constitution).

[147] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 10, at 53 (Madison's Notes, May 31, 1787) (describing John Rutledge (So. Carolina) and Charles Pinckney (So. Carolina), calling for an exact enumeration).

[148] *See* 2 FARRAND'S RECORDS, *supra* note 10, at 26 (Madison's Notes, July 17, 1787) (describing Roger Sherman (Conn.), speaking in favor of an enumeration).

[149] *See* Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DHRC, *supra* note 1, at 273 (refusing to sign the Constitution because of the "cover of general words").

generis (of the same class or kind). *Ejusdem generis* means that congressional powers must be for the same class as the enumerated items, but that Congress has implied or unexpressed powers within the more general standard, for the common defense and general welfare.[150] The Constitution is then not a hard border keeping in national power to anything narrower than the common defense and general welfare, but merely a framework for the political process to work out where the division of powers would in fact occur, as Madison had explained before his turn. The enumeration then becomes an illustrative list of campaign promises, things that Randolph and the other framers thought they would like Congress to accomplish for the general welfare, without excluding other useful things when their time came.

B. Resurrection of Expressly Delegated

The Federalists, having achieved a written Constitution with a general power over the general welfare, promptly began describing the Constitution in the ratification debate as if the expressly delegated limitation were still there.

Charles Pinckney told the South Carolina House that in the federal government, "no powers could be executed, or assumed, but such as were *expressly delegated*."[151] Pinckney's draft in the Committee of Detail had provided "[e]ach State retains its Rights not expressly delegated,"[152] but his draft never went anywhere beyond himself. Pinckney is describing his own draft of the Constitution to South Carolina, but not the official deal that the framers sent out for ratification.[153]

In one of the most important speeches of the ratification campaign, James Wilson argued on October 6, 1787, not long after the convention broke up to a public assembly in front of the hall where the Constitution was written, that the states had plenary powers, but the federal government did not: "[T]he congressional authority is to be collected, not from tacit implication," he said, "but from the positive grant expressed in the" proposed Constitution.[154] The states could have powers not mentioned in any document. For the federal government, however, "every thing which is not given, is reserved [to the states]."[155] Within the Convention, Wilson joining

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[150] *See* Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 28–29.

[151] Charles Pinckney, Speech to the South Carolina House of Representatives (Jan. 16, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 11, at 259 (emphasis added).

[152] Pinckney's Plan for the Constitution drafted in the Committee of Detail had provided that Congress would have only the powers expressly delegated to it. *See Committee of Detail Documents*, *supra* note 138, at 255. The Pinckney Plan was never picked up or pushed forward beyond his draft.

[153] *See generally* Charles Pinckney, Speech to the South Carolina House of Representatives (Jan. 16, 1788), *in* 4 ELLIOT'S DEBATES, *supra* note 11, at 253–63.

[154] James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 DHRC, *supra* note 1, at 338.

[155] *Id.* at 338. *See also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN

with Madison and Randolph, opposed enumeration, saying that "it would be impossible to enumerate the powers which the federal Legislature ought to have,"[156] so that Wilson's flip appears to fall from the air without a prior foundation.

Thomas Jefferson, reading of the argument in Paris, dismissed Wilson's claim:

> To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed [a public meeting—perhaps a democratic mob—in front of Constitutional Hall], but is surely *gratis dictim*,[157] opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which had declared that in express terms.[158]

The Anti-Federalists, opposing ratification, dismissed Wilson's claim in similar terms. "If this [enumerated powers] doctrine is true," said "A Democratic Federalist" in Pennsylvania, "it ought at least to have been clearly expressed in the plan of government."[159] "Let us compare," said "A Republican" in New York, Wilson's claim that all powers not granted are reserved "with the sense of the framers, as *expressed* in the instrument itself."[160] Anti-Federalist "Brutus" labeled Wilson's argument that all which is not given is reserved as "rather specious than solid."[161] "The powers . . . granted to the general government by this constitution," Brutus said, are "complete."[162] Cincinnatus considered Wilson's argument to be a "professional figment," since the confederation's article at its very start declared that what is not expressly given is reserved, but the Constitution did not.[163] George Lee Tuberville wrote in Virginia that "Mr. Wilson[']s sophism has no weight with me when he declares . . . that in this

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THE MAKING OF THE CONSTITUTION 143–46 (1996) (describing the importance of Wilson's speech within the entire ratification process).

[156] 1 FARRAND'S RECORDS, *supra* note 10, at 60 (Pierce's Notes, May 31, 1787).

[157] *Gratis dictim* is a voluntary observation, not necessary to the decision, to which the speaker is not held to precise accuracy. *See Gratis Dictum*, THELAW.COM DICTIONARY, https://dictionary.thelaw.com/gratis-dictum/ [https://perma.cc/N2MB-CDQS] (last visited Mar. 1, 2023).

[158] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 JEFFERSON PAPERS, *supra* note 75, at 440.

[159] *A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 387.

[160] *A Republican I: To James Wilson, Esquire*, N.Y. J., Oct. 25, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 478.

[161] *Brutus II*, N.Y. J., Nov. 1, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 526.

[162] *Id.*

[163] *Cincinnatus I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 531.

Constitution we retain all that we do not give up, because I cannot observe upon what foundation he has rested this curious observation."[164]

Jefferson and the Anti-Federalist readers are of course right on the merits: The public meaning of the constitutional scripture had no words nor implications that the listed Congressional powers of Clauses 2–17 were exhaustive because the Framers had taken the exhaustive limitation out. If the Framers promised a limitation of the federal government to a list of narrow powers, they did not do so using the precise wording or public meaning in the scripture of the Constitution that they were offering for ratification.[165]

When Wilson presented his limited-powers argument and the Anti-Federalists responded, Madison was still committed to the view that the Constitution created a framework under which the federal power would be set by competitive politics, but not a hard border.[166] Madison was the efficient cause of the Constitution, the first to believe that confederation of sovereign states had to be replaced with a supreme national government with supremacy over the states and power, to quote his Virginia plan, over "the common defence [sic], security of liberty and general welfare."[167] Madison pushed the whole cascade from the formation of the constitutional movement in Virginia legislature, through to the Virginia plan and adoption of the powerful national government in the Constitutional Convention. But Madison flipped and adopted the enumerated power limitation.[168] He denied his nationalist creation—three times before the cock crowed, so to speak.[169] In Federalist No. 45

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[164] Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), *in* 13 DHRC, *supra* note 1, at 505–06.

[165] *See* Kavanaugh, *supra* note 24, at 1908 (arguing that precise wording is the "anchor, the magnet, the most important factor" in constitutional jurisprudence).

[166] *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS, *supra* note 44, at 205, 210–11 (arguing that there will be "a continual struggle between the head and the inferior members, until a final victory has been gained in some instances by one, in others, by the other of them"); THE FEDERALIST NO. 37 (James Madison) (arguing that neither the local nor the general government would entirely yield to the other, "and consequently that the struggle could be terminated only by compromise"); THE FEDERALIST NO. 46 (James Madison) (arguing that the people in the future will become more partial to the federal than to the state governments only if the federal level offers "manifest and irresistible proofs of a better administration").

[167] *See, e.g.*, Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 MADISON PAPERS, *supra* note 44, at 383 (calling for due supremacy of the national authority because the "individual independence of the [s]tates is utterly irreconcileable [sic] with their aggregate sovereignty"); 1 FARRAND'S RECORDS, *supra* note 10, at 20–22 (Madison's Notes, May 29, 1787) (calling for national government with power over "common defence, security of liberty and general welfare"); *see generally* JOHNSON, RIGHTEOUS ANGER, *supra* note 8, at 40–60, 125–27 (stating the case that Madison is the chief architect and developer of a strong nationalist constitution).

[168] *See* THE FEDERALIST NO. 45 (James Madison).

[169] *Cf. Luke* 22:61 (quoting Jesus telling Peter, "Before the rooster crows today, you will deny me three times").

(January 6, 1788), Madison, writing as Publius, echoed James Wilson and wrote that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[170]

Within the confines of the secret convention, it was known that the binding resolution from the whole convention to which the drafting committees conformed gave the Congress the power to legislate in any case for the general interests of the union.[171] "Legislate in any case" is not consistent with the enumerated power doctrine that Wilson and Madison came to espouse. It is Madison's notes that tell of the Bedford resolution.[172] Wilson and Madison knew that their description was not describing the *Sola Scriptura*, at least unless their denial had been strongly internalized.[173]

Edmund Randolph, speaking out of both sides of his mouth, defended [his] deletion of the "expressly delegated" limitation in the Virginia Ratification Convention because it had proved destructive to the union,[174] and also inconsistently told the Virginia Convention that it was "fairly deducible" that the general government has "no power but what is expressly [delegated to] it."[175] He also left the Convention opposed to ratification because "the latitude of the general powers"[176] and the "cover of general words" allowed Congress to swallow up the states.[177] Randolph was describing two Constitutions, one with an expressly delegated limitation in it, and the Constitutional text that was in fact being offered to Virginia, almost at the same time. Randolph is inconsistent on the issue.

Massachusetts, New York, and New Hampshire in ratifying called for an amendment of the Constitution to return the expressly delegated limitation.[178] In Maryland, the ratification convention ultimately decided not to propose amendments of any kind—a plausible reason was to leave it up to the first Congress to work out different versions of the same idea[179]—but a Committee of their convention unanimously

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[170] *See id.*

[171] *See* Johnson, *The Dubious Enumerated Power Doctrine*, *supra* note 8, at 27.

[172] *See* 2 FARRAND'S RECORDS, *supra* note 10, at 25–27 (Madison's Notes, July 17, 1787).

[173] *See id.*

[174] *See id.* at 601.

[175] Edmund Randolph, Debate in the Virginia Ratification Convention (June 17, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 11, at 464.

[176] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), 10 MADISON PAPERS, *supra* note 44, at 215.

[177] Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), *in* 8 DHRC, *supra* note 1, at 260, 273.

[178] The Ratifications of the Twelve States, 1 ELLIOT'S DEBATES, *supra* note 11, at 322, 326–27 (detailing the recommendations of the states of Massachusetts, New Hampshire, and New York in ratifying the Constitution).

[179] *See, e.g.*, James Madison, Convention of Virginia (June 24, 1788), 3 ELLIOT'S DEBATES, *supra* note 11, at 618–19 (arguing against amendments because every state will propose contradictory amendments and be unable to agree on them).

recommended amendment to provide that Congress would have only powers expressly delegated.[180] South Carolina and Virginia in ratifying the Constitution "declared" that the Constitution could not be read to take away powers of the states not expressly relinquished by them.[181] Massachusetts, New York, New Hampshire, and Maryland ratified a Constitution that was different from the Constitution that Virginia and South Carolina ratified, in that their version of the former had no expressly delegated restriction in it. And of course, Massachusetts, New York, New Hampshire had it right: if the Constitution needed an expressly delegated limitation, it needed an amendment. If those states are right, then Virginia and South Carolina never ratified this Constitution, unless we treat their description of the Constitution as having an expressly delegated limitation as mere after-the-fact spin control, like twisting one's body after the bowling ball has already been released down the lane, but having no effect in fact on the movement of the ball.[182]

Madison, Wilson, and (sometimes) Randolph endorsed the expressly delegated limitation and they are the three most important nationalists at the Convention. Still, there is no expressly delegated limitation. By the dominant Protestant mode of interpretation at the time, *Sola Scriptura*, the binding Constitution speaks its mandatory word by its text, not by subsequent commentary, spin control or tradition.[183] The Constitution was set as of September 17, 1787, when the ink on the document is dry. There is no expressly delegate limitation nor substitute making the listed powers exhaustive in that binding text. Subsequent commentary may help us understand the words, but commentary that is inconsistent with that text, is an attempt to amend the text and has to be ignored. The text of the Constitution gives Congress the power to provide for the general welfare—to legislate for the general interests of the Union—without reducing the powers of Congress to more modest list of Clauses 2–17.

C. Is Taxation Independent of Subsequent Enumeration?

Congress, as noted, can accomplish most of what it wants to accomplish if it can tax and spend for the general welfare, within the expressed power of Clause 1, even assuming *arguendo* that the "necessary and proper means" does not expand the

[180] A Fragment of Facts, Disclosing the Conduct of the Maryland Convention (Apr. 21, 1787), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 550, 555.

[181] The Ratifications of the Twelve States, *in* 1 ELLIOT'S DEBATES, *supra* note 11, at 325, 327 (stating that every power not granted remains in the states).

[182] We, however, can also let Virginia and South Carolina into the Union, by interpreting their actions as applying harmless body-English, the twisting after the bowling ball has been released to keep it from falling in the gutter, and ignore the spin as harmless. Virginia and South Carolina did not have the authority to change the Constitutional text unilaterally without at least three quarters of all the states.

[183] *See generally* MATHISON, *supra* note 22 (Calvinist theologian describes the history of *sola scriptura* and Catholic interpretations but advocates a role of faith in interpreting the text).

power to allow regulation and other helpful tools. It can impose a prohibitive tax rate on activity it does not want, and give generous spending subsidies to activities it wants, without any regulation.[184]

When Madison flipped from the causing nationalist to the restraining Jeffersonian, he thereafter argued that the taxation power itself did not encompass the common defense and general welfare and did not extend further than Clauses 2–17. In Federalist 41 (January 19, 1788), Madison argued that the broad Clause 1 power to tax and spend for the common defense and general welfare was limited by "clear and precise" expressions of Congressional power in the following Clauses 2–17. Clause 1 is separated from the enumerated powers of Clauses 2–17, Madison said, by no longer a pause than a semicolon.[185] No additional federal power was given by the terms, "common defence, and general welfare" in Clause 1, Madison later argued, because those terms were themselves "limited and explained by the particular enumeration subjoined."[186] Jefferson very much later, when Monroe was President, similarly said that Clauses 2–17 were the "exact definition" of the general welfare clause.[187] Jefferson said that he hoped that the courts would never countenance the "sweeping pretensions" which have been set up under the words "general defense and public welfare" because "should this construction prevail, all limits to the federal government are done away" with,[188] which is of course a fair description of the constitutional text.

All of the clauses in Section 8 are separated by a mere semicolon. They are parallel and of equal weight in form. Each clause of Section 8 is separate and independent. Neither the format nor the drafting history of Section 8 supports limitation of taxation to provide for the common defense and general welfare by the subsequently listed powers.

As noted, "general welfare" and "common defense" are also used in the preamble to the Constitution and the preamble is interpreted as not effecting mandatory constitutional rules but only an inspirational introduction.[189] However, Clause 1 of Section 8 is neither a preamble nor preface but a specified power.

In the document from which the Section 8 drafting originates, moreover, the power to provide for the common defense and general welfare is not subjoined by nor even close to the other listed powers. Clause 1 of Section 8 comes from the

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[184] U.S. CONST. art. 1, § 8, cl. 1.

[185] THE FEDERALIST NO. 41 (James Madison).

[186] James Madison, Speech in the House of Representatives (Feb. 2, 1791), *in* 2 ANNALS OF CONG., *supra* note 89, at 1896; *see also* Letter from James Madison to Andrew Stevenson (Nov. 17. 1830), *in* 3 FARRAND'S RECORDS, *supra* note 10, at 494 ("Common defence and general welfare [are used] . . . as general terms, limited and explained by the particular clauses subjoined to the clause containing them.").

[187] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 18, at 72.

[188] Thomas Jefferson to Spencer Roane (Oct. 12, 1815), THE QUOTABLE JEFFERSON, *supra* note 111, at 55.

[189] U.S. CONST. pmbl.

Articles of Confederation article VIII, allowing Congress to charge to the common treasury expenses for the common defence and general welfare.[190] Clauses 2–17 come from Article IX, paragraph 3 of the Articles with the addition in the Constitution of new powers.[191] Within the document from which they were drawn, Clause 1 is separated by several paragraphs from the powers brought over from the Articles to become Clauses 2–17; the separate powers have no connection with each other in the model document from which the powers were drawn.[192] That independence of clauses remains when carried over to the Constitution. The power to provide for the general welfare is itself an independent enumerated power.

If the narrower enumerated powers were intended to be a limitation on general welfare, the text needed a word such as "namely" or "specifically" after general welfare to tie it to the listed powers that followed.[193] "General welfare" would also have to be a heading or preamble to Section 8 rather than a separately listed independent power. The Confederation had said that all congressional powers had to be expressly delegated, but the limitation had been taken out.

The phrase "to provide for the common defense and general welfare" was added to the Constitution by a Brearly Committee of Eleven report on September 4, 1787,[194] near the end of the Convention. The format of the enumeration in Clauses 2–17 powers had already been in place since the Committee of Detail report on August 6, 1787.[195] The earlier enumerated powers cannot be understood to illuminate the later-added "common defense and general welfare" because of the arrow of time. The Committee of Detail did not know that "the provide for the general welfare" language would come into the Constitution when Randolph added an enumeration since it was in the future.

If the earlier enumerated powers written in the Committee of Detail were meant to be exhaustive (and it was not), in any event, the Committee of Eleven or the later Committee on Style had the chance to fix it when it amended Clause l.

Moreover, the Resolution's expression of the idea, merely polished for the public in the constitutional text, is that Congress may "legislate in any case for the general interest."[196] The language "legislate in any case" [whatsoever] is not amenable to being limited by some listed examples.

Madison's argument is sophistry, driven undoubtedly to constrict the Constitution to increase its chances of ratification by the necessary nine states. He also was

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[190] ARTICLES OF CONFEDERATION of 1781, art. VIII.

[191] ARTICLES OF CONFEDERATION of 1781, art. IX.

[192] ARTICLES OF CONFEDERATION of 1781, art. II.

[193] I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 73, § 925 at 676.

[194] Report of the Brearly Committee of Eleven (Sept. 4, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 10, at 497.

[195] Report of the Committee on Detail (Aug. 6, 1787), *in* 2 FARRAND'S RECORDS, *supra* note 10, at 177.

[196] Committee of Detail, I, *in* 2 FARRAND'S RECORDS, *supra* note 10, at 131.

plausibly driven by the felt political need to protect slavery on his own plantation. Madison knew the resolution, so he knew he was misdescribing the text as he spoke. We cannot, of course, know how much he was deluding himself as well as his readers, but we can know he was wrong and that he was in a position to be accurate.

Given that taxation for the general welfare serves most of federal purpose, Madison needed an impossible reading of the Constitution if he was going to prevent the national government from getting into programs justified only by general welfare. Madison is not resolving some ambiguity in the text by fair interpretation, he is rewriting the text to say something different from what it says. The constitutional agreement was fixed in writing on September 17, 1787, and the subsequent arguments even in writing are not part of the contract and can be ignored. Constitutional amendment requires two thirds of both houses and ratification by three quarters of the states, and Madison could not deliver that.

D. "Expressly Delegated" and the Bill of Rights

The Tenth Amendment to the Constitution, the last amendment within the Bill of Rights, provides that powers not delegated to the United States by the Constitution are reserved to the states or to the people.[197] The amendment is a reaction to Anti-Federalists' calls for a return of the expressly delegated limitation; however, in considering what became the Tenth Amendment, Congress considered and rejected a return of "expressly delegated" into the text.[198] Madison flipped back from minimizing the scope of the national government, after January 1788, to minimizing the restrictions on the national government in his sponsorship of the Bill of Rights in August 1789 and blocked any amendments that would constrict the power of the federal government vis a vis the states.[199] The Federalists wanted implied or unexpressed powers including, specifically, the passport and the power to enforce direct taxes or requisitions, beyond the powers given by the ordinary and necessary clause.[200] They thought the absence of implied powers to enforce requisitions had doomed the Articles.[201] Having described the unamended Constitution as if it had the expressly delegated limitation in it, the Federalists accepted only a watered down version of the limitation in the text of the Amendment that allowed room for unstated powers of Congress.[202] The Tenth Amendment, in any event, has no effect on the federal power to provide for the common defense and general welfare, whether the Amendment

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[197] U.S. CONST. amend. X.

[198] Debate at the House of Representatives (Aug. 18, 1789), *in* 1 ANNALS OF CONG., *supra* note 89, at 761.

[199] *Id.*

[200] THE FEDERALIST NO. 41 (James Madison).

[201] *Id.*

[202] U.S. CONST. amend. X.

is read aggressively or as a sop, because the power to provide for the common defense and general welfare is an enumerated power under Clause 1, inside the walls of the Tenth Amendment.

Anti-Federalists found Madison's proposed Tenth Amendment to be inadequate and moved in Congress that the Amendment should require Congress to be limited to powers "expressly delegated" to it as in the Articles.[203] The Federalists opposed the insertion, arguing that it was impossible to delineate all the powers that Congress might need by implication.[204] Madison claimed that the federal passport would be excluded by the expressly delegated language.[205] Roger Sherman, who had once advocated the enumerated powers doctrine,[206] argued that all corporate bodies are supposed to possess the powers incident to a corporate capacity, even if those powers were not absolutely expressed.[207] The Anti-Federalist proposal to insert "expressly" was rejected overwhelmingly.[208]

Chief Justice Marshall would later say that proposed insertion of "expressly delegated" was rejected because "it would strip the government of some of its most essential powers."[209] "The men who drew and adopted [the Tenth] amendment," Marshall wrote, had "experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments."[210]

The Tenth Amendment allows implied or unexpressed powers of unknown scope beyond the Necessary and Proper Clause, which include at least the passport. In 1941, the Supreme Court held that the Tenth Amendment is "but a truism that all

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[203] Debate at the House of Representatives (Aug. 18, 1789), *in* 1 ANNALS OF CONG., *supra* note 89, at 761.

[204] *Id.* at 759.

[205] Madison claimed that the Virginia ratification convention had acquiesced in the federal passport, even though it was not enumerated by failure to propose addition of "expressly delegated" in the Virginia Anti-Federalist amendments. Madison, Debate at the House of Representatives (Aug. 18, 1789), *in* 1 ANNALS OF CONG., *supra* note 89, at 590. The acquiescence is dubious: Virginia in ratifying the Constitution had "declared" that the Constitution could not be read to take away powers of the states not expressly granted by them. 1 ELLIOT'S DEBATES, *supra* note 11, at 327. The declaration was not strictly a proposed amendment, but it shows the convention was not acquiescing in the absence of "expressly delegated." Still, Madison might well be right that giving the Congress the power over passports would have been allowed even by Anti-Federalists.

[206] 2 FARRAND'S RECORDS, *supra* note 10, at 26 (Madison's Notes, July 17, 1787) (saying that Sherman "in explanation of his ideas read an enumeration of powers").

[207] Debate at the House of Representatives (Aug. 18, 1789), *in* 1 ANNALS OF CONG., *supra* note 89, at 761.

[208] *Id.* at 761, 767–68 (reporting that Elbridge Gerry's proposal to add "expressly delegated" to the Ninth Amendment was defeated, 17–32, without debate).

[209] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 384 (1819).

[210] *Id.* at 406–07.

is retained which has not been surrendered" with many and important implied powers within the delegated scope.[211] That reading is faithful to the historical excavation.

Treating the Tenth Amendment as a weak limit makes sense with the context of the Bill of Rights as a whole, because Madison limited his Bill of Rights to proposals that protected individual rights but did not affect the strength of the national government. The Anti-Federalists opposed ratification of the Constitution on the ground that it had no Bill of Rights, but what the Anti-Federalists wanted was re-empowerment of the states.[212] Lansing and Yates, the Anti-Federalists delegates from New York, set a standard for Anti-Federalism that "the leading feature of every amendment [to the Constitution that came out of Philadelphia] ought to be the preservation of the individual states in their uncontrolled constitutional rights."[213] In New York, only about twenty-five percent of the Anti-Federalist proposed amendments reflected individual-rights ideas that were later incorporated in the Amendments I–X of the Constitution, and none especially important.[214] The other three-quarters were restrictions on the power of the new national government, preventing tax on dry land, making it harder to borrow, and limiting the new government to only those powers expressly delegated to it.[215] Madison interpreted the Anti-Federalist amendments as offered to "strike at the essence of the system"[216] and as mere excuses to block the essence of the proposed national government,[217] which seems a fair description.

Madison sponsored the Bill of Rights, to bring North Carolina and Rhode Island into the union and opponents still not reconciled, but he offered only those amendments that were "not objectionable or unsafe."[218] Madison's Bill of Rights protected individuals—not states. Madison was a member of the Revolutionary generation that had fought a long hard war for the fundamental rights of Englishmen, even when they ceased to want to be Englishmen. In 1785, Madison had offered a constitution for the state of Kentucky that included a bill of rights preventing the legislature from meddling with religion, right to a jury, taking away habeas corpus, forcing a citizen to testify against himself, controlling the press, enacting retrospective laws, and

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[211] United States v. Darby, 312 U.S. 100, 124 (1941).

[212] Letter from Robert Yates & John Lansing Jr. to N.Y. Governor George Clinton (Jan. 14, 1788), *in* 1 ELLIOT'S DEBATES, *supra* note 11, at 480.

[213] *Id.* at 481.

[214] Johnson, *supra* note 93, at 1510. The most important rights issue, the right to jury in criminal cases, had already been granted by the unamended proposed Constitution, so that the added rights tended to be supportive of criminal defendants, but not the core.

[215] *Id.* at 1509–14.

[216] Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), *in* 10 MADISON PAPERS, *supra* note 44, at 312.

[217] Letter from James Madison to Edmund Randolph (Apr. 10, 1788), *in* 11 MADISON PAPERS, *supra* note 44, at 18–19.

[218] Ratification without Conditional Amendments (June 24, 1787), *in* 11 MADISON PAPERS, *supra* note 44, at 172, 177.

seizing private property for public use without paying full value.[219] The Bill of Rights that Madison proposed to Congress in 1789 has far stronger resemblance to his own 1785 individual-rights list in Kentucky than to the Anti-Federalists' lists, the latter so heavily leaning on restrictions on national power.

The Anti-Federalists considered Madison's Bill of Rights protecting individuals alone to be "trivial and unimportant," neglecting the more fundamental issues of structure of government.[220] Madison's amendments were "good for nothing" and "will do more harm than benefit," the Anti-Federalists complained; they "shall affect personal liberty alone, leaving the great points of the Judiciary & direct taxation [et]c. to stand as they are."[221] The Bill of Rights amendments, Anti-Federalists argued, were "not those solid and substantial amendments which the people expect; they are . . .frothy and full of wind."[222] Madison's Bill of Rights were "a tub thrown out to a whale" to divert the whale and "secure the freight of the ship and its peaceable voyage."[223] George Mason announced he opposed ratification in part because the Constitution lacked a bill of rights, but he was not mollified by this set.[224] Madison's amendments, Mason claimed, were a "Farce."[225] The Virginia Anti-Federalists so hated Madison's list that they defeated Virginia ratification of the Bill of Rights Amendments when it was first offered in Virginia in 1789.[226]

The expressly delegated limitation was not a protection of the rights of individuals, acceptable in Madison's overall scheme, but a limitation of the national government in favor of state power. There was no room for a meaningful restriction on national power, in Madison's Bill of Rights. If the Tenth Amendment is treated as a weak limit, a mere truism, that is, a watered-down sop, a farce, trivial and unimportant, a distraction to divert the whale, then the Amendment is consistent with

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[219] Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 MADISON PAPERS, *supra* note 44, at 351.

[220] Staughton Lynd, *Abraham Yates's History of the Movement for the United States Constitution*, 20 WM. & MARY Q. 223, 227 (1963) (quoting Abraham Yates).

[221] Letter from William Grayson to Patrick Henry (Sept. 29, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 300 (Helen E. Veit et al. eds., 1991); Letter from William Grayson to Patrick Henry (June 12, 1789), *in* CREATING THE BILL OF RIGHTS, *supra*, at 248–49.

[222] Debates in the House of Representatives (Aug. 15, 1789), *in* 1 ANNALS OF CONG., *supra* note 89, at 745.

[223] Aedanus Burke, Gazette of the United States (Aug. 19, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 221, at 175.

[224] Letter from George Mason to John Mason (July 31, 1789), *in* 3 THE PAPERS OF GEORGE MASON 1162, 1164 (Robert A. Rutland ed., 1970).

[225] *Id.*; *accord* Letter from George Mason to Thomas Jefferson (Mar. 16, 1790), *in* 3 THE PAPERS OF GEORGE MASON, *supra* note 224, at 1188–89 (saying that the Constitution was a "great [d]anger to the Rights & Liberties of our Country" even after the Bill of Rights).

[226] RISJORD, *supra* note 45, at 356–57. The Bill of Rights Amendments were, however, ratified when the Virginia legislature revisited the issue in 1791.

Anti-Federalist descriptions of it and consistent with what the Federalist proponents were trying to do.[227]

The history of the "expressly delegated" limitation makes for a strange career. The limitation was omitted from the text, but then the Federalists described the text as if it was there, but then, once the Constitution was adopted, they accepted only a watered-down version in the Tenth Amendment, which does not require that Congress's powers be expressed. Still, Clause 1 providing that Congress may provide for the common defense and general welfare is an enumerated power, within the delegation required by the Tenth Amendment. Even if the Tenth Amendment was stronger, it would not limit the enumerated power to provide for the common defense and general welfare.

CONCLUSION

If we are to treat the Constitutional text alone, *Sola Scriptura,* as the exclusive source of Constitutional authority, then the Congress has the general power to provide for the general welfare. Article I, Section 8 of the Constitution gives the Congress plenary power to provide for the general welfare by tax and by other necessary and proper means. "Provide for the common defense" and "provide for the general welfare" are parallel and of equal weight in the first listed power given to Congress. Since to provide for the common defense was by consensus a plenary power, so too the power to provide for the general welfare.

The text is a faithful polishing for the public of the resolution passed by the Convention as a whole, which provided that Congress may *legislate in any case* for the general interests of the union. The Necessary and Proper Clause of Section 8 gives Congress the power to meet the goals of providing for the common defense and general welfare by necessary and proper means beyond tax. Regulation is a modest auxiliary to taxation because "tax" and "regulation" were commonly used as synonyms in the adoption debates and because Congress can usually accomplish its goals by a high enough tax and high enough spending subsidy. Tax and regulation are tools, mere means, to accomplish the underlying goal of general welfare.

The Articles of Confederation provided that Congress would have only powers expressly delegated to it. The first draft of the Constitution in the Committee of Detail took out the limitation because it had proved destructive to the union, and there never was a replacement that made the list exhaustive. The Articles of Confederation, the Federalist Founders said, had failed for absence of an unexpressed implied power to enforce requisitions. Even the Federal power over passports were questioned.

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[227] *See generally* Charles A. Lofgren, *The Origins of the Tenth Amendment: History Sovereignty, and the Problem of Constitutional Intention*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 331 (Ronald Collins ed., 1980) (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

Having taken out the expressly delegated limitation, the Federalists in the ratification debates acted as if the expressly delegated language were still there in describing the text. Jefferson on first reading and the Anti-Federalists were right in saying that the claim that expressly delegated was still there had no foundation in the Constitutional text. In the debate over the Tenth Amendment, the Anti-Federalists demanded that the expressly delegated clause be returned to the Constitution, but their move was defeated because the Federalists wanted implied powers beyond the necessary and proper clause. The general power to provide for the general welfare, in any event, is an enumerated power inside the walls set by the Tenth Amendment.

Congress should not use all the powers given to it by the Constitution. Some issues are best decided at a local level. Still the actual border between the national and state governments were to be set, according to Madison first and faithful descriptions of the Constitution, by "a continual struggle" between the national head and the state inferior members, "until a final victory has been gained in some instances by one, in others, by the other of them."[228] The national government would prevail, Madison said, only by offering "manifest and irresistible proofs of a better administration."[229] Hamilton wrote consistently that it would be a "vague and fallible" conjecture as to where politics would set the line between national and state.[230] There is only "one sovereign in this Constitution," James Wilson told Pennsylvania, "from which there is no appeal," and that sovereign is the people.[231] "The supreme, absolute, and uncontrollable power *remains* in the people."[232] Under this Constitution, as Wilson accurately described it, the Democracy is to decide.[233]

Notwithstanding the strength of the case for the text giving Congress the general power to provide for the general welfare, binding constitutional law comes from doctrine or tradition as well as from scriptural text. Under Court doctrine, Congress is limited to a modest enumeration of powers, plus implied powers of uncertain scope. Both the constitutional definition of Congress's reach, and extending the rights of unpopular minorities arise from Constitutional doctrine and traditions, and not from text. Constitutional doctrine, however, evolves over time even without a change in the text and constitutional doctrine might evolve back to allow Congress a general power to provide for the general welfare.

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[228] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), 10 MADISON PAPERS, *supra* note 44, at 210.

[229] THE FEDERALIST NO. 46 (James Madison).

[230] THE FEDERALIST NO. 31 (Alexander Hamilton).

[231] James Wilson, The Debates in the Convention of the State of Pennsylvania (Nov. 26, 1787), *in* 2 ELLIOT'S DEBATES, *supra* note 11, at 432.

[232] *Id.*

[233] *Id.*

APPENDIX

Short Form Citations to Documentary Collections

Short Citation	**Full Citation**
ANNALS OF CONG.	ANNALS OF CONGRESS (Joseph Gale, ed. 1834–1856).
DHRC	DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino ed., 1976–), 28 volumes
ELLIOT'S DEBATES	DEBATES IN THE CONVENTIONS OF THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1907), 5 volumes
FARRAND'S RECORDS	THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 (Max Farrand ed., rev. ed. 1937), 4 volumes. Citations are to Madison notes unless otherwise noted.
JEFFERSON PAPERS	THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1950–), 21 volumes.
JCC	JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 (Worthington C. Ford et al. ed., 1904–1937), 34 volumes
LETTERS OF DELEGATES	LETTERS OF DELEGATES TO CONGRESS, 1774–1789 (Paul H. Smith et al. eds., 1976–2000), 25 volumes
MADISON PAPERS	THE PAPERS OF JAMES MADISON (William T. Hutchinson et al. eds., 1962–1991), 17 volumes