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"The Essential Characteristic": Enumerated Powers and the Bank of the United States

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**“THE ESSENTIAL CHARACTERISTIC”:
ENUMERATED POWERS
AND THE BANK OF THE UNITED STATES**

*Richard Primus**

The idea that Congress can legislate only on the basis of its enumerated powers is an orthodox proposition of constitutional law, one that is generally supposed to have been recognized as essential ever since the Founding. Conventional understandings of several episodes in constitutional history reinforce this proposition. But the reality of many of those events is more complicated. Consider the 1791 debate over creating the Bank of the United States, in which Madison famously argued against the Bank on enumerated-powers grounds. The conventional memory of the Bank episode reinforces the sense that the orthodox view of enumerated powers has been fundamental, and agreed upon, from the beginning. But in 1791, Members of the First Congress disagreed about whether Congress needed to point to some specific enumerated power in order to create the Bank. Moreover, Madison’s enumerated-powers argument against the Bank seems to have involved two rethinkings of Congress’s enumerated powers, one about the importance of enumeration in general and one about the enumeration’s specific application to the Bank. At the general level, Madison in the Bank debate elevated the supposed importance of the enumerated-powers framework: in 1787 he had been skeptical that enumerating congressional powers could be valuable, but in the Bank debate he described the enumerated-powers framework as essential to the Constitution. At the particular level, Madison’s enumerated-powers argument against the Bank seems to have been an act of last-minute creativity in which he took constitutional objections that sounded naturally in the register of affirmative prohibitions, but which the Constitution’s text did not clearly support, and gave them a textual home by translating them into the register

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of enumerated powers. Madison's move may have set a paradigm for enumerated-powers arguments at later moments in constitutional history: subsequent enumerated-powers arguments down to those against the Affordable Care Act might be best understood as translations of constitutional objections best expressed in terms of affirmative prohibitions, forced into the register of enumerated powers because the relevant prohibitions are not found in the Constitution.

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INTRODUCTION

In American constitutional law, history matters in both official and unofficial ways. Officially, history can provide evidence of prior practice, of earlier understandings of a text, or of the problems with operating the constitutional system in a particular way. A fair amount of constitutional-interpretation literature argues about how these and other uses of history should and should not matter in official constitutional decisionmaking. But the unofficial ways in which history matters are often no less important. After all, few constitutional decisionmakers have clear theoretical views about how history should matter in constitutional law, but most are nonetheless influenced by their sense of the constitutional past. Intuitive views about why the Constitution was written and ratified, about the values of the Founders, about the nature and lessons of the Civil War, about Jim Crow and the New Deal and the Civil Rights Movement and so on, all contribute to Americans’ understandings of the Constitution. As a result, successful constitutional arguments must usually be reconcilable with the audience’s intuitive sense of the national constitutional story.

The idea that historical *intuitions* matter may require some unpacking. As the term is used here, “historical intuitions” inhabit what some social theorists call the realm of “memory” rather than that of history conceived as an academic discipline: a partly historical, partly mythical space in which complexities are smoothed out and past events given particular value-laden meanings.¹ Historical intuitions are not completely independent of facts, but neither are they strictly factual. They are a complex product of disciplinary history, societal storytelling, and political imagination. To be sure, most judges who look to historical sources for guidance in constitutional cases are probably not consciously trying to give force to the intuitions of memory. Their normal aspiration is to use history in the ways that history is officially supposed to matter. But in practice, and unofficially, the intuitions of historical memory do a fair amount of work in the enterprise of constitutional persuasion. A decisionmaker trying to make sense of a historical episode is

1. See generally PAUL CONNERTON, *HOW SOCIETIES REMEMBER* (1989).

more likely to read it to mean something he or she intuitively expects it to mean rather than anything else.

Because historical intuitions are the joint products of storytelling, imagination, and actual historical narrative, there are many different ways to shape or change a given audience's historical intuitions. Some of the most effective operate by means that would not be appropriate in academic scholarship. The works of Ken Burns² and Lin-Manuel Miranda³ come to mind, not to mention those of Margaret Mitchell⁴ and D.W. Griffith.⁵ But professional academics also have a role to play, and a big part of that role consists of pushing back against memory's tendency toward simplification. Often, constitutional intuitions rest on overly neat pictures of the past. Bringing historical complexity into the foreground can then be a salutary corrective—one that aims to let constitutional decisionmakers think critically about propositions they have too easily taken for granted.

In that spirit, this Article is intended to challenge a set of historical intuitions that shape lawyerly thinking about a central idea in American federalism. That idea, which every law student learns, is that the federal government is limited by its enumerated powers.⁶

To be more precise, this Article is intended to put pressure on three related propositions, all of which are reinforced by a powerful set of historical intuitions. The first proposition, which we can call the *enumeration principle*, states that Congress can legislate only on the basis of powers enumerated—that is, affirmatively written—in the Constitution.⁷ The second proposition, which we can call the *internal-limits canon*,⁸ states that the sum total of what Congress's enumerated powers entitle it to do is less than Congress would be authorized to do if it enjoyed general legislative jurisdiction.⁹ The

2. See *The Civil War* (Florentine Films 1990).

3. See LIN-MANUEL MIRANDA, *HAMILTON: AN AMERICAN MUSICAL* (2015).

4. See MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

5. See *THE BIRTH OF A NATION* (David W. Griffith Corp. 1915).

6. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (opinion of Roberts, C.J.) (“The Federal Government ‘is acknowledged by all to be one of enumerated powers.’ . . . The enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824))).

7. *Id.* at 535 (“If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted . . .”).

8. “Internal limits” of legislative powers are the limits of those powers taken on their own terms, without reference to affirmative prohibitions that might block the exercise of those powers. See *infra* Section I.A.

9. *NFIB*, 567 U.S. at 534 (opinion of Roberts, C.J.) (“The enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824))). *But see* Richard Primus, *The Gibbons Fallacy*, 19 U. PA. J. CONST. L. 567 (2017) (explaining why the dictum quoted from *Gibbons* was not meant to indicate that the sum total of congressional power must be less than it would be with a grant of general jurisdiction).

third proposition is that the limitation of Congress to its constitutionally enumerated powers is no trivial or peripheral matter; it is a central and foundational feature of the system.¹⁰ Or as Madison put the point in 1791, it is the government's "essential characteristic."¹¹

I have argued elsewhere that at least the last two of those propositions are mistaken.¹² Depending on how one distinguishes between "enumerated" and "nonenumerated" powers, it could be true that Congress can exercise enumerated powers only. But the internal-limits canon does not follow and is not entitled to the authority it presently commands. To be sure, Congress is constitutionally prohibited from doing many things, and properly so. But neither the text of the Constitution nor the best understanding of federalism requires Congress to be limited *by the enumeration of its powers*, rather than by affirmative prohibitions like those in the First Amendment. And if the enumeration need not limit Congress at all, a limiting enumeration is obviously not a crucially important feature of the constitutional system. The crucially important limits on Congress are, in reality, not embodied in an enumeration of powers but built into the process of federal lawmaking or affirmatively specified in sources like the rights-protecting Amendments.¹³

My argument for that position is complex, and I will not try to summarize it here. Readers who are interested are invited to consult what I have written elsewhere.¹⁴ For present purposes, what matters is that most well-socialized constitutional lawyers have a certain set of intuitions about the historical status of enumerated-powers ideas. According to the general understanding, the idea of a limiting enumeration has been a bedrock principle of constitutional law all the way back to the Founding.¹⁵ That sense of historical pedigree reinforces the sense that these ideas are authoritative and any

10. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

11. 2 ANNALS OF CONG. 1898 (1791).

12. See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014) [hereinafter Primus, *The Limits of Enumeration*] (explaining why neither text nor structure nor history requires the internal-limits canon); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1 (2016) [hereinafter Primus, *Why Enumeration Matters*] (exploring the function of the limiting-enumeration idea in light of the reality that the internal-limits canon does virtually no practical work in constitutional law).

13. To rephrase that sentence with a helpful set of terms, the actually important limits on Congress are process limits and external limits, not internal limits. See *infra* Sections I.A, I.B.

14. See *supra* note 12 and accompanying text.

15. See, e.g., *Lopez*, 514 U.S. at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. . . .' This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (citations omitted) (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961), and *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) (citing U.S. CONST. art. I, § 8)).

deviation from them unacceptable.¹⁶ So to persuade constitutional lawyers to take seriously the idea that Congress need not be limited by its enumerated powers, it is helpful—indeed, essential—to challenge those historical intuitions.

The challenge I seek to mount does not deny that the enumeration principle and the internal-limits canon have long histories. They do. All the way back the Founding, there have been prominent voices arguing, insisting, or just assuming that a limiting enumeration of congressional powers is a central feature of the system.¹⁷ But the long pedigree of that way of thinking coexists with another reality. Early in the history of the Republic, the enumeration principle and the internal-limits canon were not universally shared premises. They were contested interpretations of the Constitution. At the Convention,¹⁸ during the ratification process,¹⁹ and into the 1790s,²⁰ any number of well-informed Americans denied the enumeration principle, the internal-limits canon, or both. And even among those who were willing to endorse those propositions, the idea of a limiting enumeration was not necessarily all that important.²¹

To bring those features of early constitutional thought to the fore, this Article digs deeply into one of the early Republic's famous constitutional controversies: the debate over chartering the first Bank of the United States. Many law students first confront questions about Congress's powers by reference to that controversy, whether through *McCulloch v. Maryland*²² or by

16. Cf. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961) (speaking of “that veneration which time bestows on everything”). For complicated reasons, American constitutional lawyers often think not just that principles endorsed at the Founding must be authoritative today (absent contravening formal amendment) but also that principles now fundamental in constitutional law (and not the result of formal amendment) must have been there from the beginning. Neither proposition is true.

17. See, e.g., *id.* Nos. 41, 45 (James Madison), No. 84 (Alexander Hamilton); *James Wilson: Speech at a Public Meeting in Philadelphia 6 October*, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter DHRC].

18. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1911) [hereinafter RECORDS] (statement of John Rutledge, asserting that Congress would have the power to suppress insurrections regardless of whether any enumerated power so specified); *id.* at 309 (statement of Nathaniel Gorham, asserting that Congress would have the power to create paper money even if it lacked an enumerated power to do so).

19. See, e.g., Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 10 THE PAPERS OF JAMES MADISON 335, 336 (Robert A. Rutland et al. eds., 1977) (calling the enumeration principle “a gratis dictum, opposed by strong inferences from the body of the instrument [(i.e., the proposed Constitution)]”).

20. See *infra* Section III.C.

21. See *infra* Part I (describing Madison's attitude toward enumeration during the 1780s).

22. 17 U.S. (4 Wheat.) 316 (1819).

direct engagement with the 1791 debate.²³ That debate is usually remembered through the arguments of four famous Founders.²⁴ In the House of Representatives, James Madison argued that incorporating a bank lay beyond the enumerated powers of Congress.²⁵ After Congress passed the Bank bill over Madison's objections, Secretary of State Thomas Jefferson and Attorney General Edmund Randolph urged President Washington to veto the bill on enumerated-powers grounds.²⁶ On the other side, Treasury Secretary Alexander Hamilton argued that Congress did have the power to incorporate a bank.²⁷ Each argument in that canonical set proceeded from the premise that Congress could exercise only its constitutionally enumerated powers—just like Chief Justice Marshall's opinion in *McCulloch*, three decades later. So it is no wonder that the Bank controversy is remembered as reflecting the fact—if it were a fact—that from the dawn of the Republic, everyone has taken the enumeration principle as an established premise in constitutional law.

But the standard presentation misleads. When the First Congress debated the Bank, not everyone shared the view that Congress could legislate only on the basis of specifically enumerated powers. Some members of Congress maintained that Congress could act so long as nothing in the Constitution *prohibited* a given action,²⁸ or on the basis of authority inherent in being the

23. Consider the constitutional law casebooks written by, on one hand, Randy Barnett and Josh Blackman, and on the other, Paul Brest, Sanford Levinson, Jack Balkin, Akhil Amar, and Reva Siegel. From widely diverging jurisprudential perspectives, these books seek to give constitutional history an especially salient place in the introductory study of constitutional law. Both books give prominent space in their opening chapters to the 1791 congressional debate over the Bank and present that debate as a paradigm for reasoning about the powers of Congress. See RANDY E. BARNETT & JOSH BLACKMAN, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 66–79 (3d ed. 2018); PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 29–36 (6th ed. 2015).

24. Barnett/Blackman and Brest/Levinson both present this set of documents. See BARNETT & BLACKMAN, *supra* note 23, at 66–79; BREST ET AL., *supra* note 23, at 31–39. In so doing, they follow in a longer tradition of writing about the conflict over the Bank in 1791. See, e.g., BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 115–19 (1957) (focusing on this set of famous players).

25. 2 ANNALS OF CONG. 1894–1902, 1956–60 (1791).

26. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275 (Julian P. Boyd ed., 1974); Edmund Randolph, *Opinion on the Constitutionality of the Bank of the United States* (Feb. 12, 1791), reprinted in Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 121–30 (1994) [hereinafter Randolph's Opinion].

27. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965).

28. See *infra* Section III.C.2 (describing, e.g., the arguments of Fisher Ames, Representative from Massachusetts).

nation's legislature,²⁹ or because Congress must be able to do things that the states could not do themselves,³⁰ regardless of whether any particular text in the Constitution authorized Congress to enact a specific sort of law. Similarly, some members of Congress accepted the enumeration principle but read the Constitution to enumerate powers in a way that in practice would authorize Congress to pass any legislation that a grant of general jurisdiction would.³¹

For modern lawyers, this diversity of Founding-era opinion is perhaps masked most powerfully by Hamilton's argument in support of the Bank bill. In his memorandum to the President, Hamilton argued that Article I, properly interpreted, authorized Congress to incorporate the Bank.³² Hamilton did not dispute Madison's premise that Congress could act only on the basis of a specifically enumerated power. Modern readers are accustomed to thinking of Hamilton as "the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution,"³³ so it may not occur to us that there might have been others with broader visions of congressional power than the one Hamilton articulated to Washington.³⁴ But there were. And in 1791, their side carried the day.³⁵

Close attention to the Bank debate also reveals something about the third conventional proposition—the one that teaches that the limiting enumeration is a fundamental feature of the Constitution. Madison staked out that position when arguing against the Bank in the House of Representatives; it was on this occasion that he called the limiting enumeration the "essential characteristic" of the government that the Constitution had created.³⁶ Modern lawyers who read Madison's argument might assume that Madison was merely reciting a commonplace observation. But even for Madison himself, that view was novel in 1791. In 1787, when the Constitution was written,

29. See *infra* Section III.C.2 (describing, e.g., the arguments of John Vining, Representative from Delaware, and Fisher Ames, Representative from Massachusetts).

30. See *infra* Section III.C.3. (describing, e.g., the arguments of William Loughton Smith, Representative from South Carolina).

31. See *infra* III.C.1 (describing the arguments of Elias Boudinot and John Laurance).

32. See Hamilton, *supra* note 27.

33. *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997) (quoting CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 199 (1964)).

34. Whether Hamilton was moderating his own views so as to persuade Washington on the specific point at hand is a question on which I offer no view.

35. That does not demonstrate that the majority of Congress rejected the enumeration principle. The representatives who voted to incorporate the Bank were probably a coalition comprising some who accepted the enumeration principle and believed that Congress's enumerated powers authorized the measure, some who believed that Congress could incorporate the Bank without respect to the Constitution's enumeration of congressional powers, some who believed both of the two foregoing propositions, and some who had no clear view on the constitutional issue. It is not possible to tell from the surviving records how many members of Congress fell into each category.

36. 2 ANNALS OF CONG. 1898 (1791).

Madison did not think a limiting enumeration essential, and there were at least two different reasons for his holding that view. First, Madison in 1787 was a resolute nationalizer and not especially concerned with limiting the general government's sphere relative to that of the states.³⁷ And second, even if Madison had wanted to find devices for limiting the scope of federal power, he did not think that enumerations of powers were practically effective tools for limiting legislatures.³⁸ His contrary views in the Bank debate represented an important new development.

The novelty of Madison's fervent investment in enumerated powers in 1791 helps explain an important but often overlooked feature of the Bank debate: many Members of the First Congress who disagreed with Madison about the constitutionality of the Bank bill did not merely think that Madison had a different view of the Constitution from their own. They doubted that he really believed what he was arguing.³⁹ In their view, Madison's insistence that the enumeration principle was a centrally important element of the new Constitution transparently contradicted positions he had taken earlier in the First Congress, when other issues of constitutional power were before the House. So in beating the drum for the limiting enumeration this time around, these members of Congress thought, Madison was making an argument of convenience, hoping to use a constitutional smokescreen to defeat a bill he didn't like. And it is not hard to see why they thought so. If one puts Madison's enumerated-powers argument in some of the contexts in which his critics saw it—that is, if one evaluates Madison's argument against the Bank in light of his earlier arguments about the removal power⁴⁰ and the permanent location of the seat of government⁴¹—then it is easy to see why some members of Congress thought that Madison's enumerated-powers argument was merely a ruse.

These critics were probably too dismissive. Madison had authentic, public-regarding reasons for opposing the Bank bill, including some that are sensibly considered constitutional reasons.⁴² When he argued against the Bank, he could perfectly well have believed that he was correctly applying the Constitution's provisions relating to the powers of Congress. But if Madison held that view in good faith when he rose in the House to speak against the Bank bill, he had come to his position at something like the eleventh hour. For most of the time when the Bank proposal lay before Congress, Madison seems to have had no sense that creating a bank would be an enumerated-powers problem. A bad idea, yes. Even a constitutionally concerning one. But not a problem having to do with the limits of the congressional powers

37. See *infra* Section I.C.

38. See *infra* Sections I.B–D.

39. See *infra* Section III.D.2.

40. See *infra* Section III.D.

41. See *infra* Part IV.

42. See *infra* Section II.B.1.

enumerated in the text of the Constitution. *That* argument against the Bank was a last-minute development.⁴³

The case for Madison's having developed his enumerated-powers argument against the Bank only at the last minute is inferential. Nowhere in this paper will I report finding a letter from Madison to Jefferson, dated February 1, 1791, and reading "Dear Tom: As you know, I've been bothered by the Bank bill but unable to articulate an objection connected to the text of the Constitution. I'm happy to say that I've now figured out that granting corporate charters is not within the enumerated powers of Congress." But there also do not seem to be any letters, speeches, essays, diary entries, or any other sort of documents testifying to Madison's having given any indication that he thought the Bank raised an enumerated-powers problem before the last days of January 1791.⁴⁴ Indeed, as far as I can tell, *nobody* thought the Bank raised that kind of problem at any time between Hamilton's submitting his Report on a National Bank to Congress and shortly before Madison made his famous speeches in the House.⁴⁵ In that seven-week period, Madison and other players in the drama wrote notes, letters, memoranda, and so on about the proposal to incorporate the Bank. That set of sources contains arguments about any number of relevant issues: banking policy, the dangers of debt, paper money, the role of monopoly privilege, who stood to benefit, and many more. But as far as I can tell, there is no indication in those sources—none—that anyone, Madison or otherwise, was skeptical of the Bank for enumerated-powers reasons until near the very end.

That Madison came late to his enumerated-powers objection does not mean that he was wrong. Developing innovative arguments is what creative constitutional thinkers do. What's more, Madison's movement toward a restrictive view of Congress's powers may have been part of a general trend in his 1790s thinking, rather than an ad hoc rationalization for opposing the Bank.⁴⁶ As noted earlier, Madison was not invested in the idea of a limiting

43. See *infra* Part II.

44. To the best of my knowledge, the first document suggesting that Madison was contemplating a challenge to Congress's authority to charter the Bank is a letter dated January 30, 1791—many weeks into Congress's consideration of the issue, and just three days before Madison made his first famous enumerated-powers speech on the subject. See *infra* Part II.

45. The words "as far as I can tell" in the sentence above are important. One cannot directly prove a negative proposition. To put the point precisely, I have been unable to falsify the null hypothesis that nobody believed the Bank to raise an enumerated-powers problem at the relevant time. Part II provides more complete description of that failure. If readers are aware of relevant documents that I have missed, I would be grateful for their calling those documents to my attention.

46. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 133–61 (1993); NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON* chs. 8–9 (2017) (describing Madison as having fundamentally shifted from a nationalist stance to a skepticism of national power during the 1790s). For different views, see GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 141–72 (2006) (arguing that scholars have overstated changes in Madison's perspective over time); Jack N. Rakove, *The Madisonian Moment*, 55 U.

enumeration in 1787, but he may have come to that idea in good faith by 1791. Even if Madison's movement on these issues is best understood as the good-faith development of his ideas, though, it remains the case that his enumerated-powers argument against the Bank was an eleventh-hour innovation. It was not the straightforward implementation of a previously settled theory—neither Madison's own, nor one that was a matter of consensus among the Founding generation.

In Part I of this Article, I examine Madison's ideas about enumerated powers in the years before the Bank debate. Constitutional lawyers normally picture Madison as an important proponent of the enumeration principle from the very beginning.⁴⁷ But in the 1780s, when the Constitution was written and ratified, Madison did not see the enumeration of congressional powers as an important mechanism for limiting federal power. To be sure, Madison articulated both the enumeration principle and the internal-limits canon, in the *Federalist Papers* and elsewhere. But not everything that Madison said and wrote in 1787–1788 conveyed a settled and authentic view. If Madison's discussions of enumerated powers in 1787–1788 are considered as a body, and if one remembers that in the *Federalist Papers* Madison was both writing pseudonymously and trying to make a sale, an alternative picture is at least as plausible. In that alternative picture, Madison in those years was not particularly invested in the idea of using an enumeration of powers as a means of limiting Congress.

In Part II, I examine the documentary record for the time leading up to Madison's enumerated-powers argument against the Bank bill in 1791. Based on a survey of that record, I suggest that neither Madison nor anyone else conceived of the Bank bill as raising a question about Congress's enumerated powers until the last stage of the legislative process. To be clear, it is not my contention that Madison invented the enumeration principle itself, or the internal-limits canon, in order to mount an attack on the Bank bill. What he came to late was the idea that he could use that apparatus to argue against the Bank. And when he did use the enumerated-powers idea to oppose the Bank, he credited the enumeration principle and the internal-limits canon with a much more important role in the constitutional system than he previously had.

In Part III, I analyze the debate in the House of Representatives. I begin with Madison, offering to explain how he might have translated his concerns about the Bank into an enumerated-powers register and then reviewing the enumerated-powers argument he made. Next I turn to the Bank's support-

CHI. L. REV. 473, 504 (1988) (arguing that some of Madison's ideas remained constant while others underwent changes ranging from "modest shifts of emphasis" to the acceptance of "radically new positions").

47. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined . . .'" (citations omitted) (quoting THE FEDERALIST, *supra* note 16, No. 45 (James Madison)) (citing U.S. CONST. art. I, § 8)).

ers. Some of them accepted the enumerated-powers framework and disputed Madison's application of it.⁴⁸ But others rejected the enumerated-powers framework entirely.⁴⁹ Toward the end of Part III, I foreground one strain of the debate—the parallels that representatives drew between the Bank debate and Congress's debate two years earlier on the president's power to remove appointed officials—in order to highlight gaps between the First Congress's assumptions about the enumerated-powers idea and the assumptions that modern lawyers make.⁵⁰ In sum, the debate in Congress reveals both that the enumerated-powers premise was anything but universal and that even the members of Congress who agreed that the federal government could exercise only enumerated powers did not understand that idea in the way that modern constitutional law does.

In Part IV, I bring in one other piece of context for understanding the Bank debate—one that significantly informed many participants' understandings of the affair but that has since been largely forgotten. It concerns the relationship between the Bank bill and one of Madison's leading achievements during the First Congress: the decision to locate the nation's seat of government along the Potomac River. Introducing this context should help readers evaluate the contention that Madison's enumerated-powers argument against the Bank was, and was understood to be, an act of real-time creativity.

I. MADISON ON ENUMERATED POWERS, 1785–1788

A. *Internal and External Limits*

The Bank debate is usually remembered as a story about one particular kind of strategy for limiting Congress. That strategy involves limiting a legislature by enumerating its powers, or what modern constitutional theory sometimes calls the strategy of *internal limits*.⁵¹ But to understand the Bank debate more completely, it is necessary to think about the relationship between the enumeration of a legislature's powers and a different strategy for limiting legislation. That second strategy involves affirmatively prohibiting certain kinds of laws, or what modern constitutional theory calls the strategy of *external limits*.⁵²

Internal limits on legislative power inhere in the terms on which power is given to legislatures in the first place. Suppose a legislature has just three powers: the power to tax property, the power to make traffic laws, and the

48. See *infra* Section III.C.1.

49. See *infra* Section III.C.2–4.

50. See *infra* Section III.D.

51. See, e.g., 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 794–95 (3d ed. 2000).

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

power to write a fire safety code. Each of those powers is limited by its own terms. Such a legislature would not be authorized to do things falling outside the powers specifically granted—say, enact a health-inspection code for restaurants, or tax incomes as opposed to property. These limits are called “internal” because they inhere in—that is, they are internal to—the grants of power themselves. Each grant of power is a power to do the thing specified and no more.

External limits block lawmaking from the other direction. Rather than inhering in a grant of power, an external limit is a prohibition: a rule that blocks an action that the government would otherwise have the power to do. Suppose that the jurisdiction with the hypothetical legislature described above also had a rule stating that no financial burdens could be imposed on houses of worship. Absent that rule, the legislature’s power to tax real property would include the power to tax the real property owned by churches. The rule exempting houses of worship limits the legislature’s power not on the basis of anything inherent in the nature of taxation but on the basis of an authority outside of—that is, external to—the initial authorization. In American constitutional law, the First Amendment embodies several external limits on government power, as does the rule against cruel and unusual punishment. These rules do not inhere in the powers granted to the government. They stand outside those powers and push back against them.

The central question in the Bank debate could in principle be approached either through the lens of internal limits or through the lens of external ones. In 1787–1788, some people (including Madison) wanted Congress to have the power to charter corporations.⁵³ Others disagreed. And at different points in the process, those who opposed a congressional power to charter corporations used both internal- and external-limit strategies.

According to Madison’s notes from the Constitutional Convention, Madison had proposed giving Congress an express power to grant charters of incorporation in cases where state legislation would be inadequate for the task.⁵⁴ The Convention rejected the proposal, with the delegates voting no apparently comprising a coalition between some who did not want Congress to have such a power and others who did want Congress to have such a power but feared that naming that power in the Constitution would provoke opposition in the ratification process.⁵⁵ The delegates who voted no for the former reason were pursuing an internal-limit strategy: they did not want Congress to issue charters of incorporation, so they voted against a clause

53. See, e.g., 2 RECORDS, *supra* note 18, at 615–16.

54. *Id.* Madison’s journal is not a fully reliable source. He was an interested party rather than a dispassionate observer, and he tended to write entries in the journal at the end of a day’s proceeding rather than as the proceedings occurred. He also seems to have made revisions to the journal years after the Convention ended. See generally MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015). But Madison’s journal is certainly some indication of what occurred, and I am unaware of particular reasons for doubting the accuracy of his report on this specific matter.

55. See *id.* at 616.

that would say Congress had the power to issue such charters.⁵⁶ After the Convention, people who wanted to prevent Congress from chartering corporations pursued an external-limit strategy. During and after the ratification process, several states sent Congress proposed amendments that would have added language to the Constitution expressly prohibiting Congress from chartering corporations, or at least corporations with monopolistic privileges (like the Bank of the United States).⁵⁷ But no such constitutional amendment was added. Madison did not include such a proposed amendment among the package of amendments that he proposed in Congress in 1789, and when other members of Congress did propose such amendments, Congress voted the proposals down.⁵⁸

Two years later, when Congress debated the Bank bill, Madison famously propounded an internal-limits view in opposition. To charter a corporation would exceed the limits of Congress's enumerated powers, he argued.⁵⁹ And to exceed the limits of Congress's enumerated powers, he continued, would be to violate a fundamental and centrally important feature of the constitutional design.⁶⁰ But in making those arguments, Madison was not only arguing against the exercise of a power that he had tried, at the Convention, to confer on Congress expressly. As I illustrate in the balance of this Part, he was also investing the idea of a limiting enumeration with vastly greater importance than he afforded it a short while before.

B. *Against Internal Limits: The Letter to Wallace*

Even before he began preparing for the Constitutional Convention at Philadelphia, Madison had a view about enumerated powers as limits on legislatures. He was skeptical. If one wanted to limit a legislature, Madison thought, enumerating its powers was not a good way to do it.

One person to whom Madison communicated that view was a college friend named Caleb Wallace.⁶¹ Wallace lived in the western region of Virginia that would eventually become the separate state of Kentucky.⁶² In 1785,

56. See *id.* at 515–16.

57. Examples include Massachusetts, New Hampshire, Rhode Island, and New York. See 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326, 330, 337 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. reprint, 2d ed. 1937) (1836) [hereinafter ELLIOT].

58. See 1 ANNALS OF CONG. 778 (Joseph Gales ed., 1834); 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 158–59 (Linda Grant De Pauw ed., 1972) [hereinafter 1 DHFFC].

59. See *infra* Section III.A.2.

60. See *infra* Section III.A.2.

61. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON 166 (Gaillard Hunt ed., 1901).

62. See Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1516 (2002).

Wallace was thinking about how Kentucky should be governed once it achieved statehood.⁶³ So he wrote to his old friend Madison, asking about various issues that would arise in designing a new state government.

As part of his response, Madison offered advice about how to limit legislatures. Clearly it was undesirable for the legislature to be omnipotent; there must be limits on what even a properly structured and democratically elected body could pass into law.⁶⁴ The question was how to establish those limits. To use the terms of modern constitutional theory, Madison canvassed three methods: internal limits and external limits, as described above, and also *process limits*. (A process limit—like a supermajority voting rule, or a requirement that a bill pass two houses rather than just one—limits legislation not by putting some kinds of lawmaking out of reach on substantive grounds but by raising the cost of legislating.) Of the three, he endorsed process limits and external limits. Internal limits might seem like a good idea, he wrote, but in the end it was not a strategy he could recommend.

Madison began his advice with process limits. He especially recommended a bicameral legislature, with a “Senate constituted on such principles as will give *wisdom* and *steadiness* to legislation.”⁶⁵ Indeed, he considered the virtue of such a process limit so great that even a bad Senate was better than no Senate. Of the Virginia Senate at the time, Madison wrote that “a worse could hardly have been substituted.”⁶⁶ Still, he continued, “bad as it is, it is often a useful bit in the mouth of the house of Delegates.”⁶⁷ Prior scholarship has correctly noted that the Philadelphia Convention in general, and Madison in particular, focused first and foremost on process limits when designing the Constitution, believing them to be the most important kind.⁶⁸ Madison’s chosen starting point in his letter to Wallace showed the same orientation two years earlier.

Madison then discussed a method for limiting legislation that might seem like a good idea but wasn’t: writing a constitution specifying affirmatively what the legislature was authorized to do. “If it were possible,” he wrote, “it would be well to define the extent of the Legislative power but the nature of it seems in many respects to be indefinite.”⁶⁹ In other words, Madison saw the appeal, in principle, of affirmatively specifying a legislature’s powers, thus authorizing that legislature to enact the kinds of laws specifically authorized and not others. But he also saw that in practice such a project might be unworkable, because it would be very difficult to capture with verbal definitions all the things that a legislature would need to do. As a result,

63. *Id.*

64. See Letter from James Madison to Caleb Wallace, *supra* note 61.

65. *Id.* at 167.

66. *Id.*

67. *Id.*

68. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1515–20 (1994); see also e.g., THE FEDERALIST, *supra* note 16, Nos. 10, 46, 51 (James Madison).

69. Letter from James Madison to Caleb Wallace, *supra* note 61, at 168.

trying to reduce a legislature's authority to a set of defined and specific powers might be a misguided project, albeit a well-intentioned one.

Instead, Madison recommended that Kentucky specify in its constitution what the legislature could *not* do. Just after saying that the nature of legislative power does not lend itself to being captured by a set of specific authorizations, Madison wrote that “[i]t is very practicable however to enumerate the essential exceptions.”⁷⁰ As examples, he noted that “[t]he Constitution may expressly restrain [the legislature] from meddling with religion—from abolishing Juries—from taking away the Habeas corpus—from forcing a citizen to give evidence against himself—from controuling the press—from enacting retrospective laws at least in criminal cases, . . . [and] from taking private property for public use without paying its full Value,” as well as “from licensing the importation of Slaves” and “from infringing the confederation”—that is, from failing in its obligation toward the United States as a whole.⁷¹

In short, Madison counseled Wallace against relying on an enumeration of powers as a way of limiting a legislature. Making the legislative process more difficult to navigate and specifying affirmative prohibitions would be a better approach. To return to the modern terms introduced earlier, Madison recommended *process limits* and *external limits* on legislative powers rather than *internal limits*.⁷² That recommendation is noteworthy, of course, because the idea that a constitution limits a legislature by enumerating its powers is the strategy of internal limits. Two years before the Constitutional Convention, Madison was warning against pursuing that strategy in a constitution.⁷³

Does Madison's expression of that attitude in a letter about the Kentucky legislature mean anything for what his attitudes would be toward the national legislature that the Constitution would soon create? Readers to whom the dominant ideas of modern constitutional law are second nature may have doubts. After all, it is orthodox that Congress differs from state legislatures precisely by being a legislature with a set of specific mandates, rather than a legislature of general jurisdiction. But invoking that idea cannot be sufficient to prove that Madison in the 1780s would have thought his reasons for preferring external limits to internal ones where Kentucky was concerned were inapplicable to Congress. It would assume the thing to be proved, namely that Madison at the Founding conceived of Congress as lim-

70. *Id.*

71. *Id.*

72. See, e.g., TRIBE, *supra* note 51, at 794–95.

73. One might wonder whether an excursus on the subject in one 1785 letter is a reliable indicator of Madison's ideas over a longer period of time. The question cannot be answered for certain. I am unaware, however, of other writings from the years shortly before the Convention in which Madison took a different view of this question.

ited to a set of enumerated powers in a way that made it fundamentally different from a state legislature.

Moreover, it is not clear what structural or functional difference between Congress and state legislatures touches the reason for Madison's skepticism as he articulated it to Wallace. That skepticism was founded on an idea about the impossibility of anticipating and articulating, in linguistic formulas, all the things that a legislature would need to do. That concern would seem to apply to Congress as well as to state legislatures. Congress might not do the full range of things that state legislatures would do, but it would need to do many things, and there was no obvious closed list of what those things should be. Language is not more susceptible to clarity and precision when applied to a national legislature than when applied to a local one. And indeed, during the ratification process Madison warned the public that the Constitution's written demarcation of the general government's powers could not be expected to establish clear and certain limits.⁷⁴

C. *At the Convention*

The records of the Constitutional Convention do not reveal much about Madison's attitudes regarding the wisdom of enumerating Congress's powers. Indeed, and especially by comparison with the degree of attention paid to process limits, the Convention as a whole does not seem to have thought searchingly about either the question of whether Congress's powers should be enumerated or the particular enumeration of powers that was ultimately proposed and adopted.⁷⁵ But when Madison did address the possibility of enumerating congressional powers, he voiced skepticism. According to his own journal, when the possibility of enumerating the powers of Congress arose, Madison told his fellow delegates that he had "doubts concerning [the] practicability" of such an undertaking and indeed that during the Convention's discussions "his doubts had become stronger."⁷⁶ In another surviving account of Madison's remark, the skepticism seems to run even deeper: according to William Pierce's notes, Madison "said he had brought with him a strong prepossession for the defining of the limits and powers of the federal Legislature, but he brought with him some doubts about the practicability

74. See *THE FEDERALIST*, *supra* note 16, No. 37 (James Madison) ("Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.").

75. See Primus, *The Limits of Enumeration*, *supra* note 12, at 616 ("Prior to the appointment of the Committee of Detail, there was no deep engagement with questions about whether this or that power should be included among the powers of Congress, and the draft enumeration that the Committee presented on August 6 was largely accepted by the full Convention, albeit with emendations.").

76. 1 *RECORDS*, *supra* note 18, at 53. These are Madison's remarks as recorded in his own journal, which, as noted above, may not be a fully reliable source.

of doing it: —at present he was convinced it could not be done.”⁷⁷ There is no record of Madison’s having changed his mind during the Convention’s subsequent proceedings, nor even of his having reconsidered the question. According to his own journal, Madison addressed the matter only on that single occasion, and the surviving notes of other delegates do not record his having engaged the question at other times.

In addition to being skeptical about the prospect of enumerating Congress’s powers, Madison at the Convention does not seem to have been invested in the project for which enumeration is usually considered a mechanism—that is, for confining the scope of federal legislation so as to leave other fields of governance to the states. To choose one illustration, consider Madison’s lengthy response when Connecticut’s William Samuel Johnson asked how, exactly, a Constitution embodying the Virginia Plan would maintain a significant role for the state governments. The stakes of that conversation were significant. In Johnson’s view, the rival New Jersey plan had such a mechanism: equal representation for each state in the Senate.⁷⁸ So unless Madison could explain how the Virginia Plan would achieve the same goal, Johnson would be drawn to support the New Jersey Plan. Madison wanted to defeat the New Jersey Plan, of course, and he considered the idea of equal representation for each state in the Senate repugnant. If he had a ready answer to the question of how a Virginia-Plan Constitution would prevent Congress from swallowing up the states, this would have been a good moment to produce it.

Madison did nothing of the kind. Instead, he responded that the danger to the balance of power was more likely to come from the states than the federal government, that even if the general government had plenary legislative power it would have no reason to disable the states from acting for the public good, and that the real objection to abolishing the state governments was merely that the general government could not as a practical matter be competent to do all the things that the government of a vast and varied country required.⁷⁹ If the general government turned out to be competent to do all of that necessary governing, Madison argued, the people would be no less free for letting it do so.⁸⁰ So even if the Virginia Plan might have a tendency to let Congress absorb the states, Madison concluded, that would not be a major problem with the Plan.⁸¹

Needless to say, these are not the remarks of a person who is bent on finding a legal mechanism to limit the scope of congressional legislation, let alone those of someone who believes that such a mechanism is at hand and should be used. To be sure, Madison was interested in preventing any deci-

77. *Id.* at 60.

78. *Id.* at 355.

79. *Id.* at 356–57.

80. *Id.* at 357.

81. *Id.* at 355–58.

sionmaking institution from wielding too much of the general government's power. The federal legislature, executive, and judiciary needed to be configured so as to check and balance one another. But on the question of the scope of that government's legislative domain relative to that of the states, Madison was, in 1787, a resolute nationalizer.⁸² So for two different reasons, he would not have thought that the Constitution should include, as one of its most important features, an enumeration of congressional powers aimed at limiting the general government and preserving space for the states. One reason was practical: he did not think that enumerating powers was a good way to limit legislatures. The other reason was a matter of what the Constitution was supposed to accomplish. To Madison in 1787, the critical objective was to empower the general government. He was not much worried about how to limit its purview.

D. *The Constitution in Congress*

Once the Convention finished its work, Madison's project changed from trying to improve the Constitution to trying to defend it against skeptics. His first forum for such a defense came just nine days after the Convention rose, when Congress discussed the Constitution before voting to transmit copies to the state legislatures along with a letter asking the states to hold ratifying conventions.⁸³ Our knowledge of what happened in Congress's conversations depends, as for the Convention itself, on the surviving notes taken by individual participants. From those records, it appears that Madison twice made arguments about enumerated legislative powers. One of his arguments suggested a more robust view of the importance of limiting Congress by enumerating its powers. But on full consideration, and remembering especially what Madison's tactical imperatives were, it seems most plausible that Madison's views on enumeration had not changed very much in the week and a half since the Convention ended.

Madison's first discussion of enumerated powers during Congress's discussion of the proposed Constitution was about the powers of the *Convention*, not those of the proposed Congress. The issue under discussion was whether the Convention exceeded its delegated authority in proposing an entirely new Constitution.⁸⁴ Madison acknowledged that the Convention may have exceeded its formal mandate. But he urged Congress not to see that fact as invalidating what the Convention had produced. To make that argument, he pointed out that Congress too had done things that exceeded

82. One of Madison's greatest disappointments at the Convention came when the delegates rejected the part of the Virginia plan that would have authorized Congress to nullify state laws as unconstitutional. Indeed, Madison's own preference was for an even more extensive federal veto power, by which the Senate alone could veto any state law at all, whether for constitutional reasons or otherwise. See generally FELDMAN, *supra* note 46, at ch. 5.

83. *The Confederation Congress and the Constitution: 26–28 September*, in 13 DHRC, *supra* note 17.

84. *Id.* at 233.

its own delegated powers under the Articles of Confederation. In particular, he mentioned Congress's legislation providing for the sale of land in the western territory and also for the organization of government there.⁸⁵ Madison might also have had in mind Congress's creation of the Bank of North America in 1781. One week after Congress formally incorporated that institution, Madison wrote to his friend Edmund Pendleton that most members of Congress agreed that under the Articles Congress lacked power to take that action but nonetheless thought it important to incorporate the Bank, so they forged ahead.⁸⁶

Why did Madison point out that Congress too had exceeded its enumerated powers? In one way or another, he seems to have been urging his congressional colleagues not to throw stones at the Convention for a sin that they had committed themselves. But he might have meant his point in a local way or a more general one. In the local version, Madison might have been acknowledging that an institution that exceeds its enumerated powers behaves badly but also saying that Congress should be prepared to forgive this sin, because Congress had sometimes done the same thing. In the more general version, Madison might have been saying not just that Congress happened to have committed the same sin the Convention had but that the ostensible sin is actually just normal behavior. On the latter version, Madison would have been arguing that faulting the Convention for exceeding its enumerated powers would be holding that body to an unrealistic standard, because—as Congress's own example suggested—enumerating the powers of a decisionmaking body is not a reliable mechanism for limiting what that body actually does. It hadn't worked for Congress, and people shouldn't expect or demand that it work for the Convention.⁸⁷ It is hard to know, of course, whether Madison meant this point in the more local way or the more general one. But it bears noting that the more general version accords with Madison's view of internal limits as expressed in the letter to Wallace and at the Convention: enumerating powers is not a practically reliable mechanism of limitation.

That said, Madison also said something that day that seemed to envision a more robust limiting role for the Constitution's enumeration of congressional powers. One question that arose in Congress was whether the proposed Constitution was deficient because it contained no Bill of Rights.⁸⁸

85. *Id.* at 236.

86. Letter from James Madison to Edmund Pendleton (Jan. 8, 1782), in 4 THE PAPERS OF JAMES MADISON 22–23 (William T. Hutchinson & William M.E. Rachal eds., 1965). One wonders whether these experiences informed the skepticism about enumeration as a device for limiting legislatures that Madison articulated to Wallace.

87. One could of course argue that the relevant dynamics in Congress were different from those respecting the Convention. But Madison drew the parallel nonetheless.

88. On some of the ways in which this question might not have meant what it means to modern lawyers, see GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS 5–7, 23–49 (2018).

Together with his fellow Convention-veteran Nathaniel Gorham of Massachusetts, Madison defended the Constitution on a ground familiar to modern constitutional lawyers: that a Bill of Rights was unnecessary because the new government, unlike the state governments, would be a government of enumerated powers rather than a government of general jurisdiction.⁸⁹

Making that argument on that day should have come at some cost to Madison's credibility. Earlier on the same day, he had made the somewhat contradictory observation that the existing Congress had not in practice been limited to exercising the powers delegated to it under the Articles of Confederation. One argument claimed that an enumeration could be relied on to limit a legislature, and the other argument pointed out that in practice enumerations cannot be relied upon in that way. And if Madison was contradicting himself, we might inquire whether he had no stable view of the question, or whether he might in some other way have been unaware of the contradiction—or whether he simply argued two irreconcilable positions on the same day, switching from one to the other as necessary to defend the proposed Constitution.

If we seek to identify one of his two arguments that day as Madison's actual view, though, there is a good case for picking the argument that legislatures are not reliably limited by enumerations of powers. That was his view in 1785 and also in the summer of 1787. In the absence of some reason to think he had undergone a conversion, it makes sense to think that he still thought in the autumn of 1787 what he had thought a short time before.

To reach that conclusion, one would have to think that Madison was making an argument he didn't believe when, in the same conversation, he claimed that the enumeration obviated a Bill of Rights. That possibility seems completely plausible. For one thing, the claim that the enumeration obviated a Bill of Rights was terribly weak on its merits, as would soon be widely recognized.⁹⁰ For another, Madison's partner in advancing that claim in Congress that day was Gorham, who indicated during the Convention that he thought Congress would be able to exercise powers not enumerated, so long as the acts in question were not affirmatively prohibited.⁹¹ If Madison's partner was arguing disingenuously in order to get the Constitution

89. *The Confederation Congress and the Constitution: 26–28 September*, *supra* note 83, at 237.

90. See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 377–78 (2007); Primus, *The Limits of Enumeration*, *supra* note 12, at 614–19; see also *infra* notes 98–101 and accompanying text.

91. For example, Gorham argued at the Convention in favor of deleting a proposed clause authorizing Congress to emit bills on credit and, simultaneously, against inserting a clause prohibiting Congress from doing the same thing, on the theory that emitting bills of credit should not be prohibited but also should not be encouraged, and putting the words in the Constitution might give Congress ideas. 2 RECORDS, *supra* note 18, at 309. On this view, the point of declining to enumerate a power was to try to reduce the use of the power, not to make the power legally unavailable.

through Congress and on to the states, it is certainly plausible that Madison was too.

But there are also other reasons to think that Madison did not really believe that a Bill of Rights was unnecessary in light of Constitution's enumeration of congressional powers. For one, Madison declined to defend that view once it was challenged by others. The chief challenger in Congress was Virginia's Richard Henry Lee.⁹² Gorham and Madison's idea, Lee noted, relied on the premise that Congress under the new Constitution would only be authorized to exercise those powers that were expressly given.⁹³ But what was the basis for that premise? Nothing in the proposed Constitution specified that Congress would only be able to do those things that were particularly authorized. Worse still, the proposed Constitution's failure to state that Congress would be limited to the powers enumerated seemed particularly meaningful because it stood in contrast to the Articles of Confederation.⁹⁴ The text of the Articles, Lee argued, restricted Congress to only those powers that were "expressly delegated to the United States, in Congress assembled."⁹⁵ The proposed Constitution had no parallel language. Surely the contrast was significant. If the drafters of the Articles had specified that Congress could exercise no powers but those expressly delegated to it, and the drafters of the Constitution had not, it made sense to think that the Constitution contemplated Congress's exercising powers *beyond* those expressly delegated. To be sure, the text of the Constitution did not say "Congress may exercise more powers than are identified here." But at the very least the salient omission of any statement limiting Congress to those powers expressly delegated to it left the door open to the exercise of additional powers. Given that state of affairs, Lee argued, a Bill of Rights was essential in order to prevent Congress from exercising powers inappropriately.⁹⁶

92. See *The Confederation Congress and the Constitution: 26–28 September*, *supra* note 83, at 236–40.

93. *Id.* at 237–40.

94. *Id.* at 237.

95. ARTICLES OF CONFEDERATION OF 1781, art. II; accord *The Confederation Congress and the Constitution: 26–28 September*, *supra* note 83, at 237. Lee was here offering a reading of the Articles that might not seem literal to a twenty-first-century reader but that was conventionally accepted in the 1780s. Strictly speaking, the relevant text in the Articles did not say what powers Congress could exercise. Instead, that text—Article II—ran as follows: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION OF 1781, art. II. Against the background assumption that powers belonged either to Congress or to the states but not both concurrently, Lee took that statement as tantamount to saying that Congress could exercise only those powers expressly delegated. This seems to have been the consensus reading; I am unaware of readers among the Founding generation who read Article II differently.

96. *The Confederation Congress and the Constitution: 26–28 September*, *supra* note 83, at 237.

After Lee made this argument, Madison seems to have backed down. He offered no defense of his contention that the enumeration of congressional powers made a Bill of Rights unnecessary. Indeed, after Lee disputed the point directly, Madison seems to have backed away from that argument as a general matter for the remainder of the ratification process.⁹⁷ And Madison's backing away from that argument after having been once called out on its weaknesses should not be particularly surprising. It's a famous argument, and it seems to have persuasive power for modern audiences, who often associate it with its canonical expression in Hamilton's *Federalist* 84.⁹⁸ But in the 1780s most people quickly recognized that argument as implausible—a talking point that defenders of the Constitution had dreamed up after the Convention was over as a way of covering for their failure to anticipate the public's appetite for a Bill of Rights. Pretty much nobody bought it, and for

97. In the *Federalist Papers*, Madison described the enumeration as limiting Congress, see *THE FEDERALIST*, *supra* note 16, No. 45 (James Madison), but no Federalist Paper attributed to Madison argued that the enumeration made a Bill of Rights unnecessary. As far as I can tell, the only occasion during the ratification process when Madison made that argument after Lee confronted him with its weaknesses in September 1787 came one day before the very end of the Virginia convention, when the Constitution's opponents were proposing to have Virginia ratify the Constitution conditionally, on the condition that a specified set of amendments be adopted. See 3 ELLIOT, *supra* note 57, at 621–22, 626–27. Madison believed, and perhaps correctly, that conditional ratification was a strategy for preventing ratification: given the choice to ratify conditionally, delegates might take that middle road rather than simply voting yes, and if Virginia ratified only conditionally, the project might fail. If Virginia ratified conditionally, other states might make similar demands, and there might be little hope of satisfying everyone. So Madison believed it essential to secure ratification without conditions, and, facing a demand for conditional ratification at his state convention's last moment, he broke out every anti-amendment argument he had, including even the one he had stayed away from for the previous nine months. (To be sure, my claim that Madison did not make this argument on other occasions is limited by the impossibility of proving a negative. I would be grateful to readers who point me to sources showing that Madison did at some point make this argument during the ratification debates, if such sources exist.) To my knowledge, Madison's next articulation of something like this argument came in his letter to Jefferson of October 17, 1788. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 *THE WRITINGS OF JAMES MADISON* 269, 271 (Gaillard Hunt ed., 1904). In his letter to Jefferson, Madison wrote that he had “always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration” of congressional powers. *Id.* There is reasonable ground for suspecting that Madison was here engaged in revisionism. See MAGLIOCCA, *supra* note 88, at 34 (“Only a politician as adroit as Madison could have written this with a straight face, as he has said nothing in favor of a bill of rights until then.”). By the time of this letter to Jefferson, the Constitution had been ratified, and Madison was turning his attention to running for office in Virginia, where his election to Congress was anything but guaranteed and support for a Bill of Rights was strong. See FELDMAN, *supra* note 46, at 247–51.

98. *THE FEDERALIST*, *supra* note 16, No. 84 (Alexander Hamilton). This argument is, for example, the official account of the National Constitution Center's Interactive Constitution. See Gary Lawson & Robert Schapiro, *The Tenth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-x> [<https://perma.cc/DE5Y-RKZX>]; see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.) (“Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government.”).

good reason.⁹⁹ After all, Lee was right that the Constitution had no text limiting Congress to the powers expressly delegated. Readers of Article I could also see that a Congress vested with the powers enumerated there—including the power to tax and the power to raise armies—would have no trouble behaving oppressively if it had a mind to do so.¹⁰⁰ Calls for a Bill of Rights continued unabated, and Madison himself drafted one for the First Congress to approve just as soon as he could.¹⁰¹ In that context, the fact that Madison never repeated the *Federalist 84* argument¹⁰² during the ratification debates suggests that, as between the two arguments he made in Congress in September 1787, his articulation of the *Federalist 84* argument was more likely the aberration and his observation that enumerations do not in practice confine legislatures more likely the accurate reflection of his view at the time. Once, early in the process, he tried to say something else; he was called out; he knew that what he'd said was weak, and he didn't say it again. And it wasn't hard for him to drop that argument, because it didn't accord with his actual view anyway.¹⁰³ His actual view—as it had been during the Convention, and as it had been two years before—was that one should not expect enumerations of power to constrain in practice.

E. Publius and Ratification

The ratification debates called for Madison to soft-pedal his nationalism. The task at hand was to sell the Constitution to a broad audience, and Madison did not need to worry about convincing people who were strongly in favor of a powerful national government. He had them already. What he had to worry about was reassuring people who were concerned that the new system would give the general government too much power. To the extent that

99. See Graber, *supra* note 90, at 377–78 (2007); Primus, *The Limits of Enumeration*, *supra* note 12, at 614–19.

100. See, e.g., 3 ELLIOT, *supra* note 57, at 415–16 (relaying the June 14, 1788 speech of George Mason at the Virginia Ratifying Convention).

101. To be clear, though: to say that Madison drafted a Bill of Rights in the First Congress is not to say that Madison thought of the twelve amendments approved by that Congress and sent to the states for ratification as “a Bill of Rights.” On the contrary, referring to the first set of ratified amendments as “the Bill of Rights” seems to be a considerably later historical development. See MAGLIOCCA, *supra* note 88, at 38–40. In Madison's own mind, the “Bill of Rights” that he drafted in the First Congress was a general statement about the basis for the new government's authority—a statement that Congress declined to approve as a proposed Article V Amendment. See *id.* at 40.

102. Obviously, it is anachronistic to call this argument “the *Federalist 84* argument” as of the time Madison argued in Congress in 1787. *Federalist 84* would not be written until the following year. But for the modern audience, it is a reasonable shorthand.

103. I seriously doubt Hamilton believed it either, of course. It seems more likely that he threw that argument into *Federalist 84*, near the end of the series, in a kitchen-sink tour of arguments in which he included anything that he thought might persuade his audience, whether he believed it or not.

we are interested in identifying Madison's own ideas, rather than in what a reasonable observer might have made of the proposed Constitution, it is therefore prudent to take statements about limited congressional power that Madison made during the ratification process at a bit of a discount.

During the ratification process, Madison articulated both the view that the textual enumeration of congressional powers would limit Congress and the view that textual enumerations of powers are not, in practice, good at settling questions about who has the power to do what. In private correspondence with Jefferson, Madison took the latter view.¹⁰⁴ Similarly, Madison in the *Federalist Papers* devoted an essay to explaining that the Constitution did not, and in the nature of things could not, draw a clear line between Congress's jurisdiction and that of the states.¹⁰⁵ Nonetheless, Madison in the *Federalist Papers* also presented the new general government as limited to something less than plenary legislative power and pointed to the enumeration of specific powers in support of that characterization. In the voice of Publius, Madison described the government's jurisdiction as extending "to certain enumerated objects only,"¹⁰⁶ argued that the very fact of an enumeration of congressional powers showed that Congress would not have general legislative authority,¹⁰⁷ and characterized the powers of Congress as "few and defined."¹⁰⁸ And according to the available documentation, Madison seems to have insisted at Virginia's ratifying convention that the new government would not be able to exercise more powers than those enumerated in the new Constitution—especially in the Convention's final stage, when he combatted a push for Virginia to ratify only on the condition that a specific set of amendments be added to the Constitution.¹⁰⁹

The public statements of any Founder about contested issues during the ratification process are potentially unreliable guides to what that person really thought, both because people do not always have stable views and because people sometimes say what they think their audiences want to hear rather than what they actually believe. (Elbridge Gerry, who would later serve as Madison's vice president, would say during the Bank debate that nobody

104. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON* 270, 275 (Julian P. Boyd ed., 1955) (speaking of "the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial" (footnote omitted)). As with the letter to Wallace, the immediate subject of Madison's discussion is enumerations of powers in state constitutions, so there is room for someone to argue that Congress is different. But as I noted earlier, the substance of Madison's argument seems applicable to Congress as well, because the argument is founded in a view about the nature of language and the nature of legislation, not about anything specific to the legislatures of states.

105. *THE FEDERALIST*, *supra* note 16, No. 37 (James Madison).

106. *Id.* No. 39 (James Madison).

107. *Id.* No. 41 (James Madison).

108. *Id.* No. 45 (James Madison).

109. 3 *ELLIOT*, *supra* note 57, at 95 (June 6); *id.* at 620, 626–27 (June 24); *see also id.* at 629–31 (discussing whether to insist on the adoption of proposed amendments as a condition of ratification).

should take seriously the representations made during the ratification debates by Publius, or by anyone else either—people said what they thought they had to say.¹¹⁰) On the theory that a politician's private correspondence with friends is more likely to be authentic than his public statements when trying to win over skeptical voters, the fact that Madison's private communication to Jefferson took the same view that Madison had held previously—that is, that enumerations of legislative powers are not in practice good devices for confining legislatures to the exercise of particular powers—suggests that Madison was at least partly posturing on the occasions when he suggested otherwise publicly.

But whatever the relationship between Madison's statements during the ratification process and his actual views at that time, it seems safe to think that Madison believed the enumeration to be *at most* as important and as limiting as he said in public. After all, Madison was a strong proponent of national power at the Convention. During the ratification process he was trying to sway people more skeptical of national power than he. If he shaded his views, it would have been toward exaggerating the limits that the proposed Constitution would place on Congress. In that light, his willingness to say in *Federalist 37* that the enumeration could not be understood to create hard limits on the general government is telling. It suggests, not surprisingly, that Madison retained his earlier skepticism about enumerations of powers as devices for limiting legislatures. And to the extent that he was skeptical, it would have made little sense for him to regard the enumeration of congressional powers as the essential characteristic of the new government. After all, it makes little sense to rest a constitutional system on an ineffective device.

II. THE BANK DEBATE WITHOUT THE ENUMERATION QUESTION, 1790–1791

After the Constitution was ratified, Madison served in the House of Representatives as a congressman from Virginia. In that capacity, in February of 1791, Madison made a major enumerated-powers argument in opposition to the bill to incorporate the Bank of the United States.¹¹¹ In important ways, his argument is a paradigm for later enumerated-powers arguments. And the story of the debate of which Madison's argument was a central part is often (and easily) told through the writings of four famous participants. In the House, Madison argued that the Bank was unconstitutional because it exceeded Congress's enumerated powers. In President Washington's cabinet, Jefferson and Randolph concurred with Madison, and Hamilton argued the other side. To read those documents is to confront the Bank Bill as squarely posing an issue about the extent of Congress's enumerated powers. And that is how constitutional lawyers generally think of the Bank debate.

110. 2 ANNALS OF CONG. 1950, 1953 (1791).

111. *Id.* at 1896–902, 1956–59.

In this Part, however, I present the Bank controversy differently by starting the story at an earlier point—with Hamilton’s report to Congress in December 1790 recommending the creation of the Bank. I frame the narrative this way to make a point that cannot be seen if one starts with Madison in the House. It is this: until the last stage of the legislative process, the Bank bill was not the subject of any enumerated-powers controversy. It had critics and opponents, Madison among them. Depending on what it means to characterize a problem as a “constitutional” problem, some of Madison’s bases for opposition could even be regarded as constitutional.¹¹² But nobody, Madison included, seems to have thought that Congress might lack the authority to create the Bank by legislation. That idea surfaced only when the bill stood on the brink of passage.

A. *Hamilton’s Report*

Hamilton delivered his Bank proposal to Congress on December 14, 1790. As printed in the Appendix to the *Annals of Congress*, the Treasury Secretary’s report was more than fourteen thousand words long.¹¹³ In considerable depth, Hamilton discussed the merits of creating a Bank of the United States. The report devoted considerable space to anticipating arguments against the Bank and explaining why, in Hamilton’s view, those arguments should not prevail.¹¹⁴ But at no point did Hamilton mention the possibility of an enumerated-powers issue—not even to say, “Some people might think that chartering a Bank is beyond the power of Congress, but that’s a fringe view, and here’s why.” The Report contains no indication whatsoever that Hamilton could perceive or anticipate an enumerated-powers objection.

Hamilton was reasonably conversant with the Constitution. He knew the proposition—not universally accepted, but certainly mainstream—that Congress was limited to its enumerated powers. If the idea that those enumerated powers were not sufficient to authorize the incorporation of the Bank had been within the ambit of conventional constitutional thinking, Hamilton should have been able to see Madison’s objection coming. Given that Hamilton apparently did not anticipate Madison’s argument, we should consider the possibility that Madison’s argument was not an accessible mainstream concern. It may instead have required some creativity, pushing the boundaries of what capable constitutional thinkers at the time thought of as arguable positions.

To be sure, the fact that Hamilton anticipated no enumerated-powers objection does not prove that there was no such objection to make. Hamilton was in favor of the Bank, and people often overlook the potential obsta-

112. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013) (canvassing possible meanings of “constitutional”).

113. See ALEXANDER HAMILTON, TREASURY DEP’T, REPORT ON A NATIONAL BANK, reprinted in 2 ANNALS OF CONG. app. at 2031–59 (1790).

114. See, e.g., *id.* at 2035–42.

cles to projects they support. But as noted above, Hamilton's report paid a lot of attention to analyzing and overcoming potential arguments against the Bank. Moreover, Hamilton was not just any advocate, and the objection that Madison ultimately propounded was—in Madison's presentation, anyway—founded on a central and fundamental feature of the Constitution. So the question is not just whether government officials sometimes overlook problems with their pet projects. It is whether the author of fifty-one Federalist Papers was likely to overlook an issue going to the heart of the new Constitution on a topic to which he devoted fourteen thousand words.

The point can be sharpened further, because Hamilton's report did take account of the Constitution in other ways. One of the topics Hamilton covered was the possibility of the government's creating paper money. In that discussion, Hamilton noted that the Constitution prohibited the states from creating paper money. He then argued that although the Constitution did not impose the same prohibition on the federal government, it would be wise for the federal government not to create paper money either.¹¹⁵ So Hamilton had not put the Constitution out of mind while writing his report. Where he thought the Constitution relevant to an issue he was discussing, he said so. The fact that he catalogued and discussed many possible objections to the Bank and never wrote a word about a possible enumerated-powers challenge to Congress's authority to create the Bank accordingly suggests that Madison's speeches in the House did not pursue an obviously available line of argument. In 1791, to make a constitutional move that Hamilton could not see coming was, at least presumptively, to engage in creative lawyering.¹¹⁶

B. *Madison's Opposition*

1. Madison's Concerns

Some of Madison's reasons for opposing Hamilton's Bank proposal were prosaic. For example, if the Bank were incorporated as proposed, its system for offering shares to the public was such that Madison's Virginian constituents were unlikely to come away with much.¹¹⁷ But more general and fundamental matters were also at stake. The Bank would be an institution controlled by a financial elite. Madison had no problem with elites holding power, but the elite he trusted was a landed-gentry elite, not a financial-

115. *Id.* at 2043–44.

116. To repeat a point in the interest of clarity: Madison's creativity lay not in the idea that Congress could legislate only on the basis of enumerated powers but in the idea that those powers might not be sufficient for authorizing the Bank bill. The general idea that Congress could legislate only on the basis of enumerated powers was a known part of constitutional argument, albeit a contested one. Hamilton would not have been surprised at that general idea. What Hamilton did not foresee was that that idea would be pressed into service in an argument against the Bank.

117. *See, e.g.,* FELDMAN, *supra* note 46, at 315.

markets elite.¹¹⁸ In the tradition of a country-party ideology that had recently animated Antifederalists and that would soon be important to the Democratic-Republican Party, Madison worried that relationships of financial credit and debt could undermine the political and economic independence of citizens and thereby erode an important basis of republicanism.¹¹⁹ A national bank could thus be particularly threatening, because it would be a vehicle through which a financial elite—much of it located in England—could hold the debt, and thereby compromise the independence, of the Republic itself.

Madison also worried that recognizing a federal power to create corporations would have unwelcome repercussions in the national political process. By 1791, he was coming to think that the extended republic he had praised in *Federalist 10* was turning out to give a structural advantage to the financial class, which seemed better able to mobilize politically on a national scale than the more locally oriented planter-gentry were.¹²⁰ If Congress had the power to grant charters of incorporation, then the financial class would be able to use its advantage in national politics to secure a great deal of what it wanted—that is, power-wielding corporations controlled by financial elites. But if only the state governments could create corporations, those financial elites would be forced to pursue their interests in state-level politics, and in state politics the gentry could not be so easily overwhelmed.¹²¹

In a partially related but less well-remembered concern, Madison also may have worried about the relationship between the Bank proposal and the plan for establishing a national capital on the Potomac River.¹²² The Potomac plan was deeply important to Madison, partly as a way to increase Virginia's buy-in to the new Constitution and partly because, in line with his distrust of financial elites, he saw the possibility of a seat of government in or near a financial center like Philadelphia or New York City as inviting the financial class's domination of the government. Much better to put the seat of government somewhere away from the existing cities, and somewhere sufficiently central that it might be accessible by many different kinds of people. If that somewhere adjoined Virginia, well, all the better. And for a very prac-

118. See ELKINS & MCKITRICK, *supra* note 46, at ch. 3; FELDMAN, *supra* note 46, at 315–18; RODERICK M. HILLS, JR., *FEDERALISM AND SELF-RESTRAINT: THE GENTRY, THE SAINTS, AND THE FEDERAL REPUBLIC IN NINETEENTH CENTURY AMERICA* (forthcoming) (manuscript ch. 3, at 3).

119. See ELKINS & MCKITRICK, *supra* note 46, at ch. 3; HILLS, *supra* note 118 (manuscript ch. 3, at 3).

120. HILLS, *supra* note 118 (manuscript ch. 3, at 7); see also James Madison, *For the National Gazette*, in 14 *THE PAPERS OF JAMES MADISON* 137 (Robert A. Rutland et al. eds., 1983) (reprinting Madison's note on consolidation of December 3, 1791); James Madison, *Notes for the National Gazette Essays*, in 14 *THE PAPERS OF JAMES MADISON*, *supra* at 157, 161–63 (concerning the "Influence of public opinion on Government"). Like the fear of debt, this concern about the power of financial networks at large scale was a staple theme in country-party thought. HILLS, *supra* note 118 (manuscript ch. 3, at 7).

121. *Id.* at 9–10.

122. See *infra* Part IV.

tical reason, the Bank proposal seemed like a threat to Congress's agreement to put the capital where Madison wanted it. Everyone knew that a national bank would be located in Philadelphia, where Congress was in temporary quarters. Every increase in the government's Philadelphia footprint while Congress was "temporarily" there might make it harder to pick up and move the whole operation as scheduled in 1800. Voting to approve a grand plan for the distant future is one thing, but actually bringing that plan to fruition is another, and Madison was practical enough to know it.¹²³

In an important sense, Madison may have regarded several of these reasons for opposing the Bank bill as *constitutional* concerns. Institutional arrangements that could enhance or undermine the independence of citizens or of the government in general, allocations of legislative power that would channel political competition in different ways, a (geographic) separation of powers between the capital markets and the seat of government—all these things are matters of constitutional design, and potentially important ones.¹²⁴ But the text of the written Constitution did not vindicate Madison's concerns. No language in the Constitution expressly spoke to the possibility of a national bank, or to federally chartered corporations, or to the relationship among the government, the gentry, and the financial class, or to the merits of putting the seat of government in this or that location. In some cases, as with the seat of government, the Constitution named the issue and openly deferred its resolution to Congress at some later date.¹²⁵ In other cases, as with the question of a federal power to charter corporations, the Constitution said nothing, not because nobody in 1787 had recognized the possibility of a constitutional issue but as the result of a set of standoffs in which no constituency managed to make the Constitution reflect its preference.¹²⁶ The text of the Constitution accordingly reflected no agreement on the issue, except in the sense that it reflected an agreement to adopt a Constitution that would not speak directly to the question.

One could articulate this state of affairs in either of two ways. One, which takes as axiomatic that "constitutional issues" in American law are those and only those addressed by the text of the Constitution, would say that Madison's objections were not *constitutional* objections.¹²⁷ The other framework, which classifies fundamental matters of government structure and national-polity ethos as "constitutional" whether or not the written Constitution names or settles the relevant issues, would be willing to see Madison's concerns as constitutional.¹²⁸ (Not necessarily as *justified*, of

123. The matters described in this paragraph are fleshed out and documented *infra* in Part IV.

124. See Primus, *supra* note 112.

125. See U.S. CONST. art. I, § 8, cl. 17.

126. See *supra* Part I.

127. See Primus, *supra* note 112, at 1088–1104.

128. See *id.* at 1127–39.

course: that would require a further judgment. To describe a concern as constitutional in this way is to say something about its subject matter, not to say which way it should be resolved.) But within this second framework, the fact that a concern is constitutional does not mean that the written Constitution speaks to its resolution.

2. Madison's Preparation

As of January 1791, Madison did not seem to have thought that his objections to the Bank were rooted in the written Constitution's text. The case for this possibility is inferential: I am not aware of a letter from Madison to Jefferson saying "Dear Tom: The Bank bill is lousy, but nothing in the Constitution prohibits it, so I'll have to meet it on other grounds." Instead, the claim that Madison was not thinking in terms of objections based on the written Constitution is an inference from absence. In the weeks before the House debated the Bank, Madison spent considerable time preparing to debate the Bank bill.¹²⁹ And to the best of my knowledge, there is no indication that his preparations included the development of any arguments appealing to the written Constitution.¹³⁰

Instead, Madison immersed himself in the literature on banking, intending to be an expert on the subject by the time the House took up Hamilton's proposal.¹³¹ He read about the Bank of England, about the Banks of Amsterdam and Rotterdam and Hamburg, and about banks in Florence and Venice and Genoa and Padua going back to the twelfth century.¹³² By the end of January, he had compiled several pages of notes based on his reading.¹³³ By all indications, he was equipping himself to argue against the Bank from a position of great knowledge. The ground of argument for which all this reading would prepare him would be the merits and evils of banking, not the enumerated powers of Congress—and indeed when Madison rose in opposition on February 2, he spoke for a while about banking before ever mentioning an objection tied to the written Constitution.¹³⁴ If Madison spent any time before February preparing to make an argument about the enumerated powers of Congress, he seems to have left behind no evidence.

Similarly, Madison's correspondence during the seven weeks between Hamilton's proposal and the House debate gives no indication that Madison was thinking about the Bank in terms of anything specified in the written Constitution. One should not overread this evidence, both because the ab-

129. See FELDMAN, *supra* note 46, at 316–17.

130. Once again, I will be grateful to readers who bring documents I may have missed to my attention.

131. FELDMAN, *supra* note 46, at 316–17.

132. James Madison, *Notes on Banks*, in 13 THE PAPERS OF JAMES MADISON 364 (Charles F. Hobson & Robert A. Rutland eds., 1981).

133. *Id.*; James Madison, *Notes on the Bank of England*, in 13 THE PAPERS OF JAMES MADISON, *supra* note 132, at 367.

134. 2 ANNALS OF CONG. 1894–96 (1791).

sence of a subject from correspondence cannot prove that a topic was not on a writer's mind and because Madison seems not to have written much about the Bank at all during that period. Only in two surviving letters, one to his father and one to Edmund Pendleton, did Madison write about the Bank issue, and to his father he merely wrote that he expected the Bank bill to occasion a serious fight in the House.¹³⁵ The letter to Pendleton, however, may be more revealing.

Madison's letter to Pendleton opened by addressing a different topic: the legal force of a provision of the peace treaty with Britain.¹³⁶ The question was whether a provision should be treated as self-executing—that is, whether the treaty had the force of operative law on the point it covered, or whether it required further legislation in both the United States and Britain to become operative. In giving his view on that question, Madison conducted an overt exegesis of the Constitution's text. He quoted and interpreted the words in Article VI that describe treaties as “the supreme law of the land.”¹³⁷ Over the course of six paragraphs, Madison explained why he took that language to make the treaty self-executing and also addressed other constitutional questions arising from the “supreme law” language. Then, immediately after his analysis of Article VI was finished, Madison turned to the subject of the Bank. The only view he expressed on that subject was as follows: “I augur that you will not be in love with some of its features.”¹³⁸

If Madison believed that the Bank bill was in conflict with the Constitution, it would have been natural for him to say so in this letter. He was discussing the Bank, and the letter up until that point had been an exercise in interpreting the text of the Constitution. Why switch out of that register and say merely that Pendleton might dislike certain features of the Bank? If Madison believed the Bank flatly unconstitutional, why would he not have said so?

One should not make too much of this evidence. The sentence to Pendleton is only a sentence, and strictly speaking it says nothing about Madison's own views. But the contrast with Madison's discussion of the treaty in the same letter is striking. To believe that Madison considered the Bank proposal unconstitutional on enumerated-powers grounds when he wrote to Pendleton, one must think that Madison took whatever time was necessary to write six longhand paragraphs interpreting a constitutional clause on a different issue and then immediately afterwards, when addressing another subject presenting a problem under the Constitution, chose to say nothing at all suggesting that such an issue was even in play. That seems unlikely. So

135. Letter from James Madison to James Madison Sr. (Jan. 23, 1791), in 13 *THE PAPERS OF JAMES MADISON*, *supra* note 132, at 358.

136. Letter from James Madison to Edmund Pendleton (1791), in 13 *THE PAPERS OF JAMES MADISON*, *supra* note 132, at 342.

137. *Id.* (citing U.S. CONST. art. VI).

138. *Id.* at 344.

here is another interpretation, and a straightforward one: Madison discussed the treaty question in light of the Constitution's text because he thought the Constitution's text bore on the question. He said nothing about the Constitution in connection with the Bank because he didn't think the Bank raised any issues of that kind. It was an important matter, surely. Perhaps even a constitutional one, in the small-c sense of the word. But it wasn't an issue to be settled by reference to the written Constitution.

C. *The Senate*

The Senate took up consideration of the Bank bill in January, ahead of the House.¹³⁹ In 1791, the Senate (unlike the House) met behind closed doors, and the *Annals of Congress* record only a bare-bones procedural account of the Senate's business. We accordingly cannot discern from the *Annals* what arguments, if any, particular senators made to their colleagues when the Bank bill was before them. What the *Annals* do reveal is that the bill passed in the Senate with relatively little controversy. On controversial questions, or on issues where senators on the losing side wanted to be on record, the practice in 1791 as now was for senators to ask that the "Yeas and Nays" be reported in the journal. Under Article I, Section 5 of the Constitution, the Yeas and Nays must be printed if at least one-fifth of the Members present so request.¹⁴⁰ In the short Senate proceedings on the Bank bill that preceded the final vote, in which the Senate hashed out specific aspects of the Bank's charter, the Yeas and Nays appear.¹⁴¹ But at the end of the process, when the main question was put, the *Annals* simply record that the bill passed, without recorded Yeas and Nays.¹⁴² That indicates that less than one-fifth of the senators thought the final question was even worth being on record about.¹⁴³

139. See 1 DHFFC, *supra* note 58, at 531–36 (describing Senate action on the Bank bill between January 13 and January 20, 1791).

140. U.S. CONST. art. I, § 5, cl. 3.

141. See, e.g., 2 ANNALS OF CONG. 1748 (1791) (recording the Yeas and Nays on the question of whether the Bank's charter should expire in 1801 or in 1811). The reason why the length of the charter was especially important is further discussed *infra* in Section IV.D.

142. 2 ANNALS OF CONG. 1748 (1791).

143. Some commentators have read this evidence to indicate that passage in the Senate was unanimous. For an early example, see R.K. MOULTON, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANKS OF THE UNITED STATES 13 (photo. reprint. 2008) (New York, G.&C. Carvill & Co. 1834) ("The yeas and nays are not given. It is however supposed that the vote was unanimous."). A modern example is BREST ET AL., *supra* note 23, at 30. That inference might or might not be correct. Maybe the Senate was unanimous, or maybe a few Senators not amounting to one-fifth of those present objected. The last recorded vote on January 20 before the approval of the Bank bill showed twenty-three Senators on the floor, so as many as four could have asked for the Yeas and Nays and been rebuffed. 2 ANNALS OF CONG. 1748 (1791). According to the diary of Senator William Maclay, three senators objected to Hamilton's proposal early in the Senate's discussions: Butler, Izard, and Monroe. 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 359 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter 9 DHFFC] (entry of Jan. 10, 1791). But whether the

The most detailed surviving evidence of what transpired among the senators when the Bank bill was before them comes from the diary of William Maclay, then serving as a senator from Pennsylvania. The diary contains notes on the Senate's discussions of the Bank on at least eight different days in January 1791.¹⁴⁴ According to Maclay's notes, the Senate discussed the terms on which private individuals could buy and hold stock in the Bank,¹⁴⁵ the nature and size of a subscription by the United States on behalf of the public,¹⁴⁶ the appropriate length of the charter,¹⁴⁷ and whether Congress could repeal the charter once it was enacted.¹⁴⁸ The diary contains no suggestion that anyone questioned Congress's constitutional authority to incorporate the Bank.

Maclay was a fastidious republican. He suspected several of his more nationalistic Senate colleagues of aiming to annihilate the state governments altogether.¹⁴⁹ His diary entries during the Bank debate characterized Hamilton as a "damnable Villain."¹⁵⁰ Indeed, Maclay repeatedly criticized Washington himself for allegedly antirepublican tendencies, going so far as to wish "this same Genl. Washington were in Heaven," so that Washington's prestige could not be mobilized as "cover to [the Administration's] every Unconstitutional and irrepublican Act."¹⁵¹ Not surprisingly given his general orientation, Maclay was not a fan of banking systems, which he regarded as "Machines for promoting the profits of unproductive Men."¹⁵² He feared that the proposed Bank of the United States would serve the interests of a small financial elite and neglect the broader public.¹⁵³ On balance, and perhaps because he suspected the bill had the votes to pass, Maclay devoted himself to cutting the best deal he could for the public rather than trying to block passage of the bill.¹⁵⁴ But given his ideological stance, Maclay would hardly have been one to underplay constitutional objections to Congress's power to incorporate the Bank. Given that he recorded none, perhaps there were none to record.

bill passed unanimously or merely overwhelmingly, its passage does not seem to have been the occasion of significant controversy before the Senate.

144. See 9 DHFFC, *supra* note 143, at 359–66 (entries of Jan. 10, 11, 13, 14, 17, 18, 19, and 20, 1791).

145. *Id.* at 362 (entry of Jan. 18, 1791).

146. *Id.* at 359, 361–62 (entries of Jan. 11, 14, and 17, 1791).

147. *Id.* at 361 (entry of Jan. 14, 1791).

148. *Id.* at 364 (entry of Jan. 19, 1791).

149. *Id.* at 379 (entry of Feb. 11, 1791).

150. *Id.* at 362–63 (entry of Jan. 18, 1791).

151. *Id.* at 342 (entry of Dec. 14, 1790).

152. *Id.* at 362 (entry of Jan. 17, 1791).

153. *Id.* at 359, 361–62 (entries of Jan. 11, 14, and 17, 1791).

154. *Id.* at 355, 361–62, 364 (entries of Jan. 3, 14, 17, and 19, 1791).

This is not to say that Maclay never considered the possibility that Congress might lack the power to incorporate the Bank. On the contrary, his diary contains one reference to that possibility. It appears in an entry dated December 24, 1790, after Hamilton submitted his report but before the matter was taken up for discussion in the Senate. In that entry, Maclay wrote about Hamilton's Bank proposal. Much of what he wrote was critical. Banks, he wrote, might operate as taxes on the poor in favor of the rich, and by concentrating wealth in a few hands, their operation "may be regarded [a]s opposed to republicanism."¹⁵⁵ But Maclay did not doubt Congress's power to incorporate a bank if it chose to do so. His discussion of that matter consisted of a single sentence speculating that someone might question Congress's power to grant charters of incorporation, followed immediately by three short sentences dismissing the concern.¹⁵⁶ In other words, Maclay—who feared that his colleagues were seeking to extend congressional power so far as to annihilate the state governments, who viewed banks as unrepresentative, and whose republicanism was fierce enough to wish Washington dead—gave rather short shrift to the idea that Congress might lack the authority to incorporate the Bank. As far as he could see, there was no serious issue to discuss.

The only reference I have discovered to the possibility of a constitutional objection's having been mentioned in the Senate appears in a letter from Senator Pierce Butler of South Carolina to Representative James Jackson of Georgia, and it is just as dismissive. After the Senate passed the Bank bill, but before the House took up the matter, Jackson asked Butler to describe the Senate's deliberations on the issue. Butler penned about nine hundred words in response, summarizing arguments for and against the bill.¹⁵⁷ Toward the end of his letter, in less than a full sentence, Butler briefly raised and quickly dismissed the possibility that the Bank's exclusive privilege to do the fiscal business of the government would make the proposal unconstitutional.¹⁵⁸

The potential constitutional problem to which Butler referred—the granting of an exclusive privilege, meaning a corporate charter entitling the holder to monopolize the relevant business—might or might not be conceptualized as a problem about Congress's acting beyond its enumerated powers. If the idea was that Congress was forbidden to create legal monopolies, then the relevant constitutional rule might be better understood as an external limit on congressional power rather than as an internal one. A rule against monopolies is an affirmative prohibition, not something inherent in the specification of a delegated power. On the other hand, the idea that Con-

155. *Id.* at 347 (entry of Dec. 24, 1790).

156. *Id.* ("The power of incorporating may be inquired into. But the old Congress enjoyed it. Bank Bills are promissary Notes and of Course not Money. I see no Objection on this Quarter.")

157. Letter from Pierce Butler to James Jackson (Jan. 24, 1791), in 21 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 514 (Charlene Bangs Bickford et al. eds., 2017) [hereinafter 21 DHFFC].

158. *Id.* at 515.

gress lacked power to create a monopoly might have been rooted in Article I, Section 8, Clause 8, which authorizes Congress to grant time-limited monopoly privileges to authors and inventors.¹⁵⁹ From a perspective that sees the enumeration as a carefully limited set of authorizations and as intended overall to limit federal legislative power, one might reason that the affirmative specification of a power to grant time-limited monopolies to authors and inventors implies the denial of a more general right to grant monopolies.

Whether Butler meant to communicate the latter sort of reasoning as opposed to imagining a freestanding ban on monopolies is unclear. But either way, what is most telling about Butler's reference is his quick statement that the constitutional argument to which he was making reference was unworthy of Jackson's attention. It was not a serious objection. It merited a quick mention at the end of a general summary, in less than a sentence, and nothing more.¹⁶⁰ So even if Butler's letter is read for all it might be worth, it does not begin to suggest that any senators shared the sort of full-dress enumerated-powers concern that Madison would raise in the House, according to which incorporating the Bank lay beyond the powers of Congress and would therefore transgress the essence of the new Constitution. And apart from this equivocal reference in Butler's letter, I have been unable to discover any indication that anyone in the Senate debate contemplated an enumerated-powers objection to the Bank bill.

Much as it seems unlikely that Hamilton would have failed to anticipate an objection to the Bank based on a core tenet of the new Constitution, it seems odd that the entire United States Senate would overlook one. The Senate in 1791 was significantly populated by men who had recently attended constitutional conventions. Moreover, every senator in 1791 served as the ambassador of a state legislature, so it would be particularly strange for the entire Senate to overlook a core constitutional problem sounding in the federal government's exceeding its proper authority and intruding on the prerogatives of the state governments.

Similarly, the Senate's failure to raise that alarm cannot be explained on the grounds that the Senators were all in the tank for Hamilton, because the Senate in 1791 included outspoken opponents of extensive congressional power. Maclay is a less famous example. A more famous one is Virginia's James Monroe. Monroe was a prominent Antifederalist, and the Virginia legislature had sent him to the Senate in preference to Madison precisely be-

159. U.S. CONST. art. I, § 8, cl. 8.

160. As other possible objections to the Bank, Butler mentioned the concern that the Bank would "give an undue preponderance to the centre and finally destroy the ballance of power among the states." Letter from Pierce Butler to James Jackson, *supra* note 157, at 515. On a certain view of "constitutionality," those concerns could be regarded as constitutional objections to the Bank. But they are not the sort of constitutional objections with which this paper is concerned—that is, objections arising from the textual specification of the powers of Congress.

cause Madison was too solicitous of congressional power.¹⁶¹ And although Maclay's diary indicates that Monroe had objections to the Bank when the proposal first came before the Senate, there is no indication—not in Maclay's notes, not in Monroe's own papers, and not anywhere else that I have been able to discover—that Monroe doubted Congress's power to incorporate the Bank at any time before Madison pressed that argument in the House.¹⁶² It would be curious if an obvious objection to Congress's authority to incorporate the Bank—an objection serious enough to be championed by the man whom Virginia considered too much of a nationalist to represent it in the Senate—had not occurred to the reliable Antifederalist whom Virginia sent instead.¹⁶³

D. Other Evidence

To test further the hypothesis that the enumerated-powers objection to the Bank was a last-minute development when Madison spoke in the House, I have canvassed the surviving writings of all members of both Houses of Congress for the seven-week period between December 14, 1790, when Hamilton submitted his report, and February 2, 1791, when Madison rose in opposition, as well as the surviving letters written to members of Congress by other persons during that time period. For the entirety of that time, I have

161. Cf. FELDMAN, *supra* note 46, at 246–47. To be precise, the Virginia Legislature had chosen Richard Henry Lee and William Grayson, both Antifederalists, to represent it in the First Congress, rather than choosing Madison. Madison then ran for the House of Representatives and won, narrowly defeating Monroe. *Id.* at 247–56. Grayson died in March 1790, and the Virginia Legislature named Monroe, also a reliable Antifederalist, to succeed him. Beverley Randolph, *Credential for Election to the U.S. Senate*, in 2 THE PAPERS OF JAMES MONROE 488 (Daniel Preston ed., 2006).

162. Unsurprisingly, Monroe was not to be outdone by Madison in his opposition to congressional powers. On February 7, one day after Madison made the second of his two major speeches against the Bank in the House, Monroe for the first time (so far as I can tell) wrote that he objected to the Bank bill as exceeding the powers of Congress as enumerated in the Constitution. But he hedged, writing that he was not certain of the correctness of that view. (In the same letter, Monroe also reported that he had been one of six senators who had voted against the Bank—a claim that stands in tension with the absence of yeas and nays in the *Annals*. Perhaps Monroe was puffing a bit, retrospectively.) Letter from James Monroe to Nicholas Lewis (Feb. 7, 1791), in 21 DHFFC, *supra* note 157, at 722. After another four days passed, Monroe was prepared to go all in, writing in a different letter that the Bank was “absolutely unconstitutional” on enumerated-powers grounds, going into noticeably more detail about the argument, and seemingly presenting his constitutional objection as if it were a long-held conviction. See Letter from James Monroe to Zachariah Johnston (Feb. 11, 1791), in 21 DHFFC, *supra* note 157, at 757, 758. Monroe would not be the first politician to jump onto an idea after someone else articulated it and later to describe himself as having had the idea all along.

163. Virginia's other Antifederalist Senator—Lee—was not physically present in the Senate during the Bank debate; illness seems to have kept him home in Virginia during January 1791. But he wrote to his colleague Monroe about the subject. In his letter, Lee gave several reasons why he thought the Bank proposal was a bad idea. He said not a word about any potential constitutional problem. See Letter from Richard Henry Lee to James Monroe (Jan. 15, 1791), in 21 DHFFC, *supra* note 157, at 437.

discovered, in addition to Butler's letter to Jackson and Maclay's diary entry of December 24, exactly one document mentioning the possibility that Congress might lack the power to incorporate the Bank.¹⁶⁴ That lone document is a letter by Theodore Sedgwick, who represented Massachusetts in the House.¹⁶⁵ Like the references by Maclay and Butler, it does nothing to dispel suspicion that Madison came up with his enumerated-powers objection as a last-ditch attempt to derail the Bank. On the contrary, it communicates Sedgwick's view that Madison might make just such an attempt, and not in good faith either.

On January 30, 1791—three days before Madison made his first big speech against the Bank—Sedgwick wrote a letter to a friend in New York. In the letter, Sedgwick wrote that he expected Madison to come forward with a constitutional objection to the Bank bill. Indeed, he specified that Madison “will probably deny the constitutional authority of [C]ongress on the subject.”¹⁶⁶ It seems, therefore, that in the final few days before the Bank bill was presented to the House for its third and final reading, Madison's intention to press some such argument was known to, or at least suspected by, another member of Congress. But Sedgwick also suspected something else: that Madison's likely argument about congressional authority, if it materialized, would be pretextual. In Sedgwick's estimation, Madison was strongly committed to trying to defeat the Bank bill, but for reasons that Madison did not want to articulate overtly. So he was going to try to block the bill on the basis of some pretend reason. For the purpose, he had chosen an argument about the limited authority of Congress.¹⁶⁷

Sedgwick might not be a reliable narrator as to Madison's motives, and not only because people often misunderstand other people's intentions. For one thing, Sedgwick supported the Bank bill,¹⁶⁸ and the uncharitable interpretation of one's political opponents' motives is all too common a phenomenon. Moreover, it seems that Madison and Sedgwick had a personal falling out sometime in 1790,¹⁶⁹ which again raises the possibility that Sedgwick was disposed to think worse of Madison than Madison really deserved. But regardless of how accurately Sedgwick diagnosed Madison's motives, his letter, like Butler's letter and Maclay's diary entry, mentions a possible constitutional objection to the Bank only to disparage it. None of them reported awareness of an enumerated-powers problem worth taking seriously on its

164. One can never be certain that one has found everything. I will be grateful to readers who point me to other relevant sources.

165. Letter from Theodore Sedgwick to Peter Van Schaack (Jan. 30, 1791), in 21 DHFFC, *supra* note 157, at 608.

166. *Id.* at 609.

167. *Id.*

168. See 2 ANNALS OF CONG. 1910–12, 1939 (1791).

169. See Letter from Theodore Sedgwick to Pamela Sedgwick (Dec. 26, 1790), in 21 DHFFC, *supra* note 157, at 237, 238.

merits. And apart from those three sources, nobody in the First Congress seems to have left any record of thinking the Bank bill might be unconstitutional at any time between Hamilton's proposal in December and the last stage of House proceedings in February.

As a final note, consider two essays against the Bank written by the pseudonymous author Mercator, who was likely Representative Hugh Williamson of North Carolina.¹⁷⁰ On February 2, the *Federal Gazette* printed a thousand-word essay in which Mercator harshly condemned the Bank proposal on many fronts but said not a word about the Constitution.¹⁷¹ Two days later, another Mercator essay appeared—and this one right from the start foregrounded the argument that Congress had no power to grant charters of incorporation.¹⁷² Why would this fervent opponent of the Bank have completely neglected in his first essay the constitutional argument that headlined his second? We cannot know for certain. But here is a hypothesis. The essay that appeared in print on February 2 was written a day or so before February 2, without the benefit of Madison's February 2 speech. Determined opponent of the Bank though he was, Mercator had not hit upon the enumerated-powers objection. Only after Madison spoke did enumerated powers become the framework for Mercator's opposition.¹⁷³

E. *Summation*

The picture, then, looks like this. In December, the Secretary of the Treasury, who was one of the Founding generation's leading expositors of the Constitution, wrote fourteen thousand words explaining why Congress should incorporate a bank, devoted considerable attention to overcoming possible objections, and apparently could not foresee a constitutional challenge to Congress's authority to pass the relevant legislation—a constitutional challenge purportedly arising from one of the Constitution's core features. Madison worked industriously to formulate arguments against the Bill, but he left no record of having considered enumerated-powers objections, or indeed any objections arising from the Constitution's text, at any time during that work. Nor did other members of Congress seem to see such a problem. The United States Senate, with signers of the Constitution and prominent Antifederalists in the room, passed the bill with little fuss. The Bank had im-

170. David Hosack, *A Biographical Memoir of Hugh Williamson*, reprinted in 6 *THE INVESTIGATOR* 1, 32 (William Bengo' Collyer et al. eds., London, Thomas & George Underwood 1823) (identifying Mercator as Williamson).

171. See Letter from Mercator to Mr. Printer (Feb. 2, 1791), in 21 *DHFFC*, *supra* note 157, at 664.

172. See Letter from Mercator to the American Daily Advertiser (Feb. 4, 1791), in 21 *DHFFC*, *supra* note 157, at 686.

173. Consider also the pseudonymous author Philadelphiensis. On January 26, that writer (who may have been Benjamin Workman) published a long essay in the *Federal Gazette*, prosecuting argument after argument against the Bank bill. The essay, which appeared before Madison spoke in the House, contained not a word about constitutionality. See Letter from Philadelphiensis to Mr. Printer (Jan. 26, 1791), in 21 *DHFFC*, *supra* note 157, at 549.

passioned detractors in the press, but they did not argue that Congress lacked the power to incorporate it. The bill was then sent to the House and progressed to the very last stage of consideration—whereupon Madison, a determined opponent of the bill and one of the most creative constitutional thinkers of his age, produced a constitutional argument explaining why Congress could not incorporate a bank even if it wanted to.

All things considered, it seems plausible that Madison's argument was an eleventh-hour invention. To be sure, the evidence is circumstantial. I know of no Madisonian diary entry saying that the enumerated-powers argument had occurred to him only at the last minute. But then again, there are apparently no Madisonian diary entries, or other documents, indicating that Madison expressed or even thought about an enumerated-powers objection to the Bank at any time before February, when the bill reached the last stage of the legislative process.

III. IN THE HOUSE, FEBRUARY 1791

Ultimately, of course, Madison argued that the Bank was unconstitutional on enumerated-powers grounds. In this Part, I explain how Madison may have used the enumerated-powers framework as a vehicle for articulating his substantive constitutional concerns about the Bank. The view that Congress should not incorporate a bank, or the more general view that Congress should not charter corporations at all, is most naturally expressed as an external limit. (“No banks,” or “no corporations.”) But the text of the Constitution offered Madison no foundation for relevant external-limit arguments, and Madison eventually discovered that he could try to work the problem from the other end. He didn't persuade his audience: the majority of the House took the view that Congress had the power to incorporate a bank. But Madison did succeed in establishing a template, and a precedent, for arguing against legislation on enumerated-powers grounds.

The other major point I make in this Part, though, is that the central premise of Madison's argument—that Congress was limited to a set of textually enumerated powers—was not a consensus view in 1791. It was a known position: some representatives argued within that framework. But others did not. Rather than being a premise that all sides took for granted as part of the new constitutional system, the idea that Congress could legislate only on the basis of a particular set of enumerated powers was, in the First Congress, a contested proposition. And in 1791, the people who most insisted on that proposition were the losers.

A. *Madison's Enumerated-Powers Argument*

1. From External Limits to Internal Limits

As explained in the previous Part, Madison and others gave a great deal of serious attention to the merits of the Bank proposal before anyone seri-

ously pursued the thought that the Bank might raise an enumerated-powers problem. And it is not hard to see why, once we set aside our normal habit of approaching the Bank debate as an obvious enumerated-powers issue.

Madison wanted to impose some limits on Congress: no national bank, and no power to grant charters of incorporation. In a constitution, rules like those are *external limits*, straightforwardly expressed as affirmative prohibitions.¹⁷⁴ Conceptually, it would be awkward to think of rendering the constitutional principle animating Madison as something like “A power to incorporate should not be understood as included in a power to tax, or a power to borrow money, or a power to regulate commerce, or a power to make uniform rules for naturalization and bankruptcy . . .” and so on for the balance of the 1787 Constitution’s twenty-nine clauses specifying congressional powers. The idea is much better captured by a direct statement of what Congress may not do, in the manner of the prohibition of the taxation of exports¹⁷⁵ or the adoption of bills of attainder.¹⁷⁶ But unlike the prohibitions on the taxation of exports and the adoption of bills of attainder, the prohibition Madison wanted did not appear in the text of the Constitution. So for a while, Madison—like everyone else—did not think to argue that the Constitution’s text disabled Congress from incorporating the Bank.

What happens, though, when a strongly held intuition about a substantively constitutional subject is not straightforwardly embodied in any formally enacted constitutional text? Sometimes people conclude that the intuition in question just isn’t a constitutional proposition. Not surprisingly, some people who disliked the idea of a national bank took this view with regard to Hamilton’s bill: one might have all manner of reservations, but it was the case for better or worse that Congress had the authority to incorporate the Bank.¹⁷⁷ But there is also another possibility. When a strongly held intuition on a substantively constitutional subject appears to lack traction in the Constitution’s text at Time 1, that intuition sometimes gets articulated through some unexpected constitutional text at Time 2, sometimes more and sometimes less awkwardly.¹⁷⁸ Depending on their intuitions about what the text of the Constitution “really” says, different readers here might think of the proposition that legislative districting schemes are justiciable under the Equal Protection Clause¹⁷⁹ or the doctrine that the Fifth Amendment

174. See *supra* Section I.A.

175. U.S. CONST. art. I, § 9, cl. 5.

176. U.S. CONST. art. I, § 9, cl. 3.

177. Maclay is a good example. See *supra* Section II.C.

178. See Richard Primus, Debate, *The Constitutional Constant*, 102 CORNELL L. REV. 1691, 1692–95 (2017); Primus, *supra* note 112, at 1098 n.45.

179. See *Baker v. Carr*, 369 U.S. 186 (1962) (holding that a question previously considered as arising under the Guaranty Clause and as nonjusticiable could be cognizable and justiciable under the Equal Protection Clause); *Colegrove v. Green*, 328 U.S. 549 (1945), *abrogated* by *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

imposes the strictures of equal protection on the federal government.¹⁸⁰ The fact that the text isn't understood to house a particular commitment at one moment does not mean that some part of the text cannot be reunderstood to house the same concern later on.

In 1791, the Constitution articulated no external limit about banks or corporations. No clause straightforwardly prohibited Congress from doing what Madison thought Congress ought not to do. So naturally enough, Madison did not initially think in terms of opposing the Bank with an argument based on the Constitution's text. But before he was done, Madison found a way to present his argument as grounded in the written Constitution: he rearticulated what was in substance a theory of why Congress affirmatively should not do certain things in terms of the gaps left by the Constitution's specifications of what Congress was affirmatively authorized to do. He would use a theory of internal limits to do the work that could have been done most straightforwardly, but had not been done, by the adoption of external ones. The move was not obvious, and it took him a while to get there. But Madison was an uncommonly creative constitutional thinker. He got there before time ran out.

2. The Reading

Madison first made his enumerated-powers argument at the very last stage of the Bank bill's legislative process. In 1791, as today, a bill pending before the House of Representatives was read three times before it could be the subject of a final vote.¹⁸¹ It was standard practice in 1791 for members of the House to raise objections to bills, or otherwise enter into substantive discussion, at the time of any of the three readings.¹⁸² But Madison raised no objection to the Bank bill until its third reading.¹⁸³ Indeed, by the time Madison made his first speech against the Bank on February 2, the legislative pro-

180. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); see also Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 982–89 (2004) (describing the judicial transition from insisting that the federal government faced no equal-protection requirement to holding that the Fifth Amendment, as applicable against the federal government, incorporates the substance of equal protection doctrine).

181. See 1 ANNALS OF CONG. 105 (1789) (Joseph Gales ed., 1834) (describing the rules of proceeding on bills); see also KAREN L. HAAS, RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED FIFTEENTH CONGRESS Rule XVI, cl. 8, at 30 (2017).

182. See, e.g., 1 ANNALS OF CONG. 891, 895–98 (1789) (Joseph Gales ed., 1834) (debating, on second reading, the bill to establish the seat of government); *id.* at 894, 899–903 (debating, on second reading, a bill setting the salaries of federal judges); 3 ANNALS OF CONG. 300 (1791) (debating, on second reading, a bill to extend the time for settling the accounts of the United States with individual states); *id.* at 415–416 (1792) (debating, on second reading, a bill to apportion representatives among the states); see also 1 ANNALS OF CONG. 101 (1789) (Joseph Gales ed., 1834) (stating, as a rule of procedure, that opposition could be raised at the first reading of a bill).

183. 2 ANNALS OF CONG. 1886 (1791).

cess had officially moved from considering the bill in the Committee of the Whole to considering it before the House itself—the final stage before passage.¹⁸⁴ Only then, for the first time, did Madison argue that Congress lacked the authority to incorporate a bank.¹⁸⁵

184. *Id.* at 1891–93.

185. Madison may not have been the first Member of the House to raise an enumerated-powers objection to the bill. One day before Madison spoke, Jackson argued on the floor of the House that the Bank bill was unconstitutional because it called for the creation of “a monopoly . . . [that] contravenes the spirit of the Constitution; a monopoly of a very extraordinary nature; a monopoly of the public moneys for the benefit of the corporation to be created.” *Id.* at 1891. On its face, an argument about an unconstitutional monopoly seems like an external-limit argument. But it seems plausible that Jackson also raised an internal-limits argument. According to the *Annals*, Jackson also “read several passages from the *Federalist*, which he said were directly contrary to the assumption of the power proposed by the bill.” *Id.* The *Annals* for February 1 do not indicate what passages Jackson read from *The Federalist*, and, given the innumerable constitutional arguments one can support from those eighty-five essays, it would not be possible, in the absence of other evidence, to make responsible guesses about what Jackson was getting at by adducing *The Federalist*. But on February 4, in a portion of a speech identified as a reply to Jackson, Elias Boudinot read aloud from *Federalist 44*’s treatment of the Necessary and Proper Clause. *Id.* at 1926. If Boudinot’s remarks accurately tracked Jackson’s speech of February 1, then Jackson on February 1 may have offered an internal-limits argument against the Bank. There are uncertain inferences in this chain of reasoning, of course. Even if Boudinot was responding to an argument based on the Necessary and Proper Clause, that argument would only have been an enumerated-powers argument if it took that clause to give Congress the power to make laws necessary and proper to execute enumerated powers, rather than the power to make laws necessary and proper for executing nonenumerated powers vested in the federal government. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1050 (2014) (explaining that the clause is best read to refer to unenumerated powers as well as enumerated ones). Maybe Boudinot’s remarks did not accurately track Jackson’s speech of February 1, either because Boudinot did not remember quite what Jackson had argued three days earlier or, perhaps, because Boudinot was in fact responding not to Jackson’s remarks of February 1 but to a speech that Jackson made on February 4, immediately before Boudinot’s rebuttal reading of *Federalist 44*. 2 ANNALS OF CONG. 1916–19 (1791). (The *Annals* do not record Jackson’s relying on *Federalist 44* in his February 4 speech, but as always one must remember that the *Annals* were not a verbatim transcript. Whether it is more likely that the *Annals* failed to record part of Jackson’s remarks on February 4 or that Boudinot meant to respond not to the speech that immediately preceded his own but rather to a speech made by that same speaker three days earlier is a question on which readers will need to make their own reasonable guesses.)

Madison made his first constitutional argument against the Bank on February 2, the day after Jackson’s first constitutional objection. Assuming that Jackson did make an internal-limits argument on February 1, the relationship if any between his having made that argument and Madison’s development of his own argument is, again, a matter on which we can only speculate. One possibility is that the two men came independently to the enumerated-powers argument—and that both of them did so only with time running out. Another possibility is that Jackson had picked up the gist of Madison’s planned argument and beat him to it by a day in the House’s official proceedings. Madison seems to have determined to oppose the Bank on enumerated-powers grounds no later than January 30, because on that day Sedgwick wrote in a letter that Madison was likely to come forward with such an objection. Letter from Theodore Sedgwick to Peter Van Schaack (Jan. 30, 1791), *supra* note 165, at 609. Sedgwick and Madison were not close in January 1791, so Sedgwick is more likely to have learned of Madison’s intention second- or third-hand than from Madison directly. See *supra* note 169 and accompanying text. If so, it seems likely that word of Madison’s plan was getting around the House member-

Madison's first long speech in opposition to the bill began by objecting to the Bank on grounds having no apparent connection to the Constitution.¹⁸⁶ After all, his preparations for the previous several weeks had involved the history and business of banking, not the nature of Congress's constitutional powers. Then, after making his arguments about the dangers of national banking, Madison turned to the constitutional argument for which the debate is famous.¹⁸⁷ A law incorporating the Bank, Madison urged, would be invalid because it was authorized by no power or set of powers that the Constitution enumerated as belonging to Congress. Six days later, Madison spoke again, repeating parts of his argument and in some respects developing his points further.¹⁸⁸

Considered schematically, Madison's enumerated-powers argument went like this: it is a fundamental principle that the Constitution confers on Congress not general legislative power but only particular powers. Varying his formula slightly as he went—or perhaps the variations are merely the result of the *Annals*' nonstenographic reporting—Madison called that proposition “the very characteristic of the Government,” “[t]he essential characteristic of the Government,” and “the main characteristic of the Constitution.”¹⁸⁹ Next, and now endorsing the *Federalist 84* argument from which he had kept his distance during most of the ratification process, Madison argued that the justification for the Convention's having omitted a Bill of Rights rested on the understanding that the powers of Congress were specified and “not to be extended by remote implications.”¹⁹⁰ Any construction of Congress's powers that would in effect give Congress plenary legislative jurisdiction was accordingly inadmissible.¹⁹¹ A power to grant charters of incorporation was not among the enumerated powers of Congress. Indeed, offering his personal testimony on the matter, Madison told his fellow representatives—half a dozen of whom had also attended the Philadelphia Convention—that the Convention had rejected a proposal to enumerate a congressional power to

ship in the last two or three days of January. Jackson's correspondence with Butler indicates that Jackson was in the business of collecting arguments against the Bank; perhaps he collected this one as well. See *supra* note 160 and accompanying text. But again, it is also possible, based on the available evidence, that the two men reasoned independently—or even, perhaps, that Jackson hit first upon the idea and Madison picked it up from him. Once again, readers may have different intuitions as to the plausibility of these different scenarios. And regardless of which of these scenarios is closest to the truth, it remains the case that no enumerated-powers objection to the Bank was offered until the Bank's opponents found themselves in their last ditch.

186. 2 ANNALS OF CONG. 1894–96.

187. *Id.* at 1896–1902.

188. *Id.* at 1956–59.

189. *Id.* at 1896, 1898, 1902.

190. *Id.* at 1901.

191. *Id.* at 1896.

grant charters of incorporation.¹⁹² And no congressional power enumerated in the Constitution authorized Congress to incorporate the Bank.¹⁹³

At different times in his two speeches, Madison addressed specific constitutional clauses that might be thought to confer a power to incorporate the Bank and explained why, in his view, none of them did. The first clause of Article I, Section 8 would not do the trick because its language describing the power to provide for the “general welfare of the United States” merely described the purposes for which Congress could exercise its power to tax, and the Bank bill was not a law imposing taxes.¹⁹⁴ The second clause of Section 8 could not authorize the Bank bill as a bill to borrow money, because the bill would borrow no money.¹⁹⁵ The third clause—the Commerce Clause—would not suffice because the bill did not regulate trade.¹⁹⁶ Nor, in Madison’s view, was the Bank bill authorized as a rule “respecting . . . Property belonging to the United States” under Article IV, Section 3.¹⁹⁷ That Clause, Madison argued, referred only to the process of disposing of the property the government held at the end of the war for independence and did not reach issues of general government finance.¹⁹⁸

The only other potentially relevant clause, Madison submitted, was the Necessary and Proper Clause.¹⁹⁹ Madison asserted three important principles for interpreting that Clause. First, any argument that the Necessary and Proper Clause justified an exercise of congressional legislation would have to show why the legislation at issue was necessary and proper for the execution of some other specifically enumerated congressional power. A more general claim that a law was necessary and proper for advancing the purposes of the government or the Union was inadmissible.²⁰⁰ Second, the Necessary and

192. *Id.* He did not mention that he had voted in favor of enumerating such a power at the Convention. See 2 RECORDS, *supra* note 18, at 615–16.

193. 2 ANNALS OF CONG. 1896–1901 (1791).

194. U.S. CONST. art. I, § 8, cl. 1; 2 ANNALS OF CONG. 1897 (1791).

195. 2 ANNALS OF CONG. 1897 (1791).

196. *Id.* at 1957.

197. U.S. CONST. art. IV, § 3, cl. 2.

198. 2 ANNALS OF CONG. 1958 (1791).

199. *Id.* at 1896, 1898.

200. *Id.* at 1900. Madison’s view that the Necessary and Proper Clause must be used in conjunction with some other enumerated power is conventional today, but it is probably not justified on a close reading of the constitutional text. Strictly speaking, what we call the Necessary and Proper Clause has three separate clauses, only the first of which ties the power granted to Congress’s enumerated powers. The other two clauses give Congress the power to make all laws necessary and proper for carrying into execution “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18. If the Constitution vests certain powers in the government of the United States inherently or implicitly rather than by enumeration, as some Members of the First Congress thought, see *infra* Sections III.C.2, III.C.3, then these words give Congress the power to make laws for carrying those nonenumerated powers into execution. And as John Mikhail has pointed out, it is very hard to give content to that language without positing that the text recognizes the existence of powers not given by enumeration. After all, it is hard to

Proper Clause did not give Congress more power than Congress would have had in the absence of that Clause. Instead, the Clause merely confirmed the commonsense proposition that Congress had the authority to do those things that might be necessary for executing those other powers.²⁰¹ Last, the Necessary and Proper Clause must not be interpreted in a way that would in practice undermine the essential principle that Congress had only particular legislative powers.²⁰² A construction of that Clause that would justify incorporating the Bank as necessary and proper to the execution of any of Congress's enumerated powers, Madison warned, would be so permissive that Congress would be able to justify any legislation at all, because any legislation could be connected to one of the enumerated powers if one were willing to indulge connections as attenuated as the one between the Bank and, say, collecting taxes or borrowing money.²⁰³

It was not his view, Madison noted, that Congress could do only what was specified *in haec verba* in the Constitution. Congress could also do things that were in fact necessary for carrying out its specified powers.²⁰⁴ But the undoubted good sense of reading Section 8 to give Congress the means needed for executing its enumerated powers should not be used as a pretext, Madison warned, for letting Congress wield powers that would have been affirmatively specified if Congress were supposed to be able to exercise them.²⁰⁵ A power to grant corporate charters, Madison argued, would be a big deal, and the Constitution would not have left it to mere implication.²⁰⁶

B. *The Enumerated-Power Responses*

Several members of Congress believed that Madison's understanding of Congress's enumerated powers was unduly narrow. In their view, legislation incorporating the Bank was—or was necessary and proper for executing—legislation pursuant to one or more enumerated powers of Congress: collect-

identify any enumerated power that the Constitution vests in “the Government of the United States” rather than in a “Department or Officer thereof.” Mikhail argues that such powers clearly exist: examples include the power of the government of the United States to hold property and to sue in court. *See generally* Mikhail, *supra* note 185.

201. 2 ANNALS OF CONG. 1898 (1791).

202. *Id.* at 1898–99.

203. *Id.* at 1899–1902. Madison knew, of course, that he was fighting a potential reading of the Necessary and Proper Clause that had seemed only too natural to many readers in 1787–1788. During the ratification process, any number of the Constitution's opponents had argued that the Necessary and Proper Clause would give Congress enormously expansive powers—enough even to let the general government swallow the states completely. *See, e.g.*, Brutus, To the People of the State of New York (Dec. 13, 1787), in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 422, 423 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

204. 2 ANNALS OF CONG. 1896, 1898 (1791).

205. *Id.* at 1899–1900.

206. *Id.* at 1899–1900, 1956.

ing taxes,²⁰⁷ borrowing money,²⁰⁸ regulating commerce,²⁰⁹ supporting armies,²¹⁰ regulating and disposing of its own property,²¹¹ and others as well.²¹² Several representatives also pushed back against Madison's narrow construction of the Necessary and Proper Clause. Yes, some of them acknowledged, one could elect to take a stingy view of that clause. But what was the point of replacing the Articles of Confederation with the Constitution, they asked, if not to take a more generous attitude toward national legislative power?²¹³ Moreover, several representatives argued, Congress had already established a clear practice of legislating as if the Necessary and Proper power were broader than Madison allowed, or more generally as if the enumerated powers should be read as giving substantial permission for the exercise of powers inferred by implication. As Elias Boudinot of New Jersey put the point, most of what Congress had actually done in its first two years of business involved the exercise of powers only implicitly connected to, rather than expressly stated in, constitutional clauses specifying congressional powers.²¹⁴ Or, in Sedgwick's somewhat sharper formulation: if the Necessary and Proper Clause were as miserly as Madison claimed, pretty much everything Congress had already done must be unconstitutional.²¹⁵

Later that month, Hamilton's memorandum to President Washington defending the constitutionality of the Bank bill took the same approach. It accepted Madison's premise that Congress could incorporate a bank only if the enumerated powers authorized it to do so, and then it argued for broader readings of those powers than Madison had offered.²¹⁶ So if one takes Madison and Hamilton to define the opposite sides of the controversy, the question of Congress's power to incorporate the Bank looks like it conforms to the paradigm of enumerated-powers analysis that modern constitutional

207. *Id.* at 1922 (statement of Rep. Boudinot).

208. *Id.* at 1892 (statement of Rep. Laurance); *id.* at 1909 (statement of Rep. Ames); *id.* at 1948 (statement of Rep. Gerry).

209. *Id.* at 1909 (statement of Rep. Ames).

210. *Id.* at 1922 (statement of Rep. Boudinot).

211. *Id.* at 1908 (statement of Rep. Ames).

212. *E.g., id.* at 1922 (statement of Rep. Boudinot) (paying debts); *id.* at 1909 (statement of Rep. Ames) (power to govern the ten miles square and other places of exclusive congressional jurisdiction).

213. *Id.* at 1909 (statement of Rep. Ames).

214. *Id.* at 1924–25.

215. *Id.* at 1911.

216. Alexander Hamilton, *supra* note 27, at 99–102, 119–20, 132. It is reasonable to wonder whether Hamilton took this tack because he believed that Congress could only legislate based on specifically enumerated powers or because he calculated that an argument not disputing Madison's premise was more likely to sway Washington than a bolder argument would be. Given Hamilton's general enthusiasm for central power, it might be counterintuitive for him to have held a more restrictive view of congressional authority than a large contingent of members of Congress. And as this Part documents, many representatives took the view that Congress could legislate even without specifically enumerated powers. But none of that proves whether Hamilton was in fact trimming; the matter remains one for speculation.

lawyers know. Within that paradigm, disagreements about the extent of congressional power are disagreements about how to read the Constitution's affirmative grants of power to Congress. Everyone agrees that Congress enjoys less than general legislative jurisdiction, and everyone agrees that Congress can legislate only on the basis of its enumerated powers.

C. *Beyond Enumerated Powers*

If one looks more comprehensively, however, it becomes clear that the Bank debate did not conform to that paradigm. Several representatives who spoke in support of the Bank rejected the premise that Congress could legislate only on the basis of some express specification of its powers in the Constitution. And even some representatives who did not reject that premise read the Constitution to give Congress the practical equivalent of general legislative power.

In what follows, I canvas the ideas of representatives who did not share Madison's framework for assessing the scope of Congress's legislative authority. Roughly speaking, I begin with conceptions of congressional power that are relatively close to Madison's framework and then work progressively toward ideas that are more and more unlike it. That progression begins with representatives who accepted the idea that Congress could do only what the Constitution affirmatively authorizes but rejected the related idea that the sum total of what the Constitution authorizes must be less than general legislative authority. It then moves to representatives who rejected the idea that Congress could act only the basis of enumerated powers and then to representatives who rejected even the idea that congressional legislation should in any way be thought of as less favored, or harder to justify, than state legislation.

Two caveats are appropriate here. First, the representatives whose arguments I discuss below—Boudinot and Sedgwick, along with William Smith (South Carolina), John Vining (Delaware), John Laurance (New York), and Elbridge Gerry and Fisher Ames (both Massachusetts)—were not necessarily better guides to the Constitution than Madison was. Like Madison's views, the views of these representatives were contestable (and contested). Like Madison, these representatives had political and economic interests that informed their constitutional visions—and, like Madison's, their constitutional visions likely also reflected sincere intuitions about what was best for the American polity and about how the written Constitution should be read. So the point of noticing their various ways of rejecting Madison's enumerated-powers framework is not to suggest that their approaches reflected an objective meaning of the Constitution, from which Madison had strayed. It is to show that at the time of the First Congress, the enumeration principle was a contested proposition among well-informed participants in the constitutional discourse. Their views do not demonstrate that Madison was mistaken about the Constitution—and Madison's views do not demonstrate that his opponents were mistaken about the Constitution either.

Second, when I describe representatives as having rejected the premise that Congress could legislate only on the basis of enumerated powers, I am not saying that these representatives never made enumerated-power arguments in favor of the Bank. On the contrary, some took a both-and position. On that view, Congress had the authority to incorporate a bank irrespective of its enumerated powers, and Congress also had enumerated powers sufficient for incorporating a bank.²¹⁷ To argue that Congress has an enumerated power authorizing it to incorporate a bank is, of course, in no way to concede that Congress could incorporate a bank only if some enumerated power authorized it to do so—especially if the person making the argument has made clear that he thinks Congress can exercise powers on bases other than textual enumeration. For present purposes, what is important is that several Members of the First Congress believed that enumerated powers were not necessary conditions for the exercise of congressional authority.

1. The Preamble as a Grant of Powers

According to some representatives who agreed with Madison that Congress could only do those things the Constitution affirmatively specified, Madison's argument against the Bank indefensibly ignored the Constitution's greatest affirmative specification of powers: the Preamble.²¹⁸ Modern lawyers do not generally regard the Preamble as having distinctive legal force, and Madison denied that the Preamble conferred powers on Congress.²¹⁹ But others disagreed. Boudinot, for example, read the list of constitutional purposes specified in the Preamble as an enumeration of the purposes for which Congress could legislate. In his view, a law aimed at further perfecting the Union, establishing justice, ensuring domestic tranquility, providing for the common defense, promoting the general welfare, or securing the blessings of liberty qualified as a law expressly authorized by the Constitution.²²⁰ Laurance similarly spoke of "The great objects of this Government . . . contained in the context [that is, the Preamble²²¹] of the Consti-

217. For example, Ames argued that the power to create a bank was inherent in Congress, 2 *ANNALS OF CONG.* 1905–06 (1791), and he also argued that Congress could create a bank on the basis of its enumerated power to make needful rules for the property of the United States, *id.* at 1908–09, or its enumerated powers to borrow money and regulate trade, *id.* at 1909.

218. *Id.* at 1921 (statement of Rep. Boudinot).

219. *Id.* at 1957.

220. *See id.* at 1921.

221. The inference that Laurance used the word "context" to refer to the Preamble is worth unpacking. The *Annals of Congress*, which as noted earlier are not a verbatim transcript, record him as follows: "The great objects of this Government are contained in the context of the Constitution. He recapitulated these objects, and inferred that every power necessary to secure these must necessarily follow . . ." *Id.* at 1914–15. It seems more than plausible that Laurance's "recapitulation" of the Constitution's objects was a reading of the purposes stated in the Preamble, and if so, the Preamble is what Laurance (or the editor of the *Annals*) meant by the Constitution's "context." Note, however, that if Laurance did not mean to refer to the Pre-

tution” and argued that the federal government’s power relative to those objects was “as full and complete in all its parts as any system that could be devised.”²²²

The idea that the Preamble vests power in the federal government is formally compatible with the idea that Congress is limited to a set of affirmatively specified powers. But it is not hard to see that reading the Preamble’s list of purposes as a list of purposes for which Congress can legislate would make Congress, in practice, a legislature of general jurisdiction.²²³ It is difficult to think of a law that Congress might want to pass which could not reasonably be classified as a law aimed at promoting one or more of the purposes specified in the Preamble. More than one representative responding to Boudinot made this point plainly.²²⁴ But there is no indication that Boudinot was bothered by that implication. The Constitution had been established for those purposes, and in his view, Congress could legislate to pursue them.

2. Inherent Authority Checked by External Limits

In a different vein, some representatives rejected the enumerated-powers paradigm altogether and denied that exercises of congressional authority needed to be grounded in specific textual warrants within the new Constitution. John Vining of Delaware, for example, made the simple argument that the United States, on becoming an independent nation, assumed all the powers that independent nations could exercise, including the power to incorporate a bank.²²⁵ That was it—no fretting about powers enumerated in this or that bit of constitutional text. Congress was the legislature of an independent country, and as such it could do things, this thing included.

amble, he was endorsing the yet more government-friendly proposition that the Constitution had purposes, and the government had power to pursue those purposes, without reference to any text in the Constitution—not even the Preamble. On that understanding, talk of the Constitution and its objects might have been historical rather than textual: perhaps Laurance was recapitulating the story of the conditions that had made the Constitution necessary and the Framers’ determination to create a government sufficient for solving the problem. This stronger reading might or might not be supported by the fact that the next paragraph of Laurance’s remarks, as given in the *Annals*, is a capsule summary of those historical events. *Id.* at 1915.

222. *Id.* at 1914–15.

223. In terms I have developed elsewhere, a reading of the Constitution on which Congress could act only on the basis of its enumerated powers, and on which the Preamble stated enumerated powers, such that Congress would in fact have an enumerated power sufficient for authorizing any legislation, would be a reading that respected the enumeration principle but rejected the internal-limits canon. See Primus, *The Limits of Enumeration*, *supra* note 12, at 593–94. Or, put in other words, it would contemplate a federal legislature of enumerated powers, but not a federal legislature *limited* by its enumerated powers.

224. 2 ANNALS OF CONG. 1939 (1791) (statement of Rep. Giles); *id.* at 1931 (statement of Rep. Stone) (asking rhetorically whether there is “any power under Heaven which could not be exercised within the extensive limits of this preamble?”).

225. *Id.* at 1955.

Fisher Ames of Massachusetts also took the view that the government of the United States had inherent powers, independent of the Constitution's text, simply by virtue of its being the government of the United States. In support of this position, Ames noted that corporations have certain inherent powers simply by virtue of being corporations, and he then argued that "Government is itself the highest kind of corporation."²²⁶ It followed, he said, that "from the instant of [the government's] formation, it has tacitly annexed to its being, various powers . . . essential to its effecting the purposes for which it was framed."²²⁷ Congress could obviously lend money, and buy back its own debt on the market, and ransom American sailors held captive by the Barbary States, even though no such powers were expressly given.²²⁸ What's more, in Ames's view the inherent powers of Congress were not confined to minor matters. They could be powers of the highest importance. If the Constitution had not enumerated a congressional power to raise armies, Ames reasoned, Congress would still obviously have that power, because national governments raise armies, and because the purposes of the Constitution require armies to be raised.²²⁹

Ames did not take the view that Congress had the authority to do *anything it wanted*. Like everyone else in the debate, he believed that Congress needed to operate within constitutional limits.²³⁰ But he thought it fallacious to imagine that those limits would come from an enumeration of congressional powers. A full enumeration of things the government could do, Ames declared, would be impossible.²³¹ The better way to think about limiting Congress was to think in terms of particular things it was forbidden to do.²³² If the power to make a law were expressly denied to Congress in the Constitution, Ames explained, then such a law would be invalid. The same would be true if a law violated natural rights, or if making a law required exercising a power that only the states could exercise.²³³ But so long as Congress did not transgress those limits, it could make whatever laws were necessary for pursuing the purposes for which the Constitution was adopted. In short, Ames thought that Congress should be understood to be limited by *external* constitutional limits, not *internal* ones. As such, he was disagreeing sharply with Madison's insistence that the Constitution limited Congress to a set of enumerated powers.

226. *Id.* at 1905.

227. *Id.*

228. *Id.*

229. *See id.*

230. *Id.* at 1906–07.

231. *Id.* at 1905–06.

232. *Id.*

233. *Id.*

3. Collective Action

Vining and William Smith of South Carolina both argued that Congress must have the power to create the Bank because no state acting alone could establish such an institution.²³⁴ Their remarks highlighted two different reasons why the states alone could not answer the purpose. Vining thought that no state bank could create a currency that would circulate throughout all parts of the union, because its legal warrant would stop at the state line.²³⁵ Smith seems to have had in mind that no state acting alone could confer on a bank the privileges that the Bank of the United States would enjoy, meaning especially the exclusive privilege of doing financial business with and for the United States Government.²³⁶ On either rationale, these representatives believed that the states' inability to establish a national bank established Congress's authority to act. And on either rationale, no part of Vining's or Smith's argument relied on any constitutional provision affirmatively specifying a congressional power.²³⁷

4. No Difference in Defaults

Measured by the official conventions of twenty-first-century constitutional discourse, all of the foregoing arguments for recognizing congressional powers beyond those enumerated in the Constitution's text are radically nationalistic. But in the Bank debate, several representatives offered arguments that were yet *more* solicitous of national legislative power. In particular, several arguments rejected the idea that the federal and state govern-

234. *Id.* at 1955 (statement of Rep. Vining); *id.* at 1929 (statement of Rep. Smith).

235. *Id.* at 1955.

236. *Id.* at 1929.

237. Readers who assume that all members of Congress would have agreed that Congress could act only on the basis of enumerated powers might misread Smith as endorsing that proposition in a different set of remarks that Smith made during the debate. Responding later to the charge that his views would empower Congress to do "whatever the Legislature thought expedient," Smith explained that he believed nothing of the kind. *Id.* at 1937. Congress could not, for example, pass a law "prohibited by any part of the Constitution" or one that would be "a violation of the rights of any State or individual." *Id.* But if those external limits were not transgressed, Congress could make laws "necessary and proper to carry into operation certain essential powers of the Government." *Id.* It would then fall to the courts, Smith continued, to annul a law that the judge "deemed not to result by fair construction from the powers vested by the Constitution." *Id.* at 1937. Modern readers accustomed to assuming that "the powers vested by the Constitution" means powers *enumerated* in the text of the Constitution might take these remarks to show that Smith actually did subscribe to the enumeration principle. But that reading of Smith follows only if one assumes the thing to be proved: that the Constitution vests powers only through the mechanism of enumeration. If the Constitution also vests other, non-enumerated powers in the federal government, then Smith's remarks do not imply an endorsement of the enumeration principle. (The necessary and proper power is itself enumerated, of course, but invoking that power as a warrant to make laws in aid of the execution of a nonenumerated power is a rejection of the enumeration principle as usually understood. *Cf.* Mikhail, *supra* note 185.)

ments face different default positions for justifying legislation—that is, that state governments may act for any reason not prohibited, but that the federal government may act only when some affirmative reason warrants federal action.²³⁸ In modern constitutional law, this idea about different default positions is orthodox. But in 1791, several members of Congress exhibited no sense that federal legislation must be justified against a standard any more demanding than the one applicable to state legislation.

The various arguments described so far for congressional authority beyond the enumerated powers might still in principle be compatible with the idea of different default positions for state and federal legislation. Consider the idea that the general government has the power to do things that no state could do alone. That view would justify many congressional actions that would not be justified if Congress could only act on the basis of its enumerated powers. But it could still be the case that in order to legislate, Congress would have to make an affirmative showing of a sort that state legislatures were not required to make (i.e., that someone else couldn't get the job done). Similarly, the idea that the federal government has certain inherent powers as the legislature of an independent nation or as a corporation could be compatible with the different-defaults approach. No, the thinking would run, Congress isn't restricted to the list of enumerated powers. But it is still the case that for Congress to be able to do something, there must be an affirmative reason justifying congressional action. The inherent-powers approach might merely add a set of unenumerated subject headings—the specific powers inherent in national legislatures, or in the corporate form—to the list of acceptable affirmative reasons.

In the Bank debate, however, some representatives not only rejected the idea that the federal government needed specific textual warrants in order to act but also showed no sense that federal legislation requires some special kind of justification that state legislation does not. On the contrary, they seem to have assumed that the principles determining what legislative powers the federal government could exercise were the same as those applicable to states. Sedgwick, for example, argued that Congress had implicit powers by pointing out that the state legislatures have such implicit powers.²³⁹ A lawyer whose thinking is shaped by later orthodoxy would know never to make such an argument: to the modern lawyer, the fact that state legislatures are not limited to enumerated powers has no bearing on what Congress can do. But in 1791, Sedgwick—a delegate at the Massachusetts ratifying convention, a Member of the First Congress, and later both Speaker of the House

238. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, & Scalia, JJ.) (“The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.”).

239. 2 ANNALS OF CONG. 1910 (1791).

and President Pro Tempore of the Senate²⁴⁰—was willing to assert that if state legislatures could exercise nonenumerated powers, Congress must be able to do so as well.

The analogous idea that federal legislation is supposed to be exceptional or disfavored—also familiar in modern constitutional law²⁴¹—was similarly rejected. Ames, for example, argued explicitly against putting a thumb on the scale against federal legislation, contending that denying Congress a power that Congress should have would be just as bad as letting Congress exercise a power that Congress should not have.²⁴² Or consider Gerry, who at the Constitutional Convention had been famously skeptical of extensive national power.²⁴³ Responding to opponents of the Bank who asked where the outer limit of congressional power could be drawn if the Bank were deemed legitimate, Gerry asked where the line marking the *minimum* that Congress was clearly authorized to do could be drawn if the power to create the Bank were denied.²⁴⁴ Gerry's argument here, like that of Ames, seems at odds with the presumption that the Constitution regards federal legislation as generally disfavored. That presumption would seem to argue for erring on the side of less congressional power.

Consider also Boudinot, who took a view almost directly opposite the idea that the Constitution would not leave important congressional powers to mere implication. Some people, Boudinot said, seemed to be of the view that incorporating a national bank would involve the exercise of a particularly important power.²⁴⁵ He disagreed: in Boudinot's view, the power to grant charters of incorporation was, within the world of governmental powers, nothing special. But if he were wrong and the power at issue were in fact of great significance, Boudinot continued, that would only strengthen the case for letting Congress exercise it. After all, Boudinot reasoned, who better than the nation's legislative body to exercise a hugely significant power?²⁴⁶

The point here is not that Boudinot's celebratory posture toward national legislative authority correctly stated the meaning of the Constitution, either in 1791 or today. Nor is the point that Boudinot's arguments and those

240. Sedgwick, *Theodore*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/People/Detail/21411> [https://perma.cc/9K6X-GDFL].

241. See, e.g., HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 52 (1961).

242. 2 ANNALS OF CONG. 1905 (1791).

243. Gerry was one of three delegates present at the end of the Constitutional Convention who declined to sign the finished product. His objections chiefly sounded in the Constitution's giving too much power to Congress. See 2 RECORDS, *supra* note 18, at 631–33, 648–49.

244. 2 ANNALS OF CONG. 1950 (1791).

245. *Id.* at 1925–26. In the *Annals of Congress*, Boudinot is recorded as having used the term “high act of power.” *Id.* But the *Annals* are not verbatim transcripts—they were compiled by shorthand notetakers—so we should not be too confident about the particular choice of words he used.

246. *Id.*

of the other representatives described here were superior to those of others who argued within the enumerated-powers paradigm. The point, rather, is that all of these ideas were thinkable, and publicly articulable, by well-informed participants in the constitutional system in the very first years after ratification. Over and over, they argued about the powers of Congress in ways incompatible with the orthodox proposition that Congress may act only on the basis of textually enumerated powers. They may not even have subscribed to the more general sense of federal legislation as exceptional and presumptively disfavored that helps make the orthodox proposition about enumerated powers seem rational.

D. *The Shadow of Removal*

All of the foregoing evidence still understates the degree to which the Members of the First Congress did not subscribe to modern orthodoxies about enumerated congressional powers. To see more clearly how far they were from sharing a set of views that modern constitutional lawyers generally believe were fundamental from ratification forward, it is necessary to look beyond the Bank debate itself. In particular, it is helpful to look at a relationship between the Bank debate, which occurred at the end of the First Congress, and a great constitutional debate that occurred at the beginning of that Congress: the debate over the president's power to remove Senate-confirmed executive officers.

Modern constitutional lawyers remember both the Bank debate and the removal debate. But usually we do not connect the two, perhaps because one sounds in federalism and the other in the separation of powers. During the Bank debate, though, many representatives thought that the removal debate furnished an important bit of background. And nobody really contested the point.

1. A Legislative Precedent

In May and June of 1789, while considering the legislation that would establish the first cabinet departments, the House of Representatives confronted a disagreement about whether the president would have the power to dismiss the heads of those departments on his own unilateral authority.²⁴⁷ Some representatives thought the president would need the concurrence of the Senate in order to dismiss officers.²⁴⁸ Others maintained that senatorially confirmed officers could be removed only through impeachment and conviction.²⁴⁹ After considerable debate, the House adopted the view that the president had the power to remove such officers unilaterally.²⁵⁰

247. See 1 ANNALS OF CONG. 370–83, 455–585 (1789) (Joseph Gales ed., 1834).

248. See, e.g., *id.* at 371–73.

249. See, e.g., *id.* at 373–74.

250. *Id.* at 383.

The representatives who argued for the majority position offered a range of arguments, most of which modern constitutional theory would call “structural.” Structural reasoning, in a nutshell, is reasoning that proceeds from the nature of the offices and institutions of the constitutional system, and the relationships among them, rather than from judicial doctrine, enacted text, original meanings, or other potential sources of constitutional authority.²⁵¹ In the removal debate, the leading structural argument was that staffing the offices of the federal government is, in its nature, an executive function, so it belongs to the executive branch.²⁵² As a *prima facie* matter, both appointment and removal should be up to the president. Given that the Constitution’s text expressly qualified the president’s appointment power by adding the requirement of Senate confirmation,²⁵³ the *prima facie* arrangement was modified, and the president could not exercise the appointment power unilaterally. But no textual specification qualified the removal power. So, the argument went, the president should be understood to enjoy the unilateral power to remove federal officers.²⁵⁴

Other representatives were unpersuaded. Some doubted that the appointment power was by nature executive,²⁵⁵ or even that it made sense to think in terms of powers being “naturally” executive at all.²⁵⁶ More to the point for present purposes, several representatives raised enumerated-powers objections. Federal authorities, they contended, could exercise no powers other than those affirmatively enumerated in the Constitution.²⁵⁷ The president could appoint officers, subject to Senate confirmation, not for general structural reasons but because the Constitution expressly authorized him to do so. But nowhere did the Constitution give the president a power to remove officers. It followed, the argument ran, that the president had no power to remove officers.²⁵⁸

After extensive debate, the argument from enumerated powers failed to persuade the House: the majority adopted the view that the president could unilaterally remove confirmed officers.²⁵⁹ So in the Bank debate less than two years later, proponents of the Bank cited the removal debate to rebut the argument that Congress could only legislate on the basis of specifically enu-

251. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (photo. reprinted 1985) (1969).

252. See, e.g., 1 ANNALS OF CONG. 463–64 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

253. See U.S. CONST. art. II, § 2, cl. 2.

254. See, e.g., 1 ANNALS OF CONG. 463–64 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

255. See, e.g., *id.* at 471 (statement of Rep. Smith); *id.* at 472 (statement of Rep. Gerry).

256. See, e.g., *id.* at 567 (statement of Rep. Stone) (“My conception may be dull; but telling me that this is an Executive power, raises no complete idea in my mind.”).

257. See, e.g., *id.* at 466–67.

258. See, e.g., *id.*

259. *Id.* at 383.

merated powers.²⁶⁰ If it was appropriate in 1789 to recognize a power not specified by any constitutional clause, they reasoned, why couldn't they do the same in 1791? Surely the removal debate reflected the House's prior judgment that federal decisionmakers had such powers as were fairly inferred from the existence and structure of the government, whether or not those powers arose from specific power-granting clauses of the written Constitution.

Modern constitutional lawyers can easily find ways to distinguish these two debates, such that the House's decision to recognize a unilateral presidential removal power would not undermine the idea that Congress could only legislate on the basis of specifically enumerated powers. Most obviously, one could distinguish between Congress and the president, arguing that the enumerated-powers principle applies to the former but not the latter. That distinction overlaps with, but is not reducible to, a second distinction based on a difference between the Vesting Clauses of Articles I and II. Article I does not speak of vesting a general legislative power in Congress,²⁶¹ but Article II does purport to vest "the executive power" in the president.²⁶² So perhaps the president's executive power is general, rather than being composed of separately delegated executive powers, taken one by one. Or, in a different formulation, perhaps the Vesting Clause of Article II counts as the enumeration of a power encompassing all executive power, such that the president isn't exempt from the enumeration principle but is within his enumerated powers whenever he undertakes executive action. As a third option, one could argue that the enumeration principle is about federalism and the removal question is about the separation of powers. The crux of this third distinction would be that the federal government is confined to affirmatively enumerated powers when legislating in ways that compete with or override state governments, but questions about the interactions among the federal branches, or the internal organization of the federal government, do not raise the concern that grounds the enumeration principle in the first place.²⁶³

260. See, e.g., 2 ANNALS OF CONG. 1910 (1791) (statement of Rep. Sedgwick); *id.* at 1925 (statement of Rep. Boudinot); *id.* at 1929 (statement of Rep. Smith); *id.* at 1955 (statement of Rep. Vining).

261. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States of America.").

262. See U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States.").

263. This is a proposition about the way that modern lawyers generally understand the function of the Constitution's enumeration of congressional powers, not a proposition about why the Constitutional Convention enumerated the powers of Congress as it did. As a historical matter, most of the text of Article I, Section 8 seems to have been written with an eye on the separation of powers between Congress and the president, not the division of authority between the federal government and the states. See 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION: IN THE HISTORY OF THE UNITED STATES 412–29 (1953); Michael W. McConnell, *The President Who Would Not Be King* (unpublished manuscript) (on file with the *Michigan Law Review*); Julian Davis Mortenson, *Article II Vests Executive Power, Not the*

These distinctions are intro-level stuff for the modern constitutional lawyer; in all likelihood, readers of this Article thought of all three without having to read this paragraph.

But in the First Congress, nobody seems to have hit upon any of these solutions. Whatever the merits of the foregoing distinctions to a modern audience, and no matter how obvious or intuitive they now seem, it appears that none of them occurred to any of the players in 1791. To be sure, one should be careful about any claim to prove a negative. The records of eighteenth-century congressional debates are not verbatim transcripts, and it is always possible that some argument was made and not properly recorded. But as far as the available documentation reveals, nobody opposing the Bank tried to rebut the other side's use of the removal debate by saying, "That was about the separation of powers, and this is about federalism" or "That was the president and this is Congress."

On the contrary, more than one of the Bank's prominent opponents conceded the parallel. Consider Maryland's Michael Jenifer Stone. In the Bank debate, Stone argued vigorously against Ames, Smith, and others whose approach, he warned, would vest Congress with plenary power.²⁶⁴ In Stone's view, the idea that Congress had implicit as well as express enumerated powers would destroy a core constitutional principle.²⁶⁵ But he acknowledged that the House's resolution of the removal issue two years earlier reflected an acceptance of implicit powers as well as enumerated ones.²⁶⁶ Stone accordingly regarded the removal decision as mistaken: when speaking against the Bank, he reminded his colleagues that he had voted against recognizing a removal power in the president.²⁶⁷ That reminder helped Stone claim a consistent view as he argued against the Bank. But it did nothing to weaken the other side's argument that insisting Congress could legislate only on the basis of enumerated powers was hard to square with what the House had already decided in a different full-dress constitutional debate.

In much the same vein, consider Attorney General Randolph's letter to Washington arguing against the constitutionality of the Bank bill.²⁶⁸ Like Madison, Randolph argued that Congress could act only on the basis of its enumerated powers.²⁶⁹ And like Stone, Randolph candidly acknowledged that this enumerated-powers approach was probably incompatible with recognizing a unilateral removal power in the president on the basis of general

Royal Prerogative (Aug. 26, 2018) (unpublished manuscript) (on file with the *Michigan Law Review*).

264. 2 ANNALS OF CONG. 1932 (1791).

265. *Id.* at 1931.

266. *Id.* at 1934.

267. *Id.*

268. Randolph's Opinion, *supra* note 26.

269. *Id.* at 122–23.

ideas about executive authority, as the House had done two years earlier.²⁷⁰ So it might be, Randolph concluded, that the House had erred on the removal power.²⁷¹

In other words, the Attorney General squarely faced the challenge that the removal debate posed for opponents of the Bank bill and did not distinguish the cases by reference to the distinction between federalism and the separation of powers, or the distinction between Congress and the president, or the different textual formulations of the Article I and Article II Vesting Clauses. Nor does it seem that anyone in the House offered those distinctions. Instead, the Bank's opponents accepted that the proposition that the federal government could act only on the basis of powers affirmatively enumerated in the Constitution applied across the board, such that it must stand or fall together across these contexts.

In Randolph's and Stone's views, it did not follow that Congress could legislate without an enumerated power. In their opinion the removal decision either was,²⁷² or perhaps was,²⁷³ a constitutional mistake. That concession seems like a pretty good indication that the friends of the Bank were making sense, by the lights of their contemporaries, in asserting that the removal decision contradicted the idea that Congress could act only on the basis of powers enumerated in specific constitutional texts. To be sure, nothing in this analysis proves who was *right* in either the removal controversy or the Bank debate. But it does seem that the representatives who rejected the idea that Congress could legislate only on the basis of affirmatively enumerated powers were making, at the very least, a perfectly cogent and mainstream argument—indeed, one that aligned better with a salient aspect of the First Congress's constitutional deliberations than the argument on the other side.

2. Madison's Predicament

The charge that the removal debate demonstrated the House's prior rejection of the idea that the federal government could exercise only enumerated powers was a particular problem for Madison. After all, when the First Congress debated the removal power, Madison was a central player and a leading proponent—maybe *the* leading proponent—of the view that the president had the power to dismiss Senate-confirmed cabinet secretaries unilaterally.²⁷⁴ He had successfully held to that view in the face of objections from people who pointed out that the president had no enumerated power to remove officers. So in the Bank debate, when Madison was the one insist-

270. *Id.* at 129.

271. *Id.*

272. 2 ANNALS OF CONG. 1934 (1791).

273. Randolph's Opinion, *supra* note 26, at 129.

274. See 1 ANNALS OF CONG. 371–75, 462–64, 495–501 (1789) (Joseph Gales ed., 1834). Madison also seems to have experimented briefly with, but then clearly rejected, the view that Congress could decide whether the president should be able to exercise that power. See *id.* at 461 (experimenting); *id.* at 547, 581 (rejecting).

ing on enumerated powers, several representatives explicitly charged Madison with changing his interpretive principles to suit the occasion.²⁷⁵ And Madison offered no defense of his apparently contradictory behavior.

Madison offered two main arguments in the removal debate, both of them structural. First, he argued that the president must be accountable for the conduct of the cabinet officers, and only if he had the power to dismiss them could he be responsible for their actions.²⁷⁶ Later, Madison was the principal architect and articulator of the argument that the power to remove officers was by nature executive²⁷⁷ and therefore belonged to the person in whom executive power was vested.²⁷⁸ But Madison acknowledged that he could not rest his argument at that point, because the Constitution vested some powers that he and many others considered “executive” in decisionmakers other than the president. The Senate’s power to confirm appointees was one example. In Madison’s view, that power was in its nature executive but was properly exercised by the Senate in light of the text of Article II, Section 2.²⁷⁹ But the only deviations from the general principle that executive powers were for the president, Madison maintained, were those affirmatively specified by the text. All executive power other than what the Constitution expressly vested elsewhere resided with the president.²⁸⁰ Given that the Constitution was silent on the removal power, Madison concluded, that power must lie with the president exclusively.²⁸¹

After Madison’s first articulation of this position, his fellow Virginian Alexander White objected directly to Madison’s reasoning, and he did so on enumerated-powers grounds.²⁸² In White’s view, the president, just like Congress, was limited to a set of textually enumerated powers. The Vesting Clause of Article I was not a general grant of power of a certain kind. Instead, White maintained, the executive powers the president was entitled to authorize were those the Constitution specifically enumerated.²⁸³ Nothing in the Constitution specifically authorized the president to remove officers, so the president did not have that authority.²⁸⁴ Other representatives echoed

275. See 2 ANNALS OF CONG. 1910 (1791) (statement of Rep. Sedgwick); *id.* at 1929 (statement of Rep. Smith); *id.* at 1951 (statement of Rep. Gerry).

276. 1 ANNALS OF CONG. 371–72, 499 (1789) (Joseph Gales ed., 1834).

277. *Id.* at 463–64. Some representatives disputed the proposition that removal was by nature executive. See, e.g., *id.* at 471, 545 (statements of Rep. Smith); *id.* at 472, 504 (statements of Rep. Gerry); *id.* at 494, 567 (statements of Rep. Stone).

278. The first representative to offer this argument seems to have been Vining. See *id.* at 373. Madison picked it up later and elaborated it further. See *id.* at 463–64, 496–97.

279. *Id.* at 463–64.

280. *Id.* at 463–64, 496–97.

281. *Id.* at 463–64.

282. *Id.* at 466–67.

283. *Id.*

284. *Id.* Later, White added that to go with Madison and say that the president has all executive power other than what the Constitution expressly excepts is to imply that Congress

this argument, insisting with White and against Madison that the president had only a set of specifically enumerated powers and therefore could not exercise the removal power, which was not textually specified.²⁸⁵

In short, Madison's opponents in the removal debate made their case in clear enumerated-powers terms. Madison did not rebut them by arguing that in fact the president did have some enumerated power to remove officers.²⁸⁶ Instead, he returned to his overall structural argument about executive power²⁸⁷ and to his argument that the president needed a removal power in order to exercise the kind of control that would let him be responsible for the actions of the officers around him.²⁸⁸

One of Madison's leading allies in this debate against an opposition inconsistent on a strict understanding of enumerated powers was Ames, who would later be among Madison's principal antagonists on the Bank. During the removal debate, Ames and Madison both read the Vesting Clause of Article II to mean that the President enjoyed all executive power not specifically placed elsewhere.²⁸⁹ That position made lots of sense to Ames, who did not believe that exercises of power under the Constitution had to be traced to specific power-conferring clauses.²⁹⁰ He was comfortable with the idea that the federal government was an entity—a corporation, or a government—of a sort that exercised certain powers simply because of the sort of beast it was.²⁹¹ Given that approach, and given that the president was an executive sort of beast, it made sense to Ames to credit the structural argument Madison was offering about removal. In other words, Madison's argument made sense to Ames as part of Ames's more general rubric for thinking

has all legislative power other than what the Constitution expressly excepts, and that's not right: each branch has enumerated powers only. *Id.* at 514.

285. *See, e.g., id.* at 486 (statement of Rep. Laurance) (insisting that Madison's position was untenable under a Constitution delegating only enumerated powers); *id.* at 510 (statement of Rep. Smith) (arguing that the President had only those powers affirmatively specified and that the Vesting Clause did not implicitly confer general executive power).

286. The closest he came was to say, at one point in the debate, that the president's responsibility to take care that the laws be faithfully executed implied a power of removal as a necessary means to the end. *Id.* at 496. To a modern reader accustomed to thinking of the Take Care Clause as a source of presidential power, that might seem like the assertion of an enumerated presidential power of removal. But there is reason to doubt that Madison understood himself to be adducing the sort of enumerated-power proof that White and those who followed him demanded. Madison's reference to the Take Care Clause was made only once, and briefly, in between larger arguments, and he did not say that it supplied what the enumerated-power critics were seeking. He spoke of the president's law-enforcement responsibility only as a factor that supported his general structural argument about residual executive power lying with the president. *Id.*

287. *Id.* at 496–97.

288. *Id.* at 499.

289. *Id.* at 463–64 (statement of Rep. Madison); *id.* at 539 (statement of Rep. Ames).

290. *See* 2 ANNALS OF CONG. 1904–06 (1791).

291. *Id.* at 1905.

about the government's powers—an approach that had no need, or use, for an enumerated-powers paradigm.

Moreover, both Ames and Madison in the removal debate entertained the idea of attributing unenumerated powers not just to the president but also to Congress. Both Ames and Madison took the view that the removal power belonged to the president without a specific textual enumeration. Speaking in the alternative, they both suggested that if the Constitution had not vested the removal power anywhere in particular, the power would belong to Congress, again without respect to any particular enumerated power. More particularly, they held that the power might belong to Congress simply because it was sensible to think (1) that *someone* in the federal government had the removal power, and (2) that federal powers not vested anywhere in particular belong residually to Congress.²⁹² In other words, not just Ames but also Madison contemplated a category of powers belonging inherently to the federal government and deemed Congress the natural repository of those powers.

Small wonder, then, that when Madison attacked the Bank on enumerated-powers grounds, several colleagues called him out for abandoning his prior approach to constitutional interpretation.²⁹³ They had heard him go one way on the enumeration issue in a major debate before, and they were not about to let him take the other side when it served his purposes against their own. The assault must have stung: over and over, Members of the House accused Madison of changing his position on a central constitutional issue in order to get the results he wanted in particular cases.²⁹⁴

292. 1 ANNALS OF CONG. 461 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison); *id.* at 538–39 (statement of Rep. Ames). Note that Madison's view on this score was not that Congress would enjoy the power on the basis of the enumerated necessary and proper power. It was about the role that Congress, as the legislature, played within the constitutional system. *See id.* at 461 ("If the power naturally belongs to the Government, and the Constitution is undecided as to the body which is to exercise it, it is likely that it is submitted to the discretion of the Legislature, and the question will depend upon its own merits."). For a recent development of a similar idea, see Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452 (2010).

293. *See* 2 ANNALS OF CONG. 1910 (1791) (statement of Rep. Sedgwick); *id.* at 1929 (statement of Rep. Smith); *id.* at 1951 (statement of Rep. Gerry).

294. In all likelihood, Madison's shift from supporting an unenumerated unilateral presidential removal power in 1789 to his insistence on construing the enumerated powers of Congress narrowly in 1791 was not a matter of ad hoc convenience on those two issues but a part of Madison's more general movement away from nationalism, and his increasing discomfort with executive power, in those years. That shift, which Feldman describes as the transition from Madison's first political life to his second, was likely propelled by Madison's unhappy experience with the way the federal government was exercising its power under the Washington Administration—an experience that caused him to rethink much of his 1780s constitutional theory. *See* FELDMAN, *supra* note 46, at 338–41; *see also* Hills, *supra* note 118 (manuscript ch. 3, at 7–8). Madison's change of mind in this direction seems to have been sincere, such that it disserves him to think the contradiction between his 1791 position on the Bank and his 1789 position on removal was simply unprincipled. But "I've decided that I was wrong about a lot of

The most telling thing about these accusations, therefore, is the response they provoked—or failed to provoke. Madison did not answer the charge of interpretive duplicity. He did not say that his colleagues did not properly understand or remember what his views had been a year and a half earlier. And he offered no principle that would explain why the enumerated-powers rule applied in the Bank controversy but not to the question of the removal power.

Madison's failure to offer such a principle is especially telling because modern constitutional lawyers can effortlessly supply arguments that would have completely defended Madison against the charge of interpretive inconsistency. As noted above, it is elementary to justify insisting on an enumerated power in the Bank debate but not in the removal debate by pointing to the difference between congressional powers and presidential powers, or to the difference between federalism (at issue in the Bank debate) and the separation of powers among the federal branches (at issue with respect to the removal power).²⁹⁵ But Madison offered neither of these distinctions, despite being hammered repeatedly with the charge that he was playing fast and loose with the requirement of enumeration. Why not?

The best answer, I suspect, is as straightforward based on the historical evidence as it is counterintuitive if approached through the lens of modern doctrine. Madison did not defend himself with those obvious responses because those responses were not obvious to Madison in 1791. Nor were they obvious to his opponents in the debate. If the charge that Madison was being flagrantly inconsistent could be so easily answered by pointing to the difference between Congress and the president, it seems unlikely that Sedgwick²⁹⁶ and Gerry²⁹⁷ and Vining²⁹⁸ and Smith²⁹⁹ would have attacked Madison as they did. A competent legislator does not publicly accuse a colleague of bad faith when he knows that the colleague can quickly refute the charge, thus making the accuser seem unfair and impolite. But they all did pursue this attack. Madison offered nothing in response, and the easiest explanation for his failing to defend himself is that he could not think of anything good to say. The twenty-first-century reader can rescue Madison easily from the charge of interpretive duplicity because the twenty-first-century reader has ready access to a set of principles that, though orthodox today, were not part of the toolkit that Madison and his adversaries had at their disposal. When the First Congress sat, ideas about enumerated powers were at the time uncertain and unsettled. Not everyone agreed that the federal government was limited to a set of enumerated powers. And even among those who agreed

the ideas that I propounded when persuading people to adopt the Constitution" was apparently not an argument that Madison wished to make in the House in 1791.

295. *See supra* Section III.D.1.

296. 2 ANNALS OF CONG. 1910 (1791).

297. *Id.* at 1951.

298. *Id.* at 1955.

299. *Id.* at 1929.

with that principle, further specifications of the idea that many modern lawyers take for granted had not yet taken shape.

One further inference is worth pursuing here. Madison was a skilled and experienced debater, and he worked hard in advance of important debates to be ready for the event. As noted earlier, he spent a lot of time in the weeks before the Bank debate absorbing centuries' worth of information and ideas about banking.³⁰⁰ How could a person of his intelligence, and with his—*his!*—level of familiarity with the Constitution, commit so great a debater's blunder as to open himself up to a charge of fundamental inconsistency and have nothing to say in response? The removal issue and the Bank controversy were two great constitutional debates bookending the First Congress. How could Madison have thought, in his preparation for the second of those debates, that the people in the room would not remember the prominent role he took in the first one? And if he knew that they would remember, how could he not have prepared an answer to the attack they would make?

The available evidence cannot support a conclusive answer to that question. But here is a plausible speculation. Madison had not, in fact, prepared his constitutional argument thoughtfully and in advance. The idea of using the enumerated-powers framework to defeat the Bank bill had come to him at something close to the last minute. He was fiercely opposed to the Bank. He had sometimes articulated, but had not been particularly invested in, the idea that the enumeration of congressional powers was an important mechanism for limiting federal legislation. As the moment of decision approached, he realized that if he took the limiting-enumeration idea rather seriously, he could make it the basis for an argument against the Bank. So with the process in its final stage, he ran with that idea. And as sometimes happens when people run with last-minute ideas, he hadn't thought through all of the problems that might come up.

Madison is hardly the only legislator in American history to have taken inconsistent constitutional positions at different times. And the point of noticing what Madison's adversaries noticed is neither to impugn his character nor to argue that at least one of his positions must have been wrong. It is to realize that Madison in the Bank debate was not simply cranking the handle on the same well-specified theory of enumerated powers that is familiar to constitutional lawyers today. Nor, in all likelihood, was he making an argument that he had carefully thought through, proceeding on the basis of his own well-settled constitutional views. He was making arguments in unsettled terrain, and he was improvising.

IV. THE SEAT OF GOVERNMENT

That Madison failed to persuade a majority of the House is well known. But to leave matters there would be to understate his colleagues' skepticism.

300. See *supra* Section II.B.2 (citing FELDMAN, *supra* note 46, at 316–17).

Some of them didn't just disagree: they found it hard to take Madison's enumerated-powers argument against the Bank seriously. In a letter to a friend, Sedgwick archly described Madison's speech as displaying "scholastic ingenuity."³⁰¹ Others were less circumspect. On the floor of the House, Gerry—who would one day serve as Madison's vice president—openly accused his future running mate of interpreting the enumerated powers with a set of rules formulated for the specific purpose of blocking the Bank.³⁰² Ames chose not to make such a pointed allegation publicly, saying in open debate only that he thought Madison's argument surprising.³⁰³ He was more candid in his private correspondence. In one letter written while physically in the House and listening to the debate, Ames described Madison's argument as "full of casuistry and sophistry"³⁰⁴ and asserted that Madison's articulated view was not the actual ground of his position.³⁰⁵ And if Ames's report to a friend is to be credited, it was not only the Bank's supporters who understood Madison's conduct that way. According to Ames, Madison's argument made "little impression Many of the minority [i.e., the Bank's opponents] laughed at the objection deduced from the Constitution."³⁰⁶

That Ames told a friend that even Madison's allies laughed at his enumerated-powers argument does not prove that things really happened that way. Certainly it would not be fair to Madison to assume the accuracy of a report by one of his chief antagonists. Maybe Ames was telling tall tales, or at least exaggerating his opponent's plight. But there is also another possibility. Maybe Ames was telling it straight. Or even if Ames engaged in a little hyperbole, maybe his report was accurate enough to be illuminating. (Instead of laughing at Madison, did Members of the House merely snicker? Or smile?)

Perhaps it is hard for a modern audience to think of one of Madison's most famous and archetypical constitutional arguments as having been regarded by Members of the First Congress as fundamentally unserious. And perhaps the representatives who dismissed Madison's argument that way were too hasty. Even if Madison had come to the argument only at the eleventh hour (which he had), and even if the argument was hard to reconcile with positions he had previously taken (which it was), it would not follow that the argument must be devoid of merit. Maybe the heat of conflict made other Members of the House judge Madison too harshly—and readers more

301. Letter from Theodore Sedgwick to Ephraim Williams (Feb. 23, 1791), in 21 DHFFC, *supra* note 157, at 923.

302. 2 ANNALS OF CONG. 1946 (1791).

303. *See id.* at 1904.

304. Letter from Fisher Ames to Thomas Dwight (Feb. 7, 1791), in 1 WORKS OF FISHER AMES 94, 94 (Seth Ames ed., Boston, Little, Brown & Co., 2d ed. 1854) (1809).

305. *Id.* at 94–95 ("Mr. Madison discovers an intention to speak again We sit impatiently to hear arguments which guide, or at least change, no man's vote.").

306. Letter from Fisher Ames to George Richards Minot (Feb. 17, 1791), in 1 WORKS OF FISHER AMES, *supra* note 304, at 95.

than two centuries later are free to come to their own conclusions about the quality of Madison's argument.

But to be fair to Madison's critics, it should also be noted that they had a richer contextual understanding of Madison and his arguments than we might intuit. So before this Article concludes, I will bring forward one other largely forgotten piece of background against which the Bank debate should be seen. It regards something that I touched upon briefly in Part II: the relationship between the Bank bill and the permanent location of the nation's seat of government.

A. *Desperately Fighting Susquehanna*

When the First Congress convened, New York City functioned as a temporary seat of government.³⁰⁷ Madison badly wanted to locate the permanent capital in or close to Virginia, and more was at stake in that preference than a shorter commute.³⁰⁸ In 1789, the new system had officially been adopted, but its stability and success were not guaranteed, and Madison knew it. He had, after all, lived through two changes in constitutional regimes in the prior thirteen years. Moreover, the ratification process had been bitterly contested, and the Constitution's opponents had not simply converted or disappeared. A lot of powerful people were not happy about the new system.³⁰⁹ For the federal government to succeed, it would have to transform its doubters into willing participants and ultimately into supporters.

Many of the powerful doubters were Virginians.³¹⁰ That's why Madison was stuck in the House of Representatives, after all: his state legislature had no interest in sending a nationalist like Madison to represent it in the Sen-

307. See FELDMAN, *supra* note 46, at 277.

308. See *id.*; Madison at the First Session of the First Federal Congress: 8 April–29 September 1789; Editorial Note, in 12 THE PAPERS OF JAMES MADISON 52, 61–62 (Charles F. Hobson & Robert A. Rutland eds., 1979).

309. See HILLS, *supra* note 118; see also JOHN MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 297–98 (Philadelphia, C.P. Wayne 1807) (describing the continuing political strength, after ratification, of people who had opposed the Constitution, and asserting that “[t]he old line of division was still as strongly marked as ever”).

310. In September 1789, Virginia's two United States Senators—Lee and Grayson—sent a letter to the Virginia Legislature, commenting on the proposed constitutional amendments that Madison had gotten Congress to approve and send to the states for ratification. They wrote with a dire warning: “It is impossible for us not to see the necessary tendency to consolidated empire in the natural operation of the Constitution, if no further amended than as now proposed.” Letter from Richard Henry Lee & William Grayson to the Speaker of the House of Representatives in Virginia (Sept. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 217, 217–18 (photo. reprt. 1999) (1905). Madison obtained a copy and transmitted it to Washington, describing the letter as “well calculated to keep alive the disaffection to the Government, and . . . accordingly applied to that use by the violent partizans.” Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES, *supra* at 221.

ate.³¹¹ Madison was keenly concerned with bringing Virginia's political class to a more favorable view of the new system. Virginia was both Madison's home state and the most powerful state in the Union—the state that more than any other could strengthen the new Constitution by being fully invested or undermine it by acting recalcitrantly.

Madison suspected, perhaps wisely, that a national capital in Virginia's orbit would help move marginal Virginians into the new system's camp.³¹² After all, a Virginian's attitude toward a national government located in Virginia's own shadow might be predictably less hostile than a Virginian's attitude toward a national government in New York or Philadelphia. A national government in New York or Philadelphia would be an alien entity, from a Virginian point of view.³¹³ A national government in an essentially Virginian location would be *our thing*. In short, a capital on the Potomac could make Virginia root for the national government's success rather than wishing to see its failure. And as described earlier, Madison also liked the idea of a centrally located capital and a capital away from the urban centers of finance.³¹⁴ Madison was accordingly deeply invested in bringing the seat of government to the Potomac.

Famously, Madison in 1790 reached a deal with Hamilton whereby Madison would get his Potomac capital and Hamilton would win approval for his plan for the national government to assume state debts.³¹⁵ But almost

311. See *supra* Section II.C (describing Virginia's selection of Antifederalists as senators).

312. See FELDMAN, *supra* note 46, at 309.

313. Consider, as one crucial element of this dynamic, the hostility to slavery that Virginians serving in federal office would encounter while residing in a northern capital city. New York enacted a statute in 1781 freeing slaves who had fought on the American side during the war against Britain, and by the end of the decade there was a considerable free black population there. Act of Mar. 20, 1781, ch. 32, § 6, 1781 N.Y. Laws 40, 42. Pennsylvania enacted a gradual abolition law in 1780, and in 1788 it enacted further legislation specifically designed to make it difficult for slaveholders from other states to keep slaves while temporarily residing in Pennsylvania. See Act of Mar. 29, 1788, ch. 1334, 1788 Pa. Laws 443; Act of Mar. 1, 1780, ch. 870, 1780 Pa. Laws 492. See generally Edward Raymond Turner, *The Abolition of Slavery in Pennsylvania*, 36 PA. MAG. HIST. & BIOGRAPHY 129, 137–38 (1912). Pennsylvania's scheme created an exception for members of Congress, but Virginians serving in the federal executive branch were not exempt: Attorney General Randolph actually had his slaves freed by Pennsylvania law while he served in the Washington Administration. Act of Mar. 1, 1780, ch. 870, § 10, 1780 Pa. Laws 492, 495; see Letter from Tobias Lear to George Washington (Apr. 24, 1791), in 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 129, 130–32 (Mark A. Mastromarino ed., 1999).

314. See *supra* Section II.B.1.

315. See, e.g., LIN-MANUEL MIRANDA ET AL., *The Room Where It Happens, on HAMILTON* (Atlantic Records 2015). Understanding that Madison's motive for locating the capital along the Potomac was in significant part about shoring up Virginian support for the new government helps explain that this "Compromise" of 1790 was not simply a quid pro quo arrangement in which each side was willing to tolerate a sacrifice in order to win something that it valued more. It was an arrangement in which Hamilton and Madison pursued a common end by two different means. Madison's project of getting approval for a Potomac capital and Hamilton's project of getting the national government to assume the debts of state governments were both aimed at getting key constituencies to see their interests as aligned with those of the new

a year before, Madison nearly lost his chance to secure the capital for Virginia, because a group of northern representatives beat him to the issue. In September 1789, Representative Benjamin Goodhue of Massachusetts introduced a resolution calling for the permanent seat of government to be placed in Pennsylvania, somewhere along the Susquehanna River.³¹⁶ Madison was vexed. He seems to have suspected, perhaps correctly, that representatives from New England and New York had cut a deal to support a Pennsylvania location for the capital, figuring that Pennsylvania was as far north as a majority of Congress could conceivably agree to.³¹⁷ Unexpectedly, Madison saw the possibility of a Potomac capital, which he had not yet acted upon, slipping away.

The day after Goodhue introduced his resolution, Madison rose in the House and made a battery of arguments against the proposed Pennsylvania location. It wasn't sufficiently central geographically.³¹⁸ It wasn't sufficiently central relative to the American population.³¹⁹ The rivers leading to the place were not sufficiently navigable.³²⁰ Its proximity to stagnant water would make it a place with a relatively high incidence of disease.³²¹ It was as if Madison had left Congress the day before and gone straight to the library, seeking all possible data that could be marshaled to argue against the Pennsylvania site. But to no avail. The House approved the resolution, thus triggering the next step of the legislative process: the drafting of an actual bill to fix the seat of government in Pennsylvania, along the Susquehanna River.³²²

Two weeks later, that bill was before the House, and Madison raised a different sort of objection. This time, he did not argue about location or population or navigation or disease. He argued that the proposal was *unconstitutional*. To fix the permanent seat of government by law, Madison contended, would violate the Constitution.³²³

Madison reasoned as follows: under Article I, Section 5, Clause 4, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn . . . to any other Place than that in which the two Houses shall be sitting."³²⁴ By implication, the two Houses of Congress acting concurrently could decide to adjourn to some other place. Congress's authority to change the location of its meetings was thus immune from interference by

national government. For Hamilton, the key constituency was the financial class. For Madison, it was Virginia, where ratification had been only narrowly approved.

316. 1 ANNALS OF CONG. 867-68 (1789) (Joseph Gales ed., 1834).

317. See *id.* at 912.

318. *Id.* at 894-99.

319. *Id.*

320. *Id.* at 899-900.

321. *Id.* at 901.

322. *Id.* at 917-20.

323. *Id.* at 905-06.

324. U.S. CONST. art. I, § 5, cl. 4.

the president: where to meet was a decision for the legislature alone. Indeed, Article I, Section 7, Clause 3 expressly exempted questions of adjournment from the normal requirement that Congress's work product be presented for presidential approval.³²⁵

Any attempt to specify *by statute* where Congress would meet, Madison argued, would therefore be invalid.³²⁶ Such a statute would purport to bind Congress to meet in a certain location unless Congress repealed that statute, and repeal would require either the concurrence of the president or a two-thirds supermajority in each House. The net result of such a statute, therefore, would be to deprive Congress of its Article I right to decide where to adjourn on the strength of the concurrence of majorities in the two Houses alone, without any need for supermajorities or presidential approval.³²⁷ Like it or not, Madison concluded, the bill to fix the permanent seat of government at a location in Pennsylvania could not be constitutionally enacted.

To say that Madison did not persuade his colleagues on this point would be to put the matter gently. The recorded reaction of—who else?—Fisher Ames may capture the moment better:

Mr. Ames . . . admired the abilities of the honorable gentleman [i.e. Madison], and doubted not but the Constitution was the better in consequence of those abilities having been employed in its formation; but he was not disposed to pay implicit deference to that gentleman's expositions of that instrument.³²⁸

In other words, Ames tipped his hat to Madison's ingenuity and did not for a moment think that Madison's argument made any sense at all. As a Massachusetts man happy to have the capital as far north as possible, Ames favored the bill that Madison was opposing, so perhaps he was not the most sympathetic judge of Madison's argument. But even some southerners who shared Madison's opposition to putting the seat of government in Pennsylvania were dismissive of this reading of Article I.³²⁹

The narrative, then, seems to run as follows: Madison was deeply invested, in good faith and for public-regarding reasons, in securing a location in or near Virginia for the permanent seat of government. When confronted with legislation that threatened the outcome he sought, he marshaled as many arguments as time and effort permitted. In the first instance, none of those arguments rested on the text of the Constitution, probably because nothing in the text of the Constitution seemed to speak to the issue. But none of his arguments worked. So in due course, he came forth with a differ-

325. *Id.* art. I, § 7, cl. 3.

326. 1 ANNALS OF CONG. 905 (1789) (Joseph Gales ed., 1834).

327. *Id.*

328. *Id.* at 908–09.

329. *See id.* at 909 (Smith, of South Carolina, saying that of course the site of the seat of government could be fixed by law, with presidential participation); *id.* at 910 (Jackson, of Georgia, somewhat more gently describing Madison's constitutional point as “not well founded”).

ent kind of argument—an argument involving a reading of the Constitution’s text—that he probably thought up in the meantime. It was a clever argument. But it was also a tendentious argument, and Madison’s fellow representatives didn’t buy it. They understood perfectly well that Madison’s purported theory explaining why a bill he opposed on the merits was not just undesirable but actually unconstitutional had been cooked up ad hoc. They brushed him aside.

The bill for a Pennsylvania capital was approved on September 22, with Madison voting against it.³³⁰ But Madison did not give up. He seems later on to have instigated a disagreement about exactly where along the Susquehanna the seat of government would be located, and the resulting impasse opened the door for his deal with Hamilton the following summer and the plan to move the capital to the Potomac.³³¹ When that deal came before Congress in the form of a bill to locate the seat of government on the Potomac, Madison gave what seemed like pretty good proof of the insincerity of his constitutional objection the year before. Not only did Madison now vote in favor of fixing the seat of government by statute, but he advised Washington in a written opinion that, as a matter of constitutional law, the seat of government *must* be fixed by statute—exactly the opposite of what he said a year earlier.³³² Contemporary commentators skewered Madison for the self-contradiction.³³³ In short, it was widely understood that Madison was willing to manufacture an unreliable constitutional argument at the last minute and to insist on it in the House of Representatives.

B. *The Cow in the Stable*

When President Washington signed the legislation that embodied the Compromise of 1790, Madison’s desire for a Potomac capital took one long step toward realization. Indeed, it would be easy to think that the question of where the capital would be located was settled at that moment. But the matter was not that simple, because agreements to undertake grand plans in the future do not always make those plans come true. As many Americans recognized at the time, getting Congress in 1790 to vote in favor of a Potomac

330. *Id.* at 946.

331. *See id.* at 926; FELDMAN, *supra* note 46, at 277; *Madison at the First Session of the First Federal Congress: 8 April–29 September 1789*; *Editorial Note*, *supra* note 308, at 61.

332. *See* James Madison, *James Madison’s Concurring Opinion* (July 14, 1790), in 17 THE PAPERS OF THOMAS JEFFERSON 199 (Julian P. Boyd, ed, 1965).

333. *See* One of the Gallery, *One of the Gallery on the Conduct of Madison, Page, and Carroll*, N.Y. DAILY ADVERTISER (July 15 1790), *reprinted in* 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 332, at 200–01 (“What is become of another person’s *oath* which stuck in his throat last session, and prevented his voting for the Susquehannah? Has he swallowed it since that time? Or is it so long since he took it that he has forgot it? Or have the waters of the *Patowmac* the virtue of the *Lethe*, that those who drink of them may lose their memory?”).

capital was one thing, and actually moving the government there ten years later would be another.³³⁴

According to the relevant legislation, Congress was to leave New York at the end of 1790, spend ten years in Philadelphia, and then move to the Potomac.³³⁵ But ten years is long enough for an operation to put down roots, and temporary arrangements sometimes have a way of making themselves permanent. Philadelphia was America's largest city.³³⁶ The Potomac alternative was an undeveloped swamp and, perhaps, not the most fashionable of destinations. (Gerry had published remarks saying that people might just as easily believe that Congress was serious about relocating to Mississippi or Detroit.³³⁷) Was Congress really going to pick up and move there, leaving behind the quarters and routines that it would have become accustomed to during ten years of residence in the metropolis?

Apparently, many influential Pennsylvanians thought they still had a shot at keeping the capital for themselves. Upon his arrival in Philadelphia at the start of Congress's residence there, Sedgwick wrote to his wife reporting rumors that the Pennsylvania delegation in Congress "do not hesitate to declare that they never intended to aid in a removal from hence to the Potomack, and this declaration has awakened the jealousy of the southern members to a great degree."³³⁸ Indeed, the fact that Pennsylvania was not reconciled to being merely a temporary home for Congress seems to have been apparent to the general public, or at least to those parts of the public

334. See, e.g., Editorial Note, in 17 THE PAPERS OF THOMAS JEFFERSON, *supra* note 332, at 452–53 (collecting opinions doubting that the planned Potomac move could be achieved).

335. See Act of July 16, 1790, ch. 28, 1 Stat. 130.

336. U.S. CENSUS BUREAU, 1790 CENSUS 37, 45 (J. Phillips 1790), https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf [<https://perma.cc/T6UW-KWZS>] (showing that the whole number of persons in Philadelphia was 41,580, as opposed to New York's 33,131).

337. Editorial Note, *supra* note 334, at 453–54 (quoting *Debates of 6 July*, N.Y. DAILY ADVERTISER (July 10, 1790)) ("Enquiries will be made, where in the name of common sense is Connogocheque [(i.e., the Maryland creek, flowing into the Potomac, designated as the northern limit for the site of the capital)], and I do not believe that one person in a thousand in the United States knows that there is such a place on earth. If the second class of American nobility, the Society of St. Tammany . . . had passed a vote to celebrate their festival in their wigwam at Connogocheque, I should have thought that there was some propriety, some stile in the measure; but for the grave council of the United States, to pass a bill that the seat of government should be removed to that place, is a measure too ridiculous to be credited. Few will suppose that Congress are serious. . . . You might as well induce a belief that you are in earnest by inserting Mississippi, Detroit, or Winnipiocket Pond, as Connogocheque. . . . Can it be conceived that after ten years residence, Congress will remove from the city of Philadelphia?").

338. Letter from Theodore Sedgwick to Pamela Sedgwick (Dec. 26, 1790), *supra* note 169, at 237; see also Letter from William Few to Catherine Few (Jan. 31, 1791), in 21 DHFFC, *supra* note 157, at 624 (reporting that "a Yankee [in Congress] has threatened . . . [to] move for a repeal" of the Act settling the seat of government on the Potomac); Letter from William Symmes to George Thatcher (Feb. 10, 1791), in 21 DHFFC, *supra* note 157, at 746 (observing that, given the unpleasantness of Philadelphia's weather, the Pennsylvanians would need to treat Congress nicely if they expected Congress to stay permanently in Philadelphia, and thus reflecting awareness that Pennsylvanians so intended).

that were paying attention. In January 1791, an anonymous wag writing in a New York literary magazine published a thirty-six line poem about a cow (yes, a cow), recently resident on the Hudson River (as Congress had been in New York), who had relocated to “the banks of the Delaware” (that is, to Philadelphia).³³⁹ The poet explained that “proud stuffy Dons” of Virginia had helped establish the cow in her new home and believed that soon she would move farther south.³⁴⁰ But the Virginians were in for a rude shock, the poem continued:

But hear now the sly, plotting sons of old [William] Penn—
 “The cow’s in our stable—there she must remain.
 Talk now of agreements, and bargains your fill,
 Our scheme is effected—the grist’s at our mill.”
 . . . And swore by the city, white men should turn sable,
 Before the cow stir’d one foot’s length from their stable.³⁴¹

To be comprehensible, allegorical satire of this kind needs a readership that already knows the substance of the matter being lampooned. So unless this satirist had a runaway imagination, it is safe to infer that people knew of, or at least suspected, a Pennsylvanian design to keep the capital where it was. As it happens, it seems that neither the satirist nor the audience was imagining things. In April 1791, the Pennsylvania House of Representatives passed a bill to appropriate twenty-five years of funds for the construction of buildings to house the federal government in Philadelphia.³⁴² This was not Congress appropriating funds to rent temporary space. It was Pennsylvania appropriating funds to build permanent structures, with the design of enticing the government to stay where it was, rather than decamping for some undeveloped swamp.³⁴³

339. *A New-York Farmer to the New-York Magazine*, GAZETTE U.S. (Feb. 9, 1791), reprinted in 21 DHFFC, *supra* note 157, at 640.

340. *Id.*

341. *Id.*

342. See JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES IN THE COMMONWEALTH OF PENNSYLVANIA 300, 350–52 (Hall and Sellers 1790), microformed at EARLY AMERICAN IMPRINTS, Series 1, no. 23675, bit.ly/PAHouse1791 [https://perma.cc/A4VF-7LXL].

343. Washington, who was as invested as Madison in the Potomac location, responded to a report of the Pennsylvania House’s agenda by urging the commissioners responsible for developing the Potomac site to proceed as quickly as possible, presumably in order to demonstrate that the Potomac project was alive and proceeding. Letter from George Washington to William Deakins, Jr. & Benjamin Stoddert (Apr. 1, 1791) in 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 313, at 34. If that project’s momentum flagged, it would be all the easier for Pennsylvania to gain the advantage. On April 24, while Washington was traveling in the Deep South, his personal secretary wrote to him from Philadelphia to report that:

Mr Ellicott has returned to this City from surveying the federal territory, and the flattering account which he gives of the spot and the prospect of things in that quarter, added to other information of the same kind which has been received, have created a serious,

C. *The Bank as Anchor*

Hamilton's proposal to create a national bank reached Congress exactly at the moment when Congress took up its ostensibly temporary residence in Philadelphia—that is, in December 1790. And there was a widely understood practical connection between the possible creation of a bank and the hopes that Pennsylvanians maintained for keeping the nation's capital. Everyone knew that if Congress created a Bank of the United States, the institution would be located in Philadelphia, where the government was working and where there was a capital market with which to do business.³⁴⁴ To create the Bank was accordingly to deepen the government's ties to its existing Philadelphia location. And every increase in the government's footprint in Philadelphia during the 1790s would make it harder to pick up and move in 1800. It is easier to relocate an operation that consists of fewer than two hundred people—as the whole federal apparatus in Philadelphia did in 1790³⁴⁵—than to move a larger enterprise. The Bank proposal thus threatened both to increase the new government's ballast of its own force and to set a precedent for other expansions of the federal footprint, making a move ten years later even more difficult.

Many members of Congress had this dynamic on their minds as Congress considered the Bank bill. Between December 1790 and February 1791, members of Congress from at least nine different states, spread evenly from North to South, wrote, mostly privately but occasionally for public consumption, that creation of the Bank would make it hard for the government to leave Philadelphia³⁴⁶ or, alternatively, that southern and especially Virginian opposition to the Bank was largely rooted in a fear of losing the Potomac

and to many an alarming expectation, that the law for establishing the permanent seat of Government will be carried fully into effect. This idea has heretofore been treated very lightly by people in general here.

Letter from Tobias Lear to George Washington (April 24, 1791), *supra* note 313, at 132 (footnote omitted). According to Lear's letter, support for the proposed construction of permanent federal buildings in Philadelphia flagged accordingly, in part because Western Pennsylvanians, now more persuaded that the Potomac site was plausible, were coming to think that they would prefer a national capital on the Potomac than one in eastern Pennsylvania. *Id.*

344. See, e.g., Letter from Edward Carrington to James Madison (Feb. 2, 1791), in 21 DHFFC, *supra* note 157, at 660; Letter from Joseph Jones to James Monroe (Jan. 27, 1791), in 21 DHFFC, *supra* note 157, at 557. Philadelphia was also home to the Bank of North America, to which a Bank of the United States would be a de facto and perhaps also a de jure successor. See Letter from Edward Carrington to James Madison (Feb. 2, 1791), *supra* at 660.

345. See LEONARD WHITE, *THE FEDERALISTS* (1956). When Jefferson became the first president to begin a term in the District of Columbia in 1801, the total number of federal employees (excluding the members of Congress themselves) was 153. BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 112 (2009).

346. See, e.g., Letter from Daniel Carroll to the Delegates of Frederick, Washington, & Allegany Counties, Maryland (Dec. 30, 1790), in 21 DHFFC, *supra* note 157, at 267.

capital.³⁴⁷ Monroe got a letter from a Virginian constituent warning that a national bank in Philadelphia “will I think effectually establish the permanent seat in that place”;³⁴⁸ Representative George Thatcher of Massachusetts wrote that some southern representatives “look upon a national bank established at Philadelphia as throwing a monstrous sheet anchor in that Harbour, which no future Congress will ever be able to weigh.”³⁴⁹

D. *The Senate: The Length of the Charter*

Proceedings in the Senate give further proof, if more cryptically, of the perceived connection between the Bank bill and the lingering question about the seat of government. As discussed earlier, the Senate approved the Bank bill without recorded dissent.³⁵⁰ But what contentious discussion there was in the Senate may have occurred in direct contemplation of the Potomac problem. The evidence for that proposition is not merely the private writings of senators.³⁵¹ It is also visible in the published *Senate Journal*, scant though that record is, if the *Journal* is read in light of the concern about whether the government would actually leave Philadelphia.

Before voting overwhelmingly to approve the Bank, the Senate held three divisive votes on the subsidiary question of how long the Bank’s corporate charter should be valid. In the first vote, taken on January 13, the Senate considered and approved a twenty-four year charter, valid until 1815.³⁵² The vote was close and also sectional. Senators from states north of Maryland and Virginia overwhelmingly supported the measure, and every vote from Maryland and Virginia southward was cast against it.³⁵³ A week later, the

347. See Letter from Fisher Ames to George Richards Minot (Feb. 17, 1791), *supra* note 306; Letter from Fisher Ames to Thomas Dwight (Jan. 24, 1791), *in* 21 DHFFC, *supra* note 157, at 509; Letter from Fisher Ames to Thomas Dwight (Jan. 2, 1791), *in* 21 DHFFC, *supra* note 157, at 295; Letter from Benjamin Bourne to Zephaniah Andrews (Feb. 3, 1791), *in* 21 DHFFC, *supra* note 157, at 668; Letter from Benjamin Huntington to Samuel Huntington (Feb. 3, 1791), *in* 21 DHFFC, *supra* note 157, at 674; Letter from Theodore Sedgwick to Pamela Sedgwick (Dec. 26, 1791), *supra* note 169, at 237–38; Letter from Theodore Sedgwick to Peter Van Schaack (Jan. 30, 1791), *supra* note 165, at 609; Letter from George Thatcher to William Symmes (Jan. 26, 1791), *in* 21 DHFFC, *supra* note 157, at 546; Letter from Hugh Williamson to Alexander Martin (Feb. 7, 1791), *in* 21 DHFFC, *supra* note 157, at 723; Letter from Paine Wingate to Nathaniel Peabody (Feb. 4, 1791), *in* 21 DHFFC, *supra* note 157, at 684.

348. Letter from Joseph Jones to James Monroe (Jan. 27, 1791), *in* 21 DHFFC, *supra* note 157, at 557, 558.

349. Letter from George Thatcher to Jeremiah Hill (Jan. 24, 1791), 21 DHFFC, *supra* note 157, at 524, 525.

350. See *supra* Section II.C.

351. Though that exists too. On January 19, 1791, Maclay wrote in his diary that “The Potowmack interest seemed to regard [the Bank] as a Machine Which in the hands of the Philadelphians, might retard the removal of Congress. the Destruction of it of Course was their Object.” 9 DHFFC, *supra* note 143, at 364 (entry of Jan. 19, 1791).

352. 1 DHFFC, *supra* note 58, at 531–32.

353. *Id.* at xxiii–xxiv, 531–32.

Senate considered an amendment that would have limited the charter to ten years—meaning that it would expire within a few months of the government’s scheduled move to the Potomac. That amendment failed, entirely on sectional lines.³⁵⁴ Another amendment was then attempted, this one to delete the clause that gave the Bank the exclusive privilege of doing the federal government’s financial business. That failed too, and again the vote was split geographically.³⁵⁵ These three votes were the only issues on which the Senate is recorded as having taken votes on the Bank bill.

Why, of all possible aspects of the Bank plan, were these issues the contentious ones? Here’s a hypothesis: because of the threat that a national bank in Philadelphia would prevent the government’s move to the Potomac. A bank with a charter running until 1815 would be a going concern in Philadelphia when the appointed moving day came. But if the charter could be made to expire in ten years, Congress would have to reauthorize the Bank at the time of the move, and Congress could then recharter the Bank on the condition that it move to the Potomac. Or it could charter a different bank on the Potomac, or no bank at all. The proposal to strike the Bank’s exclusive privilege was to the same effect. It would have let Congress charter a different Bank on the Potomac at the time of the move, rather than requiring Congress to continue doing business with a Philadelphia institution and therefore adding to the inconvenience of relocating. To be sure, Senators skeptical of monopoly privileges or overly powerful corporations might have supported a short charter or a nonexclusive bank for reasons independent of the Potomac issue. But if Senators in January 1791 were concerned about the impact of the Bank bill on the Potomac plan—and we know that some were—then it makes all the sense in the world for them to have proposed exactly the two options that the Senate considered in the final phases of its process: either make the charter expire in the year of the proposed move, or enable the government to do business with someone other than the Philadelphia-Philadelphia-based bank.

E. *Randolph’s Proviso: The Ten Miles Square*

The background concern with the seat of government left a similarly subtle fingerprint on the Attorney General’s written opinion about the constitutionality of the Bank bill. Randolph’s memo to Washington mostly tracked Madison’s argument in the House. The question, he wrote, was whether Congress had the power to charter corporations.³⁵⁶ Randolph then reasoned that neither the taxing power, nor the money-borrowing power, nor the power to regulate commerce, nor the power to dispose of the government’s property should be understood to encompass the power to create

354. *Id.* at 535.

355. *Id.* at 535–36.

356. Randolph’s Opinion, *supra* note 26, at 122.

a bank.³⁵⁷ Nor could the Necessary and Proper Clause reasonably be construed in a way that would bring a power to incorporate within its scope.³⁵⁸

Toward the end of his opinion, however, Randolph noted one other possibility. It concerned Article I, Section 8, Clause 17, which gives Congress the power to legislate “in all cases whatsoever, over such District (not exceeding ten miles square) as may . . . become the Seat of the Government of the United States.”³⁵⁹ In Randolph’s view, Clause 17 gave Congress the authority to create a bank within the ten miles square that would be the seat of government.³⁶⁰ That makes sense, of course. If Congress could do anything it chose in that space, or at least anything that a state legislature could do and that the Constitution did not expressly forbid, then it could incorporate a bank, just as a state government could within its own jurisdiction. But, Randolph wrote, Congress’s power under Clause 17 could not justify the pending Bank bill, because that bill was not an exercise of Congress’s power to govern the ten miles square.³⁶¹ If Congress wanted to wait until it had taken up residence at its permanent seat and then use Clause 17 to incorporate a bank there, it could validly do so. But it could not create a bank in some other location.³⁶²

So in the view of the Attorney General—recently the Governor of Virginia—creating a National Bank was not unconstitutional after all. It would just be unconstitutional if that Bank were located somewhere other than on the Potomac site that was to become the seat of government.

F. *Madison Himself*

And what of Madison?

As far as I can tell, Madison never commented publicly on the relationship between the Bank and the seat of government. But he came close. In 1792, William Smith³⁶³ published an anonymous screed attacking Madison and Jefferson for all manner of political perfidy.³⁶⁴ With respect to the Bank, Smith charged that nobody genuinely thought the proposal unconstitutional, but that “Virginia” worried that the Bank’s presence in Philadelphia would

357. *Id.* at 126.

358. *Id.* at 127.

359. U.S. CONST. art. I, § 8, cl. 17.

360. See Randolph’s Opinion, *supra* note 26, at 130 (“It has been also asserted that Congress have an exclusive legislation at the seat of government. This will not be true until they go to the place of the permanent residence.”).

361. *Id.*

362. *Id.*

363. That is, the South Carolina representative who had argued that Congress could create the Bank because no state could do it. See *supra* Section III.C.3.

364. William Smith, *The Politicks and Views of a Certain Party, Displayed, October 1792*, reprinted in 22 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1082 (Charlene Bangs Bickford et al. eds., 2017) [hereinafter 22 DHFFC].

jeopardize the move to the Potomac, and that Madison's constitutional argument against the Bank was a bad-faith pretext aimed at solving that problem.³⁶⁵ Madison did not respond publicly to Smith's attack. But in a surviving set of notes that he prepared for such a response,³⁶⁶ Madison acknowledged that the Potomac angle had played at least some role in his thinking.

We cannot know just how Madison would have articulated these ideas had he made them public. In his notes, Madison wrote that he never worried that the Bank would actually prevent the government from leaving Philadelphia for the Potomac—but that he had “great apprehensions” that chartering the Bank in Philadelphia could make *other people* think that removal to the Potomac was less likely, that such doubts could “be used as an engine for turning the fears & hopes of . . . particular States” against the national project, and that the prospect of such a development might have figured in his approach to the Bank debate.³⁶⁷ In particular, Madison wrote that concern about the seat of government might have figured in his decision to oppose giving the Bank a twenty-year charter.³⁶⁸ A bank with only a ten-year charter might go out of business just before the scheduled moving date and therefore be less of an anchor in Philadelphia. If the government still wanted a bank at the time of the move, it could charter a new one on the Potomac River.

Some of Madison's adversaries—not just Smith—would have regarded that explanation as less than the whole truth. Like Smith, they characterized Madison's interest in the Potomac plan as the driving force behind his entire opposition to the Bank bill. For example, when Sedgwick wrote at the end of January that he expected Madison to make a pretextual constitutional argument against the Bank, it was Madison's stake in the Potomac plan that Sedgwick took to be Madison's true motivation.³⁶⁹ And the day after Madison articulated his enumerated-powers objection to the House, Rhode Island's Benjamin Bourne wrote as follows:

Mr. Maddison [*sic*] spoke yesterday an hour & an half on the Subject. he Combats it both on the grounds of unconstitutionality and inexpediency. But I am persuaded we should not have heard any thing of either, did not the Gentlemen from the southward View the measure, as adverse to the removal of Congress, ten years hence, to the Potowmack.³⁷⁰

The representatives who took this reductionist view likely underestimated Madison's other reasons for opposing the Bank. Whether or not the

365. *See id.* at 1082, 1090–91.

366. *James Madison, Notes on Politicks and Views*, [4 November 1792], in 22 DHFFC, *supra* note 364, at 1098 (date assigned by the editors of *The Papers of James Madison*).

367. *Id.* at 1101.

368. *See id.*

369. Letter from Theodore Sedgwick to Peter Van Schaack (Jan. 30, 1791), *supra* note 165, at 609.

370. Letter from Benjamin Bourne to Zephaniah Andrews (Feb. 3, 1791), *supra* note 347, at 668.

Compromise of 1790 was threatened, Madison distrusted the financial class that would control the Bank, feared that debt would undermine republican independence, and wanted the spoils-politics of corporations and monopolies to occur at the state level, where the citizen-gentry stood a better chance of resisting the forces of financial corruption. Those seem like sufficient reasons for Madison to have opposed the Bank. But just as it seems unwise to believe that Madison's enumerated-powers argument was motivated solely by his desire to protect the Potomac plan, it might be unwise to take Madison at his word and conclude that Madison's concern for the seat of government figured to no greater extent than he described in his notes for the response to Smith.³⁷¹ Truth might lie at one of those poles, but it seems at least as likely that it lies somewhere in between, and it's impossible to say just where.

Whatever the best resolution of that uncertainty, bringing the Bank debate's connection to the seat of government into view should help us better understand how the participants understood their controversy. Even if Madison was in perfectly good faith when he argued against the Bank, his critics had reason to be skeptical. Only a year and a half earlier, when the Susquehanna proposal threatened Madison's hopes for a Potomac capital, they had heard him come forward at the last minute with an implausible constitutional argument, and his subsequent flip-flop on the issue when Congress agreed to the Potomac site probably confirmed his critics in their view that Madison had tried to dupe them into accepting an odd reading of Article I.³⁷² So a year and a half later, when once again the House was considering a bill that might prevent the seat of government from moving to the Potomac and Madison at the last moment again produced an unexpected constitutional argument in opposition, his colleagues in the House had reason to be suspicious. Maybe even to laugh.

To be sure, Madison's enumerated-powers argument against the Bank was not as idiosyncratic as his argument against fixing the seat of government by statute. The idea that the federal government was limited to a set of enumerated powers was a known part of constitutional discourse, albeit a contested one. Madison had not been particularly invested in that idea before the Bank debate, but he had articulated it from time to time. What's more, Madison did not later repudiate the enumerated-powers framework,

371. If the Potomac problem had in fact been part of Madison's motivation for making his enumerated-powers argument, it would have been hard for him to say so publicly in a response to Smith. It would be hard, after all, to explain why a concern about the seat of government would be relevant to the question of whether Congress had an enumerated power to incorporate a bank (leaving aside possibilities arising from the enumerated power to govern the ten miles square). Put another way, to say "I worried about the Potomac, so I argued that for enumerated-powers reasons the Bank would be unconstitutional" would be tantamount to saying "...so I made a pretextual argument about the Constitution." People rarely say such things.

372. See *supra* Section IV.A.

as he had repudiated his argument against fixing the capital's location by statute. On the contrary, the idea of a limiting enumeration became an important part of the general constitutional vision that Madison would develop and hold, sincerely, for the next long phase of his career.³⁷³ As I've noted before, the pressure of concrete problems sometimes provokes people to further develop their ideas, and there need be nothing untoward about that dynamic: necessity is a mother of invention in legal theory as surely as elsewhere, and inventions are often good. But in 1791, Madison's audience could not know that he was articulating an idea to which he would adhere authentically going forward. What they could know, and did, is that he was saying something unexpected, and something in tension with his prior ideas. And that many of them disagreed with his basic premise.

CONCLUSION

I have argued elsewhere that constitutional law's prevailing wisdom on the subject of congressional powers makes some important mistakes.³⁷⁴ For one, it conflates two propositions about enumerated powers, of which one at most is true. The first proposition—the enumeration principle—is that Congress is entitled to legislate only on the basis of constitutionally enumerated powers. The second proposition—the internal-limits canon—provides that the sum total of what Congress can do on the basis of its enumerated powers must be less than what Congress could do with a grant of general legislative jurisdiction. As I have explained, the first proposition does not entail the second one.³⁷⁵ Put another way, even if it is true that Congress can legislate only on the basis of its enumerated powers, it need not follow that Congress must be limited by those enumerated powers. To be sure, it is crucially important that Congress be limited. But as Madison told Wallace in 1785, external limits are better tools for limiting legislatures than internal limits are.³⁷⁶ In practice, Congress has long been limited not by internal limits but by a combination of external limits and the process limits that are built into the structure of the Constitution.³⁷⁷ And as I see it, the idea that Congress must be limited by the particular strategy of internal limits—that is, by the operation of its enumerated powers—is not required by fidelity to the

373. Though not so dogmatically as to refuse to sign the bill creating the second Bank of the United States in 1816.

374. See Primus, *supra* note 9; Primus, *The Limits of Enumeration*, *supra* note 12; Primus, *Why Enumeration Matters*, *supra* note 12.

375. See Primus, *The Limits of Enumeration*, *supra* note 12, at 593–94.

376. See *supra* Section I.B.

377. See Primus, *Why Enumeration Matters*, *supra* note 12, at 3–4. Prior scholarship generally (and, I think, correctly) regards Madison in the 1780s as having considered process limits the most important kind. See, e.g., Kramer, *supra* note 68, at 1515–20; see also *THE FEDERALIST*, *supra* note 16, Nos. 10, 46, 51 (James Madison).

Founders,³⁷⁸ not necessary or even helpful in the maintenance of American federalism,³⁷⁹ and not ordained by the text of the Constitution.³⁸⁰

Nothing I have shown about the Bank debate demonstrates that twenty-first-century constitutional lawyers need abandon either the enumeration principle or the internal-limits canon. The Members of the First Congress who did not think in now-orthodox ways about the powers of Congress might have been wrong in their own time, and even if they were not wrong in their own time, the best understanding of constitutional law in 1791 might not be the best understanding in 2018. Similarly, even if Madison's harshest 1791 critics were correct—even if Madison knowingly made a lousy constitutional argument against the Bank—it would not follow that the enumeration principle or the internal-limits canon was thereby poisoned. One could come to believe in the enumeration principle and the internal-limits canon for reasons having nothing to do with Madison or the Bank. And even if one has doubts about the textual, structural, and historical accounts that are usually taken to support modern orthodoxies related to enumeration and internal limits, there is now a good deal of constitutional tradition building the enumeration principle into constitutional law. The opinions of the courts, and the broader discourse of the legal profession, have made the enumeration principle part of modern constitutional law no matter what might have been true in 1791.

Nonetheless, it matters that the enumeration principle was not a consensus proposition in the First Congress. It matters too whether we remember the Bank debate as a set piece in which the rival parties argued within a stable framework or as a moment of argumentative innovation. In part it matters simply because, other things being equal, it is better to get the story straight than not to. But it also matters for other reasons.

Madison's argument against the Bank offers a model for how enumerated-powers arguments can carry the content of important commitments—including small-c constitutional commitments—that are not otherwise reflected in the written Constitution's text. In 1791, Madison was concerned about banks, corporations, monopolies, debts, and other things that weighed heavily within traditional country-party ideology. His constitutional theory was significantly shaped by that frame. Had the written Constitution better conformed to his small-c constitutional intuitions at that time, it would probably have contained an express prohibition blocking Hamilton's Bank proposal—say, a clause prohibiting Congress from chartering corporations, or monopoly corporations, or banks in particular. As it happened, there were no such clauses, because the constituencies supporting these kinds of external limits had lacked the political strength necessary for getting relevant

378. See Primus, *The Limits of Enumeration*, *supra* note 12, at 613–28.

379. See *id.* at 595–613.

380. See *id.* at 628–42.

amendments adopted.³⁸¹ In the absence of such external limits in the Constitution's text, it took Madison a while to discover a way to articulate his objections to the Bank in terms of the written Constitution.

When he did discover one, it was less than compelling. The First Congress disagreed, and so did the Court in *McCulloch*.³⁸² And perhaps part of the weakness of Madison's move lay in the fact that he was using the enumeration for something that it wasn't clearly built to achieve. Absent a substantive skepticism of banks or the financial class or federally chartered corporations, Hamilton's arguments reading the enumerated powers as sufficient for chartering a Bank seem pretty straightforward.³⁸³ The real force of Madison's argument, such as it was, lay not in its cogency as a reading of the enumerated powers but in its channeling a set of small-c constitutional commitments that to him, and to many other Americans, was deeply important.

Madison's move was not the last of its kind. Once we recognize that substantive constitutional commitments that would be best captured by external limits can sometimes also be advanced with innovative readings of internal limits, we should be primed to ask whether the same phenomenon is at work in other arguments from enumerated powers. When the idea of a limiting enumeration has seemed to do work—in the *Civil Rights Cases*,³⁸⁴ say, or in *Dagenhart*³⁸⁵ or *Schechter*³⁸⁶ or *Butler*³⁸⁷ or *Lopez*³⁸⁸ or *Morrison*³⁸⁹ or *NFIB*³⁹⁰—might a proffered reading of Congress's enumerated powers be animated less by an intuition about the scope of those powers on their own terms than by an intuition more naturally expressed as an external limit, but which the written Constitution happens not to contain? (Like “Congress should not make agricultural policy,”³⁹¹ or “Congress should not interfere with family law”?³⁹²) Opinions will vary, from lawyer to lawyer and from case to case. But the question should be one that we are ready to ask.

381. See *supra* Section I.A.

382. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) (holding that Congress had the power to charter a bank).

383. As do Marshall's, even if Marshall did less to nail down the particulars of his analysis. See David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1, 57–58 (2015).

384. 109 U.S. 3 (1883).

385. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

386. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

387. *United States v. Butler*, 297 U.S. 1 (1936).

388. *United States v. Lopez*, 514 U.S. 549 (1995).

389. *United States v. Morrison*, 529 U.S. 598 (2000).

390. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. 519 (2012) (opinion of Roberts, C.J., in part).

391. See *Butler*, 297 U.S. at 68 (holding that the Agricultural Adjustment Act “invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government”).

392. See *Morrison*, 529 U.S. at 615–16.

The modern lawyer's sense that Congress must be meaningfully limited by the Constitution's enumeration of its powers draws support from many different sources. It rests partly on readings of constitutional text, including principally Article I and the Tenth Amendment. It rests partly on ideas about federalism. And it rests partly on a set of ideas about, or images drawn from, the history of the early Republic. These include the story of the Framers' having considered the limiting enumeration so fundamental that it justified their omission of a Bill of Rights from the original constitution, a certain reading of ratification-era documents like *Federalist 45*, an understanding of the Bank debate, and a presentation of Chief Justice Marshall's dictum that "[t]he enumeration presupposes something not enumerated"³⁹³ as a statement that the Constitution's text precludes letting Congress exercise the practical equivalent of plenary legislative authority. These historical pieces matter not only in official ways (say, as evidence of original meaning, or of longstanding practice, among people who attribute authority to such things) but also in unofficial ways. Successful constitutional arguments must usually be reconcilable with the audience's intuitive sense of the national constitutional story. So the content of the story often matters simply at the level of intuition.

This Article is part of a larger effort to challenge prevailing intuitions about enumerated powers. Elsewhere, I have explained that the text of the Constitution does not require that Congress be limited by the enumeration of its powers;³⁹⁴ that a limiting enumeration is neither necessary nor helpful for maintaining American federalism;³⁹⁵ that the system in practice behaves, and has long behaved, as if the enumeration does no meaningful limiting work;³⁹⁶ that the Framers did not omit a Bill of Rights because they trusted the enumeration to do the work of limiting Congress;³⁹⁷ and that Marshall's dictum about enumeration, read attentively, says nothing about the overall scope of congressional power.³⁹⁸ This Article is intended to call into question yet another of the traditional supports for enumerated-power orthodoxies—the idea that the Bank debate reflects a Founding consensus about the enumerated-powers framework as the rubric for assessing federal legislation. Madison's claim that the limiting enumeration was essential to the Constitution is not one that he would have made in 1787; the enumeration principle was not a consensus proposition in the First Congress. And the more we become aware of the weaknesses in each particular element that seems to support mainstream thinking about enumerated powers, the more we may find

393. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 195 (1824).

394. Primus, *The Limits of Enumeration*, *supra* note 12, at 628–42.

395. *Id.* at 595–613.

396. Primus, *Why Enumeration Matters*, *supra* note 12, at 3–4, 20–27.

397. Primus, *The Limits of Enumeration*, *supra* note 12, at 614–19.

398. Primus, *supra* note 9, at 585–95.

ourselves open to wondering whether the other purported elements of that idea are really as solid as they are traditionally thought to be.