

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

2021

### Reframing Article I, Section 8

Richard Primus

*University of Michigan Law School, raprimus@umich.edu*

Available at: <https://repository.law.umich.edu/articles/2287>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Constitutional Law Commons](#), and the [Public Law and Legal Theory Commons](#)

---

#### Recommended Citation

Primus, Richard A. "Reframing Article I, Section 8." *Fordham Law Review* 89, no. 5 (2021): 2003-2032.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## REFRAMING ARTICLE I, SECTION 8

*Richard Primus\**

[T]he true objective of the American Constitution was not to limit but to create more power.

—Hannah Arendt, *On Revolution*<sup>1</sup>

### INTRODUCTION

As a purely textual matter, the original Constitution's<sup>2</sup> enumeration of congressional powers could be read as a limiting list ("Congress may exercise these powers and no others") or as a nonlimiting list ("Congress may exercise these powers and maybe also others"). Either way, the cumulative scope of the powers that Congress may exercise could leave Congress with less legislative jurisdiction than it would have with a general police power, or it might turn out that the powers Congress enjoys are sufficient to authorize Congress to enact pretty much any legislation that it deems to be in the public interest<sup>3</sup>—subject, of course, to affirmative prohibitions like those in the Bill

---

\* Theodore J. St. Antoine Collegiate Professor of Law, The University of Michigan Law School. This Essay was written for the Symposium entitled *The Federalist Constitution*, hosted by the *Fordham Law Review* on October 2, 2020, "at" Fordham University School of Law. I thank the organizers of and participants in this Symposium for their contributions. Thanks also to the participants in a faculty workshop at Penn State Law. Special thanks to Mary Sarah Bilder, Ruby Emberling, Cheri Fidh, Rick Hills, Daniel J. Hulsebosch, Rob Lothman, David Schwartz, and, as always, Virginia Niesler and the staff of the University of Michigan Law Library. Research for this Essay was funded in part by the Cook Endowment at the University of Michigan Law School.

1. HANNAH ARENDT, *ON REVOLUTION* 152 (1963).

2. By "the original Constitution," I mean the 1787 text without amendments. What I say in this sentence about two possible readings is true even after the addition of the 1791 amendments, including the Tenth Amendment. See CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 140–43 (New York, G. P. Putnam's Sons 1890) (explaining how the text is consistent with the second possibility); Richard Primus, *The Limits of Enumeration*, 124 *YALE L.J.* 576, 629–34 (2014) (explaining how the text of the Tenth Amendment is consistent with the first and third possibilities above). In this Essay, however, my argument is only about the unamended work product of the Convention.

3. These two possibilities can both be consistent with treating the powers of Congress as a limiting list because it is possible for a list of specific powers to be tantamount to a general power, as applied to the social world. A legislature with seven enumerated powers has in essence a general legislative power if the seven enumerated powers are the power to legislate on Sunday, on Monday, and so forth. See Primus, *supra* note 2, at 576, 581, 593–94, 636–38.

of Rights.<sup>4</sup> During the ratification debates, the Constitution's leading proponents took the position that Congress is limited to its enumerated powers and that those powers, collectively, give Congress less authority than a grant of general jurisdiction would.<sup>5</sup> Indeed, these proponents explained, the Convention had enumerated congressional powers in the Constitution precisely so as to keep Congress's legislative jurisdiction limited.<sup>6</sup> For the purpose of getting the Constitution ratified, taking that position was a prudent move. But as many Americans recognized at the time, the claim that the enumeration of congressional powers was intended to limit the national government might have been disingenuous.<sup>7</sup> The text easily supports other readings.

The Constitution's proponents won in 1787–88, and their representation that the Constitution created a government limited by its enumerated powers has long been orthodox. That orthodoxy exists not only as a matter of law but also as a matter of narrative: within our constitutional culture, the dominant story is that the Framers of the Constitution enumerated the powers of Congress in order to limit the federal government.<sup>8</sup> But as a matter of history, that view has problems. A better view, I suggest, would acknowledge that delegates at the Constitutional Convention might not have conceived<sup>9</sup> the enumeration of powers as limiting—and certainly not as the kind of critical, limiting structure that it was later described as being. Instead, the enumeration of powers might have been understood principally as a tool for empowering Congress. In this short Essay, I seek to reframe the narrative of the Convention in those terms.<sup>10</sup>

The reframed account of the Convention begins with the point that the Framers' animating aim was the creation of a more powerful general government. Not everyone at the Convention was equally enthusiastic about

---

4. I use the term “the Bill of Rights” here in its conventional modern sense—that is, as a shorthand reference to the first ten amendments. See GERARD N. MAGLIOCCA, *THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS* 6 (2018) (explaining that the term did not generally have that meaning in the founding era and giving an account of how the term came to be used that way later on).

5. See, e.g., James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), in 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 337, 339–40 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DHRC].

6. See, e.g., *id.*

7. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 14 DHRC, *supra* note 5, at 482, 482–83.

8. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533–35 (2012).

9. The delegates at the Convention were many people thinking many things. In this Essay, when I speak of views held by Convention delegates, I do not mean to say that all delegates held identical views. The same is true when I speak of views held by the Framers of the Constitution—a phrase I use interchangeably with phrases like “the Convention delegates.”

10. It is not my view that either the meaning of the Constitution or the correct content of constitutional law is a unique or direct function of the ideas of the Convention delegates. “The meaning of the Constitution” is an underspecified idea, and the determination of the correct content of constitutional law is pretty complex. So, this Essay seeks a better understanding of the Convention but not on the theory that such an understanding would directly yield a better account of the legally authoritative meaning of the Constitution.

that project, but there was little doubt that that was the project, and many of the Framers were committed to strong forms of it. The Framers understood that this more powerful government would need checks.<sup>11</sup> But the checking mechanisms on which they rested most heavily had little to do with a system of enumerated powers.<sup>12</sup> These mechanisms were the process limits built into the checks-and-balances system that the Convention spent most of the summer working out.<sup>13</sup>

It is true, as people familiar with the Convention's proceedings know, that the Virginia Plan's proposal for a strong general government at the start of the Convention provoked a call to enumerate the powers of Congress, and it is also true that the motivation for that early call was to limit what Congress could do.<sup>14</sup> But that call for enumerating congressional powers was probably motivated more by a desire to accomplish a specific thing—that is, to prevent Congress from interfering with slavery—than by a general theory about the allocation of power.<sup>15</sup> What is more, that call for enumeration fizzled. The textual enumeration of congressional powers that the Committee of Detail produced more than two months later and that eventually became Article I, Section 8 was not, or at least not principally, a response to that call from the Convention's first days. Nor was it, or at least not principally, a mechanism for limiting the national government. Principally, it was a means for *empowering* that national government.

My characterization of the enumeration of congressional powers as *principally* a means of empowerment, rather than limitation, is meant to convey that the enumeration of powers was neither all one thing nor all the other—neither only a means of limitation nor only a means of empowerment. Considered carefully, it had aspects of both. But the fact that something has different aspects does not always mean that those different aspects are equally central, or equally weighty, within it. My contention is that the Convention's enumeration of congressional powers is best understood more in the register of empowerment than in that of limitation.

The balance of this Essay proceeds as follows: Part I identifies five significant problems with the conventional narrative about why the Framers enumerated the powers of Congress. Part II describes Article I, Section 8 as a tool of empowerment, summarizing the reasons why empowering the general government was important and explaining why enumerating congressional powers would have been a good means toward that end. Part III describes the Framers' reasons for wanting to limit the general

---

11. See Primus, *supra* note 2, at 615–17.

12. See *id.* at 617–18.

13. See *id.* at 615–17.

14. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (May 31, 1787) (indicating that Pinckney and Rutledge, per Madison, asked for “an exact enumeration of the powers comprehended”). It is possible, but less clear, that a statement by John Dickinson reacting to the Virginia Plan also suggested an enumeration of congressional powers. *Id.* at 42 (May 30, 1787) (statement of John Dickinson, per McHenry). On the hazards of relying too much or too simply on the Convention's surviving records, see *infra* note 24 and accompanying text.

15. See *infra* Part III.B.

government and asks whether an enumeration of congressional powers would have been a sensible tool for those purposes. The moral of the reframed story, boiled down, is that the Convention's enumeration of congressional powers makes more sense as primarily a means of empowering Congress than as primarily a means of limiting Congress—though of course, it had aspects of both. Furthermore, to the extent that the enumeration *was* intended to place limits on Congress's legislative jurisdiction, the point of articulating those limits was largely consistent with letting congressional jurisdiction grow over time if the general government's practical capacities increased.<sup>16</sup>

Three points about the limits of this Essay are here in order. First, I do not attempt the painstaking reconstruction of fragmentary sources that would be required to produce a responsible narrative of the Convention, in a “here's what happened” way. I believe that a thorough narrative account would confirm my argument here, but producing that account would require an essay considerably longer than this one. For now, my aim is only to *reframe* thinking about what the Convention did, not to paint a full picture within the frame. But the framing is important, because our sense of the frame goes a long way toward determining which narratives we are willing to find persuasive when we try to make sense of a messy set of primary sources.

Second, my subject here is the Convention, not the discourse of ratification, and I distrust ratification-era statements by the Constitution's proponents as sources of information about the Convention. During the ratification debates, the Constitution's supporters had incentives to underplay the Constitution's empowerment of the national government. So I take ratification-era protestations by people like James Madison and James Wilson that the enumeration was designed to limit Congress with several grains of salt. I seek an account of the enumeration that would have been available to a well-informed observer at the moment the Convention adjourned, not one overlaid with what people said later.

Third, I do not claim that my reframed account, even if correct, would require any particular approach to legal doctrine, because I do not think that legal doctrine is or ought to be a direct consequence of ideas entertained or even agreed on at the Convention. Depending on one's theory of constitutional authority, one could accept my reframed account of the Convention but also think that, as a matter of law, courts should behave as if limiting Congress to a set of textually enumerated powers is an essential part of the constitutional system. By the same token, one could reject my account but also think that courts should treat Congress as having something like general legislative jurisdiction, subject to affirmative prohibitions like those in the First Amendment. I will say more about this aspect of the Essay in the conclusion.

---

16. This qualifier is the subject of Part III.D, which describes the relevance of the Framers' view of the general government's practical capacity for providing needed governance.

## I. FIVE PROBLEMS

The standard narrative explaining the Constitutional Convention's thinking on congressional powers goes something like this:

The Framers were committed to creating a federal government that would pursue only a limited set of projects.<sup>17</sup> At the start of the Convention, the Virginia delegation's call for a national legislature with the power "to legislate in all cases to which the separate States are incompetent" was a placeholder to be used until a more specific set of powers could be crafted.<sup>18</sup> So when the Committee of Detail turned the Convention's agreed-upon principles and compromises into a draft for a written constitution, it described Congress's legislative jurisdiction with a list of specific powers.<sup>19</sup> With a bit of tinkering, that list became Article I, Section 8.<sup>20</sup> The delegates later emphasized the importance of having given Congress a closed list of specific powers when they overwhelmingly rejected proposals to include a Bill of Rights within the Constitution.<sup>21</sup> Including a Bill of Rights would imply that Congress had the power to act except where it was affirmatively restrained.<sup>22</sup> The deliberate omission of a Bill of Rights, the standard narrative concludes, reflected the importance that the Convention attached to preserving the principle—central to the system's design—that Congress could act only on the basis of its textually enumerated powers.<sup>23</sup>

This narrative has problems. Here are five.

First, the documents that give us the best available view of the Convention's proceedings suggest<sup>24</sup> that key delegates believed Congress

17. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533–35 (2012).

18. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 177–78 (1996) (arguing that this was a plausible way for delegates to understand that portion of the Virginia Plan).

19. See 2 FARRAND'S RECORDS, *supra* note 14, at 181–82 (Aug. 6, 1787).

20. U.S. CONST. art. I, § 8.

21. See Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 560 (2011) (reviewing PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–88* (2010)).

22. See THE FEDERALIST NO. 84 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

23. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) ("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.").

24. Writing about what happened inside the Convention is a task that should always be approached with caution. There is no transcript of the proceedings. There was an official journal, but it recorded the proceedings only sparingly, making note mostly of votes taken. See Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1623 (2012) (noting that the journal is a poor source of information regarding most of the questions that modern Americans want answered about the Convention). Most of the available evidence of what transpired is in the form of notes and diaries written by specific delegates, none of which is fully reliable and some of which were clearly doctored after the fact. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 141 (2015) (describing the unreliability of the sources in general and of Madison's notes in particular). Even delegates recording the proceedings around them in good faith were surely liable of mischaracterizing the remarks of their fellow delegates a fair amount of the time, if only because people in large group conversations do not always thoroughly understand the complex thoughts that other people are trying to convey. If you have ever

would have various powers whether or not those powers were specified in the text of the Constitution. For example, according to Madison's notes, John Rutledge believed that Congress would have the power to help states put down insurrections whether or not any clause of the Constitution so specified;<sup>25</sup> Nathaniel Gorham believed that Congress would have the power to issue paper money without an express authorization;<sup>26</sup> and James Wilson believed that Congress would be able to punish piracies, again even in the absence of an express authorization.<sup>27</sup> This is not to say that nobody took the contrary view. But Rutledge, Gorham, and Wilson were not marginal figures. Indeed, they all sat on the committee that wrote the first draft of Congress's powers.<sup>28</sup> If Madison's notes are reliable on these points,<sup>29</sup> these three prominent delegates seem to have believed that there were powers that Congress would enjoy whether expressly specified or not.<sup>30</sup>

Second, it is not true that the Framers omitted a Bill of Rights from their draft Constitution because they trusted the enumeration of congressional powers to limit the national government. That story was invented after the fact, during the ratification process, in an attempt to respond to the contention that the Constitution's lack of a Bill of Rights was a serious flaw.<sup>31</sup> To defend the Constitution against that objection, some of the Constitution's defenders hit on the idea of arguing that the absence of a Bill of Rights was a *virtue*, if only one understood the genius of what the Convention had done.<sup>32</sup> The public did not buy this argument: as often happens, the audience recognized an ex post rationalization for what it was, and the demand for a

---

participated in a large committee meeting, or even a big family reunion, you will understand the problem. It does not follow that we cannot responsibly make any assertions about what happened inside the Convention. But claims about what happened should be made cautiously, constantly mindful that each source is only partially reliable. One should not place too much significance on the precise words attributed to any delegate, because the accounts are not verbatim reporting; the words we read in the sources are the words of the diarists, not those of the speakers. Perhaps most of all, one should be constantly vigilant against jumping too quickly to the conclusion that we have grasped what someone was trying to say.

25. See 2 FARRAND'S RECORDS, *supra* note 14, at 48 (July 18, 1787) (per Madison).

26. See *id.* at 309 (Aug. 16, 1787) (per Madison).

27. See *id.* at 315 (Aug. 17, 1787) (per Madison).

28. See Primus, *supra* note 2, at 623 n.166.

29. As Mary Sarah Bilder has explained, Madison's notes are especially unreliable for the portion of the Convention that occurred after August 21, 1787. See BILDER, *supra* note 24, at 141. The three pieces of evidence just described all come from his record of events before that date.

30. As a matter of practice, constitutional law seems to track this position—albeit sometimes unofficially, without express judicial acknowledgment—with respect to several congressional powers. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002) (documenting areas of recognized but nonenumerated congressional power); Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1396–1401 (2010) (illustrating the point with reference to immigration and foreign affairs powers).

31. 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).

32. *Id.* at 379.

Bill of Rights continued unabated.<sup>33</sup> Today, of course, constitutional lawyers commonly accept the rationalization as if it were fact. But that just means that the Constitution's 1788 supporters managed to fool future generations on this point, despite failing to fool their contemporaries.

The third problem is more subtle. The standard account invites readers to imagine the drafters saying, "We're going to make a list of congressional powers, on the understanding that Congress can only do the things on the list." Moreover, the standard account invites readers to imagine that the drafters then proceeded to write such a list—and that that list became Article I, Section 8. But Article I, Section 8 is *not* a comprehensive list of the powers that the Convention allocated to Congress. In the original Constitution, more than a third of the clauses granting power to Congress are outside of Article I, Section 8.<sup>34</sup> The standard narrative imagines a list of powers implicitly headed, "These powers and no others," when in fact the implicit heading of Section 8, from the Framers' point of view, would have had to be something like, "These powers, *among others*." To be sure, one could have a system in which Congress may only exercise affirmatively enumerated powers even if those powers are scattered throughout the Constitution, rather than collected in a single list. But the notion of a limiting enumeration is easiest to maintain if there exists, somewhere, a single list of the things that Congress is authorized to do. The Framers wrote no such list. And the fact that constitutional law commonly speaks as if Section 8 were a complete list of congressional powers<sup>35</sup>—even though it obviously is not—may suggest something about the profession's impulse to present things as if they accorded with a tidy story about a limiting enumeration—even when they do not.

Fourth, a problem arises about the mandate of the Convention's Committee of Detail, which was the first drafting body to produce an enumeration of congressional powers and whose draft was accepted by the Convention with only minor emendations.<sup>36</sup> That committee's instructions included not just the original language of Resolution VI of the Virginia Plan,

---

33. *Id.* at 377–78.

34. Counting conservatively, the original Constitution had eleven such clauses outside of Section 8. The Constitution as it exists today has twenty-five, again counting conservatively.

35. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 876 (2014) (Scalia, J., concurring) ("Once a treaty has been made, Congress's power to do what is 'necessary and proper' to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8 powers."); *United States v. Comstock*, 560 U.S. 126, 135 (2010) ("Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution." (alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819))); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1695 (2004) ("[O]ur first structural principle [is] that the courts do indeed possess authority to police the Article I, Section 8 powers.").

36. For a wonderfully thorough and thoughtful account of the work of the Committee of Detail, see generally William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012).



according to which Congress should be empowered “to legislate in all cases to which the separate States are incompetent”<sup>37</sup> but an amended form of the resolution proposed by Delaware’s Gunning Bedford, according to which Congress would also have power “to legislate in all cases for the general interests of the Union.”<sup>38</sup> That augmented formula, approved by a vote of eight states to two,<sup>39</sup> does not seem to call for a constitution that limits Congress to a list of specific projects. To be sure, it is the Constitution rather than the proceedings of the Convention that is the supreme law, so if the Constitution contradicts (the Bedford-modified) Resolution VI, it is the Constitution that prevails. But to my knowledge, no scholar has produced a persuasive, evidence-based account establishing how and when (let alone why) the Convention decided to discard the instructions it gave the Committee of Detail and to accept a constitution characterized by a limiting enumeration, rather than one enabling Congress to legislate in the broad national-interest way that (the Bedford-modified) Resolution VI envisioned.<sup>40</sup> The standard account of the limiting enumeration must say either that Resolution VI actually meant something less than it seems to or else that the Convention reversed itself—from an 8 to 2 vote, no less—without leaving a record of when or why. Perhaps some such explanation is correct: the records of the Convention are incomplete, after all. But it will not do to say things like, “Well, the fact that they wrote a limiting enumeration shows that they must have changed their minds.” Whether the enumeration was written to be limiting is precisely the question at issue.

Fifth and finally, a point about the relationship between intentions and results. As every modern constitutional lawyer knows, the Constitution’s enumeration of congressional powers has not, in practice, prevented Congress from pursuing the projects for which it musters political will. The Constitution shapes Congress’s ambitions through the structure of the lawmaking process—elections, bicameralism, presentment—and the courts have invalidated congressional legislation on the basis of affirmative prohibitions like those in the First Amendment,<sup>41</sup> as well as on the basis of nontextual affirmative prohibitions conventionally associated with the Tenth Amendment (like the anti-commandeering rules).<sup>42</sup> The courts have also invalidated congressional legislation on the grounds that such legislation violates the prerogatives of the other federal branches.<sup>43</sup> But from the First Congress forward—albeit with an exceptional period around the turn of the twentieth century—courts have done precious little by way of using the

---

37. 2 FARRAND’S RECORDS, *supra* note 14, at 17 (July 16, 1787).

38. *Id.* at 21 (July 17, 1787).

39. *Id.* at 27.

40. For a good account of this problem and the ways in which various scholars have approached it, see Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1799–1801, 1799 n.110 (2021).

41. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

42. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997).

43. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding the Balanced Budget and Emergency Deficit Control Act of 1985 unconstitutional).

enumeration of congressional powers to limit the scope of national policymaking.<sup>44</sup> This fact does not prove that the Framers did not intend the enumeration as meaningfully limiting. But if they did so intend, then it must be accepted that the Framers were, in this crucial respect, quite bad at constitutional design because a central part of the machinery seems to have utterly failed, more or less from the inception. Nor can the Framers be rescued from this charge by saying that their design was good but that the Constitution has been systematically misapplied by judges and other officials from 1789 forward; the correct anticipation of how real people in office will act is a necessary part of successful constitutional design.

None of these problems necessarily falsifies the standard account. One could produce plausible arguments explaining each problem away, especially if the problems are taken one by one. But sometimes the accumulation of problems within a narrative is a sign that something about that narrative really is wrong, just as an accumulation of epicycles can signal the need to revise an underlying theory. In the present case, it is possible to revise the dominant understanding of the Convention in a way that leaves readers with fewer and less serious problems. And the first step toward a better account is the recognition that the Convention's animating purpose was the creation of a powerful general government.

## II. ENUMERATION AS EMPOWERMENT

### A. *The Need to Empower*

Bad Governrs. are of two sorts. 1. that which does too little. 2. that which does too much: that which fails thro' weakness; and that which destroys thro' oppression. Under which of these evils do the U. States at present groan? under the weakness and inefficiency of its Governr. To remedy this weakness we have been sent to this Convention.

—James Wilson<sup>45</sup>

---

44. It is possible that the striking absence of court cases holding federal statutes to exceed the enumerated powers of Congress does not mean that the enumeration of powers has not in fact limited Congress, because it is possible that the enumeration of powers has limited Congress's own conception of what it should do. It is certainly the case that the idea that the enumeration is limiting has sometimes been marshaled *within Congress* as an argument against legislation, and it is possible that the marshaling of that argument had some tendency to prevent Congress from passing legislation that otherwise would have been passed. Between the Andrew Jackson administration and the Civil War, the idea of a Congress limited by its enumerated powers was an important piece of the constitutional ideology holding the Democratic Party together, so it is plausible that that idea had some influence on what Congress did. See Richard Primus & Roderick M. Hills Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. (forthcoming 2021). But it is hard to know for sure. After all, it is also possible that most arguments about enumerated powers in Congress have been makeweights, or reflections of substantive opposition to the relevant legislation, and that there just was not majority support in Congress for the legislation, such that arguments about constitutional limits were not changing outcomes.

45. 1 FARRAND'S RECORDS, *supra* note 14, at 483–84 (June 30, 1787) (statement of James Wilson as recorded by Madison ).

The Articles of Confederation provided for a unicameral Congress.<sup>46</sup> That Congress—or the “general government,” as Americans often called Congress and the small collection of officials it directed<sup>47</sup>—was a weak institution. By 1787, it was clear to many Americans that the general government’s weakness was a serious problem.<sup>48</sup>

For starters, Congress had trouble raising money, including the money it needed to pay debts incurred during the Revolutionary War.<sup>49</sup> Congress had no power to impose taxes.<sup>50</sup> Instead, it was supposed to make requisitions of the states, meaning that Congress could identify an amount of money that each state was supposed to raise and contribute to the federal treasury.<sup>51</sup> But Congress had no power to compel payment, and the states never paid their requisitions in full, if they paid them at all.<sup>52</sup> As a result, the United States could not repay loans that it owed to foreign countries, and that made the new nation’s international standing somewhat dicey.<sup>53</sup> Nor could Congress reliably pay its own employees, including the members of the small U.S. Army.<sup>54</sup> Organizing his thoughts in advance of the Convention, Madison described this problem as both fatal to and inherent in the existing structure of American government. It resulted, he wrote, “naturally from the number and independent authority of the States.”<sup>55</sup>

The failure of the states to act as a union created many problems in foreign affairs. When Britain imposed trade restrictions on American ships, Congress could not order a unified American response.<sup>56</sup> The same was true when Spain closed the Mississippi River to American shipping and when pirates seized American ships in the Mediterranean Sea.<sup>57</sup> Moreover, several states took actions that violated the Treaty of Paris, which had ended the Revolutionary War.<sup>58</sup> For example, the treaty provided that Americans who had remained loyal to Britain during the war would not be treated as criminals and that their remaining property would not be expropriated.<sup>59</sup> But states violated those guarantees, and Congress could do nothing to make the states comply.<sup>60</sup> Given American noncompliance, Britain often refused to adhere

---

46. See ARTICLES OF CONFEDERATION of 1781, art. V.

47. See Letter from Thomas Jefferson to James Madison, *supra* note 7, at 482–83; see also 1 FARRAND’S RECORDS, *supra* note 14, at 284 (June 18, 1787) (statement of Alexander Hamilton, as rendered by Madison); *id.* at 357 (June 21, 1787) (statement of James Madison, as rendered by Madison).

48. See MAIER, *supra* note 21, at 11–17.

49. See *id.* at 11.

50. *Id.*

51. *Id.* at 11–12.

52. See *id.*

53. See *id.*

54. See *id.* at 12–13.

55. James Madison, *Vices of the Political System of the United States*, reprinted in 2 THE WRITINGS OF JAMES MADISON 1783–1787, at 361, 361 (Gaillard Hunt ed., 1901).

56. See MAIER, *supra* note 21, at 12.

57. *Id.*

58. See *id.* at 13.

59. See *id.*

60. See *id.*

to its obligations under the treaty, including its obligation to complete the withdrawal of its forces from North America.<sup>61</sup> So, even after the war was over, British garrisons remained within the borders of some American states.<sup>62</sup> Congress could do nothing about it.

Domestic affairs were difficult as well. Many states pursued protectionist economic policies, essentially treating other states like foreign countries for economic purposes.<sup>63</sup> One state's actions to the detriment of another state naturally produced retaliatory measures with results that were bad for most people involved. In some places, economic hardship led to violence, including most famously in western Massachusetts in an uprising known as Shays's Rebellion.<sup>64</sup> And Congress could do little or nothing to bring economic stability or cooperation to the states. It had relatively little power, and the power it had was regularly flouted.

Moreover, the domestic governance problems in the United States were not simply a matter of weakness at the center. The state governments were themselves often ineffective, even within their own boundaries.<sup>65</sup> Shays's Rebellion is again emblematic: the problem was not merely the adverse economic conditions that motivated the rebellion but also the weakness of the state government, which could barely maintain its own authority against the rebels.<sup>66</sup> Constitutional law's standard telling of the transition from the Articles of Confederation to the Constitution underplays this problem because it depicts the system under the Articles as one of "sovereign" states, and sovereign states are usually imagined as capable of internal governance. But in the 1780s, the United States was not a place neatly carved up among what modern social scientists would recognize as Weberian states—that is, governments enjoying monopolies on legitimate violence within geographically defined territories.<sup>67</sup> For one thing, many of the states lacked clear geographic boundaries: a fair amount of territory was claimed by more than one state at a time.<sup>68</sup> Perhaps more to the point, the state governments often exercised their authority, not as the exclusively legitimate powers from which all other legitimate political authority must flow within the territories they claimed but as important actors within a complex ecosystem of other

---

61. *See id.* at 396.

62. *See id.*

63. *See id.* at 14.

64. *See id.* at 15–17. *See generally* SHAYS' REBELLION: SELECTED ESSAYS (Martin Kaufman ed., 1987).

65. *See* MAIER, *supra* note 21, at 16.

66. *See id.* at 15–16.

67. *See* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 *YALE L.J.* 1792, 1804–08 (2019); *see also* Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H. H. Gerth & C. Wright Mills eds., 1946) (defining the state as a "human community that (successfully) claims the *monopoly on the legitimate use of physical force* within a given territory"). For an important exploration of the possibility that the Weberian model is inapposite for the analysis of American states even long after the founding period, *see* William J. Novak, *The Myth of the "Weak" American State*, 113 *AM. HIST. REV.* 752, 761–71 (2008).

68. *See* Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 *MICH. L. REV.* 1, 35–40 (2020).

power-wielding institutions: corporations, towns, churches, Native Nations, separatist movements, and so on.<sup>69</sup> Shays's Rebellion was a particularly prominent episode in which the authority of a state to govern within its claimed territory was called into serious question, but it was by no means the only one.<sup>70</sup>

In that light, as Professor Gregory Ablavsky has explained, the standard story on which the adoption of the Constitution relocated sovereignty from the state governments to the United States obscures a messier reality.<sup>71</sup> In practice, the pre-1789 state governments could not easily exercise the kind of power that sovereignty usually implies—power to which every other actor must yield.<sup>72</sup> And contrary to the normal zero-sum presentation, the creation of a stronger national government was an opportunity for the state governments to become *more* powerful in practice. After all, the Constitution did not merely create a stronger general government. It created a system in which the only players other than that general government were the state governments. With a more robust general government at their backs, the state governments could clear the field of local claimants (towns, counties, corporations) to autonomy or quasi-sovereign power.<sup>73</sup> And the Constitution's promoters clearly understood that their plan offered this benefit to the state governments. Hamilton's *Federalist No. 9*, for example, is an advertisement for the Union's ability to marshal overwhelming force to crush insurrections against the various state governments.<sup>74</sup>

This understanding of the condition of the state governments in 1787 provides important context for reconstructing the Framers' senses of the relationship between a stronger general government and effective local government. If the state governments are imagined as firmly rooted and fully functional local sovereigns under the Articles, then it is natural to think that serious people in 1787 would have wanted to adjust the power of the general government only slightly—enough to improve coordination among the states but not enough to do much more than that.<sup>75</sup> But if the state governments are imagined as a bit more rickety, the field of possibilities looks different. In particular, it is then easier to understand why serious people would have been keen to vest extensive power in a national government—and perhaps to worry more about empowering the national government too little than about

---

69. See Ablavsky, *supra* note 67, at 1795–96.

70. See *id.* at 1810–11, 1815.

71. See *id.* at 1796.

72. See *id.*

73. See *id.*

74. See THE FEDERALIST NO. 9, *supra* note 22 (Alexander Hamilton). Read next to its neighbor, Madison's argument in *Federalist No. 10* that the extended republic will “break and control the violence of faction,” looks like a bloodless sequel—the same argument, but with less at stake. See THE FEDERALIST NO. 10, *supra* note 22 (James Madison). After all, the “violence” to be broken and controlled in *Federalist No. 10* is largely metaphorical. See *id.*

75. One important strain of scholarship has depicted the Convention's aim as the creation of a general government empowered to solve collective action problems among the states. See Cooter & Siegel, *supra* note 35, at 115. The present analysis suggests that solving collective action problems was only part of why a more powerful general government was needed.

empowering it too much. That, of course, is the attitude on display in the comment by Wilson<sup>76</sup> that opens this section of this Essay.

For all these reasons, the delegates who went to the Philadelphia Convention in 1787 went to create a more powerful central government. They were not all of one mind about how that new government should function. There were fifty-five of them, after all. But the common problem that they faced was a deficit of government power, and their disagreements would concern the best ways to make their general government more powerful.

### *B. The Utility of Enumerating Powers*

To understand the utility of enumerating congressional powers as a means of making the general government sufficiently powerful, it is useful to keep in mind two facts that confronted the Framers. First, their envisioned government would function in a world where not everyone would be happy about the general government's exercising consequential powers. Objections might be rooted in general opposition to national governance, in displeasure with specific measures taken, or both. But for one reason or another, the new government's actions were sure to be frequently opposed, and the question of its power to take action would be frequently contested. People would argue about whether the government could do this or that thing. When that happened, a constitution that described congressional power only in general terms would not be much help.<sup>77</sup> Imagine, for example, a constitution declaring, in the words of Resolution VI, that Congress had the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."<sup>78</sup> Objectors to congressional legislation would then predictably argue that this or that matter did not touch the general interests of the Union and was not beyond the competence of the states separately and raised no issue related to the harmony of the United States. If the decisionmakers turned out to be skeptics about central power—and keep in mind that many decisions might be made in state courts—then those arguments would often be accepted, thus defeating the major purpose of holding the Philadelphia Convention in the first place.<sup>79</sup> On the other hand, if the Constitution spoke more specifically about which powers Congress was entitled to exercise—say, the power to tax, to regulate commerce, or to make bankruptcy laws—

---

76. As rendered by Madison, anyway. *See* Wilson, *supra* note 5, at 339.

77. Assuming, of course, that the general principle was not something like "Congress may legislate however it likes."

78. This is the language of Resolution VI as amended on July 17, 1787, on the motion of Gunning Bedford. 2 FARRAND'S RECORDS, *supra* note 14, at 21 (July 17, 1787). It was in this form that Resolution VI was given as an instruction to the Committee of Detail when that Committee set about writing the first actual draft of the Constitution.

79. A generally stated formula for broad congressional power could get the job done if all the decisionmakers were reliable Federalists. But they would not be, and the Convention delegates knew that.

then defenders of congressional action could more easily establish their position by pointing to specific authorizations in the constitutional text.<sup>80</sup> If a government actor wants a skeptic to accept his authority to take a certain action, it is helpful not just to have the authority in writing but also for the written statement of his authority to state his relevant power in specific language.<sup>81</sup>

A second background fact raised the premium on putting specific congressional authorities in writing.<sup>82</sup> The Articles of Confederation enumerated a set of congressional powers.<sup>83</sup> Those powers included the power to borrow money on the credit of the United States, to regulate trade with Indian tribes, to coin money and regulate its value, to fix standards for weights and measures, to establish post offices, to declare war, to grant letters of marque and reprisal, to make rules concerning captures on land and on water, to provide for the trial of piracies and felonies committed on the high seas, to build and equip a navy, and to make rules for the government and regulation of the land and naval forces.<sup>84</sup> The Framers repeated those specific authorizations in Article I, Section 8, and it is not hard to see why. Omitting specific mention of a power specified in the Articles would risk the inference that a power conferred by the Articles was not conferred by the Constitution.<sup>85</sup>

Moreover, even if future interpreters of the Constitution correctly concluded that some powers not specified in the constitutional text were

---

80. I say “more easily” rather than “reliably” because people can also argue about what constitutes a tax, or a regulation of commerce, or a bankruptcy law. But over a broad domain of actions Congress might take, the more specific authorizations set the boundaries of reasonable argument in a more Congress-friendly location.

81. Consider in this connection the strategy adopted by the drafters of the Canadian Constitution, who worked eighty years after the Philadelphia Convention and who could draw on the lessons of the American experience. In Canada’s Constitution, the text setting forth the legislative authority of Parliament—Section 91—contains a general statement of power “to make Laws for the Peace, Order, and good Government of Canada.” Constitution Act, 1867, 30 & 31 Vict., c 3, § 91 (U.K.). That clause—the “POGG Clause”—is followed by an enumerated list of specific matters to which Parliament’s legislative authority extends. *Id.* And Section 91 expressly explains that the enumerated list follows “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section” (i.e., the POGG Clause). *Id.* In other words, the list of specific powers is provided to make certain that the particular subjects identified there—public debt, the regulation of trade and commerce, raising money by taxation, and so forth—fall within the broad grant of the POGG Clause, rather than taking the risk that subsequent decisionmakers might construe “Peace, Order, and good Government” narrowly enough to exclude the enumerated subjects. *See id.*

82. An earlier version of the point made in these two paragraphs appears in 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 410–28, 465–67 (1953).

83. *See* ARTICLES OF CONFEDERATION of 1781, art. IX.

84. *See id.*

85. Later readers of the Constitution understood this point, arguing for the significance of the absence in the Constitution of something that appeared in the Articles. *See, e.g., Centinel II*, PHILA. FREEMAN’S J., Oct. 24, 1787, reprinted in 13 DHRC, *supra* note 5, at 457, 460 (noting that the Articles of Confederation expressly specified the principle that each state retained all powers not expressly delegated to the United States); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (noting that the Constitution, unlike the Articles, did not affirmatively exclude incidental powers).

meant to be vested in the national government, they might then divide on the question of *where* in the national government those powers were lodged. Under the Articles, all powers vested in the United States were held by a single institution: the United States in Congress assembled.<sup>86</sup> But under the Constitution, “Congress” became just one of three branches of government—and it could not automatically be assumed that the powers held by the United States in Congress assembled under the Articles would be powers of *Congress* in the new three-branch system. Some of the powers that the Articles had given to the United States in Congress assembled—like the power to send and receive ambassadors and the power to direct military operations<sup>87</sup>—would under the Constitution be allocated to the president.<sup>88</sup> To omit express instructions about who in the new government could exercise which powers mentioned in the Articles would therefore beg some obvious questions.<sup>89</sup> Worse still, several of the powers that the Framers wanted to assign to Congress were powers associated with the king, rather than Parliament, in Blackstone’s description of the British Constitution.<sup>90</sup> So it was more than foreseeable that in the absence of a contrary instruction, people would argue that those powers were naturally vested in the president rather than in Congress. If the Framers wanted Congress to wield those powers, they needed to say so explicitly.

Nothing about these rationales for expressly enumerating many powers of Congress required that *all* of the powers of Congress be enumerated. The point of the enumeration, understood this way, was not to rule *out* powers not mentioned. It was to rule *in* a bunch of powers that were important to specify, lest Congress’s authority to exercise those powers be doubted.<sup>91</sup> And within

---

86. See ARTICLES OF CONFEDERATION of 1781, art. II.

87. See *id.* art. IX.

88. See U.S. CONST. art. II, § 2, cl. 1 (power to appoint ambassadors); *id.* § 3 (power to receive ambassadors); *id.* § 2, cl. 1 (power to act as commander in chief of military forces).

89. This separation of powers problem also explains why the Convention could not solve the first problem—that is, of negating the inference that a power specified in the Articles was also vested in the general government under the Constitution—with a blanket statement like: “All power vested in the United States under the Articles continues to be vested in the United States under the Constitution.” Such a statement would not address the crucial question of who, under the Constitution, could exercise that power on behalf of the United States.

90. Blackstone’s list of Crown powers included the powers to regulate commerce, naturalize aliens, coin money, regulate weights and measures, establish courts, declare war, issue letters of marque and reprisal, and raise and regulate armies and navies. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*244–68. This fact suggests a reason why the Convention could not solve the problem of allocating powers specified in the Articles among the branches of the new government by writing something like: “All legislative powers vested in the United States under the Confederation shall be vested in Congress, and all executive powers vested in the United States under the Confederation shall be vested in a President.” In a world where several powers the Framers wanted to allocate to Congress were prominently identified as Crown powers, invoking the categories “legislative” and “executive” might not be a reliable way of producing the specific allocation they wanted.

91. Just like Section 91 of the Canadian Constitution. See *supra* note 81. The fact that the Canadian Constitution makes this clear (by using the POGG Clause as well as an enumeration of powers) while the U.S. Constitution does not might reflect a difference in how the constitutions were supposed to function, but it might also reflect the Canadians’ having



a system where Congress was understood to possess many powers, including but not limited to, those expressly specified, the considerations just discussed would supply good reasons for enumerating a list of powers that looks a lot like Article I, Section 8.

### III. ENUMERATION AS LIMITATION

The Framers wanted to limit the general government as well as empower it. But given their reasons for limiting the general government and given what enumerations of powers are and are not good for, it is not clear why they would have chosen an enumeration of powers as a device for doing the limiting work.

To begin to see why not, it is important to recognize that something known now about enumerating legislative powers was not entirely unknown to the Framers. Constitutional lawyers today generally recognize that the enumeration of Congress's powers does not much constrain Congress in practice. With the exception of a period early in the twentieth century,<sup>92</sup> Congress has been able to do pretty much anything for which it has mustered political will,<sup>93</sup> and the courts have construed Congress's powers as sufficient to warrant whatever it is that Congress decided needed to be done. The anomalous judicial resistance of the early twentieth century came to a crashing and inglorious end.<sup>94</sup> Committed believers in enumerationism might protest that this pattern reveals not something inherent in the system of enumerated powers but simply the poor performance of American officials—especially judges—who have failed to implement the system properly.<sup>95</sup> It is hard to falsify such a claim directly, but when an argument relies on the premise that an entire professional class has done its job badly for a very long time, it is worth considering whether what is lacking is the behavior of all those people or the idea that they are supposed to be doing something else. In any event, a feature of a constitutional system is only as good as it is in practice. Put differently: if the Framers wanted to impose serious limits on federal legislation, and they had known what every modern constitutional lawyer knows about whether the enumeration has limited Congress in practice, it is hard to imagine that the Framers would have put their eggs in that basket.

---

learned, by observing American constitutional discourse, that in the absence of something like a POGG Clause the function of an enumeration of powers might be misunderstood.

92. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

93. Again, it is possible that the idea of a limiting enumeration has done limiting work *within* Congress or at least that it did so during an important stretch of the nineteenth century. See *supra* note 44. But even that possibility is speculative. And in the twentieth and twenty-first centuries, it seems hard to identify projects that Congress would have liked to pursue but abstained from pursuing due to the limits of Congress's enumerated powers.

94. See generally JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

95. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1* (2013) ("Had judges done their job, this book would not need to be written.").

To be sure, we now know things about how the system has operated that the Framers could not know. But their ignorance should not be overestimated. Some of them knew already in the 1780s that enumerating the powers of a legislature was not a reliable way to impose *ex ante* limits on what that legislature will do in practice. Madison knew it, and he said so.<sup>96</sup> The better ways to limit a legislature, in his view, were with affirmative prohibitions (like the ones in Article I, Section 9) and with what modern theorists call “process limits” (like bicameralism, executive presentment, and the requirement that legislators stand frequently for election).<sup>97</sup> There is no reason to think that Madison was unique in holding these views. Other leading Framers also expressed doubts about the practicability of dividing national and local spheres of action by enumerating the powers of Congress.<sup>98</sup> And to the extent that one can infer what the Convention thought of as the most important parts of its work by looking at how much time and discussion was spent on particular subjects, it certainly seems that the Framers regarded process limits as considerably more important than the enumeration of congressional powers.

This is not to say that nobody at the Convention thought of enumerating Congress’s powers as a mechanism capable of imposing meaningful limits on that institution. The Framers were many people thinking many things. But in asking whether it makes sense to think that the Convention generally saw enumeration as a means of limitation—or, perhaps more precisely, to think about the relative proportions in which its members thought of it as a means of limitation rather than a means of empowerment—it is important to avoid imagining the Framers as less sophisticated about real-world governance than they actually were. If enumerating powers is not a particularly effective way to limit a legislature and if eighteenth-century Americans recognized that fact, then we should be open to thinking that although the Framers wanted to put limits on Congress, they might not have relied on enumerating congressional powers to do the job. Certainly many of the Constitution’s opponents said outright that the enumeration of powers would not limit Congress,<sup>99</sup> and they have turned out to be right. Maybe the Framers were as discerning as their opponents.

---

96. See Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON 1783–1787, *supra* note 55, at 166, 168.

97. *Id.* at 167–69.

98. See, e.g., 1 FARRAND’S RECORDS, *supra* note 14, at 59–60 (May 31, 1787) (statement of Roger Sherman, as rendered by Pierce); *id.* at 172 (June 8, 1787) (statement of John Dickerson, as rendered by King) (“There can be no line of separation dividing the powers of legislation between the State & Genl. Govts.”).

99. Including some who attended the Convention. See SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 251 (James H. Hutson ed., 1987) (statement of Mason characterizing the draft Constitution as having given indefinite power to the national government); *Brutus XII*, N.Y.J., Feb. 7, 1788, reprinted in 16 DHRC, *supra* note 5, at 72, 74 (pseudonymous letter of New York delegate Robert Yates) (writing that under the Constitution, the general government’s power would “extend to every case for which any government is instituted”). Randolph was not exactly an opponent—he supported the Constitution during ratification, though he refused to sign the draft at Philadelphia—but he

With that point as background, I now turn to four leading reasons why delegates at the Convention might have wanted to limit Congress, and I ask about the suitability of enumeration as a tool for each.

### A. Liberty

Many Americans in the 1780s wanted to limit the general government because they feared that republican liberty could not survive in a polity as large as the United States.<sup>100</sup> The central concern, boiled down, was that the country was too vast and the population too large for the people and the government officials who supposedly represented them to know and trust each other.<sup>101</sup> The people would thus (correctly) come to perceive the government as alien rather than representative, and the government's authority would need to rely more and more on force rather than goodwill.<sup>102</sup> Down that road lay tyranny. George Washington's one recorded substantive intervention in the Convention's proceedings may have been intended to address just this threat. According to multiple accounts, Washington, shortly before the Convention adjourned, spoke in favor of increasing the permitted number of representatives in Congress for each state from one for every 40,000 residents to one for every 30,000.<sup>103</sup> More representatives per capita would reduce the threat that the people and the government would become alien to one another.<sup>104</sup> The Convention accepted the change.<sup>105</sup>

---

saw the same thing. See 2 FARRAND'S RECORDS, *supra* note 14, at 488–89 (Sept. 3, 1787) (statement of Edmund Randolph, as rendered by Madison).

100. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 221 (2005).

101. See, e.g., Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788), in 9 DHRC, *supra* note 5, at 878, 879; Letter from Richard Henry Lee to Samuel Adams (Apr. 28, 1788), in 9 DHRC, *supra* note 5, at 765, 765.

102. See HULSEBOSCH, *supra* note 100, at 221.

103. See 2 FARRAND'S RECORDS, *supra* note 14, at 643–44 (Sept. 17, 1787) (as recorded in Madison's notes); 3 *id.* at 337 (June 24, 1788) (as described by Hamilton at the New York ratifying convention); see also *id.* at 358 (Aug. 14, 1789) (as recollected by Roger Sherman, speaking in the House of Representatives).

104. Not everyone described the change from 40,000 to 30,000 as motivated by this benign purpose. See Luther Martin, Att'y Gen. of Md., *Genuine Information* (Nov. 29, 1787), reprinted in 3 FARRAND'S RECORDS, *supra* note 14, at 172, 199–200 (describing the change as motivated by a desire to increase the power of large states, whose populations could be expected to grow more quickly).

105. The degree of enthusiasm with which the Convention accepted the change is a matter of dispute in the surviving records. According to Madison's notes, the motion was agreed to unanimously. See 2 FARRAND'S RECORDS, *supra* note 14, at 644 (Sept. 17, 1787). That portion of Madison's notes was written at least two years after the Convention rose, rather than contemporaneously. See BILDER, *supra* note 24, at 141. According to the Annals of Congress, however, Roger Sherman in 1789 said that "not more than nine States" had voted in favor of the change. See 3 FARRAND'S RECORDS, *supra* note 14, at 358. The gap between presenting the change as unanimous and presenting it as contested might reflect a difference in attitude as to whether the measure was motivated by impartial motives. Madison, who described the change as unanimous, wrote that the motion had been introduced by Gorham "for the purpose of lessening objections to the Constitution." See 2 *id.* at 643 (Sept. 17, 1787). Sherman, who described the change as contested, represented a state that, on Martin's somewhat darker

The fear of an unrepresentative government could certainly motivate people to want that government's powers to be limited—even severely limited. But it does not follow that the Convention's enumeration of congressional powers was substantially motivated by this concern. It is hard to identify people who worried that the general government created by the Constitution would be sufficiently nonrepresentative as to risk devolution into tyranny but who also thought that the Constitution's enumeration of powers was anything like a satisfactory solution. The powers that Congress was affirmatively given, including the powers to tax and to raise armies, were sufficient tools of oppression in the hands of a government inclined to wield them that way.<sup>106</sup>

The sensible solution to the problem that a remote and unrepresentative government would become tyrannical over time would not have been to limit that government to a specific set of powers, including those powers most valuable to a tyrannical oppressor. It would have been either to make the government more representative or to take other steps to prevent the government from exercising its potentially tyrannical powers abusively. Washington's intervention about the number of representatives per capita was a form of the first strategy<sup>107</sup>: it aimed to bolster confidence that a national government could be adequately representative, not to mitigate the threat posed by a nonrepresentative government by limiting its powers. The work that occupied most of the Convention's attention—that of structuring a system of checks and balances—embodied the second strategy.<sup>108</sup>

### B. Slavery

For many Americans, the abstract concern with protecting republican liberty coexisted—uneasily or otherwise—with a concrete imperative to perpetuate chattel slavery.<sup>109</sup> Slaveholders in states where slavery was strong wanted to be certain that a powerful national government would not become a vehicle for emancipation. At the Convention, the most prominent early calls to enumerate Congress's powers came from Charles Pinckney, John Rutledge, and Pierce Butler—all from South Carolina.<sup>110</sup> These men were

---

interpretation of the change, would stand to be disadvantaged relative to the large states if the change were adopted. *See infra* note 109.

106. *See, e.g.*, Letter from Richard Henry Lee to Edmund Pendleton, *supra* note 101, at 879–80 (expressing the concern that the country would be too large for government to be representative and identifying the enumerated congressional power to tax as sufficient to render “resistance vain”); George Mason, Speech at the Virginia Ratifying Convention (June 14, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 410, 416 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836).

107. *See supra* note 103 and accompanying text.

108. *See Primus, supra* note 2, at 616.

109. At least some Convention delegates were aware of the tension. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 14, at 364 (Aug. 21, 1787) (statement of Luther Martin, as rendered by Madison) (describing a constitutional provision protecting the importation of slaves as “inconsistent with the principles of the revolution and dishonorable to the American character”).

110. 1 *id.* at 53 (May 31, 1787) (as recorded by Madison).

not, as a general matter, skeptical of centralizing power.<sup>111</sup> Over the course of the Convention, all would play important roles in pushing for a vigorous general government. But South Carolina had a keen interest in ensuring that one particular subject matter—or to use a local term, one domestic institution—would remain under South Carolina’s control rather than being subjected to the authority of the United States in general.<sup>112</sup> Pinckney’s cousin and fellow South Carolina delegate Charles Cotesworth Pinckney told the Convention bluntly that South Carolina would support no Constitution that did not give Southern states protection against emancipation.<sup>113</sup> So when these generally pro-national-power delegates said it was important to enumerate Congress’s powers, they might have had a particular aim in mind.

The South Carolinians’ early call for enumerating congressional powers was an immediate response to the Virginia Plan’s Resolution VI, which recommended a congress able to legislate “in all cases to which the State Legislatures were individually incompetent.”<sup>114</sup> It is not hard to imagine delegates primed to spot threats to slavery seeing danger in that general language and responding with a call for greater specificity. But if so, the South Carolinians may have quickly realized that enumerating Congress’s powers was not the best strategy for vindicating their interest. After a conversation in which several delegates expressed skepticism about the practicability of separating national and local spheres of authority by enumerating congressional powers,<sup>115</sup> the South Carolina delegates backed off of their request for greater specificity and joined all the other states but Connecticut in approving Resolution VI.<sup>116</sup>

That did not mean, of course, that South Carolina’s delegates had moderated their commitment to protecting slavery. But perhaps they realized that different strategies made more sense. One of those better strategies looked to affirmative prohibitions, and the other looked to voting power within the political process.

With respect to affirmative prohibitions, as the Convention progressed, South Carolina’s delegates insisted on two affirmative prohibitions on congressional power: one prohibiting Congress from preventing the

---

111. *See id.* at 144 (June 6, 1787) (statement of Pierce Butler, per King) (articulating openness to abolishing the state legislatures and creating a single consolidated national government); *id.* at 162 (June 8, 1787) (per Convention Journal) (discussing Charles Pinckney’s motion to give Congress the power to veto all state laws “which to them shall appear improper”); 2 *id.* at 48 (July 18, 1787) (statement of John Rutledge, per Madison) (articulating that Congress would have the power to suppress insurrections in the states even if no such power were expressly specified).

112. *See 2 id.* at 95 (July 23, 1787).

113. *See id.*

114. 1 *id.* at 53 (May 31, 1787) (as recorded by Madison).

115. *See id.* (statement of James Madison, as recorded by Madison); *id.* at 59–60 (statements of Roger Sherman, James Wilson, and James Madison, as recorded by Pierce).

116. *See id.* at 53–54 (as recorded by Madison); *see also id.* at 47 (as recorded in Convention Journal). Seven weeks later, when the Convention adopted a strengthened form of Resolution VI on which Congress would also have power “to legislate in all cases for the general interests of the Union,” South Carolina and Georgia cast the only votes in opposition. *See 2 id.* at 21, 24 (July 17, 1787) (per Convention Journal).

importation of slaves and one banning the taxation of exports.<sup>117</sup> The relevance of the first prohibition is obvious and that of the second only a bit less so. As the delegates understood, the general government could endanger slavery either by legislating against it directly or, if prohibited from doing that, by taxing the export of the Southern states' slave-produced agricultural products to the point of unprofitability.<sup>118</sup> This strategy of protecting an important local interest with affirmative prohibitions on Congress, rather than by omitting relevant powers from Congress's arsenal, was eminently logical. If one's goal is to protect a particular activity from national power, it makes considerably more sense to create an immunity for that activity than to pursue the indirect strategy of giving Congress twenty or thirty powers and calculating that none of them can be deployed to interfere with that activity. (Especially if the powers given to Congress include, say, the powers to tax and to regulate commerce.) Consider: despite the claims of some leading Federalists, the public knew better than to believe that the enumeration of congressional powers made the freedoms of speech and press secure.<sup>119</sup> Affirmative prohibitions were a more logical means to that end. The South Carolina delegates surely knew the same thing about slavery.<sup>120</sup>

And with respect to voting power within the political process, the Three-Fifths Clause<sup>121</sup> and the Electoral College would enhance Southern power in the general government, thus preventing that government from exercising its powers in ways hostile to slavery. Indeed, there are some indications that Southern delegates expected this arrangement to protect their interests even more powerfully in the long term than in the short term, because they expected new western states to align mostly with the South.<sup>122</sup> On that assumption, South Carolina could agree in 1787 to constitutional protection

---

117. See 2 *id.* at 306 (Aug. 16, 1787) (statement of John Rutledge, as rendered by Madison); *id.* at 364–65 (Aug. 21, 1787) (statement of Charles Pinckney, as rendered by Madison). Delegates with other ideas forced a compromise on the latter prohibition under which Congress could prohibit the slave trade in or after the year 1808. See U.S. CONST. art. I, § 9, cl. 1.

118. See 2 FARRAND'S RECORDS, *supra* note 14, at 360 (Aug. 21, 1787) (statement of Oliver Ellsworth, as rendered by Madison) (explaining that the debate over taxing exports was really only about a small number of taxable exportable commodities, namely tobacco, rice, and indigo); *id.* (reporting that "Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States," per Madison); *id.* at 364 (statement of John Rutledge, as rendered by Madison) (noting the direct connection between the size of the slave population and the volume of exportable commodities).

119. See Primus, *supra* note 2, at 615–18.

120. That being the case, one might well ask why South Carolina's delegates did not pursue a blanket prohibition on any national legislation touching *slavery*, as such—why, that is, they focused their demands for prohibition on the proximate matters of the slave trade and export taxes, rather than directly on the institution itself. One reasonable answer is that they had a sense of what their fellow delegates would agree to.

121. U.S. CONST. art. I, § 2, cl. 3, *superseded* by U.S. CONST. amend. XIV, § 2.

122. See, e.g., 1 FARRAND'S RECORDS, *supra* note 14, at 605 (July 13, 1787) (statement of Pierce Butler, as recorded by Madison); see also MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006). *But see* GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 103–42 (2010) (questioning this account).

for the slave trade only until 1808, in part because it was confident that by 1808 the balance of power in the general government would be such that Congress would not ban the slave trade then either.<sup>123</sup> And the calculation that decisionmaking power within the general government was much more important to the future of slavery than anything about the texts describing what powers Congress could exercise seems to have been borne out by history. Slavery lasted as long as proslavery politicians maintained control of the general government's elected branches, but it did not last much longer.

### C. "Sovereignty"

Another possible reason for wanting to limit Congress was more abstract. Under the Constitution, states would not be sovereign in the way they had officially been under the Articles of Confederation.<sup>124</sup> But if not sovereign entities, what exactly would the states be? Would anything be left of their separate autonomy once sovereignty was compromised? Some delegates wondered whether the state governments would become "mere corporations"<sup>125</sup>—something like administrative departments of a national government carrying out tasks at their subordinate station.<sup>126</sup> Many delegates wanted them to be more than that—to have some existence

---

123. Whether that was a miscalculation depends on where one ends the story. Formally, Congress did prohibit the slave trade in 1808. As a matter of practice, the slave trade continued, and prominently so through South Carolina, and the general government declined to stop it. See generally W. E. BURGHARDT DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA, 1638–1870*, at 89–93 (New York, Longmans, Green & Co. 1896); Jed Handelsman Shugerman, *The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803*, 22 J. EARLY REPUBLIC 263 (2002).

124. See ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its Sovereignty . . .").

125. See, e.g., 2 FARRAND'S RECORDS, *supra* note 14, at 362 (Aug. 21, 1787) (statement of James Mason, as rendered by Madison).

126. On the origins of American colonies as corporations, and as exercising power under the constraints faced by other corporations, see Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 535–55 (2006). On the idea that states under the new Constitution might be conceived as corporations, see *id.* at 545–46, 546 n.241 (recounting articulations of this idea at the Convention and also outside the Convention in 1787). Note, however, that the idea of the states as "corporations" was slippery, and it could also point in the opposite direction from the one described in this sentence. For example, the prominent anti-Federalist Robert Yates, who represented New York at the Convention until he left in disgust, charged during the ratification debates that the new Constitution would create a general government with governmental power of every kind, rather than only a specified subset of powers, precisely because the Constitution *neglected* the states in their "corporate" capacity. Writing pseudonymously as Brutus, Yates wrote that the Constitution "will not be a compact entered into by the states, in their corporate capacities, but an agreement of the people of the United States, as one great body politic," from which it followed that the power of the government so created would "extend to every case for which any government is instituted." See *Brutus XII*, *supra* note 99, at 74. To distinguish this valence of the idea of states as corporations from the one discussed in the main text, it may be useful to remember that Convention delegates contemplating the possibility that the states would be just administrative departments of the national government often spoke of the states in that condition as *mere* corporations. The adjective signals something important. See HULSEBOSCH, *supra* note 100, at 223 (describing a continuum of corporate entities, from weak to strong, and the question of where along that continuum states would lie).

independent of, and decisionmaking autonomy from, the general government.<sup>127</sup> Whether that additional measure of autonomy could in any helpful sense be described in the language of “sovereignty” is a complex question.<sup>128</sup> (Which is why the heading for this section appears in scare quotes.) But whether or not sovereignty is an analytically illuminating rubric for considering the status of states under the Constitution, some delegates were concerned that the proposed Constitution would make the states fully subordinate to a national government, and they used the language of sovereignty (and of “mere corporations”) to express that concern.<sup>129</sup> And according to a commonly held view, one way to guarantee states a meaningful and not fully subordinate existence would be to provide that over a broad swath of decisionmaking, state governments would be the sole decisionmakers.<sup>130</sup>

From the ratification debates forward, the enumeration of congressional powers has been presented as a means to that end. But there are at least two important ways in which the idea of the enumeration as a means for giving the states a status beyond that of “mere corporations” is more problematic than generally recognized. First, the idea of enumerating congressional powers does not seem to have figured in the Convention’s major discussions of the status of states. When the delegates discussed ensuring that the states would enjoy some sort of quasi-sovereign status, the proffered solutions tended to sound in the structure of the general government rather than in the list of projects that that government could pursue. According to Connecticut’s William Samuel Johnson, for example, letting state legislatures appoint one branch of Congress could preserve the states as something like sovereign entities within the Virginia Plan’s overall scheme of a robust national government.<sup>131</sup> Within that way of thinking, guaranteeing states a status greater than mere administrative arms of the national government meant giving states seats at the table, rather than limiting what could be decided there.

Second, there is a mismatch between the goal of guaranteeing something like autonomy or quasi-sovereignty for the states and the description of congressional powers that the Convention actually drafted. The sine qua non of an enumeration of congressional powers designed to meet the state-status concern would be *that it be limiting*. That means two things. First, the enumeration of powers must not be one that would in practice allow the

---

127. See, e.g., 2 FARRAND’S RECORDS, *supra* note 14, at 362 (Aug. 21, 1787) (statement of George Mason, as rendered by Madison).

128. For an excellent and thorough argument that sovereignty has ceased to be a useful category in political thought, and indeed that it had probably ceased to be so by the time of the founding, see generally DON HERZOG, SOVEREIGNTY R.I.P. (2020).

129. 2 FARRAND’S RECORDS, *supra* note 14, at 362 (Aug. 21, 1787) (statement of George Mason, as rendered by Madison).

130. *Id.* at 25 (July 17, 1787) (statement of Roger Sherman, as rendered by Madison) (proposing that Congress should not be able to interfere in matters of “internal police” within the states).

131. 1 *id.* at 354–55 (June 21, 1787) (statement of William Samuel Johnson, as rendered by Madison); *id.* at 362–63 (statement of William Samuel Johnson, as rendered by Yates).



national government to make law across all, or nearly all, of the important policy domains. Second, it must be unmistakable that Congress could legislate only on the basis of the powers enumerated. That principle—that Congress could exercise only a closed set of legislative authorities—would be at least as important as any particular substantive choice about what powers were and were not allocated to Congress.

It is not clear that the Constitution the Convention drafted answers to the first criterion. For a long time, the enumerated powers of Congress have, in practice, authorized legislation on pretty much any topic. The conventional thinking today is that the founders did not see things that way, but in fact many Americans in that generation—including both promoters and opponents of the Constitution—read the Preamble,<sup>132</sup> the General Welfare Clause,<sup>133</sup> and the Necessary and Proper Clause<sup>134</sup> as plausibly vesting Congress with general legislative power, or at least something close to it.<sup>135</sup> To be sure, many of the Constitution’s supporters publicly rejected that reading during the ratification debates. But the fact that that reading existed, and that it was prominent rather than merely marginal, makes it problematic to conclude that the Constitution clearly did *not* warrant congressional power that broad. And with respect to the second criterion, it would have been easy for the Framers to state clearly, in the Constitution’s text, that Congress could legislate only the basis of the powers enumerated. They did not.<sup>136</sup> Given the purported importance of the principle, it is a suggestive omission.<sup>137</sup>

One might respond that the Framers did not clearly articulate the principle that Congress was confined to its enumerated powers because they took that principle for granted. But if so, the Framers must have been puzzlingly obtuse. As soon as the draft Constitution was offered to the public, critics

---

132. U.S. CONST. pmb.

133. *Id.* art. I, § 8, cl. 1.

134. *Id.* cl. 18.

135. *See, e.g.*, 2 FARRAND’S RECORDS, *supra* note 14, at 633 (Sept. 15, 1787) (statement of Elbridge Gerry, as rendered by Madison) (declining to sign the Constitution in part because of “the general power of the Legislature to make what laws they may please to call necessary and proper”); George Mason, *Objections to This Constitution of Government* (Sept. 15, 1787), *reprinted in* 2 FARRAND’S RECORDS, *supra* note 14, at 637, 640 (Mason’s “Objections to this Constitution of Government”) (warning that the Necessary and Proper Clause would permit Congress to “extend their powers <power> as far as they shall think proper”); *Brutus I*, N.Y.J., Oct. 18, 1787, *reprinted in* 13 DHRC, *supra* note 5, at 411, 414 (writing that the Necessary and Proper Clause gave Congress general jurisdiction); *see also* 2 ANNALS OF CONG. 1921 (1791) (statement of Rep. Elias Boudinot) (treating the Preamble as a broad grant of power); *id.* at 1917–18 (statement of Rep. John Lawrence) (same).

136. Some say that the Constitution does indeed say that in the Vesting Clause of Article I. *See* U.S. CONST. art. I, § 1. But as I have explained at (somewhat ridiculous) length elsewhere, that is a bad reading of the Vesting Clause, and it is virtually certain that nobody held that view of the clause at the Convention. *See generally* Richard Primus, *Herein of “Herein Granted”*: *Why Article I’s Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301 (2020).

137. Given the existence of many readers who described the enumeration as limiting, the point is not that the omission of a clear statement of the principle shows that the enumeration of powers was not meant to be limiting. What it indicates, rather, is that the Framers as a group were *not* clearly of the view that the enumeration *was* meant to be limiting.

began to argue that the list of enumerated powers was not limiting, and they could make that argument because the document did not make the contrary principle clear.<sup>138</sup> As Thomas Jefferson put the point in a letter to Madison, one could say that the enumerated powers were limiting, but the document could just as easily support the opposite inference.<sup>139</sup> Perhaps the Framers were not such poor readers of their own worked-over text not to anticipate that point.

Similarly, it would be odd for the Framers to have thought that the principle that Congress could legislate only based on its enumerated powers would be taken for granted if they also thought that limiting Congress to a set of enumerated powers would ensure that the states would not be “mere corporations.”<sup>140</sup> Anyone paying attention at the Convention would know that several leading delegates—Alexander Hamilton,<sup>141</sup> Wilson,<sup>142</sup> Gouverneur Morris,<sup>143</sup> and maybe even Madison<sup>144</sup>—might *want* a Constitution that would, in practice if not by declaration, reduce the states to the status of administrative departments of the national government.<sup>145</sup> Surely the delegates who did *not* want to reduce the states to that status would have recognized the issue as live and contested. Against that background, it would be odd for the Convention to have thought that it could enumerate

138. See *Centinel II*, *supra* note 85, at 460 (noting that the Articles of Confederation specified the principle expressly, so it was noteworthy and significant that the Constitution did not); Letter from Cincinnatus I to James Wilson (Nov. 1, 1787), *reprinted in* 13 DHRC, *supra* note 5, at 529, 531.

139. See Letter from Thomas Jefferson to James Madison, *supra* note 7, at 482–83 (“[T]o say, as Mr Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms.”).

140. See 2 FARRAND’S RECORDS, *supra* note 14, at 362 (Aug. 21, 1787) (statement of George Mason, as rendered by Madison).

141. See 1 *id.* at 291 (June 18, 1787) (as rendered by Madison) (proposing a national legislature with power “to pass all laws whatsoever”).

142. See *id.* at 172 (June 8, 1787) (as rendered by King).

143. See *id.* at 530 (July 5, 1787) (as rendered by Madison) (“State attachments, and State importance have been the bane of this Country. We cannot annihilate [the states]; but we may perhaps take out the teeth of the serpents.”).

144. See *id.* at 463 (June 29, 1787) (statement of James Madison, as rendered by Madison) (suggesting that “too much stress was laid on the rank of the States as political societies”); see also *id.* at 363–64 (June 21, 1787) (statement of James Madison, as rendered by Yates) (suggesting that it would be acceptable for the national government to swallow up the state governments, so long as it were done for the good of the whole). To be sure, Yates was an unfriendly reader of nationalizing projects, and he may (or may not) have given Madison’s words a more extreme meaning than Madison intended. But for present purposes, what matters is whether delegates eager to preserve the states as autonomous decisionmakers would have seen other delegates as contending for the contrary, regardless of whether that assessment was accurate.

145. Some delegates also read other delegates as having this agenda, even if it was denied. See, e.g., *id.* at 263 (June 16, 1787) (statement of John Lansing, as rendered by King) (comparing the Virginia and New Jersey Plans and saying that the former “[w]ill absorb the State sovereignties & leave them mere Corporations, & Electors of the natl. Senate”).

powers, and not specify that the enumeration was limiting, and trust that everyone would understand it that way.

#### D. Capacity

Another reason the delegates had for wanting to articulate limits on the national government's legislative jurisdiction is less intuitive to modern Americans. Its root was a fear not of too much governance but of too little.

The United States in 1787 was an enormous country, with a growing population spread out along more than a thousand miles of seaboard and hundreds of miles into the interior as well. It was not realistic, many of the Framers reasoned, for a single legislature to provide for all of the diverse locations within such an extensive polity.<sup>146</sup> The country needed governmental action: commerce had to be fostered and regulated, roads and canals had to be built, and so on. If Congress had the responsibility for all the necessary legislation, a great deal would be left undone. No single legislature could have the time and the information necessary for attending to all these matters. Lacking real acquaintance with the needs of all of the country's far-flung localities, Congress would often fail to provide the governance that those areas required.<sup>147</sup>

A comment at the Convention by Connecticut's Oliver Ellsworth exemplifies this concern. As Madison recorded the comment, Ellsworth said that "[w]hat he wanted was domestic happiness. The Nat[iona]l Gov[ernmen]t could not descend to the local objects on which this depended."<sup>148</sup> The rendering of Ellsworth's comment in Robert Yates's notes is even more suggestive:

I want domestic happiness, as well as general security. A general government will never grant me this, as it cannot know my wants or relieve my distress. My state is only as one out of thirteen. Can they, the general government, gratify my wishes? My happiness depends as much on the existence of my state government, as a new-born infant depends upon its mother for nourishment.<sup>149</sup>

The concern here is not with limiting the power of government, lest too much power be a threat to liberty. The concern is with making sure that government is sufficiently active, attentive, and supportive to supply the

---

146. *See id.* at 155 (June 7, 1787) (statement of George Mason, as rendered by Madison) ("[W]hatever power may be necessary for the Natl. Govt. a certain portion must necessarily be left in the States. It is impossible for one power to pervade the extreme parts of the U.S. so as to carry equal justice to them."); *id.* at 287 (June 18, 1787) (statement of Alexander Hamilton, as rendered by Madison) ("The extent of the Country to be governed, discouraged him."); *id.* at 357 (June 21, 1787) (statement of James Madison, as rendered by Madison) ("The great objection made ag[ain]st an abolition of the State Govts. was that the Gen[era]l Gov[ernmen]t could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not ag[ain]st the probable abuse of the general power, but ag[ain]st the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects.")

147. *See, e.g., id.* at 357–58 (statement of Madison, as rendered by Madison).

148. *Id.* at 492 (June 30, 1787) (statement of Oliver Ellsworth, as rendered by Madison).

149. *Id.* at 502 (statement of Ellsworth, as rendered by Yates).

conditions for a flourishing life. The language of “nourishment” and the analogy to an infant depending on its mother could hardly be more powerful<sup>150</sup> on this point. The threat to be addressed is the possibility that government will do too little.

To a modern constitutional lawyer, this concern does not call for limiting the powers of Congress. Modern Americans know that what Congress leaves undone can be done by state and local governments. The modern government operates, as a general matter, with a theory of concurrent jurisdiction, meaning that in most areas of domestic policy the state legislatures and Congress are simultaneously competent to regulate. Federal regulation prevails in case of conflict, but in the absence of federal law, states can act as they like. So if Congress fails to attend to some important economic need particular to people in Connecticut, Connecticut can take appropriate measures by itself. But in 1787, many of the Framers either did not grasp or else actively were skeptical of concurrent jurisdiction. According to a commonly held view, Congress and the state legislatures needed to regulate separate and nonoverlapping policy domains.<sup>151</sup> Within that framework, assigning domains of legislation to Congress meant preempting state legislation in those domains. And on that understanding, giving Congress more responsibility than it could handle was dangerous, because it meant that whatever Congress failed to do would simply go undone.

Modern Americans often neglect this aspect of the Framers’ worldview. Working from the premise that the primary role of the Constitution is to *limit* governmental action, many intuitively think that the point of confining Congress’s powers to certain domains is to prevent Congress from overregulating. But the Framers were not primarily worried about congressional overregulation. They were more worried about underregulation; the government they knew was too weak, not too strong, and their project was to enable government to do more, not less. And they needed to be careful, lest their design of a more powerful national government inadvertently compound the underregulation problem by stripping local officials of the authority they would need to govern all the areas of life that Congress, as a practical matter, would not be able to manage. To the extent that the Framers envisioned only one government being responsible for any given policy domain, they needed to avoid assigning too many domains to Congress—not for fear that Congress would regulate too much but for fear that Congress would regulate too little and that the states would be legally barred from picking up the slack. Enumerating specific

---

150. Or more gendered. The “Mommy State” has deeper roots than many of its detractors recognize.

151. *See, e.g.*, 1 FARRAND’S RECORDS, *supra* note 14, at 34–35 (May 30, 1787) (statement of Roger Sherman, as rendered by Madison); *id.* at 53 (May 31, 1787) (statement of Charles Pinckney, as rendered by Madison) (reflecting the view that power given to Congress necessarily withdraws power from states). *See generally* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010) (emphasizing the importance, in American thought up until the time of the Convention, of the idea that different legislatures had jurisdiction over different subject matters).

domains of congressional legislation might have seemed like a way to address this problem.

If measured by this purpose, the Convention's choice to enumerate specific powers of Congress should be classified as a success. For more or less the Constitution's first century, the laws whose constitutionality the judiciary measured by reference to Article I, Section 8 were usually not federal laws. The laws whose constitutionality were at issue on federalism grounds were usually *state* laws, and the question was whether the relevant state had legislated in an area of congressional jurisdiction—most commonly under the Commerce Clause<sup>152</sup>—and therefore, on the separate-spheres model, an area in which state law was preempted even if congressional power lay dormant.<sup>153</sup> By construing the Commerce Clause narrowly, nineteenth-century courts preserved the ability of state governments to regulate the social world at a time when Congress lacked the will and the resources to do so in any comprehensive way.

But note some dynamic features of the enumeration, understood this way. First, this approach to Congress's enumerated powers would make it logical for courts to give congressional legislation a strong presumption of constitutionality. The problem to be solved, after all, is not that Congress might regulate things it should not. It is that Congress might fail to regulate in areas where it is the only authorized regulator. So where Congress has in fact regulated, thus obviating the risk that nobody will regulate, the courts can sustain Congress's regulation—provided only that the judges can articulate a construction of congressional power on which what Congress has done is different from most of what the states are doing, thus avoiding the conclusion that a lot of state regulation comes within one of Congress's domains and is therefore invalid. (Such constructions might include, "This federal law is a regulation of commerce among the states, so it is unlike, and does not preempt, state laws that merely exercise the police power." Or, "This federal law regulates commerce directly, so it is unlike, and does not preempt, state laws that regulate commerce but only indirectly.")

So consider what might happen over time if Americans became more interested in having an active national legislature and congressional capacity

---

152. U.S. CONST. art. I, § 8, cl. 3.

153. *See, e.g.*, *Smith v. Alabama*, 124 U.S. 465 (1888); *Hall v. DeCuir*, 95 U.S. 485 (1877); *Sherlock v. Alling*, 93 U.S. 99 (1876); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Smith v. Turner* (Passenger Cases), 48 U.S. (7 How.) 283, 408–10 (1849) (plurality opinion); *Thurlow v. Massachusetts* (License Cases), 46 U.S. (5 How.) 504, 582–83 (1847), *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100 (1890); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 143 (1837); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251–52 (1829); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–49 (1827); *see also Wickard v. Filburn*, 317 U.S. 111, 121 (1942) ("For nearly a century . . . decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states.").

increased. As Congress gradually pushed its legislation into more and more areas, judicial willingness to sustain the things that Congress did would yield a significantly expanded sense of what Congress's enumerated powers include. As judicial legitimations of federal laws multiplied, it would become harder and harder to articulate plausible categorical distinctions between the purported sphere of Congress and that of the states, thus putting pressure on the idea that Congress and the states occupy separate regulatory spheres. That pressure could be relieved by adjusting to the idea of concurrent jurisdiction: why exactly, we now say, can Congress and the states not regulate in the same domains? And once we adjust to the idea of concurrent jurisdiction, preserving the states' capacity to regulate where needed would no longer require courts to articulate Congress's legislative jurisdiction as if it occupied only specific slices of the social world. All of which is pretty much what happened.<sup>154</sup>

All told, it is possible to see the Convention's enumeration of congressional powers as an attempt—indeed, a sensible attempt—to address the problem of potential underregulation, in a world where Congress would have limited capacity and concurrent jurisdiction was not yet well accepted. And to the extent that this way of thinking captures the point of enumerating Congress's powers, the enumeration was a solution to a problem that American law no longer has. No wonder it does not do much work.

#### CONCLUSION

Few constitutional theorists, whether originalists or otherwise, contend that the intentions of the Framers determine the correct answers to modern questions of constitutional law. But the correct answers to questions of constitutional *history* often depend on the ideas of the Framers, because the content of the Framers' ideas is precisely what some of those questions are about. Our interest in understanding the Convention is not exhausted by our interest in modern law.

Moreover, it would misunderstand American constitutional culture to think that decisions about modern constitutional law are entirely independent of modern decisionmakers' intuitions about the ideas of the Framers, even when those decisionmakers do not consciously believe that the Framers' intentions are a source of constitutional authority. It is hard, and rare, for modern decisionmakers to think, "Here is the right answer, and it flies in the face of the judgment of the Philadelphia Convention."<sup>155</sup> In other words, intuitions about the story of the Convention frame many modern constitutional analyses, even absent a claim that anything about the Convention is authoritative. Nomos and narrative maintain some rough correspondence. So until we accept a better understanding of the

---

154. For one good telling of this story, see Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125.

155. Cf. Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016) (describing this feature of the psychology of constitutional decisionmaking).

Convention, the present one, with its flaws, will do work in constitutional law.