Mr. Madison's War on the General Welfare Clause

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The General Welfare Clause of Article I, section 8, clause 1 of the Constitution ("Clause 1"), though ambiguous, is most naturally read to grant Congress the power to "provide for … the general welfare"—that is, to legislate on all national matters. James Madison understood this and recognized that this broad interpretation of Clause 1 presented a major textual obstacle to his tendentious "enumerationist" interpretation of federal powers: that the "the essential characteristic" of the Constitution was to grant only limited enumerated powers to the federal government. Madison therefore waged a 50-year campaign to render the General Welfare Clause "harmless," as an essential element of his broader project to win his preferred enumerationist interpretation and erase the nationalist interpretations of his one-time Federalist allies. Madison achieved a partial victory in this political struggle for constitutional meaning, by taming the General Welfare Clause and establishing enumerationism as an ideology to which we pay continued lip service. But his arguments against the nationalist interpretation of the General Welfare Clause, based primarily on text and Framers' intent, were circular, fallacious, or disingenuous. The weakness of Madison's arguments on this critical issue of federal power may account for his puzzling drift toward embracing "compact theory"—the view that the states, and not the sovereign people of the United States, are the true parties to the Constitution. Madison's war on the General Welfare Clause casts doubt on the practice of treating his partisan views on enumerationism as authoritative statements of the Constitution's original meaning.

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INTRODUCTION

James Madison is not the "father" of the United States Constitution.[1] But he may be the father of "enumerationism"[2]: the constitutional dogma that the federal government is limited to its enumerated powers, even if that means that some national problems must go unaddressed.[3] While Madison did not invent the idea, he was its most famous and authoritative exponent in the early republic, and his view has had an enduring — and distorting — impact on our constitutional law.

For Madison, the failure of the enumeration of powers to provide for unanticipated national needs could only be "lamented, or supplied by an amendment of the Constitution."[4] In other words, the doctrine of enumerationism builds federal-power gaps into the design of the Constitution, "however necessary [the power] might have been,"[5] thereby guaranteeing that there will be instances of the federal government having a constitutionally imposed inability to address a truly national problem. This is a significant limitation on the Preamble's stated goal of creating a government that would "promote the general welfare," and would thus seem to require a normative justification.[6] Yet Madison never offered one. In his lifelong advocacy of enumerationism, beginning with his *Federalist* essays, Madison argued almost exclusively in the register of textualism and the Framers' original intentions, with a superficial nod to what would now be called original public meaning.

But in those modalities, enumerationism was and remains an interpretive choice, not an inexorable constitutional command.[7] The

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[1] *See* David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033, 2033 (2021).

[2] David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575, 581-82 (2017) [hereinafter *A Question Perpetually Arising*] (originating and explaining the term).

[3] *See* 2 ANNALS OF CONG. 1898 (1791) (Rep. Madison) (arguing that the principle of limited enumerated powers is the Constitution's "essential characteristic"). For discussions of enumerationism, see Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 183-89 (2020); John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507, 510-13 (2019); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2003-06, 2009-11, 2018 (2021) [hereinafter *Reframing Article I*].

[4] 2 ANNALS OF CONG. 1900-01 (1791) (Rep. Madison).

[5] *Id.*

[6] U.S. CONST. pmbl.

[7] *See infra* § I.A.2; *see, e.g.*, Primus, *Reframing Article I*, *supra* note 3, at 2007-18 (arguing that textual indications of limited enumeration are at most ambiguous); David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 888-92 (2022) [hereinafter *General Welfare Clause*] (same).

Constitution nowhere states the enumeration of powers is exhaustive, and indeed the enumeration of powers in Article I, section 8 begins with a strong indication to the contrary:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, **to** pay the debts and **provide for the common defense and general welfare of the United States**…. [8]

The words of this General Welfare Clause — "to … provide for the common defense and general welfare" — are most naturally read as a power to address all national problems. I call this the "general welfare interpretation." The intention of the Framers in drafting the language this way was to compromise on the dispute between nationalists and enumerationists at the Constitutional Convention.[9] Madison knew this: indeed, he was almost certainly involved in negotiating and drafting this language.[10] And, despite its ambiguity, the language favored the general welfare interpretation. Madison knew this too. In a moment of candor late in life, Madison admitted that these words "literally … express[ed]" a power to legislate on all national problems.[11]

Thus, the General Welfare Clause posed a major textual obstacle for Madison's effort to establish an enumerationist interpretation of the Constitution. For that reason, in the words of one his distinguished biographers, Madison "loathed" the General Welfare Clause.[12] From the *Federalist* essays to the end of his life, Madison strove to render the General Welfare Clause "harmless" (his word) by ensuring that its literal meaning would not become its established interpretation. Madison attempted to do so with a series of textual arguments that were thin, circular, or fallacious; and Framers' intent arguments that were disingenuous. Perhaps realizing the weaknesses of these arguments, Madison advocated a constitutional amendment to get rid of the General Welfare Clause. More fundamentally, Madison would eventually go so far as to abandon his original 1787 theory of a nationalist Constitution founded on the consent of the sovereign

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[8] U.S. CONST. art. I, § 8, cl. 1.

[9] *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 917-27.

[10] *See id.* at 924-25; *infra* text accompanying notes 117-27.

[11] Letter from James Madison to Andrew Stevenson (Nov. 27, 1830) [hereinafter "Madison to Stevenson"], *in* 9 THE WRITINGS OF JAMES MADISON 411, 417 (Gaillard Hunt ed., 1910) [hereinafter WJM].

[12] DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 77 (1989); *see infra* Part III.

"people of the United States" in favor of a "compact theory" under which the Constitution was a compact between sovereign states.[13]

Madison's 50-year war against the General Welfare Clause is an overlooked central episode in a broader struggle for the fundamental spirit of the Constitution: did the Constitution create a true national government, or did it merely strengthen the Confederation's union of states? Madison's enumerationist interpretive approach to limiting the powers of the federal government, which is central to "Madisonian" federalism, is ultimately grounded more in compact theory than nationalist theory and requires tendentious and debatable interpretations of the Constitution's text. Madison was only partially successful in his decades-long interpretive campaign: our constitutional order ultimately rejected compact theory and for the most part finds ways to work around the purported limits of the enumerated powers.[14] Yet we continue to pay lip service to enumerationism and in some cases, laws are struck down in its name. And Madison succeeded in neutralizing the General Welfare Clause: we can see this in the fact that scholars, judges, lawyers, and students of the Constitution fail even to perceive the general welfare interpretation.

Parts I and II of this Article provide essential background. Part I explains the impact on enumerationism of the various interpretations of the General Welfare Clause. Part II explains how the General Welfare Clause found its way into the Constitution. I have recounted this history in detail elsewhere, and here merely summarize the key points.[15]

Part III, the core of the Article, recounts and analyzes Madison's career-long war on the general welfare clause. This history encompasses several important events in constitutional politics in which Madison argued for narrow interpretations of the General Welfare Clause. These spanned over four decades, beginning with the *Federalist Papers* and extending to Madison's 1826 suggestion to excise the General Welfare Clause by constitutional amendment, and to his 1830 public letter in opposition to federal spending on "internal improvements" (infrastructure projects). I show Madison's arguments to be fundamentally flawed, and at times, dishonest.

My argument is not that Madison was wrong to assert that the Constitution *could* be given an enumerationist reading; rather, he was wrong to suggest that the Constitution *could only* be given an enumerationist reading. Madison was wrong in claiming that the notion

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[13] *See infra* § III.A.2.

[14] *See* Schwartz, *A Question Perpetually Arising*, *supra* note 3, at 620-45 (describing workarounds); *infra* § I.B (discussing the rejection of compact theory).

[15] *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 885-916.

of limited enumerated powers was the uniquely true meaning of the Constitution. And he was wrong to imply that that interpretation was so "essential" to the Constitution that all other policies and principles had to be subordinated to it — including the sovereignty of the people of the United States. Madison's interpretation cannot be taken as conclusive proof that enumerationism is the Constitution's original meaning or binding constitutional interpretation. His war on the General Welfare Clause is essential to understanding that Madisonian federalism, which is ultimately grounded in compact theory, is not our federalism.

I. ENUMERATIONISM, COMPACT THEORY, AND THE GENERAL WELFARE

A. Enumerationism vs. General Welfare

The dogma that the Constitution grants only limited enumerated powers to the federal government is so entrenched that we fail to see the lack of textual support for that interpretation. In this Section, I explain the difference between the enumerationist and "general welfare" interpretations of the Constitution's grant of powers, then show how the text of the Constitution, though ambiguous, actually points more strongly to the general welfare interpretation. I then briefly discuss the historical context for understanding Madison's enumerationism.

1. Principles

Enumerationism maintains that "[t]he Constitution's express conferral of some powers makes clear that it does not grant others."[16] Particularly inconsistent with enumerationism are "general powers," which are not confined to specific subject matter, such as a power to legislate "for the general welfare."[17] In contrast, enumerationism holds that the enumerated powers are necessarily subject-matter specific, such as the enumerated powers "to coin money" or even the far broader, but still subject-specific power "to regulate commerce…among the several states."[18] An immediate problem with this element of enumerationism is how to explain the taxing and spending powers, which are not subject specific. Enumerationist doctrine today squares

[16] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) (Roberts, C.J.).

[17] U.S. CONST. art. I, § 8, cl. 1.

[18] *Id.* art. I, § 8, cl. 3, 5.

this circle by stipulating that taxing is non-regulatory if it primarily raises revenue rather than penalizing behavior, and spending is non-regulatory if it is non-coercive.[19] Madison never accepted that view, maintaining instead that taxing and spending are forms of regulation and therefore must be confined to the enumerated regulatory subject matter.[20]

The general welfare power suggested by Article I, section 8, clause 1 ("Clause 1") is a power to legislate on all national matters. Enumerationists typically argue that the alternative to limited enumerated powers can only be "a plenary police power that would authorize enactment of every type of legislation."[21] As Chief Justice Roberts put it, "rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers."[22] This false dichotomy is either a logical error or a rhetorical ploy. It excludes the plausible middle ground of limited *general* rather than limited *enumerated* powers. The general welfare interpretation, as suggested by the plain language of Clause 1, authorizes Congress to legislate on all *national* matters, not all *conceivable* matters. The word "general" was used by antebellum constitutionalists essentially to mean "nationwide" or national, and what we now call the "federal government" was frequently referred to in antebellum United States as "the general government."[23] There is nothing implausible or illogical about delegating a power to legislate on all national matters, and such a delegation is significantly more limited than a power "to perform all the conceivable functions of government."

To be sure, the line between "national" and "local" concerns may be blurry; it may also be a moving target, as local problems can evolve to take on national dimensions. Yet it is hardly more blurry than many distinctions drawn in constitutional law: consider "activity" versus "inactivity" in *National Federation of Independent Business v. Sebelius*.[24] Moreover, a general legislative power over national matters has the

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[19] *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 576-78.

[20] *See infra* text accompanying notes 215-33.

[21] United States v. Lopez, 514 U.S. 549, 566 (1995).

[22] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534.

[23] *See, e.g.*, Martin Van Buren, First Annual Message (Dec. 5, 1837), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 1590, 1609 (James D. Richardson ed., 1898) [hereinafter MPP] ("[T]he General and State governments . . . ."); *infra* text accompanying note 249 (Madison referring to "the general and state governments"); *infra* text accompanying note 206 (Hamilton using "general" to mean nationwide).

[24] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 555-58.

virtue of framing the federalism stakes clearly and directly — asking whether a legislative problem is best handled at the national or state level — compared to questions that have no direct connection with federalism, like whether something is "commerce." It might also be objected that this standard is better suited to congressional policy judgments than judicial tests, and therefore unduly favors Congress over the courts when it comes to drawing the line between federal and state power.[25] But that is a flimsy objection. It assumes, absurdly, that courts will make wiser federalism decisions than Congress by recasting the national vs. local question as one of "commerce vs. not-commerce" or "activity vs. inactivity."

Mainstream constitutional interpreters have always recognized that Congress must have significant implied powers to implement its enumerated powers.[26] Yet this essential doctrine of implied powers destabilizes the central tenet of enumerationism, that the listing of powers defines and limits them to specified substantive subjects: commerce, bankruptcy, coinage, war, etc. There are two reasons for this. First, by definition, an implied power expands the subject-matter reach of federal legislative power. Despite the absence of an enumerated power to charter corporations, grant monopolies, or regulate banking, Congress's power to create a national bank and grant it a nationwide monopoly charter — which it did twice, in 1791 and 1819 — is arguably the strongest non-judicial precedent in U.S. constitutional law.[27] Enumerationism tries to finesse this problem by stipulating that implied powers are only recognized if they are *subordinate* means to the exercise

[25] ALEXANDER HAMILTON, *Final Version of the Report on the Subject of Manufactures* [hereinafter *Report on Manufactures*], *in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett ed., 1966) ("It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare."); James Madison, *Veto Message*, *in* 1 MPP, *supra* note 23, at 585 [hereinafter *Bonus Bill Veto*] ("[Q]uestions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance."); *cf.* McCulloch v. Maryland, 17 U.S. 316, 423 (1819) ("[W]here the law is not prohibited . . . to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.").

[26] *See* U.S. CONST. art. I, § 8, cl. 18; THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) ("No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."); *McCulloch*, 17 U.S. at 407-12 (same).

[27] *See* James Madison, *Veto Message*, *in* 2 MPP, *supra* note 23, at 540 [hereinafter Bank Bill Veto] ("waiv[ing]" his constitutional objection to a national bank based on First Bank precedent); DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* 254 (2019).

of enumerated powers. But that is wishful thinking: the United States Code is filled with exercises of implied powers whose importance is equal to or greater than at least some enumerated ones.[28]

Second, enumerationism contends that "inviolable" state legislative jurisdiction extends to whatever powers are not enumerated.[29] But implied powers cannot be known or defined in advance,[30] and because the Supremacy Clause makes no distinction between the exercise of express or implied federal powers, these implied powers do in fact make inroads into state legislative jurisdiction. The Supreme Court's effort for over a century to carve out identified subject matters "reserved" to the states — those involving labor and production — ended in failure in the late New Deal era: cases like *Hammer v. Dagenhart*[31] and *Carter v. Carter Coal*[32] are correctly viewed as serious doctrinal errors.[33]

Finally, enumerationism builds into the delegation of powers a regulatory gap in which Congress is prohibited from regulating some truly national problems. Enumerationists argue that "there must be something Congress cannot regulate." This "mustbesomething rule," as I have called it, purports to reject congressional-power arguments that create a slippery slope ending with a general police power.[34] But it imposes a significant cost: the category of things Congress cannot regulate is not, and logically cannot be, limited to matters of purely state

[28] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (asserting power to regulate race discrimination as commerce); Arizona v. United States, 567 U.S. 387, 395 (2012) (stating that immigration laws are authorized by implied sovereign powers rather than strictly enumerated powers); Schwartz, *A Question Perpetually Arising*, *supra* note 3, at 624-44.

[29] *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 26, at 245 (James Madison) ("since [the federal government's] jurisdiction extends to certain enumerated objects only," it "leaves to the several States a residuary and inviolable sovereignty over all other objects.").

[30] *See, e.g.*, THE FEDERALIST NO. 44, *supra* note 26, at 285 (James Madison) (stating that implied powers "must always necessarily vary" owing "to all the possible changes which futurity may produce").

[31] 247 U.S. 251 (1918).

[32] 298 U.S. 238 (1936).

[33] *See* United States v. Lopez, 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring) (reaffirming disapproval of *Lochner*-era commerce power cases); Wickard v. Filburn, 317 U.S. 111, 119-20 (1942) (disapproving *Carter Coal* and *Lochner*-era commerce power cases); United States v. Darby Lumber Co., 312 U.S. 100, 116 (1941) (overruling *Hammer*).

[34] *See Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power."); David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 939, 1011 (2019) (originating the phrase "mustbesomething rule").

or local concern. If the only things Congress cannot regulate are those matters that are purely local, then the residuum of legislative problems within Congress's powers encompasses all national problems. This would result in a general welfare power, which is different from the sum total of the enumerated powers — unless, wishfully, all national problems happen to come within the enumerated powers. But they do not: a nationwide epidemic of violence against women, a national problem of free riding the health insurance market, and — undoubtedly — a pandemic all apparently fall outside the enumerated powers.[35] In sum, the enumerationist requirement of "something Congress cannot regulate" must be, not some purely local problems, but rather some truly national ones. This resulting regulatory gap is what Madison had in mind in his bank debate speech: such a "defect" in the grant of powers "could only [be] lamented, or supplied by an amendment of the constitution."[36] Lest it be thought that amendment is an adequate alternative to lamentation, it is worth noting that only three constitutional amendments have added significant new congressional powers — the Thirteenth, Fourteenth, and Fifteenth — and these required a civil war to pave the way.[37]

In sum, enumerationism presents three theoretical and practical problems: the inability to account for implied powers, the diversion of federalism questions into tangential or abstract definitional disputes (over such niceties as the meaning of "commerce" or "inactivity"), and the necessity of "lamenting" national regulatory problems that cannot be constitutionally addressed. Recognition of a general welfare power would solve these problems.

2. Text

A growing body of scholarship has questioned the enumerationist interpretation of the powers of Congress as a matter of text, history, and constitutional practice.[38] I will only briefly summarize the key takeaways from that literature here.

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[35] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012) (health care individual mandate exceeds commerce power); United States v. Morrison, 529 U.S. 598, 602 (2000).

[36] 2 ANNALS OF CONG. 1900-01 (1791) (Rep. Madison).

[37] The Sixteenth Amendment might be said to have added the admittedly significant power to tax incomes; but in my view, that amendment clarified the scope of the existing taxing power by overruling an erroneously narrow interpretation imposed by the Supreme Court in *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895).

[38] *See supra* note 3.

The textual arguments for limited enumerated powers are all fatally circular. First, enumerationists simply assume that the list of powers is exhaustive. Chief Justice Roberts stated the enumerationist position succinctly in *NFIB*: "The enumeration of powers is also a limitation of powers. The Constitution's express conferral of some powers *makes clear* that it does not grant others."[39] But this is not at all "clear," because lists can be exhaustive or illustrative, and legal drafters know they have to include cues to tell us which sort of list they intend. The Framers might have taken the simple expedient to "make clear" that the enumeration was exhaustive by beginning Article I, section 8 with "the Congress shall have *only* the following powers." With this purpose in mind, we would also expect them to have put all the purportedly exhaustive powers in one section, rather than scattering them throughout the Constitution. But, in fact, nine or more significant congressional powers are found outside Article I in the original Constitution.[40]

Second, enumerationists argue that the phrase "herein granted" in Article I, section 1, the Legislative Vesting Clause, conclusively demonstrates that the enumerated powers are exhaustive.[41] This argument, too, is circular. "Herein" does not mean "expressly in writing." Therefore, if — but only if — we know by other textual or extra-textual signifiers that the enumerated powers are exhaustive, then "herein granted" *reflects* that meaning. But "herein granted" does not *supply* that meaning. If instead the Constitution grants unenumerated or general powers — for instance, a power to legislate for the general welfare — then "herein granted" reflects that unenumerated or general grant and does not override it.[42]

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[39] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 (emphasis added).

[40] *See* Primus, *Reframing Article I*, *supra* note 3, at 2009 n.34 (eleven powers outside Art. I, § 8); Schwartz, *A Question Perpetually Arising*, *supra* note 3, at 599 (at least nine).

[41] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1; *see, e.g.*, United States v. Lopez, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) ("Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-34 (1994) ("*[H]erein granted* . . . clearly indicates that the national government can legislate only in accordance with enumerations of power.").

[42] *See* Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENTARY 301, 310-15 (2020). Moreover, the enumerationist interpretation substantially rewrites the Legislative Vesting Clause to say: "The legislative powers *expressly* granted herein, together with those incidental powers necessary and proper to implementing them, shall be vested in a Congress . . . ." In contrast to this heavily edited reading of the

Enumerationists also argue that "herein granted" is meant to be textually limiting when contrasted with the Article II Executive Vesting Clause, which omits those words purportedly to vest a vast mass of unenumerated powers in the president.[43] But this argument is likewise circular. Unless one is prepared to argue that the President holds extra-constitutional powers — for example, an inherent power to declare a state of emergency or prorogue Congress — then the President, like Congress, has only those powers granted by the Constitution. Perhaps many of the president's powers are implied. But since those powers are implied *from the Constitution* — that is to say, "herein granted" — there is no sound basis for distinguishing the two vesting clauses that way.

Instead of taking obvious measures to "make clear" that the enumeration was exhaustive and limiting, the Framers gave indications pointing the other way. To be sure, the language and intentions of the Framers remain ambiguous.[44] But the Preamble's eighteenth-century function of serving as an interpretive guide suggests that the ambiguity should be resolved in favor of the stated purposes, including to "promote the general welfare."[45] This favors implying powers to address national problems rather than lamenting their absence. Further, the Article I, section 8 enumeration is bookended by the General Welfare

provision, a more natural reading is: "Whatever legislative powers are granted herein shall be vested in a Congress, which shall consist of a Senate and a House of Representatives." So read, the emphasis of the Legislative Vesting Clause is not to define the legislative powers, *but rather to define the institution that will exercise them*. Because the Constitution was changing the one-house Congress of the Confederation into a two-house Congress, this issue was very important to the Framers and the ratifying public. Note that not until section 8 does the Constitution get around to defining powers. Emphasizing "herein granted" rather than "vested in a [bicameral] Congress," is a presentist misreading that reverses the Framers' emphasis.

[43] *See* Zivotovsky v. Kerry, 576 U.S. 1, 34-35 (2015) (Thomas, J., concurring) ("By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256 (2001) (arguing that Article II's Vesting Clause "must" be a grant of power because Article I refers only to those powers "herein granted").

[44] *See supra* note 7; *supra* § I.A.2.

[45] *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 59 (1803) ("If words happen to be still dubious, we may establish their meaning from *context*. . . . Thus the proeme, or preamble, is often called in to help the construction . . . ."); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462, at 445 (1833) (the preamble's "true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution").

Clause and the Necessary and Proper Clause, both of which tend to negate the inference of an exhaustive enumeration.[46]

3. The General Welfare Clause

My focus in this Article is on the General Welfare Clause. Enumerationism requires that we read "to … provide for the common defense and general welfare" as something other than an express authorization to legislate on all national matters. Those readings, as a purely textual matter, are certainly plausible, but are far from compelling. The Clause can be construed as merely a qualification on the taxing power by reading "to" in its purposive sense, "in order to": "To lay and collect taxes … [in order] to pay the debts and provide for the common defense and general welfare of the United States[.]" Alternatively, the Clause can be read to confer a spending power by treating "provide for" to mean "spend on." This reading arguably gains support by reading the entirety of Clause 1 as dealing only with revenue: raising taxes means money coming in, and "to pay and provide for" means money going out. This parsing treats "to pay … and provide for" as a doublet expressing a single concept (payouts of revenue) and requires that we accord no substantive significance to the verb change (pay versus provide).[47]

Yet both these readings depend on interpreting "provide for" to mean "spend," which is not the plainest meaning of that term. "Provide," in founding era dictionaries, meant "to furnish; to supply,"[48] and could also mean "to stipulate previously."[49] But when "provide" is used to mean "furnish" or "supply" in the Constitution, as in "provide … a Navy"[50] — the only other place in the Constitution that even comes close to a pure spending authorization — the word "for" is absent. A

[46] *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1057 (2014) (Necessary and Proper Clause negates the inference of exhaustiveness); Schwartz, *General Welfare Clause*, *supra* note 7, at 878-82 (General Welfare Clause negates the inference of exhaustiveness).

[47] *See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 KAN. L. REV. 1, 15-16 (2003) (suggesting that "pay" and "provide" should not be interpreted as synonyms).

[48] *See Provide*, SAMUEL JOHNSON'S DICTIONARY 415-16 (1766), https://archive.org/details/dictionaryofengl02johnuoft/page/n415/mode/2up (last visited Sept. 9, 2022) [https://perma.cc/EXX7-8DZ3]; *Provide*, WEBSTER'S DICTIONARY (1828), https://webstersdictionary1828.com/Dictionary/provide (last visited Sept. 9, 2022) [https://perma.cc/2AUU-5X7F] [hereinafter *Provide*, WEBSTER'S].

[49] *Provide*, WEBSTER'S, *supra* note 48. "Provide" is used in this sense in Art. I, § 5, cl. 1 ("under such Penalties as each House may provide").

[50] U.S. CONST. art. I, § 8, cl. 13.

more natural reading of "provide *for*" means "to legislate for." "Provide for" appears five other times in the Constitution. Three of these instances occur in Article I, section 8: "provide for the punishment of counterfeiting"[51]; "provide for calling forth the militia" [52] ; "provide for organizing, arming, and disciplining, the militia."[53] The other two instances are found in Article II: "Congress may by Law *provide for* the Case of Removal … of the President"),[54] and "[officers] whose Appointments are not herein otherwise *provided for*."[55] In short, "provide for" appears six times in the Constitution, and in five of those six occurrences, it indisputably means "legislate for" or "implement by law." Only in the General Welfare Clause is "provide for" said to mean "spend on." Yet where the Constitution refers merely to spending per se, it uses other words and phrases: "raise *and support* Armies, but no *appropriation for that use* shall be for a longer term than two years"[56]; "provide *and maintain* a Navy"[57]; "money drawn from the treasury" and "expenditures of all public money."[58]

During the ratification debates, numerous Anti-Federalists found the most natural interpretation of the General Welfare Clause to authorize a power to legislate for the general welfare. A leading Anti-Federalist commentator, the pseudonymous Brutus, claimed that "the most natural and grammatical" interpretation of "the first clause" of Article I, section 8, was to "extend [Congress's power] to almost every thing about which any legislative power can be employed."[59] Many other Anti-Federalists echoed this reading.[60] Even Madison, as we will see, felt

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[51] *Id.* art. I, § 8, cl. 6.

[52] *Id.* art. I, § 8, cl. 15.

[53] *Id.* art. I, § 8, cl. 16.

[54] *Id.* art, II, § 1, cl. 6 (emphasis added).

[55] *Id.* art. II, § 2, cl. 2 (emphasis added).

[56] *Id.* art. I, § 8, cl. 12 (emphasis added).

[57] *Id.* art. I, § 8, cl. 13 (emphasis added).

[58] *Id.* art. I, § 9, cl. 7.

[59] Brutus, *XII*, *in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 72, 75 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 1986) [hereinafter DHRC].

[60] *See, e.g.*, DeWitt Clinton, *A Countryman V*, N.Y. J., Jan. 17, 1788, *reprinted in* 20 DHRC, *supra* note 59, at 623, 623 (General Welfare Clause "[g]ives [Congress] power to do any thing at all, if they only please to say, it is for the common welfare"); Samuel Adams,*"O,"* AM. HERALD (Mass.), Feb. 4, 1788, *reprinted in* 5 DHRC, *supra* note 59, at 851, 854 ("We shall see what these powers are in sect. 8th. 'The Congress shall have power to provide for the general welfare of the United States.'"); Address to the Members of the New York and Virginia Conventions (post-Apr. 30, 1788), *in* 17 DHRC, *supra* note 59, at 255, 259 ("[W]e conceive that there is no Power which Congress may think necessary to exercise for the general Welfare, which they may not assume under this

compelled to look outside the text of the Constitution to argue that the words of the General Welfare Clause were "not meant to convey the comprehensive power, *which taken literally they express*[.]"[61]

The first place enumerationists look to negate the literal interpretation of the General Welfare Clause is the anti-surplusage interpretive canon. From Madison's argument in *Federalist* 41 to the present day, it is argued that the broad interpretation of the General Welfare Clause renders the enumeration that immediately follows mere surplusage.[62] But according to Antonin Scalia and Bryan Garner, a specific itemization that follows a general term is not surplusage: "Following the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics…. The enumeration of the specifics can be thought to perform the belt-and-suspenders function."[63] Thus, the anti-surplusage canon does not apply to a "genus-followed-by-species" or "general-specific sequence."[64] Indeed, "when

Constitution . . . ."); Abraham Yates, Jr., *Sydney*, N.Y. J., June 13, 1788, *reprinted in* 20 DHRC, *supra* note 59, at 1153, 1167 (General Welfare Clause "arrogat[es] to [Congress] the right of interfering in the most minute objects of internal police, and the most trifling domestic concerns of every state"); George Mason, Speech at The Virginia Convention (June 16, 1788), *in* 10 DHRC, *supra* note 59, at 1325, 1326 (general welfare power would authorize "any thing our rulers may think proper" and "be carried to any power Congress may please"); Patrick Henry, Speech at The Virginia Convention (June 24, 1788), *in* 10 DHRC, *supra* note 59, at 1473, 1476 (arguing that "power to provide for the general defense and welfare" would empower national government to free all slaves); John Williams, Speech at The New York Convention Debates (June 26, 1788), *in* 22 DHRC, *supra* note 59, at 1908, 1917-18 ("[I]n the clause under consideration, the power is in express words given to Congress — 'to provide for the common defence, and general welfare.'"); George Clinton, Remarks on the Mode of Ratifying the Constitution, Speech at the New York State Convention (July 17, 1788), *in* 23 DHRC, *supra* note 59, at 2220, 2221 ("Congress shall have power to provide for the common defence and general welfare and to make all laws which in their judgment may be necessary and proper for these purposes . . . ."); THE FEDERALIST NO. 41, *supra* note 26, at 211 (James Madison) (noting that "it has been urged and echoed" by Anti-Federalists that Clause 1 "amounts to an unlimited commission to exercise every power").

61 Madison to Stevenson, *supra* note 11, at 417 (emphasis added).

62 *See* Michael Ramsey, *David Schwartz on Originalism and Indeterminacy*, ORIGINALISM BLOG (Jan. 8, 2020, 6:23 AM), https://originalismblog.typepad.com/the-originalism-blog/2020/01/david-schwartz-on-originalism-and-indeterminacymichael-ramsey.html [https://perma.cc/T2X8-Q9VZ] ("And, of course, reading the clause to allow Congress to 'legislate' for the general welfare would make most of the rest of Article I, Section 8 superfluous."); *see also* Natelson, *supra* note 47, at 11. For Madison's argument, see *infra* § III.A.

63 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 204 (2012); *see* Primus, *Reframing Article I*, *supra* note 3, at 2016-17.

64 SCALIA & GARNER, *supra* note 63, at 204-05.

the genus comes first… one is invited to take it at its broadest face value."[65]

4. History and Practice

The history of enumerationism can be seen as a long-term struggle by our constitutional order to shake off Madisonian federalism: the idea that we must lament a disabled national government rather than solve national problems. The compact theory that Madison embraced was never uncontested,[66] but it gained ascendancy in the political branches after Jefferson's electoral triumph in 1800 and in the Supreme Court with the appointment of Roger Taney to the chief justiceship in 1836. Enumerationism, the handmaiden of compact theory, took hold earlier, due to the perception of Federalists — beginning with the ratification campaign — that they could achieve their policy objectives by arguing in the register of enumerationism coupled with "liberal construction" of the enumerated powers. That approach continues to this day. We continue pay lip service to enumerationism in the form of an interpretive parlor game: pin the federal policy onto an enumerated power. While the Supreme Court tended to interpret the enumerated powers of Congress narrowly for a century, from 1837 (the Taney Court's first enumerationist decision[67]) to 1937 (the New Deal turnaround), our constitutional order has generally found workarounds to the purported limits of limited enumerated powers.[68] A strict constructionist could call this a failure of proper constitutional interpretation. But it could instead be seen as constitutional interpretation working itself out to the right result: that it was always the intended meaning of the Constitution to empower Congress to address all national problems. We have achieved this result by reading the Commerce Clause as largely fulfilling the functions of a properly interpreted General Welfare Clause.[69] One result of this interpretive workaround is to transform the question of the appropriateness of

[65] *Id.* at 205. Nor, according to Scalia and Garner, does the ejusdem generis canon apply to the general-specific sequence, because that canon generally maintains that general words *following* an enumeration are limited in scope by a preceding specific enumeration. *Id.*

[66] *See, e.g.*, SENATOR DANIEL WEBSTER, The Constitution Not a Compact Between Sovereign States, Speech Before the Senate (Feb. 16, 1833), *reprinted in* 1 THE PAPERS OF DANIEL WEBSTER 571, 600-01 (Charles M. Wiltse & Alan R. Berolzheimer eds., 1986).

[67] *See* Mayor of New York v. Miln, 36 U.S. 102, 139 (1837) (holding that state police power supersedes federal commerce power).

[68] *See* Schwartz, *A Question Perpetually Arising*, *supra* note 3, at 620-44.

[69] *See id.* at 582-83.

federal versus state regulation into a question of whether something "is commerce," or "substantially affects commerce" or even "is activity" rather than "inactivity." Most federal policies addressing national problems meet this test, but — crucially — some occasionally do not.[70]

The longest-running debate in antebellum constitutional politics involved the federal government's power to promote the nation's economic development. Eventually labeled "the American System," this set of policies included a national bank, protective tariffs, and "internal improvements" — the building or maintenance of roads, canals, bridges, navigable waterways, navigation facilities, and later in the century, railroads and telegraphs. We would see such matters as policy questions today, but in the antebellum era, they were debated frequently as constitutional questions, with opponents invariably arguing that these policies exceeded the limited enumerated powers of Congress.[71] Even as many erstwhile opponents of these measures came to accept the constitutionality, if not the policy, of the national bank and protective tariffs, constitutional objections to internal improvements persisted until after the Civil War.[72]

Internal improvements were generally popular, so why was federal involvement in them so persistently controversial? Why did the three successive Virginia Republican presidents, Jefferson, Madison, and Monroe, advocate internal improvements while opposing their constitutionality — and recommending constitutional amendments to permit them? The best explanation appears to be that a liberal construction extending the enumerated powers to unlisted regulatory matters would open the constitutional door to regulation or abolition of slavery. If the federal government could build a road or a bridge within the borders of a state without its consent, it could exercise other forms of regulatory jurisdiction within the purportedly sovereign territory of that state — so strict constructionists feared.[73]

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[70] *See supra* text accompanying note 35. It might also be argued that declining to wear a face mask or to be vaccinated are forms of "inactivity" that would fall afoul of *NFIB*'s activity/inactivity distinction.

[71] 2 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829, at 258-59 (2001) [hereinafter THE JEFFERSONIANS]; SCHWARTZ, *supra* note 27, at 24, 31-35.

[72] *See generally* 3 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861 (2007).

[73] *See, e.g.*, 41 ANNALS OF CONG. 1306-08 (1824) (statement of John Randolph) (power over internal improvements implies power to abolish slavery); Patrick Henry, Speech at The Virginia Convention (June 24, 1788), *in* 10 DHRC, *supra* note 59, at 1476 ("power to provide for the general defense and welfare" would empower the national government to free all slaves).

Madison initially argued against the constitutionality of federal economic development policies of all kinds.[74] And though he came around to accepting the national Bank and protective tariffs, he never relented in his lifelong opposition to federal internal improvements under the powers granted in the 1787 Constitution. Madison actually endorsed internal improvements, but he maintained that they could be pursued by the federal government only if expressly permitted by a constitutional amendment. This policy context is critical to understanding Madison's focus on the General Welfare Clause.

B. Enumerationism and Compact Theory

A growing body of scholarship has begun to recognize that the replacement of the Articles of Confederation with the Constitution was a step — a major and crucial one, to be sure — in an ongoing debate over the nature of central governmental powers.[75] Until recently, the full nature and extent of the nationalist side of this debate at the founding — "the Federalist Constitution" — has been greatly obscured.[76]

As Professor Jonathan Gienapp has explained, both sides in the founding era debates over reforming the Articles of Confederation and ratifying the Constitution recognized "that there was a tight, inextricable relationship between the nature of the federal union and the character and scope of governmental power."[77] The Articles of Confederation had been undergirded by a theory of a "compact" or "treaty" of sovereign states: a "firm league of friendship" among the signatory states, in the Articles' own language. Nationalist constitutionalists who pushed for the Constitutional Convention and played a dominant role at the Philadelphia Convention believed that the Constitution outlined a government for a true nation, "established by a national people who had previously formed a national polity."[78]

Madison understood this distinction clearly, and he was an early adopter (and perhaps a leading expositor) of the view that the new

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[74] *See infra* text accompanying notes 204, 220, 240.

[75] For an outstanding analysis of the interpretive implications of this point, and a comprehensive review of the literature, see Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783 (2021) [hereinafter *In Search of Nationhood*].

[76] For examples of this scholarship, see Symposium, The Federalist Constitution, 89 FORDHAM L. REV. 1669 (2021); see also William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021).

[77] Gienapp, *In Search of Nationhood*, *supra* note 75, at 1787.

[78] *Id.* at 1793.

Constitution had to be ratified by the people rather than the state legislatures. Ratification of the Articles of Confederation by state legislatures, Madison had argued throughout 1787, left it unclear whether acts of the Confederation Congress took precedence over conflicting state laws. Furthermore, the Confederation under the Articles made the "Union of states" a mere "league of sovereign powers, and not … one sovereign power."[79] As a corollary, the Articles would be undergirded by "the doctrine of compacts, that a breach of any of the articles of the confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they chuse to exert it, of dissolving the Union altogether."[80] Ratification by the people would solve these problems: the federal Constitution and laws would be supreme over state law and the union would not be subject to dissolution by state legislatures. As Madison explained in a letter to Jefferson in March 1787, "the foundation of the new system" would have to be placed on "a ratification by the people themselves of the several States as will render it clearly paramount to their Legislative authorities."[81]

"The doctrine of compacts" — compact theory — held further implications for constitutional interpretation. After ratification, advocates of strict construction and states' rights, including many erstwhile Anti-Federalist opponents of ratification, argued that the Constitution was a compact among sovereign states. A compact was inherently limiting because "states could only delegate and retain those powers they could competently exercise."[82] Moreover, the powers delegated by the states in the compact would be narrowly construed: compacts between sovereigns, whether treaties or confederations, were interpreted in the late eighteenth century under a well-established private-law/international law paradigm. In contrast to domestic public laws, which were interpreted liberally in light of their purposes, compacts, treaties, and private laws were to be narrowly construed, with heavy emphasis on textual limitations and a strong presumption against implied waivers of sovereign rights.[83] This analysis explains why

[79] JAMES MADISON, *Vices of the Political System of the United States* [hereinafter *Vices*], *in* 2 WJM, *supra* note 11, at 365; *see infra* note 86.

[80] *Id.*; *see also* THE FEDERALIST NO. 44, *supra* note 26, at 281 (James Madison).

[81] Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 2 WJM, *supra* note 11, at 326.

[82] Gienapp, *In Search of Nationhood*, *supra* note 75, at 1800.

[83] This forgotten public law/private law interpretive paradigm has been insightfully recovered by Professor Farah Peterson. *See* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 16-25, 29-31 (2020). The closely related international law paradigm is

compact theory was understood to lead naturally to strict construction of federal powers, and an insistence that the enumeration be viewed as exhaustive and limiting. Compact theorists, in essence, argued that the Constitution should be viewed through a private-law/international law lens, in the same manner as international treaties.

In contrast, nationalist constitution theory implied that "the national government would have all of the power entitled to a national government established by a national people."[84] Such a government would be empowered to solve all national problems. Enumerationists "recognized that limiting the scope of the federal government's power required challenging nationalists' account of federal union."[85]

The Federalist Framers, especially Madison, rejected compact theory by maintaining that ratification could not be effectuated by state legislatures or governments.[86] Under the Articles, the states were holders of sovereignty pursuant to their republican state constitutions and exercised the sovereign power of entering into the Articles' "league of friendship." But since, according to republican theory, the people are the true sovereigns, the state ratifying conventions that the proposed Constitution insisted upon in Article VII were not "surrendering" pieces of state sovereignty; rather, they were reapportioning sovereignty ab

also explained in Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 842-49, 852-57 (2020).

[84] Gienapp, *In Search of Nationhood*, *supra* note 75, at 1801.

[85] *Id.* at 1810.

[86] *See* MADISON, *Vices*, *supra* note 79, at 365 (identifying "want of ratification by the people" as one of the deficiencies of the Articles of Confederation); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911) [hereinafter FARRAND] (statement of Edmund Randolph) (ratification by the states rather than the people meant that the Articles of Confederation were "not even paramount to the state constitutions"); *id.* at 122-23 (statement of James Madison) (arguing that it was "indispensable that the new Constitution should be ratified . . . by the supreme authority of the people themselves"); *id.* at 283 (statement of Alexander Hamilton) (even if "the States can not ratify a plan not within the purview of the article[s] of Confederation," "the people at large" within the states can do so (emphasis omitted)); *id.* at 317 (statement of James Madison) (arguing that New Jersey plan was defective because "[i]ts ratification was not to be by the people at large, but by the Legislatures," so that "[i]t could not therefore render the acts of Cong[res]s . . . legally paramount to the Acts of the States" (emphasis omitted)); 2 *id.* at 88 (statement of George Mason) (arguing that the state legislatures "have no power to ratify" the Constitution because "[t]hey are the mere creatures of the State Constitutions, and cannot be greater than their creators"); *id.* at 665 ("Resolved, That the preceding Constitution . . . should afterwards be submitted to a Convention of Delegates, chosen in each State . . . ."); *see also* U.S. CONST. art. VII ("The Ratification of the *Conventions* of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same." (emphasis added)).

initio between their (perhaps) formerly sovereign state governments and their newly constituted national government — or so the nationalists conceived. This point receives some confirmation in the Philadelphia Convention's recommendation — ultimately adhered to — that the Confederation Congress act as a mere pass-through, forwarding the proposed Constitution to the state ratifying conventions rather than approving, disapproving, or amending it.[87] The implication was that the state-sovereignty-based Confederation Congress was not part of constitution-making at this crucial stage. Further confirmation can be seen in Convention-president Washington's cover letter to Congress, indicating that the states' "rights of independent sovereignty" were merely an aspect of "individual… rights which must be surrendered" to form the new national Constitution.[88] Under this nationalist theory of the Constitution, state sovereignty did not carry forward by implication; rather, states would have whatever sovereignty was afforded them by the people's new Constitution.[89]

Yet the Constitution was and is not entirely unambiguous. Article VII provides that "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution *between the states so ratifying* the same."[90] One could theorize that separate state conventions were necessary to undo the sovereignty of each respective state and unwind the Articles of Confederation's interstate compact. But the state convention language and procedure opened the door to a compact theory interpretation. Chief Justice Marshall, in *McCulloch v. Maryland*, acknowledged "It is true, [the people] assembled in their several States," adding, "and where else should they have assembled?"[91] Marshall's rhetorical question suggests that ratification by state conventions was an administrative convenience or perhaps a merely practical concession to political realities. This explanation is less than thoroughly convincing that state-by-state ratification was a purely national act, further reflecting the ambiguity. But in *McCulloch* itself there was no doubt that the Court rejected compact theory: the states,

[87] *See* 2 FARRAND, *supra* note 86, at 665 ("resolv[ing]" that the Constitution "be laid before the United States in Congress assembled, and . . . that it should afterwards be submitted to a Convention of Delegates, chosen in each state by the People thereof").

[88] *Id.* at 666 (Letter from George Washington to Congress (Sept. 17, 1787)).

[89] For this reason, Bellia and Clark are mistaken in supposing that international law principles applicable to treaties applied to the states after ratification. Bellia and Clark, in essence, seek to revive compact theory under the rubric of international law. *See* Bellia & Clark, *supra* note 83, *passim*.

[90] U.S. CONST. art. VII (emphasis added).

[91] McCulloch v. Maryland, 17 U.S. 316, 403 (1819).

though "sovereign" in a limited sense, were nevertheless "subordinate governments."[92]

Still, though the point is somewhat ambiguous, the nationalist reading is the stronger one. As Madison explained, sovereign states could withdraw from a compact based on the state's own view that another member had breached the compact; the "more perfect union" for which the Constitution was "ordained and established" is best understood as overcoming this defect. And of course, the ringing first words of the Constitution, demonstrate that this more perfect union was established by "*We the People of the United States*" — a compelling statement of the formation of a national constitution rather than a compact. Anti-Federalists saw this clearly.[93] Ratification opponent Samuel Adams proclaimed, "as I enter the building, I stumble at the Threshold. I meet with a National Government, instead of a federal Union of sovereign states."[94]

C. Five Historical Interpretations of the General Welfare Clause

Madison is associated with an interpretation of the General Welfare Clause as a narrowly construed spending power. The received wisdom tells us that the (so-called) Madisonian interpretation maintains that the General Welfare Clause enumerates a power of Congress to spend federal money within the confines of its enumerated powers. The so-called Hamiltonian interpretation holds that the General Welfare Clause authorizes Congress to spend on any national purpose, so long as the spending is structured to permit its recipients to refuse the money. That right of refusal makes the spending non-coercive and therefore prevents spending from crossing the line into regulation that could breach the limits of enumerated powers.[95] This interpretation, though attributed to Hamilton, is not exactly his: the proviso that the spending be "non-

[92] *Id.* at 400 (Maryland is a "sovereign state"). *But see id.* at 427 (states are "subordinate governments").

[93] *See* Gienapp, *In Search of Nationhood*, *supra* note 75, at 1801-04.

[94] 4 DHRC, supra note 59, at 349 (letter from Samuel Adams to Richard Henry Lee); *accord* 2 *id.* at 407-08 (Pa. Ratifying Convention, Nov. 28, 1787) (statement of John Smilie) (the Preamble "explicitly proposes the formation of a new Constitution upon the original authority of the people and not an association of states upon the authority of their respective governments"); 6 *id.* at 1397 (Mass. Convention Debates, Feb. 1, 1788) (statement of Samuel Nasson) ("If [the Preamble] does not go to an annihilation of the state governments, and to a perfect consolidation of the whole union, I do not know what does.").

[95] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576-78 (2012).

coercive" was grafted onto Hamilton's actual interpretation by the Supreme Court in *United States v. Butler* (1936).[96]

Only the "Madisonian" and "Hamiltonian" interpretations were seriously considered when the Supreme Court settled the interpretation of the General Welfare Clause in *Butler*. The Court assumed that "to provide for the common defense and general welfare" meant to spend non-coercively under either interpretation.[97] The spending power thus could not directly regulate, but only offer regulated parties the option to accept federal money with conditions. The difference between Madison's and Hamilton's purported views, as the *Butler* Court saw it, was that Madison argued that Congress could not spend on matters outside the enumerated powers. Hamilton, in contrast, argued that Congress could spend on anything that served the national interest. The *Butler* Court adopted the Hamiltonian view.[98]

This conventional wisdom is shaped by the tendency to view constitutional history through a Jefferson/Madison-versus-Hamilton lens. This Manichean reductivism misleads us to believe that only two interpretations of the General Welfare Clause are possible, when in fact the clause can be parsed in five ways. In addition to the "Madisonian" and "Hamiltonian" interpretations, there are three others.

Taxing Purpose. Strict constructionists insisted that the General Welfare Clause conferred no power, but instead limited the federal taxing power to specified federal purposes. First argued by Constitutional Convention delegate Roger Sherman, this interpretation was embraced by Madison in Federalist 41 and later in his House speech opposing the bill to charter the First Bank of the United States. Thomas Jefferson picked up this interpretation in his 1791 memorandum urging President Washington to veto the Bank bill. "'To lay taxes to provide for the general welfare of the U.S.,'" Jefferson argued, "is to say 'to lay taxes *for the purpose* of providing for the general welfare'." Congress "are not to lay taxes ad libitum *for any purpose they please*; but only to *pay the debts or provide for the welfare of the Union*. In like manner they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose."[99] This interpretation does not expressly grant an affirmative spending power, and places rhetorical emphasis on limitations on the taxing power. Viewed in its narrowest form, the

[96] United States v. Butler, 297 U.S. 1, 71-74 (1936).

[97] *See id.*

[98] *Id.* at 65-66.

[99] Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 277 (Julian P. Boyd ed., Princeton Univ. Press 1974) (emphasis in original).

Jeffersonian interpretation offers arguments against the constitutionality of virtually any taxes on the ground that they favor certain interests or parts of the country.[100] But it arguably implies a spending power, insofar as the taxes are raised to cover "provi[sions]" of one sort or another. If "general welfare" is deemed a placeholder for the subject matters of the other enumerated powers, the "taxing purpose" interpretation of the General Welfare Clause converges with the Madisonian interpretation. At its broadest, one could read the taxing purpose clause as implying a spending power according to Hamilton's interpretation of the general welfare.[101]

Coercive Spending. Hamilton did not add the limitation attributed to him that federal spending in the national interest must be "non-coercive." Rather, Hamilton argued that the power to spend money is "plenary and indefinite" so long as "the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."[102] Significantly, Madison never believed that spending could be non-coercive: he saw no distinction between spending and regulation.[103] The idea of non-coercive spending seems to have been invented during the presidency of James Monroe, after 1817, as a compromise between supporters and opponents of federal spending on infrastructure projects ("internal improvements").[104]

National Legislative Power. At the Constitutional Convention, James Wilson, Gouverneur Morris and others probably envisioned the General Welfare Clause as an express (if ambiguous) authorization to legislate

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[100] *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 877-78.

[101] The *Butler* Court seemed, momentarily, to take this view. *See Butler*, 297 U.S. at 65 ("The necessary implication from the terms of [Art. I, § 8, cl. 1] is that the public funds may be appropriated 'to provide for the general welfare of the United States.'"). But immediately thereafter, "[t]he conclusion must be that [the words 'provide for the . . . general welfare'] were intended to limit and define *the granted power to raise and to expend money*." *Id.* (emphasis added).

[102] HAMILTON, *Report on Manufactures*, *supra* note 25, at 303. Hamilton conceded that the spending power "would not carry a power to do any other thing, not authorised in the constitution, either expressly or by fair implication." *Id.* at 304. But this concession was ambiguous: Hamilton further suggested that the General Welfare Clause was meant to use a spending power as a gap-filler between the enumerated powers and national needs: "The terms '*general Welfare*' were doubtless intended to signify more than was expressed or imported in those which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision." *Id.* at 303.

[103] *See infra* § III.B.3.

[104] *See infra* text accompanying notes 247–250.

on all national problems.[105] Anti-Federalist opponents of ratification read Clause 1 this way, or even more broadly.[106]

After ratification, leading Federalist members of Congress advanced this interpretation, relying on the General Welfare Clause as supplying constitutional authority to charter the Bank of the United States, to authorize the Alien and Sedition Acts, and to support various internal improvements projects.[107] Associated with the Federalist party, this interpretation fell dramatically out of favor with the implosion of that party and the dominance of the Jeffersonian Republicans. But as late as 1826, no less an authority than Chancellor James Kent asserted in his famous *Commentaries on the Constitution*, that

> The powers of Congress extend generally to all subjects of a national nature. It will be sufficient to observe generally that Congress is authorized to provide for the common defense and general welfare, and for that purpose, among other express grants, they are authorized to lay and collect taxes…; to borrow money…; to regulate commerce…; and to give full efficacy to all the powers contained in the Constitution.[108]

It is difficult to read this passage as an affirmation of enumerationism. While it might be read to imply that Congress's enumerated powers happen by good fortune to cover "all subjects of a national nature," the plainer reading is that Congress holds a power to legislate for the general welfare, for which the enumerated powers are the primary but non-exclusive means. The relationship of the enumerated powers to the general welfare power, in this view, is analogous to the relationship between the power to regulate commerce and the non-exhaustive enumeration of subsidiary commerce-regulating powers, such as

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105 *See infra* Part II.

106 *See supra* notes 59–60 and accompanying text.

107 *See, e.g.*, 5 ANNALS OF CONG. 1959 (1798) (statement of Harrison Gray Otis) ("If Congress have not the power of restraining seditious persons, it is extremely clear they have not the power which the Constitution says they have, of providing for the common defence and general welfare of the Union."); 3 *id.* at 386 (1793) (statement of James Madison) (decrying the claims of "some gentlemen, that Congress have authority . . . [to] do anything which they may think conducive to the general welfare"); 2 *id.* at 1926 (1791) (statement of Elias Boudinot) ("[W]ho so proper as the Legislature of the whole Union to exercise such a power for the general welfare? It has also been said that this power is a mere conveniency for the purpose of fiscal transactions, but not necessary to attain the ends proposed in the Constitution. This is denied, and at best is mere matter of opinion, and must be left to the discretion of the Legislature to determine.").

108 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 236-37 (Blackstone Publishing Co. 1889).

regulating the value of current coin, standardizing weights and measures, punishing counterfeiting, and regulating bankruptcy. Kent was a Federalist, and this Federalist interpretation of the General Welfare Clause was pronounced dead by Joseph Story just a few years later, in his influential *Commentaries on the Constitution* (1833).[109]

II. MADISON AND THE DRAFTING OF THE GENERAL WELFARE CLAUSE

The origins of the General Welfare Clause show why Madison was so worried about it. As a participant in the crafting of this (as we will see) compromise language, Madison well knew that it was intended to leave space for what I call the "general welfare interpretation" — that it confers a power to legislate on all national problems.

How did the General Welfare Clause find its way into the Constitution? The answer requires resort to some plausible inferences, given the lack of direct evidence in the Convention records. As I have argued elsewhere, the best explanation is that the General Welfare Clause wound up in Article I, section 8, clause 1 as a compromise between strong advocates of national power who favored a general power to legislate on all national matters, and those who favored limited enumerated powers.[110]

A first draft of the Constitution was reported out by the Committee of Detail on August 6. Between that day and September 8, the Convention delegates used the printed Committee of Detail broadside as a working draft, debating its provisions and proposing amendments to it. The General Welfare Clause first surfaced in an August 22 follow-up proposal from the Committee of Detail to add a sweeping general welfare power to the August 6 draft version of the Necessary and Proper Clause. The proposed amendment is indicated in bold:

> And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof;[111] **and to provide, as may become necessary, from time to time, for the well managing and securing the common property and general**

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109 STORY, *supra* note 45, §§ 463-64, at 447-49.

110 Schwartz, *General Welfare Clause*, *supra* note 7, at 917-25.

111 2 FARRAND, *supra* note 86, at 182. This language up to the semicolon is the near final version of the Necessary and Proper Clause. In the final adopted Constitution, the initial "And" was moved to the end of the previous clause, the word "that" was changed to "which," the commas before and after "by this Constitution" were removed, and the final semicolon replaced by a period.

> **interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be incompetent.**[112]

Hiding in plain sight for 200 years in the Convention Journals, this extraordinary proposal has been almost completely ignored by historians and legal scholars.[113] The proposal was almost certainly the work of Pennsylvania delegate James Wilson, a key member of the Constitutional Convention who had far more influence on the shaping of the Constitution than did Madison.[114] Wilson had previously argued that similar language in the Articles of Confederation conveyed broad implied powers to legislate on all national matters.[115] The only two historians even to notice this proposal — Charles Warren and Madison biographer Irving Brant — agree that its plain import was to confer such broad general legislative authority on Congress. Both simply assumed that the proposal was rejected, because it was never directly voted on.[116]

In fact, the August 22 proposal was not rejected, but approved, albeit with significant modifications that rendered its meaning ambiguous. On August 31, this proposal along with numerous others was referred to a new committee, assigned to consider "such parts of the Constitution as have been postponed, and such parts of [committee proposals] which have not been acted upon."[117] By this point in the Convention, most of the real work was being done off the Convention floor in committees;

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[112] *Id.* at 367.

[113] The journals were published in 1819, twenty-one years before the first publication of Madison's Convention notes. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 229, 236-37 (2015). The inattention of scholars may be due, in part, to the inattention given this proposal by Madison himself in his Convention notes. As Mary Bilder has discovered, this date, August 22, marks an "unconformity" in which Madison broke off from his practice of keeping contemporaneous notes, and filled details in later — sometimes years later. *Id.* at 142-47. Madison's notes do not reproduce the August 22 report, but instead mark a placeholder: a pointing finger with the interlineation "Here insert — the Report from the Journal of the Convention of this date." FARRAND, *supra* note 86, at 375 (alteration to the original). Since those who read *Farrand's Records* may gloss over the comparatively dry Journal in favor of the more colorful Madison's notes, we may have a partial explanation of why this extraordinary language, buried in the middle of the Committee of Detail's otherwise dull report, has been missed.

[114] *See* Schwartz & Mikhail, *supra* note 1, at 2041.

[115] *See* JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA 10 (1785).

[116] *See* IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, at 132-39 (Bobbs-Merrill Co. 1950); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 600 (1928).

[117] FARRAND, *supra* note 86, at 481.

regrettably, for our interest in this history, our only knowledge of virtually all those committee deliberations comes from the inferences we can draw from the reports they made to the full Convention.[118] Now known as the Committee on Postponed Parts, this committee included such Convention luminaries as Madison, Roger Sherman, Gouverneur Morris, Rufus King, and John Dickinson. The Committee on Postponed Parts reported out its revision of the August 22 proposal on September 4.[119] This happened to be the same report in which the Committee introduced its suggestion for the electoral college. The great notoriety of that latter proposal probably explains how its creation of the General Welfare Clause has flown under the historical radar.[120]

In writing the virtually final language of Clause 1, the Committee on Postponed Parts crafted an intricate three-part compromise. Using the vague phrase "to pay the debts," the Clause papered over a major disagreement about whether the new national government would be obligated or merely authorized to assume the states' Revolutionary War debts. (In his retirement years, Madison confirmed that "to pay the debts" was a "provision for the debts of the Revolution."[121]) The far-reaching general welfare language in the August 22 addition to the Necessary and Proper Clause was watered down and moved into Clause 1. The General Welfare Clause was written in such a way as to permit states' rights advocate Roger Sherman (and, later, Thomas Jefferson) to claim that it was not a grant of power at all, but a limitation on the taxing power — that taxes could only be raised if earmarked for "the common defense [or] general welfare."[122] That this was to placate Sherman can be inferred from the fact that on August 25, Sherman had proposed to amend the Taxing Clause to add "for the payment of said debts and for the defraying the expences that shall be incurred for the

[118] The sole exception is the recovery of Committee of Detail papers of Edmund Randolph and James Wilson which provide information about that Committee's famous first draft of the Constitution in its August 6 report to the Convention. FARRAND, *supra* note 86, at 129-75; *see* William Ewald, *The Committee of Detail*, 28 CONST. COMMENTARY 197, 216 (2012).

[119] FARRAND, *supra* note 86, at 493 ("The Legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States.").

[120] *See id.* at 493-94; Schwartz, *General Welfare Clause*, *supra* note 7, at 912-13.

[121] Madison to Stevenson, *supra* note 11, at 417-18.

[122] 3 FARRAND, *supra* note 86, at 99-100 (Roger Sherman and Oliver Ellsworth to the Governor of Connecticut) ("The objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare, and for payment of the debts incurred for these purposes."); JEFFERSON, *supra* note 99, at 277 (Jefferson's advocacy of this interpretation).

common defense and general welfare" after "to lay and collect taxes, duties, imposts, and excises."[123] Sherman's proposed taxing-purpose proviso had been voted down by ten states to one, and technically therefore was not a "postponed matter" that had not been acted upon.[124] But Sherman was known to be a wily and stubborn legislative dealer, and it is probable that his maneuvering explains the restoration of language that could be construed as a purpose-limitation on the taxing power.[125]

After adoption of the now familiar version of Clause 1 on September 4, both sides claimed victory — a natural outcome of strategically ambiguous compromise language. Gouverneur Morris claimed that the Clause empowered Congress to legislate for the general welfare, whereas Roger Sherman debriefed the governor of Connecticut that the Clause merely specified the purposes of federal taxation.[126] In other words, the Committee on Postponed Parts was successful in crafting strategically ambiguous language — though it would seem that the more natural reading favored Morris's nationalist view, as Madison later conceded.

It is extremely likely that Madison was significantly involved in this compromise. The General Welfare Clause was the product of three key committees: the Committee of Detail, the Committee on Postponed Parts and the committee which wrote the Constitution's final draft, the Committee of Style. Madison was a member of the latter two of these three committees. As historian and Madison scholar Mary Bilder characterized him, Madison "had a talent for working out semantic compromises that sidestepped theoretical disputes" and "was increasingly adept" during the latter days of the Convention "at resolving a debate by suggesting a textual change[.]"[127] It thus seems highly probable that Madison was involved in hammering out the revised language. It is even possible that Madison was its primary draftsman.

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[123] 2 FARRAND, *supra* note 86, at 414.

[124] *Id.*

[125] *See* 3 FARRAND, *supra* note 86, at 33-34, 88-89 (character sketches describing Sherman as "cunning" and "extremely artful"); Schwartz, *General Welfare Clause*, *supra* note 7, at 905.

[126] 2 FARRAND, *supra* note 86, at 529 (Morris's conversation with James McHenry); 3 *id.* at 99 (Sherman's letter to governor of Connecticut); Schwartz, *General Welfare Clause*, *supra* note 7, at 926-27.

[127] BILDER, *supra* note 113, at 127-28.

III. MADISON'S WAR

Whatever Madison's views may have been on the General Welfare Clause when it was first drafted, he was intent throughout his post-Constitutional Convention life to render the Clause "harmless" so that it would be understood to grant no powers. With that goal, Madison first embraced Roger Sherman's "taxing purpose" interpretation, and then in 1800 and thereafter, shifted to the "Madisonian" interpretation. Madison's writings advancing interpretations of the General Welfare Clause never reflected a dispassionate inquiry into the Clause's origins, its ambiguity, or its originally intended meaning. Nor did Madison ever share his firsthand knowledge of how the General Welfare Clause came to be. To the end, Madison's interpretations of the General Welfare Clause were partisan efforts, written in the context of specific debates in constitutional politics, aimed at neutralizing the General Welfare Clause.

A. Enumerationism in Madison's Federalist *Essays*

Madison staked out the main lines of his attack on the General Welfare Clause in *Federalist* 41. Before getting into those details, however, it is important to place *Federalist* 41 in the broader context of Madison's discussion of federalism across several of his *Federalist* essays. The *Federalist Papers* tend to be viewed as strong persuasive authority, or even, at times, conclusive evidence of the Constitution's original meaning.[128] Yet it bears repeating that The *Federalist* essays were not written as dispassionate and objective interpretations of constitutional meaning. They were campaign literature, written by partisans in the intense and often bitter struggle over ratification. They were aimed primarily at New York and secondarily at Virginia, whose ratification campaigns would make or break the constitutional enterprise and whose votes were expected to be (and proved in fact to be) very close.[129] *The Federalist* should thus be read with cautious attention to its particular partisan lean. Since "Federalists" and hard-

[128] "Thousands of articles and cases have cited the Federalist Papers to support claims about the original meaning of the Constitution." Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 840 (2007).

[129] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 320, 401 (2011). This is overlooked with surprising frequency. Professor Maggs, for example, lists nine "potential grounds for impeaching" the Federalist Papers as accurate statements of the Constitution's original meaning, yet omits the possibility that the authors would skew their interpretations to persuade an audience that was not bullish on national power. *See* Maggs, *supra* note 128, at 825-40.

core Anti-Federalists had already made up their minds, the audience of the *Federalist* essays comprised the Federalist-curious: those skeptical about a strong central government but open to persuasion. The best and most obvious way to persuade that audience was to play down the strong nationalist interpretations embedded, albeit often ambiguously, throughout the proposed Constitution. This was the explicit campaign strategy of the pro-ratification Federalists.[130] A key element of this campaign strategy was to emphasize that the proposed federal government would be limited to its enumerated powers.[131]

To his everlasting credit, Madison was a team player in the ratification debates. Madison had lost on his two most important issues: proportional representation in the Senate and the national legislative veto. He was convinced that the Constitution was doomed to failure because of these omissions. Yet Madison nevertheless made great personal effort to win ratification.[132] His contributions to *The Federalist Papers* must be understood in this light, for he was following the Federalist campaign playbook by playing down the nationalism inherent in the proposed Constitution. Madison's interpretations of limited enumerated powers and their relationship to state sovereignty may or may not have reflected his sincerely held interpretive preferences when he wrote his *Federalist* essays in the fall and winter of 1787-88. But they cannot be viewed as objective constitutional interpretation, because they were part and parcel of an effort by Madison to put the Constitution in a false light, by characterizing the Constitution as a modest alteration of the Articles of Confederation that maintained the Articles' fundamental principles — assertions best understood as propaganda.

1. Exceedingly Limited Enumerated Powers

Madison made several assertions of enumerationism in his *Federalist* essays. The two most notable are in *Federalist* 39 that the federal government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"[133]; and the famous aphorism from *Federalist* 45 that "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State

130 *See* MAIER, *supra* note 129, at 56, 260.

131 *See id.*

132 *See* Schwartz & Mikhail, *supra* note 1, at 2053-54, 2072-74.

133 THE FEDERALIST NO. 39, *supra* note 26, at 245 (James Madison).

governments are numerous and indefinite."[134] Though typically taken at face value, these statements were made in a broader context aimed at exaggerating the similarities between the proposed Constitution and the Articles of Confederation. The latter provided that "the United States in Congress assembled" — a formula indicating an ambassadorial assemblage of sovereigns rather than a true legislature — held only those powers "expressly delegated."[135]

In *Federalist* 40, Madison addressed the charge that Constitutional Convention's proposal of a wholly new scheme of government exceeded its authorization, which had been to propose alterations and new provisions to amend the Articles of Confederation to make the government "adequate to the exigencies … of the union."[136] Madison sought to rebut this charge by arguing that "the FUNDAMENTAL PRINCIPLES" of the Articles of Confederation had "not … been varied."[137]

> Do these principles, in fine, require that the powers of the general government should be limited, and that, beyond this limit, the States should be left in possession of their sovereignty and independence? We have seen that in the new government, as in the old, the general powers are limited; and that the States,

[134] THE FEDERALIST NO. 45, *supra* note 26, at 292 (James Madison), *quoted in, for example* United States v. Lopez, 514 U.S. 549, 552 (1995); Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991).

[135] ARTICLES OF CONFEDERATION of 1781, art. II; *see* JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA, *reprinted in* 13 DHRC, *supra* note 59, at 86 (describing the Confederation Congress as "not a legislative assembly, nor a representative assembly, but a diplomatic assembly" comprising ambassadors of sovereign states).

[136] *See* THE FEDERALIST NO. 40, *supra* note 26, at 248-49 (James Madison). The Confederation Congress approved the constitution-revision process with a resolution recommending that the states appoint delegates to a convention to propose amendments to the Articles of Confederation. Each state credentialed its delegates in substantially the same terms: to meet "for the sole and express purpose revising the articles of Confederation" with "such alterations and provisions . . . as shall . . . render the federal Constitution adequate to the exigencies of government and the preservation of the Union." *See* 3 FARRAND, *supra* note 86, at 14, 559-63 (Virginia delegates' authorization). This phrasing was repeated in substance in all twelve authorizing resolutions from the several state legislatures (Rhode Island, excepted). *See id.* at 559-86. These resolutions reflected the state legislatures' expectation that the Convention would merely propose amendments to the Articles, rather than replace them. *See, e.g.*, BILDER, *supra* note 113, at 52; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 16-17 (2003); MICHAEL J. KLARMAN, THE FRAMERS COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 140-44 (2016).

[137] THE FEDERALIST NO. 40, *supra* note 26, at 249 (James Madison).

> in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.
>
> The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation.[138]

After considering the enumerated powers severally in *Federalist* 41 through 44, Madison turned in *Federalist* 45 to the question "whether the whole mass of [the enumerated powers] will be dangerous to the portion of authority left in the several States."[139] Madison's famous characterization of federal powers as "few and defined" in Federalist 45 is worth closer scrutiny than it is normally given. For starters, the Constitution enumerates close to 30 powers of Congress, in addition to numerous executive and judicial powers; this stretches the definition of "few."[140] Madison also stretches the definition of "defined." Even assuming arguendo that the General Welfare Clause is not a general legislative authorization, the Necessary and Proper Clause grants powers that Madison himself recognized could not be defined in advance.[141] The existence of such implied (i.e., unenumerated) powers belies Madison's claim in *Federalist* 40 that states retain "their sovereignty and independent jurisdiction" "in all unenumerated cases."[142]

The full quotation of the famous aphorism in *Federalist* 45 is this:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.
>
> The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the

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138 *Id.* at 250-51.

139 THE FEDERALIST NO. 45, *supra* note 26, at 288 (James Madison).

140 I thank Richard Primus for this observation about Madison's use of "few." In addition to the eighteen congressional powers enumerated in Article I section 8, and the nine-to-eleven scattered through other provisions, see THE FEDERALIST NO. 44, *supra* note 26, at 285 (James Madison), and accompanying text, the "government" of the United States includes powers granted to the executive and judicial branches.

141 *See id.* (implied powers "must always necessarily vary with that object, and be often properly varied whilst the object remains the same").

142 THE FEDERALIST NO. 40, *supra* note 26, at 251 (James Madison).

> lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government.[143]

Here, Madison heavily discounts the Constitution's grants of power over domestic affairs. The notion that Constitution empowered the federal government to direct national defense and foreign relations while keeping its role in domestic affairs to a bare minimum was a sharply contested interpretation that would later be advanced by Jefferson and erstwhile Anti-Federalists like James Monroe[144]; it was hardly "the" meaning of the Constitution.[145] Indeed, it was manifestly false. The bankruptcy and coinage powers, coupled with denial of states' power to issue paper money, for example, constituted a huge shift in power from the states to the federal government over debtors' rights and the money supply — arguably the most contentious domestic issue of the day.[146] The power to regulate interstate commerce could be expected to have significant impact on domestic policy. The power to create lower federal courts would also extend considerable federal control over peacetime domestic affairs, as Anti-Federalists recognized.[147]

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[143] THE FEDERALIST NO. 45, *supra* note 26, at 292-93 (James Madison).

[144] *See, e.g.*, Thomas Jefferson, Inaugural Address (Mar. 4, 1801), *in* 1 MPP, *supra* note 23, at 311 ("[T]he State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."); James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (arguing that Commerce Clause authorized Congress to regulate interstate commerce only incidentally to regulating foreign commerce), *in* 2 MPP, *supra* note 23, at 161-62.

[145] Even the power of taxation, though granted in broad terms, would be exercised in limited fashion: as the above quote shows, Madison assured his audience that the taxing power "will, for the most part, be connected" with the regulation of foreign commerce — i.e., import taxes — whereas "the power of collecting internal taxes" would probably "not be resorted to, except for supplemental purposes of revenue." THE FEDERALIST NO. 45, *supra* note 26, at 292 (James Madison).

[146] U.S. CONST. art. I, § 8, cl. 4-5; *see, e.g.*, KLARMAN, *supra* note 136, at 77, 161; George William Van Cleve, *The Anti-Federalists' Toughest Challenge: Paper Money, Debt Relief, and the Ratification of the Constitution*, 34 J. EARLY REPUBLIC 529, 545-47 (2014).

[147] U.S. CONST. art. I, § 8, cl. 9; *see, e.g.*, AM. HERALD (BOSTON) (Jan. 7, 1788), *reprinted in* 5 DHRC, *supra* note 59, at 638 (the judicial power "implicitly extended the legislative powers of Congress to all the objects within the judicial circle. — Hence arose

Madison did not stop there, but went on somewhat preposterously to liken the Constitution to the Articles of Confederation.

> If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.[148]

This statement has a sort of sneaky-lawyer's validity, based on a dubious distinction between "enlarging" powers (presumably in their substantive coverage) and making them "more effectual." But Madison's characterization is far more false than true. For starters, the power over commerce was a huge addition, which Madison could only try to finesse rather than minimize, by saying that "few oppose[d]" it. Second, the Constitution in fact added several other new powers, expanded existing powers, and withdrew various state powers. The money and debt powers, and the power to create lower federal courts — all new powers — have already been mentioned. The militia clauses gave Congress new and significant control over an institution formerly under plenary state control.[149] Most importantly, making the powers "more effectual" was the difference that made all the difference. The Constitution shifted the basis of government from a system of toothless demands on states to raise taxes and armies on Congress's behalf to a system based on direct regulatory power over the people. This, as Madison himself said in later years, was the way in which the Constitution corrected the "radical infirmity" of the Articles of Confederation.[150]

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a power of legislation for the mode of inheritances, for limitation of actions, and for the government of all property. . . ."); AGRIPPA XII, MASS. GAZETTE (BOSTON) (Jan. 15, 1788) (objecting to judicial power over "all kinds of civil causes"), *reprinted in* 5 DHRC, *supra* note 59, at 722; Samuel Adams, *supra* note 60, at 854-55 (objecting to Constitution's grant of new "authority to erect the most formidable judicial tribunals").

148 THE FEDERALIST NO. 45, *supra* note 26, at 293 (James Madison).

149 *See* U.S. CONST. art. I, § 8, cl. 15-16.

150 JAMES MADISON, *Origin of the Constitutional Convention* (Dec. 1835), *in* 2 WJM, *supra* note 11, at 395.

Madison's effort in *Federalist* 45 to minimize the Constitution's profound changes from the Articles as a mere procedural improvement was neither "accurate" nor "candid." Such dissimulation, so clearly designed to adhere to the ratification campaign strategy, ought not be taken as objective and authoritative constitutional interpretation. Madison's "few and defined" claim in the same essay is, to be sure, more plausible. Yet there is a quality of cherry-picking involved in treating the "few and defined" quote as objective authority when it is part and parcel of the same polemic as the claim that the Constitution does not enlarge the powers of the Confederation.

Madison's polemical effort to shoehorn the Constitution into some sort of resemblance to the Articles of Confederation can also be seen in his crabbed characterization of the extent of enumerated powers. In *Federalist* 41, Madison opens a discussion of whether any of the enumerated powers are "unnecessary or improper."[151] To "review the several powers," Madison chunks them into six categories so "that this [review] may be the more conveniently done." The categories

> relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.[152]

There are two subtle but significant tendentious moves in this passage to promote enumerationism. Rather than identifying the objects of the Constitution directly from its text, where they are named in the Preamble, Madison infers the objects from the enumerated powers. This at once assumes that the federal government's powers are limited to those enumerated and imposes a more limited set of objects than might otherwise be associated with the Constitution — certainly, more limited than those in the Preamble, which of course includes "to promote the general welfare." Moreover, it reverses Madison's own dictum in *Federalist* 44, that "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized[.]"[153] Under that maxim, the ends or "objects" define the means; but here in *Federalist* 41, Madison implicitly asserts that the "means" (the enumerated powers) define the objects of the

[151] THE FEDERALIST NO. 41, *supra* note 26, at 255 (James Madison).

[152] *Id.* at 256.

[153] THE FEDERALIST NO. 44, *supra* note 26, at 285 (James Madison).

Constitution. Eventually, constitutional orthodoxy would treat the enumerated powers as the objects in themselves.

Moreover, the six identified objects are unduly narrow even under an enumerationist approach. Omitted from this list is an affirmative legislative power over domestic policy, particularly commercial policy. Madison characterizes the power over interstate commerce as "the Maintenance of harmony and proper intercourse among the States."[154] This views the interstate commerce power as a restraint on state laws — preventing protectionism and interstate trade wars — rather than a power to direct and promote the national economy. Thus, Madison described the interstate commerce power as primarily designed to provide "relief of the States which import and export through other States, from the improper contributions levied on them by the latter" and to prevent "future contrivances" by state legislatures which would "terminate in serious interruptions of the public tranquillity."[155] This view reduces the commerce power to a version of the dormant Commerce Clause.

The distinction between the Constitution's grant of a power to regulate commerce, and Madison's concern with "superintending" *state regulation* of commerce,[156] can be seen in Madison's positions on the two great domestic interstate commerce issues of his lifetime: the national bank and internal improvements. Various supporters of the bill to charter the national bank proposed by Treasury Secretary Hamilton had argued that the bank was necessary and proper to regulating commerce: specifically, its banknotes would provide a uniform currency, it would engage in commercial lending, and its system of deposit credits would increase the volume and speed of commercial transactions above that of a system dependent on the physical transfer of gold and silver coin.[157] Madison, leading the House opposition to the bill, dismissed these obvious commerce-promoting features of the proposed bank with a hand-wave: "what has this bill to do with trade? Would any plain man suppose that this bill had any thing to do with trade?"[158] This statement — the entirety of Madison's recorded argument against a commerce-power justification for the bank bill —

[154] THE FEDERALIST NO. 41, *supra* note 26, at 256 (James Madison).

[155] THE FEDERALIST NO. 42, *supra* note 26, at 267-68 (James Madison).

[156] *Id.* at 268.

[157] *See* ALEXANDER HAMILTON, Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank) [hereinafter Report on Public Credit], *in* 7 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 25, at 306-08.

[158] 2 ANNALS OF CONG. 2010 (1791) (statement of Rep. Madison).

appears on its face to be sheer plaintive nonsense. It makes sense only if one construes the Commerce Clause ("trade") as limited to a power to negate state laws interfering with interstate commerce rather than an affirmative legislative power to regulate and promote interstate commerce. This crabbed interpretation of the commerce power may have been Madison's view by 1791, and it comports with his general aversion to legislation.[159] A similarly crabbed view of commerce power underlay Madison's decades-long opposition to internal improvements. Henry Clay, the leading congressional advocate of federally directed economic development, understood, in a way that Madison pretended not to, that the chief object of the Constitution was preservation of the union, and that the commerce power as a means to that end, should be construed to promote the union.[160] The knitting together of far-flung western states with the eastern seaboard depended on a developed interstate transportation and communication network to facilitate the flow of travel, commerce, and information. Madison's negative conception of the commerce power reflects his interpretive basis for denying a commerce power over internal improvements.

2. Enumerated Powers, State Sovereignty, and Compact Theory

Historians have long debated the extent of Madison's apparent shift from nationalist to strict constructionist.[161] While the foregoing supports the claim that Madison in 1787-88 was less nationalistic in his views on federal power than often supposed, his views undeniably underwent a pronounced shift in his embrace of compact theory in the 1790s.

Madison, recall, had committed himself to the nationalist constitutional theory in his pre-Convention writings, and remained fully committed to that theory through the Convention's immediate aftermath. Resolution 15 of the Virginia-Pennsylvania Plan provided for ratification by the people.[162] Madison argued that "this provision [was]

159 *See* Schwartz & Mikhail, *supra* note 1, at 2075-77.

160 *See* HENRY CLAY, Speech on Internal Improvements, *in* 2 THE PAPERS OF HENRY CLAY: THE RISING STATESMAN 1815-1820, at 448, 462-63 (James F. Hopkins ed., 2014).

161 This debate, which has come to be known as "the Madison problem," has generally pitted those who find his pre- and post-Convention views as inconsistent against those who believe he was fundamentally consistent throughout his career. *See generally* Schwartz & Mikhail, *supra* note 1, at 2036 & n.6 (reviewing the literature). As with most Manichean presentations of reality, there is truth in both views. But his pronounced shift from nationalist ratification theorist to compact theorist is undeniable.

162 1 FARRAND, *supra* note 86, at 22 (resolving that the proposed Constitution "be submitted to an assembly or assemblies of Representatives, recommended by the several

essential," because ratification by the state legislatures would leave the Union as "a Treaty only of a particular sort, among the Governments of Independent states," with all the federal debilities that entailed.[163] Madison's point was carried unanimously.[164] In his October 1787 Convention-post-mortem letter to Jefferson, Madison summed up: "It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign States."[165]

But as the partisan political controversies of the 1790s drove Madison ever farther from his one-time Federalist allies, Madison abandoned his own nationalist theories of the Constitution and embraced compact theory. His clearest early statement of this came in the Virginia Resolution of 1798.[166] That year, the Federalist-dominated Congress had passed the infamous Alien and Sedition Acts. The Alien Act authorized the president to deport foreigners deemed dangerous to the United States. The Sedition Act made it a crime to publish "seditious libel" critical of the national government.[167] With the three branches of the federal government controlled by their Federalist adversaries, Madison and Jefferson turned to the states, hoping to rally state legislatures in uniform nationwide opposition to the federal laws. To that end, they ghost-wrote, respectively, the Virginia and Kentucky Resolutions of 1798, arguing that these laws violated the Constitution.[168] Curiously, despite his role in proposing the First Amendment, Madison did not primarily argue that the Sedition Act violated freedom of speech. A First Amendment argument would imply that Congress's legislative powers presumptively extended to seditious libel, and for Madison, presumably, confining Congress's enumerated powers was the bigger game than freedom of speech per se. So instead of foregrounding free speech, Madison emphasized compact theory. The Virginia General Assembly, he wrote, "views the powers of the

Legislatures to be expressly chosen by the people, to consider & decide thereon"). On preferring "Virginia-Pennsylvania Plan" as a more accurate label for the resolutions introduced by Virginia delegate Edmund Randolph, see Schwartz, *General Welfare Clause*, *supra* note 7, at 887 n.128.

163 1 FARRAND, *supra* note 86, at 122.

164 *Id.* at 123.

165 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 5 WJM, *supra* note 11, at 19.

166 *See* JAMES MADISON, *Resolutions of 1798* [hereinafter *Virginia Resolution*], *in* 6 WJM, *supra* note 11, at 326.

167 Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596; Act of July 6, 1798 (Alien Act), ch. 66, 1 Stat. 577.

168 *See* STANLEY M. ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 719-20 (1993).

federal government, *as resulting from the compact to which the states are parties*; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorized by the grants enumerated in that compact[.]"[169] Based on limited enumerated powers flowing from compact theory, Madison asserted that states had the right and duty "to interpose for arresting the progress of" federal laws that were a "deliberate, palpable, and dangerous exercise" of powers "not granted" by the Constitution. Madison's Virginia Resolution was relied on years later by South Carolina leaders claiming the state's right to "nullify" federal laws during the 1832-33 "Nullification Crisis."[170] The nullifiers argued that a state legislature had the right to invalidate a federal law it deemed unconstitutional, and its decision could be overridden only by a vote of three-fourths of the other state legislatures — in effect, a constitutional amendment.[171] Madison denied the connection between his theory of "interposition" and that of nullification, but it is difficult to see the difference.[172] The Virginia Resolution, along with Jefferson's only slightly more aggressive Kentucky Resolution, later became a rallying cry for secessionists.[173]

In his *Federalist* essays, Madison foreshadowed this transition from nationalist ratification theory to compact theory by muddying the distinction between state governments and the people of the states. Madison refrained from candidly acknowledging his own recent view that the Articles' confederative structure could not be patched up to create an adequate general government. Instead, Madison tried to dress up the Constitution as though it carried forward the "fundamental principles" of the Articles of Confederation. "What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed."[174] Madison did in fact explain that ratification by the people would ensure that the Constitution would

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169 MADISON, *Virginia Resolution*, *supra* note 166, at 326.

170 *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 400-08 (2009).

171 *See* JOHN C. CALHOUN, *Fort Hill Address*, *in* 6 THE WORKS OF JOHN C. CALHOUN 59, 73-74 (Richard K. Crallé ed., 1863).

172 *See* Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 WJM, *supra* note 11, at 401.

173 *See* ELKINS & MCKITRICK, *supra* note 168, at 720-21. *See generally* MARK E. NEELEY, LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 5-8 (2011) (discussing the Democratic Party's reliance on the Virginia Resolution in the 1850s).

174 THE FEDERALIST NO. 40, *supra* note 26, at 249-50 (James Madison).

be more than a league or treaty,[175] yet he somewhat contradictorily characterized ratification as "not . . . a national but a federal act."[176] The Constitution created a national government insofar as the proposed government could "operate on the people in their individual capacities," but was federal in that the states were "communities united for particular purposes."[177] For good measure, Madison more than once referred to the new Constitution as a "compact" that created a "confederacy."[178] Madison well knew the connotations carried by these terms.

While Chief Justice John Marshall would later explain that the states were "subordinate governments,"[179] a conclusion that seems unavoidably implicit in the Supremacy Clause, Madison resisted this conclusion.

> [T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.[180]

This is a tendentious assertion. The Constitutional Convention had considered a proposal to forbid the general government "to interfere with the government of the individual states in any matters of internal

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[175] *See* THE FEDERALIST NO. 43, *supra* note 26, at 279-80 (James Madison).

[176] THE FEDERALIST NO. 39, *supra* note 26, at 243. In the context of the ratification debates, the "federal/national" distinction still carried a meaning which we no longer adhere to: "federal" meant "confederative," as under the Articles of Confederation, whereas "national" meant a complete government with direct authority over the governed. The Federalists began the long historical process of changing the meaning of "federal" by co-opting that term for their party label and by arguing, as Madison was doing here, that the Constitution was a hybrid structure. But Madison's use of the two terms here was directed to an audience whom, he knew, would understand "federal" in the confederative sense. Samuel Adams's distinction between "a National Government, [versus] a federal Union of sovereign states," *see supra* text accompanying note 94, conveys how Madison's terminology would have been understood.

[177] THE FEDERALIST NO. 39, *supra* note 26, at 245.

[178] "Compact": *see* THE FEDERALIST NO. 43, *supra* note 26, at 274, 279 (James Madison). "Confederacy": *see id.* at 272, 274; THE FEDERALIST NO. 45, *supra* note 26, at 292 (James Madison). "Confederate states": THE FEDERALIST NO. 43, *supra* note 26, at 277 (James Madison).

[179] McCulloch v. Maryland, 17 U.S. 316, 427 (1819).

[180] THE FEDERALIST NO. 39, *supra* note 26, at 245 (James Madison).

police which respect the government of such states only[.]"[181] But Gouverneur Morris had objected that "the internal police as it would be called & understood by the states ought to be infringed in many cases," and the proposal was rejected by a wide margin.[182] Nothing in the proposed Constitution stated that preserving state legislative jurisdiction was an object of the Constitution. The absence of any reference — even obliquely — to state sovereignty in the Preamble, and the absence of any express reference to state sovereignty anywhere in the Constitution, is striking. By contrast, the opening provisions of the Articles of Confederation asserted that "delegates" of the states were "enter[ing] into a firm league of friendship" in which "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled."[183] In the Constitution, as written and subsequently interpreted, the implied powers of the federal government could not be "enumerated" or even known in advance — Madison acknowledged this[184] — and under the Supremacy Clause, these would indeed "interfere with" presumptive state legislative jurisdiction. Yet here was Madison expounding the Constitution as though the "internal police" resolution had been adopted and the Supremacy Clause did not exist.

The theoretical and legal implications of state ratifying Conventions have never been satisfactorily worked out in our federalism doctrine. For a generation, the Taney Court treated the United States government as a separate sovereign from the states, and merely a first among equals whose supremacy over domestic affairs extended only to the protection of slavery and free coastal and riverine navigation.[185] To this day, our constitutional order's notions of state sovereignty remain confused: Supreme Court opinions continue to speak in terms of "dual sovereignty" and "separate spheres,"[186] despite the fact that our robust conception of implied powers makes it impossible to identify any area of regulatory concern that is presumptively "reserved" to the "inviolable

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181 2 FARRAND, *supra* note 86, at 25.

182 Two states in favor, eight opposed. *See id.* at 26.

183 ARTICLES OF CONFEDERATION of 1781 pmbl.; *id.* art. III; *id.* art. II (emphasis added).

184 *See* THE FEDERALIST No. 44, *supra* note 26, at 285 (James Madison) (implied powers "must always necessarily vary with that object, and be often properly varied whilst the object remains the same").

185 *See* SCHWARTZ, *supra* note 27, at 107.

186 Printz v. United States, 521 U.S. 898, 918 (1997) ("It is incontestible that the Constitution established a system of 'dual sovereignty.'"); *id.* at 921 ("This separation of the two spheres is one of the Constitution's structural protections of liberty.").

sovereignty" of the states.[187] These confusions are reflected in — and perhaps flow from — the tensions or contradictions in Madison's discussion of state sovereignty in his *Federalist* essays.

3. The General Welfare Clause in *Federalist* 41

Madison first interpreted the General Welfare Clause toward the end of *Federalist* 41, the essay in which he began his clause-by-clause discussion of the enumerated powers. In the ratification debates to that point, Anti-Federalists had interpreted the General Welfare Clause as "an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."[188] Madison sought to refute this interpretation with textual arguments. According to Madison,

> it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."[189]

This passage has multiple elements of crafty polemics that must be unpacked. For starters, Madison was exploiting the strategic ambiguity which the drafters of the Clause had intended.[190] Appending "to pay the debts and provide for the common defense and general welfare" after the taxing power was indeed an ambiguous, if not "awkward" way to delegate a general welfare legislative power. Of course, it was an even more awkward way to *negate* such a power, as Madison knew but declined to point out. Significantly, to support the more "benign" interpretation of the General Welfare Clause, Madison felt compelled to misquote it: "to raise money for the general welfare." Here, Madison embraced Roger Sherman's taxing-purpose interpretation, changing the actual language of the clause to do so.

Madison was taking a page from the Federalists' ratification playbook, to argue that limited enumerated powers made a bill of rights

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[187] David S. Schwartz, McCulloch v. Maryland *and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL'Y 25, 58 (2021).

[188] THE FEDERALIST No. 41, *supra* note 26, at 262 (James Madison). Madison's summary of the Anti-Federalists understanding of the General Welfare Clause was not an exaggeration. *See* CURRIE, THE JEFFERSONIANS, *supra* note 71.

[189] THE FEDERALIST No. 41, *supra* note 26, at 263 (James Madison).

[190] *See supra* Part II.

unnecessary because it listed no powers "to destroy the freedom of the press [etc.]." Federalists around the country were making this argument, though it was absurd on its face and persuaded few if anyone.[191]

Second, Madison sought to play up the absurdity of the general welfare interpretation by studiously ignoring the possibility of a general power limited to national matters: the middle interpretation between limited enumerated powers and unlimited police power. Unless limited by the enumeration, Madison suggested, the General Welfare Clause would have no limits. It would extend congressional power beyond anything that could possibly have been intended, infringing state legislative jurisdiction over the law of "descents, or the forms of conveyances." Here, by the way, Madison was addressing the *Virginia* (not just the New York) ratifiers whom he hoped would have access to these essays: "descents" and "conveyances" implied the transfer of slaves, which might (many Virginians feared) be subject to restrictions or prohibition under a general welfare power.[192]

Madison continued the textual argument by employing the anti-surplusage canon of construction.

> But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? …[193]

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[191] *See* MAIER, *supra* note 129, at 56; Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 377-78 (2007); Primus, *Reframing Article I*, *supra* note 3, at 2008. For example, the freedom of the press could have been destroyed under the enumerated powers by commerce regulations taxing newspapers out of existence or postal regulations refusing to deliver them.

[192] *See, e.g.*, 10 DHRC, *supra* note 73, at 1476 (statement of Patrick Henry) ("power to provide for general defense and welfare" would empower national government to free all slaves).

[193] THE FEDERALIST NO. 41, *supra* note 26, at 263 (James Madison).

This anti-surplusage argument continues to the present day to be relied on to reject the general welfare interpretation.[194] Madison acknowledged the contrary argument:

> For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.

As argued above, this purpose refutes the surplusage contention.[195] Nevertheless, Madison glibly waved it away:

> But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity . . . .[196]

Finally, Madison argued, to construe the phrase "provide for the common defense and general welfare" as a general legislative authorization "is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation," where, plainly, the language did not authorize a legislative power.[197] Article VIII of the Articles of Confederation had provided that "All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states[.]"[198]

Both of the above statutory-interpretation-canon arguments misapply the relevant canons, and are easily refuted, and the supposed borrowing from the Articles of Confederation is a sham, all of which are explained below.[199]

4. Conclusion: Enumerationism vs. General Welfare in *The Federalist*

In *Federalist* 41, Madison outlined all but one of the arguments he would make against the general welfare interpretation of the General Welfare Clause for the rest of his life. Curiously, the one exception was

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194 *See* Natelson, *supra* note 47, at 17-19; Ramsey, *supra* note 62.

195 *See supra* text accompanying notes 59–62.

196 THE FEDERALIST NO. 41, *supra* note 26, at 263 (James Madison).

197 *Id.*

198 ARTICLES OF CONFEDERATION of 1781, art. VIII.

199 *See infra* § III.C.

the so called "Madisonian interpretation" — his argument that "provide for the common defense and general welfare" referred to a spending power limited to the enumerated powers. The reason this argument did not appear in *Federalist* 41 is probably that no one thought of the General Welfare Clause as a spending power until Hamilton advanced that interpretation in his December 1791 Report on Manufactures.[200] The delegates at the Constitutional Convention never discussed an enumerated spending power, undoubtedly assuming — as Madison would vigorously argue — that such a power was implicit in every enumerated power.[201]

Madison may or may not have sincerely preferred to give the Constitution an enumerationist interpretation in the fall and winter of 1787-88. But it is a mistake to assume that he was channeling a uniformly preferred interpretation of the pro-ratification Federalists. Madison was explicitly addressing arguments by Anti-Federalists to the effect that the Constitution granted unlimited powers.[202] By emphasizing limited enumerated powers, Madison was adhering to the Federalist campaign playbook. It would have undermined the pro-ratification campaign strategy were Madison to candidly acknowledge that the Constitution was ambiguous on the meaning of the enumeration, that it could indeed be read as a broad authorization to address all national problems, and that an influential wing at the Constitutional Convention in fact preferred to read the Constitution that way.

B. Madison's Post-Ratification Pronouncements

Madison issued five major, public pronouncements on the interpretation of the General Welfare Clause between ratification of the Constitution in 1788 and his death in 1836. In between these pronouncements, he offered additional thoughts in private letters. What emerges from these utterances are two key points. First, Madison strove to interpret the General Welfare Clause as a "harmless" provision that added no powers to the enumeration. Second, despite his insistence on the harmless no-power interpretation, Madison recognized that the language was not "harmless," and would best be rendered so by a constitutional amendment.

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200 *See* HAMILTON, *Report on Manufactures*, *supra* note 25, at 303; *infra* § III.B.2.

201 *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 927-29; *infra* § III.B.2.

202 *See* THE FEDERALIST NO. 41, *supra* note 26, at 262 (James Madison).

1. The Bank Debate

In early 1791, a bill was introduced in Congress to charter the first Bank of the United States, following up on Treasury Secretary Alexander Hamilton's recommendation in his December 1790 *Report on a National Bank*.[203] Opposition to the bank was led by congressman Madison. Late in the debate, with policy arguments exhausted, Madison and his allies turned to constitutional arguments.[204] Madison argued that enumerationism was "the essential characteristic" of the Constitution and that no enumerated powers could be construed to grant Congress authority to charter the bank.[205]

Madison sought to rebut the argument made by some Federalists that the Bank was constitutionally authorized under the power to legislate for the general welfare.[206] To do this, he again (as in Federalist 41) advanced Roger Sherman's "taxing purpose" interpretation. "The bill did not come within the first [enumerated] power," Madison argued, because "[i]t laid no tax to pay the debts, or provide for the general welfare. It laid no tax whatever."[207] In other words, the General Welfare Clause was not a grant of power, but a limitation on the purposes for which taxes could be raised. "No argument could be drawn from the terms 'common defence, and general welfare.' The power as to these general purposes, was limited to acts laying taxes for them[.]"[208] Madison went on to rebut the claim by bank bill supporters that "'general welfare' meant cases in which a general power might be exercised by Congress without interfering with the powers of the States," which Madison disingenuously labeled "a novel doctrine."[209] It was hardly "novel," as Madison knew, because it tracked almost verbatim the August 22, 1787 Committee of Detail proposal which Madison probably helped rework into the final version of the General Welfare Clause.[210] The general welfare interpretation, Madison

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[203] HAMILTON, Report on Public Credit, *supra* note 157, at 236.

[204] *See* 2 ANNALS OF CONG. 1894-902 (1791); Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 454-62 (2018).

[205] *See* 2 ANNALS OF CONG. 1896-901, 1957 (1791) (Rep. Madison).

[206] *See id.* at 1926 (statement of Elias Boudinot).

[207] *Id.* at 1896.

[208] *Id.*

[209] *Id.* at 1897.

[210] *See supra* text accompanying note 127. The relevant language of the proposal was "to provide, . . . for the . . . general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police." *See supra* text accompanying note 112.

continued, "would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments."[211] Since the words "common defense and general welfare" "are copied from the Articles of Confederation," they could not have been meant to confer a legislative power.[212]

2. The Spending Power and Proposed Amendment

Madison was roused to action again by Hamilton's *Report on Manufactures* issued in December 1791.[213] Hamilton advocated a program of government promotion of domestic industry that included direct subsidies and spending on infrastructure. This, Hamilton argued, fell within the enumerated power to "provide for … the general welfare," which he said delegated a power to spend money. This was the first significant interpretation of the General Welfare Clause as a spending power, as opposed to a regulatory power. The spending power, Hamilton argued, is "plenary and indefinite" so long as "the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."[214]

Madison saw no difference between spending and regulation, and thus viewed Hamilton's interpretation in the same vein as the general legislative power he opposed in the Bank debate. In separate cover letters transmitting copies of Hamilton's report to the governor and the chief justice of Virginia, to drum up opposition, Madison decried Hamilton's spending power interpretation, as "a new constitutional doctrine of vast consequence" that would "subvert[] the fundamental and characteristic principle of the Government, as contrary to the true & fair, as well as the received construction . . . ."[215] He continued, "If Congress can do whatever in their discretion can be done by money, and will promote the general welfare, the Government is no longer a

[211] 2 ANNALS OF CONG. 1896-97 (1791).

[212] *Id.*

[213] HAMILTON, *Report on Manufactures*, *supra* note 25, at 303.

[214] *Id.*

[215] Letter from James Madison to Edmund Pendleton (Jan. 21, 1792) [hereinafter Madison to Pendleton], *in* 14 THE PAPERS OF JAMES MADISON 195-96 (Robert A. Rutland & Thomas A. Mason eds., 1983). In a rare instance in which Madison adverted to what might today be called the "original public meaning" of the General Welfare Clause, he asserted that Hamilton's interpretation "bid[s] defiance to the sense in which the Constitution is known to have been proposed, advocated and adopted." *Id.* (emphasis added).

limited one possessing enumerated powers, but an indefinite one subject to particular exceptions."[216] Hamilton's interpretation, Madison said, exceeded even what had been advocated by "the greatest Champions for Latitude in expounding those powers."[217] Madison expostulated, "If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once."[218]

Here, too, Madison was speaking as a partisan debater rather than a coolly objective constitutional interpreter. Madison studiously ignored Hamilton's effort to distinguish between "general welfare" and local regulatory interests. While Madison was right that Hamilton's "spending power" theory was new, he was disingenuous in asserting that the novelty was in its breadth: for the spending power interpretation was a more modest view of the General Welfare Clause than the plenary legislative power advanced by Wilson and Morris at the Convention and by bank advocates in Congress. Finally, Madison disingenuously asserted "as a fact" "that the phrase out of which this doctrine is elaborated, is copied from the old articles of Confederation" in order to ensure that the General Welfare Clause would not be "liable … to misconstruction" as a grant of power.[219]

Seeing a dangerous slippery slope in any federal spending outside of the enumerated powers, Madison vigorously opposed a bill to offer monetary subsidies in support of the New England cod fisheries. Madison took issue with "some gentlemen, that Congress have authority … [to] do anything which they may think conducive to the general welfare."[220] But Madison insisted

> I, sir, have always conceived — I believe those who proposed the Constitution conceived, and it is still more fully known, and more material to observe that those who ratified the Constitution conceived — that this is not an indefinite Government deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms.[221]

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[216] *Id.* (emphasis omitted).

[217] Letter from James Madison to Henry Lee (Jan. 14, 1792), *in* 6 WJM, *supra* note 11, at 80-81, 81 n.1.

[218] *Id.*

[219] Madison to Pendleton, *supra* note 215, at 195-96.

[220] 3 ANNALS OF CONG. 386 (1792) (Rep. Madison).

[221] *Id.*

Madison then reprised the now-familiar arguments: the general welfare interpretation would make the enumeration that followed Clause 1 "without any meaning." Unless the term "general welfare" was "sought in the subsequent enumeration which limits and details them," it would "convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all."[222] The phrase "common defense and general welfare" had come from the Articles of Confederation, making it "clear and certain" that the new Congress, like "the old Congress," had only limited enumerated powers.[223] Madison then added content to the prior slippery slope argument:

> If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare . . . they may establish teachers in every state, county, and parish, and pay them out of the public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post roads; in short, every thing, from the highest object of state legislation, down to the most minute object of police, would be thrown under the power of Congress. . .[224]

If this sounds like the modern Supreme Court's "mustbesomething rule," it is. Madison's slippery slope assumes that "can" implies "will." Madison further implies that Congress cannot be trusted with discretion to distinguish between national and local regulatory matters. This was an odd assertion coming from the erstwhile leading advocate of a congressional power to veto state laws "in all cases whatsoever."[225]

Madison saw the General Welfare Clause as a sufficient threat to warrant its erasure by a constitutional amendment. At the end of the second Congress, in March 1793, Madison apparently made or supported a proposed constitutional amendment that would negate Hamilton's spending power interpretation:

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[222] *Id.* at 387.

[223] *Id.*

[224] *Id.* at 388.

[225] Letter from James Madison to George Washington (Apr. 16, 1787), *in* 2 WJM, *supra* note 11, at 346; *see* Schwartz & Mikhail, *supra* note 1, at 2068-70 (discussing Madison's advocacy of national legislative veto "in all cases whatsoever").

> Article 1, section 8, after the words 'general welfare of the United States,' add, 'in the cases hereinafter particularly enumerated.' And at the end of the section, add, 'but no power to grant any charter of incorporation, or any commercial or other monopoly, shall be hereby implied.'[226]

The first clause of this proposed amendment would constitutionalize Madison's interpretation of the General Welfare Clause, as limited to spending on only those matters within the following enumeration of powers. For good measure, the second clause proposed to amend the Necessary and Proper Clause to bar recharter of the Bank of the United States. The amendment apparently never went to a vote.[227]

3. The Virginia Report of 1800

At Madison's urging, the Virginia legislature enacted a further set of resolutions elaborating his 1798 Virginia Resolution. These additional resolutions, drafted primarily by Madison, were accompanied by a Committee Report — now known as the Virginia Report of 1800 — also written by Madison.[228] Madison publicly set out the so-called "Madisonian interpretation" of the General Welfare Clause for the first time in this document.

The first through third resolutions asserted that the Virginia legislature's "firm resolution to maintain and defend the Constitution of the United States" and "warm attachment to the union" were bound up with the power to nullify any "deliberate, palpable and dangerous exercise of … powers, not granted by the said compact" [i.e., the Constitution].[229]

The fourth resolution decried "a spirit … manifested by the Federal Government, to enlarge its powers by forced constructions of the Constitutional charter."[230] This "spirit" was manifested "particularly" in the Alien and Sedition Acts, the charter of the First Bank of the United States, and the federal excise tax on carriages. These laws reflected "a

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[226] JAMES MADISON, *Notes on Proposed Constitutional Amendments* [ca. 3 March] 1793, *in* THE PAPERS OF JAMES MADISON, *supra* note 215, at 470.

[227] Madison's involvement in the amendment is inferential. The amendment reflects his positions on the issue. According to the editors of the Madison papers, it was introduced in the Senate by James Monroe and in the House by unnamed sponsors. A document in Madison's handwriting among his papers appears to be a draft essay in favor of the amendment. *Id.*

[228] JAMES MADISON, *Report on the Resolutions* [hereinafter *Virginia Report of 1800*], *in* 2 WJM, *supra* note 11, at 341.

[229] *Id.* at 342-45.

[230] *Id.* at 352-53.

design to expound certain general phrases" — viz., the General Welfare Clause — "so as to destroy the meaning and effect" of the limited enumerated powers "so as to consolidate the states by degrees, into one sovereignty" and thereby "transform the present Republican system of the United States, into an absolute, or at best, a mixed monarchy."[231]

In advancing a relatively narrow interpretation of the General Welfare Clause, Madison repeated his arguments about surplusage and the purported borrowing of phrasing from the Articles of Confederation. Madison argued that the similarity of Clause 1 to the Articles' reference to "the common defense or general welfare" provided a "remarkable security against misconstruction," making clear that the General Welfare Clause was never, and should never be, "understood to be either a general grant of power, or to authorize the requisition or application of money… to the common defence and general welfare, except in the cases afterwards enumerated which explained and limited their meaning."[232]

Interestingly, Madison dropped the taxing-purpose interpretation of the General Welfare Clause, allowing that it was an authorization to spend money. But this spending had to be limited to matters falling within the enumerated powers. Why? Because, Madison, reasoned, there was no difference between spending and regulation.

> [W]hether the phrases in question be construed to authorise every measure relating to the common defence and general welfare, as contended by some; or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers, which follow these general phrases in the Constitution. For it is evident that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude which in its exercise does not involve or admit an application of money. The government therefore which possesses power in

[231] *Id.* at 353. This equation of a "consolidated" national government with "monarchy" reflects Madison's shift toward compact theory. Madison suggests that a consolidated national government, even one based on the consent of the people, could not be republican. In contrast to his preconvention thinking and his analysis in *Federalist* 10, republicanism on a national scale now depended far more on state sovereignty than on a direct line of accountability between the people and the national government.

[232] *Id.* at 354-55.

> either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers[.][233]

Madison concluded: "Whenever therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made."[234]

4. The Bonus Bill Veto

Seventeen years later, Madison performed his final act as a public official when he vetoed the Bonus Bill on March 3, 1817, his last day in the presidency.[235] The 1816 act chartering the Second Bank of the United States required the bank to pay a $1.5 million commission — referred to as a "bonus" — to the federal treasury as a consideration for its monopoly privileges.[236] In February 1817, the Fifteenth Congress passed a bill to use this bonus as seed money to fund federal internal improvements.[237] The bill's supporters had assumed they were acting in accord with Madison's wishes. Madison, as president, had dropped his famous and longstanding opposition to a national bank — he not only signed the Second Bank legislation, but had earlier asked Congress to send him a national bank bill. Moreover, his December 1815 annual message had advocated a federal internal improvements program.[238] Congressional leaders were therefore stunned by the veto; House Speaker Henry Clay fumed that "Madison has vetoed his own bill!"[239]

Apparently, with the demands of governing the nation just hours or minutes away from being lifted from his shoulders, Madison could give way to his more partisan constitutional scruples. In his veto message, Madison flatly asserted that the commerce power could not support a power to build these networks of trade and communication "without a latitude of construction departing from the ordinary import of the terms strengthened by the known inconveniences which doubtless led to the

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233 *Id.* at 356.

234 *Id.* at 357.

235 Madison, *Bonus Bill Veto*, *supra* note 25, at 584.

236 Act of Apr. 10, 1816, ch. 44, § 20, 3 Stat. 266, 276; SCHWARTZ, *supra* note 27, at 32.

237 *See* CURRIE, THE JEFFERSONIANS, *supra* note 71, at 260-61.

238 James Madison, *Seventh Annual Message* (Dec. 5, 1815), *in* 1 MPP, *supra* note 23, at 567-68.

239 *See* CURRIE, THE JEFFERSONIANS, *supra* note 71, at 257, 259.

grant of this remedial power to Congress."[240] In other words, the power to regulate interstate commerce was limited to Madison's preferred theories of commerce regulation: raising revenue through taxation of imports and exports, and prevention of interstate trade wars. This interpretation would fend off any claim that Congress could regulate slavery as interstate commerce.

The fifteenth Congress had undoubtedly assumed that the Bonus Bill fell within its enumerated powers on several theories, including a power to spend for the general welfare. But Madison rejected this argument in a brief outline representing his most detailed objection to the General Welfare Clause to date. Reprising his view from the Virginia Report of 1800 that there was no meaningful difference between spending and regulation, Madison asserted that accepting the Bonus Bill as within a spending power "would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper."[241] This "would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them."[242] Madison assumed, perhaps disingenuously for rhetorical effect, that a grant of federal power would necessarily be exclusive rather than concurrent — a dormant General Welfare Clause that would supersede all the "laws of the several states in all cases not specifically exempted." Further, Madison suggested, that interpretation would "exclude[e] the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and State Governments inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance."[243] Madison was "not unaware of the great importance of roads and canals and the improved navigation of water courses," and therefore advised Congress to propose an amendment to grant a power over those things expressly. This would have the virtue of permitting internal improvements without a broad construction of existing enumerated powers that might be extended to the regulation of slavery. But such an amendment would represent a surrender to Madison's strict constructionist views, and advocates of broad construction of federal powers saw it, correctly, as a poison pill.[244]

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[240] Madison, *Bonus Bill Veto*, *supra* note 25, at 584.

[241] *Id.*

[242] *Id.* at 585.

[243] *Id.*

[244] *See* CURRIE, THE JEFFERSONIANS, *supra* note 71, at 267-70, 335 n.111; MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 48-49 (1987).

5. General Welfare Amendment Redux

Madison's insistence that any broad interpretation of the General Welfare Clause was inadmissible only hardened in his retirement years. It was one of the "heresies of federalism," he wrote to Jefferson in 1825.[245] The national debate over "internal improvements" continued for decades after Madison left office. By the early 1820s, the internal improvements controversy became a defining feature of national party politics.[246] The debate centered around the constitutional question of the extent of Congress's powers, and the General Welfare Clause continued to figure prominently. Advocates of internal improvements gravitated into the faction of the Republican Party known as "National Republicans," which would soon crystalize into the Whig Party in opposition to Andrew Jackson's presidency. Strict constructionists of federal powers, who gravitated into the Jacksonian Democratic party, tended to oppose internal improvements projects. But the party alignment on this question was imperfect: many Jacksonians favored internal improvements, and strained to accommodate them within their ideology of strict construction.

In May 1822, President Monroe vetoed a major piece of internal improvements legislation, a bill to improve the nation's first interstate highway, the Cumberland (or National) Road.[247] Recognizing that his veto would be highly controversial, Monroe supplemented his veto message by issuing a 29,000-word explanatory pamphlet, which he sent around to various leaders and luminaries, including the justices of the Supreme Court — and Madison.[248] In the pamphlet, Monroe argued generally for strict construction of the enumerated powers, but proposed a compromise of sorts: The federal government could pay for roads and other internal improvements under the "spending power"

[245] Letter from James Madison to Thomas Jefferson (Feb. 17, 1825), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-03-02-0474 [https://perma.cc/83SM-JVJ3]. By "federalism," Madison meant the doctrines of the Federalist party.

[246] *See* SCHWARTZ, *supra* note 27, at 31-35.

[247] *See* CURRIE, THE JEFFERSONIANS, *supra* note 71, at 278-79. Begun during the Jefferson administration, this multi-year federal road project contemplated an interstate highway from Maryland to Ohio. The road was still incomplete by 1822, and in serious need of repair to its completed sections. Congress passed a bill to erect tollgates on the Road and use the tolls to preserve and repair the road; an additional provision of the bill would make it a federal crime to evade the duty to pay the tolls. Though the federal government's supervision would be a novelty, the use of tollgates for road revenues was long established on public and private roads within the states. *Id.*

[248] Monroe, *supra* note 144, at 144; *see* Letter from James Madison to James Monroe (Dec. 20, 1822), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-02-02-0546 [https://perma.cc/B3BG-JHRH] [hereinafter Madison to Monroe].

interpretation of "provide for the general welfare," so long as those projects served "great national" rather than "strictly local" purposes; the federal government simply could not regulate the roads thus built.[249] This position eventually became Jacksonian orthodoxy, embraced by President Jackson and the Taney Court.[250]

In a reply letter to Monroe, Madison felt "constrained" to disagree with Monroe's message:

> … I have [not] been wrong in considering the [spending] authority as limited to the enumerated objects in the Constitution which require money to carry them into execution. If an authority to appropriate without respect to that limitation, be itself a substantive one in the list, it would seem, like the others, to be entitled to 'all laws necessary & proper to carry it into execution,['] which would be equivalent to a power to 'provide for the general welfare.' A general power merely to appropriate, without this auxiliary power, would be a dead letter; and with it an unlimited power.[251]

Here, Madison elaborated his view that there was no difference between Hamiltonian spending and the broad general welfare interpretation: a general welfare spending power, he argued, would necessarily be transformed by the Necessary and Proper Clause into a plenary legislative power.

Madison soon returned to the idea of amending the Constitution to neutralize the General Welfare Clause. In an 1825 letter to Virginia editor and politico Thomas Ritchie, Madison discussed whether to revive the 1793 amendment to eliminate any potential for broad interpretation of the General Welfare Clause. Madison mused that the "seducing tendencies" of Monroe's limited spending power interpretation and the "zeal" for federal spending on internal improvements under that interpretation, made such an amendment "at present not attainable."[252] Madison worried that failure of an amendment would only strengthen the broad interpretation, but suggested that if instead an amendment expressly authorizing internal

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[249] Monroe, *supra* note 144, at 164-67.

[250] *See* Searight v. Stokes, 44 U.S. 151, 166 (1845); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 360-66 (2007) (noting Jackson's frequent approval of internal improvements spending projects).

[251] Madison to Monroe, *supra* note 248.

[252] Letter from James Madison to Thomas Ritchie (Dec. 18, 1825), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/04-03-02-0677 [https://perma.cc/5C7S-7DEM].

improvements were adopted, "the zeal for this appropriating power would be cooled."[253]

But the next year, Madison rethought this, in response to an inquiry from New York Senator Martin Van Buren asking Madison to suggest draft language for a constitutional amendment. Van Buren wanted an amendment that would permit the federal government to spend money to build internal improvements without carrying in tow an ongoing power to exercise jurisdiction over them — for example, to patrol federal highways, arrest and prosecute highway robbers, or erect toll collection stations.[254] Madison and Van Buren agreed that a power to spend on internal improvements, if recognized under the General Welfare Clause, could not be so limited: it would not exclude federal jurisdiction over the road or canal so built. Thus, Madison instructed Van Buren that "It becomes a serious question therefore, whether the better course be not to obviate the unconstitutional precedent [of a broad internal improvement power], by an amendatory article expressly granting [and limiting] the power."[255] Madison therefore proposed that

> If the sole object be to obtain the aid of the federal treasury for internal improvements by roads & canals, without interfering with the jurisdiction of the States, an amendment need only say "Congress may make appropriations of money for roads & Canals, to be applied to such purposes by the Legislatures of the States within their respective limits, the jurisdiction of the States remaining unimpaired."[256]

But this would still leave the annoying and dangerous General Welfare Clause in place. Thus, Madison proposed to amend or delete it:

> [W]hilst the terms, "Common defence & general welfare" remain in the Constitution, unguarded against the construction which has been contended for, a fund of power inexhaustible, & wholly subversive of the equilibrium between the General and the State Governments, is within the reach of the former. Why then not precede all other amendments by one, expunging the phrase, which is not required for any harmless meaning; or

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253 *Id.*

254 Letter from Martin Van Buren to James Madison (Aug. 30, 1826), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/99-02-02-0725 [https://perma.cc/PQ8K-YHD7].

255 Letter from James Madison to Martin Van Buren (Sept. 20, 1826) [hereinafter Madison to Van Buren], *in* WJM, *supra* note 11, at 251, 254.

256 *Id.* at 254-55.

> making it harmless, by annexing to it, the terms "in the cases authorized by this Constitution."[257]

Madison thus not only acknowledged that the General Welfare Clause was susceptible to a broader interpretation, but also implied that his goal all along had been to construe the General Welfare Clause to "mak[e] it harmless." Indeed, this quoted passage affirms that the Madisonian interpretation was designed to render the General Welfare Clause harmless — in essence, surplusage — by reducing it to an express acknowledgement of the undisputed implied power to spend money to implement the enumerated powers.

C. Assessing Madison's Arguments

Madison was ultimately unsuccessful in establishing the "Madisonian" interpretation to limit federal spending to the enumerated powers. But he won the point that the General Welfare Clause could not confer a power to address all national problems; instead, we must "lament" our Constitution's disabling the federal government from addressing problems beyond the capacities of states that happen to fall outside the enumerated powers — at least as a matter of constitutional dogma.[258]

Madison's argument that the General Welfare Clause cannot possibly confer the comprehensive power it literally expresses has an air of self-evident truth that leads us to overlook its fallacious and circular character. Madison's fundamental argument is that the General Welfare Clause does not confer the comprehensive power because the enumeration of powers is meant to preclude the comprehensive power. But that simply assumes that the enumeration of powers is meant to be limiting — the point in controversy. Madison's argument is fatally circular.

It also commits the fallacy of a false dichotomy. Madison repeatedly suggested that the general welfare interpretation would create an unlimited police power, as though that were the only alternative to limited enumerated powers. But, as discussed above, limited *general* powers are a possibility Madison excluded. In fact, a power to legislate on all *national* matters is more limited than a power to legislate in all cases whatsoever: purely intrastate or local concerns would be excluded. This distinction was well-recognized by the Framers. At the

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[257] *Id.* at 255.

[258] As noted above, the Commerce Clause has become a stand-in for a properly interpreted General Welfare Clause. *See supra* note 69 and accompanying text.

Constitutional Convention, the authorizing resolution which the Committee of Detail purported to implement by crafting the enumeration of powers, provided that Congress should be granted power "to legislate in all Cases for the general Interests of the Union, and also in those Cases 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."[259] This broad authorization to legislate on all national matters is less than an authorization to legislate "in all cases whatsoever." Madison understood this distinction too, having drawn it himself at the Constitutional Convention during the debate over his pet proposal for a national legislative veto.[260] He again acknowledged the distinction implicitly in his Bonus Bill veto message. There he said that a "boundary between the legislative powers of the General and State Governments" was implicit in the "general welfare" requirement, but suggested that Congress could not be trusted to police that boundary through its discretionary judgment.[261] That is different from the argument he made more explicitly and consistently that there was no middle ground in theory or logic between an unlimited police power and limited enumerated powers.

For similar reasons, Madison's use of the anti-surplusage canon is plainly wrong. In each of his pronouncements on the General Welfare Clause, Madison argued that a general welfare authorization would negate an ensuing enumeration, rendering it "meaningless" or purposeless. But the enumeration fulfills important purposes even if Clause 1 authorizes legislative power to address all national problems. First, it makes crystal clear that the enumeration carried forward the powers conferred by the Articles of Confederation. This was an explicit instruction given to the Committee of Detail, and could only be plainly implemented by enumerating at least some powers.[262] Moreover, the pattern of following a general definition with an itemized list is

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[259] FARRAND, *supra* note 86, at 131-32 (approved motion); *id.* at 131 (Committee of Detail papers). This was Resolution 6 of the Virginia-Pennsylvania Plan, as amended by the Bedford Resolution. *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 886-89 (recounting background of this resolution).

[260] *See* 1 FARRAND, *supra* note 86, at 162-65 (Madison's support of national legislative veto over "all laws" of the states). Most advocates of a congressional veto wanted to limit it to state laws contravening "the articles of Union" — that is, national concerns embraced in the Constitution. *See id.* at 21 (Virginia Plan's proposal of limited national veto); *id.* at 168 (Convention's rejection of "all cases" veto).

[261] Madison, *Bonus Bill Veto*, *supra* note 25, at 584.

[262] *See* FARRAND, *supra* note 86, at 14 (unanimous approval of resolution that "the [N]ational Legislature ought to possess the Legislative rights vested in Congress by the Confederation"); Primus, *Reframing Article I*, *supra* note 3, at 2015-18.

commonplace in legal drafting.[263] In the Constitution's enumeration of powers, as in other legal instruments, this general-then-specific pattern is far from purposeless: it provides illustrative examples of national legislative powers and serves to preempt debate over whether the enumerated items are included in the general authorization — for example, whether a uniform bankruptcy law helps provide for the general welfare.[264]

While the broad, legislative interpretation of the General Welfare Clause created no surplusage, Madisons's interpretations did. In *Federalist* 41 and his Bank Debate speeches, Madison adopted the interpretation advanced first by Roger Sherman (and later by Jefferson) that the General Welfare Clause merely stated the purposes for which taxes could be raised.[265] Roger Sherman had claimed that "The objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare, and for payment of the debts incurred for these purposes."[266] But since debts could only be incurred for such national purposes, the General Welfare Clause ("and provide [etc.]") was superfluous — unless the General Welfare Clause was meant to add only that the national government could also pay cash up front, an absurd interpretation. Moreover, since paying debts is implicit in the power to incur debts, specified in the Borrowing Clause,[267] everything after the word "excises" in Clause 1 ("to pay and provide, [etc.]") is surplusage under the Sherman-Jefferson interpretation.

Madison's subtle shift in 1800 from the Sherman-Jefferson interpretation to the so-called the "Madisonian" interpretation of the General Welfare Clause did not eliminate the surplusage problem. As Madison acknowledged in the Virginia Report, there was no need to specify a power to spend on matters within the enumerated powers: "For it is evident that there is not … a power of any magnitude which in its exercise does not involve or admit an application of money."[268] The Madisonian interpretation merely expressed what was indisputably

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[263] *See* THE FEDERALIST NO. 41, *supra* note 26, at 263 (James Madison) ("Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars."); *see also* SCALIA & GARNER, *supra* note 63, at 204-05 (explaining general-specific sequence).

[264] *See* SCALIA & GARNER, *supra* note 63, at 204-05; Primus, *Reframing Article I*, *supra* note 3, at 2015-18.

[265] *See supra* text accompanying notes 99, 189.

[266] Letter from Roger Sherman and Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), *in* 3 FARRAND, *supra* note 86, at 99.

[267] U.S. CONST. art. I, § 8, cl. 2.

[268] MADISON, *Virginia Report of 1800*, *supra* note 228, at 354-55.

implied: a power to spend money to execute the enumerated powers. In contrast to the belt-and-suspenders purpose of an enumeration following a broad General Welfare Clause, there was no argument against an implied spending power, which was also plainly embraced in the Necessary & Proper Clause. The Madisonian interpretation thus reduces the General Welfare Clause to a second pair of suspenders. That is indeed surplusage.

In *Federalist* 41, Madison also made an ejusdem generis argument, suggesting that the enumeration necessarily had to "explain and qualify" the general phrase that preceded it.[269] It is true that ejusdem generis generally limits a general term to items similar to those listed. But Madison's argument fails on two counts. First, given the breadth of some of the enumerated powers — described in *McCulloch v. Maryland* as "vast powers" covering the "sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation,"[270] — the thrust of applying ejusdem generis would arguably extend to all national matters. Moreover, ejusdem generis applies only to a general term that *follows* an itemization; but where, as here, the general term comes first, as Scalia and Garner explain, "one is invited to take [the general term] at its broadest face value."[271]

In his bank debate speech, Madison also argued that the general welfare interpretation "would supersede all the powers reserved to the State Governments."[272] There was some confusion among constitutional interpreters in the antebellum era about the possibility of concurrent federal and state powers. Did a grant of federal powers by itself preclude state legislation on the same subject, even absent preemptive federal legislation? This was the theory of the "dormant Commerce Clause."[273] Madison may have shared this confusion, but whether he did or not, the fear of a "dormant General Welfare Clause" prohibiting all state legislation was exaggerated. It exploited the same false dichotomy that ignored the General Welfare Clause's limitation to national matters.

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[269] *See* Wex Definitions Team, *Ejusdem Generis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/ejusdem_generis#:~:text=Ejusdem%20generis%20(ee%2Djoose%2D,construed%20as%20limited%20and%20apply (last updated Feb. 2022) [https://perma.cc/V7TM-6ZN7] (defining ejusdem generis).

[270] McCulloch v. Maryland, 17 U.S. 316, 407-08 (1819).

[271] SCALIA & GARNER, *supra* note 63, at 205.

[272] 2 ANNALS OF CONG. 1897 (1791) (Rep. Madison).

[273] *See* Gibbons v. Ogden, 22 U.S. 1, 209 (1824) (finding "great force in th[e] argument" that federal commerce power "excludes, necessarily, the action of all others"); SCHWARTZ, *supra* note 27, at 28-29.

The final argument advanced by Madison is his claim that "the common defense and general welfare" was a borrowing from the Articles of Confederation and would therefore be read through the lens of that document, as conforming to its guiding spirit that each state would retain its full sovereignty. This argument is pure hogwash, and Madison's long-running adherence to it — he would repeat it near the end of his life, as we will see — is one of the strongest examples of Madison's willingness to sacrifice integrity in constitutional argument in order to win the point at hand.

The phrase "common defense *or* general welfare" does indeed appear in the Articles of Confederation and — with "or" changed to "and" — in the Constitution as well.[274] But to suggest that the phrase carries the same meaning or connotations in both documents is as inane as saying that the word "Congress" means the same thing in both documents.[275] In the Articles, "the common defense or general welfare" referred to goods or services that states provided and could seek reimbursement for. Article VIII of that document had provided, "All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states[.]"[276] In contrast, under the Constitution, "the common defense *and* general welfare" was something that the national government — the "more perfect union" — would "promote"[277] and "provide for."[278] Moreover, the national government would do so directly by federal legislation, without relying on the states, and it would fund its policies out of a national treasury supplied by an independent federal tax base. These differences could not be more stark. They reflect the very different spirits of the two documents: the Articles, creating a "firm league of friendship" among states which retained their "sovereignty, freedom and independence"[279]; and the Constitution, creating for the first time a true national government. Madison knew all this as well as anyone. He was a smart man and had read both documents carefully. As noted above, he was a leading proponent of the Convention's decision to scrap the Articles, rather than amend them, and to abandon the "league" of sovereign states in favor of creating a

274 ARTICLES OF CONFEDERATION of 1781, art. VIII.

275 In the Articles, Congress was a unicameral body with legislative and executive functions. In the Constitution, Congress is somewhat different.

276 ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 1.

277 U.S. CONST. pmbl.

278 U.S. CONST. art. I, § 8, cl. 1.

279 ARTICLES OF CONFEDERATION of 1781, art. III, para. 1; *id.* art. II, para. 1.

new Constitution on new fundamental principles. While calling Madison the "father of the Constitution" is absurd,[280] he may well have been the architect of ratification by "the people of the United States." He could not have failed to appreciate that his "borrowing-from-the-Articles" argument was fallacious and dishonest.

Most of Madison's arguments, and his most developed ones, were based on the Constitution's final text or the Framers' intent. In two of his writings, he also alluded, cursorily, to an argument that sounds more in the register of public meaning originalism. As he said in his cod fisheries opposition speech, "those who ratified the Constitution conceived… that this is not an indefinite Government" and this point was "more material" than the intent of the Framers.[281] This conclusory assertion is suggestive, but undeveloped, and we can understand why. Madison knew that the Federalists asserted limited enumerated powers as a campaign strategy, but he had no way of knowing whether "those who ratified" the Constitution believed this to be the linguistically compelled interpretation. Clearly, Anti-Federalists did not believe that, and Madison never tried to explain why the winners in the ratification debates would have held a monopoly over the "meaning" of the Constitution's words — as opposed to their purportedly preferred, hoped-for, or "intended" interpretation. Moreover, "those who ratified" may well have accepted the Constitution while embracing (or lamenting) the ambiguity of the General Welfare Clause. Nor did Madison undertake the difficult analytical task of determining who among the ratifiers "counted" for determining the Constitution's public meaning, or how many ratifiers were needed to lock down a particular meaning — a problem that dogs public meaning originalists today.[282]

In *Federalist* 41, Madison was determined to quell the objection of Anti-Federalists who read the General Welfare Clause quite plausibly as a broad grant of legislative power. Madison, never a fan of legislative power, was probably reflecting his own preferred view on this point; still, he knew that the Anti-Federalist reading was far from the "absurdity" he claimed as a motivated editorial writer in *The Federalist*. In the Bank debate, the Virginia Report, and the Bonus Bill veto message, he was a politician in the fray, casting about for persuasive

[280] *See* Schwartz & Mikhail, *supra* note 1, at 2065.

[281] 3 ANNALS OF CONG. 386 (1792) (Statement of Rep. Madison).

[282] It is entirely possible that Madison felt driven to this half-baked suggestion about the primacy of the ratifiers' understanding because he knew that, in 1792, his contentious claims about Framers' intentions were subject to refutation by other living Framers. After they had all died, Madison would return to emphasizing their intentions rather than developing a theory of original public meaning.

constitutional arguments where the policy arguments were not winning. Although his arguments aligned with his eventual personal convictions, Madison's Articles of Confederation argument involved no small measure of dissembling.

D. Falsus in omnibus: the 1830 Letter to Stevenson

Madison's reputation as our most authoritative constitutional theorist and interpreter owes a great deal to his retirement years. After leaving the White House in 1817, Madison returned to his Montpelier plantations where he settled into his role as constitutional sage.[283] Until his death in 1836, he edited his Constitutional Convention notes for posthumous publication, curated his voluminous cache of public and private papers, and wrote a steady stream of letters responding to numerous requests for his constitutional opinions.[284] Typically, these requests were from partisans seeking support in political controversies being argued as matters of constitutional interpretation.

If Madison had truly adopted the vantage point of a scholar-statesman, we would have some justification to look for at least a gesture toward a disinterested inquiry into historical truth. This would have required Madison's written opinions to acknowledge the case for, if not the merit of, positions adverse to his. But Madison's writing disappoints us in this regard. Intellectually powerful though he was, and adept as he was at adopting the tone of a disinterested elder statesman, Madison never abandoned a partisan outlook. His continued campaign against the General Welfare Clause demonstrates this pointedly.

Madison's final and most detailed statement of his interpretation of the General Welfare Clause came in 1830, in an 8,000-word letter responding to an inquiry by Speaker of the House Andrew Stevenson of Virginia. By late 1830, Madison was the last surviving delegate from the Philadelphia Convention, and he was used to being consulted as a sort of living constitutional treatise.[285] He was then 79 years old.

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[283] RICHARD BROOKHISER, JAMES MADISON 223 (2011).

[284] *See generally* MCCOY, *supra* note 12.

[285] *See* JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 173 (Oscar Handlin ed., 1990) (consulted). The last two living delegates were John Lansing of New York, who disappeared, presumed dead, in 1829, and William Few of Georgia, who died in 1828; Rufus King, the last surviving member of the committees of Postponed Parts and Style, died in 1827. *See About the Signers of the Constitution*, CONSTITUTIONFACTS.COM, https://www.constitutionfacts.com/us-constitution-amendments/about-the-signers/ (last visited Aug. 14, 2022) [https://perma.cc/Q8ND-X8QA]; *The Delegates Who Didn't Sign the U.S. Constitution*, CONSTITUTIONFACTS.COM,

In the letter to Stevenson, Madison hoped to lay to rest the interpretation of the General Welfare Clause "still regarded by some as conveying to Congress a substantive & independent power[.]"[286] Apparently, Madison wrote the letter assuming and desiring that it would be made public.[287] And it was.[288]

Madison had long equivocated on whether it was fair game to mine the Constitutional Convention debates for evidence of the Constitution's intended meaning.[289] In the Stevenson letter, Madison for the first time chose to present a version of the drafting history of the General Welfare Clause.[290] Stevenson had explicitly asked Madison to explain why he had approved the General Welfare Clause and to walk the reader through "the various changes and amendments" to the Clause shown by the Convention Journal "and especially y[ou]r recollection."[291] To this latter request, Madison demurred, even though he was in the process of readying his Convention notes for posthumous publication. He gave Stevenson a history based only on a publicly available source — the Convention Journal, published in 1819 — "without relying on my personal recollections, which your partiality overvalues."[292]

Madison's surface modesty about his personal recollections is, at the least, very disappointing. To be sure, his Convention notes, as they have come down to us, don't shed much light on the matter beyond what can

https://www.constitutionfacts.com/us-constitution-amendments/those-who-didnt-sign-the-constitution/ (last visited Aug. 14, 2022) [https://perma.cc/NFD5-5UQP].

286 Madison to Stevenson, *supra* note 11, at 411.

287 MCCOY, *supra* note 12, at 77. Stevenson's inquiry made plain that he sought Madison's input into an ongoing constitutional debate in Congress. *Id.* at 148.

288 Joseph Story quoted it in his *Commentaries,* published in 1833. *See* 2 STORY, *supra* note 45, § 910, at 372-73.

289 *Compare* 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 735-36 (Charlene Bangs Bickford, Kenneth R. Bowling, William Charles diGiacomantonio & Helen E. Veit eds., 1976) (statement of James Madison in Removal Power debate of 1789) (arguing for removal power based on his recollection of Convention debates), *with Jay's Treaty*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-16-02-0195 (last visited Sept. 8, 2022) [https://perma.cc/GGS4-KBTE] (statement of James Madison in Jay's Treaty debate) ("If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.").

290 Madison to Stevenson, *supra* note 11, at 411-24.

291 Letter from Andrew Stevenson to James Madison, FOUNDERS ONLINE, (Nov. 20, 1830), https://founders.archives.gov/documents/Madison/99-02-02-2215 [https://perma.cc/BDK5-QPGF].

292 Madison to Stevenson, *supra* note 11, at 412.

be found in the Journal. And Madison also knew that his notes for the relevant time period, from August 22, 1787 on, were not contemporaneous.[293] Perhaps, with commendable introspection, Madison recognized that he no longer remembered the Committee deliberations, or that his memory was unreliable or tainted by his subsequent political views. If indeed Madison remembered the pertinent Committee discussions, perhaps he was honoring some unknown gentleman's agreement to keep those confidential. Or maybe he was just being dishonest.

Madison's account of the drafting history of the General Welfare Clause, though accurate in several respects, is skeletal. More importantly, it makes critical misstatements and omissions. Professor William Crosskey called the Stevenson letter "a demonstrable tissue of falsehoods and misleading omissions from beginning to end."[294] He is not wrong. Crucially, Madison *entirely omits* the August 22 Committee of Detail proposal to add a General Welfare Clause to the Necessary and Proper Clause. This omission is particularly striking, because he describes the first part of the August 22 Committee of Detail report, which proposed to add "for payment of the debts and necessary expences [sic]" to the Taxing Clause.[295] Since Wilson's General Welfare Clause proposal immediately follows that language in the Convention Journal, it is simply not believable that Madison innocuously missed it: Madison had a personal copy of the Journal which he had copied out himself by hand.[296]

Even worse, Madison "emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'Common defence & general welfare', unless we were so to understand the proposition containing them, made on Aug. 25" — Sherman's motion — "which was disagreed to by all the States except one."[297]

This is for all practical purposes a lie. Madison's dishonesty at this point is heightened, not diminished, by the fact that it has a sneaky literal truth: the phrase "common defence & general welfare" *in those*

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[293] *See* BILDER, *supra* note 113, at 142-47.

[294] 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 407 (1953). Irving Brant, Madison's sympathetic but clear-eyed biographer, also took Madison to task for omissions in the letter. *See* BRANT, *supra* note 116, at 138-39.

[295] Madison to Stevenson, *supra* note 11, at 416; *see* 2 FARRAND, *supra* note 86, at 366-67 (text of August 22 Committee of Detail Report).

[296] *See* BILDER, *supra* note 113, at 182.

[297] Madison to Stevenson, *supra* note 11, at 418.

exact words had not previously appeared. But Wilson had plainly proposed a power to legislate for the "general interests and welfare of the United States," which after all was the substance of what Madison was addressing in the Stevenson letter. The maxim *falsus in uno, falsus in omnibus* should perhaps apply here.[298] At a minimum, having caught Madison lying, we should hesitate to give him the benefit of the doubt for his silence about his membership on the Committee of Postponed Parts and his likely role in working out compromise language that he later wished to disavow. Moreover, Madison does more than simply walk the reader through the relevant portions of the Convention journal; the entire letter adopts the stance of an external observer or historian who was not there at the time. For example, he argues that "it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them."[299] Yet the advocates of carefully circumscribed federal powers were not a dominant majority at the Convention, and they did indeed "permit[]" language that could be, and was, interpreted as a broad legislative power — most likely as a compromise adoption of strategic ambiguity.[300] Moreover, Madison *was* there. His speculative historian-type inferences are highly suspicious coming from a firsthand witness and participant in those events. An adverse inference may be appropriate here: when a person presumed to have relevant evidence fails to produce it, we can assume the evidence would be unfavorable to him in some way.[301]

Madison might have argued once and for all that the Framers' intentions were irrelevant. Notwithstanding Stevenson's solicitation for Madison's views on the Framers' intentions, there was nothing preventing him from asserting that it was the ratifiers' intentions that truly mattered. He might then have observed that his notes and recollections, and the Convention Journals, were of at best secondary importance to understand the Constitution's meaning. Instead, with the

298 False in one thing, false in everything.

299 Madison to Stevenson, *supra* note 11, at 420. As Professor Bilder has observed, Madison tried to cast himself in the neutral observer role by referring to himself in the third person in his Convention notes. *See* BILDER, *supra* note 113, at 67.

300 *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 917-27.

301 *Cf.* 7TH CIR. PATTERN JURY INSTR. – CIV. §§ 1.19, 1.20 (COMM. ON FED. CIV. JURY INSTR., Proposed Pattern Jury Instructions 2017), https://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf [https://perma.cc/3WWH-5UL3] (stating that a jury may assume a missing witness or evidence would have been unfavorable).

other Framers safely in the grave, he emphasized their intentions. And in doing so, he seemed to want to have it both ways: to speak with the unique authority of having been "in the room where it happened," yet to refrain from providing information about what happened in the room. Thus, his explanation for how and why the General Welfare Clause language won approval in the final Constitution has a patched-together, unpersuasive quality that further supports the inference that he was covering up an inconvenient truth.

Madison again argued that the language was borrowed from the Articles of Confederation. But rather than presenting this claim for its relevance to how the "general welfare" language would have struck the ratifiers, he asserts that it demonstrated *the intentions of the Framers*. He thus asserted that the Committee of Postponed Parts' final version of Clause 1 was nothing more than a "modification" of Roger Sherman's August 25 motion. Recall that Sherman had proposed to limit the taxing power by adding "for the payment of said debts and for the defraying the expenses that shall be incurred for the common defense and general welfare."[302] Clearly, *Sherman*'s motion borrowed language from the Articles of Confederation, whose Article VIII had provided, "All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states[.]" But that motion was voted down, as Madison pointed out, ten states to one. Madison made no effort to explain why this soundly defeated motion would be revived — and then, in an improbable about-face, be unanimously approved by the Convention without recorded debate.[303] The Committee of Postponed Parts was not expected to revisit this point, because its task was not to revive rejected motions, but to consider "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on."[304] What had not been voted or acted on was Wilson's General Welfare Clause from the August 22 Committee of Detail Report. Most likely, the stubborn Sherman brought up his motion again in the Committee on Postponed Parts and held out for some sort of compromise.

It is entirely believable that Sherman's (and perhaps Madison's) objections to Wilson's General Welfare Clause could have been smoothed over by substituting language that could be publicly

302 2 FARRAND, *supra* note 86, at 414.

303 *See id.* at 499.

304 *Id.* at 473.

described as relatively harmless due to its former function in the Articles of Confederation. But, as argued above, this would hardly have signaled a consensus that the Framers intended "general welfare" to carry any interpretive baggage from the Articles, as Madison now tried to argue in the Stevenson letter.

Madison was still left with the main question: why use language susceptible of the general welfare interpretation if, as Madison put it, the words of the General Welfare Clause were "not meant to convey the comprehensive power, *which taken literally they express*"?[305] His answer is almost unbelievably flimsy. Sheepishly admitting that "it might easily have been done, and experience shews it might be well if it had been done," he explains: "the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by its identity with the harmless character attached to it" in the Articles of Confederation.[306] But this contradicts his own previous point that the language was carefully inserted to echo the Articles of Confederation. More importantly, by his own admission the language "provide for the common defense and general welfare" was not "harmless." Indeed, as he admitted to Van Buren, it had to be *rendered* harmless through "expunging the phrase" or "annexing to it, the terms 'in the cases required by this Constitution.'"[307] What "exceeds the possibility of belief" (to borrow Madison's phrase) was that Sherman, Madison, or the Convention delegates as a whole let the "General Welfare Clause" into the Constitution through inattention. On the contrary, as I have suggested, the language was the product of careful attention to crafting compromise language.[308]

For good measure, Madison attempts to distract his reader with the claim that the "variations & vicissitudes in the modification of the clause in which the terms 'common defence & general welfare' appear" are fully and uniquely explained "by differences of opinion concerning the necessity or the form of a Constitutional provision for the debts of the Revolution."[309] That was not so. Those "variations and vicissitudes" explain how "to pay the debts" wound up in Clause 1, but not how "the general welfare" got in there.[310] Madison admitted to Stevenson that "to pay the debts" referred to "the debts of the Revolution."[311] This

[305] Madison to Stevenson, *supra* note 11, at 417 (emphasis added); *see infra* § III.D.

[306] *Id.* at 417-18.

[307] Letter from Madison to Van Buren, *supra* note 255, at 255.

[308] *See supra* Part II.

[309] Madison to Stevenson, *supra* note 11, at 418.

[310] *See* Schwartz, *General Welfare Clause*, *supra* note 7, at 895-917.

[311] *See* Madison to Stevenson, *supra* note 11, at 417-18.

acknowledgment undermines the Sherman interpretation that "pay the debts" referred, not to a grant of power to pay the Revolutionary War debts, but to a limitation on the purposes of taxing to future debts and expenses in general. This in turn raises questions about Madison's good faith in publicly asserting the Sherman interpretation prior to 1800.

Madison's account of the General Welfare Clause is premised on the non-existence of Wilson's General Welfare Clause of August 22. It is further premised on the unbelievable claim that the Committee of Postponed Parts felt compelled to revive a resolution decisively voted down five days before, and to modify it with "phraseology" that accidentally made it sound like a "comprehensive power" due to "inattention." Clearly, Madison was tying himself in knots to deny that *any* of his Convention colleagues wished to enumerate a power to legislate for the general welfare.

CONCLUSION

The struggle over the soul of the Constitution, and the related struggle over the nature and extent of federal government powers, has been obscured in our constitutional history. Madison plays a major role in that obscuring. By the style and substance of his constitutional argument, he sought to deny the existence of a Federalist Constitution based firmly on the consent of "We the People of the United States." And by elevating Madison from his actual role of partisan constitutional politician to dispassionate and authoritative constitutional sage, our own constitutional historiography papers over this great debate.

Madison's numerous attempts to explain away the General Welfare Clause offer a window into his approach to constitutional interpretation more broadly. For Madison, winning the argument was far more important than candor. I would not fault a mere politician for polemical and one-sided statements. And in any event, the fault lies less with Madison than with those who place him on a pedestal above the fray of politics. For them to say that Madison was acting appropriately for a mere politician is no defense of his reputation as dispassionate sage of constitutional interpretation. Madison could have conceded that the broad general welfare interpretation was intended by at least some Framers and that it advanced an arguably legitimate constitutional vision. He could then have given his reasons why, in his view, that vision was misguided. Such a form of argument would have befitted the candid scholar-statesman that Madison is held up to be. We have a right to expect better from Madison if he truly lived up to that reputation. Or perhaps it makes more sense to say that we have a duty to expect better

from ourselves than to uncritically elevate Madison's partisan polemics into constitutional gospel.

Instead, Madison's arguments on the General Welfare Clause were partisan and disingenuous, even — especially — in his retirement years after he had supposedly left the partisan fray. Madison's candor went no further than the concession that the *literal meaning* of the General Welfare Clause was to confer a broad legislative power to address all national problems. But he insisted that this literal meaning was purely accidental and an "absurd" interpretation. In the Virginia Report, he labeled the general welfare interpretation as a post-ratification plot to subvert the Constitution rather than a good-faith interpretation of it. He consistently denied the existence of the compromise that produced this strategically ambiguous provision, a compromise he probably helped broker. This denial was part and parcel of his post-ratification life's work to deny and bury the existence of the set of interpretations urged by his more nationalistic colleagues — Washington, Morris, Wilson, Hamilton, and others — that might be called the "Federalist Constitution."[312]

Madison achieved only a partial victory over the interpretation of the General Welfare Clause. He had hoped to reduce it to completely "harmless" surplusage — an affirmation that Congress could spend money to implement its other enumerated powers. Although he lost that point, he won the arguably greater battle: to negate the literal interpretation of the General Welfare Clause as a power to address all national problems. This would be of only historical interest, but for the fact that we must now at times "lament" the absence of a general welfare power. We have Madison, in large part, to thank for this.

[312] *See* David S. Schwartz, Jonathan Gienapp, John Mikhail & Richard Primus, *Foreword: The Federalist Constitution*, 89 FORDHAM L. REV. 1669, 1668 (2021); Treanor, *supra* note 76, at 5-7.