The Original Meaning of Enumerated Powers

Andrew Coan[*] *& David S. Schwartz*[**]

ABSTRACT: The powers of Congress are limited to those enumerated in the Constitution and must not be construed as the equivalent of a general police power. This doctrine of "enumerationism" is the linchpin of a multidecade conservative assault on the broad conception of federal powers recognized by the Supreme Court since 1937. The loudest champions of enumerationism are originalists. But even critics of originalism generally accept that enumerationism is rooted in the original public meaning of the Constitution. Indeed, it is difficult to think of a stronger—or broader—consensus on an important question of original meaning.

This Article challenges that consensus. Despite its wide acceptance, the originalist case for enumerationism is remarkably weak and undertheorized. At the same time, enumerationists have largely ignored strong arguments that the original public meaning of enumeration was indeterminate. The constitutional text nowhere says that the federal government is limited to its enumerated powers. To the contrary, several provisions—the General Welfare Clause, the Necessary and Proper Clause, and the Preamble—could plausibly be read to support a congressional power to address all national problems. The historical context of the founding era is similarly ambiguous. Many readers certainly understood the Constitution to presuppose some form of enumerationism, but many did not.

If these arguments are correct, enumerationism falls into the "construction zone," where history, judicial precedent, and other sources fill the gaps in original public meaning. It is history and precedent, not original meaning, that supply the strongest arguments for enumerationism. Yet the history of enumerationism is complex and fraught with contestation. For most of that history, Congress has routinely legislated as if it possessed

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[*] Milton O. Riepe Chair in Constitutional Law, University of Arizona, James E. Rogers College of Law.

[**] Frederick W. & Vi Miller Professor of Law, Vilas Distinguished Achievement Professor, University of Wisconsin Law School. The authors wish to thank the following colleagues for their valuable comments on drafts of this Article: Randy Barnett, Jonathan Gienapp, Toni Massaro, John Mikhail, Julian Mortenson, Richard Primus, Michael Rappaport, Shalev Roisman, Lawrence Solum, and the participants of the 2023 Originalism Works in Progress Workshop at the University of San Diego Law School.

the power to address all national problems. The Supreme Court has generally acquiesced, embracing enumerationism in theory while circumventing it in practice. A constitutional construction that followed this traditional approach would pose no substantial obstacle to any important federal legislation.

INTRODUCTION

The powers of Congress are limited to those enumerated in the Constitution and must not be construed as the equivalent of a general police power, either individually or collectively. This doctrine of "enumerationism" is the linchpin of a multidecade conservative assault on the broad conception of federal powers recognized by the Supreme Court since 1937.[1] Enumerationism was at the heart of the partially successful challenge to the Affordable Care Act in *National Federation of Independent Business v. Sebelius*[2] and supplied the primary rationale for the Supreme Court's landmark decisions in *United States v. Lopez*[3] and *United States v. Morrison*.[4] After these decisions and recent conservative appointments to the U.S. Supreme Court, enumerationism lies around like a loaded weapon, potentially threatening a broad range of federal environmental, civil-rights, public-health, wage-and-hour, and workplace- and consumer-safety regulations.[5] On some interpretations, it may also threaten a vast array

1. David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575 (2017) (coining this term).

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534–35 (2012) (opinion of Roberts, C.J.).

3. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

4. United States v. Morrison, 529 U.S. 598, 615 (2000).

5. *See, e.g.*, *Lopez*, 514 U.S. at 592–93 (Thomas, J., concurring) (invoking enumerationism to argue against the "substantial effects" test that underwrites much of the modern regulatory state); Gonzales v. Raich, 545 U.S. 1, 59–60 (2006) (Thomas, J., dissenting) (same); Schwartz,

of federal taxing and spending legislation, which gives Congress quasi-regulatory authority over much of national life, including the many important areas of state governance that are funded in some significant proportion by the federal government.[6] If the Supreme Court moves to curtail federal power in the coming years, it is very likely to do so in the name of enumerationism.

The loudest champions of enumerationism are originalists, who profess to view the original public meaning of the constitutional text as authoritative.[7] But even critics of originalism generally accept enumerationism, at least for the sake of argument.[8] The few who reject it largely do so on structural or functionalist grounds, leaving originalist arguments for the principle almost entirely unchallenged on their own terms.[9] This is unfortunate because, as

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supra note 1, at 579 (describing dangers of enumerationism); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1954 (2008) (attributing "the rise of the modern regulatory state" to the withering of enumerationism); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237 (1994) (similar). *See generally* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013) (describing the enumerationist constitutional vision and its philosophical underpinnings).

6. *See, e.g.*, Lynn A. Baker, *The Spending Power After* NFIB v. Sebelius, 37 HARV. J.L. & PUB. POL'Y 71, 72 (2014) (arguing that enumerationism requires limits on conditional spending power); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 490 (2002) (arguing that conditional federal spending is unconstitutional partly on enumerationist grounds); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 532 (1993) (describing modern spending power jurisprudence, on which Social Security and other social welfare programs rest, as "gutting the doctrine of enumerated powers").

7. *See Lopez*, 514 U.S. at 592–93 (Thomas, J., concurring); *Raich*, 545 U.S. at 59–60 (2006) (Thomas, J., dissenting); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 90 (2013) (asserting that *Lochner*-era commerce cases represent correct "long-standing originalist interpretation" of Commerce Clause); Kurt T. Lash, Response, *The Sum of All Delegated Power: A Response to Richard Primus,* The Limits of Enumeration, 124 YALE L.J. F. 180, 180–81 (2014) ("Whatever else is uncertain about the scope of delegated power, the constitutional text, reasonably interpreted, communicates that the sum of all actual delegated federal power amounts to something less than all possible delegated power."); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1801 (2013) ("The Constitution contains a list of powers, and while several of the powers are open-ended, none provides a reason to think the list is not complete."); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 42–43 (2018) (arguing that New Deal commerce power cases were "unfaithful" interpretations).

8. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 614 (2012) (Ginsburg, J., concurring in part and dissenting in part) (dismissing enumerationist concerns about the Affordable Care Act without challenging their premise); United States v. Morrison, 529 U.S. 598, 639 (2000) (Souter, J., dissenting) ("The premise that the enumeration of powers implies that other powers are withheld is sound . . . ."); Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 594 (2011) (accepting enumerationism for the sake of argument and articulating judicially enforceable constitutional limits that the Affordable Care Act respects).

9. *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 156 (2010) (offering "structural and consequentialist"

this Article will demonstrate, the originalist case for enumerationism is remarkably weak and undertheorized.

One important reason for this is that enumerationism itself is undertheorized. On careful examination, that doctrine turns out to comprise three closely related but distinct principles. The first and most basic holds that Congress possesses only those legislative powers enumerated in the constitutional text. The second holds that the legislative powers enumerated by the Constitution are all specific, rather than general. In particular, Congress possesses no undifferentiated power to provide for the general welfare or legislate on all national problems. Finally, a third principle holds that Congress's enumerated powers must not be construed, individually or collectively, as the equivalent of a general police power to legislate on all subjects.[10]

Originalist defenders of enumerationism do not always distinguish carefully between these three principles, and this failure weakens their arguments in various ways. More important, none of the three principles are well-grounded in the original public meaning of the Constitution. Indeed, the original *semantic* meaning of the Constitution—the conventional meaning of its words and phrases, together with the rules of grammar and syntax—is entirely consistent with a rejection of all three. The historical context of the founding era, which supplements and enriches the semantic meaning of the text, is profoundly ambiguous. Many contemporary readers certainly understood the Constitution to embrace some form of enumerationism, but many did not, and much of the available evidence is complicated by the questionable sincerity and motivated reasoning of participants in the drafting and ratification processes.[11]

Given the contestation and uncertainty over the enumerationist reading of the Constitution at the time of ratification, any attempt to rest on historical context raises difficult theoretical questions that no originalist defender of enumerationism has begun to confront, much less answer. Is it possible to attribute a determinate original public meaning to the constitutional text based on background context and assumptions that were widely disputed and unsettled at the time of its drafting and ratification? If so, how are modern interpreters to disentangle the ratifying public's hopes, expectations, and political preferences from statements demonstrating an enumerationist understanding of the document's communicative content? What is the standard for establishing an enumerationist public meaning as determinate? And where does the burden of proof on this question lie?

One reason these questions have been so neglected is that enumerationism is far more frequently assumed than argued for. The constitutional literature

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critique of enumerationism); Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1967 (2013) (similar).

10. *See infra* Section I.A.3.

11. *See infra* Part II.

on federalism is littered with passing references to enumerationism's originalist pedigree and quotations from *The Federalist* and other advocates of ratification espousing enumerationism. But relatively few originalist scholars have squarely, explicitly, and self-consciously made the case for enumerationism, and even fewer have done so during the maturity of modern originalist theory. The small body of literature from this period often speaks in the language of public-meaning originalism but fails to appreciate the profound and challenging implications of that theory for "applied originalism"—the historical investigation of particular original public meanings.[12]

As a result, most of this literature gives short shrift to the contrary evidence—including the many founding-era sources that rejected enumerationism—that is essential to assess the determinacy of enumeration's original public meaning. Even when enumerationist originalists have considered such evidence, they have generally done so without a clear grasp of what standard their argument must satisfy to establish a determinate public meaning.[13] Perhaps for this reason, they have also failed to appreciate the difficulties of disentangling evidence of original public meaning from close cognates like expectations, hopes, and political preferences.

The upshot is that the originalist case for enumerationism remains decidedly unproven. We do not say definitively that such a case could never be made. Given the complexity of the question and the voluminous literature bearing on it, that would require a more exhaustive historical analysis than any one article could provide. But there is strong evidence that the original public meaning of enumeration was contested and indeterminate, which enumerationists have largely ignored. This evidence raises profound challenges for enumerationism under modern originalist theory that enumerationists have also largely ignored. Both enumerationists and their nationalist critics are therefore wrong to take the originalist pedigree of enumerationism for granted. Much more historical research and analytical work would be required to draw a confident conclusion.

In pressing this point, we build on a growing literature that aims to excavate and recover "the Federalist Constitution"—that is, the "vision of the Constitution held between 1787 and 1800 by leading figures in the struggle for constitutional ratification and, thereafter, by leading figures in the Federalist Party."[14] This literature has done much to unsettle received Jeffersonian-Madisonian narratives of the founding which treat a limiting enumeration of powers as "[t]he essential characteristic of the" new national

12. *See, e.g.*, Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 248 (2018) (using "applied originalism" in this way).

13. *See* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 120 (2017) ("Perhaps the most obvious gap—or canyon—is the failure of, as far as I can tell, any of the new originalist scholars to identify the operative standard of proof."). Lawson is himself an originalist. *Id.* at 118.

14. David S. Schwartz, Jonathan Gienapp, John Mikhail & Richard Primus, *Forward: The Federalist Constitution*, 89 FORDHAM L. REV. 1669, 1671 (2021).

government established by the Constitution.[15] In fact, many prominent Federalists of the founding generation took a very different view, as their Anti-Federalist opponents well recognized. But thus far, this literature has been predominantly historical and historiographical. As such, it has mostly focused on the views, intentions, and political projects of particular individuals and groups. It has not frontally engaged originalist arguments for enumerationism on their own terms—that is, in terms of original public meaning. This Article is the first to do so.[16]

Part I shows that the original semantic meaning of enumeration was fundamentally indeterminate. All of the standard textual arguments for enumerationism require that the reader presuppose or assume the core tenets of enumerationism. For that reason, they are entirely circular. Read without a presupposition of enumerationism, the original semantic meaning of the text is perfectly consistent with a rejection of all three of enumerationism's core tenets. Indeed, several of the Constitution's provisions—including the General Welfare Clause, the Necessary and Proper Clause, and the Preamble—are most naturally read to create a federal government empowered to address all important national problems, though their semantic meaning does not decisively resolve the question.[17]

Part II considers whether the semantically ambiguous constitutional text could nevertheless have communicated the core tenets of enumerationism when read in its original context. According to modern originalism, the semantic meaning of the Constitution is "enriched" by its background context—the widespread assumptions, presuppositions, and cultural frames of reference that operated to supplement the communicative content that the text conveyed to the founding-era public.[18] Consciously or unconsciously, most originalist arguments for enumerationism sound in the register of contextual enrichment, rather than semantic meaning. But the case they

15. 2 ANNALS OF CONG. 1898 (1791) (statement of Madison) (opposing the First Bank of the United States).

16. We recognize, of course, that "original-public-meaning originalism" is not the only significant school of contemporary originalist thought. In recent years, "original-law" originalism, in particular, has emerged as an influential competitor, arguing that originalism is "our law." *See, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 789–90 (2022); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–54 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818–22 (2015). Nevertheless, we believe original-public-meaning originalism remains the reigning originalist orthodoxy, and our focus in this Article is specifically the original public meaning of the Constitution with regard to enumeration. We suspect that an original-law originalist case for enumerationism would suffer from many of the same indeterminacy and dissensus problems as the original public meaning arguments, but we leave that question for another day. When we refer to originalism or modern originalism in this Article, we mean original-public-meaning originalism, unless otherwise noted.

17. *See infra* Part I.

18. *See, e.g.*, Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1983–87 (2021).

make is weak and underdeveloped, perhaps because it has so long been taken for granted. There is also considerable evidence that enumerationist assumptions were not universally shared and, in fact, were strongly contested. This evidence, in turn, poses numerous theoretical difficulties that enumerationists have never addressed in a serious way. In short, there are strong—and unanswered—arguments that the original public meaning of enumeration was indeterminate.

Part III asks what follows if these arguments are correct. Under modern originalist theory, the answer is straightforward. Constitutional decisionmakers must resolve the status of enumerationism on other grounds, through "construction" or gap-filling. Originalists disagree among themselves about how construction should work, but most acknowledge that judicial precedent and historical practice have a significant role to play.[19] Contrary to conventional wisdom, it is these two factors—not original public meaning—that supply the most persuasive argument for enumerationism. But here, too, the case for enumerationism has been far more assumed than argued for.

A clear-eyed examination of the history reveals a far more complicated picture than conventional wisdom would suggest.[20] For most of American history, the Supreme Court has found some way to accommodate a federal legislative power to address all national problems, recognizing many significant unenumerated powers in the process. Congress, too, has routinely legislated as if it possessed a general power to address any plausibly national problem. The history is complicated, and we cannot provide anything like a definitive account here. But there are strong arguments that a toothless and ceremonial enumerationism is more consistent with historical practice and judicial precedent than the muscular enumerationism of the modern movement-conservative imagination.[21]

Even a toothless and ceremonial enumerationism poses dangers, however. In the hands of strongly ideological or partisan judges, it may not be applied faithfully. Alternatively, faithful but overzealous judges may mistake rhetoric for reality, construing enumerationism to impose significant constraints on Congress's power to address national problems. This danger will persist as long as enumerationism remains an axiom of American federalism. The safest course, therefore, would be to abolish enumerationism as a judicially enforceable limit on federal power.

Part IV makes the case for this approach. Radical as it may seem, abolishing enumerationism would be consistent with most of American constitutional practice and the results, if not the rhetoric, of most Supreme Court precedent. Moreover, there are strong arguments for this approach

19. *See infra* Section III.A.

20. Schwartz, *supra* note 1, at 603–08; *see also* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 613–14 (2014).

21. *See infra* Section III.B.

that are entirely consistent with the tenets of modern originalism.[22] We doubt many, or any, conservative originalists will be willing to follow us this far. But we hope that the historical and theoretical questions that this Article poses will give them pause before wielding enumerationism as a sword.

I. ENUMERATION AND SEMANTIC MEANING

Originalists emphasize the primacy of original semantic meaning—the conventional meaning of the Constitution's words and phrases, together with the rules of grammar and syntax—throughout the interpretive process.[23] But the argument that the Constitution's original semantic meaning limits the powers of Congress bears little relationship to the actual words on the page. Only by reading the relevant constitutional language with a firm prior commitment to enumerationism—that is, with an overwhelming confirmation bias—does the key language appear to mandate limited enumerated powers.[24] That this prior commitment is shared by originalists and nonoriginalists alike does not change the words on the page: The Constitution nowhere says that the federal government is limited to its enumerated powers. Indeed, stripped of our cultural steeping in enumerationism, the Constitution—while somewhat ambiguous—leans more toward a general legislative power to address all national problems.

To uncover enumerationism in the original public meaning of the Constitution requires decidedly nontextual interpretations buttressed by contextual factors. We will discuss such "contextual enrichment" in Part II. Here, we begin by explaining the elements of enumerationism. We then move on to analyze the relevant constitutional text that enumerationists either overinterpret or explain away in support of their position.

A. THE ELEMENTS OF ENUMERATIONISM

The first thing to understand about enumerationism is that it consists of not one but three distinct principles. Although enumerationism properly comprises all three elements, enumerationists at times argue as if only one of the three requires defending. It is thus important for the sake of analytical clarity to disentangle and define those three principles. Moreover, as we shall explain shortly, the evidence and arguments for—or against—one element of enumerationism do not necessarily apply to the others. This is a significant problem for enumerationists who are not always attentive to the fundamentally plural nature of their own doctrine.

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22. *See infra* Section II.C.

23. *See, e.g.*, Solum, *supra* note 18, at 1957; Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1425–27 (2021).

24. *See* Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301, 328–29 (2020) ("[W]e tend to misread texts to say what we expect them to mean.").

1. Restricted Implied Powers

The first and most basic principle of enumerationism holds that Congress possesses only those powers actually enumerated in the constitutional text. It does not possess any powers implied from or inherent in the nature of sovereignty or implied powers of any other kind, except for the incidental powers conferred by the Necessary and Proper Clause to implement Congress's enumerated powers.[25] Call this the "Restricted Implied Powers Principle." The final caveat about incidental powers is necessary because, of course, the Necessary and Proper Clause is part of the constitutional text.

There is a significant and underappreciated tension between this caveat and the doctrine it qualifies. The core idea of limited enumerated powers is that the Constitution's enumerated list of powers is interpreted according to the canon of *expressio unius*—the enumeration of some powers excludes those not listed.[26] If, instead, the Necessary and Proper Clause can be used to imply other, distinct powers of equal or greater stature to at least some of those enumerated, then the *expressio unius* principle is violated. To reconcile the Necessary and Proper Clause with *expressio unius*, enumerationists must (1) distinguish the incidental powers it confers from other implied powers and (2) restrict those powers to a sufficiently narrow compass to preserve the limiting character of the enumerated powers. Hence the "*Restricted* Implied Powers Principle." Enumerationism must restrict implied powers—and specifically, incidental powers—but it cannot exclude them completely.

Despite its venerable pedigree and centrality to enumerationism, the Restricted Implied Powers Principle remains surprisingly undertheorized. To the extent that the need for a theory is recognized at all, conventional doctrine maintains that incidental powers under the Necessary and Proper Clause are compatible with enumerationism because they are not ends in themselves but *subordinate means* to effectuate enumerated powers.[27] The Restricted Implied Powers Principle commits enumerationists both to a limiting enumeration of powers and a restrictive interpretation of Congress's incidental powers under the Necessary and Proper Clause. Without the latter, the incidental-powers exception would swallow the limited, enumerated powers rule.

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25. The Necessary and Proper Clause also confirms that Congress has implied powers to "carry into execution" the powers of the other departments and officers, as well as "the government of the United States." *See* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045, 1069 (2014). Enumerationists are often hazy about what these other aspects of the Clause mean or how they fit with enumerationism. *See infra* Section I.C.1.

26. *See* Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016).

27. As one of us has explained elsewhere, this doctrinal requirement is easily stated but quickly breaks down on application, raising serious questions about the internal coherence of the Restricted Implied Powers Principle. David S. Schwartz, McCulloch v. Maryland *and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL'Y 25, 34–50 (2021).

2. No General Powers

The second core principle of enumerationism is that the enumerated powers of Congress must all be categorical or specific as to subject matter. Call this the "No General Powers Principle." A power is "general" in the relevant sense if it is not confined to specific, categorically defined subject matter. A power to legislate for the "general welfare" is general, in contrast to the enumerated powers "to establish . . . uniform laws on the subject of bankruptcies"[28] or even the far broader, but still subject-specific and categorically defined power "to regulate commerce . . . among the several states."[29] A power to regulate all genuinely national problems—or all problems that the states are incapable of addressing on their own—is also general in the relevant sense. Enumerationists are committed to the idea that the Constitution limits federal power through a strategy of categorical ex ante enumeration, rather than ex post judicial—or legislative—judgments about which matters are genuinely national.

It is commonplace for enumerationists to contrast the limited powers of Congress with "a general police power,"[30] which means legislative power with no presumptive subject-matter restrictions. The implication is that the only two choices for empowering a legislature are a power to regulate all conceivable subject matters, on the one hand, or an exhaustive and limiting enumeration on the other. Thus, as Chief Justice John Roberts would have it, "rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers."[31]

This is a false dichotomy, as we will see momentarily, and it functions as the concealed premise of a seductively simple syllogistic argument for enumerationism. Since "everybody knows" that the Constitution was meant to place limits on government, it stands to reason that the document would not have conferred "all the conceivable" powers of legislation on Congress. If the only alternative to such a sweeping grant of power is limited enumerated powers, enumerationism follows as a matter of basic logic.

But the dichotomy is false because it excludes a plausible middle ground: limited *general* rather than limited *enumerated* powers. For example, the Constitution could, and arguably does, authorize Congress to legislate on all genuinely *national* matters.[32] Though this authorization is stated in general

28. U.S. CONST. art. I, § 8, cl. 4.

29. *Id.* art. I, § 8, cl. 3.

30. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

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

32. *See generally* David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857 (2022) (arguing that literal interpretation of the General Welfare Clause authorizes Congress to address all national problems); Cooter & Siegel, *supra* note 9 (similar); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) (similar).

terms, it is not unlimited: It excludes purely local matters. This is true even though the dividing line between national and local regulatory problems may be difficult to define and may change from one set of circumstances to the next.[33] Put simply, it is entirely possible for a general power to be limited. Thus, the No General Powers Principle is logically distinct from the Restricted Implied Powers Principle.

3. There Must Be Something

The third core principle of enumerationism is that there must be something Congress cannot regulate; otherwise, Congress necessarily has a general police power to regulate everything, which would defeat the purpose of a limiting enumeration. Call this the "Must Be Something Principle."[34] This principle requires the rejection of any argument for the constitutionality of federal legislation that has no articulable limiting principle or stopping point short of a general legislative power. But it does more: It holds that the existence of those "somethings" Congress cannot regulate is the only way we know Congress is limited to its enumerated powers.[35] In this respect, the Must Be Something Principle goes beyond the Restricted Implied Powers Principle. Under the former, it is not enough to restrict Congress to its enumerated powers plus the incidental and subordinate powers conferred by the Necessary and Proper Clause. It is essential that those powers, individually and collectively, leave something that Congress cannot regulate.

It would be comforting if the category of things Congress cannot regulate were limited to purely local regulatory matters within the states' competence to address on their own. But that is not, and logically cannot be, the case. Once we eliminate the false dichotomy of limited enumerated or unlimited general police powers, this becomes clear. The Constitution's overlooked alternative to enumerationism is a limited general power to address all genuinely national problems. For enumerationism to differentiate itself from that alternative, it cannot rely on a Must Be Something Principle limited to purely local problems. If the only things Congress cannot regulate are those matters that are purely local, then Congress by definition *can* regulate all those matters that are truly national. A demonstration of limited enumerated

33. In many times and contexts, for example, zoning may be a predominantly local concern. But if a large number of zoning boards across the country are permitting the destruction of wetlands to such an extent that the local practices collectively imperil the nation's ecological health, the problem may be better characterized as national.

34. David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 939 (2019).

35. This is untrue as a logical matter, as Richard Primus has demonstrated. It is entirely possible for a government, or a person, to exercise only those powers specifically granted and for those powers, individually or collectively, to span the entire field. For example, a child authorized to have only chocolate, strawberry, or vanilla ice cream does not exceed that enumerated authority by eating any ice cream in the freezer if those are the only three flavors present. Primus, *supra* note 20, at 581.

powers, then, requires the existence of truly national problems that are beyond the reach of Congress. An originalist case for enumerationism must therefore show, among other things, that the original meaning of the Constitution requires that some national problems must go unaddressed.

The Must Be Something Principle is analytically distinct from the Restricted Implied Powers and No General Powers Principles, just as those principles are distinct from one another. An interpretation of the Necessary and Proper Clause that authorized Congress to exercise incidental powers of greater stature than some enumerated powers would violate the Restricted Implied Powers Principle, but it would not necessarily violate the No General Powers or Must Be Something Principles. A federal power to legislate on all genuinely national matters would satisfy the Must Be Something Principle and, if grounded in the General Welfare Clause, would also satisfy the Restricted Implied Powers Principle. But it would clearly violate the No General Powers Principle. Finally, an interpretation of the federal commerce power that authorized Congress to regulate every sphere of human activity would satisfy the Restricted Implied Powers and No General Powers Principles, but it would violate the Must Be Something Principle. Keeping the three principles distinct will facilitate a clearer analysis of their originalist pedigree—or lack of one.

B. THE FLAWED SEMANTIC ARGUMENTS FOR ENUMERATIONISM

The fragmentary or vague constitutional language traditionally relied on as evidence of enumerationism, taken piecemeal or collectively, fails to establish enumerationism as a matter of either original semantic meaning or the textualism common to all mainstream interpretive approaches. Each phrase or clause relied upon as establishing enumerationism rests on a question-begging or circular argument. It is deeply ingrained, and perhaps therefore understandable, to assume from the start that the Constitution embraces enumerationism. Nevertheless, that assumption is no part of the original semantic meaning of the Constitution. Once we peel it away, the constitutional text looks very different.

In this Section, we focus on the key words and phrases typically relied on as proof of enumerationism, which have roughly the same semantic meanings today as they did circa 1787 to 1788. The focus in this Section will be on these unadorned, conventional meanings. We also make occasional reference to other constitutional text and the structure of the Constitution as a whole, which straddle the hazy line between semantic meaning and contextual enrichment.[36] Some readers may be puzzled that we do not discuss more

36. In technical terms, such inquiries probably qualify as contextual, but the line is difficult to draw cleanly, and this classificatory question has no practical significance. The argument we call "bootstrapping from the list" may also qualify as contextual, though its proponents seldom conceive it in those terms. *See infra* Section I.B.1. We include it in this Section because it is generally classified as textualist. We thank Larry Solum for pushing us on this point.

evidence of usage and understanding by the ratifying public at this point. But the vast majority of statements about enumerationism by participants in the ratification debates spoke in the register of contextually enriched rather than semantic meaning.[37] We discuss contextual enrichment in Part II.

1. Bootstrapping from the List Itself

Chief Justice Roberts stated the conventional wisdom succinctly in *National Federation of Independent Business v. Sebelius*: "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."[38] How exactly is this "made clear?" Nothing about a list is semantically, logically, or legally exhaustive—that is, preclusive of things not listed.[39] Nor is there a general presumption in favor of treating lists as exclusive—the doctrine of *expressio unius* notwithstanding.[40] Every legal drafter knows that lists are inherently ambiguous on this point, and "making clear" their exhaustive nature requires some further indication.

Article I, Section 8 begins with the words, "[t]he Congress shall have Power to." It would have been an exceedingly simple matter to "make clear" that the enumeration was exhaustive by instead beginning Article I, Section 8 with "the Congress shall have only the following Powers." The absence of such limiting language is telling, particularly in light of other textual indicators that the enumeration should not be read as exhaustive.[41] Even if we assumed, counterfactually, that an enumerated list of powers conclusively implied exhaustiveness, that would not eliminate the possibility that the General Welfare Clause should be understood as an expressly delegated power to legislate on all national problems.[42] In other words, even an exhaustive enumeration might still violate the No General Powers Principle. By the same

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37. *See generally* Andrew Coan & David S. Schwartz, *Interpreting Ratification*, 1 J. AM. CONST. HIST. 449, 452 (2023) (collecting and analyzing examples).

38. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) (opinion of Roberts, C.J.) (citation omitted).

39. Consider an ordinary shopping list that simply enumerates grocery items ("lettuce, cucumbers, milk, etc."). Absent further written instructions, only background assumptions or context can differentiate whether the shopper is to "buy only the listed items," or to "include the listed items plus whatever else you think we need."

40. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 302 (2017) ("The *expressio unius* canon applies only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.'" (alteration in original) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002))); Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013) ("[T]he *expressio unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.'" (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003))); *see also Echazabal*, 536 U.S. at 80 (determining that "spacious . . . categories, which seem to give . . . a good deal of discretion" weigh against *expressio unius*).

41. *See infra* Section I.C.

42. *See infra* Section I.C.2.

token, the purported exhaustiveness of the enumeration is necessary but not sufficient to establish enumerationism as a textual matter.

2. The "Herein Granted" Misreading

Article I, Section 1, the Legislative Vesting Clause, states, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Enumerationists typically read "herein granted" as confirming that Congress is limited to its enumerated powers.[43] But this argument mischaracterizes the meaning of "herein," and on examination, proves fatally circular. Only if the enumerated powers are exhaustive and limiting does "herein granted" take on the meaning enumerationists attribute to it. That is because "herein" does not mean "expressly"—today or at the founding. Rather, "herein granted" means nothing more or less than "granted *in this* Constitution."[44] If the grants of power are exhaustive, then "herein granted" *reflects* that meaning. But it 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 nonenumerationist grant of power and does not override it.[45]

Enumerationists read the Legislative Vesting Clause to say, "only 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, a more natural and straightforward reading is, "whatever legislative powers are granted herein shall be vested in a Congress." 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.*

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43. *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." (quoting U.S. CONST. art. I, § 1)); Lawson, *supra* note 5, at 1233–34; *see also* Primus, *supra* note 24, at 302 n.6 (listing examples).

44. *See Herein*, AM. DICTIONARY OF THE ENG. LANGUAGE, https://websterdictionary1828.com/Dictionary/herein [https://perma.cc/BJ4S-WAN3] (defining "herein" as "[i]n this"). Originalist scholars and practitioners have been surprisingly casual in their justifications for using particular dictionaries. Dictionaries by their nature tend to be lagging, rather than leading indicators of word usage. Accordingly, the frequently relied-on Samuel Johnson's Dictionary (1755 and 1785) may be a less reliable source of usage than Noah Webster's 1828 Dictionary. Moreover, Johnson's is a dictionary of British English, while Webster self-consciously sought to capture the distinctive American English usage, relying on those whom he considered important American authors, including John Adams and John Marshall. *See* Preface, AM. DICTIONARY OF THE ENG. LANGUAGE, https://websterdictionary1828.com/Preface [https://perma.cc/B59F-2ZU4] (noting necessity of a dictionary of American English because "some differences must exist"); *id.* (identifying American writers, including "Franklin, Washington, Adams, Jay, Madison, Marshall," and others as "authorities" of American English usage).

45. For an insightful analysis reaching the same conclusion on different grounds, see generally Primus, *supra* note 24.

Present-day interpreters routinely ignore the balance of the Legislative Vesting Clause: "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*." Today, we take the nature and structure of Congress for granted. The Framers and ratifiers did not. When the Constitution was proposed in September 1787, Congress under the Articles of Confederation was a unicameral body. A bicameral Congress represented a major change that needed to be prominently announced, and perhaps explained and justified.[46] Moreover, the Confederation Congress lacked any direct legislative powers. In John Adams's words, the United States in Congress assembled was "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly" comprising ambassadors of sovereign states.[47] The essay in which Adams wrote this was published in Philadelphia on May 9, two weeks before the start of the Convention, and was read with interest by many delegates.[48] Among these was Edmund Randolph, sponsor of the Virginia Plan with its bicameral Congress, who repeated Adams's point.[49]

The Vesting Clause explained that the new Congress would be transformed from a pseudo-legislature recommending measures to the states into a body wielding true legislative power. Moreover, in contrast to the unicameral Confederation Congress, Article I, Section 1 announces the major change from a unicameral to a bicameral Congress. The Framers believed that this structural change would be of great importance to the ratifying public. They therefore took pains to emphasize it first and foremost in the cover letter the Convention transmitted to Congress along with the proposed Constitution.[50]

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46. The bicameral Congress was emblematic of the controversial abandonment of the Articles of Confederation. While there proved to be little opposition to a bicameral legislature in the ratification debates, the Framers did not know that when they drafted Article I. Benjamin Franklin had initially advocated retaining a unicameral Congress. *See* Madison (May 31, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47, 48 (Max Farrand ed., 1911). The New Jersey plan, introduced midway through the Convention, rested on a unicameral Congress. Madison (June 15, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 242, 242–43. And Luther Martin, a Convention delegate who vigorously opposed ratification in Maryland, continued to object to a bicameral Congress both during the Convention and in the ratification debates. *See* Luther Martin Addresses the House of Delegates (Nov. 29, 1787), *in* 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 87, 90–91 (John P. Kaminski et al. eds., 2015).

47. John Adams, *A Defence of the Constitutions, Letter LIII*, N.Y. DAILY ADVERTISER (May 9, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 86, 86 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

48. *Id.*; *see* Mary Sarah Bilder, *The Soul of a Free Government: The Influence of John Adams's* A Defence *on the Constitutional Convention*, 1 J. AM. CONST. HIST. 1, 15–20 (2023).

49. Madison (June 16, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 249, 256 (statement of Randolph) (calling the Confederation Congress "a mere diplomatic body").

50. George Washington, President, Letter to Congress (Sept. 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666, 666 (Max Farrand ed., 1911) (asserting "the impropriety of delegating" the "extensive" new powers of the Constitution to a unicameral congress).

In the Constitution itself, Sections 2 through 7 of Article I deal with structural and procedural elements of the newly bicameral Congress; other than the Elections Clause (Article I, Section 4), the Constitution doesn't get around to defining legislative powers until Section 8.[51] To the Framers and very likely their audience, the Constitution's enumeration of the powers of Congress was second in importance to the nature and structure of Congress.

The enumerationist reading of the Article I, Section 1 is thus a remarkably presentist misreading. Ignoring more than half of the Vesting Clause it emphasizes a purported definition of "all legislative powers" and disregards as unimportant the seismic structural changes to a truly legislative and bicameral Congress. Properly read, neither the text of the Vesting Clause itself nor the structure of Article I supports an enumerationist reading.

Enumerationists typically derive significance from the purported difference between the vesting clauses of Article I and Article II. The latter states that "[t]he executive Power shall be vested in a President of the United States."[52] The contrast, they argue, is telling: While Congress is only empowered to exercise the "legislative Powers herein granted," the president is granted whatever broad and unenumerated panoply of powers can be characterized as "executive" in nature.[53] In other words, in the peculiar lexicon of enumerationism, vesting "the . . . Power" grants broad implied powers whereas vesting powers "herein granted" grants only those powers actually enumerated.[54]

This argument is controvertible to say the least.[55] The difference in vesting clauses was barely noticed during ratification. Entirely absent from *The Federalist*, it was ignored even by Federalists eager to demonstrate an enumerationist reading of the Constitution.[56] But even assuming it is correct, this comparative-vesting-clauses argument does not escape the circularity

51. The impeachment powers are powers "of Congress," but are not enumerated lawmaking powers. *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

52. *Id.* art. II, § 1.

53. *Compare id.* art. I, § 1, *with id.* art. II, § 1.

54. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in part) ("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, 256–57 (2001) (arguing that Article II's vesting clause "must" be a grant of power because Article I refers only to those powers "herein granted").

55. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1180–83 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1274–77 (2020).

56. *See* Primus, *supra* note 24, at 305, 323–25. It appears to have been cooked up by Alexander Hamilton in 1793 to make a case for expansive foreign affairs powers on behalf of President Washington. *See id.* at 305. Hamilton was willing to trade off an expansive view of legislative power to win his point. Jonathan Gienapp, *National Power and the Presidency: Rival Forms of Federalist Constitutionalism at the Founding*, *in* POLITICAL THOUGHT AND THE ORIGINS OF THE AMERICAN PRESIDENCY 127, 151 (Ben Lowe ed., 2021).

mentioned above. Unless one is prepared to argue that the President holds extraconstitutional powers—for example, an inherent power to declare a state of emergency or dissolve Congress—then the President, like Congress, has whatever powers are 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"—the only basis for distinguishing the two vesting clauses is to assume the point in controversy, that the only legislative powers granted by the Constitution are those expressly enumerated.

3. The "Proper" Clause

Another manifestly circular argument resorts to the Necessary and Proper Clause. The most influential arguments in the sizable originalist literature on this Clause read the words "necessary" and "proper" as imposing distinct constitutional requirements.[57] The original semantic meaning of "necessary," on this reading, is something like "conducive to the exercise of" one or more of the powers Congress is authorized "to carry into execution" by the Necessary and Proper Clause.[58] The original semantic meaning of "proper" is something like "appropriate," in the sense of consistent with propriety; "naturally or essentially belonging to" or "particularly suited to."[59] On this reading, enumerationists (originalist or otherwise) define "proper" as consistent with the "spirit" or structure or general principles of the Constitution, and specifically, the core tenets of enumerationism.[60] Chief Justice Roberts endorsed precisely this rationale in holding that the Affordable

57. *See, e.g.*, Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 144, 145 (Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman eds., 2010) (reading the clause in this way); Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, *supra*, at 84, 89–91 (same); *see also* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 721–24 (2016) (summarizing the literature).

58. *See, e.g.*, Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 287–88 (1993) (arguing that the original meaning of the word "necessary" required "a telic relationship . . . between legislative means and ends").

59. *See, e.g.*, *id.* at 292; *Proper*, AM. DICTIONARY OF THE ENG. LANGUAGE, https://websterdictionary1828.com/Dictionary/proper [https://perma.cc/8SC6-QLRK].

60. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); *see, e.g.*, Lawson & Granger, *supra* note 58, at 271–72 (the Necessary and Proper Clause "serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights"); *accord* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 210–12 (2014); Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper,"* *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 146, 152 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 216–17 (2003).

Care Act's individual mandate could not be justified under the Necessary and Proper Clause.[61]

There is much that could be said against this argument, but two observations will suffice for present purposes. First, nothing in the conventional meanings of "necessary" and "proper" or the rules of grammar and syntax requires that the two words be read as imposing separate and distinct requirements. From a purely semantic standpoint, they can just as easily be read as an example of internal redundancy or pleonasm (like "separate and distinct" in the previous sentence). This was common in English usage at the founding and remains so today.[62] Such redundancy is found throughout the constitutional text.[63]

Second, no semantically plausible interpretation of the word "proper" in itself actually encompasses the core tenets of enumerationism.[64] At most, "proper" points outward to some externally defined standard of propriety or constitutional principle. Only if one takes the tenets of enumerationism as given can it be said that their violation is "improper." The circularity of this should be obvious.[65] As a matter of semantic meaning, enumerationist arguments from the word "proper" are no less question-begging than arguments from "herein granted." They supply no textual basis for enumerationism.

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61. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (opinion of Roberts, C.J.) ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective.").

62. *See, e.g.*, Mikhail, *supra* note 25, at 1114–20 (citing instances where Necessary and Proper Clause was read as pleonasm); H. Jefferson Powell, *The Regrettable Clause:* United States v. Comstock *and the Powers of Congress*, 48 SAN DIEGO L. REV. 713, 772 (2011) (attributing this reading to Chief Justice John Marshall); *see also McCulloch*, 17 U.S. at 324 (suggesting that "necessary" and "proper" are synonymous); Opinion of Edmund Randolph, Attorney General of the United States, to President Washington (Feb. 12, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 86, 89 (M. St. Clarke & D. A. Hall eds., 1832) (similar). Even careful *proponents* of the argument that "proper" functions as a distinct limitation acknowledge that the two words have broad and overlapping semantic ranges, today and at the founding. *See, e.g.*, Lawson & Granger, *supra* note 58, at 291; Miller, *supra* note 57, at 160–62; *see also* Bray, *supra* note 57, at 733–34. Bray's intriguing and thorough study claims that "necessary and proper" is a unitary phrase in which both terms contribute something to the meaning. *Bray*, *supra* note 57, at 737–38. But as he acknowledges, that reading is not semantically compelled, nor does it compel enumerationism. *Id.* at 732–40.

63. *See, e.g.*, U.S. CONST. pmbl. ("ordain and establish"); *id.* art. I, § 3, cl. 7 ("hold and enjoy any Office"); *id.* art. I, § 8, cl. 14 ("Government and Regulation"); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1728 n.20 (2002) (making this point and collecting examples).

64. *See* John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1080–81 (2015).

65. *See* Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. 1431, 1448–49 (2021); *cf.* Posner & Vermeule, *supra* note 63, at 1728 n.20 (making a similar point in the context of the nondelegation doctrine); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1031 n.115 (1995) (making a similar point in the context of the anticommandeering principle).

4. The Tenth Amendment

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[66] While this language has been cited throughout U.S. constitutional history as a confirmation of enumerationism, that interpretation has always been dubious. As a matter of original—and contemporary—semantic meaning, the Tenth Amendment cannot be read to require the core tenets of enumerationism, without resorting to circularity.

By its clear terms, the Tenth Amendment says merely that whatever powers are not delegated to the United States are reserved to the states or the people. It does not endorse the Restricted Implied Powers Principle or otherwise foreclose the possibility that some, perhaps many, of the powers delegated to the United States are implied—for instance, from the nature of sovereignty. Nor does the Tenth Amendment endorse the No General Powers Principle. General powers, like specific powers, can be delegated, either expressly or by implication, and nothing in the original semantic meaning of the Tenth Amendment forecloses their existence. Finally, nothing in the original semantic meaning of the Tenth Amendment endorses the Must Be Something Principle. If the powers delegated to Congress amount to a general power to address all national problems or even a general police power, all powers not delegated to the United States will still be reserved to the states or the people. Those powers will simply be limited to purely local issues (or, at the extreme, a null set). This is what the Supreme Court meant in *United States v. Darby* when it said that the Tenth Amendment "states but a truism that all is retained [by the states] which has not been surrendered."[67]

Like "herein granted" and "proper," the Tenth Amendment merely reflects back whatever powers are ultimately granted in the rest of the Constitution. If those include implied powers, as well as enumerated powers, the semantic meaning of the Tenth Amendment does nothing to change that. If those powers include general powers as well as specific powers, the Tenth Amendment does nothing to change that. And if those powers amount to a general police power, collectively or individually, the Tenth Amendment does nothing to change that.

This was not for lack of trying by the proto-enumerationists of the First Congress, who advocated for insertion of the word "expressly" into the text of the amendment.[68] We will discuss later the aspirations of those who wished the Tenth Amendment to textually establish enumerationism. Had they prevailed, the *semantic* meaning of the amendment would have embedded the

66. U.S. CONST. amend. X.

67. United States v. Darby, 312 U.S. 100, 124 (1941).

68. *See infra* text accompanying notes 168–71.

Restricted Implied Powers Principle in the Constitution.[69] But it would not have clearly embedded the No General Powers Principle or foreclosed the interpretation of the General Welfare Clause as a legislative power. In any case, the "expressly delegated" version is not the Tenth Amendment that Congress proposed or the state legislatures ratified. Without that crucial limiting word, the semantic meaning of the amendment is simply silent on the core tenets of enumerationism. It does not preclude or contradict those tenets. But only by assuming that the powers delegated to the United States are all express, specific, and limited, can the Tenth Amendment be read to embrace enumerationism.

Enumerationists typically respond to this straightforward reading with some variation of the following objection. If the powers of Congress amount to the equivalent of a general police power, then there are no powers *not* delegated to the United States and thus no powers reserved to the states or the people. If this were the case, the Tenth Amendment would have no applications, accomplish nothing, and have been entirely pointless to adopt. Therefore, the powers delegated to the United States must be interpreted to have limits, so that the powers reserved to the states are not a null set.[70]

This objection seems intuitively plausible, but it has several problems. First, even on its own terms, it fails to support either the Restricted Implied Powers Principle or the No General Powers Principle, neither of which is necessary to ensure that the set of powers reserved to the states is nonempty. That interpretive imperative could be just as easily accomplished by a general congressional power to legislate on all national matters, leaving purely local matters to the states. Second, the objection does not sound in original semantic meaning. Rather, it is most naturally understood as an argument about the intentions or expectations of the Framers and ratifiers, as in: "Surely, the Framers and ratifiers would not have gone to the trouble of passing a constitutional amendment that they intended—or expected—to accomplish nothing." Modern originalism does not treat original intentions or expected applications as authoritative.

It is possible that the surplusage argument could be rehabilitated as an argument from contextual enrichment, a possibility we address in Part II.[71] But that argument would run into a third problem. The inference on which it is premised is simply unsound. As Richard Primus has explained:

> One can reasonably assume that people do not write rules that they *know* will never have applications. But it does not follow that every rule

69. It would have supported strict construction of implied powers, rather than entirely eliminating them, since even strict constructionists recognized the need for some incidental powers under the Necessary and Proper Clause. *See infra* text accompanying note 172; Lash, *supra* note 5, at 1894.

70. *See, e.g.*, Lash, *supra* note 7, at 201.

71. *See infra* Section II.A.

> people write *has*, or in the future *will have*, applications. . . . Sometimes the world turns out to be different from what the writers of a rule expected, such that an anticipated set of applications fails to materialize or dissolves over time.[72]

Finally, in this specific case, there is an unresolved empirical question whether the Framers and ratifiers of the Tenth Amendment universally expected or intended it to accomplish any substantive change or clarification. As leading enumerationist and Tenth Amendment scholar Kurt Lash has acknowledged, the Tenth Amendment was widely understood as making no substantive change to the distribution of powers established by the original Constitution.[73] And of course, that is just what its semantic meaning accomplishes—nothing. These circumstances strongly suggest that the Tenth Amendment was intended and understood by many as a textual placebo, just ambiguous enough to placate defeated Anti-Federalists while simultaneously allowing victorious Federalists to dismiss it as a mere tautology. At a minimum, nothing in the semantic meaning of the Amendment precludes this reading.

Chief Justice Marshall summed it up well in *McCulloch v. Maryland*: "the [Tenth] [A]mendment . . . leav[es] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, *to depend on a fair construction of the whole instrument*."[74] If a fair construction of the whole Constitution—not just those powers expressly enumerated—supports enumerationism, then so will the Tenth Amendment. But if that construction instead supports a federal government with an enumerated power "to provide for the general welfare" or an implied power to "regulate so as to address any genuinely national problems," or a commerce power that encompasses virtually all areas of human affairs, nothing in the semantic meaning of the Tenth Amendment stands in the way. Just like "herein granted" and "proper," the original semantic meaning of the Tenth Amendment does no work on its own. Its operative content is entirely determined elsewhere, in whatever provisions of the Constitution expressly or impliedly delegate powers to the United States.

C. THE SEMANTIC CASE AGAINST ENUMERATIONISM

While the purported textual indicators of enumerationism all require circular arguments—they assume the point in controversy rather than proving it—the Constitution contains prominent textual indicators that the enumeration

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72. *See* Primus, *supra* note 20, at 631.

73. Lash is correct that the Tenth Amendment purported to make no substantive change; he is wrong that the 1787 Constitution was plainly enumerationist. *See* Lash, *supra* note 7, at 199 ("[T]he Tenth Amendment *confirms a principle already communicated* by a document employing the strategy of enumerated powers." (emphasis added)); Lash, *supra* note 5, at 1892 (agreeing with Madison's purported contention that the "Tenth Amendment[] *merely confirmed the preexisting principle* of expressly delegated power" (emphasis added)).

74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasis added).

should not be read as exhaustive and limiting. These indicators do not add up to a clear original semantic meaning rejecting enumerationism. But they considerably increase the difficulty of establishing that the original public meaning of the Constitution embraces it.

1. Implied Powers and the Necessary and Proper Clause

The Necessary and Proper Clause is in part a placeholder or textual hook for the concept of incidental powers, as we have already discussed.[75] But that accounts for only the first of three parts of the Necessary and Proper Clause, which provides: "To make all laws which shall be necessary and proper for carrying into Execution [1] the foregoing Powers, [2] and all other Powers vested by this Constitution in the Government of the United States, [3] or in any Department or Officer thereof."[76] As John Mikhail has explained, the second and third provisions are best understood as making the Necessary and Proper Clause into a "sweeping clause," a provision of a sort used generally both at the founding and now to make explicit the nonexclusivity of a preceding list.[77] The Necessary and Proper Clause performs this function by stating explicitly that Congress is authorized to carry into effect not only "the foregoing Powers"—the Article I enumerated powers—but also "all other Powers" vested by the Constitution.

The "departments" of "the government" was the Framers' term for what we now call the three "branches" of the federal government.[78] Accordingly, the Necessary and Proper Clause can be read to suggest that Congress—or the national government as a whole—has powers *in addition to the foregoing powers* enumerated in Article I, Section 8. To be sure, one could argue that "all other Powers vested by this Constitution" refers to specific enumerations of *congressional* power outside Article I, of which there are several.[79] Nothing in the original semantic meaning of the text decisively forecloses such a reading, but it is somewhat dubious. If this language were simply meant as a

75. *See supra* Section I.B.3.

76. U.S. CONST. art. I, § 8, cl. 18.

77. Mikhail, *supra* note 25, at 1121–22.

78. *See, e.g.*, Madison (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 64, 66 (referring to the executive branch as "the Executive department"); Madison (June 2, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 79, 84 (copy of Franklin Paper) ("Judiciary department"); *id.* at 86 (statement of Dickinson) ("[T]he Legislative, Executive, & Judiciary departments ought to be made as independt. as possible."); Madison (July 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 73, 79 (statement of Wilson) ("[T]he joint weight of the two departments was necessary to balance the single weight of the Legislature."). What we now think of as "departments," the Framers called "the *executive* Departments." *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

79. *See* Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2009 & n.34 (2021) (counting anywhere from eleven to twenty-five clauses); Schwartz, *supra* note 1, at 599 & n.119 (referencing additional powers).

cross-reference to other congressional powers, why doesn't the phrase say "and other powers delegated *to Congress* in this Constitution?" And even if we treat "vested in the government of the United States" as synonymous with "delegated to Congress," this enumerationist argument has the same circularity as the enumerationist interpretations of "herein," "proper," and the list itself. It is only persuasive if we assume that "all other powers" of Congress are expressly enumerated.

On the other hand, a natural meaning of this aspect of the Necessary and Proper Clause is to invoke powers "vested . . . in the Government" by implication. The Constitution fails to enumerate certain essential powers that were widely recognized at the founding as inherent in any sovereign government. The Supreme Court has long recognized several of them, despite the fact that they cannot properly be cabined as subordinate means to carry into effect any enumerated power. These include but are not limited to the powers to regulate immigration, conduct foreign affairs, acquire territory, exercise eminent domain, regulate noncommercial Indian affairs, and issue paper money.[80] While some of these powers are *related* to enumerated powers, they are not *subordinate* to them.[81] Nothing in the semantic meaning of the Necessary and Proper Clause explicitly grants these powers to Congress. But it is eminently plausible that they would have been generally understood as belonging among "the other Powers vested by th[e] Constitution in the Government of the United States."[82]

This seems to have been Alexander Hamilton's understanding as Treasury Secretary. His decisive memorandum in favor of chartering the Bank of the United States explains that powers normally inhering in sovereign governments are possessed by the United States, even absent enumeration, unless they are specifically withheld by the Constitution.[83] The Supreme Court expressly endorsed this view in the *Legal Tender Cases*.[84] *McCulloch v. Maryland*, too, declined to identify an enumerated power to which chartering the Second Bank of the United States was a subordinate means. Instead, Marshall pointed vaguely to an unenumerated—presumably sovereign—power of the United States government to manage its fiscal affairs.[85] In other words, a significant implied power (to charter a bank) was necessary and proper to implement *an unenumerated* inherent sovereign power (to manage finances). Such unenumerated inherent powers would constitute a direct repudiation of the Restricted Implied Powers Principle, the most basic tenet of

80. *See* Schwartz, *supra* note 1, at 631–36, 638–44.

81. For further elaboration, see *id.*

82. *See* Mikhail, *supra* note 25, at 1067 (emphasis omitted) (quoting U.S. CONST. art. 1, § 8, cl. 18).

83. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 132 (Harold C. Syrett ed., 1965).

84. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 544–46 (1871).

85. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819).

enumerationism. Nothing in the semantic meaning of the Necessary and Proper Clause absolutely requires the existence of such powers, but it does leave open—indeed, it invites—this interpretation.

2. The General Welfare Clause

Article I, Section 8, Clause 1 provides: "The Congress 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." Today, this clause is conventionally understood to confer separate powers (1) to lay and collect taxes and (2) to spend—but not to regulate—for the common defense and the general welfare.[86] "Provide" can mean "spend" by inference from its founding-era definition, "to furnish; to supply."[87] But this is at best a tertiary definition not used elsewhere in the Constitution.[88] Moreover, "provide *for*" means—and meant—"to take care of beforehand."[89] "Provide for" appears in four other places in the body of the Constitution, always clearly meaning to legislate or regulate.[90] As a matter of original semantic meaning, it is at least as plausible—and probably more natural—to read the clause as conveying three powers: (1) "to lay and collect taxes"; (2) "to pay the debts"; and (3) "to provide for"—meaning to legislate for—"the general welfare."

While the clause is undoubtedly ambiguous, no less an authority than James Madison recognized that the words of the General Welfare Clause, when "taken literally," "convey the comprehensive power" to legislate on all national problems.[91] This was a candid admission against interest, since Madison "loathed" the General Welfare Clause and made a lifelong effort to

86. *See, e.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 216 (2022) ("Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012) (discussing separate taxing and spending powers).

87. *Provide*, AM. DICTIONARY OF THE ENG. LANGUAGE, https://webstersdictionary1828.com/Dictionary/provide [https://perma.cc/9HYP-4E84]; 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 415–16 (6th ed. 1785).

88. In fact, the word "provide" appears in eight other places in the Constitution, seven of which clearly mean "legislate." *See* U.S. CONST. pmbl.; *id.* art. I, § 5, cl. 1; *id.* § 8, cls. 6, 15, 16; *id.* art. II, § 1, cl. 6; *id.* § 2, cl. 2. The eighth instance of "provide" means "furnish" or "supply." *See id.* art. I, § 8, cl. 13 ("To provide and maintain a Navy . . . ."); Schwartz, *supra* note 1, at 596; *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 791–92 (1999) (arguing that the Constitution can be a dictionary of its own meaning).

89. JOHNSON, *supra* note 87, at 416.

90. *See* U.S. CONST. art. I, § 8, cl. 6, ("[P]rovide for the Punishment of counterfeiting . . . ."); *id.* cl. 15 ("[P]rovide for calling forth the Militia . . . ."); *id.* cl. 16 ("[P]rovide for organizing, arming, and disciplining, the Militia . . . ."); *id.* art. II, § 1, cl. 6 ("[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President . . . .").

91. Letter to Andrew Stevenson (Nov. 27, 1830), *in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 411, 417 (Gaillard Hunt ed., 1910).

sweep its literal meaning under the rug.[92] The standard argument against this interpretation is that it would render the more specific enumeration of legislative powers that follows "mere surplusage" in violation of the "anti-surplusage canon."[93] Madison made this argument in *Federalist No. 41* and it is repeated to this day.[94] Yet, despite that respectable pedigree, the argument is easily refuted.[95]

According to Antonin Scalia and Bryan Garner, a specific itemization that follows a general term (here, the specific enumeration of legislative powers following the General Welfare Clause) 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 . . . . [T]he enumeration of the specifics can be thought to perform the belt-and-suspenders function."[96] Thus, the traditional antisurplusage canon does not apply to a "genus-followed-by-species" or "general-specific sequence."[97] Indeed, "[w]hen the genus comes first . . . one is invited to take it at its broadest face value."[98] While we hesitate to place Scalia and Garner on the same pedestal as James Madison, in this particular instance Scalia and Garner are straightforwardly conveying a standard principle of usage, while Madison in *The Federalist* was writing in the dissimulating mode of a propagandist.[99]

Why have both a sweeping clause at the end of Article I, Section 8, and a general legislative authorization at the beginning? If the enumeration of powers was itself a belt-and-suspenders addition to the General Welfare

92. DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 77 (1989); *see* David S. Schwartz, *Mr. Madison's War on the General Welfare Clause*, 56 U.C. DAVIS L. REV. 887, 890–91 (2022).

93. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012) (defining "surplusage" canon).

94. THE FEDERALIST NO. 41, at 263 (James Madison) (Clinton Rossiter ed., 1961); *see, e.g.*, 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 (on file with the *Iowa Law Review*) ("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."); *accord* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 11 (2003).

95. Madison himself lacked confidence that the surplusage argument was semantically decisive and favored a constitutional amendment to render the General Welfare Clause "harmless" to enumerationism. *See* Letter to Martin Van Buren (Sept. 20, 1826), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 91, at 251, 254–55; Schwartz, *supra* note 92, at 942–44.

96. SCALIA & GARNER, *supra* note 93, at 204; *see* Primus, *supra* note 79, at 2015–17.

97. SCALIA & GARNER, *supra* note 93, at 203, 205. Nor, according to Scalia and Garner, does the *ejusdem generis* canon apply to the general-specific sequence because that canon maintains that general words *following* an enumeration are limited in scope by a preceding specific enumeration. *Id.* at 202–03.

98. *Id.* at 205.

99. *See* Schwartz, *supra* note 92, at 890–91; Coan & Schwartz, *supra* note 37, at 452.

Clause, the sweeping clause functions textually as an extra belt.[100] Again, we do not argue that this is the only possible interpretation of the General Welfare Clause as a matter of semantic meaning. But it is a highly plausible one—perhaps the most plausible one—and it cuts strongly against enumerationism.

3. The Preamble

Enumerationists argue for applying the antisurplusage canon to the General Welfare Clause while at the same time arguing that the Constitution's Preamble is surplusage: a purely stylistic or symbolic introduction with no legal significance.[101] This treats the Preamble as the only legally inconsequential text in the entire Constitution.[102] There is no *semantic* reason to assume that. As a purely semantic matter, the Preamble can be read as a list of purposes—in the language of the founding era, "ends" or "objects"—triggering the doctrine of implied powers. So understood, the Necessary and Proper Clause would confer on Congress whatever powers are conducive to implementing the purposes of the Preamble, with the enumeration providing an illustrative list.[103]

Eighteenth-century legislative preambles were generally understood to be interpretive guides to the operative provisions that followed.[104] So said Joseph Story in his *Commentaries on the Constitution*,[105] which has been cited by the Supreme Court as the authoritative source for the conclusion that the Preamble is not a grant of powers[106]—and miscited by others for the proposition that the Preamble is a purely stylistic flourish.[107]

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100. The drafting history of Article I, Section 8, Clause 1, strongly suggests that the General Welfare Clause was intended as a strategically ambiguous compromise to permit both a narrow and a broad legislative-power interpretation. *See* Schwartz, *supra* note 32, at 917–27.

101. *See* John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1116–26 (2018) (discussing cases and commentary).

102. Even the signature block at the end of the Constitution carries operative legal significance: it communicates that the persons whose signatures follow are witnessing the preceding text and attesting to its legal status as the act of representatives of the several state legislatures. *See* David S. Schwartz, *Reconsidering the Constitution's Preamble: The Words that Made Us U.S.*, 37 CONST. COMMENT. 55, 56 (2022).

103. *See* Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 194–209 (2020) (arguing for "the Preamble's original possibilities"); *supra* Section I.C.1.

104. *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."); *see* David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1324–37 (2009) (arguing that eighteenth-century preambles offered interpretive guidance).

105. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833).

106. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

107. *See* Welch & Heilpern, *supra* note 101, at 1116–26; Schwartz, *supra* note 102, at 56.

If the Preamble is an interpretive guide that can be used to resolve ambiguities, what ambiguity is more relevant than the question of limited enumerated powers: whether the enumeration is meant to be exhaustive or illustrative, and whether "to provide for . . . the general welfare" means "to legislate" or merely "to spend"? According to Story,

> [The Preamble's] true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them. . . . [S]uppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power ; if one would promote, and the other defeat the [power], ought not the former, upon the soundest principles of interpretation to be adopted?[108]

For Story, then, the Preamble is an argument against strict construction of federal powers: a statement that the Constitution's grants of powers are to be liberally construed, to promote such purposes as "the general welfare." This could plausibly resolve the meaning of the General Welfare Clause in favor of the broad interpretation: to legislate (and not only to spend) for the general welfare.

In contrast, there is nothing in the Preamble that would resolve any of the Constitution's ambiguities in favor of enumerationism. The Preamble does not mention state sovereignty, federalism, or even the need to limit federal powers or balance them against those of the states. One could argue that "form a more perfect Union," "secure the Blessings of Liberty," and the like incorporate these ideas.[109] But like all of the other textual arguments for enumerationism, these interpretations are circular. The broad phrases of the Preamble comport with enumerationism only if one stipulates that the Constitution mandates enumerationism. Without that stipulation, the original semantic meaning of the text is perfectly compatible with a rejection of enumerationism. Indeed, in the respects we have just discussed, the text appears to invite that reading.

II. ENUMERATION AND CONTEXTUAL ENRICHMENT

We have shown that one of the most venerable axioms of American constitutional law—that the federal government is one of limited, enumerated powers—has no clear grounding in the original semantic meaning of the constitutional text. Indeed, several aspects of that meaning point quite strongly in the opposite direction. This should serve as a wake-up call to originalists and nonoriginalists alike, nearly all of whom have accepted the originalist and textualist pedigree of enumerationism without question.

108. STORY, *supra* note 105, § 462.

109. U.S. CONST. pmbl.

To our knowledge, no originalist proponent of enumerationism has grappled with anything like the full panoply of semantic difficulties that we canvassed in the previous Part. This is a very serious problem for a theory that places the linguistic meaning or communicative content of the constitutional text at the heart of the interpretive enterprise.

The problem, however, may not be fatal. Today's public-meaning originalists recognize that the communicative content of the constitutional text is not limited to the conventional meaning of its words and phrases, as refracted through the rules of grammar and syntax. That content is also a function of context, which includes both the structure and surrounding text of the document as a whole and the shared assumptions and background understandings of the founding-era audience. This context interacts with the semantic meaning of the text, enriching the communicative content that it conveys to its audience.[110] Naturally enough, public-meaning originalists call this process "contextual enrichment."[111]

Conventional wisdom holds that the core tenets of enumerationism were widely, if not universally, shared by the ratifying public. This view is the principal basis for the strong modern consensus that the original meaning of the Constitution is clearly enumerationist. Though not always recognized as such, this is a classic contextual enrichment argument. The idea is that a ratifying public steeped in enumerationism would obviously have understood the communicative content of the text in enumerationist terms, even if the semantic meaning of those terms was ambiguous on its face. But as we explained in the Introduction, this position is far more assumed than argued for. An enormous historical and legal literature catalogs the enumerationist arguments of the Constitution's Federalist advocates and the fears of a powerful centralized government expressed by Anti-Federalist opponents, often read through the distorting prism of enumerationism's triumph in the election of 1800. But most of this literature predates the maturity of modern originalism and does not speak—or analyze the historical record—in terms of original public meaning.

The body of recent literature that actually attempts to make the case for enumerationism in terms of original public meaning is remarkably small, considering the strength of the originalist consensus on this question. But the great majority of it consists of textual enrichment arguments, variously emphasizing state constitutions, the law of nations, presuppositions about

110. *See, e.g.*, Solum, *supra* note 18, at 1983 (explaining the role of context in communicative content); Mikhail, *supra* note 64, at 1075 (similar).

111. *See* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1379 (2019). In the vernacular of linguistics and the philosophy of language, contextual enrichment falls within the domain of pragmatics, rather than semantics. *See, e.g.*, *Pragmatics*, STANFORD ENCYC. OF PHIL. (Aug. 21, 2019), http://plato.stanford.edu/entries/pragmatics [https://perma.cc/NR7Q-H5UC].

state sovereignty, and the Tenth Amendment.[112] This Part explains why these contextual enrichment arguments fail to establish that the original public meaning of the Constitution determinately embraces enumerationism.

A. THE CONCEPT OF CONTEXTUAL ENRICHMENT

The concept of contextual enrichment is rooted in a highly technical literature from linguistics and the philosophy of language, but the idea is quite straightforward. Consider a simple example: A passenger shouts "light!" at the driver of a car. The bare semantic meaning of this utterance is extremely thin.[113] Since the utterance is only a single word, the rules of grammar and syntax do not even tell us whether "light" is used as a noun, adjective, or verb, much less which of its varied semantic meanings is intended.[114] But if the car is stopped at a traffic light that has turned green five seconds ago, this context—or "communicative situation"—will make perfectly clear that the passenger is referring to the green light and urging the driver to step on the accelerator.[115] The passenger is not referring to an invisible form of electromagnetic energy, or the opposite of heavy, or a small flame to ignite the passenger's cigarette. Nor is she merely naming a nearby object.

Notably, the very same utterance might have quite a different meaning—indeed, nearly the opposite meaning—if the car were moving at high speed and the traffic light in question had just turned red. Only context, not semantics, distinguishes the two. That context consists both of empirical facts and background assumptions about the operative legal rules and what an ordinary person should do under the circumstances. Perhaps most important, for the contextually enriched meaning to be "clear" or "determinate," the background assumptions and empirical facts must be commonly shared between speaker and audience.[116]

1. Contextual Enrichment and Indeterminacy

Of course, the communicative situation of a private conversation between friends or family members sharing a car is far less complicated than that of a constitution drafted and ratified by many hands and aimed at a broad public audience. Most notably, a politically, socially, and educationally diverse public will potentially bring different background assumptions to their readings of the constitutional text. In particular, they will have different views about the nature of the constitutional project; the applicable default rules and presumptions; what most people would want to achieve in the circumstances; and the frequency

112. *See infra* Section II.B.

113. *Light*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

114. *Id.*

115. *Cf.* Solum, *supra* note 18, at 1969 (explaining how "communicative situation" enriches communicative content).

116. *See id.* at 1969–71.

with which semantically indeterminate language should be understood as deliberately leaving important questions to future political or judicial resolution.[117] Richard Fallon has recently argued that this difference in communicative situations renders the concept of original public meaning "chimerical" in the constitutional context.[118] More precisely, he contends that the greater complexity of constitutional communication renders original public meaning nonexistent except for the clearest, most minimal, and utterly uncontroversial semantic meanings such as the minimum age requirement for presidential eligibility and equal state representation in the U.S. Senate.[119] Originalists obviously disagree, insisting that the available evidence will often be sufficient to establish one relatively determinate reading as superior to the alternatives. What they mean by "superior" has largely gone unexplained, as Fallon points out.[120]

This failure to articulate a standard for what constitutes a superior interpretation arguably undermines the rigor of much, perhaps most, applied originalist scholarship. But in a recent article responding to Fallon, Lawrence Solum has grabbed the bull by the horns and endorsed an essentially numerical criterion. According to Solum, a determinate original public meaning "requires broad agreement, not unanimity or near unanimity."[121] He allows that "[t]here will . . . be borderline cases" but suggests "that something like 90 [percent] agreement is enough."[122] By contrast, "a constitutional provision that was read one way by 60 [percent] of the population and in another, substantially different way, by the remaining 40 [percent] of citizens create[s] what we can call an 'irreducible ambiguity.'"[123]

This represents a praiseworthy effort by Solum to impose theoretical rigor on a body of applied originalist scholarship that has previously operated without clear standards. It is not enough to say that some or even a simple majority of ratifiers derived a particular meaning from a constitutional provision. Instead, Solum's quantification suggests that a determinate original meaning must have been very widely shared, to the point that alternative meanings were marginal, implausible, or in bad faith. Solum is only a single theorist, of course. But it would be difficult to overstate his role and influence in the development of modern originalism. Taking the theoretical framework

117. *See id.* at 1972–74; Fallon, *supra* note 23, at 1465–71.

118. Fallon, *supra* note 23, at 1476.

119. *Id.* at 1430.

120. *Id.* at 1430–32.

121. Solum, *supra* note 18, at 1953.

122. *Id.*

123. *Id.* Solum's description here is ambiguous as to whether "another substantially different" interpretation must be a single interpretation, or an aggregate of more than one dissenting interpretation. An additional question is whether members of the ratifying public holding no opinion as to meaning should count in the dissenting group. We can put these questions aside, however, because our evidence focuses on a single dissenting interpretation, holding that the Constitution did not determinately communicate any of the three principles of enumerationism.

of originalism as given, we also find his proposed standard eminently reasonable. Indeed, it is difficult to see how any reasonable theorist could contend that agreement by sixty percent or less of the ratifying public is sufficient to establish a determinate public meaning. Nor do we think a reasonable theorist could insist on agreement by more than ninety percent. We therefore feel very comfortable using Solum's proposed standard as a measuring stick for evaluating the originalist case for enumerationism.

But even on Solum's account, originalists relying on constitutional contextual enrichment face a formidable challenge in establishing enumerationism as the Constitution's original public meaning. The bare semantic meaning of the constitutional text is indeterminate. To render that meaning sufficiently determinate to resolve disputed constitutional questions today, the contextual evidence must establish that more than sixty percent—and perhaps close to ninety percent—of citizens at the time of ratification agreed, or would have agreed, that the text communicated a particular determinate meaning. The gap between sixty and ninety percent is a huge "borderline," and we suppose Solum is still pondering that question. Nevertheless, we read Solum as saying that sixty percent is not nearly sufficient to establish "broad agreement," whereas ninety percent is clearly sufficient. For ease of reference, we will split the difference and use the figure seventy-five percent rather than the more verbose formula, "substantially more than 60 [percent] but less than 90 [percent]."

The implications of this standard—or any standard in the same general ballpark—are profound. Solum's threshold for establishing a determinate original public meaning will not be satisfied if more than twenty-five percent of founding-era citizens understood—or would have understood—the constitutional text as communicating a different meaning or as incidentally or deliberately indeterminate on the issue in question. If this were not demanding enough, any rigorous originalist analysis of the contextual evidence must carefully distinguish between empirical, legal, and normative assumptions that contribute to the communicative content of the constitutional text, on the one hand, and intentions, expectations, and political preferences about how the new text would operate in practice, on the other. The former properly count toward the seventy-five percent threshold for establishing a determinate original public meaning; the latter do not. But the two are devilishly difficult to tease apart, even in theory. In actual practice, at a distance of more than two centuries, it can be next to impossible.[124]

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124. We do not even mention the further question of whether and how to count members of the ratifying public who held incoherent views—or no view at all—on esoteric subjects like the meaning of enumeration. If more than twenty-five percent of the ratifying public fell into this category, that alone might prevent enumerationism from satisfying Solum's seventy-five percent standard. And the number may well have been substantially higher, even among educated and politically engaged citizens. *See generally* Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625 (2012) (examining the issue of political ignorance at the time of ratification).

Originalists relying on contextual enrichment must also attend carefully to the sincerity or insincerity with which particular views were expressed in the heat of political battle. This factor adds quite a subtle layer of additional complexity to the question of contextual enrichment, since even insincerely expressed views might influence the communicative content conveyed by the constitutional text to an audience that takes those views at face value. On the other hand, insincere views—indeed, even sincere ones—might have little impact on an audience that dismisses them as political propaganda.[125]

2. The Burden of Proof

How confident must we be that seventy-five percent of founding-era citizens would have understood the semantically thin constitutional text as communicating a particular determinate meaning before that meaning becomes binding on contemporary constitutional decision-makers? And who bears this burden of persuasion? This is not the place for a full-blown discussion of these questions, which have received surprisingly little attention in the constitutional-interpretation literature.[126] But we need to say a few words about them before we can proceed to evaluate the various originalist arguments for enumerationism.

First, whatever its attraction in other contexts, the "inference to the best explanation" approach proposed by Lawrence Solum is a clear nonstarter here.[127] Also known somewhat inaccurately as "abduction," this approach makes sense only when adjudicating between more than two competing possibilities. Suppose that a medical doctor diagnoses a patient by concluding that there is a forty-five percent likelihood that her symptoms are caused by disease X, a thirty percent likelihood that they are caused by disease Y, and a twenty-five percent likelihood that they are caused by some as of yet unknown disease. The "best explanation" is disease X. Although this explanation is more likely than not to be false, it is nevertheless the best of the available alternatives, and that may well justify prescribing "anti-X" medication in an abundance of caution. There are many other circumstances where inference to the best explanation may constitute a sufficient basis for belief or action. Whether or not it is ever sufficient for a legal decision, it requires at a minimum that there be more than two alternatives (even if some are unknown).[128] When there are only two alternatives, the one that is less than fifty percent likely to be true is, by definition, *inferior* to the only available

125. We bracket the very real possibility that the background assumptions contributing to the text's communicative content may have evolved in meaningful ways over the course of the ratification process, which raises difficult questions about the time at which the original public meaning of the text is supposed to have been fixed.

126. *See* LAWSON, *supra* note 13, at 193–95.

127. Solum, *supra* note 18, at 2013 n.176.

128. *See* David S. Schwartz & Elliott Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 WM. & MARY L. REV. 619, 649 (2017).

alternative. Or put in reverse, the alternative that is supported by a preponderance of the evidence—that is, more than fifty percent likely to be true—is always the best explanation.[129]

In contrast to a "best explanation" situation, the determinacy of the Constitution's original public meaning is a binary question. Either seventy-five percent of founding-era citizens would have understood the text as communicating a particular determinate meaning—or they wouldn't. There is no third possibility (known or unknown), and therefore no possibility of embracing any conclusion that is less than fifty percent likely to be true but better than the alternatives. Under originalism's own terms, we can see no plausible rationale for treating an original public meaning as determinate when the evidence suggests it is more likely than not to be indeterminate.

With "best explanation" off the table, we assume that most original-public-meaning originalists would embrace a preponderance of the evidence standard rather than a higher one. Under such a standard, contemporary constitutional decision-makers should regard original public meaning as binding only when it is more likely than not that seventy-five percent of founding-era citizens understood, or would have understood, the constitutional text as communicating a particular determinate meaning. Otherwise, the constitutional question at issue falls into the construction zone. A more demanding standard could easily be argued for, especially when the consequence is to license a court to override the decision of a more democratically accountable institution—or to overrule one of its own precedents.[130] But we mean to evaluate the originalist argument for enumerationism on its own terms and do not press the point. If enumerationism fails to satisfy a preponderance of the evidence standard, it would necessarily fail under a more demanding standard such as "clear and convincing evidence."

This leaves the question of where—or, more precisely, on which party—the burden of satisfying the preponderance of the evidence standard should fall. We think the most natural answer is that the burden should fall on the party arguing that original public meaning is determinate. But again, this question has received little attention in the literature, and we do not mean to press the point here. Our goal in this Article is not to decisively refute the enumerationist conventional wisdom. It is to demonstrate that the issue is significantly closer, more complicated, and less firmly settled than is generally recognized. More specifically, our goal is to demonstrate that there are strong and unanswered arguments that the original public meaning of enumeration is indeterminate. Wherever the burden of proof lies, the original public

129. *See id.* at 648.

130. *See, e.g.*, Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527–30 (2018) (arguing for a higher interpretive burden of persuasion in high-stakes cases, with a primary focus on statutory interpretation).

meaning of enumeration cannot be regarded as settled unless and until these arguments are answered more persuasively than they have been thus far.

B. CONTEXTUAL ENRICHMENT ARGUMENTS FOR ENUMERATIONISM

The prevailing enumerationist reading of the Constitution today is primarily a product of contextual enrichment. Despite a vast literature on federalism at the founding, surprisingly few background assumptions have been identified that might realistically have led the ratifying public to understand the constitutional text as clearly and determinately embracing enumerationism. Below, we briefly describe the four most plausible.[131]

1. The Contrasting Nature of Federal and State Constitutions

Some modern originalists have contended that enumerationism is mandated by the maxim that state constitutions by their nature confer all legislative powers not expressly withheld, whereas the Federal Constitution confers only those powers expressly delegated (plus implied powers incidental and subordinate to those delegated).[132] This supposedly widely shared founding-era assumption provides the context for reading the Constitution's list of enumerated powers as exhaustive. For evidence that this maxim prevailed during the framing and ratification of the Constitution, enumerationists often look no further than Madison's statement in *Federalist No. 45* that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[133]

Numerous Federalists made this argument during the ratification campaign. Their primary motivation was to assuage skeptical ratifiers'

131. These are not the only possible contextual enrichment arguments for enumerationism, just the most plausible. For reasons of space, we will not discuss other, less conventional background assumptions that might undergird enumerationism, such as that the Constitution is a "great power of attorney." GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 3 (2017) (quoting *Debates in the Convention of the State of North Carolina*, *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148–89 (Jonathan Elliot ed., 2d ed. 1891)). This suggestion has been persuasively criticized elsewhere. *See, e.g.*, John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on* "A Great Power of Attorney": Understanding the Fiduciary Constitution *by Gary Lawson and Guy Seidman*, 17 GEO. J.L. & PUB. POL'Y 407, 410–21 (2019). The somewhat more plausible suggestion that the Constitution is analogous to a corporate charter has ambiguous implications for enumerationism. *Compare* Miller, *supra* note 57, at 144, 145 (arguing that corporate charter analogy implies strict construction), *with* Mikhail, *supra*, at 422 (arguing that the corporate charter analogy supports broad implied powers), *and* Mikhail, *supra* note 25, at 1068–69, 1109–14 (refuting Miller's interpretation), *and* John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1372–73 (2012) (reviewing GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010)) (similar), *and* DAVID STRAUSS, THE LIVING CONSTITUTION (2010) (similar).

132. *See, e.g.*, Lash, *supra* note 5, at 1913–15; Lawson & Granger, *supra* note 58, at 312.

133. THE FEDERALIST NO. 45, *supra* note 94, at 292 (James Madison).

concerns about the proposed Constitution's lack of a bill of rights. Anti-Federalist opponents of ratification argued repeatedly that a bill of rights was needed to prevent abolition of press freedom and jury trials. In response, Federalists asserted that Congress could pass no law violating the freedom of the press or abolishing civil jury trials unless it was expressly granted power to do so.[134] This, Federalists claimed, followed logically from the purported nature of a federal constitution, which limited Congress to its enumerated powers. Only state legislatures, they argued, inherently possessed all legislative powers not expressly reserved or withheld. This supposed feature of state constitutions explained why all of them had bills of rights—or so the Federalists argued.[135]

The original source of this claim was James Wilson's famous speech in the Pennsylvania State House Yard as the ratification campaign began in that state. As Wilson put it, with state constitutions, "everything which is not reserved is given," but with federal constitutions, "everything which is not given is reserved."[136] Wilson's speech was reproduced in newspapers in several states and became a template for Federalist arguments for ratifying the Constitution despite its lack of a bill of rights—one of the primary and most-repeated objections lodged by Anti-Federalists. Wilson's argument was pressed with particular emphasis in states with stiff Anti-Federalist opposition.[137]

Later, we will show that Wilson's argument was post hoc, theoretically dubious, and widely disbelieved.[138] For present purposes, the key point is that the contrast between state and federal constitutions is a background assumption arguably held by the ratifying public. As such, it is a straightforward illustration of contextual enrichment, rather than an argument about the semantic meaning of the text.

2. Confederations and International Law

A closely related argument for enumerationism stems from the purported founding-era understanding of confederations. The closest historical precedents for the Articles of Confederation were leagues of sovereign states. According to prevailing theories of seventeenth- and eighteenth-century European constitutionalists, these confederated governments were legally

134. *See, e.g.*, *James Wilson's Speech in the State House Yard* (Oct. 6, 1787), PA. HERALD (Oct. 9, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167, 167–68 (John P. Kaminski & Gaspare J. Saladino eds., 1976); *Anti-Cincinnatus*, HAMPSHIRE GAZETTE (Dec. 19, 1787), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 487, 489 (John P. Kaminski & Gaspare J. Saladino eds., 1998); *Aristides*, MD. J. (Mar. 4, 1788), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 46, at 351, 354.

135. *See infra* note 136.

136. *James Wilson's Speech in the State House Yard*, *supra* note 134, at 167–68.

137. *See* Adams, *supra* note 47, at 86–87; PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 77–81 (2010).

138. *See infra* Section II.C.1.

equivalent to treaties among fully sovereign states and subject to the principles of international law, by which waivers and delegations of sovereign power must be express and narrowly construed.[139] These European confederacies, together with the Articles, remained the closest precedents for the new continental republic created by the Constitution, even though the Constitution was in fundamental ways extremely different.

The international law theory of confederations, combined with the Framers' experience under the Articles of Confederation, is almost certainly the source for Wilson's theory that any federal constitution was inherently enumerationist, in contrast to the several state constitutions. Indeed, Wilson, Hamilton, and Madison all suggested during the ratification debates that the proposed Constitution should be understood as a compact of sovereign states. As we will explain below, such assertions were intentionally misleading.[140] But they might have supplied or reflected a background belief leading some members of the ratifying public to impose an enumerationist interpretation on the Constitution's otherwise ambiguous language.

3. Constitutional Structure and State Sovereignty

A third contextual enrichment argument for enumerationism might be found in the purported "structural postulates" of the Constitution, its "spirit," or goals. To the extent that this argument has been articulated at all, it has been left underdeveloped, relying largely on bald assertion or on selective partisan quotations as proxies for a dominant consensus during ratification.[141] Examined closely, the originalist version of this argument has two premises. First, that the ratifying public broadly understood the Constitution to be aimed at maximizing state power within the framework of a strengthened national government. Second, that enumerationism was broadly understood to be the obvious and intuitive means to that goal. This argument might be based on a holistic reading of the Constitution, evidence of a prevailing background assumption, or both.

This may at first blush sound like an argument about original intentions or purposes, rather than original public meaning. The same premises certainly could be turned to that end, and enumerationist arguments are not always careful about this crucial distinction. But charitably understood, the contextual enrichment argument makes a subtly different claim. The claim is not

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

140. *See infra* Section II.C.

141. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457–58 (1991) (quoting THE FEDERALIST NO. 45, *supra* note 94, at 292–93 (James Madison)) (treating limited enumerated powers as the defining feature of the Constitution's "federalist structure of joint sovereigns"); Chiafalo v. Washington, 140 S. Ct. 2316, 2333–34 (2020) (Thomas, J., concurring in the judgment) (similar); Lawson & Granger, *supra* note 58, at 315 (implied powers must be interpreted in light of "the Framers' conception of limited government").

merely that some or most members of the ratifying public *wanted* the Constitution to preserve state power or viewed enumerationism as the most intuitive means to that end. It is that these widely shared views formed such an integral part of the background context of the founding era that they became part of the document's communicative content, rendering nonenumerationist interpretations marginal or implausible and thereby transforming an ambiguous semantic meaning into a determinate, contextually enriched, public meaning.

4. The Tenth Amendment

We have discussed the circularity of finding the Tenth Amendment to mandate enumerationism as a matter of semantic meaning. But in the founding context, the Tenth Amendment might have been understood to communicate more than its bare and borderline-tautological semantic meaning. The most common form of this argument is to interpret the Tenth Amendment, in context, as a confirmation of the Wilsonian distinction between federal and state constitutions echoed by so many Federalists during the ratification debates.[142] Again, this is not a claim about the semantic meaning of the Amendment's words but a contextual enrichment argument.

C. CONTEXTUAL ENRICHMENT ARGUMENTS AGAINST ENUMERATIONISM

The conventional wisdom in favor of enumerationism has been so long taken for granted that the existing literature gives almost no attention to counterarguments. But viewed without this distorting prism, the record of the ratification debates contains weighty and extensive evidence that enumerationist assumptions were not universally shared—or even shared by a dominant majority. To the contrary, they were frequently and actively contested, and those who professed to embrace them often did so insincerely and strategically.

Much, though by no means all, of the evidence against enumerationism, consists of Anti-Federalist interpretations reading the Constitution to grant Congress effectively unlimited power. Like Federalist arguments endorsing enumerationism, these interpretations were offered in the heat of political battle and cannot be taken at face value. Anti-Federalists wanted to defeat the Constitution and had incentives to exaggerate the scope of the powers it conferred to rally support for their cause. But whatever their sincerity, Anti-Federalists represented a large fraction of the founding-era public and counted many shrewd advocates among their number.[143] Those advocates

142. *See supra* Section II.B.1; *infra* Section II.C.1.

143. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 540 (2016) ("[The] constitution . . . was . . . vastly different from what most Americans would have expected or wanted."); GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S, at 42–45 (2019). Among the more illustrious Anti-Federalists, each of whom was a recognized leader in his respective state, were George Mason, Richard Henry Lee, and Patrick Henry

clearly thought a founding-era audience would find their nonenumerationist interpretations plausible. Together with the post hoc and internally contradictory character of Federalist arguments, those interpretations create strong doubts that enumerationist assumptions were so widely presupposed that they literally went without saying.

The evidence against enumerationism does not map point by point onto the four contextual enrichment arguments described in Section II.B. But taken as a whole, it casts significant doubt on all of those arguments.

1. Federal Versus State Constitutions, Redux

It seems quite unlikely that the distinction between federal and state constitutions was an article of faith broadly taken for granted among the ratifying public. Rather, the best available evidence suggests that it was a creative and post hoc tactic to explain away the absence of a bill of rights in the proposed Constitution. It was widely questioned and disbelieved by Anti-Federalists, who recognized its novelty. It was also in significant tension—if not flatly inconsistent—with the Federalists' own theory of a new national union springing directly from the People, rather than state legislatures.[144]

Many Anti-Federalists seem to have been unaware of the purported international law background assumption that treated confederations as strictly limited delegations of power. In any event, they were not reassured by this argument. As leading Virginia politician Richard Henry Lee explained, the Articles of Confederation limited Congress to its enumerated powers, not because of background principles, but "because *it is expressly declared* [that] no power should be exercised, but such as is expressly given, and therefore no constructive power can be exercised."[145] This was obviously not true of the Constitution. One Anti-Federalist after another complained that the proposed Constitution needed, but lacked, such an express reservation of state sovereignty in order to create a national government governed by enumerationist principles.[146]

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of Virginia; Luther Martin of Maryland; George and DeWitt Clinton, John Lansing, Abraham and Robert Yates of New York; and Samuel Adams and Elbridge Gerry of Massachusetts. MAIER, *supra* note 137, at 90–93, 126, 132, 226–31, 320, 360. Mason, Martin, Lansing, Robert Yates, and Gerry had all been Philadelphia Convention delegates; Lee represented Virginia in the Confederation Congress and served as its president; and Henry and Clinton were, respectively, current and future state governors. *Id.* at 163–65, 226–31, 341–45, 360. *See generally* HERBERT J. STORING, WHAT THE ANTIFEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981) (describing the profound influence of Anti-Federalist thought).

144. *See* Coan & Schwartz, *supra* note 37, at 468–81.

145. Melancton Smith's Notes (Sept. 27, 1787), *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 335, 335 (Merrill Jensen ed., 1976) (alteration in original) (emphasis added).

146. *See, e.g.*, The Virginia Convention (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1325–26 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (statement of Mason); *A Republican I: To James Wilson, Esquire*, N.Y.J. (Oct. 25, 1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 130, 131–32 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles

Anti-Federalists also maintained, with considerable justification, that there was no theoretical difference between the proposed federal constitution and the state constitutions that would naturally subject the former to enumerationist strictures. Both were acts of the people themselves. Wilson's novel distinction between the nature of state and federal constitutions was directly challenged in a series of essays by the pseudonymous Agrippa, who dismissed it as "a mere fallacy, invented by the deceptive powers of mr. Wilson."[147] In support of this point, Agrippa cited the Federalists' own theory of popular sovereignty:

> To any body who will be at the trouble to read the new system, it is evidently in the same situation as the state constitutions now possess. It is a compact among the people for purposes of government, and not a compact between states. It begins in the name of the people and not of the states.[148]

From this premise, Agrippa drew a conclusion directly opposite to Wilson's: "[W]hen [the people] appoint certain persons to administer the government, they delegate all the powers of government not expressly reserved. . . . This has been the uniform practice. In all doubtful cases the decision is in favour of the government."[149] Other Anti-Federalists agreed.[150]

As Jonathan Gienapp has shown, these theoretical arguments reflect the profound uncertainty among the Framers and ratifiers about just what kind of thing the Constitution was.[151] Among other uncertainties, and critical to this discussion, the concept of a continental republic based directly on the consent of the people was unprecedented and undertheorized.[152] Whatever views on this question were bruited in newspapers, public houses, and state

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H. Schoenleber eds., 2003); Federal Farmer, Letters to the Republican, Letter IV (Oct. 12, 1787), *in* 19 *id.*, at 231, 233.

147. *Agrippa XII*, MASS. GAZETTE (Jan. 15, 1788), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 720, 722.

148. *Agrippa XV*, MASS. GAZETTE (Jan. 29, 1788), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 822, 824–25 (emphasis omitted).

149. *Id.* at 824.

150. The New York Convention (July 1, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2031, 2037 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2008) (statement of Smith); *see also* Federal Farmer: An Additional Number of Letters to the Republican, Letter XVI (Jan. 20, 1788), *in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 976, 1052 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2004) ("The supreme power is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern; this is as true in forming a state as in forming a federal government. There is no possible distinction but this founded merely in the different modes of proceeding which take place in some cases.").

151. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 4–5, 69–70 (2018).

152. *Id.* at 71–74.

ratification conventions, they were provisional, speculative, and frequently opportunistic. They little resembled the kind of dominant orthodoxy that might, in the right circumstances, transform a semantically ambiguous text into a determinate public meaning.

2. The Preamble

Many Anti-Federalists read the Preamble as undermining Wilson's theory of inherently limited federal powers. In particular, they saw the proclaimed establishment of the Constitution by "We the People"—rather than "We the States"—as implying a "consolidated" government. In the context of the ratification debates, "consolidation" was shorthand for the practical elimination of state sovereignty through the granting of all meaningful legislative power to Congress. As a delegate at the Massachusetts ratification convention put it: "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."[153] Famed Revolutionary War hero Samuel Adams concurred: "I confess, as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a foederal Union of Sovereign States."[154] The logical implication, Adams insisted, was that the grant of powers to Congress "shall extend to every Subject of Legislation."[155]

Other interpreters viewed the Preamble as directly marking out the objects or ends for which federal power could be exercised—ends which would automatically carry with them the incidental powers conferred by the Necessary and Proper Clause. George Clinton, later governor of New York and Vice President of the United States, declared with horror that "[t]he objects of this government as expressed in the preface to it . . . include every object for which government was established amongst men, and in every dispute about the powers granted, it is fair to infer that the means are commensurate with the end."[156] Writing as Brutus, a leading New York Anti-Federalist echoed the point: "[N]o doubt can remain, but that the great end of the constitution, if it is to be collected from the preamble, in which its end

153. Convention Debates (Feb. 1, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1390, 1397 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (statement of Nasson).

154. Samuel Adams to Richard Henry Lee (Dec. 3, 1787), *in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 349, 349 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

155. *Id.*; *accord* The Pennsylvania Convention, Convention Debates (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 382, 408 (statement of Smilie) (arguing that the "plain and positive meaning" of the Preamble's "formation of a new Constitution upon the original authority of the people" formed "a complete system of government" empowered with "the right of making laws for every purpose [that] is invested in the future governors of America").

156. George Clinton's Remarks Against Ratifying the Constitution (July 11, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 2142, 2146.

is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal."[157]

It would have been decidedly impolitic for Federalists to acknowledge the plausibility of these readings during the ratification debates. But many leading Federalists espoused remarkably similar views in postratification debates over the first Bank of the United States, the Alien and Sedition Acts, and elsewhere.[158] If these readings were contrary to the clear public meaning of the Constitution, it is difficult to understand why so many capable advocates across the political spectrum would have expected them to persuade their founding-era audience. The evidence is more consistent with a bare-knuckle political battle in which both sides exploited significant ambiguities in the public meaning of the Constitution to achieve their own ends in rapidly shifting circumstances.

3. The General Welfare and Necessary and Proper Clauses

The great majority of Anti-Federalists interpreted the Constitution as granting implied and—or—general powers to Congress that went far beyond those enumerated. In addition to the Preamble, the chief textual sources they cited for those concerns were the General Welfare Clause and the Necessary and Proper Clause.

Article I, Section 8, Clause 1, was particularly troubling to Anti-Federalists. Federalists generally tried to sweep the General Welfare Clause under the rug as a mere explanation of the purposes for which taxes could be raised.[159] Some Anti-Federalists also read the Clause that way, albeit expressing dismay at the breadth and unchecked discretion vested in Congress to define "the general welfare."[160] More frequently, however, Anti-Federalist advocates read the General Welfare Clause as an independent grant of general legislative power—"an indefinite power to provide for the general welfare."[161]

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157. *Brutus XII*, N.Y.J. (Feb. 7, 1788), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 72, 74 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

158. *See infra* note 223 and accompanying text; *see also* GIENAPP, *supra* note 151, at 213–25 (Bank of North America); William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 54–57 (2021) (Alien and Sedition Acts).

159. *See, e.g.*, The Pennsylvania Convention (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 382, 414 (statement of McKean); Roger Sherman and Oliver Ellsworth to Governor Huntington, NEW HAVEN GAZETTE (Oct. 25, 1787), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 351, 352 (Merrill Jensen ed., 1978); THE FEDERALIST NO. 41, *supra* note 94, at 263 (James Madison).

160. The Pennsylvania Convention, *supra* note 159, at 408; *Centinel I*, INDEP. GAZETTEER (Oct. 5, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 158, 162 (noting that the Constitution grants Congress power to tax, "whatever . . . they may deem requisite for the *general welfare*").

161. The Virginia Convention (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 1299, 1332 (statement of Grayson).

According to Brutus, "the power is in express words given to Congress 'to provide for the common defence, and general welfare.'"[162] Unimpressed by Federalist assurances that this clause merely limited the taxing power, Brutus "would reply, that the meaning and intent of the constitution is to be collected from the words of it, and I submit to the public, whether the construction I have given it is not the most natural and easy."[163] Many other Anti-Federalists echoed this reading, including Richard Henry Lee, Patrick Henry, and George Mason—three of the most prominent public men of the era.[164]

Anti-Federalists also routinely interpreted the Necessary and Proper Clause as a broad authorization to legislate for all national—or all legislative—purposes. The Necessary and Proper Clause, argued Brutus, "leaves the legislature at liberty, to do every thing, which in their judgment is best."[165] The Federal Farmer, another influential Anti-Federalist, found it "almost impossible to have a just conception of these powers, or of the extent and number of the laws which may be deemed necessary and proper to carry them into effect."[166] Future New York Governor DeWitt Clinton offered an especially precise textual argument: The Necessary and Proper Clause "speaks of the aforegoing, *and all other powers*."[167] Therefore, the implied powers "will take in every thing, but the two or three little matters, they have [ex]cepted."[168]

Indeed, Anti-Federalists were particularly alarmed by the exceptions to legislative power enumerated in Article I, Section 9, to which Clinton was referring. These exceptions—the prohibitions on abolishing habeas corpus and granting titles of nobility, for example—belied the claim that Congress was limited to its enumerated powers.[169] Again and again, Anti-Federalist commentators and ratifying convention delegates construed these express

162. *Brutus V*, N.Y.J. (Dec. 13, 1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 410, 412.

163. *Id.*

164. *See, e.g.*, Richard Henry Lee to Samuel Adams (Oct. 5, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 36, 37 (John P. Kaminski & Gaspare J. Saladino eds., 1988); The Virginia Convention (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 1299, 1324–25 (statement of Mason); *see also id.* at 1326 (statement of Mason) (identifying "to provide for the general welfare" as a separate grant of legislative power); The Virginia Convention (June 24, 1788), 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 1473, 1476 (statement of Henry) (arguing that the "power to provide for the general defence and welfare" was "clear [and] unequivocal" and would authorize Congress to "pronounce all slaves free").

165. *Brutus XI*, N.Y.J. (Jan. 31, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 680, 684.

166. Federal Farmer, Letters to the Republican, Letter IV, *supra* note 146, at 233.

167. DeWitt Clinton, *A Countryman V*, N.Y.J. (Jan. 31, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 623, 623 (emphasis added).

168. *Id.*

169. U.S. CONST. art. I, § 9.

restrictions as implying vast unenumerated powers.[170] "If every thing which is not given is reserved, what propriety is there in these exceptions?" asked Brutus.

> Does this constitution any where grant the power of suspending the habeas corpus, to make expost facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted.[171]

Again, it would have been impolitic for Federalists to advance any of these views during the ratification debates. But as with the Preamble, leading Federalists advanced similar readings of the Necessary and Proper and General Welfare Clauses in postratification legislative debates.[172] Like the preratification arguments of both sides, some of these readings may have been insincere or purely instrumental. But the very fact that they were advocated by prominent figures in public debate cuts against the notion that the meaning of enumeration was settled and clear to the ratifying public.

4. The State Forms of Ratification

The ratifying conventions each conveyed their ratification of the proposed Constitution by forwarding to Congress a "form of ratification" recounting the relevant votes and other formalities. These forms supply evidence that a substantial number of ratifiers read the Constitution as not enumerationist—or at least as dangerously ambiguous on that point in the absence of strong clarifying language. South Carolina declared its interpretation that powers not expressly delegated were reserved—a declaration which would have been unnecessary in the face of a dominant consensus favoring that interpretation.[173] The Massachusetts, New York, Virginia, and New Hampshire state conventions ratified with the explicit demand that Congress consider certain amendments, including an amendment declaring that Congress had no powers beyond those "expressly delegated."[174] Of course,

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170. *See, e.g.*, *Agrippa IV*, MASS. GAZETTE (Dec. 4, 1787), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 154, at 381, 382–83; *A Customer*, N.Y.J. (Nov. 23, 1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 293, 293; *Brutus XII*, N.Y.J. (Feb. 14, 1787), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 756, 774; The New York Convention (June 25, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 1877, 1877–78 (statement of Smith); The Pennsylvania Convention, *supra* note 159, at 392 (statement of Smilie).

171. *Brutus II*, N.Y.J. (Nov. 1, 1787), *in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 154, 158.

172. *See infra* note 225.

173. South Carolina Form of Ratification (May 23, 1788), *in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 399, 400 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2016).

174. *E.g.*, Form of Ratification (Feb. 6–7, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 153, at 1468, 1469 (Massachusetts); *accord*

this is the language that found its way, more or less, into the Tenth Amendment, with the crucial deletion of the word "expressly."[175] The proposed "expressly delegated" amendment might have functioned as a textual instruction to interpret the enumerated powers according to the canon of *expressio unius*, and to permit incidental powers under the Necessary and Proper Clause only restrictively.[176] Without "expressly," neither the Tenth Amendment nor the Constitution contains any such instruction.

The motivation for inserting such interpretive rules into a legal instrument is often unclear. On one hand, the insertion might serve merely to reinforce an already determinate meaning against the possibility of bad-faith misinterpretation. On the other, it might be meant to change an ambiguous meaning to a determinate one—or even to reverse a probable meaning. In the case of the state forms of ratification, it is logically possible that most or all of the convention delegates who supported the "expressly delegated" amendment believed the Constitution's meaning to be clearly enumerationist even without the amendment. But we find this unlikely in light of the historical record as a whole. Too many prominent and intelligent readers expressed doubts about the enumerationist character of the Constitution to dismiss their interpretations as flatly mistaken or contrary to the text's clear public meaning. While perhaps not decisive on their own, the state forms of ratification are one more indication that Anti-Federalist readings were regarded as plausible and were taken seriously.

5. The Tenth Amendment, Redux

This brings us back to the Tenth Amendment. Many or most proponents of a Tenth Amendment limiting Congress to its *expressly* delegated powers clearly hoped that the amendment would embed a strict enumerationist interpretation of the powers of Congress. If their preferred version of the amendment succeeded, it would likely have been understood to impose a strict construction on Congress's implied powers.[177] But that proposal failed to overcome determined opposition, leaving the text's essentially tautological semantic meaning unchanged—"Congress has whatever powers Congress has." Did this semantically empty text nevertheless clearly communicate the

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Convention Debates and Proceedings (July 25, 1788), *in* 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2300, 2305 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2009) (New York); The Virginia Convention (June 27, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 146, at 1550, 1553 (Virginia); New Hampshire Form of Ratification (June 21, 1788), *in* 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 376, 377 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 2017) (New Hampshire).

175. *See* U.S. CONST. amend. X.

176. *See* Lash, *supra* note 5, at 1894.

177. *Id.*

core tenets of enumerationism in the context of its adoption? It is hard to believe that it did.

The historical record on the Tenth Amendment in the founding era is exceedingly thin. Proposed by the First Congress in August 1789, the Tenth Amendment apparently received scant debate on the House floor, taking up less than half a page in the Annals of Congress.[178] The original proposal reported out of the House Committee on Amendments consisted of the language we now have, minus the coda "or the people." South Carolina congressman Thomas Tudor Tucker moved to amend it by adding "all powers being derived from the people," as a preambular phrase, and inserting "expressly" before delegated.[179] Madison opposed the motion, "because it is impossible to confine a Government to the exercise of express powers," and Roger Sherman agreed.[180] Tucker responded that he did not understand "expressly" to rule out "clearly comprehended" incidental powers.[181] Tucker's motion was voted down, and as a consolation, a motion was approved to add "or the people" at the end of the Amendment.[182] There the recorded debate ends.[183]

The Tenth Amendment, along with the rest of the Bill of Rights, was ratified in December 1791. During the ratification period, the proposed Tenth Amendment cropped up briefly in House debates over the national bank bill in February 1791. Congressman John Laurence argued that the proposed Tenth Amendment did not warrant prohibitions on implied powers by "construction."[184] James Madison, who by now had changed his views to embrace relatively strict construction of implied powers, argued that this principle was already embedded in the Constitution and "guard[ed] against a latitude of interpretation."[185] He was directly rebutted by Elbridge Gerry, who argued that if Madison's view were correct, then "our whole code of laws is unconstitutional" because the acts of Congress "are generally the result of a liberal construction."[186]

Undoubtedly, there were recorded state legislative debates and accompanying newspaper commentary that touched on the Tenth Amendment. But historians are only now collecting these materials into an easily searchable repository, and no enumerationist has made the effort to canvass them independently. Instead, they have typically relied on partisan arguments, usually made years after its ratification, that the Tenth Amendment *should* be

178. 1 ANNALS OF CONG. 761 (1789) (Joseph Gales ed., 1834). Senate debates were secret until 1794, so the only record comes from the House.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. 2 ANNALS OF CONG. 1914–15 (1791).

185. *Id.* at 1901.

186. *Id.* at 1951.

interpreted as if the word "expressly" had been added.[187] But such arguments are available on both sides.[188] At most, they show that the Tenth Amendment, like the original 1787 enumeration, is an ambiguous text whose meaning was sharply contested for decades afterward. This is hardly surprising, given the Amendment's essentially empty language and the controversy and uncertainty over enumerationism in the original ratification debates just a year or two earlier. Without a much more extensive review of the Tenth Amendment ratification debates, no originalist case for an enumerationist interpretation of the Tenth Amendment does—or could—come close to satisfying Solum's seventy-five percent standard for establishing a determinate original public meaning.

D. WEIGHING THE EVIDENCE

What are we to make of this conflicting evidence? The first and simplest takeaway is that there is a real and substantial conflict, which the enumerationist conventional wisdom has obscured rather than confronted. The second is that this conflict poses formidable—and perhaps insurmountable—theoretical challenges to the originalist case for enumerationism.

1. Counting the Uncountable

Let's begin with the obvious. The seventy-five percent threshold for establishing a determinate original public meaning is numerical. But there is of course no polling data, scientific or otherwise, on the views and background assumptions of the ratifying public. Counting up the number of pro- and antienumerationism statements in newspapers and ratifying conventions is both unworkable and too detached from the numbers of citizens holding

187. *See, e.g.*, *infra* text accompanying note 228 (Madison's partisan statement aimed at defeat of Bank Bill); Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1346–47 (2006) (stating that the Tenth Amendment–based rule of strict construction was "first presented in works" appearing in or after 1800). A good example is Kurt Lash's creative but ultimately unpersuasive argument that the Tenth Amendment limited Congress to its expressly delegated powers. Lash, *supra* note 5, at 1893–95. According to Lash, the meaning of the omitted "expressly" was later smuggled back into the amendment through the opaque phrase "or to the people." *Id.* at 1894. Lash sets out to employ public meaning originalist methodology by "determining the likely meaning of the Amendment as it was received by its ratifiers." *Id.* at 1897. But he does not unpack the standard implicit in "likely meaning." Far more problematic, he relies primarily on postratification partisan advocacy rather than contemporaneous evidence of how the Tenth Amendment's ratifiers understood the meaning of that text. Lash presents a well-grounded case that a strict constructionist interpretation of the Tenth Amendment had significant support among some important figures at some point within a few decades of ratification. But his more ambitious claim conflates "early" with "original" and extrapolates a determinate original meaning from conflicting and ambiguous evidence. We do not mean to single out Lash for criticism here: This type of argumentative drift is a feature of much applied-originalist work.

188. The most famous argument against a strict constructionist reading is Chief Justice Marshall's discussion of the Tenth Amendment in *McCulloch v. Maryland*. *See supra* Section I.B.4.

beliefs on the subject. Big-data techniques like corpus linguistics may shed helpful light on the standard usage of particular words and phrases, but they are not yet—and may never be—able to illuminate the sort of subtle and often unspoken background assumptions that the originalist case for enumerationism depends on.

The cumulative ratifying votes in the state conventions might seem like a more serviceable proxy. But here we encounter other intractable problems. Perhaps we could finesse or overlook questions about the representativeness of the various ratifying conventions.[189] But we would still have to make the highly dubious assumption that votes for and against ratification corresponded to beliefs about the meaning of enumeration: presumably, that everyone who voted to ratify believed Federalist professions that the Constitution's enumeration of powers was clearly limiting, and everyone who voted against believed Anti-Federalist arguments that it was clearly not limiting (or that the number of "crossover" beliefs washed out).[190]

None of these problems would be insurmountable if the historical evidence established a clear and dominant consensus on the original public meaning of enumeration. But as this Part has shown, there was in fact significant disagreement on this question. This makes the problem of counting unavoidable.

2. Dissimulation and Strategic Behavior

As we have already noted, it would be extremely naïve to assume that debaters and commentators on the Constitution were simply expressing their candid beliefs about the public meaning of the Constitution. Many, if not all, were speaking strategically. For example, James Madison and Alexander Hamilton both argued during the ratification debates that the Constitution was a compact of sovereign states.[191] Yet, before ratification, Madison was

189. Representativeness is problematic along two dimensions. One is the number of citizens represented by each delegate. For example, Massachusetts had almost twice as many ratifying convention delegates as Virginia, despite their similar populations. *Ratification at a Glance*, CTR. FOR THE STUDY OF THE AM. CONST., https://csac.history.wisc.edu/states-and-ratification [https://perma.cc/L6BV-AFM4]. The other is the delegates' representativeness of public opinion. For example, Delaware, New Jersey, and Georgia, collectively, cast ninety-four delegate votes for ratification and zero against. *Id.* Yet it is hard to imagine that there was no Anti-Federalist opinion in any of those states. Several states had malapportionment that underrepresented Anti-Federalist opinion. *See* KLARMAN, *supra* note 143, at 406; Coan & Schwartz, *supra* note 37, at 524 n.233.

190. Even this highly problematic assumption would not much help the originalist case for enumerationism. Collectively, delegates to the state ratifying conventions approved the Constitution, by 1,071 votes in favor, to 577 against. *Ratification at a Glance*, *supra* note 189. This is a margin of sixty-five percent to thirty-five percent, only slightly above the cautionary sixty percent figure that Solum suggests would be clearly inadequate to establish a determinate public meaning.

191. The New York Convention (June 28, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 150, at 1976, 1982–83 (statement of Hamilton); THE FEDERALIST NOS. 43, 45, *supra* note 94, at 272, 274, 279, 292 (James Madison) (referring to proposed Constitution as a "Confederacy"); THE FEDERALIST NO. 40, *supra* note 94, at 250–51 (James Madison) (arguing that Constitution does "not [vary] the fundamental principles" of the

adamant that this feature was a fatal "vice" of the Confederation, irreconcilable with a functioning national government that could act directly on the people.[192] Hamilton undoubtedly agreed.[193] At the same time, at least some Anti-Federalists almost certainly exaggerated their understanding of the powers the proposed Constitution granted to Congress. To make matters even more complicated, many of these Anti-Federalists reversed themselves after ratification by arguing that the enumeration was limiting[194]—and plenty of Federalists did the opposite.[195]

Federalists who paid lip service to limited enumerated powers may have had their fingers crossed behind their backs in another sense. James Wilson, as John Mikhail has argued, most likely viewed the Necessary and Proper Clause as opening the door to significant implied powers that were not subordinate to those enumerated.[196] In his State House Yard speech and speeches in the ratification debates, Wilson was always careful to refrain from saying that Congress would be limited to its *expressly* delegated powers. Wilson and other nationalists may also have shared the views expressed by Anti-Federalists that the General Welfare Clause was an enumerated general power to legislate on all national matters.[197]

In any case, the most plausible contextual enrichment arguments for enumerationism all depend on the existence of widely shared background assumptions that would have made the Constitution's enumerationism literally go without saying. But the Federalists were not citing such background gospel. They were offering detailed explanations and novel theories to persuade the public to embrace *new* assumptions. Their apparent need to do so calls the existence of such purportedly widespread and preexisting assumptions into serious question. So, too, does the Anti-Federalist strategy of reading the Constitution in nonenumerationist terms. If the enumerationist character of the Constitution really went without saying, such arguments would have struck the vast majority of readers and listeners as borderline ridiculous. The leading Anti-Federalists were extremely sophisticated operators. It seems quite unlikely that they would stake their case on such a strategy if it were so obviously doomed by firm and widespread enumerationist assumptions.

Articles of Confederation); *see* Schwartz, *supra* note 92, at 904–08 (explaining Madison's dissembling on this point).

192. James Madison, *Want of Ratification by the People of the Articles of Confederation* (1787), *reprinted in* 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 364, 365 (Gaillard Hunt ed., 1901).

193. *See, e.g.*, Hamilton, *supra* note 83, at 129–31 (arguing for strong national government with liberal implied powers); Madison (June 18, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 46, at 281, 283 (statement of Hamilton) (arguing that "[a] *federal* Govt." could not be saved by "[an] amendment . . . leaving the States in possession of their sovereignty").

194. *See, e.g.*, Jeffrey K. Tulis & Nicole Mellow, *The Anti-Federal Appropriation*, 3 AM. POL. THOUGHT 157, 158, 160–65 (2014) (canvassing examples).

195. *See infra* note 229 and accompanying text.

196. Mikhail, *supra* note 25, at 1096–103, 1121–24.

197. Schwartz, *supra* note 32, at 917–25.

While the secret intentions and purposes of these various advocates are not controlling under modern originalist theory, they are far from irrelevant. They constitute revealing circumstantial evidence of the speakers' beliefs about meaning. If the Federalists were insincere in their protestations, then they could not have understood the delegation of powers as determinately enumerationist. And whatever their sincerity, Anti-Federalists' vehement protestations imply a belief that the meaning of the enumeration was up for grabs. In this regard, many and perhaps most of the utterances about limited enumerated powers in the ratification debates suggest a belief that the meaning of enumeration was indeterminate.

3. Public Meaning vs. Expectations, Intentions, and Political Preferences

Wholly apart from dissimulating speakers, the expectations, intentions, and political preferences of would-be interpreters are not the same thing as public meaning and must be carefully peeled away in any rigorous originalist analysis. Most recent applied-originalist scholarship pays lip service to this distinction but seldom takes it seriously in practice. Consider a statement by a member of the ratifying public that "constitutional provision X means Y." Even setting aside the question of sincerity, such a statement can have various possible meanings of quite distinct significance for original public meaning. It could mean: "I believe that X clearly communicates Y." But it could also mean: "I prefer to interpret provision X to mean Y, and my utterance signals my engagement to win an interpretive contest on behalf of Y." Or it could mean "I expect—or I am worried—that X will be interpreted to mean Y, though I recognize that it could also reasonably be interpreted to mean Z." The first of these possibilities is evidence of a determinate original public meaning. The latter two are not. In fact, the latter two are evidence *against* a determinate original meaning.

It seems likely that many participants in the debate over enumerationism expressed definite intentions, expectations, or political preferences, while implicitly recognizing the Constitution's linguistic ambiguity. It is certainly commonplace for the drafters of legal instruments to finesse difficult questions through the use of vague or ambiguous language that effectively defers their resolution to future political struggle. Presumably, many members of the ratifying public understood this and incorporated it into their understandings of the Constitution's communicative content. But in the midst of high-stakes political struggle over the meaning of indeterminate language, the incentives all cut against open acknowledgement of its ambiguity.

Accounting for the prevalence of such views in the ratification debates poses a real problem for enumerationists and applied originalism more generally. All the more so when it is combined with Solum's reasonable but demanding seventy-five percent standard for establishing a determinate original public meaning. Under that standard, the task for originalist

enumerationists is to show that any other reading was marginal and implausible during ratification—that no more than a fringe of twenty-five percent or less of the ratifying public would have read the Constitution either as rejecting enumerationism or ambiguous on the question. To make such a showing, originalist enumerationists need to develop some reasonably reliable method of counting and to control for the insincerity and opportunism of political rhetoric. But they must also take care that the views they are counting actually support the existence of a determinate public meaning, rather than expressing a preference, hope, or expectation, while implicitly confirming the text's ambiguity. This is difficult even in theory and far more difficult in practice.

4. Do the Views of Anti-Federalists Count?

At this point, we need to address an obvious objection. The Federalists won the ratification debates. The Anti-Federalists lost. Why are we spending so much time on the latter? The short answer is that the views of Anti-Federalists are highly relevant to original public meaning, as we have explained throughout this Part. The longer answer requires us to engage with two different possible arguments for privileging the views expressed by Federalists over those expressed by Anti-Federalists.[198]

The first is a reliance argument, which goes like this: Because members of the ratifying public relied on Federalist professions of enumerationism, those professions should be treated as binding today.[199] No one relied on Anti-Federalist interpretations, or if they did, it didn't matter. The Constitution was ratified despite their opposition, so their reliance on Anti-Federalist arguments is irrelevant. We call this argument "interpretive estoppel" because its logic is similar to the logic of promissory estoppel.[200]

This argument has a certain intuitive appeal, but it fails for two straightforward reasons. First, it rests on a theory of popular sovereignty that is highly vulnerable to the dead-hand objection and which many modern originalists have abandoned for that reason.[201] Even if the Federalists' promises induced widespread reliance by members of the ratifying public,

198. For a fuller elaboration of these points, see Coan & Schwartz, *supra* note 37, at 510–26.

199. *See, e.g.*, Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 471 (2003) (describing enumerationist statements of Federalists as "as part of the basis of the political bargain by which the Constitution was ratified"); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 157 (rev. ed. 2014) (similar); *see also* Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1140 (2009) (making a similar argument about state sovereign immunity).

200. *See, e.g.*, RICHARD A. LORD, 4 WILLISTON ON CONTRACTS § 8:6 (4th ed. 2023), Westlaw WILLSTN-CN (laying out the elements of promissory estoppel).

201. *See, e.g.*, Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L.J. ONLINE 1, 3 (2020) (making this case); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1721–22 (2003) (same); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613, 651 (1999) (acknowledging the force of the dead-hand problem against popular sovereignty arguments for originalism).

which there is reason to doubt, why should that matter to contemporary Americans? No one alive today made such promises or relied upon them. A proponent of this argument might contend that contemporary Americans are, in some relevant sense, successors-in-interest to Federalists and those who relied on their promises. But this argument does not bear close scrutiny. There is no essential continuity or causal link (as there might be in a genuine claim for reparations) between those who "relied" on Federalist assurances (whoever they were) and those who today prefer enumerationism.

Second, the interpretive-estoppel argument is not an argument from original public meaning. Under modern public meaning originalism, it is the objective communicative content of the Constitution that is Supreme Law, not the subjective understandings or purposes or extratextual promises of the persons who supported it.[202] And for the reasons we have explained throughout this Part, the broad readings of federal power espoused by Anti-Federalists are every bit as probative of the text's communicative content as the enumerationist pronouncements of the Federalists. Political victors hold no monopoly on the public meaning of language.[203]

A cruder first-cousin to the interpretive-estoppel argument privileges the views of Federalists simply because they won and the Anti-Federalists lost.[204] This, likewise, is not an original public meaning argument. It treats the will, rather than the words, of the political victors as controlling. And like the interpretive-estoppel argument, it is vulnerable to the dead-hand objection. It also suffers from a third problem that the first argument does not: It takes the dubious campaign rhetoric of the Federalists at face value. But if that rhetoric was insincere or merely opportunistic, as much of it was, it does not actually represent the will of the political victors.

For all of these reasons, it is untenable and inconsistent with modern originalism to discount the views of Anti-Federalists or to accord the statements of Federalists a privileged status in weighing the evidence of original meaning. The statements of both groups are highly relevant, though as we have explained, they must both be evaluated with great care and sensitivity.[205]

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In sum, there is weighty and voluminous evidence that enumerationist assumptions were deeply contested, rather than dominant, in the founding

202. *See, e.g.*, Solum, *supra* note 18, at 1957–58; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480 (2013).

203. Unless, perhaps, one lives in an Orwellian dictatorship. We don't understand originalism to embrace such a view.

204. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1150–52 (2003).

205. Again, we have explained these points in greater detail elsewhere. *See* Coan & Schwartz, *supra* note 37, at 510–26.

era. Due to space constraints, we have presented only representative samples, but those samples tell a powerful and surprising story. It is not simply that many Anti-Federalists believed, or argued, that the proposed Constitution conferred general or unlimited powers. The vehemence of Federalist defenses of enumerationism underscore the plausibility of the Anti-Federalist interpretation, as does the post hoc and internally inconsistent character of Federalist arguments. This evidence, which has not been rigorously or comprehensively addressed, poses several major challenges to the case for enumerationism under modern originalist theory. Unless and until enumerationists grapple with these challenges and respond to them persuasively, the original public meaning of enumeration cannot and should not be regarded as settled.

III. ENUMERATION AND CONSTITUTIONAL CONSTRUCTION

There are strong arguments that the original public meaning of enumeration was indeterminate. What follows if those arguments are correct? Under modern originalist theory, the legal meaning of an indeterminate constitutional text cannot, by definition, be resolved through constitutional interpretation. Instead, it must be resolved through constitutional construction—to oversimplify slightly, gap-filling. Originalist construction might rely on any of the familiar modalities of interpretation—judicial precedent, historical practice, structural inference, prudential reasoning, etc.[206] But in this Part, we will focus primarily on judicial precedent and historical practice. These modalities are the most widely embraced by originalists. They also present the strongest originalist case for enumerationism because the roots of enumerationism in both judicial precedent and historical practice run deep. Yet the history of enumerationism over the past 230 years is complex and fraught with contestation. For most of that history, enumerationism's bark has been far worse than its bite. As a result, the case for an enumerationist constitutional construction cannot simply be assumed. It must be argued for—and making a persuasive case will not be easy. Indeed, there is a strong argument that the enumerationism of American historical practice has been mostly toothless and ceremonial.

A. THE MODALITIES OF CONSTITUTIONAL CONSTRUCTION

Within the areas of indeterminacy that Lawrence Solum has dubbed "the construction zone,"[207] there is broad agreement among originalists that construction cannot contradict a determinate original public meaning, which

206. *See infra* note 208.

207. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010) (coining this term).

therefore imposes outer limits on construction.[208] There is less consensus about the definition and elements of construction, but most orthodox contemporary originalists treat construction as a gap-filling enterprise relying on the familiar array of nontextual interpretive modalities.[209]

Most of these are self-explanatory. Judicial precedent treats the decisions of the U.S. Supreme Court—at least those that do not violate with the Constitution's clear original public meaning—as authoritative settlements of the text's linguistic indeterminacy, subject to the usual limits of stare decisis. Structural inference draws on the structure of the government established by the Constitution for the same purpose. Other common, but somewhat more controversial, strategies include judicial deference or restraint,[210] prudential judgment,[211] and a presumption of liberty.[212] Deference requires courts to defer to legislatures (and perhaps the executive branch) à la James Bradley Thayer, unless the political branches clearly contravene original public meaning. Prudential judgment licenses constitutional decision-makers to make flexible, all-things-considered judgments about the best way to fill in the gaps in original public meaning. And a presumption of liberty—the opposite of deference—requires courts to invalidate government action unless it is clearly authorized by original public meaning.

Historical practice and its close cousin "liquidation" require a bit more explanation.

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208. *See, e.g.*, Solum, *supra* note 18, at 2019–20. For recent critiques of the view that interpretation can discover original public meaning as a purely empirical or factual matter, see Fallon, *supra* note 23. *See also* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 129 (2021) (emphasizing the role of normative and legal considerations in situating—or even constituting—the object of interpretation).

209. *See, e.g.*, Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 63 (2020) ("Constitutional construction might employ a plurality of methods, including attention to historical practice, precedent, and constitutional structure."); JACK M. BALKIN, LIVING ORIGINALISM 4 (2011) (stating construction encompasses "arguments from history, structure, ethos, consequences, and precedent"); Barnett & Bernick, *supra* note 7, at 6 (advocating an approach to construction focused on "the original functions of individual clauses and structural design elements").

210. *See generally* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009) (arguing for a default rule of deference where constitutional meaning is indeterminate or underdeterminate); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 11 (1999) (advocating judicial deference as the correct approach to nearly all construction on the ground that construction is essentially political and creative).

211. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–28 (2010) (emphasizing essentially political, creative, and normative character of construction); BARNETT, *supra* note 199, at 322–38 (advocating perfectionist, justice-seeking approach to construction).

212. *See, e.g.*, BARNETT, *supra* note 199, at 254–71.

1. History and Liquidation

The historical practice modality looks to the longstanding practices of U.S. governmental institutions as a guide for the development of constitutional law within the limits of original public meaning. Historical practice can also encompass more diffuse traditions, including traditional understandings of the Constitution outside the courts, and the Anglo-American common law tradition more generally.[213] Historical practice inside and outside the courts is often deeply intertwined; as a result, history and tradition often go hand in hand with judicial precedent as methods of constitutional construction.

Liquidation is a particular method of incorporating history and tradition into constitutional law, often associated with James Madison.[214] The idea is that the meaning of constitutional provisions which were initially up for grabs can be settled—and perhaps fixed—through a combination of high-profile decisions or institutional practices, sustained over time and acquiesced in by voters and other officials and institutions.[215] What makes liquidation distinctive is its insistence that historical practice must be repeatedly considered and affirmed over time. It must also *deliberately* expound the Constitution. In other words, a brute political settlement is not sufficient; to liquidate constitutional meaning, historical practice must be widely understood as posing and settling a question of constitutional meaning.[216] Some, but not all, versions of liquidation also privilege early constitutional history and treat settlement by liquidation as at least presumptively permanent.[217]

A large literature attests to the complexity of the issues raised by these various uses of history in constitutional law.[218] For present purposes, we confine ourselves to two observations. First, there is little consensus among

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213. *See, e.g.*, BALKIN, *supra* note 209, at 260–63; William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 63–65 (2019) (theorizing the role of historical practice in resolving—or liquidating—constitutional indeterminacy); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 522 (2003) (same); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132–33 (1998) (advocating a Burkean approach involving "the long-standing and evolving practices, experiences, and tradition of the nation").

214. *See, e.g.*, Baude, *supra* note 213, at 11–12.

215. *See id.* at 18–21; Nelson, *supra* note 213, at 588–97.

216. *See* Baude, *supra* note 213, at 64 ("Liquidation, by contrast, requires that the course of practice be the result of constitutional *deliberation*—and hence more than just silence.").

217. *Compare* Nelson, *supra* note 213, at 584 (privileging early history), *with id.* at 59 (arguing against such privileging).

218. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 70 (2020); Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 417–18 (2018); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 538 (2016); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987).

modern originalists on precisely how history and tradition should inform constitutional construction or why they should do so.[219] Second, this lack of consensus, along with the sheer messiness of history itself, threatens to replicate the indeterminacy problem that construction is meant to overcome. The universe of potentially relevant historical practices and traditions is vast. Like constitutional text and judicial precedents, those practices and traditions can be defined at various levels of generality and explained according to various imputed principles. Often, they evolve or ebb and flow over time. And there is nothing like a mathematical formula for summing up these varied materials into a single determinate legal answer to the question that constitutional construction is called upon to address. Nor is there an established standard or burden of proof. The upshot is that the use of historical practice and liquidation in constitutional construction, like history more generally, is always fundamentally creative in character.[220] And it seldom, if ever, provides a determinate answer to a controverted question without some recourse to prudential or normative judgment. The same point applies, with the relevant changes and to varying degrees, to all of the most widely accepted approaches to constitutional construction.[221]

2. Enumerationism in the "Construction Zone"

What does all of this mean for enumerationism? If the original public meaning of enumeration is indeterminate, then construction is necessary to determine what significance enumeration should be accorded today. In particular, construction is necessary to determine (1) whether the enumeration of specific national powers should be understood as exhaustive; (2) whether the enumeration of specific national powers should be understood to exclude any general national powers, such as the power to provide for the general welfare or the power to legislate in all cases in which the states are separately incompetent; and (3) whether the enumeration of

219. *Compare* Baude, *supra* note 213 (developing a theory of liquidation focused on popular acquiescence), *with* Nelson, *supra* note 213 (developing a theory of liquidation focused on fixation of meaning), *and* McConnell, *supra* note 213 (advocating an originalist approach grounded in Burkean traditionalism).

220. For more along these lines, see David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 STAN. L. REV. ONLINE 17, 21–23 (2019). *See also* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 74 (2017) ("[D]etermining what should properly count as 'practice' depends in part on the justifications for gloss.").

221. We have not even mentioned the problem of harmonizing or choosing among different methods of constitutional construction when those methods point in different directions. In effect, most modern originalists are pluralists (of some limited kind) in the construction zone. But few originalists have seriously grappled with the problem of reconciling conflicts of this kind. *But see* BALKIN, *supra* note 209, at 312–17 (elaborating a broadly pluralist approach to constitutional construction and grappling with the commensurability problem). We shall have more to say on this below.

specific national powers implies that "there must be something" beyond the power of the national government.

We believe that a strong case can be made for a negative answer to all three questions under each of the most widely accepted approaches to constitutional construction.[222] For some of those approaches, such as deference and structural inference, the explanation is straightforward. If the correct default rule for constitutional construction is deference to the legislative process, as several prominent originalists believe, then courts should never invalidate federal legislation for violating the tenets of enumerationism. We say "never," rather than "almost never" or "rarely," because the indeterminacy of the original meaning of enumeration means that a violation of enumerationism can never constitute clear constitutional error.[223]

Similarly, there are strong structural and prudential arguments for rejecting enumerationism and reading the Constitution to grant the federal government all the power it needs to address genuinely national problems.[224] Of course there are also structural and prudential arguments in favor of enumerationism,[225] but suffice it to say that this is not the terrain on which originalists typically prefer to do battle. If we have shown that the debate over enumerationism comes down to the strength of the structural and prudential arguments in its favor, *even under modern originalist theory*, then we have already shown quite a lot.

This leaves the two most important and widely accepted approaches to constitutional construction—judicial precedent and historical practice, including liquidation. As we have already observed, these approaches are deeply entwined. And at first blush, they seem to spell trouble, even disaster, for our argument. Enumerationism undoubtedly has deep roots in American judicial precedent and historical practice. In recent high-profile decisions implicating enumerationism, not a single Justice of the U.S. Supreme Court so much as questioned it, much

222. The obvious exception is a presumption of liberty, which always militates in favor of a narrower reading of government regulatory power, at least if conceived in conventionally libertarian terms, as it usually is. *See* BARNETT, *supra* note 199, at 261–71. But we do not believe this qualifies as one of the most widely accepted approaches to constitutional construction. In any event, our argument will obviously not be persuasive to libertarians committed to resolving all constitutional indeterminacies against government power.

223. *See* Paulsen, *supra* note 210, at 886–87; WHITTINGTON, *supra* note 210, at 197.

224. We have both developed arguments of this kind in other work, as have many others. *See, e.g.*, Schwartz, *supra* note 1, at 608–10; Coan, *supra* note 26, at 1989; Cooter & Siegel, *supra* note 9, at 165.

225. *See, e.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 167–202 (2016); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 90–94 (2004); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 80–81 (2001). Such arguments also appear in Supreme Court decisions. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quoting New York v. United States, 505 U.S. 144, 181 (1992))).

less repudiated it outright.[226] Some version of enumerationism, we expect, is taught as the official story of U.S. constitutional law in the vast majority of American law schools. In fact, both of us have taught it that way ourselves for much of our careers. And yet, there is less to enumerationism's deep roots than meets the eye—much less, as we shall now explain.

B. ENUMERATIONISM IN CONSTITUTIONAL HISTORY

For most of American history, the Supreme Court has professed enumerationism in theory, while systematically bending, twisting, circumventing, and ultimately, eviscerating it in practice. The political branches, too, have treated enumerationism as a significant restraint on its power only occasionally or in distinct eras. If enumerationism has long been the official story of U.S. constitutional law, the reality has mostly been that Congress enacts whatever legislation it believes reasonably necessary to address national problems and the Supreme Court, at least in the long run, finds a way to accommodate and justify these expansive exercises of federal power. Under modern originalist theory, there is a strong argument that this toothless, ceremonial practice—and not the exacting doctrine of the contemporary movement conservative imagination—should inform constitutional construction. We cannot, of course, provide a full account of more than 230 years of history here.[227] But in very broad brush, the story goes like this.

1. Enumerationist Rhetoric vs. Reality

The first and arguably most precedent-setting conflict over the powers of Congress dealt enumerationism a major defeat. This was the history of the First and Second Banks of the United States, culminating in the decision in *McCulloch v. Maryland* in 1819[228]—perhaps the best-known example of a history informing or liquidating constitutional meaning. In approving the First Bank bill by a 2–1 margin, the House of Representatives roundly rejected Madison's argument that limited enumerated powers were "[t]he essential characteristic" of the Constitution.[229] In the end, all three branches of government agreed that this national institution, with control over the nation's money supply and banking network, was constitutional—despite the absence of enumerated powers to create a corporation, grant a monopoly charter, control the nation's money supply, or regulate banking.[230]

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226. *See supra* note 8.

227. For a more comprehensive account, see generally DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019); Schwartz, *supra* note 34.

228. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

229. *See* 2 ANNALS OF CONG. 1898 (1791) (statement of Madison); *id.* at 1960 (thirty-nine yea votes to twenty nays); Primus, *supra* note 218, at 422–23.

230. Three details are worth noting here to address possible reader objections. First, although Madison, as President, merely "waived" his former constitutional objection to a national

Enumerationism was openly contested in Congress through the end of the 1790s, with members arguing for implied powers violating its "restricted implied powers" tenet or endorsing a power to legislate "for the general welfare."[231] Such arguments drove Madison to lament the continuing claims of "some gentlemen, that Congress have authority . . . [to] do anything which they may think conducive to the general welfare."[232] As late as 1826, Madison privately proposed a constitutional amendment to eliminate the ongoing danger of broad interpretations of the General Welfare Clause.[233]

The election of 1800 marked a triumph for the Jeffersonian Republican party. Jefferson and his epigone James Monroe believed that the federal government should be limited in its legislative scope to national defense and

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bank (whatever that means), he affirmatively agreed that there was an unenumerated power to control the nation's money supply. *See* David S. Schwartz, *Coin, Currency, and Constitution: Reconsidering the National Bank Precedent*, 118 MICH. L. REV. 1005, 1015–16 (2020). Second, although *McCulloch* pays lip service to enumerationism, Marshall's opinion left the door open to implied powers that violate the tenets of enumerationism. *See* Schwartz, *supra* note 27, at 57. Third, contrary to popular belief, Andrew Jackson's famous veto of the recharter of the Second Bank was based on a claim that certain details of the Second Bank recharter bill were "unnecessary," and not that Congress lacked power to charter a national bank full stop. David S. Schwartz, *Defying* McCulloch*? Jackson's Bank Veto Reconsidered*, 72 ARK. L. REV. 129, 152 (2019).

231. 2 ANNALS OF CONG. 1921–22, 1924, 1926 (1791) (statement of Boudinot) (arguing that power to create a national bank could be implied from the legislative power of "providing for the general welfare and common defence"); *id.* at 1948 (statement of Gerry) (arguing that the bank bill was an appropriate means for "attaining th[e] object" of providing for "the common defence and general welfare"); 3 ANNALS OF CONG. 385 (1792) (statement of Laurence) ("The general welfare is inseparably connected with any object or pursuit which in its effects adds to the riches of the country."); 6 ANNALS OF CONG. 1726 (1796) (statement of Claiborne) ("For what purpose was it, Mr. C. asked, that money was spent to erect trading-houses in the back countries? He answered, for the general welfare."); 8 ANNALS OF CONG. 1965 (1798) (statement of Bayard); *accord id.* at 1957–58 (statement of Mr. Swell) ("Congress have a right, from their power to provide for the general welfare and internal tranquility, to take cognizance of everything which relates to aliens."); *id.* at 1959 (statement of 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."); *id.* at 1969 (Statement of Dana) ("That part of the 1st article of the 8th section of the Constitution which speaks of the common defence and general welfare is of a political nature, and does not refer to any internal regulation, but applies to what relates to the Union generally. . . . What relates to the Union generally, must be done by the Government of the United States."); *id.* at 1984 (statement of Gordon) ("[T]he right of Congress to regulate this business, arises from the power of making war, and providing for the general welfare."); *id.* at 1991 (statement of Harper) ("[T]he General Government is . . . charged with the common defence and welfare of the United States, and, in pursuance of those objects, it certainly has the right to pass all necessary laws."); *id.* at 1994 (Mr. Dayton) (claiming that the "power 'to provide for the common defence and general welfare' . . . was declared in the introductory part of the Constitution to be the great object of forming it").

232. *Accord* 3 ANNALS OF CONG. 386 (1792) (statement of Madison).

233. *See* Schwartz, *supra* note 92, at 892–93. While by that time, the broad interpretations of the General Welfare Clause tended to treat it as a spending power, Madison believed that spending was a form of regulation and did not view spending "for the general welfare" as any sort of limitation. *Id.*

foreign affairs.[234] Madison, as we have seen, believed that enumerationism was "the essential characteristic" of the Constitution.[235] Yet these views did not command a consensus—or even a dominant majority. Before the Civil War, the most significant economic issue other than slavery was the federal government's involvement in "internal improvements" (infrastructure) projects.[236] Madison, while favoring internal improvements as a policy matter, staunchly maintained that such federal infrastructure projects were unconstitutional in the absence of an amendment expressly authorizing them.[237] But a sizable faction within Madison's Republican party, led by Henry Clay, argued that the federal power over internal improvements could be implied both from a broad interpretation of the Commerce Clause and the structure and purposes of the Constitution as a whole: to solidify the bonds of union by developing a national network of commerce and communications.[238]

The Taney Court embraced a strict enumerationism from 1837 to 1861, but its views remained contested, not settled, in constitutional politics.[239] Moreover, this era represents a period of only twenty-four years. The post–Civil War Courts rolled back the Taney Court's strict enumerationism, recognizing federal powers over internal improvements, along with several unenumerated "inherent sovereign powers."[240] Outside the area of race relations, the Court rarely blocked federal legislation until the mid 1890s.

From that point through World War I and again from 1933 to 1937, the Supreme Court regularly employed enumerationism as a tool of reaction against economic reforms during the Progressive and New Deal eras.[241] But

234. *See, e.g.*, Thomas Jefferson, Inaugural Address (Mar. 4, 1801), *in* 10 ANNALS OF CONG. 765 (1801) ("The State Governments in all their rights, as the most competent administration for our domestic concerns and the surest bulwarks against anti-republican 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), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 162 (James D. Richardson ed., 1898) (arguing that the Commerce Clause authorized Congress to regulate interstate commerce only incidentally to regulating foreign commerce).

235. *See supra* text accompanying note 229.

236. SCHWARTZ, *supra* note 227, at 31.

237. *See* Schwartz, *supra* note 92, at 939–40.

238. SCHWARTZ, *supra* note 227, at 33–34, 70–71.

239. *See* JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 239–40 (2001) ("Year after year Congress heard the tired arguments about the constitutionality of [internal improvements].").

240. Downes v. Bidwell, 182 U.S. 244, 369 (1901) (Fuller, C.J., dissenting); *see, e.g.*, *id.* at 267–68 (recognizing inherent sovereign power to acquire and govern colonial territories); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 13 (1877) (recognizing implied federal power over internal improvements); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 544–45 (1871) (recognizing inherent sovereign power over the nation's currency); Ping v. United States, 130 U.S. 581, 603–04 (1889) (recognizing inherent sovereign power over immigration and deportation).

241. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (striking down Child Labor Act of 1916); Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936) (striking down New Deal coal

this use of enumerationism—always inconsistent and permeable, even at its peak—was decisively rejected by Congress, the President, and the Supreme Court between 1937 and 1942.[242] Since then, enumerationism has been largely reduced to a kind of constitutional parlor game: Pin the legislation on the enumerated power.

In sum, for most of American history, both the Supreme Court and Congress have worked around enumerationism to permit the federal government to address all national problems. A rigorous enumerationism held sway on the Supreme Court for just over fifty years (the Taney, Progressive, and New Deal eras) in a 230-year history. To uphold important congressional legislation, the Court has employed a variety of interpretive expedients, including broad construction of the enumerated powers, liberal interpretation of implied powers, recognition of inherent sovereign powers, and repurposing of the Commerce Clause as a de facto General Welfare Clause. Many of these developments were accompanied by enumerationist rhetoric, but that rhetoric has been more ceremonial than substantive. The dominant reality of American constitutional practice has been broadly—and for long stretches, flagrantly—inconsistent with all three core elements of enumerationism.

2. The Exception of Race

There was one huge exception to this dominant reality. Until the mid-twentieth century, the issue on which enumerationism most tenaciously retained its hold was the regulation of race relations. Before the Civil War, a broad constitutional consensus held that the maintenance of slavery was a question for the states that fell outside the enumerated powers of Congress.[243] Indeed, many scholars now believe that the maintenance of slavery was the driving force behind the theory of enumerationism.[244] Notwithstanding the effort to nationalize the rights of African Americans through the Reconstruction Amendments, the Supreme Court and Congress quickly fled the arena, yielding control of race relations to the states. This was manifested most clearly in legislative and judicial toleration of Jim Crow laws and the

industry regulation); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 603, 618 (1936) (striking down state minimum wage law for women); SCHWARTZ, *supra* note 227, at 177–212.

242. *See, e.g.*, United States v. Darby, 312 U.S. 100, 116, 125–26 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and upholding federal wage and hour law); Franklin D. Roosevelt, "If We Would Make Democracy Succeed, I Say We Must Act—NOW!" The President Continues the Court Fight. Address at the Democratic Victory Dinner (Mar. 4, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113, 117–18 (1941); SCHWARTZ, *supra* note 227, at 213–36.

243. *See, e.g.*, Maeve Glass, *Slavery's Constitution: Rethinking the Federal Consensus*, 89 FORDHAM L. REV. 1815, 1816 & n.4 (2021) (describing antebellum "federal consensus" protecting slavery from federal interference and citing sources); Schwartz, *supra* note 34, at 985–97 (describing Taney Court's protection of slavery by limiting implied powers under the Commerce Clause).

244. *See* SCHWARTZ, *supra* note 227, at 87–110.

Supreme Court's refusal to permit Congress to enact general equality legislation during Reconstruction.[245]

While enumerationism can therefore claim a longstanding historical pedigree for federal disempowerment over race relations through the 1940s, this fact hardly recommends itself as the basis for a binding historical settlement in enumerationism's favor.[246] To the contrary, it supplies a precedent for the rejection of enumerationist historical practice. Significantly, the rejection of the traditional doctrine that race relations fall outside the powers of Congress was only partially based on the Reconstruction Amendments. The landmark Civil Rights Act of 1964, which arguably did more to further racial equality than the Equal Protection Clause, was enacted under *the Commerce Clause* of the original 1787 Constitution.[247]

This reinterpretation of the Commerce Clause is crucial to the constitutional construction of enumerationism in two ways. First, it demonstrates how the Commerce Clause has been repurposed to function as a de facto General Welfare Clause. Second, it supplies a powerful precedent for the proposition that settled historical practices under the Constitution are not permanently fixed, but can be unsettled and resettled—and that "liquidations" can be unliquidated and reliquidated.[248] It is difficult to accept the "civil rights settlement" of the mid-twentieth century as a valid and authoritative historical practice for purposes of constitutional construction while rejecting as historically insufficient the even more longstanding New Deal settlement.

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In keeping with the methodological observations at the beginning of this Part, we do not contend that our account of historical practice is the only possible one or that it is completely independent of our normative priors. Nor have we been able to supply all of the supporting evidence that would be required to make our account fully persuasive. But at a minimum, we believe this account

245. *See generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011) (examining how and why the federal government was deferential to states in how they handled race relations and related legislation); John Mikhail, McCulloch v. Maryland, *Slavery, the Preamble, and the Sweeping Clause*, 36 CONST. COMMENT. 131 (2021) (reviewing SCHWARTZ, *supra* note 227) (discussing how fears surrounding overarching implied powers from the Constitution were connected to concerns regarding maintaining slavery).

246. Neither Congress nor the Supreme Court acted to enforce the Fourteenth and Fifteenth Amendments in a meaningful way between 1876 and 1954. But after the completion of the New Deal Revolution with *Wickard v. Filburn* in 1942, it is difficult to attribute this inaction to enumerationism, rather than political gridlock fueled by the Senate seniority and filibuster rules. *See* Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before* Katzenbach v. Morgan, 113 NW. U. L. REV. 47, 57–82 (2018).

247. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964); Katzenbach v. McClung, 379 U.S. 294, 301–05 (1964).

248. *See, e.g.*, Baude, *supra* note 213, at 54–56 (endorsing this idea).

shows that strict enumerationism cannot be taken for granted. Any plausible account of historical practice in this context must account for the contestation over enumerationism from the first Congress onward, as well as the numerous circumventions and evasions of enumerationism that pervade U.S. constitutional history. It must also take account of the willingness of Congress and the Supreme Court to repudiate enumerationism as a valid historical precedent in the race context. The exacting enumerationism of modern movement conservatism—and most academic originalists—conspicuously fails these tests.

IV. BEYOND ENUMERATIONISM

There remain two paths forward for constitutional construction in the absence of an adequate linguistic or historical showing that enumerationism is the Constitution's original public meaning. First, consistent with the history outlined in Part III, originalists might construe the Constitution to embrace an enumerationism that is strict in theory but ineffectual in practice. Second, originalists might expressly and openly resolve the tension between theory and practice in favor of practice, formally renouncing enumerationism.[249] We think the formal renunciation of enumerationism is the better course—and fully consistent with modern originalism. This Part explains why. We do not, of course, expect the Supreme Court to agree. But the country would be better off if it did. Failing that, we hope to highlight that originalism does not compel enumerationism. Even for originalists, it is a matter of choice.[250]

A. *LIKE A LOADED WEAPON*

The first reason to abolish enumerationism is that it does little, if anything, to promote the flourishing of American federalism. This is partly because enumerationism has been so flexible and easily evaded in practice. But there is a much deeper problem. As one of us has previously explained, the idea of limited, enumerated powers is fundamentally empty. It tells us that federal power must be limited but nothing about what the limits should be.[251]

On the rare occasions when the Supreme Court has attempted to enforce enumerationism, it has typically done so with crude, judicially crafted rules like the activity-inactivity distinction of *National Federation of Independent Business v. Sebelius* or the economic-noneconomic distinction of *United States*

249. We do not view the opposite approach—resolving this tension in favor of theory—as consistent with an approach to constitutional construction that takes historical practice seriously, since enumerationist theory has had such uneven and isolated practical impact on the scope of federal power for most of American history.

250. The observations in this Part overlap to some degree with Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 20–33 (2016). We are more skeptical than Primus, however, about the value of a purely symbolic enumerationism—and also about the feasibility of maintaining its purely symbolic character. This leads us to a different bottom line. Primus thinks enumerationism should be maintained as a ritual "continuity tender." *Id.* at 45–46. We think it would be better abolished outright.

251. Coan, *supra* note 26, at 1990.

v. Lopez, which fail to track any defensible theory of federalism.[252] Neither the opinions of the Supreme Court nor any of its enumerationist defenders has ever offered a convincing explanation of why economic problems were more likely to require national solutions than noneconomic ones or why Congress could be trusted to regulate economic activity but not economic inactivity. The logic of such decisions is, in effect: "There must be something Congress cannot regulate. 'This is something.'"[253] In addition to its arbitrariness, this approach virtually guarantees that some important national problems will fall into Franklin Roosevelt's "No Man's Land of final futility"—a regulatory zone beyond the competence of states to address on their own but also beyond the constitutional authority of the federal government.[254] That is no way to run a railroad or a country.[255]

Fortunately, the arbitrariness and counterproductiveness of enumerationism have been blunted—though by no means eliminated—by its generally toothless and ceremonial character up to this point.[256] But that character is not written in stone. The current conservative majority is as numerically strong and ideologically extreme as any in the modern history of the Supreme Court.[257] Unless and until enumerationism is repudiated, it will lie around like

252. *Id.* at 1988.

253. Paul Krugman, *The "Yes, Minister" Theory of the Medicare Age*, N.Y. TIMES (Dec. 12, 2012, 9:03 AM), https://krugman.blogs.nytimes.com/2012/12/12/the-yes-minister-theory-of-the-medicare-age (on file with the *Iowa Law Review*) (recounting the origins of this comic syllogism on the BBC sitcom "Yes, Minister"); Dissenting Opinions, *The Deep Deep Deep State* (May 19, 2021), https://podcasts.apple.com/us/podcast/the-deep-deep-deep-state-with-bridget-fahey/id1562902209?i=1000522378592 [https://perma.cc/B53D-C9Q9] (applying the joke to enumerationism).

254. Roosevelt, *supra* note 242, at 118; Schwartz, *supra* note 1, at 585.

255. Obviously, much more could be—and has been—said on this point. We point the interested reader, in particular, to the burgeoning literature on federalism as "the new nationalism," emphasizing the pervasive role of state governments in areas of unquestioned federal regulatory authority. The clear upshot is that states do not require judicially enforced, enumerationist limits on federal power to flourish. For most of the last century at least, "our federalism" has been one of overlapping and mutually supporting state and federal power. *See, e.g.*, Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045, 1069 (2015); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1917–18 (2014); V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 883–84 (2004). For an older account in a similar spirit, see MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 80–81 (Daniel J. Elazar ed., 1966).

256. In the area of race relations and during the Lochner era, enumerationism was undoubtedly the source of great and widespread immiseration. *See supra* Section III.B.2.

257. *See, e.g.*, *Measures*, MARTIN-QUINN SCORES, https://mqscores.lsa.umich.edu/measures.php [https://perma.cc/ZL3P-768Q]; Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 317; Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html (on file with the *Iowa Law Review*).

the proverbial loaded weapon,[258] threatening much of federal environmental, public health, labor, civil rights, and consumer protection legislation—and potentially also a large swathe of federal spending legislation. Conservative activists are already salivating at these possibilities, which have been important driving factors behind their multidecade effort to transform the Court.[259] If a majority of the Justices embraces the muscular enumerationism at the heart of this agenda, that would cause tremendous damage and disruption to the operation of the federal regulatory and welfare states.

On the other hand, we do not believe the historical weakness and inconsistency of enumerationism is an accident. The country demands national solutions to national problems. It is costly—and uncomfortable—for the Supreme Court to stand in the way.[260] Many elements of the federal regulatory and welfare states threatened by a resurgent enumerationism are deeply enmeshed in the fabric of American life and would be highly disruptive to overturn. The Court also operates under significant capacity constraints that limit its ability to impose significant constitutional restraints on federal power because doing so would generate too many cases the Court would feel compelled to review.[261] For these reasons, we doubt the Court will push enumerationism as far as conservative activists would like. But it is difficult to say with any confidence where the stopping point might be.

There is another more likely, and therefore more worrisome, scenario: An increasingly partisan Supreme Court might deploy enumerationism sporadically and opportunistically to invalidate the most important new legislative achievements of its political opponents. Enumerationism is almost tailor-made for this sort of abuse, licensing judges to impose some limit, any limit, on federal power, without providing any guidance on what that limit should be. This makes it all too easy for motivated lawyers and judges to identify an arbitrary limiting principle, unrelated to any defensible theory of federalism, which the targeted legislation—and only that legislation—

258. *See* Primus, *supra* note 20, at 585 (using the "loaded weapon" simile to describe the threat posed by enumerationism); Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

259. *See generally* KEN I. KIRSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM (2019) (recounting the long history and radically transformative goals of the conservative movement); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (similar).

260. *See, e.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 64–92 (2011). *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (explaining how the Court and its decisions have been shaped in part by public opinion); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (discussing how Justices enforce their policy preferences through different strategic methods).

261. *See generally* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019) (making this point and supporting with evidence from a wide range of constitutional domains).

exceeds. Such "one-ride-only" decisions give the veneer of constitutional principle to judicial partisanship, while sparing the Justices from the painful consequences of a broader ruling, for judicial capacity or other legislation they find more ideologically congenial.

The commerce-power holding of *National Federation of Independent Business v. Sebelius* illustrates what this approach looks like in practice.[262] The activity-inactivity distinction embraced by that holding is rooted in enumerationism. It is impossible to persuasively connect to any plausible theory of federalism.[263] It is plainly gerrymandered to apply to one case only—not coincidentally, a case involving the signature legislative achievement of an opposing-party President, which had become a national cause célèbre for conservative partisans.[264] All of these are characteristics that ought to be of special concern to principled originalists, who have traditionally emphasized the importance of constraining judicial discretion.[265] Enumerationism not only affords judges an opportunity to read their own values into the Constitution. It also threatens to accelerate the transformation of judicial review into a partisan political weapon.

Of course, we recognize the oddity of arguing for the abolition of enumerationism on the grounds that the Supreme Court Justices with the power to abolish it are likely to deploy the doctrine to disastrous results or abuse it for partisan purposes. If the Justices were responsive to the risks we are highlighting, we would not need to make the argument in the first

262. We refer to the rationale of Chief Justice Roberts's opinion, endorsed in substance by four other Justices in the joint dissent. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530 (2012) (opinion of Roberts, C.J.); *accord id.* at 646 (joint dissent of Scalia, Thomas, Kennedy, and Alito, JJ.). We recognize that under *Marks v. United States* this may not technically qualify as a holding of the Court. Marks v. United States, 430 U.S. 188, 193–94 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (citations omitted)).

263. The most frequent defense of the distinction is that it serves federalism's core purpose of protecting individual liberty. *See, e.g.*, *Sebelius*, 567 U.S. at 536 (opinion of Roberts, C.J.); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 582 (2010). But this makes little sense. A mandate to purchase broccoli, which is prohibited by the activity-inactivity distinction is certainly no more intrusive on individual liberty than a prohibition on the purchase of broccoli, which the distinction permits. In fact, the latter is almost certainly more intrusive than the former. *See* Coan, *supra* note 26, at 1998.

264. *Sebelius*, 567 U.S. at 549 (opinion of Roberts, C.J.) ("Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."). *See generally* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013) (recounting conservative legal crusade against the Affordable Care Act).

265. *See, e.g.*, Barnett, *supra* note 201, at 653; WHITTINGTON, *supra* note 210, at 57. *But see* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017) ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges.").

place.[266] But our argument is not an attempt to persuade the Court. It is an attempt to show that the country would be better off without enumerationism, even in its weak and primarily rhetorical form.

B. RECONCILING ABOLITION WITH ORIGINALISM

For all of the reasons outlined above, we think the country would be better off if the Supreme Court abolished enumerationism root and branch. But can such a construction be reconciled with originalism, despite the deep roots of enumerationist rhetoric in the American constitutional tradition? The answer is yes.

Prudential judgment is a widely accepted approach to constitutional construction.[267] And we believe the prudential case against enumerationism is strong, even as to its relatively toothless historical version. Proponents of enumerationism may disagree with that case. But that is a disagreement about the merits, not a disagreement about method. If prudential judgment is a legitimate mode of constitutional construction, the prudential arguments we have leveled against even weak-form enumerationism are arguments that originalists must take into account.

The more complicated questions are (1) how the prudential arguments against enumerationism should be weighed against the long tradition of enumerationist rhetoric and (2) how that rhetoric can best be reconciled with the decidedly non-enumerationist precedents and practices recounted in Section III.B. Both of these are variations on what Richard Fallon has called "the commensurability problem"—the need to reconcile conflicting and incommensurable forms of constitutional argument or authority.[268] This subject has received relatively little attention in the originalist literature on constitutional construction, and we cannot offer a complete theory here. But we think that Richard Fallon's "constructivist coherence" approach offers the most reasonable guide, one that is completely compatible with the spirit of modern originalism. In a nutshell, where different forms of constitutional argument cannot be harmonized, and text and original meaning are indeterminate, then value arguments—what we have been calling prudential judgments—function as tie-breakers.[269] Importantly, this tie-breaking function applies not only to conflicts *between* different forms of constitutional

266. *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013) (explaining how scholars confuse the perspective of an external analyst and that of an internal actor).

267. *See, e.g.*, BALKIN, *supra* note 209, at 4 (discussing how there are various ways that the Constitution can be interpreted, all which require multiple judicial approaches); Whittington, *supra* note 211, at 121; Barnett, *supra* note 201, at 647.

268. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987).

269. *Id.* at 1237–40. To be clear, we are not suggesting that originalists can or should embrace Fallon's approach in its entirety but merely as a mechanism for resolving conflicts between various legitimate modes of constitutional construction.

argument but also to conflicts *within* the forms of argument, such as the tension within U.S. constitutional history between enumerationist rhetoric and nonenumerationist practice.[270]

As we have suggested, the tension between enumerationism in theory and practice could be resolved by embracing a nominal or ceremonial enumerationism, which would almost never operate to limit federal power in practice. This would be far more consistent with historical practice than the muscular enumerationism of modern movement conservatism. In our view, it would also be far more attractive as a matter of prudential judgment, insulating a broad array of vitally important federal legislation against constitutional challenge. But this method of achieving coherence would leave an enormously important area of constitutional doctrine at war with itself. This is hardly the worst possible outcome, but as we have explained, it does pose real dangers.

There are two possible ways to resolve this conflict. The Supreme Court could admit that its enumerationist rhetoric has rarely matched its practice and give the rhetoric a dignified burial. Or it could alter the reality to match its rhetoric, embracing a reinvigorated enumerationism with real bite. We think the former would be vastly better for the country. Under Fallon's approach, this is an important reason for adopting it. But repudiating, rather than reinvigorating, enumerationism is also much more consistent with the traditional rationales for treating historical practice as important.

Those rationales involve a combination of popular acquiescence, stability, and Burkean consequentialism—the collective wisdom represented by practices that have stood the test of time.[271] The longstanding historical practice that the American people and their elected representatives have acquiesced to is one in which the federal government almost always enjoys the constitutional power it needs to address important national problems. This is also the practice that has stood the test of time and been found at least good enough. A repudiation of enumerationism would also enhance stability by removing the pall of constitutional uncertainty from vast and long-standing swaths of the federal regulatory and welfare states.

By contrast, it is difficult or impossible to imagine the American people acquiescing to a muscular enumerationism that consistently deprived the federal government of the power to address important national problems. And it is difficult to imagine the Supreme Court retaining its legitimacy by the selective assertion of enumerationism to advance a partisan agenda. In either

270. *See generally id.* We are summarizing a one-hundred-page article in one paragraph. Obviously, this brevity comes at the expense of some nuance.

271. *See, e.g.*, Bradley & Siegel, *supra* note 218, at 64 (cataloging justifications for considering historical practice, including "deference to nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests"). *See generally* McConnell, *supra* note 213 (elaborating the Burkean argument); Baude, *supra* note 213 (emphasizing popular acquiescence).

case, a reinvigorated enumerationism would profoundly destabilize the existing order. Nothing in modern originalism compels that result.

CONCLUSION

Our analysis of enumerationism raises challenging questions about one of the most venerable and consequential doctrines in American constitutional law. Our analysis also raises challenging questions for the theory and practice of originalism.

Originalist theorists have largely proceeded on the assumption that most constitutional provisions have reasonably determinate original public meanings. But if this is not true of enumerationism, whose originalist pedigree seemed utterly unimpeachable, how many other doctrines are vulnerable to a similar critique? Can the determinacy of any controversial original public meaning survive close examination? If not, what is left of originalism?

These questions pose an even more acute challenge to applied originalism. Generally, applied originalists have been content to leave theory to the theorists, apart from an obligatory homage to original public meaning and the interpretation-construction distinction. But our analysis shows that applied originalism is an inextricably theory-bound enterprise. At both the interpretation and construction stages, originalist theory sets standards for empirical inquiry and the assessment of evidence, where theoretical challenges and pitfalls abound.

Applied originalists who do not take theory seriously will miss crucial distinctions, disregard relevant evidence, and misconstrue the evidence they rely upon. Most fundamentally, they will proceed without awareness of the standard their historical work must meet to establish a determinate original public meaning. As a result, they will often reach unwarranted conclusions and fall prey to confirmation bias. On the other hand, applied originalists who do take theory seriously will find their work much more difficult and clear answers much harder to come by.

These are daunting problems. But an originalism that took them seriously would be both more rigorous and more modest. This would be good for originalists and good for the rest of us.