

THE MYTH OF THE CONSTITUTIONAL GIVEN: ENUMERATION AND NATIONAL POWER AT THE FOUNDING

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This piece is a Response to Robert J. Reinstein’s article, The Aggregate and Implied Powers of the United States, which appears in Volume 69 of the American University Law Review.

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I. THE “MYTH OF THE GIVEN”

American constitutional myths are tenacious. An especially stubborn one hides behind a familiar slogan that, to quote James Madison himself, the “essential characteristic” of the United States Constitution is that it establishes a government “composed of limited and enumerated powers.”¹ The description itself is banal, if not empty; the problem resides in the conclusions that are presumed to follow so naturally from it. Striking is how these innocuous words have come to so easily conjure a decisive image of the Constitution in all its essentials, one that shapes and

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1. GAZETTE OF THE UNITED STATES (Feb. 23, 1791) (statement of James Madison on Feb. 2, 1791), *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 367, 371 (Charlene Bangs Bickford et al. eds., 1995) [hereinafter DHFFC].

distorts prevailing constitutional vision to such a degree that most rival images fall completely out of view. It is one thing to recognize that national powers are enumerated in the Constitution and quite another to reach the separate, optional conclusion that the powers of the national government are distinctly limited *to* and *by* that enumeration. This latter commitment moves well beyond the initial observation, venturing toward a distinctive depiction of the Constitution itself—one in which it is imagined as an exclusive written text whose language is the sole creator of its content. As the Constitution itself is essentially textual in nature, whatever national power it vests must be textually expressed.

The slogan “limited and enumerated” holds such power, then, because it smuggles a robust image of the Constitution into the mind through description of its putative, matter-of-fact features without leaving a trail of the distance traveled in between. It is a constitutional equivalent of what the distinguished philosopher of mind Wilfrid Sellars once famously targeted in his own discipline: “the myth of the given.”² By this Sellars meant the once pervasive epistemological presumption that sensory experience of the natural world directly relayed conceptually rich sense data of that experience to the mind.³ Certain observations were taken to so naturally follow from confrontation with particular objects that they were simply assumed to be *given* by the objects themselves—observable facts (such as “the sky is blue”) that involved no independent inferential move.⁴ Thanks to the perceived *givenness* of certain suppositions, Sellars explained, observation and inference become so firmly united in the mind that observers fail to see either the considerable gap between the two or the acculturation that has closed it.⁵ They confuse habituated linguistic practice with timeless reports on an essential world. Herein lies the myth.⁶ What once permeated the study of

2. WILFRID SELLARS, *EMPIRICISM AND THE PHILOSOPHY OF MIND* 33 (1997) (introducing the term “the Myth of the Given” to discuss the problems Sellars’s sees in the idea of the immediate givenness of particular thoughts or ideas).

3. *See id.* at 14 (explaining that the framework of the “given” has been “a common feature of most of the major systems of philosophy” and noting that the givenness principle of immediate intuition of necessary ideas from sensory experiences has become increasingly criticized).

4. *Cf. id.* at 15 (stating that the purpose of the theory of givenness is to explain non-inferential knowledge that people seem to automatically possess).

5. *Cf. id.* at 68–69 (describing a category of facts that seem not to require inferences or other information to know and trump all other facts).

6. *See id.* at 37–38 (suggesting that statements that convey facts may be widely accepted as true until a new reality forces reconsideration of those statements). For cogent discussions

sense perception still suffuses study of the American Constitution. Contingent, constructed conceptions of the Constitution—and the linguistic practices that undergird them—are often assumed to be given by the Constitution itself when, in fact, they were only created later through avowedly historical processes.⁷

The image of the Constitution conjured by the its deep organizing logic as well as its dubious derivation from this familiar incantation—has of late earned the critical moniker “enumerationism,”⁸ as an impressive body of scholarship has emerged with the aim of upending its captive hold on the American constitutional imagination.⁹ All of this

of Sellars’s celebrated idea, see RICHARD RORTY, *MIND, LANGUAGE, AND METAPHILOSOPHY: EARLY PHILOSOPHICAL PAPERS* 102–04, 159–62 (Stephen Leach & James Tartaglia eds., 2014).

7. For an attempt to trace the historical foundations of this conflation, see generally JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018) (arguing that when the Constitution first appeared there was deep disagreement over its constitutive identity and that many of its features that are now treated as essential were only contingently added later as certain habits of mind took hold). In this regard, the focus here—the particular myth of the given that derives from the slogan “limited and enumerated powers”—is but one especially prominent example of a wider phenomenon.

8. This term has been coined by David Schwartz. For a fuller discussion, see David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 *ARIZ. L. REV.* 573, 575–79, 581–84 (2017) (defining enumerationism and explaining its “powerful ideological hold” despite increasing criticism and evidence that it has been applied in ways that make it “meaningless”).

9. See Jack M. Balkin, *Commerce*, 109 *MICH. L. REV.* 1, 7–13 (2010) (arguing that the structural principle underlying the enumerated powers in Article I, Section 8 was designed to permit the national government to address genuinely federal problems that require coordination); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115, 150, 178–80 (2010) (promoting the authors’ theory of collective action federalism as a way to interpret Article I, Section 8 such that Congress is not limited to the specific instances of regulation provided for in the Constitution); Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 *CONST. COMMENT.* 25, 31 (2005) (“Whatever the enumerated powers doctrine does . . . it cannot be taken seriously as prohibiting *all* implied or unexpressed powers or *all* broad readings of malleable terms.”); Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 *MINN. L. REV.* 699, 701–04 (2016) (urging a refocusing on “inherent national sovereignty constitutionalism,” an understanding of the Constitution that “seems to have been forgotten,” which recognizes the flexibility of national power beyond the specific text of Article I, Section 8); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 *VA. L. REV.* 1063, 1091–97 (2015) [hereinafter Mikhail, *The Constitution and the Philosophy of Language*] (parsing the Necessary and Proper Clause to argue that the Constitution’s text implies that Congress possesses many more implied powers than the expressly enumerated powers in Article I, Section 8); John Mikhail, *The Necessary*

work is, to a significant degree, rooted in the history of the Founding. If enumerationism was hardwired from the beginning, as its defenders repeatedly insist, then it would seem fitting to return to the original moment of constitutional conception to test the truth of this proposition. In scouring this early history, this scholarship has convincingly demonstrated not only that enumerationism was widely rejected by a substantial cross-section of framers who had an outsized role in launching the Constitution, but that crucial features of the Constitution's own text, and the history behind their inclusion, seem to directly compromise enumerationist logic.¹⁰

No matter the power of this evidence, ardent defenders of enumerationism—constitutional originalists most of all—are not likely to awaken from their dogmatic slumber. They are more liable to dismiss such findings through recitation of their familiar incantations of the unique character and virtues of public meaning.¹¹ Perhaps

and Proper Clauses, 102 GEO. L.J. 1045, 1058 (2014) [hereinafter Mikhail, *The Necessary and Proper Clauses*] (arguing that those who view the Necessary and Proper Clause as modifying only the enumerated powers of Congress in the preceding clauses, rather than other powers belonging to the United States government, “misconceive the legitimate scope of federal power by treating an entire provision of the Constitution as surplusage or by simply assuming that it does not exist”); Richard Primus, *The “Essential Characteristic”: Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 419–20 (2018) (examining the controversy surrounding the first Bank of the United States to uncover alternative understandings of the Constitution’s enumerated power at the Founding); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014) (arguing that while the enumeration principle, “so long as it is properly understood,” is sound, its closely associated principle of internal limits on Congress within the Constitution is wrong); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 5–6, 13, 44–46 (2016) (contending that the maxim that the federal government is one of enumerated powers is in fact a “continuity tender,” or a ritual statement meant to link present to past that otherwise has no practical effect on governance); Schwartz, *supra* note 8, at 582–83 (suggesting that enumerationism has evolved into “false enumerationism,” which lacks meaningful substance and is “little more than an interpretive game”).

10. This last point is especially true of John Mikhail’s pathbreaking study of the Necessary and Proper clause (or clauses, as he urges us to see). See Mikhail, *The Necessary and Proper Clauses*, *supra* note 9, at 1058–61 (explaining that the Necessary and Proper Clause is actually comprised of three distinct components—the “Foregoing Powers” clause and the two “All Other Powers” clauses—which “were inserted into . . . draft[s] of the Constitution” at different times, by different individuals, for what appear to be quite different purposes,” with the “all other powers . . . in the Government of the United States” clause designed to grant Congress powers beyond those enumerated in Article I, Section 8 or whatever might be necessary to carry those into effect).

11. On public meaning originalism and its pervasiveness, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380–82 (2013) (stating that “[o]riginalist theory has now largely coalesced around original public meaning as the

several Founders rejected enumerationism, yet—orthodox originalists are sure to say—the Constitution that was ratified did not. By the Constitution’s public meaning, the only meaning that carries legal weight, national power is distinctively enumerated.¹²

Here is where the anti-enumerationist work is especially valuable. By emphasizing the yawning gap that separates mere recognition of the Constitution’s enumerated powers from the sweeping logic of enumerationism, this emerging body of scholarship helps us see that the decisive originalist work in fact takes place, not at the level of interpretation—where most originalists fastidiously distinguish public meaning from competing interpretive targets—but rather at a prior, more fundamental, level of constitutional rendering—where originalists fashion a particular image of the Constitution in the mind.¹³ Public meaning of *what* exactly? This, it cannot be stressed enough, is the operative question. And there is nothing immediately helpful about answering, over and over: “the text of the Constitution.”¹⁴ For this is less answer than dogmatic stipulation, one that tends to beg most important questions pertaining to the Constitution’s core features and the character of its content. Enumerationism allows originalists (and often their

proper object of interpretive inquiry”); Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: BLOG AM. HIST. (Mar. 20, 2017), <http://www.processhistory.org/originalism-history> [<https://perma.cc/F7CJ-RHDW>] (explaining the evolution among a dominant subset of originalists from a focus on the original intent of the Constitution’s framers to a focus on how the average reader at the time of the Constitution’s inception would have perceived its meaning).

12. See, e.g., Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 YALE L.J.F. 180, 195 (2014) (“[T]he Founders promised (and key state ratifiers insisted upon) a Constitution that preserved a degree of sovereign state autonomy. The strategy of textual enumeration had both the purpose and communicative effect of creating a national government with only partially delegated powers while reserving all non-delegated powers to the still-sovereign people in the several states.”).

13. See generally Jonathan Gienapp, *The Unfounded Originalist Constitution*, 39 L. & HIST. REV. (forthcoming Feb. 2021) (showing how so much of what originalists argue is based on their putatively matter-of-fact—but, in reality, debatable—descriptions of the Constitution).

14. On originalists’ preoccupation with constitutional writtenness, see Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1027–28, 1031–46 (2010) (summarizing various originalist arguments that the writtenness of the Constitution requires adherence to the text’s original meaning); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1297–300, 1303–06 (2019) (explaining that “[t]oday’s originalism . . . is all about the text of the Constitution. . . . The text . . . is the be-all and end-all”).

antagonists) to begin with an object of interpretation that is matter-of-factly passed off as “the Constitution,” now and always, when in fact the object they hold in their minds is the product of considerable constructive work. It allows them to see something as *given* that is in fact a product of the imagination.

The easiest way to see the contingent, constructed character of the enumerationist Constitution is to observe how easily rival images of the Constitution sprang to mind when the instrument first appeared in 1787. Here, it becomes clear that beneath their claims of unassuming devotion to the Constitution’s text, originalists often are in fact strikingly partial to a decidedly Jeffersonian Republican, if not avowedly Anti-Federalist, conception of the Constitution,¹⁵ one that was markedly at odds with the kind of Constitution that leading nationally-minded Federalists such as James Wilson, John Jay, and Alexander Hamilton assumed had been ratified.¹⁶ This inclination is enormously consequential, for this Founding-era disagreement was not an interpretive division, as originalists might insist, but an ontological one over the Constitution’s essential attributes. There is no way to side step this Founding-era debate just by “looking at the Constitution,” as doing so invariably elevates one kind of Constitution above its competitors. Under the guise of neutrality, defenders of enumerationism erase the Federalist Constitution from history. As the Federalists played the largest role in constructing the

15. See, e.g., Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s The Classical Liberal Constitution*, 8 N.Y.U. J. L. & LIBERTY 839, 842 (2014) (describing the power struggle between Hamiltonian “mercantilists and monopolists” and anti-nationalist politicians over whether a national bank was constitutional while claiming that the anti-nationalists decisively won that battle); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1915–17 (2008) (claiming that it was widely understood at the Founding that Congress is limited to exercising only those powers expressly delegated to it). On how Anti-Federalism was absorbed by the dissenting Democratic-Republican opposition, see generally SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–828* (1999). Perhaps the implied constitutional vision most dominant among originalists, however, is actually closest to the one that later came to define Jacksonian Democracy, in which strict Jeffersonian readings of the Constitution were married to a commitment to expansive presidential authority. See M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 190–92 (2d ed. 1998) (noting how Jeffersonian Republican constitutional ideas warped into this eventual form).

16. See GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S*, at 42–114 (2019) (describing the deep constitutional disagreement that divided Federalists, moderate Republicans, and radical Republicans in the early republic).

Constitution and included among their ranks many, if not most, of the leading legal and constitutional minds of the Founding generation,¹⁷ this marks no small irony. But it speaks to an even weightier issue: the need to distinguish between kinds of meanings and kinds of constitutions. Enumerationism constructs a distinctive, optional version of the latter to win the battle over the former.

Enumerationism is predicated on the constitutional myth of the given—on a line of reasoning that moves effortlessly from the mere fact of enumerated powers in the Constitution to belief that a particular understanding of the Constitution’s essential nature is simply *given* as a result of that bare fact. The new anti-enumerationist work, and its fresh, probing look at the Founding, is so vital because it helps us see just this.

II. AGGREGATE NATIONAL POWERS AND ITS COMPETITORS

Robert Reinstein’s important article marks the latest addition to this growing scholarly movement.¹⁸ Deeply researched and powerfully argued, it grounds an expansive, if limited, account of national power in a compelling interpretation of the Constitution’s historical foundations. Joining the swelling chorus of enumerationist critics, Reinstein contends that enumerationism comports neither with long-standing American constitutional practice nor with the best understanding of the original constitutional design.¹⁹ Just as important, however, Reinstein breaks with his anti-enumerationist allies, arguing that the original Constitution cannot justify their most aggressive nationalist readings.²⁰ The Constitution did not limit national power to the enumeration found in Article I, Section 8 plus any appropriate means necessary to carry those

17. See generally WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995) (documenting how Federalist thinking dominated the early federal judiciary); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003) (outlining how Federalists successfully realized their robust vision of state-building through the Constitution); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM, THE EARLY AMERICAN REPUBLIC, 1788–800* (1993) (chronicling the heyday of Federalism during the decade after ratification).

18. Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019).

19. See *id.* at 8.

20. See *id.* at 35 (diverging with the theory that “Congress possesses a general welfare power”).

powers into effect, but nor did it vest a general regulatory power to address all issues of national import.²¹

The true scope of national power, Reinstein maintains, lies in between. “The unmistakable pattern of national powers,” he asserts, “is that they are clustered according to the essential purposes of the Union.”²² The enumerated powers do not each individually capture a legitimate end or object of national governance. Read in combination they add up to more than the sum of the individual parts to form four clusters of great aggregate powers: protecting the common defense, conducting foreign affairs, resolving national and interstate conflicts, and creating and maintaining an economic union.²³ Each cluster represents an essential purpose of the union and the enumerated and implied powers of Congress are, therefore, properly understood as means to effectuate *these* aggregate ends.²⁴

While Reinstein defends the legitimacy of this aggregate powers theory partly on its present-day value—on how it can account for essential unenumerated national powers without dismantling the limits of federalism—he largely rests his case on the Constitution’s earliest history.²⁵ While scholars have persistently missed the theory of aggregate national powers, Reinstein shows that it is as old as the Constitution itself.²⁶ It was the theory that Alexander Hamilton championed in *Federalist 23*²⁷ and then invoked in his opinion defending

21. See *id.* at 34–35 (“[A]s a matter of undeniable reality, national powers that go beyond specific enumerations [in Article I, Section 8] do exist However, acceptance of th[is] principle[] does not establish that Congress possesses a general welfare power or, as it is also called, a power to deal with all national needs and exigencies.”).

22. *Id.* at 77.

23. *Id.* at 76–79.

24. *Id.* at 76 (explaining that “[a]lmost all of the specific powers vested in the national government are designed to fulfill the four central purposes of the Union” and that many specific powers “serve more than one of these purposes”).

25. *Id.* at 32–83 (utilizing historical evidence).

26. *Id.* at 6–8 (“[T]his theory is actually quite old, having antecedents in pre-constitutional jurisprudence and the writings of Alexander Hamilton that so heavily influenced the Marshall Court.”).

27. See THE FEDERALIST NO. 23, at 115 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“These [federal] powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”); see also Reinstein, *supra* note 18, at 79 (“Hamilton . . . insisted that the realization of [essential national government purposes] requires an aggregate approach to national power . . .”).

the constitutionality of a national bank in 1791.²⁸ It was also the theory that John Marshall—no doubt drawing on Hamilton’s earlier work—developed for the Supreme Court’s landmark ruling in *McCulloch v. Maryland*²⁹ in 1819, still the crucial precedent to which modern observers look when debating the limits of national power.³⁰ More provocatively, Reinstein suggests that this theory of aggregate national powers best fits Founding-era evidence as a whole. Not only does it capture Hamilton’s and Marshall’s mature thinking, it in fact represents the underlying conventional wisdom that informed how the Constitution’s framers understood the nature of their federal union and thus subsequently defended its character and limits. Based on careful reading into a historical literature with which alarmingly few constitutional scholars are familiar, Reinstein argues that the Founding generation’s dominant frame of reference for understanding federal union was the British empire.³¹ What is striking about the enumerated powers eventually compiled in Article I, Section 8, Reinstein contends, is how closely they paralleled those powers previously exercised over the colonies by the British government. Familiarity with this distribution of authority is why it was so easy for the Committee of Detail to generate this list of national powers and for the other Convention delegates to so readily accept the committee’s

28. 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 100, 132 (Harold C. Syrett ed., 1965) [hereinafter Hamilton, Bank Opinion] (arguing that in addition to the enumerated powers there were “resulting” powers that derived from the “whole mass of the powers of government” and that the combined powers specifically related to the financial administration of the United States vest in Congress “all the powers requisite to the effective administration” of those powers, including the creation of a national bank); see also Reinstein, *supra* note 18, at 80–82 (summarizing Hamilton’s arguments for the constitutionality of the Bank of the United States, including one based solely on what he understood to be the national government’s “aggregate power and not necessarily [based on] any specific enumerated power”).

29. 17 U.S. (4 Wheat.) 316 (1819).

30. See Reinstein, *supra* note 18, at 6 (“*McCulloch* has governed constitutional law for the two centuries following its announcement Disputes have regularly arisen over whether implied powers chosen by Congress are ‘appropriate’ or ‘plainly adapted’ to executing a constitutionally prescribed end.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421)).

31. See *id.* at 69–70 (stressing continuity between the old British Empire and the system of federalism established by the Constitution).

choices.³² What is now invisible to modern constitutionalists was once, Reinstein suggests, the prevailing context.³³

Reinstein's accomplishment is significant and, on a great many fronts, his argument is persuasive. Like critics of enumerationism before him, he underscores the difference between enumerating national powers and limiting national power to an enumeration. He powerfully demonstrates the logic of an aggregate powers theory and how well-supported it is by crucial historical evidence. He is to be commended, moreover, for situating the original Constitution in the context of eighteenth-century empire, something historians have long emphasized but whose important work originalists and other constitutionalists have unacceptably ignored.³⁴

32. *See id.* at 69–70, 73–76 (stating that the Convention's delegates had, in the old British Empire, an available model for enumerating the powers of Congress).

33. *Id.* at 70 (“The old British Empire provided a model for the distribution of power between the national and state governments. This model was partially adopted in the Articles of Confederation and then was completed in the Constitution.”).

34. *See, e.g.*, MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 2–3, 10–11 (2004) (suggesting that the “transatlantic constitution” that existed in the period before the American Revolution, which consisted of the “laws of England” and the necessarily “divergent” laws of the individual colonies, “helps explain the rapid acceptance of federalism and judicial review of state legislation” during the Founding era); ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012) (arguing that the primary goal of Revolutionary American statesmen was to make the United States a treaty-worthy nation in the eyes of other sovereign powers and that attempts to join this community of “civilized” nations often led the United States to reproduce crucial features of European empire); JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788*, at 181–82 (1986) (stating that the “primary focus of American constitutional thought during the 1780s” was how to best “distribute authority between the center and the peripheries,” to avoid both the “aggressive power of the center” that Americans had complained about under the early modern British Empire and the insufficient power that Congress had exercised under the Articles of Confederation); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 207–13 (2005) (explaining that even though “[t]he founders remained British Americans, and they spoke the familiar political languages of empire, republic, province, and incorporated locality,” nonetheless “the imperial framework of the constitutional debate [of 1787–1788] is largely forgotten”); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 98–100 (1993) (claiming that American Revolutionaries embraced the traditions of statecraft of the old British empire to the extent that they would enable the union to establish itself as a reputable player on the international stage); David A. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of*

All of that said, as edifying as Reinstein's account is, it fails to grasp the full range of nationalist possibilities in play at the Founding. Hamilton's, and eventually Marshall's, theory of aggregate powers was certainly one important way of imagining how the Constitution vested national powers greater than the sum of enumeration. But there was at least one other brand of nationalist constitutionalism, every bit as viable and credible when the Constitution first appeared, that enjoyed considerable support.³⁵ As James Wilson—the leading constitutional framer and early Supreme Court justice from Pennsylvania—was its leading spokesman, for convenience this theory of constitutionalism can be called Wilsonian.³⁶ Whatever might be said about Wilson's, Hamilton's, and Marshall's individual ideologies, on the matter of national power and enumeration it is instructive to distinguish the Wilsonian Constitution from the Hamiltonian and Marshallian one.³⁷ This is because, crucially, the Wilsonian theory of national constitutionalism betrayed a distinctly different attitude toward enumeration than did the Hamiltonian theory of aggregate powers. Whatever else might be said of the latter, ultimately it was a theory of

Nations, and the Pursuit of International Recognition, 85 N.Y.U. L. REV. 932 (2010) (contending that the main purpose of the United States Constitution was to secure the nation's admission to the European-centered international community of "civilized" states through the adoption of constitutional devices that would promote compliance with treaties and the law of nations); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 760–70, 822 (2014) (arguing that during the Revolutionary period American statesmen constructed their constitutions in part as "diplomatic instruments" that could facilitate the United States' integration into an interstate system and thus consciously wrote them in the language of "a common transatlantic political culture").

35. See Jonathan Gienapp, *The Lost Constitution: The Rise and Fall of James Wilson's and Gouverneur Morris's Constitutionalism at the Founding* (unpublished manuscript in-progress) (on file with author) (examining this forgotten alternative form of nationalist constitutionalism at the Founding).

36. On Wilson's significance at the Founding, see generally William Ewald, *James Wilson and the American Founding*, 17 GEO. J. L. & PUB. POL'Y 1 (2019).

37. As David Schwartz has recently demonstrated, when Marshall emphasized aggregated enumerated powers on the Supreme Court, he often left space for broader arguments, which hints that Marshall's personal attitudes might have been closer to Wilson's than starkly differentiating the Marshallian from the Wilsonian Constitution would suggest. See DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF McCULLOCH V. MARYLAND* 49–53 (2019) (explaining why "Marshall's slipperiness about naming a specific enumerated power to sustain the Bank [of the United States] can be read, and is perhaps best read, to have aggressive nationalist implications").

enumeration. Even if it interpreted those powers broadly and built up and out from them to grand heights, it was still anchored to the very idea of enumeration. Despite its differences with strict enumerationism, it shared a common premise.³⁸ Wilsonian constitutionalism, by contrast, was built on a radically different premise altogether, one that presupposed the existence of national powers outside of the enumeration entirely.³⁹ This theory assumed that the full scope of national power under the Constitution was determined, not by the express statements found in the document's enumeration, but the kind of sovereign agent that had established the Constitution in the first place.⁴⁰

In various ways, Reinstein shortchanges this original alternative, nowhere as evidently as in his analysis of the Constitution's Preamble and initial attitudes toward it. Early readings of the Preamble are worth pondering in some depth because they point to a vital way of imagining national power at the Founding that was altogether distinct from a Hamiltonian theory of aggregate powers. And in seeing *all* of the nationalist possibilities initially viable, we can most easily expose the myth of constitutional givenness upon which enumerationism rests.

III. THE PREAMBLE: NOVELTY, UNCERTAINTY, POSSIBILITY

In relatively short order, Reinstein explains why critics of enumerationism are mistaken to enlist the Constitution's Preamble, and its set of broad constitutional purposes, as a source of expansive national power. Because "the Constitution is a law" and because "the Framers, many of whom were well-trained attorneys, drafted that document with knowledge of the common law rules of construction that governed the

38. See Reinstein, *supra* note 18, at 80–82 (describing Hamilton's view that the Constitution vested three types of power in the national government, each of which built upon the enumerated powers).

39. See Gienapp, *supra* note 35 (describing at length the Wilsonian conception of the Constitution); Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J. L. & HUMAN. 257, 289, 303–05 (2010) (quoting President Theodore Roosevelt's description of Wilson's philosophy of "inherent power [that] rest[s] in the Nation, outside of the enumerated powers conferred upon it by the Constitution," and suggesting that Wilson's view has reemerged at times in American History when the circumstances require such inherent national power (quoting Theodore Roosevelt, *At the Dedication Ceremonies of the New State Capitol Building at Harrisburg, P.A.*, reprinted in 5 PRESIDENTIAL ADDRESSES AND STATE PAPERS 827, 833 (1910))).

40. See 2 COLLECTED WORKS OF JAMES WILSON 871–72 (Kermit L. Hall & Mark David Hall eds., 2007) (documenting Wilson's view that Congress's powers were derived from those powers that any sovereign needed to possess).

interpretation of laws,” Reinstein claims that it would have been widely assumed at the Founding that the Preamble, like other legal preambles, could not “create powers or rights.”⁴¹ Preambles merely served the more limited purpose of clarifying ambiguity in the rest of the instrument.⁴² Reinstein suggests that this pervaded constitutional thinking during the earliest decades of the republic, particularly among leading nationalists eager to defend a more expansive vision of national power. As he tells it, in the years immediately following ratification neither Hamilton nor his supporters in Congress—even when forced to defend Hamilton’s controversial proposal to charter a national bank—seized on the Preamble as a meaningful source of national power.⁴³ Decades later, meanwhile, Marshall and fellow Justice Joseph Story both subscribed to a more limited reading of the Preamble.⁴⁴ Nationalists did not look outside the enumeration in Article I, Section 8. Rather, in a thoroughly Hamiltonian vein, they built up from it.⁴⁵

By failing to appreciate the sheer novelty of the United States Constitution, this account misses the Preamble’s original possibilities, and in so doing overlooks the Wilsonian brand of nationalist constitutionalism that relied so heavily, and it would seem credibly, on the Constitution’s opening words. Reinstein’s account of national power privileges continuity, emphasizing how the long history of federal union in Anglo-America originally informed the Constitution.⁴⁶ This is a

41. Reinstein, *supra* note 18, at 35–36. Here, Reinstein relies on David Konig’s important article on the Second Amendment’s preamble and its sensitive analysis of how statutory preambles were interpreted in eighteenth-century Anglo-American jurisprudence. 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) (explaining that preambles served as justifications for and explicit statements of purpose of constitutional amendments, citing Thomas Jefferson’s reliance on preambles in shaping early American constitutional law). Reinstein is right to pay special attention to Konig’s persuasive findings, but, as discussed below and for reasons Konig himself emphasizes, it is easy to see how the Constitution’s Preamble might have been seen in a different light.

42. Reinstein, *supra* note 18, at 36 (stating while preambles do not “create powers or rights,” they “clarify any ambiguous terms in specific powers and rights” and can aid with interpretation of the law).

43. See *id.* at 36, 38 (arguing that Hamilton and those who championed a national bank in Congress did not read the Preamble as a source of expansive national power).

44. See *id.* at 36 (describing how Story “emphatically denied that the Preamble was a source of national power” and that it merely “lent support for liberally interpreting” the enumerated powers, and claiming that Marshall interpreted the Preamble similarly).

45. See Reinstein, *supra* note 18, at 37–38 (describing Federalists’ efforts to ground national power in the text of Article I, Section 8).

46. *Id.* at 69–76.

valuable insight. But early American constitutionalism was, to a great extent, defined by discontinuity.⁴⁷ Even if the federal union established in 1787 strongly resembled what had preceded it, thanks to dramatic transformations in how Americans conceived of constitutionalism and surrounding concepts like sovereignty and representation, that new union might well have allocated powers differently. Moreover, certain parts of that new constitution, such as its Preamble, might have taken on meaning it otherwise would have lacked had it been attached to a different kind of instrument that was undergirded by a different theory of constitutionalism.⁴⁸ In short, if we grasp the novelty of the Constitution born of this discontinuity, we can appreciate the initial uncertainty that surrounded it; if we see this uncertainty, we can appreciate (among other things) the latent possibilities contained in the Preamble; and if we glimpse what the Preamble might have been, and what many at the Founding assumed it necessarily to be, we can begin to make out the Wilsonian theory of national constitutionalism and see how initially it commanded as much support as the Hamiltonian-Marshallian theory of aggregate powers.

The Constitution was born engulfed in uncertainty. When it first appeared, the only thing clear about its essential identity was that nothing was clear.⁴⁹ Persistent attempts to analogize it to known forms of law repeatedly broke down. As supreme, fundamental law uniquely predicated on the authority of popular sovereignty, it was manifestly distinct from statutes, contracts, treaties, powers of attorney, or seemingly anything else.⁵⁰ Some analogies worked better than others and proved especially illuminating—none more promising than likening the

47. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–87* (1998) (describing the dramatic transformations to American constitutional understanding during the Revolutionary era).

48. Reinstein downplays the Constitution's Preamble by writing that its "broad aspirational language could apply to many forms of government." Reinstein, *supra* note 18, at 62. But a preamble's meaning might vary depending upon the kind of constitution to which it was attached.

49. See generally GIENAPP, *supra* note 7 (describing how uncertain and contested the Constitution's nature originally was).

50. *Id.* at 117; see Charles A. Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMMENT. 77, 82–85 (1988) (describing the novelty of fundamental law based on popular sovereignty); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 561–78 (2003) (noting the distinct ways statutes, contracts, and treaties were interpreted in the eighteenth century and the imperfect fit between any of them and the Constitution); Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL'Y 373, 381–84 (2019) (showing that at the Founding the Constitution was virtually never likened to a power of attorney or fiduciary trust).

Constitution to a corporate charter.⁵¹ But ultimately, the Constitution was sufficiently novel and unprecedented that it could only be understood on its own terms. Thus, even if certain rules of legal interpretation were available at the time of its creation, it was at best uncertain that they applied to an entity like the Constitution.⁵² This is to say nothing of the enormously important fact that a large chorus of early observers were adamant that the Constitution was not even a legal instrument at all, but a “people’s” document, immune from the distortions and mystifications characteristic of legal reasoning.⁵³ All told, rules for interpreting the new Constitution did not readily exist; they needed to be invented. And the practice of doing so would be inextricably intertwined with the activity of clarifying the Constitution’s essential nature. This was one of the defining stories of the 1790s.⁵⁴

What worked for other kinds of legal preambles, accordingly, had no automatic relevance to a national Constitution ratified by a sovereign people. Even if rules of common law construction were clear on how to read preambles (and the eighteenth-century common law was nothing if not deeply contested),⁵⁵ it was by no means clear how or even that these rules applied to the Constitution. If the Constitution’s Preamble was going to be read akin to the Preamble to an ordinary statute, that would be thanks not to the logic of existent interpretive methods or anything required by “law,” but rather would be the result of a struggle among Americans over how to justifiably imagine and, in turn, interpret their new Constitution. It

51. See 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, 424–26 (2019). This is unsurprising because if there was anything that early American constitutions most closely resembled it was surely the individual charters that had previously governed the various North American colonies when they had been part of the British Empire.

52. See GIENAPP, *supra* note 7, at 116–23; Nelson, *supra* note 50, at 561–78.

53. See GIENAPP, *supra* note 7, at 95–98, 117; Saul Cornell, *The People’s Constitution vs. The Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J. L. & HUMAN.* 295, 304–05 (2011).

54. See generally GIENAPP, *supra* note 7.

55. See *id.* at 118–21; Bernadette Meyler, *Towards a Common Law Originalism*, 59 *STAN. L. REV.* 551, 559–80 (2006) (underscoring disagreement among eighteenth-century Anglo-Americans over the content and character of the common law). Even David Konig’s work, on which Reinstein otherwise relies, stresses the crucial division between Blackstone and his eighteenth-century critics and how Founding-era American often favored the latter. See Konig, *supra* note 41, at 1313–17.

would follow from the legitimation of new practices rather than the straightforward application of accepted ones.⁵⁶

Broad recognition that the Constitution was an unprecedented kind of object allowed its Preamble to take on new significance in American minds and, for some, to serve as a crucial basis for a far-reaching theory of delegated national power. Given the novelty of the Constitution, interpreting it was not a matter of analogizing it to lesser legal instruments but understanding its own essential character. And here the Preamble provided revealing clues into the Constitution's legal agent and, in turn, the nature of the American union.

During the ratification debates, Federalists often pointed to the Preamble to emphasize the Constitution's animating principle of national popular sovereignty. "The introduction," a Native of Virginia asserted, "is the key of the Constitution."⁵⁷ While serving as a delegate to the Pennsylvania ratifying convention, James Wilson repeatedly drew attention to the Preamble to elucidate, as he put it, "the great leading principle of this system."⁵⁸ It was a principle "very much misunderstood" by critics of the Constitution who claimed that the new instrument, like the Articles of Confederation it sought to replace, formed a compact of states.⁵⁹ "This," Wilson was adamant, "is not a government founded upon compact," for "[t]here can be no compact unless there are more parties than one," and there was but one agent positioned to authorize the new Constitution: the people of the United States.⁶⁰ It was a government "founded upon the power of the people"—*as a collective*.⁶¹ He was thus "astonished to hear the ill-founded doctrine" that the states "must possess sovereign authority forsooth, and the people to be forgot," when "in its terms and in its consequences," the Constitution declared that "the people retain the supreme power, and exercise it either collectively or by representation."⁶² Indeed, as Wilson was quick to point out, the people's collective power was "evident from the manner in which

56. See generally GIENAPP, *supra* note 7, at 125–324.

57. A Native of Virginia: Observations Upon the Proposed Plan of Federal Government (Apr. 2, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 661 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter DHRC].

58. The Pennsylvania Convention (Dec. 11, 1787) (statement of James Wilson), in 2 DHRC, *supra* note 57, at 554 (Merrill Jensen ed., 1976).

59. *Id.*

60. *Id.* at 555.

61. *Id.*

62. The Pennsylvania Convention (Dec. 4, 1787) (statement of James Wilson), in 2 DHRC, *supra* note 57, at 493–94 (Merrill Jensen ed., 1976).

[the Constitution] is announced: ‘WE, THE PEOPLE OF THE UNITED STATES.’”⁶³ It was not the people of the separate states, but the people of the *United States*: a genuinely national people set to establish a national government to act in their name. “They express in their name and their authority, ‘*We the People do ordain and establish*,’” Wilson observed.⁶⁴ The Preamble thus captured what the Constitution was: “the system itself tells you what it is,” Wilson concluded, “it is an ordinance and establishment of the people,” one whose “constitutional authenticity” derived from the sovereign authority of “the people themselves.”⁶⁵ This was why Wilson could claim, sweepingly and evocatively, that the “single sentence [of] the Preamble is tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised.”⁶⁶ While few Federalists spoke as comprehensively on this subject as did Wilson, throughout ratification they echoed his points, frequently invoking the Preamble as evidence of these deeper principles.⁶⁷

Strikingly, Anti-Federalists assumed that Wilson and his Federalist allies were correct about the Preamble. Like the Constitution itself, the Preamble was alarming, and precisely because it indeed signified the kind of union the Constitution was poised to constitute and govern. Anti-Federalists’ anxiety over the Preamble was perhaps even more revealing than Federalist defenses of it. At its “very commencement,” noted Cincinnatus, in responding to James Wilson, the Constitution “prescribe[s] this remarkable declaration—*We the People of the United States*.”⁶⁸ Why, Patrick Henry asked rhetorically, did the document begin: “*We, the People*, instead of *We, the States*?”⁶⁹ If, he inferred, “the States be not the agents of this compact,” as the Preamble seemed to indicate, “it must be one great consolidated National Government of

63. *Id.* at 494.

64. The Pennsylvania Convention (Dec. 11, 1787) (statement of James Wilson), in 2 DHRC, *supra* note 57, at 555 (Merrill Jensen ed., 1976).

65. *Id.* at 555–56.

66. The Pennsylvania Convention (Nov. 28, 1787) (statement of James Wilson), in 2 DHRC, *supra* note 57, at 383–84 (Merrill Jensen ed., 1976).

67. Given the early timing of the Pennsylvania ratifying convention, Wilson’s arguments appeared early and shaped subsequent Federalist defenses of the Constitution. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 77–82 (2010); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, at 143–46 (1996).

68. CINCINNATUS V: TO JAMES WILSON, ESQUIRE, N.Y. JOURNAL (Nov. 29, 1787), reprinted in 14 DHRC, *supra* note 57, at 307 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

69. The Virginia Convention (June 4, 1788) (statement of Patrick Henry), in 9 DHRC, *supra* note 57, at 930.

the people of all the States.”⁷⁰ The opening words were conspicuous, and their implication unmistakable. “I confess, as I enter the Building I stumble at the Threshold,” observed Samuel Adams.⁷¹ “I meet with a National Government, instead of a federal Union of Sovereign States.”⁷² This was a disquieting conclusion. By its own logic, William Findley affirmed, the Constitution was “a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit.”⁷³ The Preamble, in short, lamented a Massachusetts writer, “proposes the beginning of one new society, one new government in all matters.”⁷⁴

Federalists and Anti-Federalists alike grasped how the Preamble implied—or, at minimum, *could* imply—the kind of polity the United States would be under the Constitution. Indeed, like the state constitutions that preceded it, whose opening statements of principle have often mystified modern readers, the federal Constitution’s Preamble conveyed the deeper republican precepts upon which its political framework would rest.⁷⁵ At the Constitutional Convention, while serving on the committee responsible for transforming the Convention’s resolutions into a working draft, Virginian Edmund Randolph had claimed that “[a] preamble” which “designat[ed] the ends of government and human polities . . . is unfit here.”⁷⁶ That “display of theory,” perhaps “proper in the first formation of state governments,” was, he believed, now inappropriate “since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by

70. *Id.*

71. Samuel Adams to Richard Henry Lee, Boston (Dec. 3, 1787), in 4 DHRC, *supra* note 57, at 349 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

72. *Id.*

73. The Pennsylvania Convention (Dec. 1, 1787) (statement of William Findley), in 2 DHRC, *supra* note 57, at 447–48 (Merrill Jensen ed., 1976). This exact point, phrased almost identically, was restated in the “Dissent of the Minority of the Convention” later written by Pennsylvania Anti-Federalists (including Findley). The Dissent of the Minority of the Convention, in 2 DHRC, *supra* note 57, at 630 (Merrill Jensen ed., 1976).

74. MASSACHUSETTENSIS, MASSACHUSETTS GAZETTE (Jan. 29, 1788), *reprinted in* 5 DHRC, *supra* note 57, at 830 (John P. Kaminski & Gaspare J. Saladino eds., 1998).

75. In the work that Reinstein draws on to justify his reading of the Preamble, David Konig emphasizes how the prefatory statements of most state constitutions did more than establish constitutional purposes by laying out the republican basis of government itself. *See* Konig, *supra* note 41, at 1317–22.

76. Committee of Detail Draft (Edmund Randolph’s Draft), 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 (Max Farrand ed., 1911).

society, and . . . *interwoven with* what we call . . . the rights of states.”⁷⁷ In other words, because the new frame of government was being authorized by peoples in existing political communities, it was not necessary to lay an independent foundation for the new Constitution. That the Convention in the end opted to begin with the precise kind of preamble Randolph deemed misplaced is why Federalists such as James Wilson and Anti-Federalists such as Patrick Henry agreed that the proposed Constitution in fact incorporated the exact kind of theoretical basis Randolph had otherwise described. The Preamble hinted at not just a new national government, but, given its deeper statement of foundational principles, a new federal union as well.

The Preamble caught everyone’s attention because these conclusions, vital in their own right, carried more explosive implications still. In a world steeped in social contract thinking,⁷⁸ understanding just which kind of sovereign authority the Constitution presupposed and sorting out the character of the federal union to be established by it, on top of all else, helped determine the scope of the national government’s power. This, more than anything, was why the Preamble proved so controversial. What the Constitution implied about sovereignty and union and what it implied about the limits of national governmental authority were inextricably intertwined. Indeed, what the Preamble indicated about the former was so important—and to Anti-Federalists so troubling—because it seemed to lay the groundwork for expansive national power.

Once again, among nationalists in the 1780s, James Wilson most ably explained how and why the scope of the national government’s power was a function of the kind of sovereign power that had constituted it. He did so most fully two years prior to the Constitutional Convention when called to defend the constitutionality of the nation’s first national bank: the Bank of North America.⁷⁹ True, Wilson conceded, the Articles of Confederation vested in Congress no power to charter a national bank, and moreover, as its second article clearly stated, all powers “not . . . expressly delegated” were retained by the state governments.⁸⁰ But it was a mistake to focus solely on the Articles. The inquiry needed to begin, Wilson maintained, with the Declaration of Independence, which had

77. *Id.*

78. See Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–90, 99–103 (describing the central thrust of social contract thinking at the Founding).

79. On the episode and Wilson’s role in it, see Robert Green McCloskey, *Introduction*, in 1 THE WORKS OF JAMES WILSON, at 21–23 (Robert Green McCloskey ed., 1967).

80. ARTICLES OF CONFEDERATION of 1781, art. II.

created not thirteen autonomous states, but a single nation.⁸¹ The national government that presided over that union was, accordingly, not a creature of the states but the sovereign people of the United States.⁸² Consequently, that government derived its powers from two distinct sources. The states delegated some powers through the express terms of the Articles, but many others “*result[ed] from the union of the whole.*”⁸³ Any inherent national power, one which the individual states could not competently exercise on their own, was also automatically vested in the national government, irrespective of whether it was enumerated.⁸⁴ The states could neither assign nor retain these powers because they had never enjoyed authority over them to begin with. They had been “vested in the United States before the confederation,” when the nation itself originated through the act of separating from Britain.⁸⁵ Because the people of the United States, rather than the people of separate states, had created the union, Wilson believed the national government necessarily acquired a robust swath of national powers, none of which needed to be enumerated.⁸⁶

There is every reason to believe that Wilson’s theory informed the drafting of the federal Constitution and shaped how several nationalists understood the final product to emerge from that process, especially the enumeration of legislative powers that was written into Article I. That the Convention chose to enumerate these powers did not mean, in the eyes of many framers, that it had limited national power to the enumeration. As John Mikhail has shown, while serving on the Committee of Detail, Wilson significantly revised what became the Necessary and Proper Clause.⁸⁷ And it stands to reason that he did so with his theory of delegated national authority in mind. Not only would Congress have the power to make all laws necessary and proper for executing its “foregoing Powers” (those enumerated in what became Article I,

81. See JAMES WILSON, *CONSIDERATIONS ON THE BANK OF NORTH-AMERICA* 10 (Philadelphia, Hall & Sellers 1785) (emphasizing that the “act declares that ‘these UNITED Colonies,’ (not enumerating them separately) ‘are free and independence States’”).

82. *Id.* (noting that the “act of independence was made before the articles of confederation,” which declared the colonies united).

83. *Id.*

84. *Id.*

85. *Id.* at 11.

86. *Id.* at 9–11.

87. See Mikhail, *The Necessary and Proper Clauses*, *supra* note 9, at 1096–106. On Wilson’s role on the committee, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 213–14, 242–46, 276–83 (2012).

Section 8), but also “all other Powers” vested “in the Government of the United States” as a whole.⁸⁸ To those drawn to Wilsonian thinking, the clause underscored that the national government could already, by virtue of what it was and the legal basis on which it had been erected, exercise a set of “other powers” independent of its enumerated powers.⁸⁹ This Wilsonian reading of national power was then reinforced by the Committee of Style, where Gouverneur Morris (quite possibly with Wilson’s assistance) transformed the Preamble (which Wilson had initially drafted) into its final form.⁹⁰ The finished Preamble unambiguously established the people of the United States as the constituting agent and, every bit as important, added a set of concrete purposes for which the new government would be established, including “to form a more perfect Union” and to “promote the general Welfare.”⁹¹ These six purposes could now easily be read as the “other powers” referenced in Wilson’s revised Necessary and Proper Clause—a set of genuinely national ends, distinct from the enumerated powers, that the national government could legitimately pursue.⁹²

All told then, the Preamble could be understood as reinforcing a theory of sovereignty and national union that expanded the scope of national power, beyond either those powers that were enumerated or those powers that might be aggregated from that enumeration. By Wilsonian thinking, crucially, the Preamble was not itself a grant of additional power; rather, it was evidence of it. By making plain who was constituting the new government, the Preamble could be read as recognizing the existence of a distinct source of national power entirely separate from anything formally expressed in Article I—one rooted in an understanding of how a national people, rather than the autonomous states, were constituting a national government to act in their name and thus automatically delegating all distinctively national powers to which the individual states had no prior claim. Obviously, there were different ways to understand the textual changes that Wilson and Morris had engineered

88. U.S. CONST. art. I, § 8, cl. 18.

89. Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 9, at 1091–97.

90. William Michael Treanor, *Framer’s Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federalist Constitution 78–87* (Feb. 5, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3383183.

91. U.S. CONST. pmb1.

92. See John Mikhail, *McCulloch, Slavery, and the Sweeping Clause*, BALKINIZATION (Nov. 25, 2019, 2:00 PM), <https://balkin.blogspot.com/2019/11/mcculloch-fisher-and-sweeping-clause.html> [<https://perma.cc/7MRC-BMDN>]; see also Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 9, at 1097–103; Mikhail, *supra* note 51, at 440.

and, more broadly, the federal union that the Constitution established. But the Wilsonian mode was surely among them. And considering how the Preamble was initially invoked when the Constitution was first scrutinized and debated, its resonance was undeniable.

Once again, during ratification Anti-Federalists revealed the purchase and potency of Wilsonian thinking by grasping how, unmistakable to their eyes, the Preamble's conception of sovereignty and union might entail a corresponding expansion of national power.⁹³ "[T]his constitution," Brutus observed in one of his influential essays, "will not be a compact entered into by states, in their corporate capacities, but an agreement of the people of the United States, as one great body politic," and in that event, "no doubt can remain, but that the great end of the constitution, if it is to be collected from the preamble, in which its end is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal."⁹⁴ In signaling a reconstitution of not only the national government but also its underlying polity, the Preamble articulated the basic ends on which the new government would act. Understood in this light, the great purposes of the Preamble suddenly took on explosive new meaning. Scanning those specific ends, George Clinton, governor of New York, remarked that "[t]hese include every object for which government was established."⁹⁵ Based on the character of the Preamble, Melancton Smith added, it seemed the "genl. govt. is vested with the supreme power of the union."⁹⁶ Taking stock of "[t]he great objects . . . declared in this preamble in general and indefinite terms," Brutus could not help but note that "[n]o terms can be found more indefinite than these."⁹⁷ The Preamble "amount[ed]," he reasoned, "to a power to make laws at discretion."⁹⁸

93. For more, see GIENAPP, *supra* note 7, at 88–89, 95 (showing how Anti-Federalists feared that the Preamble would be vulnerable to a broad interpretation that would permit a sweeping expansion of federal power).

94. BRUTUS XII, N.Y. JOURNAL (Feb. 7, 1788), *reprinted in* 16 DHRC, *supra* note 57, at 74 (John P. Kaminski and Gaspare J. Saladino eds., 1986).

95. George Clinton's Remarks Against Ratifying the Constitution (July 11, 1788), *in* 22 DHRC, *supra* note 57, at 2146 (John P. Kaminski et al. eds., 2008).

96. The New York Convention (July 1, 1788) (statement of Melancton Smith), *in* 22 DHRC, *supra* note 57, at 2036 (John P. Kaminski et al. eds., 2008).

97. BRUTUS V, N.Y. JOURNAL (Dec. 13, 1787), *reprinted in* 14 DHRC, *supra* note 57, at 423 (John P. Kaminski & Gaspare J. Saladino, eds., 1983).

98. *Id.*

Nor were these Anti-Federalists swayed by Federalist assurances that the Constitution's delegated powers were clear and circumscribed. Anti-Federalists instead saw these promises for the clever, lawyerly evasions they often were. There was considerable daylight between a government whose powers were strictly limited to an enumeration and one that enjoyed general plenary power. In the throes of the ratification debates, Anti-Federalists were right to assume that many Federalists, including Wilson himself, were happy to invoke this false dichotomy to obscure their genuine understanding of what the proposed Constitution fairly licensed.⁹⁹ Just because the national government's delegated powers fell short of general governmental power, which is what Federalists repeatedly stressed, did not mean that the proposed system's powers were strictly delegated through enumeration. National authority might well still have derived from several distinct sources, at least one of which was embedded in the Preamble.

If there was any doubt to the contrary, debates immediately following ratification revealed that many former Federalists were not only convinced that the national government's powers exceeded the narrow confines of the Article I enumeration but were quick to draw on the Preamble as a basis for this position. The explosive debate over the anti-slavery petitions, submitted by some of the nation's leading anti-slavery organizations and delivered to Congress in early 1790, illustrated the Preamble's early vitality and potential.¹⁰⁰ There were three petitions in total—the first two submitted by Quaker groups based in Pennsylvania and New York and the third by the Pennsylvania Abolition Society, conspicuously signed by its president and former Constitutional Convention delegate, Benjamin Franklin.¹⁰¹ Each of the petitions asked Congress specifically to address the international slave

99. There is plenty of oft-misinterpreted Federalist testimony to choose from. For a good example of Wilson's use of this false dichotomy to his rhetorical advantage, see Pennsylvania Ratifying Convention (Dec. 4, 1787) (statement of James Wilson), in 2 DHRC, *supra* note 57, at 469 (Merrill Jensen ed., 1976).

100. For a succinct overview of the petitions controversy, see SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 155–62 (2018). For more in-depth treatments, see Howard A. Ohline, *Slavery, Economics, and Congressional Politics, 1790*, 46 J. SOUTHERN HIST. 335 (1980), and Richard S. Newman, *Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Federal Congress*, 16 J. EARLY REPUBLIC 571 (1996).

101. See Ohline, *supra* note 100, at 340–41.

trade, but their authors all hoped, more broadly, to train the national government's attention on slavery domestically.¹⁰²

Of the three petitions, the Pennsylvania Abolition Society's memorial was the most radical. Where the Quaker petitions were cautiously worded, the Abolition Society's petition instead called on Congress to "[s]tep to the very verge of the powers vested in you" in order "to countenance the Restoration of liberty to those unhappy men, who alone, in this land of freedom are degraded into perpetual Bondage" and to "promote mercy and justice towards this distressed race."¹⁰³ What might have empowered Congress to pursue such broad ends; to channel its energies toward—the authors almost purposely left things nebulous—undermining the institution of slavery itself? The memorial underscored the "many important and salutary powers" vested in the national government for "promoting the [general] Welfare & securing the blessings of liberty"—the final and most far-reaching objects of the Preamble.¹⁰⁴ The petitions captured genuine, growing anti-slavery sentiment. And it was only because the memorials, and their constitutional implications, seemed viable that representatives of the Deep South responded so violently. Over their howls of protest, the House voted, by a wide margin, to refer the petitions to a special committee.¹⁰⁵ Even more concerning to these southern congressmen, that committee's initial report, despite otherwise being designed to placate slavery's defenders, hinted that Congress's authority might stretch beyond simply the acknowledged power to end the slave trade at a later date.¹⁰⁶ Alarmed, the Deep South representatives worked strenuously to defuse the committee report and ensure that no subsequent petitions would find their way into Congress again.¹⁰⁷ Beyond what the episode revealed about the politics of slavery, it illustrated the Preamble's early significance. Anti-slavery agitators and pro-slavery zealots alike recognized its sweeping possibilities.

102. On the antislavery groups and their skillful lobbying efforts, see generally William C. diGiacomantonio, "For the Gratification of a Volunteering Society": *Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169 (1995).

103. Memorial of the Pennsylvania Abolition Society (Feb. 3, 1790), in 8 DHFFC, *supra* note 1, at 324, 326.

104. *Id.* (quoting U.S. CONST. pmbl.).

105. See WILENTZ, *supra* note 100, at 159.

106. *Id.* at 159–60.

107. See Newman, *supra* note 100, at 593–96, 598–99 (stressing especially Deep South representatives' aggressive response to the petitions).

But no episode more emphatically confirmed the Preamble's potency than quite possibly the most important constitutional debate of the entire 1790s: over Congress's authority to charter a national bank.¹⁰⁸ Secretary of the Treasury Alexander Hamilton called on the national legislature to establish such a bank as part of his ambitious economic program, and after James Madison raised a late constitutional challenge, members of the House of Representatives found themselves engulfed in a protracted debate over its constitutionality.¹⁰⁹ It was here that Madison helped christen the slogan, "limited and enumerated powers," by objecting to the bank bill on the grounds that the Constitution did not enumerate a power to issue articles of incorporation.¹¹⁰ Those who defended Congress's constitutional authority to charter the bank could simply have conceded this premise before pivoting to the Necessary and Proper Clause in order to defend the bank as a necessary means to carry out certain enumerated powers. Strikingly, however, they often disputed Madison's enumerationist premise itself by invoking Wilsonian arguments.¹¹¹ They insisted that there were national powers beyond the enumeration and readily drew on the Preamble to justify this claim.¹¹²

Fisher Ames, a young, sardonic, quick-witted representative from Massachusetts, took the first crack at answering Madison's challenge and advanced a remarkable argument. He contended that, "by the very nature of government[,] the legislature had an implied power of using every mean not positively prohibited by the constitution, to execute the ends for which that government was instituted."¹¹³ Here, he "adverted to the preamble," which he noted "declares that [the Constitution] is established for the general welfare of the Union."¹¹⁴ This "vested Congress with the authority over all objects of national concern or of a general nature," he explained, and "a national bank undoubtedly came under this idea."¹¹⁵ Numerous bank defenders echoed

108. See GIENAPP, *supra* note 7, at 202–47 (providing a full analysis of the debate).

109. See *id.* at 206–11.

110. GAZETTE OF THE UNITED STATES (Feb. 23, 1791) (statement of James Madison on Feb. 2, 1791), *reprinted in* 14 DHFFC, *supra* note 1, at 371.

111. See *infra* notes 121, 123 and accompanying text.

112. See *infra* note 122 and accompanying text (examining Federalists' use of the Preamble to justify broad national power).

113. GENERAL ADVERTISER (Feb. 9, 1791) (statement of Fisher Ames on Feb. 3, 1791), *reprinted in* 14 DHFFC, *supra* note 1, at 386.

114. *Id.* at 389.

115. *Id.*

Ames. The Constitution established a national government that “was complete and perfect for all general purposes,” claimed John Laurance of New York.¹¹⁶ Congress was “vested with every necessary power” in order “to carry the ends into execution.”¹¹⁷ And where were the “principles . . . and ends of the constitution,” the ones that Congress had all requisite authority to pursue, to be found? They “were expressed in the preamble.”¹¹⁸ Elbridge Gerry of Massachusetts amplified the point. “The constitution,” he explained, “is the great law of the people, who are themselves the sovereign legislature.”¹¹⁹ And this sovereign people expressed themselves most plainly in the Preamble. Gerry dramatically quoted it in full before declaring, “[t]hese are the great objects for which the constitution was established.”¹²⁰

These conceptions of national power under the Constitution—and of the Constitution more generally—were as thoroughly Wilsonian as anything imaginable. As the Preamble confirmed, because a national people had erected a national government in their name, that government enjoyed certain powers independent of anything otherwise expressed in the Article I enumeration. The bank was thus constitutional, not because of certain enumerated powers (be they aggregated or broadly construed), but because of the kind of thing the Constitution was and for which its Preamble was the clearest evidence. Each argument, moreover, brimmed with assurance. To bank defenders in the House, it was Madison who was on shaky ground; their conception of national power was, by comparison, utterly conventional and well grounded.

Appreciating all of this should color how we read Hamilton’s far better-known opinion on the constitutionality of the bank. The treasury secretary did not simply parrot what had been said in the House in defense of the bank. To the contrary, he ignored many of these arguments; in particular, he made no overt mention of the Preamble at all.¹²¹ As Reinstein correctly observes and adeptly explains, Hamilton instead focused on the enumerated powers, aggregating

116. GENERAL ADVERTISER (Feb. 15, 1791) (statement of John Laurance on Feb. 4, 1791), *reprinted in* 14 DHFFC, *supra* note 1, at 413.

117. *Id.*

118. *Id.*

119. GENERAL ADVERTISER (Mar. 4, 1791) (statement of Elbridge Gerry on Feb. 7, 1791), *reprinted in* 14 DHFFC, *supra* note 1, at 454.

120. *Id.*

121. *See* Hamilton, Bank Opinion, *supra* note 28, at 97–134.

them into different clusters.¹²² He surely had good motivation for adopting this strategy. Writing for an audience of one, President George Washington, who trusted Madison's judgment and recognized how wary Virginians were of expansive federal power—especially what it might mean for the institution of slavery—Hamilton most likely deduced that he would more easily accomplish his goal by granting, rather than disputing, Madison's core enumerationist premise. Motivation aside, Hamilton's opinion reveals that bank defenders in the House consciously forsook a distinct set of arguments otherwise available to them. They did not reach for the Preamble out of desperation; they made what they assumed to be the stronger case. To those who are historically-minded and loathe to impose later legal orthodoxy anachronistically on earlier testimony, what stands out is how readily participants in the debate latched onto arguments that they need not have made but which they thought were the most powerful. They would not have done so unless the Wilsonian Constitution enjoyed a vitality that we no longer easily detect.

That said, as significant as the House arguments are, it is just as important that Hamilton (and later Federalists like John Marshall) chose not to make them.¹²³ This shows that, during these formative years, there were distinct kinds of nationalist arguments available that often conceived of the Constitution in distinct ways. If we place them side by side, we glimpse a constitutional world in flux. From the perspective of 1787 or 1791, there was no telling whether the future would be Wilsonian, Hamiltonian, or something else.

IV. ORIGINAL POSSIBILITIES: BARING THE MYTH

The Constitution's Preamble was not destined to be read as an ordinary legal preamble. If it ended up being construed that way, it was thanks to subsequent interpretive developments that were political and contingent rather than anything originally mandated by the Constitution itself. Owing to the Constitution's own novelty and uncertainty, its Preamble potentially carried far-reaching implications, ones that champions and foes of expansive national power instinctively latched onto when the instrument first appeared. During those initial years, a

122. See Reinstein, *supra* note 18, at 80.

123. However, David Schwartz has recently shown how Marshall's enumerationist arguments were often laced with ambiguity, likely because he, like Hamilton before him, embraced these arguments for complex political and intellectual reasons. See SCHWARTZ, *supra* note 8, at 9–58.

great many Federalists invoked the Preamble to justify broad national power, confident it confirmed that the national government derived its powers not simply from the enumeration in Article I (however broadly construed), but also from the fact that a national people had established a national government to address genuinely national needs. By investigating early attitudes toward the Preamble, we can begin to see a robust, alternative, and now largely forgotten conception of national power at the Founding, one distinct from those predicated on either a strictly limited or broadly aggregated notion of enumerated powers—the more familiar constitutional images central to Reinstein’s account.

Recognizing the vitality of this alternative form of nationalist constitutionalism is crucial in its own right. But it holds still broader lessons. The aim is not to substitute one candidate for original meaning with another, but rather to force us to appreciate that when it came to the scope of national power under the Constitution, there were no original certainties, just competing possibilities. Depending on how the Constitution itself was conceived—a decidedly unsettled matter—there were various ways to understand how it vested power and, in turn, how much cumulative power it delegated to the national government. It is quite possible that the theory of clustered national powers that Reinstein delineates so well eventually prevailed over its early nationalist competitors, much like enumerationism itself rapidly gained strength in the crucible of early constitutional combat. (In an intriguing twist, it is also possible that James Wilson himself gravitated away from certain core Wilsonian arguments.)¹²⁴ But those developments tell us more about how the Constitution was molded over time, rather than anything about its own latent, inexorable essence. If we appreciate the full range of original possibilities, we can better understand the contingent historical processes that eventually elevated some and eliminated others. And in charting how certain ways of rendering the Constitution became ingrained, we can see how some initial possibilities were erased.

I appreciate that lawyers like Reinstein, drawn to different questions with different explanatory aims in mind than historians, are usually more inclined to choose among competing constitutional readings than to see how they once collided with one another in historical space—to favor certainty over contestation and indeterminacy. But

124. In his “Lectures on Law” (begun in 1790), Wilson clustered the Article I enumerated powers much like Hamilton had. At the same time, however, Wilson explained how these clusters effectuated the “great ends” of the national government as specified in the Preamble. See 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 40, at 870–72.

how we evaluate constitutional argument is itself often the outcome of those earlier collisions. Sometimes we presuppose certain constitutional premises not just as a matter of argument but because we take them to be given by the Constitution itself. By forcing ourselves to see all of the ways in which national power was originally imagined—by placing the Wilsonian brand of national constitutionalism alongside the Hamiltonian version that Reinstein so capably portrays—we can begin to disaggregate the original Constitution from so many of our habituated ways of seeing and interpreting it.

All of which, in turn, best equips us to lay bare the myth of the given at the heart of enumerationism: the broader purpose of the scholarly movement Reinstein has joined and the most vital aim of all. Enumerationists confidently assume that the enumerationist Constitution is simply *given* and that it springs inexorably from the Constitution itself. Yet, in better understanding the *dynamic, historical process* by which we came to see the Constitution the way we do and in taking full stock of the Constitution's original possibilities and seeing how, as the 1790s unfolded, some ways of seeing the Constitution were entrenched while others were erased, we can begin to appreciate that the image of the Constitution conveyed by enumerationism derives, not from the original Constitution, but from an invented way of imagining it. There is nothing given about it. That givenness is a myth.