

## A TALE OF TWO SWEEPING CLAUSES

JOHN MIKHAIL\*

Whenever there is a discussion about the relationship between the Declaration of Independence and the Constitution, most of the attention naturally gravitates toward the principle of equality and natural rights background of the Declaration, which have played such important roles in American history. The question then becomes whether, or to what extent, the Constitution embodies these background principles. In this Essay, I wish to focus attention on a different and less familiar connection between these two foundational documents—a connection that bears on the issue of government powers rather than of individual rights. I will make three main points, which may be surprising for some readers. I will first state these claims without much elaboration or qualification. Then I will circle back and say a few words of clarification about each of them.

Here are the three points: First, some of the most influential founders considered the Declaration of Independence to be, in effect, the “first constitution” of the United States, which not only declared the existence of a new nation, but also vested the United States with all of the express and implied authority of any other nation, including the “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”<sup>1</sup>

---

\* Associate Dean for Research and Academic Programs and Agnes N. Williams Research Professor, Georgetown University Law Center. This Essay is a revised version of invited remarks I gave on “The Relationship between the Declaration of Independence and the Constitution” at the 37th Federalist Society National Student Symposium at Georgetown University Law Center on March 10, 2018. I wish to thank Ethan Womble and the other organizers for inviting me to participate in this event, along with my fellow panelists—Judge Thomas Hardiman and Professors Randy Barnett, Lee Strang, and Michael Zuckert—for their stimulating conversation and constructive feedback.

1. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

Second, many of these same individuals celebrated the Constitution precisely because it marked a return to the broad conception of implied national powers vested in the United States by the Declaration, which the Articles of Confederation had sought to deny the national government.

Third, when it came time to draft the Constitution, the principal framers of that document turned back toward the Declaration for inspiration. The specific language on which they relied was its reference to “all other Acts and Things which Independent States may of right do.”<sup>2</sup> This language had directly inspired the “all other powers” provisions, or “sweeping clauses,” one finds in several early state constitutions, such as the Delaware, Pennsylvania, and Vermont constitutions.<sup>3</sup> It also served as a template for the “all other powers” provision of the Necessary and Proper Clause,<sup>4</sup> which James Wilson drafted for the Committee of Detail.<sup>5</sup>

My three points can be compressed into a single sentence: The Declaration was effectively the first constitution of the United States, which vested the United States with implied national powers and which later inspired one of the key provisions of the Necessary and Proper Clause. That is the main takeaway of my remarks. Let me now try to unpack the various parts of this argument and say a bit more about each of them.

---

2. *Id.*

3. See DEL. CONST. of 1776, art. I, § 5 (vesting the state legislature with enumerated powers “and all other powers necessary for the Legislature of a free and independent state”); PA. CONST. of 1776, ch. 2, § 9 (vesting the state legislature with enumerated powers “and . . . all other powers necessary for the Legislature of a free State or Common-Wealth”); VT. CONST. of 1777, ch. 2, § 8 (vesting the state legislature with enumerated powers “and all other powers necessary for the legislature of a free State”).

4. U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

5. See James Wilson, Documents of the Committee of Detail (1787), 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129, 151, 168, 182 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS]. See generally John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1096–1103, 1121–28 (2014).

## I. THE DECLARATION WAS THE “FIRST CONSTITUTION” OF THE UNITED STATES

Consider first the idea that the Declaration of Independence was, in effect, the first constitution of the United States, which vested the United States with all of the power of any other nation, including the right to do all “Acts and Things” which any other nation might do. What should we make of this language in the final paragraph of the Declaration?

A conventional reading of this passage assumes that the enumerated powers to which it refers—that is, the power “to levy War, conclude Peace, contract Alliances,” and so forth—were declared to belong to each state *individually*. On this familiar reading, the Declaration produced thirteen independent nations, *each* of which was a free and independent state, and *each* of which possessed these powers. At the Constitutional Convention, Maryland’s Luther Martin endorsed this conventional view when he claimed that “the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one.”<sup>6</sup> Martin added that “the separation from [Great Britain] placed the 13 states in a state of nature towards each other . . . [and] they would have remained in that state . . . but for the [Articles of C]onfederation.”<sup>7</sup>

Martin’s interpretation of the Declaration has a certain appeal and plausibility.<sup>8</sup> It is important to recognize, however, that many of the most influential Framers roundly rejected this interpretation. James Wilson, for example, stood at the convention and responded to Martin by reading aloud the final paragraph of the Declaration, arguing that its precise language implied that the states had declared their independence and

---

6. James Madison, Notes on the Constitutional Convention (June 20, 1787), in 1 FARRAND’S RECORDS, *supra* note 5, at 335, 340.

7. James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 5, at 313, 324.

8. In a recent opinion, the Supreme Court seemed to endorse a similar conception. See *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1475 (2018) (“When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority ‘to do all . . . Acts and Things which Independent States may of right do.’”).

possessed these enumerated powers “not Individually, but Unitedly”<sup>9</sup>—that is, in their collective, corporate capacity. Alexander Hamilton agreed with Wilson and likewise disputed Martin’s claim that the Declaration had placed the states in “a State of nature.”<sup>10</sup> And Rufus King reached similar conclusions by arguing that the individual states had never been “‘sovereigns’ in the sense contended for”<sup>11</sup> by Martin and some of the other delegates. King pointed out that the states lacked many of the sovereign powers to which the Declaration refers—for example, “[t]hey could not make war, nor peace, nor alliances, nor treaties.”<sup>12</sup> As “political Beings,” he said, the states were “dumb, for they could not speak to any for[e]ign Sovereign whatever.”<sup>13</sup> They were also “deaf, for they could not hear any propositions”<sup>14</sup> from these foreign governments.

Who was right in this debate? It’s a longstanding debate, which is still with us in some respects.<sup>15</sup> My own view is that, on balance, the nationalists had the stronger argument. Without trying to settle the matter here, let me simply highlight several key propositions in their favor, drawing on arguments that have been made at various stages in American history by influential figures such as Wilson, Hamilton, Joseph Story, and Abraham Lincoln, along with historians such as John Norton Pomeroy, Curtis Nettles, Richard Morris, and Richard Beeman, among others.<sup>16</sup>

---

9. Madison, *supra* note 7, at 324.

10. *Id.*

11. *Id.* at 323.

12. *Id.*

13. *Id.*

14. *Id.*

15. See, e.g., *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S.Ct. 1461 (2018); *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

16. See, e.g., RICHARD R. BEEMAN, *OUR LIVES, OUR FORTUNES AND OUR SACRED HONOR: THE FORGING OF AMERICAN INDEPENDENCE, 1774–1776* (2013); Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in *LINCOLN: POLITICAL WRITINGS AND SPEECHES* 115 (Terence Ball ed., 2013); Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *LINCOLN: POLITICAL WRITINGS AND SPEECHES*, *supra*, at 124; Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 *THE PAPERS OF ALEXANDER HAMILTON* 400–18 (Harold C. Syrett & Jacob E. Cooke eds., 1961); JOHN NORTON POMEROY, *INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* (9th ed. 1886); JOSEPH STORY, *1 COMMENTARIES ON THE CONSTITUTION* §§ 198–217 (5th ed. 1891); James Wilson,

First, the national government of the United States existed and became operative before the formation of the individual states. The nation preceded the states, in other words.<sup>17</sup> Furthermore, the delegates to the First and Second Continental Congresses were generally selected by the *people* of the colonies, not by the colonial legislatures.<sup>18</sup> It was these Congresses which directed the people of the colonies to organize new state governments in 1775 and 1776, beginning with New Hampshire and South Carolina in November of 1775, and then followed by the other states.<sup>19</sup>

During this period, Congress exercised implied national powers of a sweeping sort, as Hamilton and other observers frequently emphasized.<sup>20</sup> So, for example, Congress commissioned a continental army and placed George Washington at its

---

Considerations on the Bank of North America (1785), in 1 COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall & Mark David Hall eds., 2007); Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056 (1974); Curtiss Putnam Nettels, *The Origins of the Union and the States*, 72 PROC. MASS. HIST. SOC'Y 68 (1957–60). For a sharply different interpretation of the origins of national sovereignty, see, for example, Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

17. See generally Lincoln, Message to Congress, *supra* note 16; POMEROY, *supra* note 16; STORY, *supra* note 16; Nettels, *supra* note 16.

18. See, e.g., STORY, *supra* note 16, § 203; Morris, *supra* note 16, at 1068. Compare President Ronald Reagan's remark at his First Inaugural Address: "All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government." Quoted in PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGAL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 659 (7th Edition, 2018).

19. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 319 (W.C. Ford et al. eds., 1904–1937) [hereinafter J.C.C.] (Nov. 3, 1775: New Hampshire); *id.* at 326–27 (Nov. 4, 1775: South Carolina); see also, e.g., BEEMAN, *supra* note 16, at 282–87; Morris, *supra* note 16, at 1069–71; Nettels, *supra* note 16, at 73–74.

20. See, e.g., Letter from Hamilton to Duane, *supra* note 16, at 401 ("The manner in which Congress was appointed would warrant, and the public good required, that they should have considered themselves as vested with full power to *preserve the republic from harm*. They have done many of the highest acts of sovereignty, which were always cheerfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy, emitting money, making alliances with foreign powers, appointing a dictator &c. &c.—all these implications of a complete sovereignty were never disputed, and ought to have been a standard for the whole conduct of Administration."); STORY, *supra* note 16, §§ 214–17; Nettels, *supra* note 16, at 69–70.

head.<sup>21</sup> It borrowed money on behalf of the United States.<sup>22</sup> It defined treason against the United States.<sup>23</sup> It issued national passports in the name of the United States.<sup>24</sup>

Throughout the Revolutionary War, Congress's right to conduct foreign affairs—including defense, diplomacy, and the negotiation of treaties—went unchallenged by the states.<sup>25</sup> The Treaty of Peace with Great Britain was ratified solely by Congress on behalf of the United States.<sup>26</sup> Despite the fact that Article IX of the Articles of Confederation mandated that “no State shall be deprived of territory for the benefit of the United States,”<sup>27</sup> the Treaty of Peace adjusted the boundaries of eight states without their affirmative consent.<sup>28</sup> And there are many other similar examples of implied national powers on which the United States relied upon during this period.

---

21. 2 J.C.C., *supra* note 19, at 89–91 (June 14–15, 1775); Nettels, *supra* note 16, at 69–70; *see also, e.g.*, BEEMAN, *supra* note 16, at 221–38; Morris, *supra* note 16, at 1072, 1075–76.

22. *See, e.g.*, 2 J.C.C., *supra* note 19, at 103 (June 22, 1775) (resolving that “a sum not exceeding two millions of Spanish milled dollars be emitted by the Congress in bills of Credit, for the defence of America”); 3 *id.* at 390 (Nov. 29, 1775) (resolving that “a quantity of Bills of Credit be emitted by Congress amounting to 3,000,000 of Dollars”). *See generally* E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 25–47 (1961) (documenting various sums borrowed by Congress on behalf of the United Colonies, and later the United States, to fund the war).

23. *See, e.g.*, 2 J.C.C., *supra* note 19, at 111, 116 (Article XXVIII of the Articles of War, which Congress adopted on June 30, 1775, affirming that “[w]hosoever belonging to the continental army, shall be convicted of holding correspondence with, or of giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered”); 3 *id.* at 330–34 (revised Articles of War, including several articles pertaining to treason, adopted on November 7, 1775); 5 *id.* at 475 (June 24, 1776 resolution affirming that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws” and declaring that anyone who levies war against any of the colonies or gives aid and comfort to the King of Great Britain will be deemed “guilty of treason”). *See generally* Morris, *supra* note 16, at 1083–85.

24. *See, e.g.*, Morris, *supra* note 16, at 1087 n.207 (citing the passport issued by John Jay, President of Congress, to Captain Joseph Deane, June, 1779); *id.* at 1087 n.208 (citing numerous examples of United States passports issued by Benjamin Franklin while serving as American commissioner to France).

25. *See, e.g.*, Morris, *supra* note 16, at 1074–75; Nettels, *supra* note 16, at 69–77.

26. *See* 24 J.C.C., *supra* note 19, at 348; 25 *id.* at 631–32, 821–28; 27 *id.* at 615–25, 627–30. *See also, e.g.*, Morris, *supra* note 16, at 1075.

27. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

28. *See, e.g.*, Morris, *supra* note 16, at 1075; Nettels, *supra* note 16, at 78–79.

## II. THE DECLARATION VESTED THE UNITED STATES WITH IMPLIED NATIONAL POWERS

What justified the exercise of these implied powers? The classical argument was given by James Wilson in his defense of congressional authority to charter the Bank of North America. Before turning to that argument, let me say a few words of introduction about Wilson, because he is not as well-known as he should be. By any measure, he is one of the most remarkable figures in the history of American law. One of eight immigrants to sign the Constitution,<sup>29</sup> Wilson is the only founder to sign both the Constitution and the Declaration of Independence and to serve as a Justice on the United States Supreme Court.<sup>30</sup> He wrote the first complete draft of the Constitution, and in that capacity he was primarily responsible for the precise language of many of its most significant clauses and phrases, including the Vesting Clauses, the Necessary and Proper Clause, the Supremacy Clause, and the majestic opening words of the Preamble: “We the People.”<sup>31</sup> One of the best lawyers and legal minds of his generation, Wilson has also been called the “most democratic” founder because of his unwavering support for popular sovereignty and the principle of one person, one vote.<sup>32</sup>

---

29. Seven of the thirty-nine delegates to the constitutional convention whose names are affixed to the Constitution were “foreign-born,” that is, born outside of the territories that became the United States. In addition, because the English-born secretary of the convention, William Jackson, also put his name to the original document, exactly twenty percent (eight out of forty) of the individuals who signed the Constitution were foreign-born. See John Mikhail, *Foreign-Born Framers*, BALKINIZATION (Sept. 17, 2017, 2:34 PM), <https://balkin.blogspot.com/2017/09/foreign-born-framers.html> [https://perma.cc/V39K-EN2E].

30. See, e.g., GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 38–39 (1918); John Mikhail, *Law, Science, and Morality: A Review of Richard Posner’s The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1059 n.10 (2002).

31. See Wilson, *supra* note 5, at 150, 151, 171, 172 (Vesting Clauses); *id.* at 151, 168 (Necessary and Proper Clause); *id.* at 169 (Supremacy Clause); *id.* at 150, 152, 163 (Preamble).

32. For further discussion of Wilson’s commitment to popular sovereignty and its roots in Scottish Common Sense philosophy, see, for example, MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798*, at 90–126 (1997); William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053 (2010); John Mikhail, *Scottish Common Sense and Nineteenth-Century American Law: A Critical Appraisal*, 26 L. & HIST. REV. 167, 168, 171 (2008).

Now when Wilson put his mind to defending the constitutionality of a national bank under the Articles of Confederation, he faced long odds. The argument that Congress lacked the authority to charter such a bank was simple and straightforward. First, no such power was expressly given by the Articles of Confederation. Second, an implied power to charter a bank was apparently foreclosed by Article II, which limited Congress to “expressly delegated” powers and reserved all other powers to the states.<sup>33</sup>

Despite these obstacles, Wilson forcefully denied the conclusion that Congress lacked the requisite power, offering an ingenious argument on behalf of the bank that sharply narrowed the reach of Article II. The power to charter a national bank, he argued, was not a power possessed by any individual state.<sup>34</sup> Thus, it was not a power that the states could delegate in the first place.<sup>35</sup> Rather, the power to charter a national bank was an implied power that derived from the *union* of the individual states.<sup>36</sup> A national power for national purposes, it was one of those “other Acts and Things” to which the Declaration referred in 1776.<sup>37</sup>

Because the logic of Wilson’s argument is so important and has been so influential in the further development of American constitutional law, it is worth examining at length:

Though the United States in congress assembled *derive from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular states,

---

33. See ARTICLES OF CONFEDERATION OF 1781, art. II (“Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

34. Wilson, *supra* note 16, at 65.

35. *Id.*

36. *Id.* at 65–66.

37. *Id.* at 66.

nor from all the particular states, taken separately; but resulting from the union of the whole . . . .

To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

The act of independence was made before the articles of confederation. This act declares, that "*these United Colonies,*" (not enumerating them separately) "*are free and independent states; and that, as free and independent states, they have the full power to do all acts and things which independent states may, of right, do.*"

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues to vest in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.<sup>38</sup>

As many commentators have noted, this is a remarkable argument.<sup>39</sup> Among other things, it anticipates many important doctrines in American constitutional law, including those articulated by the Supreme Court in cases such as *Chisholm v. Georgia*,<sup>40</sup> *Fletcher v. Peck*,<sup>41</sup> *McCulloch v. Maryland*,<sup>42</sup> *Dartmouth*

---

38. *Id.* at 65–66.

39. See, e.g., Robert Green McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 1, 3–4 (Robert Green McCloskey ed., 1967); SUTHERLAND, *supra* note 30, at 38–39.

40. 2 U.S. (2 Dall.) 419 (1793).

41. 10 U.S. (6 Cranch) 87 (1810).

*College v. Woodward*,<sup>43</sup> *Cohens v. Virginia*,<sup>44</sup> *Missouri v. Holland*,<sup>45</sup> and *United States v. Curtiss-Wright*.<sup>46 47</sup> For our purposes, two points Wilson makes in these passages deserve primary emphasis.

First, it is notable that Wilson decides whether the Government of the United States is authorized to charter a national bank by asking whether it could do so *before* the Articles of Confederation were adopted. He then argues that if the power existed then, it remains vested in the United States still, because the Articles did not deprive the United States of any of its powers. Consider the implications of that type of argument for our understanding of the Tenth Amendment, for example.<sup>48</sup> Second, Wilson argues that the power to incorporate a bank is an implied power vested in the Government of the United States *by the Declaration*. The implications of this argument for how we might understand the “powers vested by this Constitution in the Government of the United States”<sup>49</sup> to which the Necessary and Proper Clause refers, are likewise profound.

Finally, Wilson emphasizes that implied national powers are vested in the United States in their *collective* capacity—in other words, in the *Union*, rather than in its individual members. To clarify this point, Wilson adapts an instructive metaphor from the Swiss jurist, Jean-Jacques Burlamaqui. That metaphor is *harmony*. Harmony, Wilson explains, is a musical property that no individual voice can produce on its own.<sup>50</sup> Instead, it requires the combination of two or more voices. Accordingly, harmony is an emergent property that resides at the group level, not at the level of one or more individuals. In a similar fash-

---

42. 17 U.S. (4 Wheat.) 316 (1819).

43. 17 U.S. (4 Wheat.) 518 (1819).

44. 19 U.S. (6 Wheat.) 264 (1821).

45. 252 U.S. 416 (1920).

46. 299 U.S. 304 (1936).

47. McCloskey, *supra* note 39, at 1, 3–4.

48. *Cf.* *United States v. Darby*, 312 U.S. 100, 124 (1941) (“The [Tenth A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . .”).

49. U.S. CONST. art. I, § 8, cl. 18.

50. See Wilson, *supra* note 16, at 66–67.

ion, Wilson suggests, certain national powers lie beyond the competence of individual states. They are vested—and can only vest—in the Government of the United States, conceived as a composite whole.<sup>51</sup>

III. THE DECLARATION'S "ALL OTHER ACTS AND THINGS"  
PROVISION SERVED AS A TEMPLATE FOR THE "ALL OTHER  
POWERS" PROVISION OF THE NECESSARY AND PROPER CLAUSE

Let me turn now to the last part of these remarks and briefly explain how all of the foregoing ideas about implied powers and the Declaration of Independence influenced the drafting of the Constitution.

The key point here is to recognize that when Wilson drafted the Necessary and Proper Clause for the Committee of Detail, he sought to declare and incorporate into the Constitution the doctrine of implied and inherent national powers that he and other leading nationalists of the period, such as Hamilton, Robert Morris, and Gouverneur Morris, had located in the Declaration and had repeatedly relied upon during the previous decade to justify the authority of the United States over the war effort, public finance, foreign affairs, and western lands.<sup>52</sup>

Here it is crucial to play close attention to the constitutional text and what Hamilton called the "peculiar comprehensiveness" of the Necessary and Proper Clause.<sup>53</sup> In addition to granting Congress the instrumental power to carry into effect its own enumerated powers, that clause also gives Congress

---

51. *Id.* ("It is no new position, that rights may be vested in a political body, which did not previously reside in any or in all of the members of that body. They may be derived solely from the union of those members. 'The case,' says the celebrated Burlamaqui, 'is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each.'").

52. Mikhail, *supra* note 5, at 1047–49.

53. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (Feb. 23, 1791), in 4 THE WORKS OF ALEXANDER HAMILTON: COMPRISING HIS CORRESPONDENCE, AND HIS POLITICAL AND OFFICIAL WRITINGS, EXCLUSIVE OF THE FEDERALIST, CIVIL AND MILITARY 104, 110 (John C. Hamilton ed., 1850) ("The expressions have peculiar comprehensiveness. They are—'to make *all laws*, necessary and proper for carrying into execution the foregoing powers & *all other* powers vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof.'").

the express power to make “all laws which shall be necessary and proper for carrying into Execution . . . *all other* powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>54</sup>

Unless one of the latter provisions is treated as surplusage, this carefully crafted language implies that the Constitution vests powers in the Government of the United States that are not merely identical or coextensive with the powers it vests in the Departments or Officers of the United States. Because these additional government powers are not specified in the Constitution, they must be implied or unenumerated powers.<sup>55</sup> Much like the existence of unenumerated rights affirmed by the Ninth Amendment, then, the existence of implied or unenumerated powers is thus presupposed by the precise text of the Constitution. And Wilson, of course, was instrumental in the origin of both the Ninth Amendment and Necessary and Proper Clause, both of which reflect deep features of his jurisprudence. He firmly believed that the limits of enumeration applied to both rights and powers.<sup>56</sup> Many people are familiar with the argument with respect to the Ninth Amendment: it’s impossible to enumerate all of the natural rights individuals possess, so it’s dangerous to attempt to enumerate them, and necessary to indicate that there are other rights retained by the people, which should not be disparaged. That’s true. Wilson believed the same thing about government powers, and he said so explicitly at the constitutional convention. “[I]t would be impossible to enumerate the powers which the federal Legislature ought to have,”<sup>57</sup> Wilson explained at the outset of the proceedings. And he subsequently drafted the Necessary and Proper Clause to recognize and accommodate that fundamental fact.

---

54. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

55. Mikhail, *supra* note 5, at 1047.

56. *Id.* at 1099; *see also, e.g.,* James Wilson, *Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (1787)*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 16, at 178, 195 (explaining that “[i]n all societies, there are many powers and rights which cannot be particularly enumerated”); *id.* at 212 (“Enumerate all the rights of Men! I am sure, sir, that no gentleman in the late convention would have attempted such a thing.”).

57. William Pierce, *Notes on the Constitutional Convention (May 31, 1787)*, in 1 FARRAND’S RECORDS, *supra* note 5, at 57, 60.

Wilson's reference to "all other powers" in the Necessary and Proper Clause was inspired by the Declaration's "all other Acts and Things" provision, and by the similar "all other powers" provisions in the several state constitutions to which I have referred.<sup>58</sup> There was a term that the founding generation used for this type of clause: a "Sweeping Clause."<sup>59</sup> The essential function of a sweeping clause is to cancel the implication that a given list of items is exhaustive, and the "and all other" language is the most common formula for doing so, both then and now.<sup>60</sup>

Unlike the Articles of Confederation, then, both the Declaration of Independence and the Constitution contain a list of enumerated powers, followed by a sweeping clause of the "and all other" variety. The fact that both of these foundational documents contain a Sweeping Clause is one of the clearest textual and conceptual links between them. The connection goes to the heart of how the Framers understood American nationalism and the implied national powers vested by the Constitution in the Government of the United States. It also may reflect the wisdom of John Adams' famous observation that the American

---

58. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 308 (D. Lemmings, ed., Oxford Univ. Press, 2016) (explaining that among those powers which "are necessarily and inseparably incident to every corporation" are the power to "sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may"). See generally Mikhail, *supra* note 5.

59. See, e.g., *Convention of Virginia* (1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 1, 418 (Jonathan Elliot ed., 1836) (statement of John Lawrence explaining that by virtue of "the sweeping clause" Congress was "vested with the powers to carry the ends [of the Preamble] into execution"); THE FEDERALIST No. 33, at 205 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961) (using the term "sweeping clause" to refer to a paraphrase of the last half of the Necessary and Proper Clause); Pierce Butler, *Objections to the Constitution* (Aug. 30, 1787), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 249, 249 n.1 (James H. Hutson ed., 1987) (documenting that George Mason objected to the Constitution because "[t]he sweeping Clause absorbs everything almost by Construction"); James Madison, *Notes for Speech in Congress* (c. June 8, 1789), in 12 PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson & Robert A. Rutland eds., 1979) (using the term "sweeping clause" to refer to a paraphrase of the last half of the Necessary and Proper Clause); James Madison, *Amendments to the Constitution* (June 8, 1789), in 12 PAPERS OF JAMES MADISON, *supra*, at 196, 205 (same).

60. Mikhail, *supra* note 5, at 1121–24.

experiment in constitutional government was a game of “Leap-frog.”<sup>61</sup> The first leap, however, was not the Articles of Confederation, but rather the Declaration of Independence itself.

---

61. *See, e.g., From John Adams to Benjamin Rush, 20 June 1808*, NAT'L ARCHIVES: FOUNDERS ONLINE (June 13, 2018), <http://founders.archives.gov/documents/Adams/99-02-02-5242> [<https://perma.cc/7PM5-CTNM>] (“Our Constitution operates as I always foresaw and predicted it would. It is a Game at Leap-Frog.”). As with much else, I am indebted to Merrill Jensen for bringing Adams’ use of this phrase to my attention. *See, e.g., MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 245 (1940).