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"Resolution VI": National Authority to Resolve Collective Action Problems Under Article 1, Section 8

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Abstract

American courts have traditionally followed the general principle of limited enumerated federal power in which certain matters are reserved to state-level control regardless of purported national importance or state "competency." Recently, however, a group of influential constitutional scholars have called for doing away with the traditional federalist understanding of enumerated national power and replacing it with their interpretation of a principle originally declared in Resolution VI of the so-called "Virginia Plan." Introduced in the early stages of the 1787 Philadelphia Constitutional Convention, Resolution VI declares that federal power should be construed to reach all cases involving the "general interests of the Union," those "to which the "states separately are incompetent" and those affecting national "harmony." Under this principle, Congress would have power to regulate any purported collective action problem of national importance, regardless of subject matter. Resolution VI proponents argue that the members of the Philadelphia Convention adopted Resolution VI and sent the same to the Committee of Detail with the expectation that the resulting text would embrace this overriding principle of national power. They also claim (or rely on the claim) that Philadelphia Convention member James Wilson publicly declared during the ratification debates that the framers viewed Article I, Section 8 as the textual "enactment" of Resolution VI.

A close reading of the historical sources, however, shows that the Framers did not view Article I, Section 8 as having operationalized the general "state incompetency" principle of Resolution VI. In fact, they expressly stated otherwise. Nor is there any historical evidence that James Wilson (or anyone else) referred to Resolution VI during the ratification debates. Claims to the contrary are based on errors of historical fact.

"RESOLUTION VI": NATIONAL AUTHORITY TO RESOLVE COLLECTIVE ACTION PROBLEMS UNDER ARTICLE I, SECTION 8

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INTRODUCTION

Currently, the United States Supreme Court interprets federal power under Article I, Section 8 in a manner that emphasizes both limited textual enumeration[1] and the need for judicial maintenance of the line between federal and state authority.[2] Recently, however, a group of influential constitutional scholars have suggested that courts ought to embrace Resolution VI of the 1787 "Virginia Plan" as a guide to the interpretation or construction of federal power under Article I, Section 8.[3] According to the

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[1] Chief Justice John Marshall first judicially recognized the principle of limited enumerated power in *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819) (noting that "great substantive and independent power[s]" require express enumeration), and in *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) ("the enumeration presupposes something not enumerated"). These two cases currently serve as foundational precedents for the modern jurisprudence of federal power.

[2] See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7, 617 (2000) (citing *Gibbons* and asserting that proper construction of federal power "requires a distinction between what is truly national and what is truly local.). See also *Bond v. United States*, 564 U.S. ___ (2011) (holding that individuals have the right to challenge federal action which violates the federalist constraints of the Tenth Amendment); *United States v. Comstock*, 130 S. Ct. 1949, 1967-68 (2010) (Kennedy, J., concurring) (discussing the Court's Necessary and Proper jurisprudence, including the decision in *McCulloch v. Maryland* and concluding "[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.").

[3] See Balkin, LIVING ORIGINALISM 143 (2011, Harvard University Press); Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 6-15 (2010); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115, 117, 123 (2011); Andrew Koppelman, *Bad News For Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 Yale L.J. Online 1, 12 (2011); David M. Metres, Note: *The National Impact Test: Applying Principled Commerce Clause Analysis to Federal Environmental Regulation*, 61 Hast. L. J. 1035, 1051 (2010); Peter J. Smith, Federalism, Lochner, and the Individual Mandate, 91 B.U. L. Rev. 1723, 1740 (2011); Stephen F. Williams, *Preemption: First Principles*, 103 Nw. U. L. Rev. 323, 326 (2009). See also, Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554 (1995). Even when not made the focus of constitutional theory, Resolution VI sometimes plays an oblique role in scholarly accounts of federal power. Consider, for example, the following footnote in Akhil Amar's recent book on the American Constitution:

> Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention's general instructions to the midsummer Committee of Detail, which took upon itself the task of translating these instructions into the specific enumerations of Article I, Congress

final version of Resolution VI, Congress should be empowered "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation.[4] As described by its advocates, the broad principles of Resolution VI authorize congressional oversight of all collective action problems of national importance, and all state legislative action that interrupts national "harmony," regardless of subject matter.

Although Resolution VI was never added to actual text of the Constitution, its advocates argue that the members of the Philadelphia Convention adopted the Resolution and sent the same to the Committee of Detail with the expectation that the resulting text would be based on this overriding principle of national power. When the Convention accepted the text of Article I, Section 8, the argument goes, they did so with the understanding that this section was the textual *enactment* of Resolution VI.[5] Resolution VI advocates also claim (or rely on the claim) that Philadelphia Convention member James Wilson publicly declared during the ratification debates that the framers based Article I, Section 8 on the principle of Resolution VI.[6] This opens the door to claims that the ratifiers and the

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> was to enjoy authority to "legislate in all Cases for the general interests of the Union, and also in those Cases in which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of Individual Legislation."

Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 108 fn* (2005). See also, Akhil Reed Amar, America's Constitution and the Yale School of Constitutional Interpretation, 115 Yale L.J. 1997, 2003 n.23 (2006). One can also find increasing use of Resolution VI in briefs filed before the United States Court in cases involving the proper construction of federal power. See, e.g., Susan Seven-Sky v. Holder (Appellate Brief) (C.A. D.C. July 07, 2011), Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellees; U.S. Dept. of Heath and Human Services v. Florida, 2011 WL 1461595 (Appellate Brief) (C.A.11 April 07, 2011), Brief of Amici Curiae State Legislators in Support of Defendants-Appellants 10-11, (Nos. 11-11021-HH, 11-11067-HH.) (arguing that court should use Resolution VI as a guide to interpreting the scope of federal power); Commonwealth of Virginia v. Sebelius, 2011 WL 792217 (Appellate Brief) (C.A.4 March 07, 2011), Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellant and Reversal, (Nos. 11-057, 11-1058.) (same).

[4] 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 21 (Max Farrand, ed., 1911) [hereinafter "FARRAND"] (Journal of the Convention).

[5] Balkin, LIVING ORIGINALISM, *supra* note 3, at 145.

[6] See, e.g., *id.* at 143. See also, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 117, 124 (2011); Andrew Koppelman, *Bad News For Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 Yale L.J. Online 1, 12-13 (2011).

general public were on notice that the text represented an effort to enshrine the principles of Resolution VI.

A close reading of the historical sources, however, shows that the framers did not view Article I, Section 8 as authorizing federal action in all cases in which the "states separately are incompetent." In fact, they expressly stated otherwise.[7] Not only did the framers expressly decline to read the final text as enacting the principles of Resolution VI, it turns out that Resolution VI played no role whatsoever during the ratification debates. Claims to the contrary are based on an historical mistake.

Part I of this article presents the historical development of Resolution VI during the Philadelphia Convention. Part II then explores the history-based arguments advocates rely upon in making their case for Resolution VI-based readings of Article I, Section 8. Part III takes a closer look at the Philadelphia Convention and the discussions that followed the convention's decision to replace the language of Resolution VI with a list of enumerated powers. These discussion show that the framers did not believe Article I, Section 8 empowered Congress to act in all cases involving the national interests where states were separately incompetent to act. Finally, Part IV focuses on the claim that James Wilson informed the Pennsylvania Ratifying Convention that the framers based Article I, Section 8 on the principles of Resolution VI. This claim turns out to be incorrect; Wilson actually referenced his own preferred principle—one rejected by the Convention but which he nevertheless believed was "better" than Resolution VI.

I. THE HISTORY OF RESOLUTION VI

A. May, 1787

On May 29, 1787, Virginia delegate Edmund Randolph submitted the so-called "Virginia Plan" to his fellow members of the Philadelphia Constitutional Convention. The original 6th Resolve of that Plan stated in part that

> [T]he National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the

[7] See *infra* note ___ and accompanying text.

> harmony of the United States may be interrupted by the exercise of individual Legislation.[8]

When the members first discussed Resolution VI, the Convention had been in session for less than two weeks and a quorum of delegates had been present for only a few days. Although no one could have known it at the time, there would be no serious progress on the Constitution until mid-July and the adoption of the "great compromise" on congressional representation.[9]

Even in these early days of the convention, however, the wording of Resolution VI raised concerns. Two days after it was introduced, South Carolina's Charles Pinckney and John Rutledge both "objected to the vagueness of the term *incompetent*, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition."[10] Fellow South Carolina delegate Pierce Butler feared that "we were running into an extreme in taking away the powers of the States," and he asked Edmund Randolph to explain "the extent of his meaning."[11]

In response, Randolph "disclaimed any intention to give indefinite powers to the national legislature" and insisted that "he was entirely opposed to such an inroad on the state jurisdictions."[12] However, it was too early in the debates to try and specify the proposed powers of the national government. According to Randolph, "it would be impossible to define the

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[8] 1 FARRAND, *supra* note 4, at 21. The full text of the original resolution read:

> Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the union agst. any member of the Union failing to fulfill its duties under the articles thereof.

1 FARRAND, *supra* note 4, at 21.

[9] See Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 61 (1996).

[10] 1 FARRAND, *supra* note 4, at 53.

[11] *Id.*

[12] *Id.*

powers and the length to which the federal Legislature ought to extend *just at this time*."[13] According to James Madison, the convention had been "wandering from one thing to another without seeming to be settled in any one principle."[14] For the convention to move forward, Madison advised, "it was necessary to adopt some general principle on which we should act."[15] The assembly quickly disposed of the matter and voted 9-0 in favor of "giving powers, in cases to which the States are not competent" and accepted the additional clauses "giving powers necessary to preserve harmony among the States" "with[ou]t debate or dissent."[16]

B. July, 1787

It was not until mid-July, more than a month later, when the Convention returned to Resolution VI and discussed federal power "to legislate in all cases to which the separate states are incompetent; or in which the harmony of the U.S. may be interrupted by the exercise of individual legislation." [17] By that time, the Convention had debated and settled some of the most critical issues of the Convention. The members had debated and rejected the New Jersey Plan, which proposed only a minor increase in federal power.[18] Likewise, the convention had debated Alexander Hamilton's "British Plan"[19] which envisioned a complete consolidation of the states into a single national government, but ultimately decided in favor of the "first plan" (Virginia's).[20]

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[13] *Id*. at 60 (emphasis added).

[14] *Id*.

[15] *Id*. In fact, at this point Madison was growing increasingly doubtful about the "practicability" of an "enumeration and definition of the powers necessary to be exercised by the national Legislature." *Id*. at 53.

[16] *Id*. at 54.

[17] 2 FARRAND, *supra* note 4, at 17.

[18] 1 FARRAND *supra* note 4, at 322.

[19] *Id*. at 282. Hamilton himself viewed his plan as suggested "amendments" to the Virginia Plan. See *id*. at 291.

[20] *Id*. at 327. Hamilton's plan expressly called for the erasure of state sovereignty. See *id*. at 283 ("no amendment of the confederation, leaving the states in possession of their sovereignty could possibly answer the purpose"); *id* at 323 (June 19th) ("By an abolition of the States, he meant that no boundary could be drawn between the National and State legislatures; that the former must therefore have indefinite authority. If it were limited at all, the rivalship of the states would gradually subvert it. . . . As States, he thought they ought to be abolished."). In fact, a number of members rejected the idea that the states had ever enjoyed independent sovereign status. See, e.g., *id.* at 323 (remarks of Mr. King); *id*. at 324 (remarks of Mr. Wilson) ("Mr. Wilson, could not admit the doctrine that when the Colonies became independent of G. Britain, they became independent also of each other. He read the Declaration of Independence, observing thereon that the *United Colonies* were declared to be free and independent states; and inferring that they were independent, not

Instead of the state-centric minimalism of the New Jersey Plan and the anti-state nationalism of Hamilton's Plan, the Convention ultimately compromised on the issue of state versus federal power; the House membership would be apportioned according to state population, while the states would receive equal membership in the Senate.[21] With the stumbling block of representation seemingly resolved, the assembly could now move towards defining the proposed powers of the federal government.

On July 16, immediately following the critical vote on representation in the House and Senate, the Convention attempted to resume its discussion of Resolution VI. Starting where he had left off a month before, Pierce Butler "call[ed] for some explanation of the extent of this power; particularly of the word *incompetent.* The vagueness of the terms rendered it impossible for any precise judgment to be formed."[22] Echoing earlier counsels of patience, Massachusetts delegate Nathaniel Gorham replied that the time for precision had not yet come and that, until it did, it was better to leave the principle undefined. As Gorham explained, "[t]he vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise and explicit."[23]

Butler's South Carolinian colleague John Rutledge chaffed at the continued delay and "urged the objection started by Mr. Butler and moved that the clause be should be committed to the end that a specification of the powers comprised in the general terms, might be reported."[24] This time, Rutledge and Butler had more members on their side. The vote on Rutledge's motion to recommit ended in a tie, 5-5, [25] which had the effect of maintaining the status quo. It was clear, however, that after more than a month there was a growing desire to define the powers of the national government.[26]

Individually but *Unitedly* and that they were confederated as they were independent, States.").

[21] For a discussion of the compromise over representation and its importance to the success of the convention, see Rakove, Chapter IV, ORIGINAL MEANINGS, *supra* note 9.

[22] 2 FARRAND, *supra* note 4, at 17 (Madison's notes).

[23] *Id*. (in his notes, Madison spells Gorham's name "Ghorum").

[24] *Id*.

[25] *Id*.

[26] According to Jack Rakove, even though the vote ended in a stalemate and the continuation of the status quo, the fact that there were now five votes in favor of replacing the Resolution with a list of enumerated powers "already pointed to the course debate would take." See Rakove, *supra* note 9, at 178.

The problem was that the situation had dramatically changed since Randolph had first introduced Resolution VI. The assumptions about national representation and power that had informed the original Virginia Plan no longer governed after the day's earlier vote on representation. Instead of a legislature whose membership was based on national population, the Senate would be made up of individuals appointed by the state legislatures, with each state having the same number of senators regardless of population. As a result of the compromise, the smaller states would have vastly more power in the national government than that anticipated under the original Virginia Plan and Resolution VI.

This unanticipated turn of events caught some of the original advocates of Resolution VI unprepared and in need of time to rethink their approach to national power. Edmund Randolph, for example, did not want to engage in any discussion of national power until the large states first had an opportunity to consider whether and how to proceed in light of the smaller states' surprising victory. As Randolph put it:

> The vote of this morning [the compromise on representation in the House and Senate] had embarrassed the business extremely. *All the powers given in the Report from the Come. of the whole, were founded on the supposition that a Proportional representation was to prevail in both branches of the Legislature.* When he came here this morning his purpose was to have offered some propositions that might if possible have united a great majority of votes, and particularly might provide agst. the danger suspected on the part of the smaller States, by enumerating the cases in which it might lie, and allowing an equality of votes in such cases. But finding from the preceding vote that they persist in demanding an equal vote in all cases, that they have succeeded in obtaining it, and that N. York if present would probably be on the same side, *he could not but think we were unprepared to discuss this subject further*. It will probably be in vain to come to any final decision with a bare majority on either side. For these reasons he wished the Convention might adjourn, that the large States might consider the steps proper to be taken in the present solemn crisis of the business, and that the small States might also deliberate on the means of conciliation.[27]

Over the objections of Connecticut and Delaware, Randolph's motion carried and the convention adjourned until the next day.[28] This allowed the

[27] 2 FARRAND, *supra* note 4, at 17. See also, Rakove, *supra* note 9, at 80.
[28] 2 FARRAND, *supra* note 4, at 19.

large states to meet and consider whether to press for a change in the compromised scheme of representation, or to find some other way to respond to the unexpected and unwelcomed composition of the national government.[29] For their part, the small states were unwavering on the point of equal representation in the Senate.[30] The choices left to the large states thus were either to abandon the Convention or find some other way to respond to the suddenly increased influence of the smaller states in construction and application of national policy. Ultimately, of course, the convention chose to abandon the language of Resolution VI and replace it with a list of enumerated powers. Before doing so, however, the convention engaged in one last round of debate over the proper wording of Resolution VI.

1. Roger Sherman's Proposal

On July 17th, Connecticut's Roger Sherman moved to replace the wording of Resolution VI with the following:

> To make laws binding on the People of the United States in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned. [31]

This was not so much an amendment as it was a complete revision of Resolution VI. Nothing is left of the original structure of Resolution VI or its language regarding state incompetency and the need to protect national harmony. Instead, Sherman's proposal divides those areas of concern to the national government from those areas of concern to the individual states. Congress was to have power over matters concerning "the common interests of the Union," while states maintained control over "matters of internal police" that did not concern "the general welfare of the United States." Sherman's proposal thus stood as an altogether different formulation of the general principle of congressional power. What was not clear, however, was whether Sherman's proposal amounted to *increase* or a *diminution* of proposed national power over that originally proposed in Resolution VI.

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[29] *Id.*

[30] *Id.* at 18 (Patterson: "No conciliation could be admissible on the part of the smaller States on any other ground than that of an equality of votes in the 2d branch.")

[31] *Id.* at 21, 25.

James Wilson immediately seconded Sherman's proposal and described the amendment "as better expressing the general principle" than Resolution VI.[32] Fellow Pennsylvanian Gouverneur Morris, on the other hand, opposed Sherman's language on the ground that States would claim independent police powers that "*ought* to be infringed in many cases."[33]

Morris's objection prompted Sherman to clarify the scope of federal power under his amended Resolution. "In explanation of his ideas," Sherman "read an enumeration of powers, including the power of levying taxes on trade, but not the power of direct taxation."[34] Morris pounced on this omission and wryly suggested that, since taxes on consumption would be "deficient," "it must have been the meaning of Mr. Sherman, that the Genl. Govt. should recur to quotas and requisitions, which are subversive of the idea of Govt."[35] Finding himself on the defensive, Sherman conceded that "[s]ome provision . . . must be made for supplying the deficiency of other taxation, but he had not formed any."[36]

Sherman's fellows probably considered Sherman's omission of the power to tax to be "a fatal defect" in his plan.[37] His proposed replacement language for Resolution VI failed on a vote of 2-8. Wilson, who had initially supported the proposal as superior to Resolution VI, withdrew support after hearing Sherman's narrow interpretation of the language.[38]

2. Gunning Bedford's Amendment

Immediately following Sherman's failed amendment, Delaware delegate Gunning Bedford moved to alter the language of Resolution VI so that it read:

> [T]o legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation.[39]

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[32] *Id*. at 26.
[33] *Id*.
[34] *Id.*
[35] *Id*.
[36] *Id*.
[37] Rakove, *supra* note 9, at 81.
[38] 2 FARRAND, *supra* note 4, at 26.
[39] *Id*.

Edmund Randolph, the man who originally submitted Resolution VI, now found himself opposed to such broad articulations of federal power. Randolph was uncomfortable with the suggested change since "[i]t involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police. The last member of the sentence is (also) superfluous, being included in the first."[40] Bedford responded that the change did not amount to any expansion of federal power over that of Randolph's original proposal. As Bedford explained, since Randolph's proposal anticipated that "*no State* being *separately* competent to legislate for the *general interest* of the Union," Bedford's own proposal was not "more extensive or formidable than the clause as it stands."[41]

The convention passed Bedford's motion to amend Resolution VI by a single vote (6-4),[42] and then approved his proposed language on a vote of 8-2.[43] This was the final discussion of Resolution VI before the assembly sent the language to the Committee of Detail on July 23, 1787.[44] What emerged from that Committee is the familiar list of enumerated powers contained in Article I, Section 8.

Aftermath

After the vote of July 17th, Resolution VI was never again mentioned during the Convention. Although during the ratification debates some members referred to discussions in the Convention, no one appears to have mentioned Resolution VI, much less held up the Resolution as a guide to interpreting national power. Nor can one find any discussion of Resolution VI in early case law or scholarly treatises. St. George Tucker's 1803 "*Of the Constitution of the United States*," for example, makes no mention of Resolution VI.[45] Indeed, the existence of Resolution VI of the Virginia Plan did not become a matter of public record until 1821 with the publication of Convention Secretary William Jackson's *Journal of the*

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[40] *Id.*

[41] *Id*. at 27 (emphasis in original).

[42] *Id.*

[43] *Id.*

[44] See 2 FARRAND, *supra* note 4, at 95-96. The Committee consisted of Oliver Ellsworth (CT), Nathaniel Gorham (MA), Edmund Randolph (VA), John Rutledge (SC), and James Wilson (PA). *See id*. at 97 (Journal of the Convention).

[45] See, St. George Tucker, I BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA, Appendix D: Of the Constitution of the United States (1803).

Convention.[46] To the extent that the Resolution is mentioned in later nineteenth century treatises, it is only as part of the story of the Convention. The Resolution is never presented as representing a principle or rule for interpreting federal power.[47] In fact, Resolution VI does not appear in the United States Reports until more than a century later when Justice William Henry Moody cited it in an 1908 dissent.[48] Justice Oliver Wendell Holmes may have referred to Resolution VI in the 1920 case *Missouri v. Holland*,[49] but no Supreme Court majority expressly refers to Resolution VI until the 1936 decision in *Carter v. Carter Coal*, doing so even then only in order to *dismiss* the Resolution as a reliable guide to constitutional interpretation.[50]

Of the framers themselves, I have discovered only a single instance in which a framer commented on the Convention's initial use of Resolution VI. In 1833, writing in response to John Tyler's accusation of a secret plan in the Philadelphia Convention to eradicate the sovereign existence of the states, James Madison explained:

> Let it next be seen what were the powers proposed to be lodged in the Gov[t] as distributed among its several Departments. The Legislature, each branch possessing a right to originate acts, was to enjoy,
>
> 1. the legislative rights vested in the Congs of the Confederation. (This must be free from objection, especially as the powers of that description were left to the

[46] Available at the Online Library of Liberty, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1935&chapter=118621&layout=html&Itemid=27

[47] For example, in his Commentaries, Joseph Story mentions Resolution VI only as part of his discussion regarding the origins of the power tax for the general welfare—language that Story believed was borrowed from Resolution VI. See Joseph Story, 2 COMMENTARIES ON THE CONSTITUTION, Section 925 (1833). Story says nothing about Resolution VI serving as a principle for understanding delegated federal power. Other early treatises say nothing at all about Resolution VI. See, e.g., Peter Du Ponceau, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES (1834); James Kent, COMMENTARIES ON AMERICAN LAW (1826-1830). See also, William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 73(1825) ("The enumerated powers, which we now proceed to consider, will be found to relate to, and be consistent with, the main principle; the common defense and general welfare.").

[48] *Howard v. Central Ill. R. Co.*, 207 U.S. 463, 521 (Moody, J. dissenting).

[49] See *Missouri v. Holland*, 252 U.S. 416, 433 (1820) (Holmes, J.) ("What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.").

[50] 298 U.S. 238, 292 (1936). But see, Brief of the United States, *A.L.A. Schechter Poultry Corp. v. United States*, 1934 WL 31976.

selection of the Convention)

> 2. Cases to which the several States, would be incompetent or, in which the harmony of the U. S. might be intercepted by individual Legislation. (*It cannot be supposed that these descriptive phrases were to be left in their indefinite extent to Legislative discretion.* A selection & definition of the cases embraced by them was to be the task of the Convention. If there could be any doubt that this was intended & so understood by the Convention, it would be removed by the course of proceeding on them as recorded, in its Journal. Many of the propositions made in the Convention, fall within this remark; being, as is not unusual general in their phrase, but, if adopted to be reduced to their proper shape & specification.)[51]

According to Madison, Resolution VI was no more than a placeholder of sorts, adopted with the expectation that its scope would be later "reduced to its proper shape and specification" through the adoption of a list of enumerated powers.[52] In this way, the scope of federal power would not be left to "Legislative discretion."

II. CURRENT THEORIES OF "RESOLUTION VI"

Despite the lack of textual inclusion and a complete absence of historical scholarly commentary and judicial reliance, a growing number of contemporary constitutional scholars nevertheless claim that Resolution VI ought to serve as a guide for the proper construction of federal power. The interpretive method by which Resolution VI is brought to bear on contemporary issues of federal power varies. Some scholars, for example, adopt a purely instrumentalist methodology and view Resolution VI as merely an early and commendable approach to determining the scope of national power, regardless of the original understanding of the

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[51] James Madison to John Tyler (1833) (Farrand notes that the letter apparently was never sent) *in* 3 FARRAND, *supra* note 4, at 526 (emphasis added).

[52] Madison's letter seems to capture the broad sense of the framers, even if Madison himself entertained "doubts" about the "practicability" of enumeration early in the Convention. See 1 FARRAND, *supra* note 4, at 53 ("Mr. Madison said that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but he had also brought doubts about its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell.").

Constitution.[53] Others scholars, however, stress the role Resolution VI played in both the framers' intent and the public debates over Article I, Section 8. This article focuses on the latter groups' originalist claims. Before proceeding to the evidence, however, it is important to note the remarkably strong nature of the claims being made in support of a Resolution VI-based reading of federal power.

What is most striking about Resolution VI advocates are their claims that Resolution VI can serve as either a *replacement* for the text, or as the *functional equivalent* of the text. To these theorists, the text of Resolution VI determines the scope of federal power under Article I, Section 8.[54] Any reading of Article I, Section 8 that does not allow Congress to regulate in *all cases* involving the general interests of the Union in which the States are separately incompetent, or in all cases in which the harmony of the United States may be interrupted by the exercise of individual Legislation must be an incorrect interpretation of the text. This kind of one-to-one relationship between the Resolution and Article I, Section 8 allows the one to act as a stand-in for the other.

Andrew Koppelman, for example, claims that Resolution VI was "translated by the Committee of Detail into the present enumeration of powers in Article I, Section 8, which was accepted as the *functional equivalent* by the Convention without much discussion."[55] The most influential Resolution VI advocate, Jack Balkin, claims that the principle of Resolution VI was the "animating purpose" behind Article I, Section 8, and that "the purpose of enumeration was not to *displace* the principle [of Resolution VI] but *to enact it*."[56] Accordingly, "commerce *is* 'among the several states' *when* states are 'severally incompetent' to deal with a particular issue, 'or the Harmony of the United States may be interrupted by the exercise of individual legislation.'"[57] Balkin also insists that "[b]ecause

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[53] See e.g., Cooter & Siegel, *supra* note 3.

[54] Although most Resolution VI advocates concentrate on the Interstate Commerce Clause, the theory itself involves the proper reading of a particular clause in Article I, Section 8 or the Section in its entirety. [cites] It is not altogether clear whether Resolution VI advocates are claiming Article I, Section 8 in the *aggregate* must conform to the principle of Resolution VI, or whether individual provisions like the Interstate Commerce Clause must be read in a manner that matches the full range of power authorized by their reading of Resolution VI. At least one advocate believes Resolution VI informs the construction of one particular part of the Necessary and Proper Clause [see John Mikhail's work].

[55] Koppelman, *supra* note 3, at 12.

[56] Balkin, LIVING ORIGINALISM, *supra* note 3, at 145.

[57] *Id.* at 162.

all of Congress's powers were designed to realize the structural principle of Resolution VI, they inevitably *must* overlap to *ensure* that the new government would have power to legislate in *all areas* where the states were severally incompetent."[58] Balkin thus claims that the Resolution determines both the meaning and scope of power under Article I, Section 8.[59] Both Balkin and Koppelman grant the general principle of Resolution VI primacy of place in determining the meaning and scope of enumerated federal authority. This is a power-perfectionist reading whereby textual grants are stretched to perfectly fit (and accomplish) a general non-textual principle. The Resolution becomes the measure of the text.

It is possible, of course, that Resolution VI advocates are not really making claims as strong as the above quotes seem to indicate. For example, they might actually be arguing that, even if Resolution VI does not actually replace the text or control its semantic meaning, it nevertheless serves as a principle for guiding the gap-filling construction of the text. Even this more

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[58] *Id.* at 146.

[59] In his response to an earlier draft of this article, Jack Balkin objects to my characterizing him as claiming Resolution VI provides the meaning of powers listed in the Article I, Section 8. In a post on his blog "Balkanization," Prof. Balkin writes:

> I do not claim--as Lash incorrectly asserts in one of his posts--that the list of enumerated powers *means* Resolution VI or is somehow synonymous with Resolution VI. I claim only that in construing the scope of Congress's powers, we should employ this structural principle in crafting legal rules and legal doctrines. Moreover, in the specific case of the commerce clause, I believe that this principle helps us to decide what commerce is "among the several states."

Jack Balkin, post on Balkanization (Aug. 12, 2011) http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html)

In the above post, Balkin softens his asserted link between Resolution VI and the meaning of the Commerce Clause ("in the specific case of the commerce clause, I believe that this principle *helps us* to decide what commerce is "among the several states."). In his book, however, Balkin states "commerce *is* 'among the several states' *when* states are 'severally incompetent' to deal with a particular issue, 'or the Harmony of the United States may be interrupted by the exercise of individual legislation.'" Balkin, LIVING ORIGINALISM, *supra* note 3, at 162. Balkin also insists that "[b]ecause all of Congress's powers were designed to realize the structural principle of Resolution VI, they inevitably *must* overlap to *ensure* that the new government would have power to legislate in *all areas* where the states were severally incompetent." *Id.* at 146 (emphasis added). Although using Resolution VI as a "help" rather than a replacement or definitional rule seems a more modest and reasonable (if still historically unjustified) approach, it is not the approach Balkin uses in his book. Indeed, in LIVING ORIGINALISM, Balkin goes to great length to explain both why and how Congress's textually enumerated powers must be construed in a manner that fully accomplishes the structural principle of Resolution VI. See generally, *id*. at 138-182.

modest claim requires normative support, however. After all, the principle of federal power supposedly represented by Resolution VI is only one of many possible principles or rules of construction that might be brought to bear in applying the text of Article I, Section 8 to a legal dispute. Other rules include federalist rules of "strict construction,"[60] or institutional rules of judicial deference,[61] or rules that maximize particular conceptions of liberty.[62] Choosing Resolution VI (whatever its meaning) over other possible rules of construction requires a normative theory that justifies *any* reliance on Resolution VI.

The normative argument most often relied upon by Resolution VI advocates is that the Resolution reflects the original intention of the framers and was announced as such to the ratifying public. This, in turn, gives us good reason to use that principle as guide to contemporary construction of federal power.[63] These are claims sounding in the normative theory of originalism. Although not all Resolution VI advocates follow a standard form of originalism,[64] or originalism at all,[65] even the modest claim that reliance on Resolution VI is consistent with both framers intent and public understanding will have normative pull in the minds of many readers (and judges) who believe that original meaning and understanding ought to play a role in the contemporary interpretation and construction of Article I,

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[60] See, e.g., Lash, *The Eleventh Amendment and the Background Principle of Strict Construction*, *supra* note 80.

[61] See, e.g., Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[62] See, e.g., Randy E. Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

[63] This is not to say that all Resolution VI advocates believe that constitutional construction must always follow the original intentions of the framers or the original public understanding of the text. Some, in fact, expressly deny such restrictions on contemporary construction of the Constitution. See Balkin, LIVING CONSTITUTIONALISM, *supra* note 3, at 906-07. Nevertheless, all Resolution VI advocates use evidence of framers intent to legitimize and support their argument in favor of contemporary reliance on Resolution VI. In addition to sources cited in note 3, see note 27. Reliance on original intent or original meaning is not, of course, self-legitimating; use of original intentions or original understandings as guides to construction must itself be justified. For the purposes of this article, I explore only whether the originalist claims regarding Resolution VI meet the requirements of internal consistency in terms of being supported by available historical evidence.

[64] Jack Balkin, for example, follows a unique interpretive approach he calls "text and principle." See Balkin, LIVING ORIGINALISM, *supra* note 3, at 3-6.

[65] Cooter and Siegel rely on a pragmatic approach to judicial interpretation, while nevertheless noting that their approach to collective action problems is consistent with the framers embrace of the principles of Resolution VI. See Cooter and Siegel, *supra* note 3, at 117-19.

Section 8. A close investigation of the historical sources, however, reveals serious problems with any history-based use of Resolution VI, modest or otherwise.

III. RESOLUTION VI AND THE ORIGINAL INTENT OF THE FRAMERS

Because Resolution VI was not added to the text of the Constitution, Resolution VI advocates generally rely on arguments regarding the original framers' intent. Original intent originalism has a long and checkered history,[66] and most originalists today look beyond bare considerations of framers' intent in their search for the original meaning and understanding of the Constitution. Even if it were possible to isolate "group intent," there does not appear to be any normative reason why courts should favor the views of the framers as a matter of constitutional law. Indeed, the framers themselves did not claim to have any special authority to determine the content of fundamental law—thus the decision to keep the convention proceedings a secret until long after ratification. As James Madison later explained, as an act of popular sovereignty, it was the views of the ratifiers which should determine the meaning of the text, not that of the framers:

> [W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.
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> If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.[67]

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[66] For criticism of original intent originalism, see, Brest, *The Misconceived Quest for the Original Understanding*, *supra* note 29; Powell, *Original Understanding of Original Intent*, *supra* note 28.

[67] 5 ANNALS OF CONG. 776 (1796) (Remarks of Rep. Madison). See also, H. Jefferson Powell, *The Original Understanding of Original Intent*, *supra* note 28, at 937-39. Some scholars have accused Madison as a less than sincere proponent of ratifier understanding. See, e.g., Rakove, *supra* note 9, at 64 (arguing that Madison embraced the theory of ratifier understanding "less by his belief that they provided a viable method of interpretation than by the arguments of other speakers"). Even if true (which we cannot know), the criticism

It is thus for both normative as well as methodological reasons that originalists by and large have moved away from framers' intent originalism and towards an originalism based on the original public meaning of the document[68] as well as the original understanding of the ratifiers. This is a far more plausible approach to originalism and one that I address in some detail below. Nevertheless, because some originalists still follow original intent originalism,[69] and because all originalists (and all advocates of Resolution VI[70]) believe that information regarding the framers' understanding of their work is at least relevant to understanding the public meaning of words and phrases contained in the final text, it is worth exploring what we know, and do not know, about the intentions of the members who framed and adopted Resolution VI. It turns out that, whatever the intentions behind the introduction of the Resolution, not even the most nationalist of the framers understood Article I, Section 8 as authorizing federal power in all cases involving the national interest where the states individual were "incompetent."

A. The Intent Behind Resolution VI

Crafting a framers' intent argument in support of Resolution VI seems simple enough. By introducing and originally adopting the Resolution, the framers signaled their intent that Article I, Section 8 to be read in a manner that effectuates the principles of Resolution VI. In its final form, Resolution VI states that Congress has power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Thus, if the framers' intentions are to be fulfilled, then any matter involving "the general interests of the Union," or "to which the States are separate

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does not go to the merits of the theory. For the purposes of this article, I simply note that most originalists agree that the debates of the ratifying conventions provide a far more relevant source of original public understanding of the text than do the secret debates of the convention. To the extent that one embraces original meaning originalism as part of the normative theory of popular sovereignty, determining the consensus understanding of the sovereign ratifiers is particularly important.

[68] Solum, *What is Originalism*, *supra* note 28, at 15.

[69] See, e.g., Alexander & Prakash, *supra* note 28.

[70] This includes theorists like Jack Balkin who otherwise eschews relying solely on the original intentions of the framers. See, e.g., Balkin, LIVING ORIGINALISM, *supra* note 3, at 912 n.27 ("I have argued that Resolution VI provides the proper structural principle and the best explanation for the list of enumerated powers, and, moreover, that this principle was actually intended by the Philadelphia Convention.").

incompetent," or "in which the harmony of the United States may be interrupted by the exercise of individual legislation," falls within the constitutional powers of Congress.

Some aspects of the framers' intent argument remain unclear. For example, Resolution VI advocates do not specify whether *every* clause in Article I Section 8 should be read as the "functional equivalent" or the "enactment" of Resolution VI,[71] or whether only *some* of them should be read as a functional equivalents, or whether *none* of them individually contains the full breadth of Resolution VI, but only the *aggregated* clauses contain the full breadth of power represented by Resolution VI.[72] Most often, Resolution VI scholars focus on the Commerce Clause (though not exclusively) and argue that at least *that clause* should be read in a manner that fulfills the principle of Resolution VI.[73] According to this view, power to "regulate commerce among the several states" should be read as allowing Congress to regulate any matter involving the "general interests of the Union," or collective action problems "to which the states are incompetent" or "interrupt the harmony of the United States."[74]

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[71] See, e.g., Balkin, LIVING ORIGINALISM, *supra* note 3, at 912 n.27 ("In my view, the principle of Resolution VI underlies and should inform the proper construction of all of Congress's enumerated powers.").

[72] For example, even if the Interstate Commerce Clause itself could not reasonably be interpreted to reach every collective action problem of national import, such problems might be adequately addressed through a combined use of Article I powers. Balkin seems to suggest as much when he talks about Resolution VI calling for a reading of Article I, Section which allows the powers to overlap in different ways, depending on the circumstances. See *id.* at 146.

[73] See, e.g., *id.* See also, Koppelman, *supra* note 3, at 12-13. John Mikhail is an exception here. Mikhail argues that the latter portions of the Necessary and Proper Clause should be read as effectuating the principles of Resolution VI. Mikhail, *supra* note __ at ___. I am not sure whether Mikhail believes that this is the *only* part of Article I, Section 8 which ought to be read in light of Resolution VI. Regardless, the evidence discussed below cuts as strongly against *all* Resolution VI-based power-perfectionist readings of all or any part of Article I, Section 8.

[74] Occasionally, Resolution VI advocates leave out the opening clause involving the power to legislate in "all cases for the general interests of the Union" when quoting Resolution VI. See, e.g., Koppelman, *supra* note 3, at 12 (quoting Resolution VI as power to "legislate in all cases . . . to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation"); Balkin, LIVING ORIGINALISM, *supra* note 3, at 146 ("And what principle explains what *was* delegated? Those situations in which 'the States are separately incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation.'"). However, because their arguments rely on the framers' decision to adopt the Resolution, I presume that the full Resolution, and not just parts of it, serves as a guide to the construction of congressional power.

Advocates of Resolution VI not only leave unexplained how it operates on a text-by-text basis, they also fail to explain why the Resolution should not be read as no more than a placeholder. Resolution VI advocates believe the Resolution stands for the proposition that "Congress shall have power to regulate all cases [arising now or hereafter] that involve the general interests of the United States, or to which the states are incompetent or which involve state legislation that interrupts national harmony." However, the text could actually mean something quite different: that "Congress shall have power to regulate all cases [that this Convention will later determine are matters] that involve the general interests of the United States, or to which the states are incompetent, or involve state legislation that interrupts national harmony." The former would be a broad grant of discretionary federal power to regulate any matter falling within the "national interest," whether textually enumerated or not. The latter understanding, on the other hand, would make Resolution VI a kind of placeholder until the Convention ultimately went through the difficult effort of enumerating those matters that a majority of the convention believed ought to be placed under federal control. As historian Jack Rakove explains:

> This open-ended language [of Resolution VI] may be interpreted in two ways. On the one hand, it may be viewed as an authentic formula for a national government whose legislative power would extend as its own discretion saw fit. On the other, it can also be read as a textual placeholder to be used so long as the great issue of representation remained unresolved, but then to be modified or even replaced by a list of particular powers.[75]

Rakove himself embraces the placeholder theory of Resolution VI. Rather than representing the "enactment" of Resolution VI, Rakove believes that "the process that unfolded during its [the Committee of Detail] ten days of labor is better explained as an effort to identify particular areas of governance where there were "general interests of the Union," where the states were "separately incompetent," or where state legislation could disrupt the national "Harmony."[76] According to Rakove, the fact that no one in the convention objected to Article I, Section 8 as conflicting with Resolution VI could simply reflect that framers consensus belief "that the scope of national lawmaking would remain modest."[77] Even with the addition of the Necessary and Proper Clause, "[t]here is no reason to think

[75] Rakove, *supra* note 9, at 177-78.
[76] *Id*. at 178.
[77] *Id*. at 179.

that the framers believed [that Clause] would covertly restore the broad discretionary conception of legislative power in the Virginia Plan."[78] Rather, the "debate moved the Convention away from the implications of the Virginia Plan, with its indefinite notion of the powers of the national government, and towards a more modest set of duties."[79]

The move towards a "more modest set of duties" makes sense in light of the changed circumstances since the Resolution was first introduced. The equal representation of states in the Senate by way of state legislature-appointed senators gave pause to the very men who first introduced Resolution VI. It is at this precise point, the adoption of the compromise, that Madison biographer Ralph Ketcham identifies Madison's shift from nationalism to federalism.[80] In any event, we do not need to wonder whether the Convention believed Article I, Section 8 must be read to fulfill the broad general principles of Resolution VI. They expressly rejected such a reading.

B. The Proposed Power of Incorporation in Cases When "Individual States May be Incompetent"

On August 6, the Committee of Detail presented the convention a list of enumerated powers that became Article I, Section 8.[81] On August 20th, Madison submitted to the Committee of Detail a list of additional powers "to be added to those of the General Legislature," including powers

> "To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent"
>
> "To secure to literary authors their copyrights for a limited time"
>
> "To establish a University"[82]

Although this initial effort to allow for the power to grant charters of incorporation was unsuccessful, on September 14th Madison tried again, this time using a motion by Benjamin Franklin to allow Congress "a power to

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[78] *Id*. at 180.

[79] Rakove, *supra* note 9, at 177.

[80] Ralph Ketcham, JAMES MADISON 215. Indeed, Ketcham reports the compromise triggered complete reversal by large and small state representatives in terms of their support for broad national powers for the remainder of the convention. See *id.*

[81] 2 FARRAND, *supra* note 4, at 177.

[82] *Id*. at 325.

provide for cutting canals where deemed necessary."[83] Madison "suggested an enlargement" of Franklin's motion so that Congress would have the power "*to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent.*"[84]

If the members understood the language of Article I Section 8 as granting Congress the power to legislate in "*all cases* involving the general interests of the Union," where states were "incompetent," or where state legislation interrupted national "harmony," then there would have been no need for Madison's motion. By definition, Congress would have power to act in "*all cases*" "where the interest of the United States might require" (the "general interests of the Union") and where the legislative provisions of individual states may be incompetent" (a *quote* from the language of Resolution VI).[85] From the conversation that followed the proposal, it is clear the members did not understand Article I, Section 8 as enacting the general principle of Resolution VI.

Here is the discussion as noted by James Madison:

> Mr. Madison suggested an enlargement of the motion into a power "*to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent*". His primary object was however to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for--The political obstacles being removed, a removal of the natural ones as far as possible ought to follow. Mr. Randolph 2ded. the proposition.
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> Mr King thought the power unnecessary.

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[83] *Id.* at 615.

[84] 2 FARRAND, *supra* note 4, at 615.

[85] Others have pointed out the significance of discussions in the latter part of the convention that suggest the framers did not believe they had granted Congress plenary power. See, e.g., Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55, 59 (2010); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause*, 85 Iowa L. Rev. 1, 39-40 (1999). To my knowledge, no previous scholarship has noted the particular relevance of the discussion relating to charters of incorporation and claims that the framers understood Article I, Section 8 as having authorized Congress to regulate matters of national importance to which the states were separately incompetent.

Mr Wilson. It is necessary to prevent *a State* from obstructing the *general* welfare.

Mr King--The States will be prejudiced and divided into parties by it--In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.

Mr. Wilson mentioned the importance of facilitating by canals, the communication with the Western Settlements--As to Banks he did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended. As to mercantile monopolies they are already included in the power to regulate trade.

Col: Mason was for limiting the power to the single case of Canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson.

The motion being so modified as to admit a distinct question specifying & limited to the case of canals.

N-- H-- no-- Mas. no. Ct. no-- N-- J-- no-- Pa ay. Del. no-- Md. no. Va. ay. N-- C-- no-- S-- C. no-- Geo. ay. [Ayes--3; noes--8.][86]

[86] 2 FARRAND, *supra* note 4, at 615-16 (Madison's notes) (emphasis added to Madison's proposal). The motion on the floor was Franklin's proposal to allow "a power to provide for cutting canals where deemed necessary." 2 Farrand, *supra* note 4, at 615. Madison proposed "enlarging" the motion so that it authorized "charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." *Id.* According to Madison's notes as reported in Farrand, the ultimate vote involved "[t]he motion [Franklin's] being *so modified* as to admit a distinct question & limited to the case of canals." *Id.* at 616. It is not altogether clear what this means. Presumably, Franklin's motion was modified to include Madison's suggested enlargement to include corporate charters "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," but limited to the case of canals. This modified version would have tracked both men's concerns that power be granted only when "necessary" (Franklin) or "required" (Madison) and would have satisfied Madison's "primary object" which was "to secure an easy communication between the States," as well as made a successful vote more likely by limiting the grant to just those cases were a charter was "required" by the national interests." There are,

In this short but important conversation, we learn a number of things. First, no one in the convention thought that Congress had been granted power to regulate matters in all cases involving the "general interest of the Union" or to which the states were "incompetent." Otherwise, Madison's proposal "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent" would be needless.

It also appears that no one thought Article I Section 8 granted Congress power to legislate in cases where the actions of the states interrupted the harmony of the United States. James Wilson, for example, supported Madison's proposal because he thought Congress did not currently have power to "prevent states from obstructing the general welfare." Unless we are to think that one can "obstruct the general welfare" without interrupting "the harmony of the United States," it appears that Wilson did not think that either power currently existed *anywhere* under Article I, Section 8, whether under the Commerce Clause or the Necessary and Proper Clause. In fact, it appears that Wilson—surely one of the strongest supporters of broad federal power--did not think Congress had power to incorporate a bank. Wilson's response regarding "mercantile monopolies" was that Congress already had such power. His response to the Bank objection, on the other hand, was that granting such power would not cause as much objection in Philadelphia and New York as Mr. King claimed. As for Col. George Mason, he did not think even *mercantile* monopolies had been authorized under Article I, Section 8.

Had any member of the convention thought that Resolution VI was in anyway still operative, either as a rule of construction or as the "functional equivalent" of what they had accomplished in adopting Article I, Section 8, surely someone would have saved Madison the trouble by pointing out that Congress *already had the power* to act in all cases where "the legislative provisions of individual states may be incompetent." No one, in fact, said a word about Resolution VI, despite Madison's use of the *same language* (state "incompetency") as Resolution VI. Instead, the convention rejected

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however, other possibilities. For example, it is possible that Franklin's motion was modified to allow "a power [to grant charters of incorporation for] cutting canals where deemed necessary." What is unlikely, however, is a modification of Franklin's motion that removed both Franklin's condition ("where deemed necessary") *and* Madison's condition ("where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent."). Regardless, the final form of the motion does not affect the nature of the conversation discussed above.

Madison's efforts to add a power that Resolution VI advocates claim the convention already believed it had enacted.[87]

Resolution VI advocates might object that this conversation reflects only the rejection of an expected application of a principle, not a rejection of the principle itself. This objection reflects a distinction made by some originalists between original meaning and original expected application.[88] According to this view, although the original meaning of the text has legal authority, the original expected application of the text does not. So, for example, even if the framers did not expect (or intend) the powers of Article I, Section 8 to be construed in a manner allowing Congress to grant corporate charters for the construction of canals, this is only their particular expected construction of the text. They could understand the text as allowing Congress to act in matters affecting the national interests where states are incompetent, but not believe that general power includes this particular application. One can, in other words, reject a particular application of a principle without rejecting the principle itself. Therefore, the argument might go, the rejection of power to grant charters for the cutting of canals tell us little about the framers' embrace of Resolution VI and its relationship to Article I, Section 8.

The way in which Madison framed his motion, however, and the manner in which Wilson supported it, directly cut against such a counter-argument. Madison did not just propose power to grant charters of incorporation, he proposed allowing such charters "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." To illustrate the distinction, consider the powers that Madison proposed at the same time he initially proposed the power to charter corporations:

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[87] Although it is possible to read King's comment "it is not necessary," as indicating King's belief that the power t grant charters already existed, this seems unlikely when viewed in its full context. King could have meant that it was not necessary for Congress to have such a power at all. This is how Wilson understood King's comment, and Wilson immediately responded that it *was* necessary for Congress to have such a power in order "to prevent *a State* from obstructing the *general* welfare." When King spoke next, he did not claim that Congress already had such power, but instead pointed to the problems that would arise if such a power were granted. Although one could argue that King actually believed such power existed and merely wanted to avoid actually *enumerating* such a power, this is not what King said and it is not how he was understood by his colleagues.

[88] For discussions of originalism and "original expected applications" see Balkin, LIVING ORIGINALISM, supra note 3, at 8-12; Lawrence Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923, 934 (2009).

> "To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent"
>
> "To secure to literary authors their copyrights for a limited time"
>
> "To establish a University"[89]

Only the first demands that certain conditions be met before the power is authorized: charters may be granted "where the public good requires them" *and* "the authority of a single State may be incompetent." When Madison later repeated his effort to authorize charters of incorporation, he again limited the power to only those cases "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." In both cases, to claim that Congress needed such power was to claim that, even after the adoption of Article I, Section 8, there remained matters beyond the power of Congress *even when* required by the national interest and were beyond the competency of the states. And, in fact, the discussion shows that the members did not believe Congress already had such power. To believe the *power* did not currently exist when the conditions triggering the principle existed was to believe the *principle* had not been adopted.[90]

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[89] *Id*. at 325.

[90] In a blog post written in response to an early draft of this article, Balkin presents an analogy that he believes illustrates how the incorporation dialogue represents nothing more than a rejected *application* of Resolution VI:

> Imagine that a group of ten people agree that government will uphold "equal protection of the laws." Two of them argue that now they should support same sex marriage, because this would secure equal protection of the laws. The other people in the room disagree, a vote is held, and the two supporters are outvoted. Does this vote mean that the group has rejected the basic principle of equal protection, or does it mean merely that they disagreed about how to apply the principle to concrete circumstances? The latter, surely, even if we agree with the losers on the merits. But according to Lash's argument, this vote would be clear evidence that the group has abandoned the principle of equal protection because the two proponents specifically invoked the principle in their arguments.

Jack Balkin, post from *Balkinzation* (http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html). This would be a more persuasive rejoinder if it reflected what actually happened in the discussion over the power of incorporation. It does not. Madison did not propose the power to grant charters "*because* doing so was in the national interest and the states are incompetent." He proposed allowing such charters "*where* the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." This is a conditional grant of power that comes into existence only when the identified principle is triggered (the national interests *require* a charter and states may be incompetent

One might argue that Madison actually believed such power already existed and he was making the proposal only "for greater caution." But there are numerous problems with reading the colloquy in this manner. First of all, although the framers were quite capable of making such an argument,[91] no one did so in this case. Secondly, the idea that Madison held an unstated belief that Article I, Section 8 harbored power to grant charters of incorporation seems quite unlikely given Madison's consistent denial that Article I, Section 8 properly construed did not include the power to grant charters of incorporation.[92] Madison's life-long position on the matter

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to grant it). Had Balkin created a truly analogous hypothetical, it would have looked something like this:

> "Imagine that a group of ten people agree that government will uphold "equal protection of the laws." Two of them argue that now they should support same sex marriage *in cases where the denial of such marriages truly violates the government's duty to uphold "equal protection of the laws."*

This is analogous to Madison's proposed *conditional* charter power: the right of same sex marriage comes into existence only where the identified principle is actually triggered. In such a case, someone who denies the right to same sex marriage even in cases where the denial truly violates the government's duty to uphold equal protection of the laws is someone who denies the existence of such a duty. Likewise, rejecting the power of incorporation even in cases where required by the national interests and states are incompetent is itself a rejection of the principle that power should exist in *all cases* when required by the national interests and states are incompetent to act.

Of course, the more realistic same sex marriage hypo is the one constructed by Balkin, for it reflects current disagreement over whether the right to equal protection actually *is* violated by the denial of same sex marriage. But however more realistic, Balkin's hypo is not analogous to Madison's proposed power of incorporation *in those cases* where required by the national interest.

Finally, unlike the assumption in Balkin's hypothetical, we cannot claim apriori that the framers have adopted a particular principle. We are looking for evidence to see *whether they have or believe that they have* adopted that principle. In the incorporation dialogue, Madison and Wilson clearly do not understand the text of Article I, Section 8 as having granted Congress power to act in cases required by the national interest and states are incompetent (or where there is interruption of the national harmony). This appears to be the only discussion in the convention of Resolution VI-style principles after the decision to use the textual vehicle of enumerated powers. As a result, not only is *no* evidence the framers understood their list of enumerated powers to reflect the general principle of Resolution VI, the incorporation dialogue indicates they did not.

[91] See James Madison, Speech Introducing the Bill of Rights, *in* 1 ANNALS OF CONGRESS 452 (Joseph Gales ed., 1834).

[92] See, e.g., James Madison, Detached Memoranda, *in* JAMES MADISON: WRITINGS 756 (Jack Rakove ed., 1999) (criticizing Marshall's decision in *McCulloch v. Maryland*). Although as President Madison ultimately signed the Bill establishing the Second Bank of the United States, he did so in acquiescence to precedent and not because he had changed his mind about the proper reading of Article I, Section 8. See, Letter from James Madison

supports a conclusion that the most obvious reading of Madison proposal is the correct one: Madison sought to add the power because he did not think the power had been added.

But suppose one dismisses Madison's post-adoption claims regarding the powers of incorporation as no more than political posturing or an after-the-fact change of mind. Even if true (for which, again, there is no evidence), this cannot explain the remarks of James Wilson. Wilson supported Madison's proposal, not for "greater caution," but because it was "*necessary* to prevent a State from obstructing the general welfare." The most obviously reading of this declaration is that Wilson did not think the principles of Resolution VI were currently operative (otherwise, the power to prevent the "interruption of national harmony" would have covered Wilson's concern). And even if there is some other reasonable way to understand Wilson's use of the word "necessary," Wilson then *further* clarified that Madison's proposed power was unlike the power to grant mercantile monopolies because *that* power had already been "included in the power to regulate trade." It is inescapable that Wilson viewed Madison as suggesting the addition of a power not already granted in Article I, Section 8.

Once again, remember, we are not just talking about the power to grant charters of incorporation. Madison proposed adding such power in cases "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." If Article I, Section 8 must be read to effectuate the principles of Resolution VI, then this power by definition already existed. Wilson believed it did not. And it is hard to find a more ardent or more consistently nationalist framer than James Wilson.

In sum, there is no evidence that any member of the convention understood Article I, Section 8 as "functional equivalent" or the "enactment" of Resolution VI. Instead, there is express evidence that, once they had adopted the enumerated powers of Article I, Section 8, the members *did not* believe they had granted Congress power to act in all cases where collective action problems in the states raised issues of national importance (much less where the actions of individual states threaten to obstruct the "harmony" of the United States). At most, members believed that the general interests of the union and national harmony exceeded the individual competency of the states in *particular* enumerated instances.

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to Charles Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390-93 (Marvin Meyers ed., Brandeis University Press 1981) (1973).

IV. RESOLUTION VI AND ORIGINAL PUBLIC MEANING

As noted above, most modern originalists have moved away from the search for framers' intent and now tend to seek the original public meaning or ratifier understanding of the text. Not only do most (though not all) originalist scholars today adopt some form of original public meaning originalism, this appears to be the form of originalism preferred by a majority of the current Supreme Court.[93] Thus, even if one believes the framers understood Article I, Section 8 as somehow perfecting the principle of Resolution VI, most originalists would regard this as having little relevance to the construction and application of powers granted under Article I, Section 8. At least not unless Resolution VI itself somehow became part of the broader public debate and original public understanding of the Constitution.

To date, Resolution VI advocates have produced only a single example of what they claim is a reference to Resolution VI made during the ratification debates. According to Jack Balkin, "[t]he basic principles underlying the list of enumerated powers were well stated by one of the key founders, James Wilson, in the Pennsylvania ratifying convention in November 1787."[94] Balkin then quotes Wilson:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.[95]

According to Balkin, "Wilson was doing no more than summarizing the structural assumptions of the drafters in Philadelphia. The origins of Congress's powers go back to the sixth of the resolutions prepared by the Virginia delegation."[96] Balkin then explains:

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[93] See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (majority opinion containing an extensive investigations of the original understanding of the Second Amendment).

[94] Balkin, LIVING ORIGINALISM, *supra* note 3, at 143.

[95] *Id.* (quoting James Wilson in the Pennsylvania Ratifying Convention).

[96] *Id*. See also, *id* at 146 n.27 ("James Wilson, who was a member of the Committee of Detail, and one of the first justices appointed to the Supreme Court, publicly represented that the principle of Resolution VI *was* the basis for the choice of enumerated powers.").

> [T]here is no evidence that the convention rejected the structural principle stated in Resolution VI at any point during its proceedings. Indeed, this principle was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that Framer James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania Ratifying Convention. Wilson was a member of the Committee of Detail and he would certainly have known if the Committee had abandoned the principle of Resolution VI. As Wilson explained, however, the purpose of enumeration was not to *displace* the principle but to *enact* it:
>
> > "[T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care."[97]

Balkin's use of James Wilson's speech in the Pennsylvania Convention marks an important departure from arguments based solely on original intent. It allows him to make an argument that draws upon evidence of *both* original intent and original public meaning. As Balkin puts it, this "was the key explanation that Framer James Wilson *offered to the public."* Similarly, in his general discussion of "structural principles" (principles which include Resolution VI) Balkin claims that, "[m]any of these structural principles were intended by people who drafted the Constitution *and they explained their ideas in debates about the Constitution*."[98] Balkin's own theory of Resolution VI may not rely on the theory of original public meaning, but he makes claims of obvious importance to those do.

Balkin's belief that Wilson was referring to Resolution VI accomplishes a number of important tasks. First, without Wilson, there is no evidence that the Committee of Detail—or anyone else in the convention--understood

[97] *Id*. at 145-46. Emphasis in original.
[98] *Id.* at 142.

the final text as enacting the principle of Resolution VI.[99] As Jack Rakove has pointed out, Resolution VI may have been intended as nothing more than a placeholder with the members anticipating its ultimate replacement with a more precise (and limited) statement of national power.[100] This seems especially likely, given the discussion regarding the proposed power of incorporation. However, if in his speech Wilson is in fact referring to Resolution VI as the framers' guiding principle for Article I, Section 8, then this would be evidence that at least one member saw a connection between the Resolution and the final version of Article I.

Secondly, even if the framers viewed the language of Article I, Section 8 as following the principle of Resolution VI to the letter, nothing in the records of the Convention tells us whether the framers understood the Resolution as presenting a broad, moderate or narrow view of federal power. For example, Resolutions like those of Roger Sherman's could be viewed as narrow (Sherman's view of his own proposal) or broad (Wilson's view of Sherman's proposal until he heard Sherman's explanation).[101] Likewise, even the detailed language of Article I, Section 8 was capable of broad or narrow readings; Madison understood it as not granting the power to charter corporations, John Marshall disagreed.[102] If James Wilson was speaking about Resolution VI, and if his views are representative, then his speech is evidence of a broad understanding of the Resolution's underlying principle and, accordingly, support a broad reading of congressional power under Article I, Section 8.

Third, and most importantly, if Wilson publicly linked Resolution VI to the final draft of the Constitution early in the ratification debates, then this opens the door to claims that Resolution VI-based understandings of Article I, Section 8 were part of the public debates about the meaning of the Constitution.[103] This would allow Resolution VI advocates to make claims not only about framers' intent, but also about original public understanding. In other words, if Wilson was talking about Resolution VI, then this overcomes the most serious problem with relying on an unadopted text

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[99] Indeed, some historians have argued that, by adopting a list of enumerated powers, the Committee of Detail violated the instruction to produce a draft faithful to the principle announced by the amended version of Resolution VI. See, e.g., Forrest McDonald, E PLURIBUS UNUM (1979). If this is true, it makes an even stronger case for rejecting Resolution VI as representing the framers understanding of the ultimate text.

[100] See *supra* note __.

[101] See *supra* note 58 and accompanying text (discussing Roger Sherman's proposed alteration of Resolution VI).

[102] See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[103] Balkin, LIVING ORIGINALISM, *supra* note 3 at 142.

presented in the secret Philadelphia debates: a complete lack of public notice that the Resolution even existed.

Of course, a single reference to Resolution VI during the ratification debates would be rather weak evidence that the general public understood Article I, Section 8 as being informed by a broad understanding of Resolution VI. In this case, though, we do not have even a single reference. Wilson was not referring to Resolution VI.

A. James Wilson's "General Principle" of Federal Power

As I explained in the opening section of this essay, Resolution VI was not publically known prior to the initial publication of the Philadelphia debates—an event occurring years after the adoption of the Constitution. As far as I can tell from my research, it was not until the twentieth century that *anyone* claimed Resolution VI had anything to do with the meaning of Article I, Section 8. So what makes Balkin (and those that rely on his claims) think otherwise?

Balkin has mistakenly assumed that, when James Wilson referred to the "general principle" of federal power that guided the drafting of Article I, Wilson was referring to Resolution VI as initially adopted in the Philadelphia Convention.[104] In fact, Wilson was referring to general principle proposed by Roger Sherman as an amendment to Resolution VI—a replacement principle that Wilson described at the time "as *better* expressing the general principle" than Resolution VI.[105]

Here is the final version of Resolution VI:

> [T]o legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation.[106]

Here is Sherman's proposal:

> To make laws binding on the People of the United States in

[104] Balkin was not the first scholar to assume that Wilson was discussing the general principle of Resolution VI. See, e.g., Mark Moller, A New Look at the Original Meaning of the Diversity Clause, 51 William & Mary L. Rev. 1113, 1170 n.212 (2009).

[105] 2 FARRAND, *supra* note 4, at 26.

[106] *Id*.

> all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.[107]

Here is Wilson's "general principle" that Balkin claims refers to Resolution VI:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.[108]

Unlike Resolution VI, Wilson's "general principle" and Sherman's proposal both divide power between the states and national governments with the only difference being a reversed order of subjects: Sherman's amendment *ends* with powers reserved to the states, while Wilson *begins* with powers reserved to the states. Both Sherman and Wilson's principle announce the same theory: matters that involve only the internal concerns of a single state are reserved to the state, while matters that involve the general interests of the Union belong in the hands of the federal government.

Resolution VI, on the other hand, differed in both content and structure. The Resolution lacks the "two sides of the coin" structure of Sherman's and Wilson's principles and only addresses federal power. Resolution VI also addresses collective action problems (cases where the states are separately incompetent), whereas the principle of Sherman and Wilson does not. Resolution VI is *not* the same principle as Sherman's proposal (thus his attempted amendment), nor is it the same as Wilson's reversed-order version of Sherman's proposal (thus explaining Wilson's preference for

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[107] *Id*. at 25.

[108] The version of Wilson's speech that Balkin uses is the version by Thomas Lloyd reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. This version is also reproduced in II DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 350, 355 (speech of James Wilson in the Pennsylvania Ratifying Convention, November 24, 1787) [hereinafter "DHRC"].

Sherman's approach over that of Resolution VI). Balkin has simply assumed that Wilson was talking about the *Convention's* preferred "general principle." Wilson actually was referring to *his own* preferred principle—one first proposed by *Sherman* and which Wilson had initially declared as "better" than Resolution VI.

From a modern perspective, this might seem like a distinction without a difference. After all, a first year law student could easily find ways to read all three articulations at a level of generality that allowed for congressional oversight of all matters of national importance involving collective action problems. Both principles use capacious language that is ambiguous enough to allow for broad (or narrow[109]) interpretations.

From an originalist perspective,[110] however, it is this very ambiguity that posses a problem for anyone claiming that, historically, the two principles *meant* essentially the same thing. As ambiguous statements of general principles, it is possible to understand these principles as being "animated" by very different approaches to congressional power. It is a matter of historical fact that the members of the Convention did *not* believe the principles were the same, and they specifically rejected Sherman's effort to replace the principle of Resolution VI with his own. We can speculate as to *why* they preferred one formulation over another, but the essential point was that the Convention considered and rejected Sherman's principle in favor of the language of Resolution VI. This history precludes any assertion that *the framers* would have viewed either Sherman's or Wilson's formulation as "essentially" the same as Resolution VI.

But then, we already know that Wilson himself did not view these formulations as the same thing—thus his initial support for Sherman's proposal on the grounds that it was "better" than Resolution VI. It is possible, of course, that Wilson viewed both his preferred approach and Resolution VI as "good enough," even if one was better than the other. But neither he nor the Convention thought the words of the two approaches meant the same thing.

The upshot is that there is no way to construe Wilson's speech in the Pennsylvania Rarifying Convention as containing a reference to Resolution VI or to a principle that the framers would have viewed as the same as

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[109] Recall Sherman's reading of his own proposal.

[110] Again, I make no claims about how an interpretive approach that does not rely on original intent, original meaning or original understanding might make use of Wilson's speech.

Resolution VI. This, in turn, means that there is no evidence whatsoever that Resolution VI (or what the framers would have viewed as its equivalent) was mentioned at any time or played any role at all in the public discussions of the Constitution, much less informed the public understanding of Article I, Section 8. It is not that there is little evidence that Resolution VI informed the public understanding of Article I, Section 8, there is *no evidence at all* that this is the case.

This is devastating, of course, for those scholars who believed Wilson's speech supported a claim of original public meaning. For his part, Jack Balkin insists that an embrace of Resolution VI does not require evidence that the Resolution reflects the framers' intent or the original public meaning of Article I, Section 8.[111] Accordingly, Balkin might claim that it does not matter whether Wilson actually spoke about Resolution VI, and that there remain good reasons to use either Resolution VI or Wilson's principle as a guide to determining the scope of federal power under Article I, Section 8. It is hard to see how this can be so, however. Balkin relies on Wilson *because* he believes Wilson is talking about Resolution VI,[112] and he relies on Wilson's speech to refute claims that the framers rejected Resolution VI.[113] It is because Balkin understood Wilson as referring to Resolution VI that he felt justified in asserting that not only did the framers not reject Resolution VI, "they *enacted* it."[114] But if Wilson was not referring to Resolution VI or to language the framers viewed as "essentially the same," then this argument evaporates. Indeed, if Wilson was not talking about the framers' initially adopted principle, it neither is clear why we should particularly care what Wilson thinks (given the conventions rejection of the principle), nor can Balkin continue to claim that *any* framer believed Resolution VI provides a guide to understanding Article I, Section 8.

B. The Two Versions of James Wilson's Speech

The above is enough to establish the lack of any historical evidence that either the framers or public viewed Resolution VI as relevant to understanding the scope of federal power under Article I, Section 8. Still, perhaps the advocates of national power to regulate all cases involving the

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[111] As a matter of constitutional construction, Balkin does not believe Resolution VI must represent either framers' intent or original understanding. Balkin, LIVING ORIGINALISM, *supra* note 3, at 104. So long as the principle is not inconsistent with the text, courts may and should rely on Resolution VI (or Wilson's principle) if doing so meets Balkin's normative criteria for what counts as "our law." *Id.* at 60-64, 98.

[112] *Id.* at 143.

[113] *Id.* at 145.

[114] *Id.*

national interest can lose this particular battle but still win the interpretive war by claiming that Wilson's speech indicates that *something like* the advocates' view of Resolution VI informed the public's understanding of national power. According to this view, it does not matter whether the particular words or even the general principle of Resolution VI informed the framers intent or the public's understanding, if Wilson's broad description of the framers' chosen principle *in fact* represented the structural principle that informed, justified or "animated" either the framers' construction of Article I, Section 8, or the public's understanding of the same.

We know that Wilson's formulation did not inform the actions of the framers—they rejected it. We know this from the rejection of Sherman's "mirror image" proposal and we know this from the rejection of Madison's proposed power to grant corporate charters even when required by the national interest and where states were incompetent to act. But even if this tells us something about the framers, it is possible that the public that debated and ratified the text understood the words of Article I, Section 8 as delegating to Congress broad authority to respond to collective action problems of national importance, regardless of subject matter.

In fact, if one views Wilson's speech as providing a window into the public understanding of Article I, Section 8, then perhaps Resolution VI does not matter at all. Wilson's speech could be viewed as *more* important that Resolution VI, since it was this speech that seems to have been placed before the public, whereas Resolution VI was not.

Balkin himself takes special care to construct a general theory of congressional power out of particular terms and phrases Wilson used in a reported version of his speech—words and phrases that are not found in Resolution VI.[115] For example, Balkin uses Wilson's phrase "operations and effects" as one of the subheadings in his chapter on the Interstate Commerce Clause,[116] and he constructs a theory of national power whereby "operations" represents Congress's traditional power to regulate "whatever crosses state lines"[117] and "effects" represents congressional authority over all matters that interrupt national harmony. As Balkin puts it:

> What kinds of interactions have *effects* beyond a single state? These are interactions that create spillover *effects* or collective action problems. In the words of Resolution VI,

[115] See *id.* pp 160-177.
[116] *Id.* at 160.
[117] *Id.* at 161.

> commerce is "among the several states" when the states are "separately incompetent" to deal with a particular issue, "or [when] the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[118]

Balkin further supports his choice to broadly construe otherwise ambiguous terms like "effects" and "commerce" by relying on Wilson's reported declaration that "room must be allowed for great discretionary latitude of construction of the principle."[119]

But here, Balkin falls prey to the hazard of over-relying on a single piece of reported historical evidence. It turns out that we cannot be sure whether Wilson actually used phrases like "operation and effects" and "great discretionary latitude of construction," or, even if he did, whether anyone outside the Pennsylvania Convention ever knew about it. There actually are *two* versions of James Wilson's speech of November 24, 1787. Only one of these versions contains the phrases "operation and effect" and "great discretionary latitude of construction." This, however, was not the original version. The words upon which Balkin places so much reliance appear in a version of Wilson's speech published months after the original and, unlike the original version, appears to have gone entirely unnoticed.

The first version of Wilson's speech was a summary composed by Alexander J. Dallas and published in the Pennsylvania Herald on November 28.[120] On the same day, a longer version, also from Dallas's notes, was reprinted as a pamphlet and, as the editors of the Documentary History of the Ratification of the Constitution (DHRC) put it, "circulated throughout the country."[121] Within a month and a half, Dallas's version had been reprinted in eleven newspapers in states like Massachusetts, New Hampshire, Rhode Island, Connecticut and New York.[122] Despite its broad

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[118] *Id.* at 161.(emphasis added)

[119] *Id*. at 145-146. Here is the portion of Wilson's speech quoted by Balkin:

> [T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.

2 ELLIOT'S DEBATES, *supra* note 108, at 424-25.

[120] II DHRC, *supra* note 108, at 339.

[121] *Id*.

[122] *Id*.

circulation, at least one of Wilson's supporters believed this version was "very inaccurate, and not only parts are omitted and the leading points often lost for want of seizing the exact expression, but some parts are absolutely misstated."[123] Thomas Lloyd prepared a second version of Wilson's speech that Lloyd promised would be "without mutilation or misrepresentation."[124] Lloyd's version was not printed, however, until February 7, 1788, well after the initial circulation of, and responses to, Dallas's original version.[125] Unlike the original version, Lloyd's version does not appear to have been reproduced, in whole or part, in a single newspaper.[126]

Lloyd himself was a Federalist partisan who published a wildly one-sided account of the convention in February 1788, *The Debates of the Convention of the State of Pennsylvania.*[127] Lloyd's "Debates" included only speeches by James Wilson and Thomas McKean—both supporters of the Constitution.[128] According to historian Pauline Maier, "Lloyd eliminated speeches that criticized the Constitution to satisfy Federalist benefactors who planned to circulate his account of the convention debates."[129]

Here is the relevant passage of Dallas's initial and widely circulated version of Wilson's speech of November 24th:

> Another, and perhaps the most important obstacle to the proceedings of the Federal Convention arose in drawing the line between the national and the individual governments of

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[123] Id. (letter of Samuel Vaughan, Jr. to James Bowdoin).

[124] II DHRC, *supra*, note 108, at 339.

[125] *Id.*

[126] DHRC reports several newspaper reprints of the Dallas version, but none for the later Lloyd version. *Id.* I also have not been able to locate any in my search of historical newspaper databases.

[127] See Pauline Maier, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88, 101 (2010).

[128] *Id.*

[129] *Id.* Lloyd's reputation apparently preceded him. According to Maier, "[o]n November 23, John Smilie and Robert Whitehill had opposed Lloyd's petition to be appointed the convention's assistant secretary." *Id.* at 505 n.10. (Citing II DHRC 329.). Smilie and Whitehill both were critics of the Constitution. To be sure, Dallas ultimately emerged as a partisan himself, serving as one of the original founders of the Democratic-Republican Party, and as Secretary of the Treasury under James Madison. The point, of course, is that there is no particular reason to believe *either* account is more trustworthy than the other, thus making it unwise to rely on either as the sole evidentiary support for Wilson's own views, the actual purposes and animating motivations of the framers in the Philadelphia Convention, or public meaning and understanding of the text.

> the states. On this point a general principle readily occurred, that whatever object was confined in its nature and operation to a particular state ought to be subject to the separate government of the states, but whatever in its nature and operation extended beyond a particular state ought to be comprehended within the federal jurisdiction. The great difficulty, therefore, was the application of this general principle, for it was found impracticable to enumerate and distinguish the various objects to which it extended; and as the mathematics, only, are capable of demonstration, it ought not to be thought extraordinary that the Convention could not develop a subject involved in such endless complexity. If, however, the proposed Constitution should be adopted, I trust that in the theory there will be found such harmony, and in the practice such mutual confidence between the national and individual governments, that every sentiment of jealousy and apprehension will be effectively destroyed. [130]

Just for comparison, here is Thomas Lloyd's (somewhat longer) version of the same passage published a few months later:

> They found themselves embarrassed with another of peculiar difficulty and importance; I mean that of drawing a proper line between the national government and the government of the several states. It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with

[130] II DHRC, *supra* note 108, at 344 (version of Wilson's speech by Alexander J. Dallas).

> much industry and care. It is only in mathematical science that a line can be described with mathematical precision. But I flatter myself that upon the strictest investigation, the enumeration will be found to be safe and unexceptionable; and accurate too in as great a degree as accuracy can be expected in a subject of this nature.[131]

Only the later published version by Thomas Lloyd contains the phrases so important to Balkin's theory of national power and which he relies upon in support of his claim that the framers *enacted* Resolution VI. It may well be that Balkin is relying on a more accurate account of Wilson's actual speech (though there is no reason to prefer one version over the other).[132] But even if Lloyd's is the more accurate, this is not the version of Wilson's speech that the public read in the newspapers published only days after the speech, nor was this the version reprinted in eleven different states from November 28, 1787 through February 7, 1788. Lloyd's version was not printed until months after Wilson's speech, long after almost all of the major commentary on the speech had been written and published.[133] I have not found a single newspaper that reported this later version of Wilson's speech, nor have I been able to locate a single example of anyone other than Wilson who, during the ratification debates, described federal power as extending to all cases that, in their "operation or effects," extended beyond a single state.

Given that there is no evidence that anyone else shared Wilson's reported "structural principle," it would be hard enough to establish that the *first* version of Wilson's speech played any role in the public understanding of Article I, Section 8.[134] Such a claim in regard to the second version, one published much later and with far less distribution, is even more implausible. In short, there is little reason to think that Wilson's reported discussion of "operation and effects" and the need to "allow[]for great

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[131] II DHRC, *supra* note 108, at 355 (version of Wilson's speech by Thomas Lloyd).

[132] Alexander Dallas may have every bit as much a partisan as Lloyd. See ___. Both men would have had an incentive to "spin" their reporting of the speech. Accordingly, there seems to be no way to definitively resolve which version is the more accurate.

[133] *Id.* at 339-40.

[134] Wilson's Statehouse Speech and his explanation regarding the omission of the Bill of Rights was extremely influential during the ratification debates. See, Pauline Maier, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 77-82 (2010). However, there is no evidence that the above quoted portions of his speech in the Pennsylvania Convention had any effect whatsoever. In fact, the manner in which Pennsylvania conducted its ratifying convention and suppressed alternative views became something of a scandal as the debates in other states went forward. See *id*. at 127.

discretionary latitude of construction of the principle" played any discernable role in the public debate and understanding of the text of Article I, Section 8—if, in fact, Wilson actually used these words at all.

Once again, it is important to distinguish the importance of this evidence to theorists like Jack Balkin, as opposed to its importance to an originalist account of Resolution VI and Article I, Section 8. Balkin does not embrace Resolution VI and Wilson's speech because they represent the framers' intent, or the original public meaning or the original understanding of the ratifiers. Balkin believes that Resolution VI serves as a rule of construction, not original meaning. As such, Balkin believes that historical evidence relating to Resolution VI, public or secret,[135] simply serves as a "resource"[136] for identifying "permissible constructions."[137] Thus, it is perfectly possible for Balkin to concede that Wilson was not really talking about Resolution VI, or that Lloyd misreported Wilson's words, or both, and *still* find it perfectly appropriate to rely on either version of Wilson's speech in support of Balkin's theory of what national power ought to be.

To Balkin, it is enough that the bare text of Article I, Section 8 is ambiguous enough to permit the construction of his theory of national power in a manner consistent with his normative account of constitutional law. In other words, it does not matter whether the evidence supports claims of original meaning, or even if Balkin's preferred principle was expressly rejected by the framers, opposed by both the Federalists and anti-Federalists during the ratification debates, and ran counter to most ratifiers' understanding of the text. Even if all of this is true, none of this prevents Balkin from continuing to rely on Resolution VI and either version of Wilson's speech in support of his normative theory of properly constructed national power. However, for those originalists who have not embraced Balkin's particular theory of national power, it would be a matter of some importance to know that there is not a single piece of historical evidence suggesting that anyone at the time of the Founding viewed the text of Article I, Section 8 as related in any way to Resolution VI.

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[135] See http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html ("Because structural arguments are not arguments whose authority rests on original public understanding, there is no problem with looking to the secret deliberations of the framers in Philadelphia, as well as public statements or letters by framers outside of the ratification debates.").

[136] Balkin, LIVING ORIGINALISM, *supra* note 3, at 258.

[137] *Id.*

CONCLUSION: OUR IMPERFECT CONSTITUTION

If advocates of Resolution VI were claiming nothing more than the powers ultimately listed in Article I, Section 8 involved those few matters that the framers believed were subjects beyond the legislative capacity of the states and of such national importance that they required congressional oversight, then this would be an altogether uncontroversial reading of the historical evidence. This reading of Article I, Section 8 would allow for the possible existence of *other* matters that arguably, and perhaps in some ultimate sense truly, involved matters of national importance beyond the capacity of the states but which, nevertheless, were *not* included among the textually granted powers of Congress. In such a case, the omission would render the list of delegated powers imperfect and incomplete, and would justify a call for a constitutional amendment adding the necessary but omitted power. This actually is the standard reading of Resolution VI: it stood as a placeholder or a kind of "watch this space" sign that was ultimately replaced by a list of particular powers the framers believed necessary *at the time*. Neither that list, nor anything else in the Constitution, promised constitutional perfection. This is why they also added Article V in order to keep the door open to necessary amendments at a later time.

This is not, however, how the current advocates of Resolution VI understand either the Resolution or Article I, Section 8. To these scholars, the "animating purpose" behind the creation of Article I, Section 8 was to create a perfect system national power whereby *all cases* of national importance beyond the competency of the states or which affect national "harmony" fall within the regulatory control of Congress, regardless of textual enumeration. Under such a system, it is never be necessary to further enumerate congressional power because it is definitionally *impossibl*e for any matter needing congressional oversight to fall beyond the reach of Article I, Section 8. As much as Jack Balkin claims his theory remains true to the concept of enumerated power,[138] he nevertheless presents a theory of national power that requires no enumeration.

It also is a system wholly at odds with how the Constitution was

[138] See, generally, Balkin, LIVING ORIGINALISM, *supra* note 3, at 141-49; 147 (It is commonplace to say that the national government is a government of limited and enumerated powers. But it would be more correct to say that it is a government of *federal* and enumerated powers, for the purpose of enumeration is not merely to limit the scope of the powers, but to ensure they serve a federal purpose.").

understood at the time of its enactment and for the last two centuries. The framers, the ratifiers and the public at large were well aware of the difference between perfect and imperfect delegations of government power. According to James Wilson, one of strongest advocates proponents of national authority, the framers chose a system of potentially *incomplete and imperfect* national power in order to best preserve individual liberty. According to Wilson,

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.
>
> *On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.*[139]

According to Wilson, by choosing a system of enumerated powers, the framers risked an "imperfect enumeration of power" and the omission of an enumerated power that Congress truly *ought* to possess—a situation that would render the Constitution "incomplete." In such cases, the omitted power might be truly necessary for the country but nevertheless beyond the legitimate scope of delegated congress power. But this "risk" was necessary in order to prevent the creation of a system whereby Congress was presumed to hold all power except those expressly denied to them in a list of enumerated rights. Such a list of retained liberties would necessarily be incomplete and thus would leave the people insecure in the enjoyment of their retained rights.[140] This argument was repeated over and over again throughout the ratification debates, both inside and outside the ratification

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[139] James Wilson (Pa. convention, Nov. 28), II DHRC, *supra* note 108, at 388.

[140] See James Wilson's Speech in the State House Yard (Philadelphia, Oct. 6, 1787), *in* DHRC, *supra* note 108, at 167-68.

conventions,[141] and it makes best sense of a text that utilizes the form of enumerated powers. In other words, the *purpose* of the Constitution is fulfilled by *denying* Congress perfect federal authority, even at the risk of failing to authorize a necessary power.

James Madison also spoke of the difference between those powers truly *necessary* and those powers actually *granted.* In Madison's 1791 speech before the House in which he denied that the Constitution properly understood included the power to grant corporate charters (no doubt recalling the rejection of his own proposal in Philadelphia),

> [Madison] adverted to a distinction, which he said had not been sufficiently kept in view, between a power necessary and proper for the government or union, and a power necessary and proper for executing the enumerated powers. In the latter case, the powers included in each of the enumerated powers were not expressed, but to be drawn from the nature of each. In the former, the powers composing the government were expressly enumerated. This constituted the peculiar nature of the government, no power therefore not enumerated, could be inferred from the general nature of government. Had the power of making treaties, for example, been omitted, *however necessary it might have been*, the defect could only have been lamented, or supplied by an amendment of the constitution.

One could go further and cite the literally hundreds of references to the *limited* enumerated powers of Congress promised by the Federalists and demanded by the state conventions during the ratification debates.[142]

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[141] This proposition probably goes without saying, but for those seeking specific discussion of the role this principle played in the ratification debates, a good place to start would be II DHRC, *supra* note 108, at 128, 130 (discussing the influence and publication of Wilson's speech in the statehouse yard.).

[142] When faced with anti-Federalists claims that Article I, Section 8 would grant the national government unlimited power and eradicate the sovereign independence of the states, the Federalists responded that the text must be read as following a principle of limited enumerated power. According to Hamilton in the New York Ratifying Convention, "whatever is not expressly given to the federal head, is reserved to the members." 2 ELLIOT'S DEBATES, *supra* note 108, at 362. According to Charles Pinckney in the South Carolina debates, "no powers could be executed or assumed [by the federal government], but such as were expressly delegated." 4 ELLIOT'S DEBATES, *supra* note 108, at 253-63. During the ratification debates, Madison insisted that the proposed federal government's "jurisdiction is limited to certain enumerated subjects," Federalist No. 14, *supra* note 22, at 102, and in 1791 he reminded the House of Representatives that the proponents of the Constitution had assured the state conventions that "the general government could not exceed the expressly delegated powers." Congressional Proceedings, Fed. Gazette (Phila.,

Suffice here to say that comments like those by the nationalist Wilson and the Federalist Madison illuminate how the textual device of enumerated power is *itself* evidence against power-perfectionist theories such as those advanced by advocates of Resolution VI.

Jack Balkin is right to seek structural principles that animate constitutional text. In this case, however, he has identified the wrong principle. A system of listed or enumerated power is, by definition, a system of imperfect power. Although the state conventions ultimately prevailed in their insistence on a list of enumerated rights, the addition of the Ninth Amendment prevented any implied transformation of the federal government into one of otherwise perfect power. *"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."*[143] This declaration preserved the original understanding—indeed preserved the underlying structural purpose—of an imperfect delegation of limited enumerated power.

Pa.), Feb. 12, 1791, at 2. This principle of textual enumeration presupposes the existence of other powers *not* enumerated and reserved to the states. As John Marshall put it, "the enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). Marshall also presciently noted that the struggle to identify the Court has called the "distinction between what is truly national and what is truly local" (*See Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J. concurring) (quoting *United States v. Lopez*), would "probably continue to arise, so long as our system shall exist." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (Marshall, C.J.). The perpetual struggle to maintain this distinction exists because the framers abandoned Resolution VI and adopted instead a system of enumerated powers.

[143] U.S. Const., Amend. IX.