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### What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution

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**WHAT SPENDING CLAUSE?  
(OR THE PRESIDENT'S PARAMOUR):<sup>1</sup>  
AN EXAMINATION OF THE VIEWS OF  
HAMILTON, MADISON, AND STORY ON  
ARTICLE I, SECTION 8, CLAUSE 1 OF THE  
UNITED STATES CONSTITUTION**

JEFFREY T. RENZ\*

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1. When the Author first drafted this title and the section from which it came, the controversy surrounding the Bill Clinton White House had not surfaced. The Author has decided not to alter the title. Any resemblance between this hypothetical and sitting presidents or alleged paramours is wholly coincidental.

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## INTRODUCTION

The United States Supreme Court's 1936 decision in *United States v. Butler*<sup>2</sup> ushered in an era of unprecedented federal power. In the preceding 150 years, Congress had gradually increased its use of money to effect national policy. Early Congresses took a limited view of the power to spend, excluding such things as building canals and bridges from its purview. Later Congresses interpreted their powers more liberally. One by one, matters that had been considered to be outside Congress' powers or that were deemed matters of local interest became beneficiaries of the national purse. These incremental increases were small compared to the national legislature's reaction to the emergency of the Great Depression. Congress spent liberally in order to defibrillate the national economy. Subjects never thought to be in the congressional purview became the focus of its taxing and spending power. This issue, whether Congress could apply money to objects outside its enumerated powers, an issue that had been avoided for 150 years, had finally come to a head.

In *Butler*, the Supreme Court adopted a construction of Article I, Section 8, Clause 1 of the United States Constitution<sup>3</sup> that had been propounded by Joseph Story 100 years earlier.<sup>4</sup> Story's view—that Congress' power to tax is limited by the General Welfare Clause, but once the tax passes muster, Congress may spend in any way that it deems in furtherance of the general welfare, even for purposes not set forth in the enumerated powers<sup>5</sup>—was the key to the New Deal's expansion of congressional and federal power. The ability to effect policy by means of the purse and to exercise powers beyond those granted to Congress in the Constitution, allowed Congress and the federal government to go where it had never gone before.

The Agricultural Adjustment Act of 1933 (AAA), considered in *Butler*, is merely one example.<sup>6</sup> The AAA authorized the Secretary of Agriculture to levy and collect a tax on the processing of various agricultural commodities.<sup>7</sup> The Secretary was then authorized to pay the revenues to farmers to reduce the amount of acreage in cultivation, thus increasing the prices of farm products.<sup>8</sup> The

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2. 297 U.S. 1 (1936).

3. U.S. CONST. art. I, § 8, cl. 1. This part states, "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*

4. 1-2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Melville M. Bigelow ed., 5th ed. 1891).

5. 2 *id.* § 923.

6. *Butler*, 297 U.S. at 53-56.

7. *Id.* at 54.

8. *Id.*

Court was presented with a stark choice between Madison's view that Congress could spend only in furtherance of its enumerated powers, and Story's view that it could spend for the general welfare. The Court summarily rejected the Madison interpretation in favor of Story's.<sup>9</sup> Nevertheless, in the end, the Court acknowledged that the regulation of agriculture was a purely local activity—one committed to the jurisdiction of the States<sup>10</sup>—and found that the Act violated the Tenth Amendment.<sup>11</sup>

Following on the heels of *Butler*, and after the "switch in time," the Court revisited the spending power in *Chas. C. Steward Machine Co. v. Davis*<sup>12</sup> and *Helvering v. Davis*.<sup>13</sup> Both of these cases challenged Congress' power to enact the unemployment insurance and old age pension provisions of the Social Security Act.<sup>14</sup> In one paragraph of *Helvering*, the Court cited *Butler* and concluded, "Congress may spend money in aid of the 'general welfare.'"<sup>15</sup> *Helvering* also established the Court's abdication of authority in the area of spending.<sup>16</sup> Concluding that the Constitution authorized Congress to spend for the general welfare, the Court conceded that questions might remain as to what was for the general welfare and what was not.<sup>17</sup> These questions were, however, committed to the legislative branch. The power to resolve the question of what constituted the general welfare belonged to Congress alone.<sup>18</sup>

*Butler*, *Steward Machine*, and *Helvering* finally confirmed Congress' power to spend.<sup>19</sup> Armed in this manner, Congress

9. *Id.* at 78.

10. *Id.* at 64. Although this fact is not material to my argument, the Court's conclusion was certainly superseded by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530, 557 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held "that the Commerce Clause does not empower Congress to enforce the minimum wage and over time provisions of the Fair Labor Standards Act against states 'in areas of traditional governmental functions.'").

11. *Butler*, 297 U.S. at 67-72.

12. 301 U.S. 548 (1937).

13. 301 U.S. 619 (1937).

14. *Steward Mach.*, 301 U.S. at 573; *Helvering*, 301 U.S. at 634-35.

15. *Helvering*, 301 U.S. at 640.

16. *Id.* at 640-41.

17. *Id.* at 644.

18. *Id.* at 640.

The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.

*Id.*

19. *United States v. Butler*, 297 U.S. 1, 65-66 (1936); *Steward Mach.*, 301

tested its power by attaching conditions to spending bills.<sup>20</sup> Not only would Congress spend what it thought best benefited the nation, without consideration of its enumerated powers, but it would now compel the recipients of its largesse, the states included, to refrain from acting in ways only loosely related to the purpose of the appropriation and wholly unrelated to its enumerated powers.

The courts ratified this broad conditional spending. Thus, Congress “enacted” a national speed limit by means of strings attached to federal highway funds.<sup>21</sup> Congress “enacted” a national drinking age of twenty-one, notwithstanding state laws and state constitutions that determined that eighteen-year-olds were adults, and notwithstanding the Constitution’s relegation of the power to regulate liquor to the states.<sup>22</sup>

The Court’s ruling in *South Dakota v. Dole* carried the spending power another step further.<sup>23</sup> While the Court had earlier concluded that an independent constitutional bar may limit Congress’ exercise of the spending power,<sup>24</sup> the *Dole* Court explained that this meant only that Congress could not, by means of the spending power, compel another entity to engage in activity that would violate constitutional rights.<sup>25</sup> In other words, Congress could use its spending power not only to exercise powers that were not delegated to it, but also to exercise some powers that were explicitly denied.<sup>26</sup>

The broad spending power and the power to attach conditions to it contain no limitation on Congress’ ability to abrogate individual rights guaranteed by the states, so long as those rights are not found in the federal Constitution. Thus, Congress has compelled states to dismantle their walls of separation of church

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U.S. at 581-83; *Helvering*, 301 U.S. at 640-43.

20. See *infra* notes 21-34 and accompanying text for examples of congressional acts containing spending restrictions.

21. *Nevada v. Skinner*, 884 F.2d 445, 450-51 (9th Cir. 1989). The Ninth Circuit also concluded that a national speed limit could have been enacted pursuant to the commerce power. *Id.* at 451.

22. 23 U.S.C. § 158 (1994). See *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (holding that Congress had the power to encourage state compliance with the minimum drinking age through the Spending Clause).

23. 483 U.S. 203 (1987).

24. *Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976) (per curiam); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

25. *Dole*, 483 U.S. at 210.

26. *Id.* Congress has thus taxed cattle producers and turned the revenue over to an industry promotion group. Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901(6)(b) (1994). In other words, “Eat Beef!” commercials are paid for with an excise tax. See also *id.* §§ 2701-2718 (1994) (dealing with egg research and consumer information); *id.* §§ 3401-3417 (1994) (covering wheat and food research and nutrition education); *id.* §§ 4501-14 (1994) (covering dairy research and promotion).

and state,<sup>27</sup> to violate the privacy provisions of their state constitutions,<sup>28</sup> and to waive sovereign immunity.<sup>29</sup> Additionally, in return for federal funds, Congress has prohibited citizens from speaking<sup>30</sup> and compelled them to speak in a certain way.<sup>31</sup> The only limit on Congress' power is that the legislation may not be coercive.<sup>32</sup> If a recipient may turn down federal funds, no matter how destructive the refusal of funds may be, the act is unlikely to be declared coercive.<sup>33</sup> Congress' power in this area is so widely recognized that "[n]o one today candidly denies that Hamilton's view of the spending power was correct."<sup>34</sup> Notwithstanding its

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27. The Equal Access Act, 20 U.S.C. § 4071(a) (1994). See *Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1163-64 (D. Idaho 1991) (finding enforceable a provision of the Equal Access Act requiring public schools receiving federal funds to provide student religious clubs with the same access to school facilities that other student clubs receive).

28. 49 C.F.R. §§ 651.1-653.83 (1998); *id.* §§ 654.1-654.83; *id.* §§ 40.1-40.111; *id.* §§ 199.1-199.245; *id.* §§ 219.1-219.905; *id.* §§ 382.101-382.605 (discussing drug and alcohol testing of Department of Transportation employees); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625-26 (1989) (holding that regulations issued by the Federal Railroad Administration authorizing and requiring tests of employee's blood, urine and breath did not constitute a significant invasion of privacy).

29. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). See *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999) (stating "every federal circuit that has considered this issue also has found . . . [acceptance of Rehabilitation Act funding] . . . to constitute . . . [a] waiver of state sovereign immunity . . .").

30. See 5 U.S.C. § 1502 (1994) (prohibiting certain state or local officers from influencing or taking an active part in a political campaign); Act of July 19, 1940, 54 Stat. 767 (1941) (prohibiting certain U.S. officers and employees from interfering with or affecting the election of the President, Vice President, presidential elector, member of Senate, member of House or a delegate); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 144-46 (1947) (holding that an order from the United States Civil Service Commission requiring Oklahoma to remove a member of the Oklahoma Highway Commission or suffer withholding of federal highway funds because such member took an active part in political management was not an abuse of discretion).

31. See 42 U.S.C. § 300a-6 (1994) (prohibiting the use of funding programs using abortion as a family planning method); 42 C.F.R. § 59.8(b) (1998) (providing examples of the limitations placed upon counseling and referral for abortion services); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (finding that regulations of the Department of Health and Human Services prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion activities as a method of family planning did not violate the First Amendment).

32. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

33. For example, in 1998, federal law provided for payment of roughly 80% of state highway construction funds. 23 U.S.C. § 120(b)(1), (2) (1994). It also provided for approximately 75% of Medicaid funding. 42 U.S.C. § 1396(b)(2)(A) (1994).

34. David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5 (1994).

breadth, the spending power has been the subject of little analysis and commentary.<sup>35</sup> Since *Butler* and *Helvering*, few have questioned the scope of power of the national government to spend for the national welfare, notwithstanding other limits on national power implied or expressed by a Constitution of enumerated powers.<sup>36</sup>

Until the question was settled in *Butler*, three interpretations of the General Welfare Clause persisted: the “strong” Hamiltonian interpretation, which held that the General Welfare Clause granted Congress power to enact all laws that it deems for the general welfare;<sup>37</sup> the Madison interpretation, which denied both the “strong” and “weak” Hamiltonian views, and limited congressional power to spend and to enact laws pursuant to the powers enumerated in Section 8;<sup>38</sup> and the “weak” Hamiltonian or Story interpretation, which denied the “strong” Hamiltonian power, but would grant Congress the power to spend for any purpose that it deems in furtherance of the general welfare.<sup>39</sup>

The proponents of each position offered numerous arguments to support their favored interpretation. These arguments may be distilled into three categories. The first is the “I Was There” claim. This argument relies upon public and private statements of members of the Philadelphia or state ratifying conventions, or relies upon their recollections of the intent of the respective convention.<sup>40</sup> The second, the “Course of Dealing” argument, relies upon the acts of Congress or of the Chief Executive in the new republic to demonstrate the original understanding of the General Welfare Clause.<sup>41</sup> The third is the “Appeal to Text” argument that relies upon the text of the Constitution and employs intrinsic rules of interpretation.<sup>42</sup>

Story employed a persuasive textual analysis to establish his interpretation of the clause. Since the *Commentaries*, however, no one has replicated Story’s analysis and, more important, no one has applied a textual analysis to Story’s interpretation. This

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35. *Id.* at 2 n.1.

36. *Id.* at 5. *But cf.* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 474-79 (1928) (arguing that it is a contradiction to deny Congress the power to do something, but then grant it the power to spend money to do it).

37. See *infra* Part III for further discussion of the “strong” Hamiltonian interpretation.

38. See *infra* Part IV for further discussion of the Madison interpretation.

39. See *infra* Part V for further discussion of the “weak” Hamiltonian or Story interpretation.

40. See *infra* Part II.A for further discussion of the “I Was There” argument.

41. See *infra* Part II.B for further discussion of the “Course of Dealing” argument.

42. See *infra* Part II.C for further discussion of the “Appeal to Text” argument.



Article will test the three interpretations against the text of the Constitution, and will discuss historical conditions that add to the understanding of Article I, Section 8, Clause 1.<sup>43</sup>

In the course of testing each hypothesis, a surprising conclusion was reached. Story's interpretation is inconsistent with the text and structure of the Constitution. Madison's interpretation also fails to survive. As a matter of original meaning, with historical conditions considered in the mix, both Madison's and Story's views are flawed. In addition, the "strong" Hamiltonian view crumbled readily. Before moving to the discussion of the various views and their relation to the structure and organization of the Constitution, it is important to first review the Framers' understanding of the taxing power.

#### I. THE DISTINCTION BETWEEN TAXES, DUTIES, IMPOSTS AND EXCISES AS ILLUSTRATED BY THE FIRST AMERICAN TAX REVOLTS

It is no accident that the Tax Clause refers separately to "Taxes, Duties, Imposts and Excises."<sup>44</sup> These words meant more to the Framers than their identification of various sources of revenue. They described two different powers of government: the power to raise revenue and the power to regulate trade and commerce for the general welfare.

Before and during the French and Indian War, taxation in the Colonies was a local affair.<sup>45</sup> Tax bills originated in the colonial legislatures.<sup>46</sup> Even when Great Britain sought financial support from the Colonies, Royal Governors submitted those requisitions to the Legislatures.<sup>47</sup> Colonial legislatures responded by voting supplies to the Crown in the same manner as the Parliament.<sup>48</sup>

In 1764, upon the conclusion of the war with France, this system changed. Parliament enacted the Stamp Act to supplement these periodic requisitions.<sup>49</sup> The Stamp Act laid

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43. U.S. CONST. art. I, § 8, cl. 1.

44. *Id.*

45. EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* 4-6 (1953).

46. *Id.*

47. *Id.* at 22, 61.

48. *Id.*

49. 5 Geo. 3, ch. 12 (1765), *reprinted in* 26 DANBY PICKERING, *THE STATUTES AT LARGE FROM MAGNA CHARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN* 179 (London, Joseph Bentham, 1764). The Act of 4 Geo. 3, ch. 15 (1764), called the Sugar Act, actually represented the first revenue measure. *Id.* at 33. The Colonies, however, apparently viewed that Act as one regulating commerce, since it imposed duties on foreign imports. The Sugar Act did, however, give rise to arguments against taxation without consent largely because of its language, "to raise a revenue." See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1764), *reprinted in* 4 *The University of Missouri Studies* 303 (1929).

duties on "all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written,"<sup>50</sup> as well as upon playing cards, almanacs, and newspapers.<sup>51</sup> These documents were required to bear a stamp reflecting that the duty had been paid.<sup>52</sup> Deeds or any other papers that did not carry a stamp could not be filed in a government office.<sup>53</sup>

The Colonies protested loudly and violently, and called for a Congress to prepare a petition to Parliament protesting the Act.<sup>54</sup> The Stamp Act Resolutions that came from the Stamp Act Congress of 1765 reveal the colonial view of Parliamentary power to tax.<sup>55</sup>

The Colonies denied Parliament the power to levy taxes on the Colonies or upon British subjects who resided there.<sup>56</sup> They conceded Parliament's power to regulate relations among the Colonies, England, and with foreign countries.<sup>57</sup> John Dickinson, the leading critic of Great Britain's exercise of taxing power, admitted the latter power when he wrote in 1765:

[t]hese regulations it is apprehended, establish the basis of the *British* power; and form such a firm connection between the Mother Country and her Colonies, as will produce all the advantages she ought to wish for, or that they can afford her. Any further attempt to shackle *some* of the colonies in favour of *others*, or to advance the revenue in *America* by restraining her trade, is but regulating by a severe exercise of power, what wants no regulation, and losing by too much haste to gain.<sup>58</sup>

Daniel Dulaney, another lawyer and pamphleteer, articulated this same theme, arguing that Parliament had the power to regulate trade, and that such trade regulation might take the form of duties and imposts, even though duties and imposts might

50. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 312 (Legal Classics ed. 1983) (1765) [hereinafter BLACKSTONE'S COMMENTARIES].

51. 5 Geo. 3, ch. 12 (1765), reprinted in PICKERING, *supra* note 49, at 186-87.

52. *Id.* at 190-91.

53. *Id.* at 192.

54. PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, 106-13 (Edmund S. Morgan ed., 1959); MORGAN & MORGAN, *supra* note 45, at 102-05.

55. The Avalon Project, *Resolutions of the Continental Congress October 19, 1765* (visited Oct. 20, 1999) <<http://www.yale.edu/lawweb/avalon/resolu65.htm>>.

56. *Id.*

57. *Id.*

58. JOHN DICKINSON, THE LATE REGULATIONS RESPECTING THE BRITISH COLONIES ON THE CONTINENT OF AMERICA CONSIDERED, reprinted in 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 1764-1774, 216 n\* (Paul Leicester Ford ed., Da Capo Press 1970) (1765).

produce incidental revenue.<sup>59</sup> Nevertheless, he denied Parliament the power to tax for revenue purposes without the consent of the colonists.<sup>60</sup> Though the Colonies might protest onerous trade regulations on the basis of policy, they protested Parliamentary taxation for the purpose of raising a revenue on the basis of right.

Thus, the *Resolutions of the Stamp Act Congress* contended that no tax could be levied on the colonists by Parliament.<sup>61</sup> Its argument rested on two grounds: (1) no tax could be imposed on an English subject without his consent given through his representative; and (2) circumstances prevented the colonists' representation in the House of Commons.<sup>62</sup> The eleventh article of the *Resolutions* addressed the question of onerous trade regulations.<sup>63</sup> The Congress did not claim that Parliament lacked the power to regulate trade. Rather it argued against trade regulations on policy grounds, stating "the Restrictions imposed by several late Acts of Parliament, on the Trade of these Colonies, will render them unable to purchase the Manufactures of *Great-Britain*."<sup>64</sup>

Repeal of the Stamp Act<sup>65</sup> did not end the issue. No sooner had the Stamp Act been repealed and deeds executed in violation of it ratified,<sup>66</sup> Parliament enacted the Townshend Duties,<sup>67</sup> triggering new protests in the Colonies. The Townshend Duties taxed imports of glass, paper, and other items.<sup>68</sup> Unlike the Stamp Act, the duties were not imposed directly on the colonists, but were reflected in the price of various goods. Because they did not require payment in specie, they fell less heavily on the colonists.<sup>69</sup> Like the Stamp Act, however, the Townshend Duties were levied for "a revenue" to be

raised in your Majesty's dominions in America, for making a more certain and adequate provision for defraying the charge of the administration of justice, and the support of civil government, in such provinces where it shall be found necessary; and towards further defraying the expences of defending, protecting, and

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59. MORGAN & MORGAN, *supra* note 45, at 85.

60. *Id.*

61. *Id.*; *Resolutions of the Continental Congress October 19, 1765*, *supra* note 55.

62. MORGAN & MORGAN, *supra* note 45, at 106.

63. *Id.* at 107.

64. *Id.*

65. 6 Geo. 3, ch. 11 (1765), reprinted in 27 DANBY PICKERING, THE STATUTES AT LARGE FROM MAGNA CHARTA TO THE END OF THE PARLIAMENT OF GREAT BRITAIN 19 (London, John Archdeacon, 1767).

66. 6 Geo. 3, ch. 51 (1765), reprinted in *id.* at 273.

67. 7 Geo. 3, ch. 46 (1766), reprinted in *id.* at 505.

68. *Id.*

69. Forrest McDonald, *Introduction to EMPIRE AND NATION* xii (1962).

securing, the said dominions . . . .<sup>70</sup>

Because the Townsend duties were external, referring to duties levied on various items imported from Great Britain, colonists felt less troubled by them.<sup>71</sup> This changed with the publication of John Dickinson's *Letters of a Farmer in Pennsylvania*. As to the *Letters*, Paul Leicester Ford said, "[i]t ran through the Colonies like wild fire, causing an enthusiasm which led Town Meetings, Societies, and Grand Juries to vote thanks to the author; which made him a toast at public dinners, and the subject of laudatory articles and poems in the press."<sup>72</sup>

"To the Farmer!" was the toast of the day.<sup>73</sup> And it was the Farmers' views that defined and crystallized colonial objections to imperial taxation in its various forms. In his first *Letter*, Dickinson raised the most fundamental and basic objection to levies for revenue—that taking the property of an English subject without their consent, given through their representatives, was a violation of right.<sup>74</sup> In his second *Letter*, Dickinson went straight to the difference between revenue measures and trade regulation.

The parliament unquestionably possesses a legal authority to regulate the trade of *Great-Britain*, and all her colonies. Such an authority is essential to the relation between a mother country and her colonies; and necessary for the common good of all . . . . We are but parts of a *whole*; and therefore there must exist a power somewhere to preside, and preserve the connection in due order. This power is lodged in the parliament; and we are as much dependent on *Great-Britain*, as a perfectly free people can be on another.<sup>75</sup>

Dickinson explained that before the Stamp Act, Parliament levied duties only for the purpose of regulating trade.

*All before*, are calculated to regulate trade, and preserve or promote a mutually beneficial intercourse between the several constituent parts of the empire; and though many of them imposed duties on trade, yet those duties were always imposed *with design* to restrain the commerce of one part, that was injurious to another, and thus to promote the general welfare. The raising a revenue thereby was never intended.<sup>76</sup>

Following the publication of Dickinson's first two *Letters*, his critics contended that there was a difference between internal taxation, taxes, excises, or duties levied on goods and transactions

70. MORGAN & MORGAN, *supra* note 45, at 107.

71. McDONALD, *supra* note 69, at xii.

72. DICKINSON, *supra* note 58, at 279.

73. *Id.*

74. *Id.* at 309-11.

75. *Id.* at 312.

76. *Id.* at 312-13 (citations omitted).

within or among the Colonies, which included the Stamp Act, and external taxation, such as the Townshend Duties.<sup>77</sup> They argued that Dickinson had admitted the right of Parliament to levy the latter.<sup>78</sup> The Farmer replied to this in his fourth *Letter*: “[t]o this I answer, with a total denial of the power of parliament to lay upon these colonies any ‘tax’ whatever.”<sup>79</sup> He explained, “[t]o the word ‘tax,’ I annex that meaning which the constitution and history of *England* require to be annexed to it; that is—that it is *an imposition on the subject, for the sole purpose of levying money.*”<sup>80</sup>

Dickinson briefly reviewed the evolution of taxation for revenue in Great Britain. He argued that history demonstrated that supplies to the government were “*gifts of the people to the crown, to be employed for public uses.*”<sup>81</sup> According to Dickinson, little attention was given to the regulation of trade during the period that gifts to the Crown evolved into taxation for revenue purposes.<sup>82</sup> Dickinson explained that “tax” took on its own meaning, long before Great Britain began to levy duties and imposts and engage in other forms of trade regulation.<sup>83</sup> Finally, he explained, “[e]xternal impositions, for the regulation of our trade, do not ‘grant to his Majesty *the property of the colonies.*’ They only *prevent the colonies acquiring property,* in things not necessary, in a manner judged to be injurious to the welfare of the whole empire.”<sup>84</sup>

Dickinson argued that Parliament’s revenue acts were objectionable because Parliament lacked the power to tax the colonists without their consent.<sup>85</sup> Parliament’s regulatory acts, however, were within Parliament’s power to regulate relations among the parts of the Empire and between the Empire and other nations.<sup>86</sup> Although their severity might be objectionable, Parliament enjoyed the power to regulate commerce through the imposition of duties.<sup>87</sup> In his sixth *Letter*, Dickinson argued that the difference between regulation measures and revenue acts ought to be readily apparent “by considering how far they relate to

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77. It seems that the distinction first arose when the Colonies were under the burden of the Sugar Act and anticipating a Stamp Act. They tempered their criticism of the Sugar Act, but did not complain about the unconstitutionality of the anticipated Stamp Act. MORGAN & MORGAN, *supra* note 45, at 36-37.

78. DICKINSON, *supra* note 58, at 328.

79. *Id.*

80. *Id.* at 328-29.

81. *Id.* at 330.

82. *Id.*

83. DICKINSON, *supra* note 58, at 330.

84. *Id.* at 332.

85. *Id.* at 331.

86. *Id.* at 344.

87. *Id.*

the preserving, in due order, the connection between the several parts of the *British empire*.<sup>88</sup> One thing, according to Dickinson, is certain: a duty on English goods, payable by the colonists, would always be for a revenue and, therefore, beyond the power of Parliament.<sup>89</sup>

His views were carried into the First Continental Congress.<sup>90</sup> In its Declaration of October 14, 1774, Congress complained that Parliament had imposed taxes “under various pretences, but in fact for the purpose of raising a revenue.”<sup>91</sup> Congress, however, indicated its consent to Parliament’s regulation of commerce.

That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, *in all cases of taxation and internal polity*, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.<sup>92</sup>

This understanding survived the Revolution. The distinction between duties levied for revenue and duties levied to regulate trade appeared in the proposals and deliberations of the delegates to the Constitutional Convention. While the delegates were ready and willing to grant a federal government jurisdiction over interstate and foreign trade, there were limits to how far they would go. For example, Article VII, Section 4, of the *Report of the Committee on Detail* would have prohibited the national legislature from levying duties upon exports from any state and upon the importation or migration of persons: “[n]o tax or duty

88. DICKINSON, *supra* note 58, at 349.

89. *Id.*

90. See David L. Jacobson, *John Dickinson and the Revolution in Pennsylvania, 1764-1776*, 78 UNIV. OF CAL. PUB. IN HIST. 1, 81 (1965) (contending that Dickinson wrote the resolves of the Continental Congress).

91. SOURCES OF OUR LIBERTIES 286 (Richard L. Perry ed., rev. ed. 1978).

92. *Id.* at 287-88 (emphasis added). Even the fiery Sam Adams would admit Parliament’s power to impose duties and imposts to regulate trade. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, compiled by Kenneth E. Harris & Steven D. Tilley 63 n.2, 68-69 (1976) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited.”<sup>93</sup> On August 21, 1774, George Clymer moved to amend the section by adding “for the purpose of revenue” after “duty.”<sup>94</sup> This would have had the effect of modifying the prohibition to permit regulations of trade.<sup>95</sup> Luther Martin supported the amendment because it would permit regulation of the slave trade.<sup>96</sup> The amendment failed.<sup>97</sup>

The first clause of Section 4, which prohibited duties on exports, was approved.<sup>98</sup> The Slavery Clauses of Section 4 (those which addressed the taxation, regulation, and prohibition of the slave trade) were referred to another Committee of Eleven for consideration.<sup>99</sup> That Committee reported on August 24, 1787,<sup>100</sup> with a proposal that carefully limited the power of Congress to tax or regulate the trade.<sup>101</sup> The proposal attempted to strike a balance between those members of the Convention who had objected to the exemption of the slave trade from imposts and duties and those members who feared that such imposts and duties would be used to abolish the trade.<sup>102</sup> The dispute was ultimately resolved by limiting the amount of the tax or duty.<sup>103</sup> The Convention thus recognized, but carefully limited, the power of Congress to levy duties for either revenue or regulatory purposes.<sup>104</sup>

We must keep in mind this difference. When we consider the three interpretations of the General Welfare Clause, we must distinguish between a tax levied for the purpose of revenue and a duty imposed for the purpose of regulation. Before we come to that subject, however, I shall examine the various forms of arguments employed in support of the three interpretations.

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93. 1-5 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 227 (Philadelphia, J.B. Lippincott & Co., 2d ed. 1881).

94. 1 *id.* at 255.

95. 5 *id.* at 456.

96. *Id.* at 457.

97. *Id.* at 461.

98. 5 ELLIOT, *supra* note 93, at 456.

99. *Id.* at 470.

100. *Id.* at 470.

101. *Id.* at 470-71.

102. *Id.*

103. U.S. CONST. art. I, § 9, cl. 1.

104. See James Madison, Madison on the Tariff: Letter 1 (Sept. 18, 1828), reprinted in 4 ELLIOT, *supra* note 93, at 600-05 (distinguishing the expressed power to regulate commerce by duties in the Tax Clause from the implied power in the Commerce Clause).

## II. THE VARIOUS ARGUMENTS IN SUPPORT OF EACH INTERPRETATION

### A. "I Was There."

*Come on brother scribblers, 'tis idle to lag. The CONVENTION has let the cat out of the bag, Write something at randum, you need not be nice, Public spirit, Montesquieu, and great Dr. Price,*

*Down, down, [down derry down].*

*Talk of Holland & Greece, and of purses & swords, Democratical mobs and congressional Lords: Tell what is surrendered and what is enjoy'd, All things weigh alike, boys, we know, in a void.*

*Down, down, &c.*

*Much joy, brother printers! the day is our own, A time like the present sure never was known: Predictions are making—predictions fulfil, All nature seems proud to bring grist to our mill.*

*Down, down, &c.*<sup>105</sup>

The "I Was There" argument seeks authority from the statements made in the various conventions as well as post-ratification statements of the delegates. Hamilton, Story, and others<sup>106</sup> appealed to these statements. In my view, these arguments are entitled to little weight as primary arguments for or against any view of the General Welfare Clause.

The News-Mongers' Song, which introduced this Section, illustrates the danger of relying on statements made in support of or in opposition to ratification. Arguments for and against ratification flourished. In the end, these arguments tend to cancel each other out. Madison was in the Convention with Hamilton. Yet, they arrived at opposite views of the Constitution and the nature of the nation it created. As Madison put it,

[a]s to the other branch of the subject, I deserted Colonel Hamilton, or rather Colonel H. deserted me; in a word, the divergence between us took place—from his wishing to *administration*, or rather to administer the Government (these were Mr. M.'s very words), into what he thought it ought to be; while, on my part, I endeavored to make it conform to the Constitution as understood by the Convention that produced and recommended it, and particularly by

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105. *The News-Mongers' Song for the Winter of 1788*, ALBANY GAZETTE, Nov. 15, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 117 (John P. Kaminski & Gaspare J. Saladino eds., State Historical Society of Wisconsin 1983) [hereinafter DOCUMENTARY].

106. ANNALS OF CONG. 1727 (Dec. 7, 1796).



the State conventions that *adopted* it.<sup>107</sup>

According to some participants, there were three “parties” at the Philadelphia Convention.<sup>108</sup> Nationalists like Hamilton sought to reduce the states and to lodge an “indefinite power to legislate in the Congress.”<sup>109</sup> Others wanted to limit Congressional power.<sup>110</sup> The third faction wished to retain a structure similar to the Confederation.<sup>111</sup>

Robert Yates, who attended the Philadelphia Convention, opposed the Constitution.<sup>112</sup> He argued in separate essays that the General Welfare Clause variously conferred an unlimited power to tax and spend or constituted an unlimited power to legislate.<sup>113</sup> Oliver Ellsworth argued the very opposite in the Connecticut Convention—any exercise of the taxing power for purposes other than those set forth in the first clause would be void.<sup>114</sup> Should we consider these arguments, offered in an attempt to generate opposition to ratification but rebutted by the federalists, as authoritative statements or as hyperbole?

The members of the Convention had their own jealousies. Luther Martin accused Mason and Gerry of trying to sabotage the Constitution so that their own scheme of government might replace it.<sup>115</sup> Martin then engaged in his own sabotage, arguing that the taxing power would be employed oppressively.<sup>116</sup> Some have suggested that members presented explanations of the taxing power that furthered their own financial interests.<sup>117</sup>

107. Nicholas P. Trist, *Memoranda of Conversations with Thomas Jefferson* (Sept. 27, 1834), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 534 (Max Farrand ed., 1966) [hereinafter RECORDS].

108. Luther Martin, “*The Genuine Information II*”, MARYLAND GAZETTE, Jan. 1, 1788, reprinted in 1 THE DEBATE ON THE CONSTITUTION 639-40 (1993) [hereinafter THE DEBATE ON THE CONSTITUTION].

109. *Id.* at 195.

110. *Id.* at 196.

111. *Id.* at 639-40.

112. Robert Yates & John Lansing, *On the Likely Failure of Liberty: The Dissent of Two New York Delegates to the Philadelphia Convention* (Jan. 14, 1788), reprinted in *id.* at 3-6.

113. *Brutus I*, N.Y. J., Oct. 18, 1787, reprinted in THE DEBATE ON THE CONSTITUTION, *supra* note 108, at 167; *Brutus V*, N.Y. J., Dec. 13, 1787, reprinted in *id.* at 501; *Brutus VI* (Dec. 27, 1787), reprinted in 2 THE FOUNDERS’ CONSTITUTION 419 (Philip B. Kurland & Ralph Lerner eds., 1987).

114. Oliver Ellsworth, *On the Power of Congress to Lay Taxes* (Jan. 7, 1788), reprinted in 2 ELLIOT, *supra* note 93, at 190-97.

115. 1 THE DEBATE ON THE CONSTITUTION, *supra* note 108, at 641.

116. *Id.* at 650.

117. WARREN, *supra* note 36, at 470; CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73-151 (1986). Beard’s view of the dominance of economic and selfish interests has been effectively criticized. Nevertheless, personal interest did play a role, certainly in the debates over the payment of Revolutionary War securities. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE

We can safely say that members of the Philadelphia Convention and of the state ratifying conventions supported or opposed the proposed Constitution for many reasons, some personal, some principled, some less than noble. Whether as good advocates or as good propagandists, convention members seized the arguments that were available.<sup>118</sup> Uttering one view or another cannot be deemed conclusive of what the speaker or any other delegate intended the Constitution to mean. Nevertheless, statements of various delegates, often taken out of context, formed a substantial part of the United States' argument in defense of congressional power in *Butler*.<sup>119</sup>

B. "The Course of Dealing."

*"Good roads and canals will promote many very important national purposes."*<sup>120</sup>

The Course of Dealing argument appeals to the actions of Congress or of the Executive in the years following ratification. Because many members of Congress and two Presidents were members of the federal Convention, and others were members of their respective state ratifying conventions (so the argument goes), the informed actions of the branch to which they belonged reflect the true understanding of the General Welfare Clause.

The acts of Congress and the Executive constitute this course of dealing. For example, in 1794, Congress appropriated funds to aid French refugees from the St. Domingo revolt.<sup>121</sup> Shortly afterward, Congress declined to appropriate funds to aid Savannah, Georgia, following a devastating fire.<sup>122</sup> Members of Congress justified both actions on constitutional grounds.

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SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, 122-24 (1940) [hereinafter THE ARTICLES OF CONFEDERATION].

118. Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 LAW & HIST. REV. 1, 12-20 (1994); Ronald P. Formisano, *Deferential-Participant Politics: The Early Republic's Political Culture, 1789-1840*, 68 AM. POL. SCI. REV. 473, 476-77, 484-85 (1974).

119. See generally Brief for the United States, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401), reprinted in 30 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 154-433 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

120. See generally James Monroe, *Views on the Subject of Internal Improvements* (May 4, 1822), reprinted in 6 THE WRITINGS OF JAMES MONROE 254 (Stanislaus Murray Hamilton ed., 1902) (emphasis added).

121. Act of Feb. 12, 1794, 6 Stat. 13 (1794).

122. ANNALS OF CONG. 1727 (Dec. 7, 1796). See 3 REGISTER OF DEBATES IN CONGRESS 752, 758 (Washington, Gales & Seaton 1829) (discussing aid to Alexandria, Virginia and concluding that it was not authorized by the General Welfare Clause).

Supporters of the bills to aid the French asserted that the bills were within Congress's enumerated powers because they would offset the United States' debt to France.<sup>123</sup> Opponents of the bill to aid Savannah pointed out that the bill had no such justification and could not be justified by the General Welfare Clause.<sup>124</sup>

Abraham Baldwin, a federal Convention delegate from Georgia, argued in the debates on the Alien and Sedition Acts that the General Welfare Clause was "introduced to limit the other parts of the sentence, and [was] not of itself a substantive power."<sup>125</sup> Roger Sherman objected to a proposal to loan funds to the American Glass Manufacturing Company on the same constitutional grounds.<sup>126</sup>

The United States' brief in *Butler* pointed to the Codfishing Bounties<sup>127</sup> as proof of congressional ratification of the Story interpretation.<sup>128</sup> Madison supported the bounties, but only on the theory that they were remissions of taxes, rather than appropriations to support an industry.<sup>129</sup> Hugh Williamson, another delegate to the Convention, argued that Congress lacked the power to pay monies to fishermen in excess of the amount of the duty.<sup>130</sup> The Codfishing Act passed only after the House amended the bill to substitute "allowance" for "bounty,"<sup>131</sup> satisfying constitutional objections.<sup>132</sup> Hamilton, as reflected by his *Report on Industries*, considered the power to aid industry to be a natural national power.<sup>133</sup>

On his last day in office, James Madison in 1817 vetoed a bill that provided for spending on internal improvements.<sup>134</sup> Jefferson celebrated the veto, writing to Albert Gallatin:

[y]ou will have learned than an act for internal improvement, after passing both Houses, was negatived by the President. The act was founded, avowedly, on the principle that the phrase in the constitution which authorizes Congress "to lay taxes, to pay the debts and provide for the general welfare," was an extension of the powers specifically enumerated to whatever would promote the

123. ANNALS OF CONG. 170 (Dec. 3, 1793).

124. *Id.* at 1712-27 (Dec. 7, 1796).

125. *Id.* at 1967-68 (Nov. 16, 1797).

126. *Id.* at 1631 (June 3, 1790).

127. Act of July 4, 1789, ch. 2, § 4, 1 Stat. 27 (1789).

128. LANDMARK BRIEFS, *supra* note 119, at 427.

129. ANNALS OF CONG. 385-86 (Feb. 6, 1792).

130. *Id.* at 378-82 (Feb. 3, 1792).

131. *Id.* at 400-01 (Feb. 9, 1792).

132. See David P. Currie, *The Constitution In Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 654-55 (1996) (noting other enumerated power arguments tendered to support the Codfishing bill).

133. *Id.* at 655 n.299.

134. James Monroe, First Annual Message (Dec. 2, 1817), reprinted in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 589 (Bureau of Nat'l Literature and Art 1913) (1897).

general welfare; and this, you know, was the federal doctrine. Whereas, our tenet ever was, and, indeed, it is almost the only landmark which now divides the federalists from the republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant that they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purposes for which they may raise money. I think the passage and rejection of this bill a fortunate incident. Every State will certainly concede the power; and this will be a national confirmation of the grounds of appeal to them, and will settle forever the meaning of this phrase, which, by a mere grammatical quibble, has countenanced the General Government in a claim of universal power.<sup>135</sup>

The following day, President James Monroe took office and gave further comfort to Jefferson, concluding in his annual message that Congress lacked the power under the General Welfare Clause to pay for internal improvements.<sup>136</sup> But Jefferson was far too sanguine. Within five years, Monroe reversed his position:

Congress shall have power to lay and collect taxes, duties, imposts, and excises. For what purpose? To pay the debts and provide for the common defense and general welfare of the United States, an arrangement and phraseology which clearly show that the latter part of the clause was intended to enumerate the purposes to which the money thus raised might be appropriated.<sup>137</sup>

The "Course of Dealing" argument suffers from the same defect as the "I Was There" claim. The acts of Congress and of the Chief Executive reflect less of their constitutional philosophies than the needs of the day. Presidents and members of Congress offered justifications for legislation and arguments against it that often did not reflect their underlying purposes for supporting or opposing it. For every Washington, Hamilton, or Adams who supported a National Bank there was a Madison, Jefferson, or Jackson who opposed it, on constitutional or other grounds.<sup>138</sup> For

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135. Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *reprinted in* THE FOUNDER'S CONSTITUTION, *supra* note 113, at 452.

136. James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *reprinted in* 1 RICHARDSON *supra* note 134, at 713-752.

137. *Id.* at 713; 6 THE WRITINGS OF JAMES MONROE, *supra* note 120, at 246.

138. Letter from John Quincy Adams to Andrew Stevenson (July 11, 1832), *reprinted in* 17 CONG. REC. 226 (1886); James Madison, Veto Message (Jan. 30, 1815), *reprinted in* 1 RICHARDSON, *supra* note 134, at 540; see also *infra* note 281 for a discussion on Madison's view that the establishment of a national bank is not within the powers granted to Congress; LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988); Thomas

every James Monroe who felt that the General Welfare Clause authorized spending for infrastructure, there was an earlier James Monroe who felt that the power was lacking<sup>139</sup> and a corresponding Congress who would assert constitutional reasons against it.<sup>140</sup>

Our current understanding of the Commerce Clause easily accommodates spending for public water projects.<sup>141</sup> This would not have been true in 1805; however, it was true in 1818, when Congress concluded that a power to build roads and canals could be found in its authority over interstate and foreign commerce as well as in its duty to raise and support the army and militias, as modified by the Necessary and Proper Clause.<sup>142</sup>

These examples demonstrate that the act of any Congress and the approval or veto by any President enlarging or restricting the scope of the General Welfare Clause, represent more of a determination of what constitutes good national policy than an interpretation of the Constitution. The acts of Congress and of the Chief Executive are poor sources of the original intent of the General Welfare Clause.

### *C. Originalism, Textualism, Structure and Organization*

This leaves us with fewer tools to interpret the General Welfare Clause; only Story's textual analysis and the extrinsic aid of historical condition—of pre-ratification history—remain. To be acceptable, any construction of the General Welfare Clause should fit the text of the entire Constitution. To make sense, the General Welfare Clause ought to address the evil that the Framers were trying to correct. The textual analysis, however, calls for

Jefferson, Opinion on the Constitutionality of a National Bank, *reprinted in* WRITINGS 416 (Merrill D. Peterson ed., 1984); Andrew Jackson, First Annual Message (Dec. 8, 1829), *reprinted in* 2 RICHARDSON, *supra* note 134, at 1005, 1025; Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (Feb. 23, 1791), *reprinted in* 3 THE WORKS OF ALEXANDER HAMILTON 180 (New York, Henry Cabot Lodge ed., 1885).

139. Compare James Monroe, First Annual Message (Dec. 2, 1817), *reprinted in* 1 RICHARDSON, *supra* note 134, at 587, with James Monroe, Message on Internal Improvements (May 4, 1822), *reprinted in* 6 THE WRITINGS OF JAMES MONROE, *supra* note 120, at 245-54 (noting that Monroe's original opinion that Congress' power to spend money should be exercised with other constitutional powers was later changed). See CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 181 (1922) (noting that James Monroe submitted a memo stating that he once felt that the power to tax was dependent upon the other powers delegated to Congress).

140. ANNALS OF CONG. 715-21 (Nov. 23, 1804).

141. See *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 351 (D.C. Cir. 1981) (discussing Congress' appropriation of funds for the reconstruction of Locks and Dam 26 on the Mississippi River); *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 476 (5th Cir. 1980) (discussing Congress' appropriation of funds for the construction of the Tennessee-Tombigbee Waterway).

142. ANNALS OF CONG. 1249 (Mar. 10, 1818).

consideration of the structure and organization of the document. Several features of the Constitution's structure and organization assist in the analysis of the three interpretations.

The structure of the Constitution and its organization tend to be uniform throughout the document. The first three Articles assign general powers (i.e. the description of the role of the branch),<sup>143</sup> prescribe qualifications for office,<sup>144</sup> set out rules of procedure (whether for selection of officers or members, or for conduct of business),<sup>145</sup> grant specific powers,<sup>146</sup> and enumerate specific prohibitions on the exercise of power.<sup>147</sup> Each Article contains its own provision governing compensation of the members of the Branch.<sup>148</sup> The Fourth Article governs relations among the states.<sup>149</sup> The Fifth governs amendments,<sup>150</sup> while the Sixth is a catch-all or a set of summary rules applicable to the preceding Articles.<sup>151</sup>

Thus, Article I, Section 1 assigns the legislative power to Congress,<sup>152</sup> just as the first sections of Articles II and III assign the executive and judicial powers to the President and Supreme Court, respectively.<sup>153</sup> Sections 2 through 5 include qualifications for office and rules of procedure in the houses.<sup>154</sup> Section 7 describes powers that are specific to each house.<sup>155</sup> Section 8 sets forth the powers of Congress as a whole.<sup>156</sup> Section 9 enumerates prohibitions on congressional power<sup>157</sup> and Section 10 enumerates prohibitions on state power.<sup>158</sup>

Section 8 is, in effect, a limitation on the plenary grant of power of Section 1. Section 1 assigns all legislative power "herein granted" to Congress.<sup>159</sup> Without the enumerations of Section 8, the legislative power would be plenary and limited only by the prohibitions found in Section 9 and in other parts of the

143. U.S. CONST. art. I, § 1; *id.* art. II, §1; *id.* art. III, §1.

144. *Id.* art. I, § 2, cl. 1, 2; *id.* art. I, § 3, cl. 1, 3; *id.* art. II, § 1, cl. 5. The Judicial article contains no qualifications—its determination being committed to the Executive and the Senate. *Id.* art. II, § 2, cl. 2.

145. *Id.* art. I, § 2, cl. 5; *id.* art. 1, § 3, cl. 5; *id.* art. 1, § 4, 5, 7; *id.* art. II, § 3; *id.* art. III, § 2.

146. *Id.* art. I, § 8; *id.* art. II, § 2; *id.* art. III, § 2.

147. *Id.* art. I, § 9; *id.* art. II, § 4; *id.* art. III, § 3.

148. U.S. CONST. art. 1, § 6; *id.* art. II, § 1, cl. 7; *id.* art. III, § 1.

149. *Id.* art. IV.

150. *Id.* art. V.

151. *Id.* art. VI.

152. *Id.* art. I, § 1.

153. U.S. CONST. art. II, §1; *id.* art. III, §1.

154. *Id.* art. I, §§ 2-5.

155. *Id.* art. I, § 7.

156. *Id.* art. I, § 8.

157. *Id.* art. I, § 9.

158. U.S. CONST. art. I, § 10, cl. 1.

159. *Id.* art. I, § 1.

Constitution.

When grants of power in Section 8 are limited in scope or definition, the limitation or definition appears in the Granting Clause. For example, Clause 12 authorizes Congress to raise and support an army, but limits any appropriation to a period of two years.<sup>160</sup> Clause 8 sets forth the object of promoting the progress of arts and sciences, but limits the scope of that power by setting forth the means, for example, granting of patents and copyrights.<sup>161</sup> Clause 16 grants Congress the powers to organize, arm, and discipline the militia, but these powers are limited by reservations of power to the States.<sup>162</sup> In contrast, Clause 2 describes Congress' power to borrow money as unlimited.<sup>163</sup> Congress' power to make rules for the government and the armed forces is likewise unlimited.<sup>164</sup>

Related powers are not necessarily set out in the same clause. For example, Section 8 contains no less than four separate clauses governing the armed forces (including the power to call forth the militia), but a separate clause governing the militia.<sup>165</sup> Clause 11, however, contains three separate grants of power respecting war: the powers to declare war, to grant letters of marque, and to make rules governing captures.<sup>166</sup> In short, sometimes the Committee on Style and Arrangement placed related powers in separate clauses and sometimes they did not.

The drafters were freely redundant. They granted Congress the power to regulate interstate and foreign commerce, in Clause 3, and also granted Congress the power to regulate trade by means of duties and imposts in Clause 1.<sup>167</sup> This redundancy, however, is understandable in light of their concern about rules of construction. Two key desires drove the Convention: (1) to ensure that the national government had the power to raise revenue independently of the states; and (2) to ensure that the power over interstate trade was committed to the national government.<sup>168</sup> The drafters could grant to Congress the power to lay and collect taxes and that power would encompass all forms of taxation for revenue, including duties, excises, and imposts. The omission of "Duties, Imposts and Excises," however, might be construed as intent to deny Congress that form of regulatory power. Therefore, they expressly included it.

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160. *Id.* art. I, § 8, cl. 12.

161. *Id.* art. I, § 8, cl. 8.

162. *Id.* art. I, § 8, cl. 16.

163. U.S. CONST. art. I, § 8, cl. 2.

164. *Id.* art. I, § 8, cl. 14.

165. *Id.* art. I, § 8, cl. 12-16.

166. *Id.* art. I, § 8, cl. 11.

167. *Id.* art. I, § 8, cl. 3.

168. 1 ELLIOT, *supra* note 93, at 116-20 (citing to the report of the Annapolis Convention).

For purposes of this Article, these three practices are important. The Constitution's authors were intentionally redundant. They included limits on a power in the same clause that granted the power, and they did not consistently include related powers in the same clause. With these observations in mind, in the next three sections, this Article will examine the constitutional text to determine whether the interpretations of Hamilton, Madison, or Story are correct.

### III. THE "STRONG" HAMILTONIAN INTERPRETATION

#### A. *The View Itself*

The "strong" Hamiltonian interpretation finds an independent grant of power in the General Welfare Clause. Under this view, the Tax Clause grants a power to tax and the General Welfare Clause grants an independent power to provide for the general welfare—that is, to enact any law in furtherance of the general welfare of the United States.<sup>169</sup>

Attempts to establish such a broad power began in the Convention. At the outset of the Convention, Edmund Randolph proposed a limited grant of legislative power—that Congress "enjoy the legislative rights vested . . . by the Confederation . . . [and have the power] . . . to legislate in all cases to which the separate states are incompetent."<sup>170</sup> General Charles Pinckney proposed a separate plan. Pinckney proposed to include the power "to lay and collect taxes, duties, imposts, and excises."<sup>171</sup>

On June 18, 1787, Alexander Hamilton offered his plan, although he showed little apparent enthusiasm.<sup>172</sup> Among other things, according to Madison's notes, he proposed that Congress "shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union."<sup>173</sup> The Convention gave Hamilton their respectful attention and gave his plan their respectful disregard.

On July 17, 1787, Roger Sherman, who was not a member of

169. 1 STORY, *supra* note 4, §§ 907-08 n.1.

170. 5 ELLIOT, *supra* note 93, at 127.

171. *Id.* at 128. Although a list of enumerated powers appears in the Journal of the Convention, it is not clear whether they were in Pinckney's original draft, or whether they appeared for the first time in a version that Pinckney marked up years later and provided to John Quincy Adams, who was preparing the Journal of the Convention. *Id.* at 578. James Madison, to whom Pinckney gave a copy, concluded that the Journal version was in fact a later draft after he compared the draft with Pinckney's statements in the Convention and noted major inconsistencies. *Id.* at 578-79. Madison attributed these to Pinckney's failure of memory. *Id.* at 579.

172. 1 *id.* at 178-79.

173. 5 *id.* at 588. The Journal's version records this as "power to pass all laws whatsoever." 1 *id.* at 179.



the nationalist faction, proposed that Randolph's resolution be modified to state:

[t]o 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.<sup>174</sup>

According to Charles Warren, several strong nationalists supported this proposal, including James Wilson, who saw the opportunity to legislate for the general welfare.<sup>175</sup>

Gunning Bedford, seconded by Gouverneur Morris, then moved to include the following language, which provided that Congress was

[t]o enjoy the Legislative rights vested in Congress by the Confederation, and moreover 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.<sup>176</sup>

This proposition passed and the Convention referred it, along with Randolph's revised resolutions and Pinckney's proposals, to the Committee of Detail.<sup>177</sup> On August 6, 1787, the Committee presented the legislative article.<sup>178</sup> It bore little resemblance to either Randolph's or Bedford's resolutions. The article enumerated congressional powers, but omitted any mention of payment of pre-existing debts.<sup>179</sup> At this point in the Convention, the effort to grant Congress plenary legislative power had failed.

Congressman Henry Tucker, with four generations of the blue blood of states' rights coursing through his veins, claimed that the nationalists attempted six times to insert a grant of general legislative power into the Constitution, without success.<sup>180</sup> I have been able to find five: Hamilton's plan;<sup>181</sup> Sherman's provision, as interpreted by the nationalists;<sup>182</sup> Bedford's proposal;<sup>183</sup> and the July 26, 1787, Resolution (which is a slight modification of

174. 1 *id.* at 206.

175. WARREN, *supra* note 36, at 314-15.

176. *Id.* at 315.

177. 1 ELLIOT, *supra* note 93, at 216. The Committee of Detail comprised Oliver Ellsworth of Connecticut, Nathaniel Gorham of Massachusetts, Edmund Randolph of Virginia, John Rutledge of South Carolina (Chairman), and James Wilson. 1 DOCUMENTARY, *supra* note 105, at xlvii.

178. 1 ELLIOT, *supra* note 93, at 226.

179. *Id.*

180. Henry St. George Tucker, *Judge Story's Position on the So-Called General Welfare Clause*, 13 A.B.A. J. 363, 363 (1927).

181. 1 ELLIOT, *supra* note 93, at 179-80.

182. *Id.* at 206.

183. 5 *id.* at 320.

Bedford's proposal).<sup>184</sup> In addition, it appears that Gouverneur Morris even stooped to subterfuge, as illustrated by this anecdote from Albert Gallatin, recounted in the next to last Congress of the Eighteenth Century.

Mr. G. said he was well informed that those words had originally been inserted in the Constitution as a limitation to the power of laying taxes. After the limitation had been agreed to, and the Constitution was completed, a member of the Convention, (he was one of the members who represented the State of Pennsylvania)<sup>185</sup> being one of the committee of revisal and arrangement, attempted to throw these words into a distinct paragraph, so as to create not a limitation, but a distinct power. The trick, however, was discovered by a member from Connecticut,<sup>186</sup> now deceased, and the words restored as they now stand.<sup>187</sup>

After ratification, some members contended that the presence of a semi-colon after "excises," found in some drafts of the Constitution, reflected the official and intended construction and conferred an independent power upon Congress.<sup>188</sup> The engrossed version, it was eventually agreed, was that containing a comma.

In his 1830 letter to Andrew Stevenson, written over forty years after the convention adjourned, Madison restated his attack on the strong Hamiltonian view. When some members of Congress asserted the strong Hamiltonian position, Speaker of the House Stevenson inquired as to the meaning of the terms

184. *Id.* at 375-76.

185. This was Gouverneur Morris, who Madison described as supporting many of the features of Hamilton's plan. Letter from James Madison to Jared Sparks (Apr. 8, 1831), *reprinted in* 3 RECORDS, *supra* note 107, at 498-500.

186. Gallatin refers to Roger Sherman, who died in 1793. 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1678 (Leonard W. Levy et al. eds., 1986) [hereinafter ENCYCLOPEDIA]. William Samuel Johnson was the Connecticut member and the Chairman of the Committee on Style. 1 DOCUMENTARY, *supra* note 105, at xlvi. He did not pass away, however, until 1819. ENCYCLOPEDIA, *supra* at 1026. Oliver Ellsworth was Chief Justice of the United States Supreme Court when Gallatin recounted this story. *Id.* at 625-26.

187. ANNALS OF CONG. 1976 (June 19, 1798).

188. Letter from Timothy Pickering to John Marshall (Mar. 10, 1828), *reprinted in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 302-03 (1971). In the contended for construction, the Clause would then read: "[t]o lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States . . ." 4 THE JAMES MADISON LETTERS 131 (New York, Townsend Mac Coun. 1884); 3 RECORDS, *supra* note 107, at 491. This view would be resurrected as recently as 1935, when Congressman David J. Lewis, a sponsor of the Social Security bill, argued that the draft of the Constitution containing the elusive semi-colon delivered to Washington, ought to be considered the official draft. 79 CONG. REC. 5688 (1935). He also argued that Article I, Section 8, Clause 1 granted Congress a plenary power to legislate for the general welfare whether the Clause included a semi-colon or a comma. *Id.*

“common defence and general welfare.” To this, Madison replied:

I have recd. your very friendly favor of the 20th instant, referring to a conversation when I had lately the pleasure of a visit from you, in which you mentioned your belief that the terms “common defence & general welfare” in the 8th. Section of the first Article of the Constitution of the U.S. were still regarded by some as conveying to Congress a substantive & indefinite power; and in which I communicated my views of the introduction and occasion of the terms, as precluding that comment on them; and you express a wish that I would repeat those views in the answer to your letter.<sup>189</sup>

Madison reviewed the appearances of the phrase in the Journal of the Convention.<sup>190</sup> He asked, if the General Welfare Clause conferred a general power upon the Congress, why would the Convention have gone to such great lengths to describe the enumerated powers that follow?

The debate continued until 1840, when Justice Joseph Story published his *Commentaries*. The Nationalists’ efforts to establish an unlimited legislative power were interred by Justice Story, whose argument destroyed the “strong” Hamiltonian construction of Article 1, Section 8, Clause 1.<sup>191</sup>

### B. Why the “Strong” Hamiltonian View Is Wrong

If we assume that the “strong” Hamiltonian view is correct, then it must comport with the text of the Constitution. For this analysis, we may look simply to Story’s<sup>192</sup> and Madison’s<sup>193</sup> treatment of the claim. If the Constitution grants Congress a plenary power to legislate for the general welfare, then why go to the trouble of setting forth numerous enumerated powers? Story refers us to the common rule of interpretation, which holds that the parts of an instrument should be construed together so as to give effect to the whole.<sup>194</sup> This elegant argument destroyed the “strong” Hamiltonian claim.

The structure and organization of the Constitution reinforces Story’s conclusion. The form of a grant of power definite in scope becomes significant when we examine the first clause of Section 8. Clause 1 grants the power “[t]o lay and collect Taxes, Duties, Imposts and Excises . . .” and nothing more (at least, not expressly).<sup>195</sup> If we claim that this clause also grants the power “to

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189. Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), reprinted in 3 RECORDS, *supra* note 107, at 483.

190. 1 JOURNAL OF THE FEDERAL CONVENTION: KEPT BY JAMES MADISON 61 (Chicago, Albert Scott & Co. 1893).

191. 1 STORY, *supra* note 4, §§ 906-11.

192. *Id.* §§ 909-11.

193. 3 RECORDS, *supra* note 107, at 486.

194. 1 STORY, *supra* note 4, § 907.

195. U.S. CONST. art. I, § 8, cl. 1.

pay the Debts," then the power is unnecessarily redundant. For how are debts incurred? For example, when the federal government buys gunpowder or a new fighter plane, owes wages to its officers, or orders materials to erect a building, it incurs a debt. Yet nowhere in Section 8, Clause 1 do we find the authority expressly granted "to incur debts." Such a power would have to be granted to all governmental branches. Additionally, the power would be subject to the Appropriations Clause.<sup>196</sup>

The power to do these things, to incur and to pay debts, is derived from the Necessary and Proper Clause.<sup>197</sup> Congress, by appropriation and in making laws necessary and proper to carry out all powers vested by the Constitution, authorizes the branches to incur debts. The authority to incur debts would carry with it the power to pay debts, also incident to the Necessary and Proper Clause, or it would have no meaning at all. A Clause 1 power "to pay debts" would unnecessarily duplicate the powers "[t]o raise and support Armies,"<sup>198</sup> or "[t]o provide for and maintain a Navy,"<sup>199</sup> for example. As soon as Congress appropriated funds, the power to pay debts was granted to the coordinate branch. So, "to pay the Debts" must refer to the subject debated in the Philadelphia Convention—the payment of Revolutionary War debts.

Likewise, if we claim that Clause 1 grants the power to "provide for the common Defence," then the grants of power found in Clauses 10 through 16 become unnecessarily redundant. Clauses 10 through 16 might be considered the means by which to exercise the broader power of providing for the common defense. This, however, would be inconsistent with the structure of the document, which joins the means in the same clause as the object.

Therefore, if "to pay the Debts and provide for the common Defence" are not independent grants of general legislative powers, is "provide for . . . the general Welfare" a special case? It would have to be if we are to succumb to the strong Hamiltonian interpretation. But the General Welfare Clause suffers the same defect as the first two sub-clauses. That is, the clauses following Clause 1 could then only be the means of carrying out the more general power to provide for the general welfare.

If we admit that the enumerated powers following Clause 1 are the means by which broader powers found in Clause 1 are to be executed, then we reach the same conclusion—that a power "to pay the Debts and provide for the common Defence and general Welfare of the United States" is limited by those "means" that follow in Clauses 2 through 17. When we add the Necessary and

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196. *Id.* art. I, § 9, cl. 6.

197. *Id.* art. I, § 8, cl. 18.

198. *Id.* art. I, § 8, cl. 1.

199. *Id.* art. I, § 8, cl. 13.

Proper Clause to the mix, however, those clauses between it and Clause 1 become useless, since Clauses 1 and 18, considered together would constitute a complete and plenary grant of legislative power. Yet we know, if only because of the relation described by the semi-colons, that these intervening clauses were intended to have meaning independent of each other.

Thus, we cannot conclude that "to pay the Debts and provide for the common Defence and general Welfare" are independent grants of power. Such a conclusion does violence to the organization of the document. Rather each of the powers are set out in separate clauses by subject matter, on occasion one subject being addressed by more than one clause. Under the Hamiltonian view, the natural result would divide Clause 1 into three separate clauses.

To lay and collect Taxes, Duties, Imposts and Excises, but all Duties, Imposts and Excises shall be uniform throughout the United States and no Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken;

To pay the Debts of the United States;

To provide for the common Defence and general Welfare of the United States.<sup>200</sup>

Each of these observations militates against the granting of an independent power by the subordinate clause of Clause 1. Therefore, the "strong" Hamiltonian view does not survive a textual analysis. As a result, we then ask ourselves, does the power to tax imply the power to spend generally? This brings us to James Madison's interpretation.

#### IV. THE MADISON INTERPRETATION

##### A. *The Interpretation Itself*

The Madison interpretation is more difficult to summarize because he so often phrased it as a rebuttal to the "strong" and "weak" Hamiltonian positions. In the course of Madison's debates with the Federalists, his interpretation developed several components. First, Madison denied a general power to legislate pursuant to the General Welfare Clause.<sup>201</sup> Second, he denied a power to spend beyond the powers enumerated in Article I, Section

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200. The Author reaches this conclusion by dividing Article I, Section 8, Clause 1 into two separate sentences, and by combining Article I, section 9, Clause 4 with the first sentence of article I, Section 8, Clause 1. See U.S. CONST. art. I, § 8, cl. 1; *id.* art I, § 9, cl. 4.

201. THE FEDERALIST NO. 41, at 262-63 (James Madison) (Clinton Rossiter ed., 1961).

8.<sup>202</sup> Finally, he admitted a limited spending power in the General Welfare Clause, but argued that this power was applicable only to the enumerated powers.<sup>203</sup> As we will see, this admission would later prove fatal to Madison's interpretation.

Madison often argued that the General Welfare Clause was drawn from the Articles of Confederation, since the phrase "general welfare" first appeared in the Articles.<sup>204</sup> Benjamin Franklin was the first to commit a rough sketch of the Articles to paper. He proposed the following.

The said United Colonies hereby severally enter into a firm League of Friendship with each other, binding on themselves and their Posterity, for their common Defence ~~and Offence~~, against their Enemies for the Security of their Liberties and Propertys, the Safety of their Persons and Families, and their ~~common and~~ mutual and general Welfare.

....

The Congress shall also make ~~and propose~~ such general Regulations Ordinances as tho' necessary to the General Welfare, particular Assemblies ~~from their local Circum~~ cannot be competent to; viz. ~~such as may relate to~~ those that may relate to our general Commerce; or general Currency; to the Establishment of Posts; and the Regulation of our common Forces. The Congress shall also have the Appointment of all General Officers, civil and military, appertaining to the general Confederacy, such as General Treasurer, Secretary, &c.

All Charges of Wars, and all other general Expences to be incurr'd for the common Welfare, shall be defray'd out of a common Treasury, which is to be supply'd by each Colony in proportion to its Number of Male Polls between 16 and 60 Years of Age; the Taxes for paying that proportion are to be laid and levied by the Laws of each Colony. ~~And all Advantages gained at a common Expence.~~<sup>205</sup>

We know little about Franklin's view of a General Welfare Clause. Franklin participated in the Albany Convention in 1754.<sup>206</sup> The Albany Plan of Union would have granted powers to a Grand Council and a President-General.<sup>207</sup> The plan would have limited

202. *Id.*

203. *Id.*

204. The Avalon Project, *Articles of Confederation* (visited Oct. 25, 1999) <<http://www.yale.edu/lawweb/avalon/artconf.htm>>.

205. Franklin's Articles of Confederation (July 21, 1775), *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 92, at 195-96.

206. Benjamin Franklin, Reasons and Motives For the Albany Plan of Union (July 1754), *reprinted in* WRITINGS 383 (The Library of America 1987) [hereinafter WRITINGS].

207. The Avalon Project, *Albany Plan of Union of 1754* (last modified Sept. 14, 1999) <<http://www.yale.edu/lawweb/avalon/albany.htm>>.

these powers to regulating commerce and relations with Indian tribes, purchasing and selling Indian lands, making laws to govern settlements established on the newly obtained lands, the raising of an army when necessary for the defense of any colony, and a navy to protect trade.<sup>208</sup> Any consideration of general welfare did not go beyond these subjects.

As to Dickinson's *Letters*, in which a general welfare objection to Parliamentary taxation was first voiced, Paul L. Ford contended, "Franklin too, though causing the [Dickinson's] letters to be reprinted, spoke of them most cautiously in his preface, and in private seemed neither to understand nor approve of the doctrines advanced."<sup>209</sup> It was not until 1768, when Franklin defended the American boycott of goods subject to the Townshend Duties, that we see intimations that Franklin considered Great Britain's favoritism towards the home islands as a cause of rebellion.<sup>210</sup> From then on, he criticized the Townshend Duties and similar taxes on general welfare grounds, together with the more familiar taxation without consent claim.<sup>211</sup>

By the time of the organization of the Continental Congress, Franklin came to understand the general welfare in the Dickinson sense—that even if the Colonies had been represented in Parliament, Parliament should lack the power to levy indirect taxes on the Colonies for purposes other than the general welfare of the Empire. Franklin's 1775 proposal for confederation,

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208. *Id.*

209. 1 DICKINSON, *supra* note 58, at 281. Dickinson and Franklin, if not enemies, were certainly adversaries. Franklin was a leader of the anti-proprietary forces in the Pennsylvania legislature. CHARLES J. STILLÉ, *THE LIFE AND TIMES OF JOHN DICKINSON, 1732-1808*, 38 (Burt Franklin Reprint 1969). Dickinson, while no great friend of the Penns, saw greater danger in making Pennsylvania a Crown colony, which was the goal of Galloway and Franklin. *Id.* at 43-44.

210. Franklin stated:

[i]t is of no importance to the common welfare of the Empire, whether a subject gets his living by making hats on this or that side of the water; yet the Hatters of England have prevailed so far as to obtain an act in their own favour, restraining that manufacture in America, in order to oblige the Americans to send their beaver to England to be manufactured, and purchase back the hats loaded with the charges of a double transportation.

Letter from Benjamin Franklin to the Printer (Jan. 7, 1768), *reprinted in WRITINGS, supra* note 206, at 613. Franklin had argued years earlier that it would make no more sense to tax the Colonies for their defense than it would to tax the Channel islands for theirs. Letter from Benjamin Franklin to William Shirley (Dec. 4, 1754), *reprinted in id.* at 406.

211. Letter from Benjamin Franklin to the Public Advertiser: Rules by Which a Great Empire May be Reduced to a Small One (Sept. 11, 1773), *reprinted in id.* at 694; Letter from Benjamin Franklin to the Printer of the Gazetteer and New Daily Advertiser (Sept. 28, 1768), *reprinted in id.* at 636-38.

however, “had a reception similar to that accorded [to] Galloway’s plan.”<sup>212</sup> That is, it was received by a Committee of the Whole without action.<sup>213</sup> On June 7, 1776, Congress resolved that a plan of confederation be prepared.<sup>214</sup> On June 12, Congress appointed a committee “to prepare and digest the form of a confederation to be entered into between these colonies.”<sup>215</sup> The committee consisted of one delegate from each colony.<sup>216</sup> Dickinson, not Franklin, represented Pennsylvania on the committee and he prepared the first draft of the Articles.<sup>217</sup> Consequently, the first draft contained Dickinson’s theories on the concept of general welfare.<sup>218</sup> Under the proposed Confederation, the Colonies were to unite, “for their common Defence, the Security of their Liberties, and their mutual and general Welfare, binding the said Colonies to assist one another against all Force offered to or attacks made upon them or any of them, on Account of Religion, Sovereignty, Trade, or any other Pretence whatever.”<sup>219</sup> Under the draft proposal, Section XI stated “[a]ll Charges of Wars and all other Expences that shall be incurred for the common Defence, or general Welfare, and allowed by the United States in ~~General Congress~~ assembled, shall be defrayed out of a common Treasury. . . .”<sup>220</sup>

Ultimately, Article XI became Article VIII, and remained largely unchanged.<sup>221</sup> Article XII of the Dickinson draft clarified how the Confederation’s General Welfare Clause would be implemented. “Every Colony shall abide by the Determinations of the United States in ~~General Congress~~ assembled, concerning the Services performed and Losses or Expences incurred by every Colony for the common Defence or general Welfare . . .”<sup>222</sup> Article

212. 1 LETTERS OF DELEGATES TO CONGRESS 1774-1789, 116 (Paul H. Smith et al. eds., 1976).

213. *Id.* at 644; 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 92, at 195 n.1.

214. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 425 (Worthington Chauncy ed., Government Printing Office 1906) (1776) [hereinafter JOURNALS].

215. *Id.* at 433.

216. *Id.*

217. *Id.* at 546 n.1.

218. *Id.* See Letter from Edward Rutledge to John Jay (June 29, 1776), reprinted in 4 LETTERS OF DELEGATES TO CONGRESS 1774-1789, 338 (Paul H. Smith et al. eds., 1976) (stating “I have been much engaged lately upon a plan of a Confederation which Dickinson has drawn.”).

219. 6 JOURNALS OF THE CONTINENTAL CONGRESS, OCT. 9-DEC. 31, 1776, 546-47 (Government Printing Office 1906). Article I of the Articles stated, “[t]he Stile of this Confederacy shall be “The United States of America.” *Articles of Confederation*, *supra* note 204.

220. 5 JOURNALS, *supra* note 214, at 548.

221. *The Articles of Confederation and Perpetual Union* (visited Nov. 11, 1999) <<http://www.earlyamerica.com/earlyamerica/milestones/articles/text.html>>.

222. 5 JOURNALS, *supra* note 214, at 548.



XII was modified, and its final version, later adopted as Article X, provided, “[e]very State shall abide by the determinations of the United States in Congress Assembled, on all questions which by this Confederation are submitted to them.”<sup>223</sup>

The Articles of Confederation describe a tax relationship between the States and the Continental Congress similar to that which the Colonies sought between themselves and Great Britain. The Articles denied Congress any power to levy taxes for revenue.<sup>224</sup> The Articles left the power of taxation in the State legislatures, which would vote supplies to the national government.<sup>225</sup> Congress’ power to requisition funds was limited. Aside from the support of the civil list and the maintenance of an army and navy, the Articles limited required State contributions to charges incurred for the common defense or the general welfare.<sup>226</sup> Under this scheme, the general welfare placed no limitations on congressional power since Congress had no power to levy taxes. Instead, the general welfare “limitation” was guaranteed by the requirement that nine states assent and by the final veto of any State that declined to vote supplies.<sup>227</sup> Because the requisition system was unenforceable, this arrangement ultimately failed.

Under the Articles, a State could incur debts and expenses that the Confederation could pay, if they were incurred for the common defense or for the general welfare.<sup>228</sup> But here again, the General Welfare Clause of the Articles was definitional more than it was limitational. This arrangement became significant when the Philadelphia Convention thoroughly discussed the issue of the States’ debts. The Convention proposed to pay those State debts that would have been paid under Article VIII.<sup>229</sup> Madison referred to this arrangement in his *Federalist No. 41*, where he explained that the General Welfare Clause found its source in the Articles of Confederation.<sup>230</sup>

The Constitution altered this Confederation arrangement in significant ways. The limitation on the powers of the national government was now found primarily in its division of powers among the three separate branches. The limitation was found secondarily in the length of the terms of elected officials. Having granted Congress the power to lay and collect taxes, duties, imposts, and excises by a mere majority vote, and having denied

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223. *Id.* at 678.

224. *The Articles of Confederation and Perpetual Union*, *supra* note 221.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. 1 ELLIOT, *supra* note 93, at 248; 5 *id.* at 441.

230. THE FEDERALIST NO. 41, *supra* note 201, at 263.

the States the power to interfere with the funding of the national government, clear limits on the taxing power were necessary. The clauses that addressed the tax abuses of the Crown provided the limitations on taxing power.<sup>231</sup>

The history of the General Welfare Clause at the Philadelphia Convention lends some weight to Madison's views. The General Welfare Clause was entered into the draft of the Constitution during the latter half of the Convention and after the most serious disputes dividing the states had been resolved. After the Randolph, Bedford, and Pinckney proposals were referred to the Committee on Detail, the August 6th *Report of the Committee* proposed that "[t]he legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises."<sup>232</sup> The Convention approved the draft language on August 16, 1787.<sup>233</sup>

On August 18, 1787, the Convention heard the argument that the new government should reassure the debtors of the old, and that language to that effect ought to be inserted in the Constitution.<sup>234</sup> Charles Pinckney moved that the powers "[t]o secure the payment of the public debt" and "[t]o secure all creditors, under the new Constitution, from a violation of the public faith, when pledged by the authority of the legislature," among others, be added to the powers of Congress.<sup>235</sup> The Convention referred these to the Committee on Detail, chaired by John Rutledge.<sup>236</sup> John Rutledge then asked the Convention to appoint a committee to "consider the necessity and expediency of the debts of the several states being assumed by the United States."<sup>237</sup> Rutledge argued that the states might find the taxing power more palatable if the new government would assume their Revolutionary War debts.<sup>238</sup>

The Convention appointed a committee consisting of one member from each state to consider the proposal.<sup>239</sup> John

231. See *infra* Part VI for a discussion of the General Welfare Clause as a limitation on the power to tax.

232. 1 ELLIOT, *supra* note 93, at 226. Additional clauses of Section 1 enumerated other legislative powers. *Id.* Many of these passed into the final draft without change. See *id.* at 226-27 (providing examples of the constitutional draft language that has remained relatively unchanged).

233. *Id.* at 245.

234. *Id.* at 247.

235. *Id.* at 247-48.

236. *Id.* at 248; DOCUMENTARY, *supra* note 105, at xlvi.

237. 1 ELLIOT, *supra* note 93, at 248.

238. 5 *id.* at 441.

239. 1 *id.* at 248. This committee was later referred to as the Committee of Eleven. *Id.* at 253. That title leads to some confusion in the Journal. By the time the Convention adjourned, five Committees of Eleven had been appointed to consider various matters. See *id.* at 248 (consisting of Langdon, King, Sherman, Livingston, Clymer, Dickinson, M'Henry, Mason, Williamson, Pickney and Baldwin); *id.* at 256 (consisting of Langdon, King, Johnston,

Dickinson represented Delaware on the Committee, which was chaired by Governor Livingston.<sup>240</sup> The drafting of provisions to address the pre-existing national debt and the debts of the Revolution took parallel courses in separate committees. On August 22, 1787, Rutledge laid the proposal of the Committee on Detail regarding debts of the Confederation before the Convention.<sup>241</sup> Among other things, the Committee recommended:

[a]t the end of the 1st clause of the 1st section of the 7th article, add, 'for payment of the debts and necessary expenses of the United States, provided, that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than [ ] years.'<sup>242</sup>

The Convention deferred consideration of the Rutledge Committee's proposal in order to study it and also to consider the proposal of the Livingston Committee of Eleven. The proposal Governor Livingston had reported the day before stated:

[t]he legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states, during the late war, for the common defence and general welfare.<sup>243</sup>

Gouverneur Morris moved to amend the Livingston Committee's proposal to provide, "[t]he legislature shall fulfil the engagements and discharge the debts of the United States."<sup>244</sup> This proposition was approved unanimously.<sup>245</sup> The next day, the State Debts Clause was added to Article VII, Section 1, Clause 1 by the following amendment: "[t]he legislature shall fulfil the engagements, and discharge the debts, of the United States, and shall have the power to lay and collect taxes, duties, imposts, and

Livingston, Clymer, Dickinson, Martin, Madison, Williamson, Pickney and Baldwin); *id.* at 266 (consisting of Langdon, Gorham, Sherman, Dayton, Fitzsimons, Read, Carroll, Mason, Williamson, Butler and Few); *id.* at 280 (consisting of Gilman, King, Sherman, Brearly, Morris, Dickinson, Carroll, Madison, Williamson, Butler and Baldwin); 5 *id.* at 461 (consisting of Langdon, King, Johnson, Livingston, Clymer, Dickinson, Martin, Madison, Williamson, Pickney and Baldwin). For clarity, this Article refers to each committee by its chairman.

240. 1 ELLIOT, *supra* note 93, at 248.

241. *Id.* at 256.

242. *Id.*

243. *Id.* at 254; 5 *id.* at 451. This is the first indication of the pedigree of the General Welfare Clause.

244. 1 *id.* at 258. Madison reported that the proposed language was, "[t]he legislature *shall* discharge the debts, and fulfil the engagements, of the United States." 5 *id.* at 464.

245. 1 ELLIOT, *supra* note 93, at 258.

excises.<sup>246</sup>

Whatever the intent of the Convention may have been, the language proposed by the Livingston Committee, and as amended, encompassed both the Revolutionary War debts as well as the debts of the Confederation. The increased scope of the provision was reflected in the August 25th debate.<sup>247</sup> At this point, the debate in the Convention revolved around the redemption of the securities issued during the Revolution. One faction supported denying full value to speculators.<sup>248</sup> The other faction opposed that approach as damaging to the credit of the new nation.<sup>249</sup>

The debate was set aside on August 25th, and the Convention turned to the question of ensuring the debts of the Confederation.<sup>250</sup> Randolph proposed, and the members approved, this amendment to the proposal of the Committee on Detail: “[a]ll debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States under this Constitution as under the Confederation.”<sup>251</sup>

That question being settled for the time being, Sherman dwelled on the old debts issue.

Mr. SHERMAN thought it necessary to connect with the clause for laying taxes, duties, &c., an express provision for the object of the old debts, &c., and moved to add to the first clause of article 7, sect 1,

‘for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare.’

The proposition, as being unnecessary, was disagreed to . . . .<sup>252</sup>

No further action was taken on the State debts until August 31st, when the Convention assigned to a new Committee of Eleven<sup>253</sup> the work of cleaning up and reporting on “such part of reports as have not been acted on.”<sup>254</sup> This Committee, chaired by New Jersey Chief Justice David Brearly, included Madison and John Dickinson.<sup>255</sup> On September 4th, the Brearly Committee

246. *Id.* at 260.

247. 5 *id.* at 475-76.

248. *Id.*

249. *Id.* at 471, 475-76.

250. 1 ELLIOT, *supra* note 93, at 264.

251. *Id.*

252. 5 *id.* at 476-77. Opponents would point to this defeat as evidence that no spending power was intended.

253. The Committee consisted of Gilman, King, Sherman, Brearly, G. Morris, Dickinson, Carroll, Madison, Williamson, Butler, and Baldwin. 1 *id.* at 280.

254. *Id.*

255. 1 ELLIOT, *supra* note 93, at 280.

reported, among other things:

That, in their opinion, the following additions and alterations should be made to the report before the Convention, namely:—

1. The 1st clause of the 1st section of the 7th article to read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, of the United States."<sup>256</sup>

This language was approved and referred, with other parts of the Constitution, to the Committee on Style and Arrangement. On September 12, the Committee on Style offered a near-final revision: "[t]he Congress may, by joint ballot, appoint a treasurer. They shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, of the United States."<sup>257</sup>

For several days following, the Convention fine-tuned the *Report of the Committee on Style*. They reduced the veto-override from a three-fourths to two-thirds vote.<sup>258</sup> They removed from Congress the power to appoint a treasurer.<sup>259</sup> They added, "but all duties, imposts, and excises, . . . shall be uniform and equal throughout the United States[,]" to the first clause of Article 1, Section 8 and adopted that provision in its final form.<sup>260</sup> Having first been proposed on August 25, 1787,<sup>261</sup> Madison stated that the final words "were unanimously annexed to the power of taxation."<sup>262</sup>

Although the climax in the general welfare discussion had passed, some closing scenes followed. On September 14th, Franklin proposed adding a power "to provide for cutting canals where deemed necessary."<sup>263</sup> This proposal was defeated, in part because some thought the cost would be paid by the union and the benefit enjoyed by the locale, and in part because some thought the power unnecessary.<sup>264</sup> In a final salute to the fear of

256. *Id.* at 283. Madison's notes say, "1. The first clause of article 7, sect. 1, to read as follows: 'the legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States.'" 5 *id.* at 506. His footnote to this provision pointedly says, "\* This is an exact copy. The variations in that in [sic] the printed Journal are occasioned by its incorporation of subsequent amendments. This remark is applicable to other cases." *Id.* The footnote refers to the difference between the Journal entry and Madison's notes—that being the semi-colon as opposed to the comma.

257. 1 *id.* at 300.

258. 5 *id.* at 538.

259. *Id.* at 542-43.

260. 5 ELLIOT, *supra* note 93, at 543.

261. *Id.* at 479.

262. *Id.* at 543.

263. *Id.*

264. *Id.* at 543-44.

disproportionate taxation, George Read moved to insert “or other direct tax” after “capitation” in the fourth clause of Section 9.<sup>265</sup> “He was afraid that some liberty might otherwise be taken to saddle the states with a readjustment, by this rule, of past requisitions of Congress; and that his amendment, by giving another cast to the meaning, would take away the pretext.”<sup>266</sup>

So, we see the evolution of the General Welfare Clause in this way. It arose from the proposal that the new government assume the Revolutionary War debts of the States.<sup>267</sup> This proposal made clear, however, that only those debts incurred for the common defense and general welfare were to be assumed by the federal government.<sup>268</sup> The debt proposal was made less specific to ensure that Revolutionary War securities could be redeemed.<sup>269</sup> The debt proposal was merged with the power to levy taxes, to make clear that the new Congress could levy taxes for that purpose.<sup>270</sup> That language, however, would have constricted the scope of Congress’ taxing power.<sup>271</sup> Since the Confederation’s inability to raise funds was one of the issues that triggered the Convention and because the taxing power was likely to be one of the more controversial, the members realized that some would try to construe the provision strictly. Thus, the Brearly Committee of Eleven added the familiar language, “to pay the debts and provide for the common defence and general welfare . . . .”<sup>272</sup> Madison asserted until his death that this language was intended to do nothing more than enlarge the scope of the taxing power in order to avoid an *inclusio unius exclusio alterius* claim,<sup>273</sup> and that the power of Congress to spend was found only in the enumerated powers.<sup>274</sup>

Madison’s view is best represented in his 1800 *Report on the Virginia Resolutions*, where he addressed both the “weak” and “strong” Hamiltonian views.<sup>275</sup> He argued that the effect of either results in “a government without the limitations formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the

265. 5 ELLIOT, *supra* note 93, at 545.

266. *Id.*

267. 4 *id.* at 451.

268. *Id.* Otherwise, states could tender for payment of indebtedness incurred for their day-to-day administration. These are also the charges that would have been paid under the Articles of Confederation. 1 *id.* at 81.

269. 4 *id.* at 451.

270. 1 ELLIOT, *supra* note 93, at 260; 5 *id.* at 469.

271. Letter from James Madison to Joseph C. Cabell (Oct. 20, 1828), reprinted in 2 THE FOUNDERS’ CONSTITUTION, *supra* note 113, at 452.

272. 5 ELLIOT, *supra* note 93, at 506.

273. See BLACK’S LAW DICTIONARY 763 (6th ed. 1990) (defining *inclusio unius exclusio alterius* as “[t]he inclusion of one is the exclusion of another”).

274. 4 ELLIOT, *supra* note 93, at 552.

275. *Id.* at 546-80.

exposition given to these general phrases."<sup>276</sup> Madison then articulated his view.

The true and fair construction of this expression, both in the original and existing federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and general welfare. In both is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution which declares that "no money shall be drawn from the treasury but in consequence of appropriations made by law." An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction.<sup>277</sup>

He argued that the clause was intended to do nothing more than provide for the payment of the debts of the Revolution.<sup>278</sup> He felt that it simply reflected the disagreements of the members of the Convention upon how to make payments.<sup>279</sup> He went on to state:

[b]ut it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms "common defence & general welfare", unless we were so to understand the proposition containing them, made on Aug. 25. which was disagreed to by all the States except one.<sup>280</sup>

The obvious conclusion to which we are brought is, that these terms copied from the Articles of Confederation, were regarded in the new as in the old Instrument merely as general terms, explained & limited by the subjoined specifications; and therefore requiring no

276. *Id.* at 552.

277. *Id.*

278. 2 THE FOUNDERS' CONSTITUTION, *supra* note 113, at 452-54.

279. *Id.* at 454. In fact, payment of state debts was one of the first orders of business for the new Republic. See Act of Aug. 4, 1790, 1 Stat. 178 (1790) (establishing a post office); Act of May 31, 1794, 1 Stat. 371 (1794) (settling overdue accounts between the United States and individual states). See also Currie, *supra* note 132, at 806-07 for further discussion.

280. 3 RECORDS, *supra* note 107, at 487 (citation omitted). The clause proposed on August 25, 1787 provided "for the payment of said debts, [entered into by the Confederation] and for the defraying the expences that shall be incurred for the common defence and general welfare." 2 *id.* at 408, 414. See also 1 ELLIOT, *supra* note 93, at 264; 5 *id.* at 477 (containing the same quote).

critical attention or studied precaution.<sup>281</sup>

Madison concluded by responding to arguments that it was the practice of the Revolutionary Congress to spend generally, without regard to enumerated powers.<sup>282</sup> He went on to point out that while numerous amendments were offered at the time of ratification and in the First Congress, and that all were aimed at limiting the power of the national government, not one addressed the Common Defence and General Welfare Clauses.<sup>283</sup> Furthermore, he argued, while strenuous objections were made to the limited powers set out in the Constitution, few were made to what was now argued to be a much broader authority.<sup>284</sup>

### B. Why The Madison Interpretation Is Wrong

In 1800, Madison was willing to admit to a limited spending power found in Article I, Section 8, Clause 1.<sup>285</sup> It was his view that, if such a power was to be found in the clause, it was limited to spending for purposes of the enumerated powers. Madison's concession, that the spending power might be found in the General Welfare Clause, proved fatal to his position. As soon as he conceded that a power to spend may be found in the clause, but is limited by the enumerated clauses that follow, his interpretation began to break down. Story criticized it competently.<sup>286</sup> When the time came a century later for the Supreme Court to issue its first authoritative interpretation, Madison's construction lacked persuasive force. Had he adhered to his earlier stated view, that the General Welfare Clause was no more than a limitation on the taxing power and an addition to avoid an *inclusio unius exclusio*

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281. 3 RECORDS, *supra* note 107, at 487. Madison made the same argument in his comments on the Bank Bill. James Madison, The Bank Bill (Feb. 2, 1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 113, at 446. It was his view that the establishment of a national bank was not within the powers granted Congress. He stated:

[n]o argument could be drawn from the terms "common defence, and general welfare." The power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question [to establish a National Bank], would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments. These terms are copies from the articles of confederation; had it ever been pretended, that they were to be understood otherwise than as here explained?

*Id.*

282. 3 RECORDS, *supra* note 107, at 489-90.

283. *Id.* at 490.

284. *Id.* at 489-90.

285. 4 ELLIOT, *supra* note 93, at 552.

286. 1 STORY, *supra* note 4, §§ 911-18.



*alterius* claim,<sup>287</sup> his interpretation would have carried more persuasive power.

Madison's view suffered from other shortcomings. It was too narrow. He granted only to Congress the powers in the enumerated clauses together with all means "necessary and proper" to carry them out.<sup>288</sup> Madison seemed to overlook the Necessary and Proper Clause's application to the other branches. While debts might be paid by congressional appropriation, the ability to incur debts was not limited to the legislative branch.

Let us consider some examples. The Executive holds the inherent power, as Commander-in-Chief, to resist invasions.<sup>289</sup> Congress, however, may call forth the militia and may declare war against the invader.<sup>290</sup> The Executive's power to resist an invasion does not arise because of an appropriation by Congress or from any other congressional authorization. It comes directly from the Constitution. When the Executive, acting as Commander in Chief, resists invasion, he incurs debts that inure to the Union.<sup>291</sup> Some of these debts may pay for munitions, others may be for the repair of war damage.<sup>292</sup> The first class of debts is incurred for the common defence. The second class is incurred for the common defence and general welfare, the theory being that one region of the country has sacrificed for the general welfare of the rest by bearing the brunt of the invasion. These debts may be incurred without prior congressional appropriation.

The appropriation to pay the debts may come after the invasion or insurrection has been defeated. Congress, for example, appropriated funds in order to aid officers and citizens who lost property while resisting the Whiskey Rebellion.<sup>293</sup> The power to

287. See *supra* note 273 for the definition of *inclusio unius exclusio alterius*.

288. 4 ELLIOT, *supra* note 93, at 552.

289. U.S. CONST. art. II, § 2, cl. 1; *id.* art. IV, § 4.

290. *Id.* art. I, § 8, cls. 11 & 15.

291. See ANNALS OF CONG. 901-02 (Feb. 28, 1793) (expressing the view that the executive may, in an emergency, spend outside the scope of an appropriation and incur debts for which funds have not been appropriated); Currie, *supra* note 132, at 26 (noting that President Washington incurred debts in suppressing the Whiskey Rebellion, expecting that Congress would appropriate funds to pay them).

292. See Act of Feb. 27, 1795, 1 Stat. 423 (1795); ANNALS OF CONG. 794 (Nov. 20, 1794); *id.* 996 (Dec. 17, 1794); Act of Dec. 31, 1794, 1 Stat. 404 (1845) (appropriating funds to pay costs of employing militia to suppress the Whiskey Rebellion).

293. Act of Feb. 27, 1795, 1 Stat. 423 (1794).

Congress appropriated "\$8,500 to be applied by him [the President] to aid such officers of government and other citizens, who have (in consequence of their exertions in support of the laws) sustained losses in their property, by the actual destruction thereof, by the insurgents in the western counties of Pennsylvania, as, in his opinion, stand in need of immediate assistance, to be them accounted for, in such manner, as may hereafter be directed by law."

pay for the munitions expended, to resist the invasion, or to pay for the damages suffered by citizens on the frontier, does not depend upon the Common Defence and General Welfare Clause. Rather, those powers are inherent in the Executive's power to resist invasion. Congress, however, may decline to pay those bills at its discretion.

Similarly, should Congress declare war, its authority to pay for repair of war-damaged buildings, an appropriation for the general welfare, would come from the war power. As with the first example, the General Welfare Clause is not necessary to properly implement the appropriation.

The States retain the power to officer and train their militias.<sup>294</sup> Not being prohibited (except when called into service for the United States), the States retain the power to employ their militia to resist invasions and to suppress insurrections.<sup>295</sup> The States could seek to have Congress appropriate funds to defray these expenses. Congressional power to appropriate funds to defray those expenses would not come from the General Welfare Clause. It is the Necessary and Proper Clause that ensures congressional power to appropriate funds to promote energy "in the execution of the laws."<sup>296</sup>

In the arena of spending, the Necessary and Proper Clause performs, or may perform, all the labor required by the enumerated clauses of the Constitution, whether they are in Article I or not. With respect to the enumerated powers, the General Welfare Clause performs no work.<sup>297</sup> In this sense, then, Madison was wrong. An implied power to spend pursuant to the enumerated powers, lodged in the General Welfare Clause, makes no sense when a clearer statement of that power may be found in the Necessary and Proper Clause. In this sense, Story's critique was accurate. Under Madison's interpretation, the General Welfare Clause would be rendered a nullity.

Story criticized Madison's view that the clause was neither an independent power to legislate nor an independent power to apply revenues.<sup>298</sup> He stated that Madison's interpretation was "neither more nor less, than an attempt to obliterate from the constitution the whole clause, 'to pay the debts, and provide for the common defence and general welfare of the United States,' as entirely

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*Id.*

294. U.S. CONST. art. I, § 8, cl. 16.

295. *Id.* art. I, § 10, cl. 3.

296. ANNALS OF CONG. 995-96 (Dec. 17, 1794). See Currie, *supra* note 132, at 26 n.136 (discussing remarks of Representative Hartley regarding the Reparations Bill). The power is granted by U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3; *id.* art. IV, § 4.

297. 2 STORY, *supra* note 4, § 915. This was one of Story's chief criticisms of Madison's view. 1 *id.* § 916.

298. *Id.* § 917.

senseless, or inexpressive of any intention whatsoever.”<sup>299</sup> Story ridiculed the idea that the Taxing Clause was a grant of general power, limited by the enumerated powers that followed it in Section 1.<sup>300</sup> Story continued,

[i]t is no sufficient answer to say, that the clause ought to be regarded, merely as containing “general terms, explained and limited, by the subjoined specifications, and therefore requiring no critical attention, or studied precaution;” because it is assuming the very point in controversy, to assert, that the clause is connected with any subsequent specifications. It is not said, to “provide for the common defence, and general welfare, *in manner following, viz.,*” which would be the natural expression, to indicate such an intention.<sup>301</sup>

He then attacked Madison’s explanation that the general welfare phrase originated in the Articles of Confederation, where the Articles were not understood to be a grant of power.<sup>302</sup> He argued that “[t]here is not, however, any solid ground, upon which it can be for a moment maintained, that the language of the constitution is to be enlarged, or restricted by the language of the confederation.”<sup>303</sup> In the next section of his *Commentaries*, Story contended that the failure of the Confederation and the rejection of its more limited powers by the Philadelphia Convention, militated against Madison’s incorporation of the Articles’ understanding of the General Welfare Clause.<sup>304</sup> Finally, Story directly addressed Madison’s contention that money may not be applied to the general welfare other than through or as part of the exercise of the enumerated powers. He stated:

[s]tripped of the ingenious texture, by which this argument is disguised, it is neither more nor less, than an attempt to obliterate from the constitution the whole clause, “to pay the debts, and provide for the “common defence and general welfare of the United “States,” as entirely senseless, or inexpressive of any intention whatsoever. Strike them out, and the constitution is exactly what the argument contends for. It is, therefore, an argument, that the words ought not to be in the constitution; because if they are, and have any meaning, they enlarge it beyond the scope of certain other enumerated powers, and this is both mischievous and dangerous. Being in the constitution, they are to be deemed, *vox et preterea nihil*, an empty sound and vain phraseology, a finger-board pointing to other powers, but having no use whatsoever, since these powers

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299. *Id.* § 916.

300. *Id.* §§ 907-08.

301. *Id.* § 910 (citations omitted).

302. See Madison’s Report on the Virginia Resolutions (1799-1800), reprinted in 4 ELLIOT, *supra* note 93, at 551-52.

303. 2 STORY, *supra* note 4, § 911.

304. *Id.* § 912.

are sufficiently apparent without.<sup>305</sup>

This construction or perception of Madison's view carried the day in 1936. Madison's view was tendered to the Supreme Court in *Butler*, not by the Respondent, but by an *amicus*.<sup>306</sup> Not surprisingly, considering Chief Justice Hughes' long-standing view of the General Welfare Clause, the Court did not adopt it.<sup>307</sup>

Madison's position was defeated by his concession that the General Welfare Clause conferred a limited power to spend. As a result of text and history, Madison stated his position in a form that was readily criticized. It was the text that led to efforts to expand, rather than to restrict congressional power. This would seem unavoidable, since Congress, once it was empowered to do something, would attempt to do more. Historically, the changes in the needs of the Republic ensured that Congress raised questions concerning the Spending Clause in the form of an attempt to create and expand a spending power. This meant that Madison's argument would always be offered to defeat attempts to expand congressional power. As a result of this history, Madison would repeatedly expound his view in an effort to oppose the construction proposed by the Federalists and, in particular, by Alexander Hamilton.<sup>308</sup> Had the dispute been over Congress' power to tax or spend in furtherance of any enumerated power (as it was in the early Congresses), the form and language of the debate would have been different and Madison's view might have prevailed.

In the end, however, Story was correct. When Madison contended, "Congress is authorized to provide money for the common defence and general welfare,"<sup>309</sup> his construction of the General Welfare Clause was that of a "finger-board" pointing to the enumerated powers.<sup>310</sup> Nevertheless, Madison's defeat is not necessarily Story's victory.

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305. *Id.* § 916 (citations omitted).

306. Brief filed by Malcolm Donald as Amicus Curiae on behalf of the National Association of Cotton Manufacturers at 70, *United States v. Butler*, 297 U.S. 1 (1936) (No. 401), *reprinted in* 30 LANDMARK BRIEFS, *supra* note 119, at 762.

307. *Butler*, 297 U.S. at 78. Hughes had certainly adopted Story's interpretation 20 years earlier in his opinion regarding the bonds issued by the Federal Land Banks. Letter from Charles E. Hughes to Alexander Brown & Sons 8-17 (May 4, 1917) (on file with *The John Marshall Law Review*). He argued the same view in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 195-96 (1921).

308. See discussion *supra* Part III for a complete analysis of the Hamiltonian interpretation.

309. 4 ELLIOT, *supra* note 93, at 552.

310. 2 STORY, *supra* note 4, § 916.

## V. THE "WEAK" HAMILTONIAN OR STORY INTERPRETATION

### A. *The Interpretation Itself*

The next step down from a general grant of the power to provide for the general welfare is a grant of power to spend for the general welfare. This is the "weak" Hamiltonian or Story interpretation, articulated in Hamilton's 1791 *Report on Manufactures*.<sup>311</sup> In his *Report*, Hamilton urged the aggressive use of tariffs and subsidies to protect and encourage existing and fledgling industries. He stated:

[a] question has been made concerning the constitutional right of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the . . . general welfare," with no other qualifications than that "all duties, imposts, and excises shall be uniform throughout the United States; and that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by a census or enumeration, taken on the principles prescribed in the Constitution," and that "no tax or duty shall be laid on articles exported from any State."

These three qualifications excepted, the power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive than the payment of the public debts, and the providing for the common defense and general welfare. The terms "general welfare" were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the "general welfare," and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.<sup>312</sup>

Hamilton continued:

[i]t is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the

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311. Alexander Hamilton, *Report on Manufactures to the House of Representatives* (Dec. 5, 1791), reprinted in 4 THE WORKS OF ALEXANDER HAMILTON, *supra* note 138, at 70-198.

312. *Id.* at 150-51.

sphere of the national councils, as far as regards an application of money.<sup>313</sup>

Story endorsed this view in his *Commentaries*. He articulated his theory most briefly in the following passage.

If it [the debts and general welfare clause] is a mere appendage or qualification of the power to lay taxes, still it involves a power of general appropriation of the moneys so raised, which indirectly produces the same result . . . [This] position [that there is no difference between a plenary power to provide and a plenary power to apply revenue] is not a just conclusion from the premises, which it states, that it is a qualified power. It is not a logical or a practical sequence from the premises; it is a *non sequitur*.<sup>314</sup>

The “weak” Hamiltonian or Story position consists of three prongs. First, it holds the General Welfare Clause to be a limitation on the taxing power.<sup>315</sup> Second, it holds that if Congress has been granted the power to tax “in order” to provide, or for the purposes of providing, for the general welfare, then this must include the power to apply revenue for that purpose.<sup>316</sup> Finally Congress, as Hamilton and Story argued and *Helvering* held, has the exclusive power to determine what is for the general welfare.<sup>317</sup>

Before I engage in a critique of the “weak” Hamiltonian or

313. *Id.* at 151-52.

314. 1 STORY, *supra* note 4, § 920.

315. 2 *id.* § 907. See also THE WORKS OF ALEXANDER HAMILTON, *supra* note 138, at 150 (arguing that the term “general welfare” “intended to signify more than was expressed or imported” because without a broad term many “exigencies incident to the affairs of a nation” would be left out).

316. 2 STORY, *supra* note 4, §§ 911, 919-20. See also THE WORKS OF ALEXANDER HAMILTON, *supra* note 138, at 149 (arguing that the use of public money to support industry serves a beneficial purpose).

317. 2 STORY, *supra* note 4, § 909. See *Helvering v. Davis*, 301 U.S. 619, 640 (1937). Hamilton, however, appeared to be less emphatic about this than Story. In his opinion regarding the power to establish a national bank, he stated:

[i]t is true that they cannot without a breach of trust lay taxes for any other purpose than the general welfare; but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as under only one restriction which does not apply to other governments—they cannot rightfully apply the money they raise to any purpose merely or purely local. But, with this exception, they have as large a discretion in relation to the application of money as any Legislature whatever. The constitutional test of a right application must always be, whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the Union, must be a matter of conscientious discretion, and the arguments for or against a measure in this light must be arguments concerning expediency or in expediency, not constitutional right.

3 THE WORKS OF ALEXANDER HAMILTON, *supra* note 138, at 484-85.

Story position, we should consider what it does not encompass. As we saw above, the power of the national government to regulate international and interstate commerce by means of duties, imposts, and excises was undoubted at the time of the Philadelphia Convention.<sup>318</sup> When the Supreme Court said the power to tax is the power to destroy,<sup>319</sup> it could also have said that the power to regulate is the power to prohibit.<sup>320</sup> Thus, Congress is free to lay prohibitive duties for purposes other than raising revenue. Its laying of such duties would be to provide for the general welfare as a matter of regulation, not as a matter of revenue. Hamilton's position extends beyond that power, however. He articulated this clearly in his *Opinion on the National Bank* in which he stated, "[w]hatever relates to the general order of the finances, to the general interests of trade, etc., being general objects, are constitutional ones for the application of money."<sup>321</sup>

#### B. Why the "Weak" Hamiltonian or Story Interpretation Is Wrong

In order to determine why the "weak" Hamiltonian or Story interpretation is wrong, one must ask himself, does this view comport with the text? Let us segregate and examine the text of the first clause. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,"<sup>322</sup> would, standing alone, grant a plenary and unlimited power to impose and collect taxes, etc. The question then becomes, what is the purpose of the following phrase, "to pay the Debts and provide for the common Defence and general Welfare of the United States . . . [?]"<sup>323</sup>

We have previously concluded that the second phrase is not an independent grant of power. Thus, the second phrase performs work only if it modifies the first. As a modification, is it a limitation or an extension of power? Story tells us that it is both. That is, he agrees that Congress may not tax except to pay the debts and provide for the defense and the general welfare.<sup>324</sup> Congress may not lay and collect taxes for any other purpose.<sup>325</sup>

318. See *supra* Part I for a discussion of taxes, duties and imposts.

319. *McCulloch v. Maryland*, 17 U.S. 316, 433-34 (1819).

320. *Champion v. Ames*, 188 U.S. 321, 358-59 (1903).

321. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (Feb. 23, 1791), reprinted in 3 THE WORKS OF ALEXANDER HAMILTON, *supra* note 138, at 485. The Avalon Project, *Hamilton's Opinion as to the Constitutionality of the Bank of the United States, 1791* (last modified Sept. 14, 1999) <<http://www.yale.edu/lawweb/avalon/amerdoc/bank-ah.htm>>.

322. U.S. CONST. art. I, § 8, cl. 1.

323. *Id.*

324. 2 STORY, *supra* note 4, § 911.

325. *Id.* This is not to say that Congress may not impose taxes within the scope of this limitation for other purposes. For example, Congress could impose a prohibitive tax upon cigarettes for the primary purpose of raising funds for defense, and for the secondary (or primary) purpose of limiting the

But once Congress collects revenues, it may appropriate them for these general purposes.<sup>326</sup>

How is taxing for the general welfare a limitation on scope? The short answer is that Congress can tax for national, but not for local, purposes. The General Welfare Clause was a reaction to perceived and actual abuses by Parliament and the English monarchy. In the same way, the States wanted to ensure that Congress did not tax one state or one region for the benefit of the others.<sup>327</sup> This theme, varied in the final phrase of Clause 1,<sup>328</sup> is repeated throughout the Constitution and, as a matter of history, appeared most strongly in the *Resolutions of the Stamp Act Congress*.<sup>329</sup>

Nevertheless, Story's view, that the clause is also an extension of power, conflicts with the organization and structure of the remaining clauses and sections. Remember, the clauses of Section 8 follow a standardized structure. Each clause grants either a plenary power or grants a power followed by limits on the power. The commerce power is self-limited to commerce between the states, with the Indian tribes, and foreign nations.<sup>330</sup> The Copyright Clause is of similar effect.<sup>331</sup> It is not a plenary power to protect inventions, etc., but describes the limited means by which this may be done: "by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries."<sup>332</sup>

Additionally, Congress has the power "[t]o raise and support Armies," but may appropriate monies only for a period of two

tobacco industry. The imposition of taxes for other purposes has been labeled the doctrine of "extraneous ends" by Professor David E. Engdahl. Engdahl, *supra* note 34, at 16-26. This doctrine, however, is an unnecessary doctrine. Since the power to lay "Duties, Imposts, and Excises" is a direct power to regulate—to prevent people from acquiring property—the regulatory power is a primary, not an extraneous purpose.

326. 1 STORY, *supra* note 4, § 923.

327. Congress could tax goods found only in one region. However, the excise would end up affecting the rest of the nation. For example, snuff users in New York would end up paying a higher price for their snuff. See *Hylton v. United States*, 3 U.S. 171, 174 (1796) (providing an example of a carriage tax to demonstrate that owners of carriages in one state would pay more than owners of carriages in another state). In contrast, Congress could not impose a tax on all goods produced in states that legalized slavery or on all goods sold in the State of New York. *Id.* at 174-75. Such a tax would violate both the Uniformity and the General Welfare Clauses. *Id.* at 174.

328. U.S. CONST. art. 1, § 8, cl. 1. Clause 1 states, "but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*

329. *Resolutions of the Stamp Act Congress* (Oct. 19, 1765), *reprinted in SOURCES OF OUR LIBERTIES*, *supra* note 91, at 270-71.

330. U.S. CONST. art. I, § 8, cl. 3.

331. *Id.* art. I, § 8, cl. 8.

332. *Id.*



years at a time.<sup>333</sup> Congress may “provide for [the] organizing, arming, and disciplining” of the militia,<sup>334</sup> powers that are also self-limited by the phrases that follow within the clause.

This is the scheme of Section 8.<sup>335</sup> Either plenary powers are granted, or limited powers are granted, with the limitation appearing in the same clause that grants the power. If we are to accept Story’s construction, we must deviate from this scheme and hold that Clause 1 is the grant of a power not merely limited, but also expanded by the limiting phrases that follow. Of the clauses in Section 8, only the General Welfare Clause is viewed as both a limitation and an implied power.

If we assume that the power to tax is also the power to spend, then many of the limitations in the clauses that follow lose their meaning. Story’s view enlarges powers that are expressly limited. For example, Congress has the power to promote the sciences and arts, but that power is limited to a system of patents and copyrights. Story’s interpretation enlarges the power by authorizing Congress to give money to artists and scientists, doing violence to the express limitation of the clause.

Finally, in the last prong of Story’s view, we see the argument break down as a result of its own structure. If “provide for the common defence and general welfare” is a limitation on the power of Congress, but Congress has the unlimited power to determine the general welfare, then the clause is no limitation at all.

Thus, the General Welfare Clause can perform no function, other than that of a limitation on the taxing power, without doing violence to the rest of the Constitution. Story argued that a grant of plenary power to provide for the general welfare (the “strong” Hamiltonian position) made no sense in light of the enumerated and specific powers that followed.<sup>336</sup> His own view is subject to the same criticism. A grant of plenary power to spend for the general welfare makes no sense in light of the enumerated and specific powers to spend that follow it.

Such is the origin, explanation, and criticism of the three views. The “strong” Hamiltonian interpretation that Congress could legislate for the general welfare failed chiefly because it was not supported by any reasonable construction of the Constitution’s text. Madison’s interpretation, that Congress could spend (or appropriate) money only in the furtherance of the powers expressly granted by the Constitution, as expanded by the Necessary and Proper Clause, failed partly because of the form taken by the debate and partly because Story’s critique was valid. The “weak” Hamiltonian or Story interpretation prevailed because

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333. *Id.* art. I, § 8, cl. 12.

334. *Id.* art. I, § 8, cl. 16.

335. U.S. CONST. art. I, § 8.

336. 2 STORY, *supra* note 4, § 909.

it was authoritatively set forth by Story, because Story's construction had never been seriously critiqued, and because the evolution of the nation rendered Madison's construction obsolete. This is how Hamilton's and Story's view, that Congress may spend for the general welfare and that Congress has the exclusive authority to determine what constitutes the general welfare, came to triumph in *United States v. Butler*,<sup>337</sup> *Helvering v. Davis*,<sup>338</sup> and *South Dakota v. Dole*.<sup>339</sup>

The differences between the Hamilton/Story and Madison interpretations encompass more than the meaning of the General Welfare Clause. Madison spoke of original intent. This was an "I Was There" argument and it foundered on the shoals of the text. Story and Hamilton, in contrast, spoke of original meaning and their argument was more enduring. As a matter of text, and as a matter of intent, this Article concludes that the General Welfare Clause acts differently than either Madison or Story argued.

#### VI. ORIGINAL INTENT V. ORIGINAL MEANING: THE GENERAL WELFARE CLAUSE AS A LIMITATION ON THE TAXING POWER

The General Welfare Clause was not inserted into the Constitution accidentally. It appears in the Tax Clause for the same reason it was set forth in the Articles of Confederation. It reflected the Convention's knowledge of history, the experience of its members, and the experience of the Colonies before the Revolution. It was inserted as a limitation on the power to raise revenue.

The Crown's abuses of the taxing power were well known. They extended over centuries. Each form of abuse was addressed by its own clause in the Constitution, as much out of fear of tyranny as out of the States' regional jealousies.

In Edward I's reign, the monarch had the authority to grant taxing powers to individuals and to municipalities.<sup>340</sup> Monarchs exercised this power liberally, conferring it on favorites. These grants often resulted in non-uniform levies that did not benefit the nation as a whole.<sup>341</sup>

During his reign, James I began the abuse of the practice of impositions, duties not authorized by Parliament, and the use of privy seals, which were coercive appeals for donations.<sup>342</sup> These were used "not only to meet the expenditures of the kingdom but also to satisfy the lavish generosity he customarily bestowed upon

337. 297 U.S. 1 (1936).

338. 301 U.S. 619 (1937).

339. 483 U.S. 203 (1987).

340. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 662-63 (Legal Classics ed. 1982).

341. *Id.*

342. *SOURCES OF OUR LIBERTIES*, *supra* note 91, at 63.

court favorites.<sup>343</sup>

In 1625, during Charles I's reign, Parliament refused supplies to the King to demonstrate its objection to his prosecution of the war with Spain.<sup>344</sup> As a result, the King dissolved Parliament in 1626 and resorted to prerogative taxes to raise money.<sup>345</sup> The Crown also compelled the quartering of soldiers as a money-saving measure.<sup>346</sup> As with his father, Charles I's prerogative levies included impositions, privy seals, and a new form of compelled loans, which a number of the nobility refused to pay.<sup>347</sup> This resulted in their imprisonment and led to *Darnell's Case*, sometimes referred to as the *Five Knight's Case*.<sup>348</sup> By 1628, when Parliament next met, seventy-six people, including some members of Parliament, had been imprisoned.<sup>349</sup>

Parliament condemned taxation without its consent, stating "no Tax, Tallage, Loan, Benevolence, or other like Charge ought to be commanded, or levied by the King, or any of his Ministers, without common consent by Act of Parliament."<sup>350</sup> This resolution was later revised and embodied in the Petition of Right (which was approved by Charles I), stating "no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament."<sup>351</sup> Parliament later condemned the King's continued collection of tonnage duties, which had not been authorized by Parliament and also had not been mentioned in the Petition of Right.<sup>352</sup> In response, Charles I dissolved Parliament in 1629.<sup>353</sup>

For the next eleven years, in the Parliament's absence, the Crown continued to levy duties and other forms of taxation by prerogative.<sup>354</sup> Charles I exacted "ship money," a tax that had evolved from the requirement that ports provide ships for the King's use.<sup>355</sup> "Ship money" was soon extended to inland counties and bore no relationship to defense.<sup>356</sup> His subjects objected to these and other abuses, and Charles I eventually lost his head over the matter in 1649.<sup>357</sup>

343. *Id.*

344. *Id.* at 63-64.

345. *Id.* at 64.

346. *Id.* at 65.

347. SOURCES OF OUR LIBERTIES, *supra* note 91, at 64-65.

348. *Id.*; 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1 (London, R. Bagshaw 1809) [hereinafter COBBETT'S STATE TRIALS].

349. SOURCES OF OUR LIBERTIES, *supra* note 91, at 65.

350. *Id.* at 66 n.13.

351. *Id.* at 75.

352. *Id.* at 70.

353. *Id.*

354. SOURCES OF OUR LIBERTIES, *supra* note 91, at 70.

355. *Id.* at 70 n.29.

356. *Id.*

357. CHRISTOPHER HIBBERT, CHARLES I 280 (1968).

"Ship money" was a pejorative in the Colonies and in the post-Revolutionary states. When Fairfax County met to instruct its burgesses on the Confederation's proposed 1783 finance plan, they contended that it "contained the same arguments that were formerly used in the 'business of ship money' and to justify the arbitrary measures of the 'race of Stuarts in England.'"<sup>358</sup> *Hampden's Case*,<sup>359</sup> which challenged the ship money levies, was viewed as a palladium of liberty in the Colonies. Both Franklin<sup>360</sup> and Dickinson<sup>361</sup> compared the Townshend Duties to "ship money" and pointed to *Hampden's Case* as a beacon in the English fight for liberty.<sup>362</sup>

Following the Restoration in 1660, abuses of the prerogative taxing power resumed.<sup>363</sup> Both Charles II and James II resorted to prerogative taxation.<sup>364</sup> The Bill of Rights of 1689<sup>365</sup> complained that James II had subverted the laws and liberties "[b]y levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament."<sup>366</sup>

Between the reign of William of Orange and George III, little controversy over taxation is reported.<sup>367</sup> Parliament had not suspended supplies to the Crown since the Glorious Revolution.<sup>368</sup> Notably, it was in George III's reign that the sovereign attempted to recover his prerogative taxing power from Parliament.<sup>369</sup> He urged that the Colonies be taxed and encouraged the proceedings against John Wilkes when Wilkes opposed him.<sup>370</sup> In 1779,

358. MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, 410 (1981).

359. *SOURCES OF OUR LIBERTIES*, *supra* note 91, at 70 n.29. Hampden objected to the assessment on the ground that the King was taking his goods without consent. COBBETT'S *STATE TRIALS*, *supra* note 348, at 825. He refused to pay a 20 s. assessment and was sued for it. *Id.* at 846, 857. The Court of the Exchequer eventually heard the case, and ordered Hampden to pay the taxes. *Id.* at 1252. Parliament responded by overturning the holding and impeaching and removing the judges. *Id.* at 1283.

360. Benjamin Franklin, *Queries for the London Chronicle* (Aug. 18, 1768), *reprinted in WRITINGS*, *supra* note 206, at 633-34.

361. 1 DICKINSON, *supra* note 58, at 311.

362. See *supra* notes 360-61 and accompanying text.

363. *SOURCES OF OUR LIBERTIES*, *supra* note 91, at 227.

364. *Id.*

365. Bill of Rights (Dec. 16, 1689), *reprinted in id.* at 245-50.

366. *Id.* at 245.

367. 1 SIR THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 440-41 (New York, A.C. Armstrong & Son, 3d ed. 1889).

368. *Id.* at 441. May reports that members of Parliament attempted to suspend supplies in 1781, but the resolution was defeated. *Id.* at 442-43.

369. *Id.* at 36.

370. *Id.*; Case of John Wilkes, *reprinted in* 19 *A COMPLETE COLLECTION OF STATE TRIALS* 982, *compiled by* T.B. Howell (London, Longman, Hurst, Rees, Orme & Brown 1813); *Leach v. Money*, *reprinted in id.* at 1002; *Entick v.*

Parliament sought, according to May, "to correct abuses in the civil list expenditure, and every other branch of the public revenue."<sup>371</sup> George III retaliated by expelling various members of Parliament from civil offices.<sup>372</sup> Throughout this period, and until the end of the war with the Colonies, Parliament complained of and sought to regain authority over arbitrary spending by the King.<sup>373</sup>

The 18th Century, of course, saw the Stamp Act.<sup>374</sup> The *Resolutions of the Stamp Act Congress*, drafted by Dickinson,<sup>375</sup> complained that Parliament had levied the tax without consent of the colonists.<sup>376</sup> In the Sixth Article of the Resolutions, the Stamp Act Congress complained that England's taxation of the Colonies benefited England to the Colonies' detriment.<sup>377</sup> Or in other words, the taxes were not levied for the general welfare.<sup>378</sup> Daniel Dulaney argued:

[t]here is not that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies which must inevitably involve both in the same taxation; on the contrary, not a single elector in England might be immediately affected by a taxation in America . . . . Moreover, even Acts oppressive and injurious to the colonies in an extreme degree might become popular in England, from the promise or expectation that the very measures which depressed the colonies, would give ease to the inhabitants of Great Britain.<sup>379</sup>

Thus, the Sixth Article provided:

[t]hat all supplies to the crown, being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to his majesty the property of the colonists.<sup>380</sup>

In the Ninth Article, Congress complained that the various duties Parliament imposed failed to consider the unique

Carrington, *reprinted in id.* at 1029; Case of John Wilkes, *reprinted in id.* at 1075.

371. MAY, *supra* note 367, at 55.

372. *Id.* at 36-37.

373. *Id.* at 59-73.

374. See *supra* notes 49-65 and accompanying text for a discussion of the Stamp Act.

375. Jacobson, *supra* note 90, at 32; SOURCES OF OUR LIBERTIES, *supra* note 91, at 266.

376. SOURCES OF OUR LIBERTIES, *supra* note 91, at 264-65.

377. *Id.* at 270.

378. Among the propoganda against the Stamp Act was Samuel Adams' claim that the revenues would be used to bring Catholic Bishops to the Colonies. THE ARTICLES OF CONFEDERATION, *supra* note 117, at 46.

379. Daniel Dulany, Considerations on the Propriety of Imposing Taxes in the British Colonies, *reprinted in* SAMUEL ELLIOT MORISON, SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788, 27 (1923).

380. SOURCES OF OUR LIBERTIES, *supra* note 91, at 270.

circumstances of the Colonies.<sup>381</sup> It contended that, because Great Britain compelled them to buy their goods from British sources, the colonists already provided support to the Crown because the costs of taxes on those goods were passed on to them.<sup>382</sup>

Although the Stamp Act was quickly repealed, the Townshend Duties gave rise to the same objections. According to Dickinson, the duties were another attempt to levy taxes for a revenue without the consent of the Colonies.<sup>383</sup> He restated the general welfare argument in his fourth *Letter from a Farmer*:

[historically,] certain services were rendered to the crown for the *general good* . . . [G]ifts and grants of their own property were made by the people, under the several names of aids, tallages, tasks, taxes, and subsidies, &c. These were made, as may be collected even from the names, for *public service* upon “need and necessity.” All these sums were levied upon people by virtue of their voluntary gift. Their design was to support the *national honor and interest*. Some of those grants comprehended duties arising from trade; being imposts on merchandizes. These Lord Chief Justice Coke classes under “subsidies,” and “parliamentary aids.” They are also called “customs.” But whatever the *name* was, they were always considered as *gifts of the people to the crown, to be employed for public uses*.<sup>384</sup>

Dickinson’s most vigorous assertion of the general welfare claim is found in his eighth *Letter*. In it he argued that the Stamp Act provided that “the money thereby to be raised, should be applied ‘towards defraying the expences of defending, protecting and securing the *British* colonies and plantations in *America*.’”<sup>385</sup>

Dickinson stated that the Townshend Duties, however impose duties upon *British* colonies, “to defray the expences of defending, protecting and securing *his Majesty’s DOMINIONS in America*.”

What a *change of words*! What an *incomputable addition* to the expences intended by the *Stamp-Act*! “*His Majesty’s DOMINIONS*” comprehended not only *the British colonies*, but also *the conquered provinces of Canada and Florida, and the British garrisons of Nova Scotia*; for *these* do not deserve the name of *colonies*.

What justice is there in making US pay for “defending, protecting and securing” THESE PLACES? What benefit *can* WE, or have WE ever derived *from them*? None of them was conquered *for* US; nor will “be defended, protected or secured” *for* US.<sup>386</sup>

381. *Id.* at 271.

382. *Id.* at 270-71.

383. 1 DICKINSON, *supra* note 58, at 312-22.

384. *Id.* at 329-30 (citations omitted).

385. *Id.* at 360.

386. *Id.*

He signed this letter, "*Qui sentit commodum, sentire debet et onus*. They who feel the benefit, ought to feel the burden."<sup>387</sup>

In his tenth *Letter*, Dickinson reviewed the Crown and Parliament's abuses of the civil lists, stating:

[a]ttempts have been made [sic] to gloss over these gross encroachments, by this specious argument—"That expending a competent part of the PUBLIC REVENUE in pensions, from a principle of charity or generosity, adds to the dignity of the crown; and is *therefore* useful to the PUBLIC." To give this argument any weight, it must appear, that the pensions proceed from *charity* or *generosity* only"—and that it "adds to the dignity of the crown," to *act directly contrary to law*.<sup>388</sup>

Dickinson's letters flamed colonial discontent. His influence and the retaliatory acts of Parliament led to the 1774 meeting of the First Continental Congress. Colonial complaints of taxation without representation and taxation for other than the general welfare of the Empire were set out in *Declaration and Resolves of the First Continental Congress*.<sup>389</sup> The *Declaration and Resolves* reflect Dickinson's key arguments.<sup>390</sup>

The Philadelphia Convention was comprised of delegates who not only knew this history but had also participated in it. The Convention knew therefore of the dangers of an unrestricted power of taxation. The delegates included checks on historic abuses of the power throughout the text of the Constitution. The principle that taxes are gifts of the people is reflected in the rule that revenue measures shall originate in the people's House.<sup>391</sup> Note that Article I, Section 7, Clause 1 does *not* say that taxes, duties, etc. shall originate in the House.<sup>392</sup> This, yet again, distinguishes the power to levy duties as a form of regulation from the power to lay taxes, duties, imposts, and excises for purposes of revenue.

The Tax Clause commands "all Duties, Imposts and Excises shall be uniform throughout the United States."<sup>393</sup> These, of course, are indirect taxes. The uniformity rule preserves Dickinson's principle that those who share the benefit should share the burden.<sup>394</sup> Because direct taxes, even if "uniform" could result in heavier burdens on some states, the Constitution also commands that per capita and other direct taxes be levied in

387. *Id.* at 364.

388. 1 DICKINSON, *supra* note 58, at 377-78.

389. *Declaration and Resolves of the First Continental Congress* (Oct. 14, 1774), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 91, at 286-89.

390. *Id.* at 287-88.

391. U.S. CONST. art. I, § 7, cl. 1.

392. *Id.*

393. *Id.* art. I, § 8, cl. 1.

394. 1 DICKINSON, *supra* note 58, at 364.

proportion to population.<sup>395</sup>

The Constitution forbids taxes on exports.<sup>396</sup> To the extent that this prohibition prevents regional taxation that does not fall upon the rest of the country, it is redundant. The Constitution also prohibits preferences for duties among ports.<sup>397</sup> This latter rule, said Story, “cuts off the power to require that circuitry of voyage, which, under the British colonial system, was employed to interrupt the American commerce before the Revolution.”<sup>398</sup> Finally, the Constitution limits withdrawals from the Treasury to those for which Congress had earlier appropriated funds, protecting against abuses of spending by the Executive, whether by prerogative taxation or some other ingenious method.<sup>399</sup>

The Framers, then, went to great lengths to insure that the new government would not repeat the taxing sins of the old. They addressed the principal complaints articulated by the Stamp Act Congress,<sup>400</sup> the Pennsylvania Farmer,<sup>401</sup> and the First Continental Congress,<sup>402</sup> including the complaint that a tax might be levied on one region for the benefit of another.<sup>403</sup> They were intentionally redundant. The General Welfare Clause, like the ports, uniformity, and proportionality rules, ensures that Congress may not impose either a tax or a duty in a manner that burdens one section for the benefit of another. Less specific than the other three, the General Welfare Clause ensures against novel means of imposing regional taxation.

If any person’s view of the General Welfare Clause is entitled to deference, it would have to be Dickinson’s view. His theory of the power of taxation provided the principle justification for the colonial resistance to taxation that led to independence.<sup>404</sup> Dickinson’s theory that a national body could not levy taxes for purposes other than the common defense and the general welfare was put into practice in his draft of the Articles of Confederation.<sup>405</sup> Dickinson’s views on taxation for the general welfare, set out in the drafts of the Committees of Eleven (on which he served) would have to describe the original intent of the authors of the Constitution.

395. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

396. *Id.* art. I, § 9, cl. 5.

397. *Id.* art. I, § 9, cl. 6.

398. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 135 (Regenery Gateway, Bicentennial ed. 1986) (1859).

399. U.S. CONST. art. I, § 9, cl. 7.

400. SOURCES OF OUR LIBERTIES, *supra* note 91, at 270-71.

401. DICKINSON, *supra* note 58, at 307-406.

402. SOURCES OF OUR LIBERTIES, *supra* note 91, at 286-89.

403. *Id.* at 270.

404. *Id.* at 276.

405. See *supra* notes 217-28 and accompanying text for a discussion of Dickinson’s draft proposals.



But original intent is not the same as original meaning. The State conventions ratified a written document, not the various and conflicting thoughts of its authors. Nevertheless, they also ratified the document with the historical knowledge of the Crown and Parliament's abuses of the power to tax. It is this same history that informed the Framers of the meaning of the General Welfare Clause and it is what informs us.

## VII. WHAT INTERPRETATION?

What interpretation is left? If we adopt Story's interpretation that Congress may spend in any manner it deems in furtherance of the general welfare, then we must concede that the limitations to the powers that follow, limitations that appear in the text, are meaningless. Story's interpretation expands powers that are expressly self-limiting, thus violating the constitutional text. The "strong" Hamiltonian interpretation does violence to the text of the Constitution, as we have seen above and as Story so convincingly demonstrated. The Madison interpretation, because of its form, also fails the test of the constitutional text. Story correctly summed up Madison's view as a "finger-board," pointing to the other powers.<sup>406</sup> So, how then do we interpret the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"?<sup>407</sup>

The first conclusion is that the general welfare limitation is one of many redundancies that appear in the Constitution. It is another means of saying, "[t]hey who feel the benefit, ought to feel the burden."<sup>408</sup> Reflected in the rules of uniformity and proportionality, this principle is repeated more broadly in the general welfare limitation.

Second, the General Welfare Clause is a truism, a reaffirmation of the power to regulate commerce by means of duties. That is, we know that the Colonies admitted Parliament's power to impose regulations through duties and imposts. Repeatedly they referred to Parliament's power to levy duties as the power to provide for the general welfare of the Empire.<sup>409</sup> Had the Convention omitted the General Welfare Clause from the power that authorized Congress to lay duties, imposts and excises to pay the debts, the omission would reasonably have been construed as a denial of that form of regulatory power.

That said, it is both fair and necessary to subject this interpretation to the same examination as conducted of the

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406. 2 STORY, *supra* note 4, § 916.

407. U.S. CONST. art. I, § 8, cl. 1.

408. 1 DICKINSON, *supra* note 58, at 364.

409. See discussion *supra* Part I.

Madison, Hamilton, and Story views. This examination is broken into two cases: taxes for revenue upon which the General Welfare Clause acts as a limitation, and regulatory duties that are deemed for the general welfare.

*A. The First Case: Tax as Revenue*

When Congress lays a tax for revenue purposes, several subcases may arise: (1) the tax revenue may be ear-marked for the exercise of an enumerated power; (2) the tax bill may ear-mark the revenue for the exercise of an enumerated power, but the proceeds may be appropriated for the exercise of another enumerated power; (3) the tax may not be ear-marked but may be appropriated in furtherance of an enumerated power; (4) the tax may be ear-marked, but the proceeds are appropriated "for the general welfare"; (5) the tax, not ear-marked, may be appropriated "for the general welfare"; (6) the tax is ear-marked (or not) for a non-general welfare purpose; and finally, (7) Congress lays a tax on one region and confers the benefits on another, but not in furtherance of an enumerated power.

In the first three subcases, Congress spends to further an enumerated power. Is the General Welfare Clause a limitation in these instances? I conclude not. Congress may spend locally, the General Welfare Clause notwithstanding. This power, to spend locally in furtherance of an enumerated power, defeats the view of the General Welfare Clause as a spending limitation.

Beginning with the enumerated powers of Congress, we must observe that the powers are plenary. Congress may exercise them nearly in any manner they see fit, subject only to the expressed prohibitions of the Constitution. Consider the power to establish post offices, since this will illustrate our case. Congress has the express and unlimited power "[t]o establish Post Offices and post Roads."<sup>410</sup> Assume a majority in Congress, to coerce the abolition of slavery, decided to withhold establishing post offices in slaveholding states. Having imposed a general tax to, among other things, pay the costs of the post office department, Congress would then arguably have levied a tax for a local purpose: to establish post offices in non-slave states and to coerce the abolition of slavery in slave-holding states. Therefore, the tax would be general; the benefit would be (arguably) local.<sup>411</sup>

Now assume Congress, in the exercise of its wisdom, determines that its budget does not permit establishing post offices in all states. It thus establishes post offices in New York

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410. U.S. CONST. art. I, § 8, cl. 7.

411. This Article assumes a local benefit, although it is admittedly argued that abolition of slavery would be, in Congress's view in this instance, in furtherance of the general welfare.

and Massachusetts only. It has laid a general tax to for pay the costs of establishing the post offices among other things. Non-beneficiaries would argue that the tax was levied for a local purpose. The tax again is general, and the benefit local, but Congress would have to start somewhere in establishing a postal system and a General Welfare Clause argument against congressional power in this case would defeat the power expressly granted to it.

The power to spend, to establish, and to maintain post offices comes not from the General Welfare Clause, but from Article I, Section 8, Clause 7.<sup>412</sup> The power is plenary and Congress could establish only two post offices for budgetary reasons or limit post offices to non-slave states for extraneous reasons. The General Welfare Clause does not control Article I, Section 8, Clause 7.<sup>413</sup> Neither does it prohibit the laying of a tax that would confer the local benefits of a post office.

Congress' enumerated powers, being plenary, may not be limited by the General Welfare Clause. If we restate the case by saying that the enumerated powers are those necessary for the general welfare, then the General Welfare Clause also does not expand the scope of the enumerated powers. The tax power in such instances is not limited by the General Welfare Clause. Laying a tax to support the exercise of enumerated powers always would be a tax for the common defense or general welfare, even if the power was exercised locally or for expressly local purposes. I must conclude that when taxes are laid to carry out any enumerated powers, the General Welfare Clause does nothing to expand or to limit either the power to tax or the power to spend in furtherance of the enumerated power.<sup>414</sup>

This rule applies to the first three subcases. Later appropriations to further any enumerated power fall simply within Congress' power to change its mind and to exercise the power to appropriate for purposes found in the enumerated powers and the Necessary and Proper Clause.

It is the fourth subcase that becomes problematic. If the appropriation is for a "general welfare" purpose not found among the enumerated powers, then we find no source of power for the appropriation. It is no solution to claim a spending power in such an instance, because the tax was for an ear-marked enumerated-power purpose. At best, the defender of the appropriation could claim that Congress impliedly amended the tax bill to provide for the levying of taxes for the general welfare, and therefore the appropriation is pursuant to the "spending power."

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412. U.S. CONST. art. I, § 8, cl. 7.

413. *Id.*

414. This would include Congress' power to provide for the support of the various departments of the three branches.

The fifth subcase arises when the tax is levied for the purpose of generating revenue to be appropriated for the general welfare. If the tax is expressly "to provide funds in furtherance of the general welfare" or to generate revenue for a program not authorizable under the enumerated powers, but which arguably furthers the general welfare, then we must again find a spending power source for the appropriation.

This brings us to the sixth subcase, the case of the "President's Paramour." In this instance, consider two hypotheticals. In the first, Congress levies a tax for a non-enumerated, non-general welfare purpose. In the second, Congress levies a tax for a purpose authorized by an express power, but the Executive spends for a non-general welfare purpose. In this second instance, the role of the General Welfare Clause, as a limitation on the taxing power, may be examined with respect to the exercise of powers by the other branches.<sup>415</sup>

Assume that Congress, being especially solicitous of an extremely powerful and popular Executive, taxes chocolate to provide income to the "President's paramour" and appropriates the proceeds for the same purpose. This would be an indirect tax, uniformly applied but not imposed for the general welfare. In that instance, we see how the General Welfare Clause operates as a limitation on the tax, not a limitation on spending. After all, Presidents may spend money appropriated for their "paramours," and nothing in the Constitution would prohibit them from doing so.<sup>416</sup>

We may change the hypothetical to further illustrate how the other branches may exercise the spending (as opposed to the appropriation) power. Assume that, to make the "paramour" happy, the President appoints him or her to a position without confirmation pursuant to Article II, Section 2, Clause 3.<sup>417</sup> The position is funded by generally levied taxes. In that case, Congress has taxed for general welfare purposes. The Executive appointing the "paramour" has nevertheless spent for an arguably non-general welfare purpose. The same would be true any time Congress provides supplies to the Executive branch. The purpose, supplies for the Executive, is part of the general welfare.<sup>418</sup> If the

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415. The Executive executes the laws and this requires spending. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (holding that grant of power to Comptroller General to cancel spending items unconstitutionally gave Legislative branch functions that entailed execution of the laws).

416. Cf. Act of Mar. 2, 1797, ch. 6, 1 Stat. 497 (1861) (appropriating funds for the President's household expenses).

417. U.S. CONST. art. II, § 2, cl. 3.

418. "The three most important articles that our assemblies, or any legislatures can provide for, are, First—the defence of the society: Secondly—the administration of justice: And Thirdly—the support of civil government." 1 DICKINSON, *supra* note 58, at 366.

Executive employs the funds to pay the paramour-appointee, it is the President, not Congress, who has arguably spent for a non-general welfare purpose. Nevertheless, both actions would be constitutional as both lie within the powers of the respective branch.

Carrying this further, assume that Congress has made a general appropriation for purposes of conducting the country's foreign policy.<sup>419</sup> The Executive determines that it is in the national interest to spend funds "for propagating Mahometanism among the Turks."<sup>420</sup> Congress has taxed for a general purpose—foreign policy. The Executive has then spent for what Story considered a purpose not in furtherance of the general welfare.<sup>421</sup>

Congress has the power to appropriate funds in such a way that it effectively "spends" them.<sup>422</sup> But for all practical purposes, the spending power is properly found in the Executive, who spends to "take Care that the Laws be faithfully executed."<sup>423</sup> So, we see that the General Welfare Clause does not act as a check on executive spending of funds for non-general welfare purposes. The Executive's power to spend is limited only by the appropriations injunction of Article I, Section 9, Clause 7 and abstractedly by the injunction that the Executive "take Care that the Laws be faithfully executed"<sup>424</sup> and by Congress's power to impeach.<sup>425</sup>

The final case is self-explanatory. Levying a local tax to confer a benefit on a different locality violates the general welfare injunction, but is most likely to be struck down under the easier uniformity/proportionality rules.

### B. The Second Case: Taxation as Regulation

Under the second case, assume that Congress has levied a tax for regulatory purposes—to discourage the consumption of a particular item. As a regulation, even a prohibitive duty (i.e., *The Lottery Cases*)<sup>426</sup> will be an exercise of the tax power for the general

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419. "Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937).

420. 1 STORY, *supra* note 4, § 922.

421. *Id.*

422. *See Train v. New York*, 420 U.S. 35, 41 (1975) (holding that provisions in the Clean Water Act making available 75% of the cost of municipal sewers and sewage treatment works allows a state administrator to allot less than the amount appropriated).

423. U.S. CONST. art. II, § 3, cl. 1. *See also Clinton v. New York*, 524 U.S. 417, 441-45 (1998) (finding the Line Item Veto Act unconstitutional because it violated the Presentment Clause).

424. U.S. CONST. art. II, § 3, cl. 1.

425. U.S. CONST. art. I, § 9, cl. 7.

426. *Champion v. Ames*, 188 U.S. 321, 358-59 (1903).

welfare. What of an impost that is destructive of an industry that is generally considered beneficial? If the question is one of power under Article I, Section 8, Clause 1,<sup>427</sup> then the power plainly exists, for the power to lay imposts is plenary and the determination of the general welfare is left to Congress. With respect to such injurious duties, we may look to the colonial protests. While they protested the Sugar Act and other harmful duties, the colonists did not deny Parliament's power to impose them as regulations.<sup>428</sup> The power to lay duties, imposts, and excises is the power to regulate in order to provide for the general welfare.

Is it possible for Congress to exercise the regulatory taxing power for a non-general welfare purpose? This could not happen without a violation of the Ports Clause, a violation of the Uniformity Clause, or a violation of the Proportionality Clauses. Provided that the duty, impost, or excise is uniform, the question of whether it is levied for the general welfare is a question committed to the legislative branch.<sup>429</sup> For instance, a duty on things imported by one region of the country (i.e. a duty on imported wheat combines) is uniform if it applies to the entire United States.<sup>430</sup> It is arguably for the general welfare. While that limited class of farmers or harvesters who buy combines may be injured by higher prices, domestic manufactures are encouraged. While such a tax may be criticized on policy grounds as not being for the general welfare, it would nevertheless be within Congress' levying power.

If we excise "general welfare" from the Tax Clause, we are presented with the claim that Congress may not levy duties for purposes other than paying the debts and providing for the common defense. Indeed, omitting the general welfare phrase would eliminate nearly all duties for regulatory purposes. A strong argument could be made that while Congress might have the power to regulate foreign and interstate commerce, the omission of "general welfare" from the Tax Clause was intended to deny it the power to regulate commerce by means of duties.<sup>431</sup>

Duties, even while having a general welfare regulatory purpose, will generate revenue incident to the regulation. The revenue gives rise to several subcases of appropriations: (1) appropriations to pay for the cost of the regulation; (2) appropriations of the excess above the cost of collection to further any enumerated power; (3) appropriations for the "general

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427. U.S. CONST. art. I, § 8, cl. 1.

428. See *supra* notes 54-72 and accompanying text for examples of when the Colonies violently protested.

429. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

430. *Hylton*, 3 U.S. at 174-75.

431. U.S. CONST. art. I, § 8, cl. 1.

welfare” not pursuant to an enumerated power; and (4) appropriations not for the general welfare. It should be apparent that the first two subcases are well within Congress’ powers. Congress is free to spend in furtherance of any enumerated power.

The third subcase, appropriation “for the general welfare,” arises when Congress appropriates the excess revenue for a “general welfare purpose” not found within its enumerated powers. In that instance, where is the constitutional authority for the appropriation? The duty, having been levied for a regulatory purpose, would not readily give rise to a power to spend for the general welfare. As in the case of the ear-marked tax, the proponent of the appropriation would be left with an unsatisfactory and naked claim that Congress has impliedly amended its taxing measure to provide that the proceeds may be spent for the general welfare.

The fourth subcase assumes that Congress appropriates for a non-general welfare purpose. Again that appropriation finds no source of authority in the Constitution. Its defender is left with the weak claim that Congress has impliedly amended its taxing measure and that Congress is the sole determiner of the general welfare.

We are left, then, with what may be an unsatisfactory answer. The General Welfare Clause is simply redundant. But it is intentionally redundant, and no more redundant than many other clauses of the Constitution.

#### CONCLUSION

The General Welfare Clause reflected one of the Colonies’ deeper concerns—that one region or the whole might be taxed for the benefit of another. Under the Confederation, the general welfare principle had been enforced through the super-majority requirement of the Articles and tacitly through a state’s ability to refuse the requisitions of the Confederation. The Constitution changed the means of enforcement. The key was the division of powers—among the branches and between the Houses of Congress. However, the Convention retained the general welfare rule and it was enforceable through the new means found in the Constitution.

Thus, neither Madison nor Story nor Hamilton were fully correct in their measurement of the General Welfare Clause. The clause is not a mere introduction to the enumerated powers that follow. Neither is it a grant of power to spend. It cannot be a spending power without expanding or eliminating the limitations on power expressed in the clauses that follow it. The General Welfare Clause is a nullity when considered solely against Congress’ enumerated powers. But when considered against the powers granted to the other branches, it makes sense as an

indirect check on the Executive.

Story's *Commentaries* were written with at least part of his eye on the coming storm. The Virginia Resolutions of 1798 and 1799,<sup>432</sup> the Kentucky Resolutions of 1798,<sup>433</sup> and the South Carolina Nullification Acts of 1828 and 1832<sup>434</sup> occurred within Story's lifetime and prior to his completion of the *Commentaries*. They, and Tucker's *Blackstone Commentaries*, were the tremors that preceded the general eruption of 1861. Story focused on the Constitution as the charter of a national government, repeatedly striking blows against the views that the Constitution represented a compact among the individual states. Story's views were repeatedly attacked by Southern states' rights apologists.<sup>435</sup> Upon the *Commentaries'* publication in 1833, Chief Justice John Marshall wrote to comment favorably upon them.<sup>436</sup> The coming division was at the front of his mind as well.

I have finished reading your great work, and wish it could be read by every statesman, and every would-be statesman in the United States. It is a comprehensive and an accurate commentary on our Constitution, formed in the spirit of the original text. In the South, we are so far gone in political metaphysics, that I fear no demonstration can restore us to common sense. The word "State Rights," as expounded by the resolutions of '98 and the report of '99, construed by our legislature, has a charm against which all reasoning is vain. Those resolutions and that report constitute the creed of every politician, who hopes to rise in Virginia; and to question them, or even to adopt the construction given by their author [Madison], is deemed political sacrilege. The solemn and interesting admonitions of your concluding remarks will not, I fear, avail as they ought to avail against this popular frenzy.<sup>437</sup>

Consistent with what went on before and with what followed, slavery infected the interpretation of the General Welfare Clause. Those who feared the power of the federal government to destroy the institution, argued strenuously for states' rights, and a weak federal government. Those like Marshall and Story who foresaw the destruction of the Union labored mightily and quickly to

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432. 4 ELLIOT, *supra* note 93, at 546-80.

433. *Id.* at 540-45.

434. *Id.* at 580-94.

435. See generally ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 50-81 (Philadelphia, National Publishing Co. 1868); HENRY ST. GEORGE TUCKER, LECTURES ON CONSTITUTIONAL LAW (Richmond, Shepherd & Colin 1843); ABEL P. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT: BEING A REVIEW OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Leonard W. Levy ed., 1971) (1840).

436. Letter from John Marshall to Joseph Story (July 31, 1833), *reprinted in* 2 LIFE AND LETTERS OF JOSEPH STORY 135-36 (Boston, Charles C. Little & James Brown, 1851).

437. *Id.*



entrench federal power. One result was Story's articulation of the spending power, which prevails today.

The first Part of this Article reviewed the organization and structure of the Constitution, coming to several conclusions. Key among them were the observations that the Convention was freely and intentionally redundant and that a limitation on a power was included in the same clause as the grant of power. The General Welfare Clause is an intentionally redundant limit on the tax power. Forced to choose between Story's interpretation, which has the effect of expanding enumerated powers beyond their self-imposed limitations and an interpretation that follows a rule of intentional redundancy, the latter must prevail.