

# The University of Kansas Law Review

## The General Welfare Clause and the Public Trust: An Essay in Original Understanding

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*What think you of [Hamilton's] commentary . . . on the terms  
"general welfare"?—The federal Gov<sup>t</sup>. has been hitherto limited  
to the specified powers—If not only the means but the objects are  
unlimited, the parchment had better be thrown into the fire at  
once . . . .*

—James Madison<sup>1</sup>

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1. *Letter from James Madison to Henry Lee dated Jan. 1, 1792*, NAT'L GAZETTE, Jan. 2, 1792, reprinted in 6 THE WRITINGS OF JAMES MADISON 81, 81 (Gaillard Hunt ed., 1906).

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2. REPEATEDLY REFERENCED WORKS: For convenience, this note collects alphabetically by author or editor sources cited more than once in this Article. The editions and short form citations used are as follows:

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RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987).

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Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1936).

John Dickinson, *Letters from a Farmer in Pennsylvania*, in *EMPIRE AND NATION* (Forrest McDonald intro., 1962).

John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (1941) (1836) [hereinafter ELLIOT’S DEBATES].

David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995).

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) [hereinafter CONVENTION RECORDS].

MILTON E. FLOWER, *JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY* (1983).

## I. INTRODUCTION

*The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States*<sup>3</sup>

This is the Taxation Clause—the first in the Constitution’s enumeration of congressional powers. It has been controversial since it first saw the light of day. The most controversial part of all has been the phrase in the middle (“to pay the Debts and provide for the common Defence and general Welfare of the United States”). It is called the General Welfare Clause, and it is the subject of this Article.

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ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788 (Paul Leicester Ford ed., 1892) [hereinafter Ford, ESSAYS].

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788 (Paul Leicester Ford ed., 1888) [hereinafter Ford, PAMPHLETS].

THE POLITICAL WRITINGS OF JOHN DICKINSON 1764–1774 (Paul Leicester Ford ed., Da Capo Press 1970) (1895) [hereinafter POLITICAL WRITINGS].

ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST].

James H. Hutson, *John Dickinson at the Federal Constitutional Convention*, 40 WM. & MARY Q. 256 (1983).

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JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

Jeffrey T. Renz, *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*, 33 JOHN MARSHALL L. REV. 81 (1999).

Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793 (1985).

THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) [hereinafter Storing, ANTI-FEDERALIST].

CHARLES J. STILLÉ, THE LIFE AND WRITINGS OF JOHN DICKINSON 1732–1808 (1969) (1891).

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891) (2 vols.).

CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928).

3. U.S. CONST. art. I, § 8, cl. 1.

The General Welfare Clause is one of the two principal constitutional pillars supporting the modern federal welfare state<sup>4</sup>—the other being the Commerce Clause.<sup>5</sup> While the Commerce Clause supports most unfunded federal regulation, the General Welfare Clause is said to include an implied spending power used to justify federal spending programs and the regulatory conditions attached to them.<sup>6</sup> For that reason, the General Welfare Clause sometimes is called the Spending Clause.

This Article examines the three traditional interpretations of the General Welfare Clause. These are, first, that it is a plenary grant of regulatory and spending power to Congress; second, that it is a plenary grant of spending power only; and, third, that it is not a grant of power at all. I find severe textual problems with the first and second interpretations, and my subsequent historical analysis confirms that those interpretations have little basis in original understanding. I find that the third view is the most textually sound. Examination of history, however, shows that the General Welfare Clause is more than a mere “non-grant” of spending power. It was intended to be a sweeping *denial* of power—specifically, it was intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature’s capacity to “play favorites” with federal tax money.

Of course, some may argue that the United States Supreme Court already has adopted an interpretation of the General Welfare Clause, and that it has been settled for some time.<sup>7</sup> An academic response is that an authoritative historical understanding of the Clause will help us assess the forces that induced the Supreme Court to get its own version wrong (or right). A practical response is this: One lesson of the late twentieth century is that in politics (of which constitutional interpretation is arguably a branch), the proposition that everything is settled is a safe bet only for losers. The world is changing too fast to take any political settlement for granted. Ask the people of East Berlin.

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4. For a discussion of the use and interplay of the commerce and spending power and the Tenth Amendment, see MICHAEL S. GREVE, *REAL FEDERALISM* 46–61, 80 (1999).

5. U.S. CONST. art. I, § 8, cl. 3.

6. The Supreme Court adopted this position by dicta in *United States v. Butler*, 297 U.S. 1, 64–66 (1936), and has followed it in cases such as *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987), *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 144 (1947), *Helvering v. Davis*, 301 U.S. 619, 640 (1937), and *Steward Machine Co. v. Davis*, 301 U.S. 548, 586–87 (1937).

7. Cf. *The General Welfare Clause: The Hamiltonian and Madisonian Views*, 22 A.B.A. J. 115, 115 (1936) (declaring that the Supreme Court has “[brought] a Long Historic Argument to an End by the Explicit Adoption of the Hamiltonian View”).

## II. PRIOR STUDIES OF THE GENERAL WELFARE CLAUSE: THE NEGLECT OF RATIFICATION

After the Supreme Court began to narrow the scope of the federal commerce power in the 1990s,<sup>8</sup> commentators began to examine anew the issue of whether the Court ought to curtail the spending power as well. For example, some commentators have urged the court to impose more rigorously a requirement that expenditures be for “general,” as opposed to “local,” welfare.<sup>9</sup> Others have argued that the General Welfare Clause really does not include any spending power.<sup>10</sup> Still others prefer to keep things as they are.<sup>11</sup>

Such controversy would seem to justify an examination of the original purpose and meaning of the Clause, for the Supreme Court is usually attentive, if not deferential, to efforts to elucidate the “original understanding”<sup>12</sup> of constitutional language.<sup>13</sup> Yet the legal literature contains no fully adequate effort to capture the original meaning or purpose. Admittedly, some great minds have addressed the issue: Alexander Hamilton, James Madison, Joseph Story, John Randolph Tucker, and Charles Warren. However, Hamilton’s interpretation is suspect for reasons explored later in this Article,<sup>14</sup> and none of these writers had available the extensive historical collections published over the last few decades, including John Dickinson’s convention notes, which were published only twenty years ago.<sup>15</sup> Joseph Story wrote

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8. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress cannot commandeer state executives); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress can regulate states as states); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot commandeer state legislatures).

9. E.g., Lawrence Claus, “*Uniform Throughout the United States*”: *Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 536–48 (2001); Eastman, *supra* note 2, at 65, 72.

10. E.g., Engdahl, *supra* note 2, at 216, 224–43; Renz, *supra* note 2, at 141–42.

11. See, e.g., Chemerinsky, *supra* note 2, at 92 (arguing that the spending power should be protected because of the good outcomes it produces).

12. By “original understanding” I mean the common understanding, insofar as it is recoverable, of the Constitution’s ratifiers. For the relationship between original intent and original understanding, and the legal primacy of the latter, see RAKOVE, *supra* note 2, at 8–9, 17–18.

13. See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 1–7 (1969) (discussing the role that history plays in Supreme Court opinions).

14. See *infra* notes 255–57 and accompanying text.

15. Since 1976 sixteen volumes of the DOCUMENTARY HISTORY, *supra* note 2, have been published. In 1981, Herbert Storing issued the first good collection of Anti-Federalist writings. See Storing, *supra* note 2. In 1983, John Dickinson’s convention notes were published. See Hutson, *supra* note 2.

without even the benefit of that mainstay of constitutional scholarship: Madison's comprehensive convention notes.<sup>16</sup>

Moreover, all prior examinations, early and modern,<sup>17</sup> have neglected the most important determinant of "original understanding"<sup>18</sup>—the constitutional ratification process.<sup>19</sup> Indeed, some modern writers (including the writers of the brief that led the Supreme Court to its current interpretation<sup>20</sup>) have focused instead on events and usages arising years—even decades—*after* ratification.<sup>21</sup> Yet the course of public negotiation leading to ratification both clarified and shaped the meaning<sup>22</sup> of some of the Constitution's most important language, including the General Welfare Clause.

Ratification of the Constitution was a very public political deal.<sup>23</sup> Its roots extended deep into Anglo-American history, but for the General Welfare Clause the critical stages began in 1786, when Virginia called a meeting to consider granting Congress the power to regulate trade. This meeting, the Annapolis Convention, which was chaired by John Dickinson,<sup>24</sup> called on Congress and the states to authorize what became the national constitutional convention. The convention met in May, and through mid-September deliberated until the delegates had prepared a draft acceptable to a majority of them. The convention then transmitted

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16. Patterson, *supra* note 2, at 63, and WARREN, *supra* note 2, at 479, both imply that Story's interpretation of the General Welfare Clause may have been different if he had seen Madison's account of the convention.

17. E.g., BERGER, *supra* note 2, at 66–76; Engdahl, *supra* note 2; Soifer, *supra* note 2. The most historically thorough of the modern writers is Renz, *supra* note 2, who takes full account of history leading up to the drafting, but does not discuss the ratification process in detail.

18. On the legal primacy of ratification, see RAKOVE, *supra* note 2, at 8–9, 17–18.

19. See, e.g., 1 STORY, *supra* note 2, at 661–81 (focusing on the text, with some reference, at 679–81, to the official journal of the national constitutional convention); WARREN, *supra* note 2, at 464–79 (focusing on the national convention); Engdahl, *supra* note 2 (focusing on the proceedings of the continental congress and the national constitutional convention).

20. The briefs for both parties in *Butler v. United States* are extracted in *The General Welfare Clause*, *supra* note 7.

21. E.g., Corwin, *supra* note 2 (relying almost exclusively on occurrences after ratification, some more than a century after ratification); Herman J. Herbert, Jr., *The General Welfare Clauses in the Constitution of the United States*, 7 FORDHAM L. REV. 390 (1938) (same).

22. One commentator has explained that

the original commentary of 1787–88 arguably possesses a unique authority that later interpretations can never equal . . . . In this view, the ratifiers were not interpreting the Constitution merely to decide whether it would take effect; they were also investing their notions of its meaning in the document itself, thereby obliging later interpreters to treat those understandings as binding sources of authority.

RAKOVE, *supra* note 2, at 14.

23. See Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 354–56 (2003) (discussing the constitutional bargain).

24. FLOWER, *supra* note 2, at 238.

it to Congress for further distribution to the states. This text was essentially an offer from the convention to the general public.

What followed next was widespread public debate both in and outside of the state ratifying conventions.<sup>25</sup> Much of this debate consisted “of highly problematic predictions of the consequences of particular decisions.”<sup>26</sup> In other words, both proponents of the Constitution (the “Federalists”) and opponents (the “Anti-Federalists”) tried to convince the public of the *ad horrorem* consequences of adopting the other side’s logic. Although conventions in every state eventually ratified the document—in other words, accepted the offer—most states did so in a manner that was conditional *de facto* if not *de jure*.

The first way in which ratification was conditional was that the ratifiers relied on the Federalists’ representations as to the meaning of some particularly controversial clauses. Mostly, this reliance was informal (although clear), but it was sometimes formal. For example, the New York ratifying convention approved the Constitution while reiterating expressly the Federalist representation that “the prohibition contained in the said Constitution against *ex post facto* laws, extend[ed] only to laws concerning crimes.”<sup>27</sup> This was one way to provide the public with security against the Anti-Federalists’ *ad horrorem* constitutional predictions.

The second *de facto* condition on ratification was that the Constitution would be speedily amended to clarify the limits on federal power and add a bill of rights. During the years 1789 through 1791 the Federalists assented to this condition and helped to ratify the first ten amendments (which were, of course, drafted and pushed through Congress by James Madison, a leading Federalist). These amendments provided further security against the dreadful consequences of ratification that Anti-Federalists had feared.

A by-product of this public political bargain was an outpouring of notes, transcripts, letters, newspapers, pamphlets, broadsides, and recorded orations. Through this historical record, we can hear Anti-Federalists arguing that this or that part of the proposed frame of government had such-and-such a meaning. We can hear their Federalist adversaries agreeing with the Anti-Federalist interpretations in some cases, and advancing their own in others. We can hear Federalists

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25. See RAKOVE, *supra* note 2, at 17 (“Our reconstruction of the original understanding(s) of the Constitution, then, cannot be divorced from the political context of the ratification struggle.”).

26. *Id.* at 6.

27. 18 DOCUMENTARY HISTORY, *supra* note 2, at 300; 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 194 (U.S. Dep’t of State, 1894).

representing to the ratifying public what particular clauses mean, and urging ratification on that basis. We hear Anti-Federalists insist on, and Federalists finally agree to, subsequent amendments. Obviously, knowledge of this historical record is crucial for reconstructing the original understanding of the General Welfare Clause.

### III. LEADING INTERPRETATIONS OF THE GENERAL WELFARE CLAUSE

Commentators have offered three principal interpretations of the phrase, “to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>28</sup> The first, which I shall call the *plenary view* (or plenary interpretation), is that the phrase grants Congress an independent power to regulate and spend for the common defense and general welfare.<sup>29</sup> Under this interpretation, the authority of the federal government is limited only by the express exceptions set forth in the Constitution, such as those contained in Article I, Section 9<sup>30</sup> and in the first eight amendments of the Bill of Rights.<sup>31</sup>

Alexander Hamilton first suggested the second interpretation in 1791.<sup>32</sup> Joseph Story accepted it in his *Commentaries on the Constitution*,<sup>33</sup> defending it principally by textual rather than historical analysis.<sup>34</sup> The Supreme Court adopted it by way of dictum in 1936,

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28. U.S. CONST. art. I, § 8, cl. 1.

29. Professor Renz calls this the “strong Hamiltonian view,” because at the national convention, Hamilton advocated a national government of plenary powers. Renz, *supra* note 2, at 103; see also 2 CONVENTION RECORDS, *supra* note 2, at 291 (setting forth Hamilton’s plan for a legislature with plenary powers). However, Hamilton also acknowledged that the final document was very different from what he had sought. 2 CONVENTION RECORDS, *supra* note 2, at 645–46 (“No man’s ideas were more remote from the plan than his own were known to be. . .”). I have avoided associating Hamilton’s name with this interpretation because Hamilton never maintained explicitly that the Constitution as ratified granted *plenary* powers.

30. Article I, Section 9 of the Constitution contains a variety of limitations, including restrictions on the ability of Congress (and presumably other branches of the federal government) to prohibit or tax the slave trade, suspend the writ of habeas corpus, grant titles of nobility, adopt ex post facto laws, and so forth.

31. U.S. CONST. amends. I–VIII.

32. Found in Story’s *Report on Manufactures*. The relevant language is reprinted in 2 THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 21.

33. STORY, *supra* note 2.

34. *Id.* at 329–54. The relevant language is reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 28.



without much detailed examination, in *United States v. Butler*.<sup>35</sup> The Court has followed the Hamilton-Story view ever since.<sup>36</sup>

Under the Hamilton-Story view, the General Welfare Clause does not grant authority to regulate<sup>37</sup> but does grant authority to appropriate and spend. This spending authority is independent of the other powers enumerated in Article I, Section 8, and is not limited by their scope. If there is a limitation,<sup>38</sup> it is that money must be used to pay national debts or fund programs that serve “the common Defence” or the “general Welfare” rather than some local or special welfare.<sup>39</sup> However, it is Congress, not the courts, that is the principal judge of whether the common defense-general welfare standard is met.<sup>40</sup> The real-life result of this interpretation is that Congress can, and does, spend money on pretty much whatever it wants.

The third principal interpretation of the General Welfare Clause is that it grants no power at all. This was James Madison’s interpretation.<sup>41</sup>

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35. 297 U.S. 1 (1936). Discussion of the General Welfare Clause in the briefs filed in *Butler* is excerpted in *The General Welfare Clause*, *supra* note 7.

36. *South Dakota v. Dole*, 483 U.S. 203 (1987); *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127 (1947); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

37. Engdahl, *supra* note 2, at 257, refers to regulatory powers as “governance” powers.

38. The Supreme Court has stated that this power may be limited as to federal grants to states if conditions on the grant are coercive, *Dole*, 483 U.S. at 211, but thus far no court has found conditions to be sufficiently coercive to check the power.

39. See, e.g., *Butler*, 297 U.S. at 67 (noting Story’s position that “if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indispensable upon constitutional principles”); 1 STORY, *supra* note 2, at 673.

40. *Butler*, 297 U.S. at 67.

41. Renz, *supra* note 2, at 118–19. In his thoughtful and useful article, Professor Jeffrey Renz attributes another view to Madison—that the language in question granted spending authority to discharge the enumerated powers. *Id.* I cannot find the basis for this conclusion. On the contrary, Madison seems to have interpreted Article I, Section 8, Clause 1 as a taxing power alone. See, e.g., THE FEDERALIST NO. 41, *supra* note 2, at 263 (summarizing the clause as stating “to raise money for the general welfare”). Cf. James Madison, *The Bank Bill, House of Representatives*, 2 Feb. 1791, reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 20 (“The bill did not come within the first power. It laid no tax to pay the debts, or provide for the general welfare. It laid no tax whatever. It was altogether foreign to the subject. No 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.”).

Professor Renz’s conclusion apparently comes from Madison’s 1800 Report on the Virginia Resolutions, which he says best represents Madison’s position. Renz, *supra* note 2, at 117. The passage cited includes this language:

[T]he 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.

Madison maintained that the General Welfare Clause meant that tax money could be spent only pursuant to the other enumerated powers.<sup>42</sup> As Story phrased it, Madison saw the General Welfare Clause as a “finger-board” pointing to the succeeding powers.<sup>43</sup> Other writers, while agreeing with Madison that the Clause grants no power, have suggested that it does act to *restrict* the taxing power.<sup>44</sup> I shall refer to any conclusion that the General Welfare Clause does not grant spending or regulatory authority as a *Madisonian view*.<sup>45</sup>

In the succeeding pages I shall first examine all three positions from a textual standpoint. After that, I shall examine the history behind the General Welfare Clause.

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THE WRITINGS OF JAMES MADISON, *supra* note 1, at 357 (emphasis in original).

Thus, in Madison’s view, the junction of two powers is necessary for Congress to spend: it may raise the money through the first clause of Article I, Section 8, but the spending is authorized by a following clause. See also James Madison to Andrew Stevenson, Nov. 27, 1830, *reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 27 (“An express power to raise money, and an express power (for example) to raise an army, would surely imply a power to use the money for that purpose. And if a doubt could possibly arise as to the implication, it would be completely removed by the express power to pass all laws necessary and proper in such cases.”).

What may have misled Professor Renz into concluding that Madison believed the Taxation Clause contained a spending power was the phrase “to provide for,” which appears both in the General Welfare Clause and in the Virginia Resolutions. In twenty-first century English, “provide” often means the same as “apply” or “spend.” However, in eighteenth century English “provide” usually and “to provide for” invariably means to build up a store for future use. *Infra* notes 72–84 and accompanying text.

Such quibbling aside, I should note that Professor Renz’s actual conclusion on the scope of the General Welfare Clause is more Madisonian than anything else, and not too far from the original understanding, as shown in this Article.

42. See, e.g., James Madison, *The Bank Bill, House of Representatives 2 Feb. 1791, reprinted in* THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 20 (“The bill did not come within the first power. It laid no tax to pay the debts, or provide for the general welfare. It laid no tax whatever. It was altogether foreign to the subject. No 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.”).

43. 1 STORY, *supra* note 2, at 670–71.

44. Renz, *supra* note 2, at 144.

45. For other statements of Madisonian views, see WARREN, *supra* note 2, at 464–79; Engdahl, *supra* note 2, at 218; Patterson, *supra* note 2, at 48–57.

## IV. TEXTUAL ANALYSIS

A. *Textual Analysis of the Plenary View*

The plenary view is widely acknowledged to be textually problematic, and thus has been widely rejected.<sup>46</sup> There are three fundamental difficulties. The first is that the effect of interpreting the General Welfare Clause as a grant of plenary power to legislate for the common defense and general welfare would be to render as surplus Congress's remaining powers, both inside and outside of Article I.<sup>47</sup> For example, if the General Welfare Clause includes the power to regulate commerce, there is no need for a separate commerce power. If the phrase includes the power to establish rules for the naturalization of citizens, then there is no role for a separate naturalization clause. Taken as a whole, the resulting surplusage would amount to over 380 words in Article I, Section 8 alone—that is, nearly ten percent of the unamended document.

The second textual difficulty with the plenary view is that the textual role of the Tenth Amendment<sup>48</sup> is to reinforce limits on federal power.<sup>49</sup> The Tenth Amendment is a subsequent addition to the Constitution, so in cases of irresolvable conflict it should, of course, receive constructional preference over the General Welfare Clause in accordance with the maxim, *Leges posteriores priores contrarias abrogant*.<sup>50</sup> Yet the plenary view, if it does not render the Tenth Amendment entirely nugatory, renders its scope improbably narrow.

The third textual difficulty is that a plenary interpretation of federal powers runs contrary to the evident policy of the Ninth Amendment,

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46. *E.g.*, WARREN, *supra* note 2, at 476–77; Corwin, *supra* note 2, at 550–51; Eastman, *supra* note 2, at 67 n.18; Patterson, *supra* note 2, at 66–67; Renz, *supra* note 2, at 106–08; *cf.* Engdahl, *supra* note 2, at 233–34.

47. Congress has some powers outside of Article I, such as the power to fix the compensation of the President. U.S. CONST. art. II, § 1, cl. 7.

48. *See id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The incongruity of treating the Tenth Amendment as something other than a statement of the limits on enumerated powers is discussed in Soifer, *supra* note 2, at 822–23.

49. *See, e.g.*, 3 ELLIOT’S DEBATES, *supra* note 2, at 442. George Mason addressed this issue at the Virginia ratifying convention:

That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.

*Id.*

50. “Later laws overrule earlier ones to the contrary.” The United States Supreme Court has recognized the maxim. *See, e.g.*, *Hale v. Gaines*, 63 U.S. 144, 149 (1859).

which was to assuage Anti-Federalist concerns that under the unamended Constitution the central government's powers might be construed as plenary and subject to only limited exceptions—rather than enumerated and tightly defined.<sup>51</sup>

For reasons such as these, the plenary view has not won many supporters. Professor John C. Eastman is only the latest scholar to pronounce the plenary interpretation “manifestly erroneous.”<sup>52</sup>

### *B. Textual Analysis of the Hamilton-Story View*

The Hamilton-Story interpretation—that the General Welfare Clause does not include a power to regulate, but does include very broad spending authority—also labors under serious textual defects. One of these is the same as the plenary view's first textual defect: accepting it makes several other constitutional clauses redundant. Several items in the Article I, Section 8 enumeration are powers that rather clearly anticipate congressional spending, especially when coupled with the Necessary and Proper Clause.<sup>53</sup> If the words “to provide for the common Defence and general Welfare” give Congress power to spend money on the common defense, there is no need for a separate clause authorizing Congress to “support Armies,”<sup>54</sup> “maintain a Navy,”<sup>55</sup> purchase “Forts, Magazines, [and] Arsenals,”<sup>56</sup> or “punish Piracies and Felonies committed on the high Seas”<sup>57</sup>—all of which Congress could do under the General Welfare Clause.<sup>58</sup> Similarly, if the General Welfare Clause grants an independent, largely unqualified domestic spending power, then there is no need for separate grants of spending authority to “establish Post Offices and Post Roads,”<sup>59</sup> “constitute Tribunals inferior

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51. Opinion on the scope of the Ninth Amendment is sharply divided, but practically all writers agree that whatever else it may do, it certainly serves as a rule of construction against the conclusion that federal power covers the entire field outside the exceptions in the Bill of Rights. For a collection of views, see *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989). See especially *id.* at 60 (Madison, commenting on the danger that an enumeration of rights might suggest that others are not retained).

52. Eastman, *supra* note 2, at 67 n.18.

53. U.S. CONST. art. I, § 8, cl. 18.

54. *Id.* cl. 12.

55. *Id.* cl. 13.

56. *Id.* cl. 17.

57. *Id.* cl. 10.

58. Obviously, even the regulatory powers, such as governing commerce, require the expenditure of money as well, although generally much less. The Necessary and Proper Clause eliminates any doubts that Congress may spend money to effectuate other powers. *Id.* cl. 18.

59. *Id.* cl. 7.

to the supreme Court,”<sup>60</sup> or purchase “dock-Yards, and other needful Buildings.”<sup>61</sup> In light of this result, it is odd that Justice Story’s principal objection to the Madison view was that it resulted in surplus.<sup>62</sup> His own interpretation resulted in much greater surplus.

In addition to converting into surplus many of Congress’s powers in Article I, Section 8, the Hamilton-Story view also renders nugatory certain *limitations* on congressional power set forth in the same section.<sup>63</sup> The structure of Article I, Section 8 is first to list a power and then add any limitations on the power. The enumerated power “To raise and support Armies” is qualified immediately by the rule that “no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>64</sup> If the General Welfare Clause contains independent authority to spend “for the common Defence and general Welfare,” then Congress may avoid the time limit in the Military Appropriation Clause by relying on the General Welfare Clause.

Congress has not tried to use the General Welfare Clause to bypass the time limit on military appropriations, but it has acted in that manner respecting another enumerated power. The Constitution grants Congress authority “[t]o promote the Progress of Science and useful Arts,” but only by “securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>65</sup> However, Congress has used its spending power under the prevailing Hamilton-Story view to promote science and the useful arts in other ways, such as through direct grants.<sup>66</sup>

Another example of an enumerated power subject to express limitation is the following. The italicized words are the words of limitation:

To exercise exclusive Legislation in all Cases whatsoever, over such District (*not exceeding ten Miles square*) as may, by Cession of *particular States* and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places *purchased by the Consent of the Legislature of the State*

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60. *Id.* cl. 9.

61. *Id.* cl. 17.

62. 1 STORY, *supra* note 2, at 670–71, 676.

63. Renz, *supra* note 2, at 127–28.

64. U.S. CONST. art. I, § 8, cl. 12.

65. *Id.* cl. 8.

66. *E.g.*, 15 U.S.C. § 3707 (2003) (requiring the National Science Foundation provide assistance to Cooperative Research Centers for technological innovation).

*in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.*<sup>67</sup>

The Hamilton-Story view does not erase the limitation of the capital district to “ten Miles square,” as the plenary interpretation would do. It does, however, render nugatory the limitation that Congress spend money only for land “purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”

Professor David E. Engdahl has identified yet another textual problem with the Hamilton-Story view: if the General Welfare Clause is a spending authorization, it is a curiously incomplete one. It permits Congress to spend tax revenue, but not revenue from other sources—fines, penalties, tolls and other user fees, leases, surplus property sales, gifts, bequests, and returns on investments.<sup>68</sup>

In addition, construing the General Welfare Clause as a spending power imports into the Constitution a stylistic awkwardness very uncharacteristic of that elegantly-drawn document. Under that reading, Article I, Section 8, Clause 1 grants an authority to tax, then grants an authority to spend, then doubles back to restrict the authority to tax.<sup>69</sup> No other enumerated power is structured that way. Nor is any other enumerated power granted by a *subordinate* clause. Most of the enumerated items in Article I, Section 8 contain only one independent clause (although a few contain two, connected by coordinating conjunctions). Each independent clause grants a power,<sup>70</sup> but the invariable role of subordinate clauses is to *restrict or qualify* powers rather than grant them.<sup>71</sup> That is why all grants of power (other than those in added independent clauses) are introduced by the capitalized word, “To.” The General Welfare Clause, on the other hand, begins with a small letter.

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67. U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

68. Engdahl, *supra* note 2, at 222.

69. The restrictive portion reads as follows: “but all Duties, Imposts and Excises shall be uniform throughout the United States.” 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES § 222 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899).

70. Several of the powers divided by semi-colons contain two independent clauses, each granting a separate power. See U.S. CONST. art. I, § 8, cl. 11 (“to declare War . . . and make Rules”); *id.* cl. 17 (“To exercise . . . and to exercise”). One might place Clause 13 (“To provide and maintain a Navy”) in this category.

71. *Id.* art. I, § 8, cl. 1 (“but all Duties, Imposts and Excises shall be uniform throughout the United States”), *id.* cl. 8 (“by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”), *id.* cl. 12 (“but no Appropriation of Money to that Use shall be for a longer Term than two Years”), *id.* cl. 16 (“reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia”).

Those are only some of the textual difficulties involved in construing “to pay the Debts and provide for the common Defence and general Welfare” as an affirmative grant of power.

Yet there is still another difficulty, this one understood only through knowing the subtle, but interpretatively critical, differences between modern and eighteenth-century English: one might argue that the verb “to pay” suggests an immediate power of payment—hence, a spending power. However, the Clause states that taxes will be levied “to *pay* the Debts” but “to *provide for*” (not “pay for”) the common defense and general welfare. The significance of the change of verbs seems to have been lost on courts and commentators unfamiliar with the founding generation’s Latinate English.<sup>72</sup>

Today, we usually employ the verb “provide” to mean “to give,” as in “she provided him with cash.” That was *not* the usual way the term was used in the eighteenth century. Then, the term usually had the aspect of futurity in it suggested by its Latin forbear, *providere*, meaning to look ahead or predict—and still captured in the modern English term “provision,” as in “he is making provision for the future.” In Samuel Johnson’s Dictionary of 1755, the first definition of “to provide” is “[t]o procure beforehand; to get ready; to prepare.”<sup>73</sup> Although something closer to the modern usage appears in a secondary meaning,<sup>74</sup> this was notably *not* true of the specific phrase employed in the Constitution—“to provide for.” That meaning was always one of *making provision for the future*, as “[t]o take care of beforehand”<sup>75</sup> or “to provide for the coming winter.”<sup>76</sup> The difference between “provide for” and “pay” is the same

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72. See GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 93 (1978) (discussing the Framers’ use of words based on their Latin roots); McDONALD, *supra* note 2, *passim*. See also CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS* 2 (1994) (highlighting the Framers’ classical educations).

After several years in this business, I have come to believe that unfamiliarity with the Greek and Roman classics is a serious obstacle to competent constitutional interpretation, and unfamiliarity with the Latin language is almost an insuperable one. To illustrate the point, I sometimes ask my students the meaning of the phrase in the Preamble, “a more perfect Union.” Those with no Latin invariably answer, “a better union.” The answer is “a more complete union.” In the eighteenth century, outside the religious context, the word “perfect” almost always meant “complete,” JOHNSON, *supra* note 2, following the Latin verb *perficere*, to finish or complete.

73. JOHNSON, *supra* note 2.

74. *Id.* (giving a secondary definition of “provide” as “[t]o furnish; to supply”).

75. *Id.*

76. Another illustration of the distinction between providing and paying was found in the wording of the Townshend Duties, whose language was popularized in America by John Dickinson: “Whereas it is just and necessary . . . that a revenue should be raised . . . for making a more certain and adequate provision for defraying the charge . . . and the support . . . and towards further defraying the expenses. . . .” DICKINSON, *supra* note 2, at 10, 56.

as that employed by John Dickinson in distinguishing between “levying” money and “applying” it.<sup>77</sup>

Whenever the verb “to provide”<sup>78</sup> appears in the Constitution, it embodies an element of futurity inconsistent with immediate spending or appropriation. We have seen that in the Taxation Clause (of which, recall, the General Welfare Clause is a part) the word “provide” appears in contradistinction to “pay.” The verb “pay” was used, not for future debts arising under the Constitution, but for debts already incurred by the Confederation.<sup>79</sup> In another enumerated power, Congress is given authority “[t]o provide and maintain a Navy.”<sup>80</sup> First comes the provision, next comes the maintenance. Similarly, Congress is “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”<sup>81</sup> Congress must adopt the relevant statutes in advance; Congress does not do the actual punishing, which is the prerogative of the executive and judicial branches. Yet again: Congress is “[t]o provide for calling forth the Militia”<sup>82</sup>—not actually call it forth, which apparently is the prerogative of the President. Other examples occur both in the Constitution<sup>83</sup> and in the Articles of Confederation.<sup>84</sup>

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77. *Id.* at 52. Dickinson noted that in England, only Parliament could levy money, while the Crown had authority to apply it. *Id.* Indeed, the phrase “to pay the Debts and provide for the common Defence and general Welfare” was but a replacement for Roger Sherman’s earlier wording, “for the payment of said debts and for the defraying the expences *that shall be incurred* for the common defence and general welfare.” WARREN, *supra* note 2, at 472–73 (emphasis added). Sherman’s motion, which appears at 2 CONVENTION RECORDS, *supra* note 2, at 408, was defeated, only to be resurrected by Judge David Brearley’s “Committee of Eleven.” It was, says Warren, “the very change proposed by Sherman on August 25, but rejected by the Convention as unnecessary.” WARREN, *supra* note 2, at 473.

78. I am excluding here as inapplicable the Constitution’s use of “provided” in the sense of a legal proviso. See U.S. CONST. art. II, § 2, cl. 2 (“[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

79. WARREN, *supra* note 2, at 473.

80. U.S. CONST. art. I, § 8, cl. 13.

81. *Id.* cl. 6.

82. *Id.* cl. 15.

83. See *id.* cl. 16 (“To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”—i.e., the actual work is to be done by the states and executive power); *id.* art. II, § 1, cl. 6 (“[C]ongress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President . . .”).

84. See ART. CONFED. art. VI, cl. 4 (“shall provide and constantly have ready for use”—words of contrasting future and present force).



### C. Textual Analysis of Madisonian Views

Under the various Madisonian views, the General Welfare Clause is not a grant of power at all. Madison himself argued that the words “common Defence and general Welfare” are no more than a reference to the other enumerated powers the Constitution grants Congress.<sup>85</sup> Justice Joseph Story contended that this position left the phrase without meaning—as surplusage:

Stripped of the ingenious texture by which this argument is disguised [Story wrote], 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. . . . 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 are sufficiently apparent without.<sup>86</sup>

Deferring to the constructional preference against surplus, Story felt forced to conclude that the words granted an independent spending power:

[I]f congress may lay taxes for the common defence and general welfare, the money may be appropriated for those purposes, although not within the scope of the other enumerated powers. Certainly, it may be so appropriated; for if Congress is authorized to lay taxes for such purposes, it would be strange, if, when raised, the money could not be applied to them. That would be to give a power for a certain end, and then deny the end intended by the power.<sup>87</sup>

This is the view that, as noted earlier,<sup>88</sup> the Supreme Court adopted in *United States v. Butler*.<sup>89</sup>

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85. WARREN, *supra* note 2, at 474–75.

86. 1 STORY, *supra* note 2, at 670–71; *see also id.* at 676. *Vox et preterea* (classical Latin: *praeterea*) *nihil* means “voice (or sound) and beyond that, nothing.” Translations from Latin to English in this Article are by the author, unless otherwise noted.

87. *Id.* at 673–74.

88. *Supra* notes 6, 20 and accompanying text.

89. 297 U.S. 1, 65 (1936):

Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. 1, § 9, cl. 7.) They can never accomplish the objects for which they were collected, unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated “to provide for the general welfare of the United States.” These words cannot be

Now it must first be said in response to Story's argument that the fact that a particular interpretation leads to a small amount of surplus does not "certainly" disqualify that interpretation. By their own admission, the framers occasionally sprinkled surplus into the Constitution—"additional fences," Madison once said in another context.<sup>90</sup> More importantly, if it be presumed that in constitutional interpretation as in most kinds of legal interpretation, less surplusage is better than more, then Story is subject not only to a *tu quoque* response, but to a *tu quoque maius* response. For as we have seen, the Hamilton-Story construction leads to much more surplus than Madison's view does. Madison's surplus is merely a subordinate clause; Story's surplus consists of several powers in the Article I, Section 8 enumeration.<sup>91</sup>

Yet one may avoid even a small amount of surplus by going beyond Madison and construing the General Welfare Clause not as a "fingerboard," but as a *substantive limitation on the taxing power*. This construction is consistent with the organization of several other items in Article I, Section 8: they begin with a grant, then follow (generally in a subordinate clause) with a limitation on the grant.<sup>92</sup> Even Justice Story, although reading the General Welfare Clause as creating a spending power, also viewed it as limiting the power just granted.<sup>93</sup>

If, however, the General Welfare Clause is a limitation on the taxing power, then what sort of limitation is it? Is it a limitation on the *structure* of taxes imposed or a limitation on the *purposes* for which taxes may be imposed? It could be both.

If the clause is a restriction on the *structure* of taxes, then it may disallow taxes imposed only on a particular locality or otherwise unfairly. However, that protection is rendered largely unnecessary

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meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money.

90. THE FEDERALIST NO. 44, *supra* note 2, at 282 (referring to the Ex Post Facto Clauses, Article I, Section 9, Clause 3 and Article I, Section 10 of the Constitution).

91. Professor Renz, in finding that the language in question is not a spending clause, concedes a certain redundancy. Renz, *supra* note 2, at 142. As appears below, I do not believe that concession is necessary.

92. U.S. CONST. art. I, § 8, cl. 8 (patents and copyrights), *id.* cl. 12 (military appropriations), *id.* cl. 16 (militia); *id.* cl. 17 (limitation on federal property and purchases located in parenthesis and in terminal phrase).

93. 1 STORY, *supra* note 2, at 673:

If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous (as, for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes), it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power.

For a modern view similar to Story's, see Corwin, *supra* note 2, at 551-52 (quoting Jefferson with approval).

because the Constitution has several explicit guards against discriminatory taxation. Duties, imposts, and excises—the “indirect” taxes—must be uniform throughout the United States.<sup>94</sup> Direct taxes must be allocated by population.<sup>95</sup> No taxes can be levied on exports.<sup>96</sup> All ports of the United States must be treated equally.<sup>97</sup> One might even argue that construing the General Welfare Clause as a limitation on the structure of taxes renders it a mere “fingerboard” pointing to the more specific structural limitations—and may turn those structural limitations into surplusage.

On the other hand, if the General Welfare Clause is a limitation on the *purposes* for which taxes may be imposed, then it indirectly restricts how tax revenue may be used. This avoids all surplusage objections. It also fits with the pattern of the document: the initial independent clause of the Taxation Clause empowers Congress to tax, leaving the focus of the ensuing subordinate clause as limiting the purposes for which taxes may be imposed; that is, tax money is to be employed only “to *pay* the Debts and *provide for* [store up revenue for eventual appropriations for<sup>98</sup>] the common Defence and general Welfare.”<sup>99</sup>

Thus, textual analysis does not support either the plenary or the Hamilton-Story view. It gives better support to Madison’s view, at least as characterized by Story, that the General Welfare Clause is a “fingerboard” pointing to the ensuing powers. However, the best textual interpretation is that the General Welfare Clause limits the purposes for which taxes can be levied.

Next we turn to adoption history to see whether it corroborates or conflicts with textual analysis, and if it corroborates textual analysis, to determine the nature of the limitation imposed.

## V. HISTORY PRIOR TO THE FEDERAL CONSTITUTIONAL CONVENTION

A history of the General Welfare Clause might fruitfully begin with John Dickinson, because he was, in an important sense, its principal

94. U.S. CONST. art. I, § 8, cl. 1.

95. *Id.* § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.”); *id.* § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

96. *Id.* § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

97. *Id.* § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

98. *Supra* notes 72–84 and accompanying text.

99. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

drafter.<sup>100</sup> Dickinson farmed in Delaware, practiced law in Pennsylvania, and was active in the public affairs of both of those partially-conjoined colonies. He was a man with strong beliefs on the subject of government revenue. Before the Revolution, he popularized his beliefs in his wildly successful *Letters from a Farmer in Pennsylvania*.<sup>101</sup> In the "Letters" (actually they were essays), Dickinson urged peaceful resistance to, and repeal of, the Townshend Duties that Parliament had imposed on the colonies.

Early in his *Letters*, Dickinson distinguished two different kinds of financial exactions. "Taxes" were imposed to raise revenue.<sup>102</sup> "Duties" were for regulating trade.<sup>103</sup> Dickinson argued that the Townshend Duties were really taxes because they were designed to raise revenue.<sup>104</sup> He argued that Parliament had no power to tax the colonies; that power belonged exclusively to the colonial assemblies.<sup>105</sup> However, Dickinson also contended that, legitimacy aside, the Townshend taxes violated the salutary principle that the people charged with paying should be the same people who benefited from expenditure of the money.<sup>106</sup> *Qui sentit commodum, sentire debet et onus*,<sup>107</sup> he wrote. Under the Townshend exactions, however, the British authorities planned to use the revenue gathered from the thirteen colonies to pay for expenses incurred elsewhere (Florida, Nova Scotia, and Canada) and for expenses incurred in the thirteen colonies that those colonies didn't need because they had been providing those services themselves.<sup>108</sup>

Dickinson conceded that Parliament had authority to impose duties to regulate trade. He further conceded that those duties need not be uniform. Parliament could employ them to restrain the trade of only one

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100. For a longer narration of Dickinson's influence, see Renz, *supra* note 2, although my conclusions differ in a few particulars.

101. The *Farmer's* letters were printed in 19 of the 23 American newspapers. FLOWER, *supra* note 2, at 65. The title selected is interesting. Dickinson certainly was present "in Pennsylvania" much of the time, and he was, among other things, a farmer. But his farms were in Delaware.

102. Dickinson, *supra* note 2, at 21.

103. *Id.*

104. *Id.* at 10.

105. *Id.* at 15.

106. *Id.* at 47-50.

107. "He who feels the benefit should feel also the burden." Dickinson translated it, "They who feel the benefit, ought to feel the burden." *Id.* at 50.

108. *Id.* at 47-50. See also *id.* at 66:

Let any person look into the late act of parliament, and he will immediately perceive, that the immense estates of Lord *Fairfax*, Lord *Baltimore*, and our *Proprietaries*, which are among his Majesty's other "DOMINIONS" to be "defended, protected and secured" by the act, will not pay a *single farthing* for the duties thereby imposed, except [if] Lord *Fairfax* wants some of his windows glazed [there was a duty on glass]; Lord *Baltimore* and our *Proprietaries* are quite secure, as they live in *England*.

part of the empire.<sup>109</sup> But the *goal* had to be to further the “general welfare” (his words) of the entire Empire.<sup>110</sup> Duties designed merely to benefit a part of the empire were not defensible.<sup>111</sup> Also not defensible were duties designed to create monopolies or otherwise assist merely private parties.<sup>112</sup>

Whether financial exactions were revenue-raising taxes or trade-regulating duties, Dickinson thought they should serve the “general welfare,” not local or private welfare. The measure of whether an exaction served the general welfare was less the structure of the exaction than its *effects*.<sup>113</sup>

In preparing a charter for colonial union, Benjamin Franklin anticipated Dickinson somewhat. On July 21, 1775, Franklin presented to the Continental Congress proposed Articles of Confederation, Article II of which provided that the colonies were to “severally enter into a firm League of Friendship . . . for their common Defence . . . the Safety of their Persons and Families, and their . . . mutual and general Welfare.”<sup>114</sup> Article V specified that the general welfare included those items on which the colonial assemblies “cannot be competent”: commerce, currency, posts, and defense.<sup>115</sup> Article VI included a financial “General Welfare Clause” limiting expenditures: “All Charges of Wars, and all other general Expences to be incurr’d for the common Welfare, shall be

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109. Dickinson, *supra* note 2, at 8.

110. *Id.* at 8; *see also id.* at 37 (stating that placing a duty only on exports from Great Britain must be a tax, rather than a duty, because it only affects the colonies).

In the *Preface* to the 1801 edition of his works, Dickinson quoted with approval Lord Chatham (William Pitt the Elder), who in 1774 had spoken on behalf of the colonies:

As an *Englishman*, I recognize to the *Americans*, their supreme unalterable right of property. As an *American*, I would equally recognize to *England*, her supreme right of regulating commerce and navigation. The distinction is involved in the abstract nature of things; property is private, individual, absolute: the touch of another annihilates it. Trade is an extended and complicated consideration; it reaches as far as ships can sail, or winds can blow; it is a vast and various machine. To regulate the numberless movements of its several parts, and combine them into one harmonious effect, for the good of the whole, requires the superintending wisdom and energy of the supreme power of the empire.

John Dickinson, *Preface* to 1 POLITICAL WRITINGS, *supra* note 2, at xvi.

111. John Dickinson, *The Late Regulations Respecting The British Colonies on the Continent of America Considered*, in 1 POLITICAL WRITINGS, *supra* note 2, at 221–22.

112. John Dickinson, *Two Letters on the Tea Tax*, in 1 POLITICAL WRITINGS, *supra* note 2, at 459–60.

113. Dickinson was not inattentive to structure. He believed that taxes should be proportioned based on ability to pay. John Dickinson, *The Late Regulations Respecting The British Colonies on the Continent of America Considered*, in 1 POLITICAL WRITINGS, *supra* note 2, at 230. But that received little or no emphasis in his discussions of the general welfare criterion.

114. *Journals of the Continental Congress: Franklin's Articles of Confederation; July 21, 1775*, art. II, The Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/contcong/07-21-75.htm> (last visited Oct. 6, 2003).

115. *Id.* art. V.

defray'd out of a common Treasury." Still another general welfare limitation appeared in Article XI: Purchases from the Indians were to be only those that were "for the General Advantage and Benefit of the United Colonies."<sup>116</sup> Under Franklin's draft, local welfare was to be furthered locally, for Article III specified that "each Colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, ~~and~~ Privileges, and peculiar Jurisdictions within its own Limits; and may amend its own Constitution as shall seem best to its own Assembly or Convention."<sup>117</sup> Franklin and Dickinson had been at political loggerheads in the past,<sup>118</sup> but on this occasion all of Franklin's language was very Dickinsonian.

After the Declaration of Independence, Congress authorized the preparation of the actual Articles of Confederation. For this task Congress turned to the "genuine article," so to speak. It entrusted the chairmanship of the drafting committee to Dickinson, and the first draft is in his handwriting.<sup>119</sup> This draft's statement of purpose provided that "The said Colonies unite themselves . . . for their common Defence, the Security of their Liberties, and their mutual and general Welfare."<sup>120</sup> The document further authorized spending of money "for the common Defence, or general Welfare"<sup>121</sup> and required that purchases of Indian lands<sup>122</sup> and dispositions of lands<sup>123</sup> be for the "general Benefit."<sup>124</sup> Congress was to convene "for the more convenient Management of the general Interests."<sup>125</sup> Yet, each state would retain "sole and exclusive Regulation and Government of its internal police [governance],"<sup>126</sup>

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116. *Id.* art. VI.

117. *Id.* art. III (line-out in original).

118. They were on opposite sides of the debate over whether Pennsylvania should petition for conversion from a proprietary to a crown colony. STILLÉ, *supra* note 2, at 41; FLOWER, *supra* note 2, at 37. Dickinson was much more conservative than the populist Franklin. Compare, e.g., 2 CONVENTION RECORDS, *supra* note 2, at 202, 207 (Dickinson favors property requirement for voting for federal House of Representatives) with *id.* at 204–05, 208 (Franklin opposes such a requirement).

119. FLOWER, *supra* note 2, at 159.

120. *Journals of the Continental Congress: Articles of Confederation and Perpetual Union; July 12, 1776*, art. II, The Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/contcong/07-12-76.htm> (last visited Oct. 6, 2003).

121. *Id.* art. XI.

122. *Id.* art. XIV.

123. *Id.* art. XVIII.

124. *Id.*

125. *Id.* art. XVI.

126. *Id.* art. III. "Internal" governance was a term used by popular pre-Revolutionary authors, including Dickinson, to cover certain powers said to be within the exclusive jurisdiction of colonial assemblies rather than Parliament, including regulation of property, governance of the courts, and taxation. See H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 180 (Liberty Fund, 1998) (1965); John Dickinson, Resolutions Adopted by the Assembly of Pennsylvania Relative to the Stamp Act, in 1

agreeing to abide by the determinations of Congress made “for the common Defence or general Welfare” while foreswearing the use of force to resolve impositions by Congress on matters of local benefit.<sup>127</sup>

The finished version of the Articles of Confederation followed much the same pattern. There was a statement of intent: “The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare . . . .”<sup>128</sup> There was an enumeration of the powers of Congress and a reservation of all other powers in the states.<sup>129</sup> Most relevant for our purposes, the completed Articles, like their predecessors, included a financial clause that made it clear that any spending had to be on matters of general welfare. Article VIII stated:

All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state . . . .<sup>130</sup>

Note that this article added no power to the others granted in the instrument. It is explanatory and restrictive.<sup>131</sup> Note also that the future-looking language applied to money-raising presaged the future-looking “to provide for” language of the Constitution’s General Welfare Clause.

## VI. THE FEDERAL CONSTITUTIONAL CONVENTION

### A. *Proceedings at the Convention*

The inadequacy of the Articles of Confederation as a governing charter induced the delegates at the federal convention to look for other models. The perils of extreme decentralization, coupled with the understandable influence of British precedents, help explain why the first

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POLITICAL WRITINGS, *supra* note 2, at 173–77 (claiming for colonies taxation power and trial by jury); John Dickinson, A Petition to the King from the Stamp Act Congress, *in id.* at 193–96 (claiming for the colonies “full power of legislation and trial by jury”).

127. *Journals of the Continental Congress*, *supra* note 120, art. XII.

128. ART. CONFED. art. II.

129. The enumerated powers of the Confederation are located primarily in *id.* art. IX. The Articles also cautioned that the states retained all powers not “expressly” delegated to Congress. *Id.* art. II. On the nature of the Confederation as a government of limited capacity, see THE FEDERALIST NO. 41 (James Madison), *supra* note 2, at 264.

130. ART. CONFED. art. VIII.

instinct of convention leaders was to propose a “consolidated” rather than a “federal” union.

This consolidationist vision was embodied in the Virginia Plan, so-called because it was proposed by the Virginia delegation, led *de facto*<sup>132</sup> by Governor Edmund Randolph and by James Madison. In effect, the Virginia Plan was a scheme in which the states would survive only as “corporations,” fulfilling the kind of subordinate roles that local government played in England.<sup>133</sup> One delegate, Delaware’s George Read, proposed abolishing the states entirely.<sup>134</sup> Most of the delegates believed, however, that the states should be preserved, if merely for instrumental reasons: the general government simply could not “extend its care to every requisite object”<sup>135</sup> over such a large territory.

The Virginia Plan served as the basis of discussion during the first few weeks of the convention. The Virginia Plan was premised on the conclusion that the Articles were inadequate to “accomplish the objects proposed by their institution; namely, ‘common defence, security of liberty and general welfare.’”<sup>136</sup> By the terms of the scheme, the new government would receive the cumulative total of powers (1) that Congress had enjoyed under the Confederation, (2) in which “the separate states are incompetent,” and (3) necessary to “the harmony of the United States.”<sup>137</sup> In addition, Congress would receive (4) a plenary veto over state legislation.<sup>138</sup> At this stage, proposals for a more limited list of federal powers were dismissed as impractical.<sup>139</sup> When the New Jersey delegation offered its own, more decentralized proposal on June 16, 1787 (the New Jersey Plan) the delegates rejected it by a decisive vote. On the other hand, they quietly laid aside the proposal of Alexander Hamilton, offered on June 18, which would have granted Congress legislative authority without limit—“with power to pass all laws whatsoever”—subject only to the executive veto.<sup>140</sup> While not going quite as far as Hamilton, the delegates at this point still appeared

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132. Technically, the leader of the Virginia delegation was George Washington, but as President of the Convention, his participation in the debates was limited.

133. Some Anti-Federalists later charged that the effect of the Constitution, unless amended, would be to reduce the states to the level of “corporations.” *E.g.*, 4 DOCUMENTARY HISTORY, *supra* note 2, at 277 (AMERICAN HERALD). *See also* 5 *id.* at 638 (AMERICAN HERALD discussing the effect of the “High Court of the Union” on the states’ sovereignty).

134. 1 CONVENTION RECORDS, *supra* note 2, at 136.

135. *Id.* at 357 (James Madison).

136. *Id.* at 20; *see also id.* at 187 (referring to G. Morris’s statements concerning the Articles’ goals of “Common Defence, Security of Liberty, mutual and general Welfare”).

137. *Id.* at 21.

138. *Id.*

139. *E.g.*, *id.* at 53 (James Madison); *id.* at 59–60 (Roger Sherman).

140. *Id.* at 291.



willing to grant the new government even the power to interfere with the “internal police” (internal governance) of states.<sup>141</sup> Indeed, when Roger Sherman proposed that the states retain exclusive jurisdiction over such matters, Gouverneur Morris responded that in some cases they ought not even have that.<sup>142</sup>

Sherman introduced his proposal in the form of a motion to enumerate the powers of the central government, with a proviso that states should be able to legislate when “the General welfare of the United States is not concerned.”<sup>143</sup> The convention rejected it,<sup>144</sup> adopting instead a resolution allowing Congress “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>145</sup>

Yet the day the convention rejected Sherman’s motion—July 17, 1787—marked the high tide of proposed centralization. He was only one of several delegates contending that the states should not be mere “corporations,” but should be left with considerable authority.<sup>146</sup> Later the same day they won their first battle when the convention voted to abandon the congressional veto over state legislation and to replace it with a general supremacy clause. On July 23, when the draft constitution was submitted to the Committee of Detail, the new government was not yet limited to enumerated powers,<sup>147</sup> but when the Committee submitted its revision on August 1, the sweeping language of the Virginia Plan was gone and a modest enumeration had replaced it.<sup>148</sup> Efforts later in the convention to add powers to the list were mostly unsuccessful.<sup>149</sup>

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141. For the accepted meaning of “internal” governance, see *supra* note 126.

142. 2 CONVENTION RECORDS, *supra* note 2, at 26.

143. *Id.* at 25–26.

144. *Id.* at 21, 26.

145. *Id.* at 21.

146. *E.g., id.* at 86 (John Dickinson). See also *id.* at 133 (Roger Sherman stating that criminal and civil jurisdiction should be left with the states); *id.* at 160 (George Mason stating that the Senate should be appointed by state legislatures); *id.* at 165 (Hugh Williamson averring that states ought to control their “internal police”); *id.* (Elbridge Gerry opining that control of the militia ought to be a state power).

147. *Id.* at 131–32.

148. *Id.* at 157–59. One writer has argued that the change arose from the personal beliefs of the members of the Committee of Detail—beliefs not typical of the convention, but which the convention accepted because of the press of time. John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 779–82 (1990). While not ruling out that possibility, noted historian Jack N. Rakove suggests the convention may have viewed the sweeping “federal powers” language in the Virginia Plan as a place-holder for a subsequent, more detailed enumeration. RAKOVE, *supra* note 2, at 177–78. His views have some support from comments made at the convention. See, *e.g.*, 1 CONVENTION RECORDS, *supra* note 2, at 53 (Edmund Randolph,

Meanwhile, the process had begun of tacking general welfare language onto the new government's financial powers. On August 6, the Committee of Detail presented to the convention a draft constitution embodying the delegates' agreements thus far.<sup>150</sup> The draft did not include a general welfare qualification on federal tax authority, so Dickinson added the following words on his copy: "no Preference or Advantage to be given to any persons or places—Laws to be equal."<sup>151</sup> Soon thereafter, Dickinson was placed on a Committee of Eleven chaired by William Livingston to deal further with financial issues.<sup>152</sup> On August 21, that committee proposed a general welfare qualification to the payment of debts.<sup>153</sup> On August 25, Roger Sherman offered a proposal to connect the previously-granted power to pay Confederation debts with the Taxation Clause, qualifying them both with general welfare language. Madison reported:

Mr. Sherman thought it necessary to connect with the clause for laying taxes duties &c [sic] an express provision for the object of the old debts &c—and moved to add to the 1st. clause of 1st. sect—of art VII "for the payment of said debts and for the defraying the expences that shall be incurred for the common defence and general welfare"

The proposition, as being unnecessary was disagreed to, Connecticut alone, being in the affirmative.<sup>154</sup>

However, just as Roger Sherman initially lost on enumerating federal powers only to win via committee, here he also recovered to win via committee. On September 4, a Committee of Eleven, headed by Judge David Brearley—and also numbering among its members John Dickinson<sup>155</sup>—recommended insertion in the Taxation Clause the phrase "to pay the debts and provide for the common defence and general welfare."<sup>156</sup> Historian Charles Warren argues that this was but a

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disclaiming any intention for indefinite federal powers). Whatever the reason, the change was fortunate, for the participating public would have never ratified the sweeping language of the Virginia Plan.

149. For example, the convention defeated on August 25 (by a 10-1 margin) Edmund Randolph's motion to provide "for the payment of said debts *and* for the defraying the expences that shall be incurred for the common defence and general welfare." 2 CONVENTION RECORDS, *supra* note 2, at 408 (emphasis added).

150. *Id.* at 177-89.

151. Hutson, *supra* note 2, at 281.

152. 2 CONVENTION RECORDS, *supra* note 2, at 327-28, 352.

153. *Id.* at 352.

154. *Id.* at 414.

155. *Id.* at 473, 493.

156. *Id.* at 493.

replacement for Sherman's earlier wording, "for the payment of said debts and for the defraying the expences *that shall be incurred* for the common defence and general welfare."<sup>157</sup> Again, we see the future-orientation of the reference to spending. A more recent historian, Forrest McDonald, contends that "[t]he phraseology . . . was understood as prohibiting the expenditure of money for such 'internal improvements' as roads and canals, since those must, of necessity, promote the particular welfare of specific states rather than the 'general' welfare."<sup>158</sup> Both of these seem consistent with Dickinson's apparent reason for the Clause: that "no Preference or Advantage to be given to any persons or places."<sup>159</sup>

Thus, the Taxation Clause now read, "[t]he 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>160</sup> A Committee of Style and Arrangement chaired by Gouverneur Morris later added a requirement that indirect taxes be uniform.<sup>161</sup> Finally, on September 12 and 13, Dickinson cooperated with George Mason to insert in the Constitution a Congressional power to revise state inspection duties.<sup>162</sup> The idea was to prevent states with ports from oppressing those without<sup>163</sup>—consistent with Dickinson's consistently-stated view.<sup>164</sup>

Regarding Gouverneur Morris, a stubborn tradition has it that he thought that the General Welfare Clause was a separate and copious fount of legislative power. The basis for this tradition rests on the convention notes of James McHenry for September 6:

Spoke to Gov Morris Fitzimmons and Mr Goram to insert a power in the confederation enabling the legislature to erect piers for protection of shipping in winter and to preserve the navigation of harbours—Mr

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157. WARREN, *supra* note 2, at 472–73 (emphasis added). It was, says Warren, "the very change proposed by Sherman on August 25, but rejected by the Convention as unnecessary." *Id.* at 473.

158. McDONALD, *supra* note 2, at 264–65.

159. Hutson, *supra* note 2, at 281.

160. 2 CONVENTION RECORDS, *supra* note 2, at 493.

161. The September 12 report of the Committee of Style and Arrangement added the final clause. As of that day, the clause read:

Sect. 8. The Congress may by joint ballot appoint a treasurer. They shall have power.  
<(a)> 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 & excises shall be uniform throughout the U. States.>

*Id.* at 594 (citations omitted).

162. *Id.* at 589, 607.

163. *Id.* at 589.

164. *Supra* notes 110, 151 and accompanying text.

Gohram against. The other two gentlemen for it—Mr Gov: thinks it may be done under the words of the I clause I sect 7 art. amended—“and provide for the common defence and general welfare.”—If this comprehends such a power, it goes to authorise the legisl. to grant exclusive privileges to trading companies etc.<sup>165</sup>

McHenry apparently understood Morris's point to be that the General Welfare Clause was plenary in nature because it could serve as a source of authority to erect piers and therefore create monopolies.<sup>166</sup> McHenry was likely confused. He tells us that Morris and Thomas Fitzsimmons were in favor of “insert[ing] a power . . . enabling the legislature to erect piers.”<sup>167</sup> If Morris was in favor of inserting such a power, he could not have thought the General Welfare Clause broad enough to include it. Morris' suggestion that “it may be done under the words . . . ‘and provide for the common defence and general welfare’”<sup>168</sup> may mean only that the insertion could be placed in the part of the enumeration that follows (i.e., is physically “under”) the Taxation Clause.<sup>169</sup>

Gouverneur Morris plays the villain in another doubtful story. This is the tale that, as chairman of the Committee of Style and Arrangement he surreptitiously tried to create an independent general welfare power by setting off the General Welfare Clause from the language immediately preceding with a semicolon rather than a comma. The tale was told more than a decade later by Albert Gallatin on the floor of Congress.<sup>170</sup>

This story also seems unlikely, and Gallatin could not have known the truth personally since he wasn't at the convention. The story assumes that Morris thought he was playing with fools, easily hoodwinked—at the Philadelphia convention, the “assembly of demigods!”<sup>171</sup> Of course, any sleight of hand was likely to be caught, and this error was indeed caught. The convention's decision to remove the semicolon corroborates the conclusion that the General Welfare Clause was not an independent power.<sup>172</sup>

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165. 2 CONVENTION RECORDS, *supra* note 2, at 529–30.

166. McDONALD, *supra* note 2, at 265.

167. 2 CONVENTION RECORDS, *supra* note 2, at 529–30.

168. *Id.*

169. Engdahl, *supra* note 2, at 252, also doubts McHenry's interpretation, although on different grounds.

170. 3 CONVENTION RECORDS, *supra* note 2, at 379; McDONALD, *supra* note 2, at 265 n.8.

171. Thomas Jefferson to John Adams (Aug. 30, 1787), in 3 CONVENTION RECORDS, *supra* note 2, at 76.

172. *Id.* at 379.

### *B. Implications of History through the National Convention*

The final draft of the Constitution reported to Congress contemplated a far weaker central government than had been envisioned in the Virginia Plan. Indeed, one could argue that the final proposal was at least as similar to the Articles of Confederation as to the Virginia Plan. At the South Carolina legislative session that called the South Carolina ratifying convention, Edward Rutledge pointed out that federal powers under the new Constitution were basically similar to those under the Articles of Confederation. The major difference, he said, was that the government under the Constitution would have the power to enforce its decrees.<sup>173</sup>

What is striking about the phrase “general welfare,” however, is that it ran as a constant theme through shifting plans of government for over twelve years. It appeared (1) in Benjamin Franklin’s proposed articles of confederation of 1775, (2) in John Dickinson’s first draft of the eventually-adopted Articles, (3) in the Articles themselves (and therefore, by reference, in the New Jersey Plan to strengthen the Articles<sup>174</sup>), (4) in the centralized Virginia Plan, (5) in Roger Sherman’s proposal for a government less powerful than that contemplated by the Virginia Plan, (6) in proposals to have the federal government pay confederation debts, and (7) in the finished Constitution. The phrase seems to have been shorthand for “the benefit of the interests we have in common rather than the benefit of particular localities or parties.” In other words, each of these proposals left some powers to the states, and the “common Defence and general Welfare” language was designed to define the outer limits of federal power. Thus, it was essentially not a phrase of power, but of *limitation*.<sup>175</sup>

It may be significant that Alexander Hamilton’s proposed frame of government—the only proposal to grant Congress plenary authority—did not include “general welfare” language.<sup>176</sup> The reason is simple: words

173. 4 ELLIOT’S DEBATES, *supra* note 2, at 299, available at <http://memory.loc.gov/ammem/amlaw/lwed.html>. For other observations of the similarities between the documents, see 4 DOCUMENTARY HISTORY, *supra* note 2, at 245–46 (article appearing in the *Cumberland Gazette*, Nov. 15, 1787); 5 *id.* at 567 (letter from Nathaniel Peaslee Sargeant); RAKOVE, *supra* note 2, at 177, 178–79 (citing Madison’s FEDERALIST NO. 45).

174. 1 CONVENTION RECORDS, *supra* note 2, at 242–45.

175. This is underscored by the decisive rejection of Edmund Randolph’s August 25 motion to bestow on Congress authority to tax “for the payment of said debts *and* for the defraying the expences that shall be incurred for the common defence and general welfare,” which by setting off “expences . . . for the common defence and general welfare” might have looked something like a source of independent power. 2 *id.* at 408 (emphasis added).

176. 1 *id.* at 291–93. Around the time the federal convention ended, Hamilton presented to Madison a plan more polished than that he had presented during the convention, which he said reflected the constitution he would have liked to have seen. 5 ELLIOT’S DEBATES, *supra* note 2, at

of limitation did not belong in a proposal that would empower Congress to “pass all laws whatsoever.”<sup>177</sup> Hamilton wanted the national legislature to have power to legislate on matters of local and private as well as general welfare.

## VII. THE COURSE OF THE RATIFICATION DEBATE: THE GENERAL WELFARE CLAUSE AS A “NON-POWER”

### A. *The Significance of the Debate*

I am far from the first to conclude that the national convention delegates did not *intend* the General Welfare Clause to be an independent grant of power.<sup>178</sup> However, the relevant inquiry here is not into original *intent* but into original *meaning* or *understanding*. More important than what the national delegates thought in secret<sup>179</sup> was what the ratifying public was led to believe it was agreeing to.<sup>180</sup> The principle is well understood in contract law: if the subjective, hidden intent of an offeror is not reflected in the offer and is different from the understanding of the offeree, then generally it is not part of the ensuing contract.<sup>181</sup>

### B. *Early Anti-Federalist Attacks*

The Taxation Clause was prominent in the public debate over the proposed Constitution. The more extreme Anti-Federalists, such as Patrick Henry of Virginia, apparently didn’t think that Congress should

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584. Article VII, Section 1 of that plan does include general welfare language, but specifies that the legislature shall be the judge of the general welfare—a prescription for nearly plenary power. *Id.* at 588 (“The legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the union.”). The paper includes some specific limitations on the legislative power apparently taken from the convention’s final draft, such as bans on ex post facto laws, bills of attainder, titles of nobility, and state-by-state apportionment of real estate and capitation taxes. *Id.*

177. *Id.* at 291.

178. See, e.g., WARREN, *supra* note 2, at 475; Engdahl, *supra* note 2, at 237; Patterson, *supra* note 2, at 48; Renz, *supra* note 2, at 129.

179. See WARREN, *supra* note 2, at 479 (implying that Story’s erroneous interpretation of the Taxation Clause may have arisen in part because Madison’s account of the convention was not yet available); Patterson, *supra* note 2, at 63 (same). Cf. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 9 (1988) (stating, with respect to Hamilton’s interpretation of the General Welfare Clause, “[i]n effect, Hamilton capitalized on the fact that Madison’s Notes had not been published”).

180. On the distinctions between original intent and original understanding, and the legal primacy of the latter, see RAKOVE, *supra* note 2, at 8–9, 17–18.

181. See E. ALLEN FARNSWORTH, CONTRACTS 114 (1982) (stating that the objective theory of contracts generally prevails).

have the power to tax at all.<sup>182</sup> However, the moderate Anti-Federalists who comprised a majority of the Constitution's public critics do not seem to have shared Henry's views in that regard. Most outspoken Anti-Federalists conceded that Congress needed the capacity to tax. They just thought the scope of that capacity should be narrower.<sup>183</sup>

That the power granted by the Taxation Clause was too wide was a common theme of early Anti-Federalist attacks on the Constitution. Note that these Anti-Federalists weren't necessarily saying (as some Anti-Federalists later said) that the Taxation Clause would grant Congress separate spending or regulatory powers. They were saying that the Constitution granted Congress the power to levy too many different kinds of taxes, and in potentially undefined amounts. Accordingly, some proposed that congressional taxation authority be restricted to duties on imports or indirect taxes on commerce.<sup>184</sup>

One of the best Anti-Federalist writers, "Brutus,"<sup>185</sup> described how, without such limitations, federal revenue demands might come to dominate American life:

The general legislature will be empowered to lay any tax they chuse [*sic*], to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes. . . .

This power, exercised without limitation, will introduce itself into every corner of the city, and country—It will wait upon the ladies at their toilet [*sic*], and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly; it will go with them when they visit, and will, on all occasions, sit beside them in their carriages, nor will it desert them

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182. See 3 ELLIOT'S DEBATES, *supra* note 2, at 148 (speaking at the Virginia ratifying convention: "I never will give up that *darling* word *requisitions*: my country may give it up; a majority may wrest it from me, but I will never give it up till my grave.").

183. See, e.g., 5 DOCUMENTARY HISTORY, *supra* note 2, at 541 ("Agrippa," approving earlier proposals to give Congress a "limited revenue" with "a right to collect it" and "a moderate duty upon foreign vessels"); *id.* at 619 (the Anti-Federalist minority at the Pennsylvania ratifying convention, supporting a Congressional power to impose duties on imports); 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 229 ("Federal Farmer," advocating that the states retaining sole power to levy "internal" taxes, while conceding to Congress a power to regulate commerce, which was understood to include a power to levy duties and imposts upon it); 3 ELLIOT'S DEBATES, *supra* note 2, at 29–31 (George Mason, at the Virginia ratifying convention, opposing unconditional federal power to levy "direct" taxes while favoring such a power conditioned on state disregard for requisitions).

184. For samples of Anti-Federalist arguments of this sort, see 2 DOCUMENTARY HISTORY, *supra* note 2, at 619 (*Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania*); 5 *id.* at 540 (Agrippa).

185. This was possibly Robert Yates of New York, who had been a constitutional convention delegate. 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 358.

even at church; it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats or drinks; it will attend him to his bedchamber, and watch him while he sleeps; it will take cognizance of the professional man in his office, or his study; it will watch the merchant in the counting-house, or in his store; it will follow the mechanic to his shop, and in his work, and will haunt him in his family, and in his bed; it will be a constant companion of the industrious farmer in all his labour, it will be with him in the house, and in the field, observe the toil of his hands, and the sweat of his brow; it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances, in which it will attend them, the language in which it will address them, will be GIVE! GIVE!<sup>186</sup>

I have quoted the foregoing at length, not because any of the things that “Brutus” predicted have come to pass, but only to illustrate the Anti-Federalist position that a very broad taxing power could result in an intrusive national government. In addition to this argument, “Brutus”<sup>187</sup> and others<sup>188</sup> had another: without more limitations written into the Constitution, Congress could so monopolize available revenue as to leave states with an insufficient tax base.

Anti-Federalists soon developed a related argument—that unprincipled federal judges and politicians might pervert the power to tax for the “common Defence and general Welfare” into a grant of powers beyond the right to tax. This was not an argument about the real meaning of the Taxation Clause. It was a suggestion of how its language left it vulnerable to the distortions of legal sophistry. A creative soul denominated “Timoleon” offered an argument of this type in the New

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186. 15 DOCUMENTARY HISTORY, *supra* note 2, at 112–14; 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 396–97. For other examples of this “excessive taxation” argument, see letter from William Symmes, Jr. to Peter Osgood, Jr. (Nov. 15, 1787), in 4 DOCUMENTARY HISTORY, *supra* note 2, at 239, and 4 Storing, ANTI-FEDERALIST, *supra* note 2, at 57–58; Argument of Amos Singletary, at the Massachusetts ratifying convention, in 6 DOCUMENTARY HISTORY, *supra* note 2, at 1296; Argument of General Samuel Thompson, at the same convention, in 6 DOCUMENTARY HISTORY, *supra* note 2, at 1317; Letter from Federal Farmer to the Republican (Jan. 4, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 2, at 294.

187. 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 366.

188. See, e.g., Letter from Centinel to the People of Pennsylvania (Nov. 30, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 2, at 333, and 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 140 (“The Congress may construe every purpose for which the state legislatures now lay taxes, to be for the *general welfare*, and thereby seize upon every object of revenue.”). See also A Federal Republican, A Review of the Constitution Proposed by the Later Convention (Oct. 28, 1787), reprinted in 3 Storing, ANTI-FEDERALIST, *supra* note 2, at 75 (“The taxation of the particular states for their own support will be overruled by Congress . . .”).



York Journal on November 1, 1787. “Timoleon” posited a hypothetical legal opinion (complete with useful Latin maxims) by an unscrupulous judge sustaining a federal statute to suppress freedom of conscience and of the press:

By this power, [the hypothetical court opinion states] the right of taxing is co-extensive with the *general welfare*, and the *general welfare* is as unlimited [*sic*] as actions and things are that may disturb or benefit that general welfare. A right being given to *tax* for the general welfare, . . . as *necessarily* includes a power of protecting, defending, and promoting it by all such laws and means as are fitted to that end; for, qui dat finem dat media ad finem necessaria, who gives the end gives the means necessary to obtain the end. The Constitution must be so construed as not to involve an absurdity, which would clearly follow from allowing the end and denying the means. A right of *taxing* for the general welfare being the highest and most important mode of providing for it, cannot be supposed to exclude inferior modes of effecting the same purpose, because the rule of law is, that, omne majus continet [*sic*] in se minus.<sup>189</sup>

Warnings against potential abuse of the Taxation Clause were popular late in 1787. On November 28, John Smilie, an Anti-Federalist delegate at the Pennsylvania ratifying convention, pointed out that the unlimited power to tax could “be easily perverted to other purposes,”<sup>190</sup> including destruction of the states’ reserved powers.<sup>191</sup> A similar line of argument appeared in *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constitutents*,<sup>192</sup> issued on December 18, which claimed that Congress might “abrogate and repeal” state tax laws “upon the allegation that they interfere with the due collection of their taxes, duties or excises,” and that “Congress might gloss over this conduct by construing every purpose for which the state legislatures now lay taxes, to be for the ‘*general welfare*,’ and therefore as of their jurisdiction.”<sup>193</sup>

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189. 13 DOCUMENTARY HISTORY, *supra* note 2, at 534, 535. The final maxim may be translated (with “continct” duly amended to “continet”), “[t]he entire greater thing contains the lesser within itself,” or, more poetically, “[t]he greater contains within itself the entire lesser.”

190. 2 *id.* at 408.

191. *Id.* at 408–11.

192. *Id.* at 617.

193. *Id.* at 627 (emphasis in original), also reprinted in 3 Storing, ANTI-FEDERALIST, *supra* note 2, at 154–55.

C. *Federalist Responses to Early Anti-Federalist Attacks*

The Federalists did not respond directly to the “sophistry” argument, but they challenged directly the charge that the congressional taxing power would be too broad. One of the most famous responses was James Wilson’s October 6, 1787, speech in the State House Yard in Philadelphia, in which he contended that federal taxing authority had to be broad to enable the federal government to fulfill the responsibilities assigned it.<sup>194</sup> This speech was distributed nationally.<sup>195</sup> Other Federalists made the same argument. Interestingly enough, though, the examples of congressional responsibilities that they cited all fell within the powers specifically enumerated in Article I, Section 8. Their most common example was war.<sup>196</sup>

Illustrative was Hamilton’s approach in his “Publius” article of December 18, 1787, later republished as Federalist No. 23:

Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its

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194. *Id.* at 167, 171.

On the 2d point to wit, security against danger from abroad, it is no less evident that Requisitions will fatally deceive us. For the same reason that they will not obtain from the States their respective shares of Contribution and thence become a source of intestine quarrels, they must invite foreign attacks by shewing [*sic*] the inability of the Union to repel them: and when attacks are made, must leave the Union to defend itself, if it be defended at all, as was done during the late war; by a waste of blood, a destruction [*sic*] of property, and outrages on private rights, unknown in any Country which has credit or money to employ the regular means of defence.

Letter from James Madison to George Thompson (Jan. 29, 1789), in 2 THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, no. 17.

195. 13 DOCUMENTARY HISTORY, *supra* note 2, at 337–38.

196. See, e.g., 2 *id.* at 413–14 (quoting Thomas McKean, at the Pennsylvania ratifying convention, arguing that the taxing power given was necessary for the purposes of the union. “But we must divest ourselves of this extravagant jealousy, and remember that it is necessary to repose some degree of confidence in the administration of a government from which we expect the revival of commerce, the encouragement of arts, and the general happiness of the people.”); 2 ELLIOT’S DEBATES, *supra* note 2, at 190–91 (quoting Oliver Ellsworth, speaking at the Connecticut ratifying convention); *id.* at 66–67 (quoting Christopher Gore, at the Massachusetts ratifying convention, giving the example of the need for funds for armies and navies); *id.* at 79 (quoting John Choate, at the Massachusetts ratifying convention, stating that revenue must be equal to exigencies of union, and mentioning war); *id.* at 84–85 (quoting James Bowdoin, at the same convention, mentioning the need for power to be equal to exigencies, and citing examples of war and public safety); *id.* at 78–79 (quoting Colonel Joseph B. Varnum at the same convention, giving war as an example of the need for taxation and stating that it was apparent Congress had no right to alter the internal relations of a state); 3 *id.* at 227–28 (quoting John Marshall, at the Virginia ratifying convention, giving the example of war).

jurisdiction is permitted to extend. Is the administration of justice between the citizens of the same State the proper department of the local governments? These must possess all the authorities which are connected with this object, and with every other that may be allotted to their particular cognizance and direction. Not to confer in each case a degree of power commensurate to the end would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.<sup>197</sup>

Hamilton followed this with a similar argument (compiled as Federalist No. 30) just ten days later,<sup>198</sup> yet another (No. 31)<sup>199</sup> on January 1, and still another (No. 34) on January 5.<sup>200</sup> Congress simply could not, he and other Federalists maintained, carry out its specifically enumerated powers without a broad authority to tax.

#### *D. The Anti-Federalists Take Off the Gloves*

As noted earlier, the Constitution uses the verb “provide” in a future-looking sense. Spending money is not “providing,” but legislation for future eventualities might be.<sup>201</sup> Thus, a clause allowing Congress to “provide for the common Defence and general Welfare” could suggest a regulatory power to some. This suggestion may have been the germ of

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197. THE FEDERALIST NO. 23, *supra* note 2, at 155.

198. *Id.* NO. 30 at 190–91:

Who can pretend that commercial imposts are, or would be, alone equal to the present and future exigencies of the Union? . . . Let us attend to what would be the effects of this situation in the very first war in which we should happen to be engaged. We will presume, for argument's sake, that the revenue arising from the impost duties answers the purposes of a provision for the public debt and of a peace establishment for the Union. Thus circumstanced, a war breaks out. What would be the probable conduct of the government in such an emergency? Taught by experience that proper dependence could not be placed on the success of requisitions, unable by its own authority to lay hold of fresh resources, and urged by considerations of national danger, would it not be driven to the expedient of diverting the funds already appropriated from their proper objects to the defense of the State?

199. *Id.* NO. 31 at 194–95:

As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

200. *Id.* NO. 34 at 207–08:

There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity . . . . The support of a navy and of naval wars would involve contingencies that must baffle all the efforts of political arithmetic.

201. *Supra* notes 72–84 and accompanying text.

the plenary interpretation of the General Welfare Clause—the notion that the Clause gives Congress a general legislative authority. In any event, Richard Henry Lee was promoting this construction in private correspondence as early as October, 1787.<sup>202</sup> Around the same time the great lexicographer, Noah Webster, alluded to (and rebutted) it in his pamphlet supporting the Constitution.<sup>203</sup>

However, the plenary interpretation was slow to enter the general debate, perhaps because the structure of the document rendered that interpretation implausible.<sup>204</sup> That it eventually became a central argument of the Anti-Federalists may reflect growing desperation on their side.

In an essay written in October, 1787, “Brutus,” like “Timoleon,”<sup>205</sup> took the position that the General Welfare Clause was, in form at least, a limitation on the taxing power—although an ineffectual one.<sup>206</sup> In

202. Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 2, at 36, 37; Lee to Edmund Randolph (Oct. 16, 1787), in *id.* at 61–62.

203. Ford, PAMPHLETS, *supra* note 2, at 50; *see also* 19 DOCUMENTARY HISTORY, *supra* note 2, at 303 (“A Querist,” raising on November 24, 1787, the Anti-Federalist argument that the General Welfare Clause gives Congress the right to extend its terms of office); *id.* at 293–96 (“A Customer,” raising on November 23, 1787 a plenary view drawn not from the General Welfare Clause, but from the Preamble and the Necessary and Proper Clause).

204. *Supra* Part IV(A).

205. *Supra* note 186 and accompanying text.

206. Letter from Brutus to the *New York Journal* (Oct. 18, 1787), reprinted in 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 365. *See also* letter from Brutus to the *New York Journal* (Dec. 27, 1787), reprinted in 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 397–98, and 15 DOCUMENTARY HISTORY, *supra* note 2, at 114–15 (Letter No. VI):

But it is said, by some of the advocates of this system, “That the idea that Congress can levy taxes at pleasure, is false, and the suggestion wholly unsupported: that the preamble to the constitution is declaratory of the purposes of the union, and the assumption of any power not necessary to establish justice, &c. to provide for the common defence, &c. will be unconstitutional. Besides, in the very clause which gives the power of levying duties and taxes, the purposes to which the money shall be appropriated, are specified, viz. to pay the debts, and provide for the common defence and general welfare.” I would ask those, who reason thus, to define what ideas are included under the terms, to provide for the common defence and general welfare? Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by every one? No one will pretend they will. It will then be matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter . . . .

It is as absurd to say, that the power of Congress is limited by these general expressions, “to provide for the common safety, and general welfare,” as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, & at will and pleasure.

William Symmes, Jr.’s argument at the Massachusetts ratifying convention also can be construed as saying the same thing: that the General Welfare Clause was a limitation in form only, and not in substance. *See* 2 ELLIOT’S DEBATES, *supra* note 2, at 74 (claiming that the clause is “too general to be understood as any kind of limitation of the power of Congress”).

December, however, he began to publicize the “plenary view.”<sup>207</sup> By January of the following year, stung by swift ratification in four states in less than a month,<sup>208</sup> Anti-Federalists were pushing the plenary view at full throttle. Silas Lee wrote to George Thatcher that the General Welfare Clause gave the federal government regulatory and spending power “to extend to every matter of legislation”<sup>209</sup> and speculated that the General Welfare Clause would enable Congress to control the press.<sup>210</sup> Also in January, the Anti-Federalist author “A Countryman” published an article taking the same tack.<sup>211</sup> “Brutus” followed with another barrage in February<sup>212</sup> as did the “Deliberator,” who repeated the charge that the General Welfare Clause would give Congress the power to establish a state religion.<sup>213</sup> William Symmes, Jr., at the Massachusetts ratifying convention, made an argument that can be construed as plenary as well, for he averred that “general welfare” might apply to expenditures, too; indeed “any expenditure whatever.”<sup>214</sup>

By the spring of 1788, statements of the plenary view were found all over America.<sup>215</sup> At the New York ratifying convention in June, John

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207. See letter from Brutus to the *New York Journal* (Dec. 13, 1787), reprinted in 2 Storing, *ANTI-FEDERALIST*, *supra* note 2, at 388–89 (approving the plenary view); 19 DOCUMENTARY HISTORY, *supra* note 2, at 410–16 (“Brutus,” Letter V, Dec. 13, 1787).

208. Delaware ratified on December 7, 1787; Pennsylvania on December 12; New Jersey on December 18; and Georgia on December 31. 2 DOCUMENTARY HISTORY, *supra* note 2, at 21–22. Of course, people in the North would not have heard about Georgia’s ratification until well into January.

209. Letter from Silas Lee to George Thatcher (Jan. 23, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 2, at 782; see also letter from “O” to the *American Herald* (Feb. 4, 1788), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 2, at 854–55 (fearing that the government will become “supreme and unchecked”).

210. Letter from Silas Lee to George Thatcher (Jan. 23, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 2, at 782.

211. 6 Storing, *ANTI-FEDERALIST*, *supra* note 2, at 87.

212. 16 DOCUMENTARY HISTORY, *supra* note 2, at 75; 2 Storing, *ANTI-FEDERALIST*, *supra* note 2, at 424.

213. 3 Storing, *ANTI-FEDERALIST*, *supra* note 2, at 179.

214. 2 ELLIOT’S DEBATES, *supra* note 2, at 74. Symmes’ argument was cited for the Hamiltonian view in *United States v. Butler*, 297 U.S. 1 (1936), arguably a misuse of the citation, since Symmes was at that time an Anti-Federalist and Federalists represented his position as erroneous. *The General Welfare Clause: The Hamiltonian and Madisonian Views*, *supra* note 7, at 11. Not surprisingly, both briefs suffer from a selective use of history, and in neither is ratification history satisfactorily explored. Moreover, Symmes may have been trying to show merely that the General Welfare Clause was in form a limitation, but ineffectual as such. See 2 ELLIOT’S DEBATES, *supra* note 2, at 74 (“These words, sir, I confess, are an ornament to the page, and very musical words; but they are too general to be understood as any kind of limitation of the power of Congress . . .”).

215. In addition to the references in the text, see 17 DOCUMENTARY HISTORY, *supra* note 2, at 259 (address to the members of the New York and Virginia Conventions, post Apr. 30, 1788); 10 *id.* at 1332 (The Virginia Convention, June 16, 1788); 3 ELLIOT’S DEBATES, *supra* note 2, at 449 (The Virginia Ratifying Convention); THE ANTI-FEDERALIST PAPERS No. 48 (“Leonidas,” a London

Williams argued that the General Welfare Clause would give Congress almost complete power,<sup>216</sup> including the power to “essentially destroy[]” the state governments.<sup>217</sup> At the Virginia convention, Patrick Henry contended that the clause would grant Congress authority to billet armies on the people and emancipate slaves.<sup>218</sup> In the same venue, George Mason repeated the charges that the General Welfare Clause could be used to infringe liberty of the press and trial by jury.<sup>219</sup> “Sydney” (Robert Yates) in articles published in New York on June 13 and 14, 1788, also took the plenary line.<sup>220</sup>

### *E. Federalist Responses, Representations, and Enumerations*

The Federalists did not wait long to respond. They assured the public that the General Welfare Clause was not a grant of plenary power at all, and that the Constitution should be viewed as creating a government of carefully circumscribed authority. James Madison’s comments were published on January 20, 1788:

It has been urged and echoed that the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No

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writer, whose essay was first printed in the LONDON TIMES) (Morton Borden ed., 1965), *available at* <http://www.constitution.org>.

216. 2 ELLIOT’S DEBATES, *supra* note 2, at 330.

217. *Id.* at 338.

218. See 10 DOCUMENTARY HISTORY, *supra* note 2, at 1299 (“[Congress] may billet them on the people at pleasure.”); 3 ELLIOT’S DEBATES, *supra* note 2, at 590 (“[M]ay they not pronounce all slaves free, and will they not be warranted by that power?”).

219. 3 ELLIOT’S DEBATES, *supra* note 2, at 441–42:

Among the enumerated powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common defence; and by that clause (so often called the sweeping clause) they are to make all laws necessary to execute those laws. Now, suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? . . . Might they not thus destroy the trial by jury? Would they not extend their implication? It appears to me that they may and will . . . . That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.

220. 6 Storing, ANTI-FEDERALIST, *supra* note 2, at 113, 120.

stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the Articles of Confederation . . . .<sup>221</sup>

Madison was only one of many Federalists to issue such representations. These representations were stated in various ways and with various degrees of eloquence, but their basic message was that the language in question was not a grant at all—rather it was a restriction on federal authority.<sup>222</sup> Thus, the pro-Constitution essayist "Cassius" asserted that the General Welfare Clause was *not*

a power coextensive with every possible object of human legislation. A moment's calm reflection must have informed you, that no such legislative latitude is given to the house of representatives, except in the imposition of taxes, and in that branch, it must, necessarily, be intrusted, because the line could not be drawn. Congress can make no

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221. THE FEDERALIST NO. 41, *supra* note 2, at 262–63.

222. That the General Welfare Clause is in *form* a limitation seems to have been conceded initially by "Brutus," the best lawyer among the Anti-Federalist writers, although he didn't think the limitation particularly effective. 2 Storing, ANTI-FEDERALIST, *supra* note 2, at 365–66.

laws, except such, as are, essentially, necessary to carry into execution the particular powers given to them by the constitution.<sup>223</sup>

The issue was particularly hard-fought at the Virginia ratifying convention, where, as we have seen, Patrick Henry firmly urged the plenary view.<sup>224</sup> Several Federalists responded.<sup>225</sup> One of the clearest statements came from Governor Randolph:

I appeal to the candor of the honorable gentleman [Patrick Henry], and if he thinks it an improper appeal, I ask the gentlemen here, *whether* there be a *general, indefinite* power of providing for the general welfare? The power is, "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare;" so that they can only raise money by these means, in order to provide for the general welfare. No man who reads it can say it is general, as the honorable gentleman represents it. You must violate every rule of construction and common sense, if you sever it from the power of raising money, and annex it to any thing else, in order to make it that formidable power which it is represented to be.<sup>226</sup>

Later we shall examine additional Federalist representations specific to the General Welfare Clause.<sup>227</sup>

Federalist reassurances on the restricted scope of national power took other forms as well. For example, at the Pennsylvania ratifying convention, James Wilson predicted that, "the taxes of the general government (if any shall be laid) will be more equitable, and much less expensive, than those imposed by state government."<sup>228</sup> James Madison,<sup>229</sup> Roger Sherman and Oliver Ellsworth,<sup>230</sup> and other

223. 9 DOCUMENTARY HISTORY, *supra* note 2, at 714.

224. See *supra* note 218 and accompanying text.

225. 3 ELLIOT'S DEBATES, *supra* note 2, at 244-45 (George Nicholas); *id.* at 301 (Edmund Pendleton).

226. *Id.* at 599-600. Randolph also weighed in, having this to say:

But the rhetoric of the gentleman has highly colored the dangers of giving the general government an indefinite power of providing for the general welfare. I contend that no such power is given. They 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." Is this an independent, separate, substantive power, to provide for the general welfare of the United States? No, sir.

5 *id.* at 466. See also 3 *id.* at 207 (Edmund Randolph, at the same convention, again discussing the meaning of the clause).

227. See *infra* notes 260-68 and accompanying text.

228. 2 DOCUMENTARY HISTORY, *supra* note 2, at 482.

229. James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 THE FOUNDERS' CONSTITUTION, *supra* note 2, ch. 17, doc. 22, at 644 ("[T]o draw a line of demarkation which would give to the



Federalists argued in public,<sup>231</sup> as they had contended privately at the federal convention,<sup>232</sup> that the states would enjoy control over their “internal police.”<sup>233</sup> One instance of this argument was offered by Noah Webster, who wrote that, “the powers of the Congress are defined, to extend only to those matters which are in their nature and effects, *general* . . . . [T]he Congress cannot meddle with the internal police of

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General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them.”):

230. 1 ELLIOT’S DEBATES, *supra* note 2, at 492 (Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787)).

231. For examples of such statements at the state ratifying conventions, see 2 ELLIOT’S DEBATES, *supra* note 2, at 78 (Col. Joseph B. Varnum, speaking at the Massachusetts ratifying convention); *id.* at 241 (John Williams, at the New York ratifying convention opining that “[t]he constitution should be so formed as not to swallow up the state governments: the general government ought to be confined to certain national objects; and the states should retain such powers as concern their own internal police”); *id.* at 283 (John Jay, speaking at the same convention); *id.* at 385 (Chancellor Robert Livingston, speaking at the same convention); 3 *id.* at 259 (James Madison, speaking at the Virginia ratifying convention); 4 *id.* at 38 (James Iredell, speaking at the North Carolina ratifying convention); *id.* at 160 (William Davie, speaking at the same convention); Letter of Pierce Butler to Weedon Butler (Oct. 8, 1787), in 3 CONVENTION RECORDS, *supra* note 2, at 102–03 (“The powers of the General Government are so defined as not to destroy the Sovereignty of the Individual States.”); 2 DOCUMENTARY HISTORY, *supra* note 2, at 190 (“One of the People” writing that internal matters are reserved to the states); 15 DOCUMENTARY HISTORY, *supra* note 2, at 458 (Tench Coxe, writing as “A Freeman,” stating “nor can they [Congress] do any other matter or thing appertaining to the internal affairs of any state, whether legislative, executive or judicial, civil or ecclesiastical.”). Other quotations are collected in BERGER, *supra* note 2, at 66–76.

Anti-Federalists sometimes adopted the same distinction. See, e.g., 2 ELLIOT’S DEBATES, *supra* note 2, at 332 (Melancton Smith, speaking at the New York ratifying convention).

232. For examples of such statements at the federal convention, see 1 CONVENTION RECORDS, *supra* note 2, at 157 (James Wilson opined that “[t]he state governments ought to be preserved—the freedom of the people and their internal good police depends on their existence in full vigor—but such a government can only answer local purposes”); *id.* at 165 (“Mr. Williamson was agst. giving a power that might restrain the States from regulating their internal police.”); *id.* at 439 (Luther Martin, later an Anti-Federalist, stating that, “[a] general government may operate on individuals in cases of general concern, and still be federal. This distinction is with the states, as states, represented by the people of those states. States will take care of their internal police and local concerns. The general government has no interest, but the protection of the whole.”); 2 *id.* at 25 (reporting Roger Sherman “observed that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States; that he did not like the definition contained in the Resolution, and proposed in place of the words ‘of individual legislation’ line 4 inclusive, to insert ‘to make laws binding on the people of the <United> States in all cases <which may concern the common interests of the Union>; but not to interfere with <the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General> welfare of the U. States is not concerned.’”); *id.* at 26 (reporting Edmund Randolph said, “[t]his is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police.”); *id.* at 198 (Rufus King stating, “[t]he most numerous objects of legislation belong to the States. Those of the Natl. Legislature were but few. The chief of them were commerce & revenue”).

233. For the accepted meaning of “internal” governance, see *supra* note 126.

any State, or abridge its Sovereignty.”<sup>234</sup> Madison penned probably the best known comment of this sort:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, such as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>235</sup>

Such reassurances still were not enough for the Anti-Federalists, however, who wanted more specificity as to what the scope of federal prerogatives would be.<sup>236</sup> They pointed out that the Constitution denied the central government power in some areas, but those exclusions were comparatively narrow. If this was to be a regime of strictly limited authority, then exactly what would be reserved to the states?<sup>237</sup>

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234. Noah Webster, *America*, in *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS: 1787–1788*, at 169, 176 (Colleen A. Sheehan & Gary L. McDowell eds., 1998); *see also* 1 *CONVENTION RECORDS*, *supra* note 2, at 492 (Oliver Elseworth and Rufus King distinguishing between state or local objects and federal or general objects); Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, in Ford, *PAMPHLETS*, *supra* note 2, at 217, 252 (writing that states retain “the whole internal government of their respective republics”).

235. *THE FEDERALIST NO. 45*, *supra* note 2, at 292–93. *Cf.* *A Native of Virginia*, in 9 *DOCUMENTARY HISTORY*, *supra* note 2, at 655, 692 (stating that, “[t]o [the state legislatures] is left the whole domestic government of the states; they may still regulate the rules of property, the rights of persons, every thing that relates to their internal police, and whatever effects [*sic*] neither foreign affairs nor the rights of the other States”).

236. *See, e.g.*, Letter from Edmund Randolph to the Speaker of the House of Delegates of Virginia (Oct. 10, 1787), in 1 *ELLIOT’S DEBATES*, *supra* note 2, at 482, 491 (listing specific limits to Federal power that he wanted included in the Constitution); Letter from The Hon. Elbridge Gerry to The Hon. Samuel Adams, President of the Massachusetts Senate & The Hon. James Warren, Speaker of the House of Representatives of Massachusetts, *id.* at 492–93 (stating reasons for not signing the Federal Constitution); Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 9, 1788), in 2 *ELLIOT’S DEBATES*, *supra* note 2, at 1, 81 (Rev. Samuel Niles asking what limits on Congress were included in the Constitution). Sometimes a Federalist admitted that the lines were rightly vague. *See, e.g., id.* at 84 (James Bowdoin, speaking at the Massachusetts ratifying convention).

237. Debates in the Convention of Pennsylvania, in 2 *DOCUMENTARY HISTORY*, *supra* note 2, at 398, 427 (Robert Whitehill, speaking at the Pennsylvania ratifying convention). The primary enumeration of powers denied occurs in U.S. CONST. art. I, § 9, and includes, but is not limited to, protection from suspensions of the writ of *habeas corpus* and from bills of attainder. Federalist Jasper Yeates, at the same convention, responded to Whitehill’s argument by stating that the enumerated items in Article I, Section 9 were merely exceptions to enumerated powers. *Id.* at 435. This counter-argument may have proven too much, and does not seem to have been widely used.

Federalist essayists and orators answered this challenge by publicly *enumerating* particular powers and classes of powers to be exercised concurrently or exclusively by the states. Short lists of state powers came from a variety of Federalist speakers and writers, especially prominent lawyers. Among them were these conspicuous founders, all of them lawyers: Alexander Hamilton, James Madison, James Wilson, Edmund Pendleton (the Chancellor of Virginia), John Marshall (a Federalist spokesman at the Virginia ratifying convention and later Chief Justice of the United States Supreme Court), and James Iredell (a former judge, state attorney general, ratification convention delegate in North Carolina, and later Justice of the United States Supreme Court). In addition, several anonymous Federalist authors provided short enumerations.<sup>238</sup>

More complete enumerations came from the pens of other Federalist writers, anonymous<sup>239</sup> and otherwise—again, several of them lawyers. Justice Nathaniel Peaslee Sargeant of the Massachusetts Supreme Judicial Court (and shortly thereafter, Chief Justice), included an enumeration of state powers in a letter sent to Samuel Otis, a member of Congress.<sup>240</sup> Alexander White, a distinguished Virginia lawyer, published another. White was a member of the House of Burgesses before the Revolution, a member of the House of Delegates after the Revolution, and a delegate at the Virginia ratifying convention in 1788.<sup>241</sup> Perhaps most influential were the widely distributed enumerations penned by Alexander Contee Hanson, a Congressman from Maryland writing as “Aristides,”<sup>242</sup> and by businessman Tench Coxe.<sup>243</sup>

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238. Natelson, *supra* note 2, at 479.

239. A.B., *Letter to the Editor*, HAMPSHIRE GAZETTE, Jan. 2, 1788, in 5 DOCUMENTARY HISTORY, *supra* note 2, at 596, 599; *Letter to the Members of the Convention of Massachusetts*, MASS. CENTINEL, Jan. 9, 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 2, at 651–52. Both clearly were intended to be relied on. The former was in specific response to the claims of the Anti-Federalist essayist “Brutus” that the Constitution imposed insufficient limits on the federal government. A.B., *supra*, at 596, 599. The latter was reprinted in two other papers. In one, the *Massachusetts Centinel*, the piece was published under the headline, “‘READ THIS! READ THIS!’” *Letter to the Members of the Convention in Massachusetts*, *supra*, at 652 n.1.

240. Nathaniel Peaslee Sarjeant, *Letter of Chief Justice Sarjeant of Massachusetts*, in 1 THE NEW ENGLAND HISTORICAL & GENEALOGICAL REGISTER 237–39, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 2, at 563, 568.

241. The relevant (first) portion of White’s essay (with explanatory annotations) is found at 8 DOCUMENTARY HISTORY, *supra* note 2, at 401–08.

242. Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, in Ford, PAMPHLETS, *supra* note 2, at 217. On March 27, 1788, Hanson wrote to Tench Coxe of the “avidity, with which I am informed my humble essay has been bought up . . . .” Letter from Alexander Contee Hanson to Tench Coxe (Mar. 27, 1788), in 8 DOCUMENTARY HISTORY, *supra* note 2, at 520–21.

Coxe, in fact, has been credited as the single individual most responsible for shaping public understanding of the Constitution.<sup>244</sup> All of these enumerations were remarkably consistent, with much overlap, but relatively little dispute among Federalist writers about which powers were reserved to the states.

I previously have written about the content of these enumerations of state powers.<sup>245</sup> In capsule form, Federalist representations were that, outside the capital district, national authority would not include the following objects:<sup>246</sup>

- training the militia and appointing militia officers;
- control over local government;
- regulation of real property;
- regulation of personal property outside of commerce;
- control over domestic and family affairs;
- control over crimes *malum in se*, except treason, piracy, and counterfeiting;
- control over state court systems;
- the law of torts and contracts, except in suits between citizens of different states;
- control of religion and education and establishment of religious and educational institutions;
- services for the poor and unfortunate; and
- control of agriculture and other business enterprises.

#### *F. Implications of the Federalist Response for the Plenary and Hamilton-Story Views*

Obviously, these Federalist representations are inconsistent with a plenary view of the General Welfare Clause. They are equally inconsistent with the Hamilton-Story view that federal spending is not limited to the powers otherwise enumerated, if only because several

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243. Tench Coxe, *Letter from "A Freeman" to the Minority of the Convention of Pennsylvania*, PA. GAZETTE, Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 2, at 453, 457–58; Tench Coxe, *Letter from "A Freeman" to The Minority of the Convention of Pennsylvania*, PA. GAZETTE, Jan. 30, 1788, reprinted in *id.* at 508–10; Tench Coxe, *Letter from "A Freeman" to The Minority of the Convention of Pennsylvania*, PA. GAZETTE, Feb. 6, 1788, reprinted in 16 *id.* at 49–50.

244. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978). For background information on Coxe, see Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms 1787–1823*, 7 WM. & MARY BILL RTS. J. 347 (1999).

245. Natelson, *supra* note 2.

246. *Id.*

items on the list of enumerated state powers—such as the establishment of religious and educational institutions and services for the poor—involve expenditures of money.<sup>247</sup> If the states had the exclusive right to spend money on such things, then the federal government could not have the unlimited right—or, indeed, any right—to spend on them. Additionally, as I have pointed out elsewhere, insofar as the Hamilton-Story view is used to support federal grants in aid to states in areas outside the enumerated powers, the view is inconsistent with the founding generation's strong constitutional policy of preventing financial dependence by one level of government on another.<sup>248</sup>

One might ask why, in their attacks on the plenary view, Federalists never rebutted the Hamilton-Story view specifically. The answer is that the Hamilton-Story view made no defined appearance in the pre-ratification debates,<sup>249</sup> because it had not been invented. Hamilton devised it in 1791, a full two years after the new government was under way. He did so, apparently, for political purposes—to promote his Report on Manufactures (Report).<sup>250</sup> Insofar, however, as the Report

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247. Moreover, Tench Coxe represented certain taxes—those on state offices—as outside the federal power. See 16 DOCUMENTARY HISTORY, *supra* note 2, at 51 (writing as “A Freeman”).

248. Federalists and Anti-Federalists alike emphasized the importance of assuring that branches of government were independent of each other, so as to be more reliably dependent on the people. This policy applied among the federal branches (Senate, House, President, and Judiciary) and between the state and federal levels of government. It applied with particular force to prevent branches closer to the people (e.g., the states) from being dependent on branches farther from the people (e.g., the federal government). The historical record copiously supports this as a fundamental policy even more powerful than separation of powers. See generally Natelson, *supra* note 23, at 402–05 (discussing the reasons for promoting independence among governmental entities). For dependencies limited to more remote branches on less remote ones, see *id.* at 407.

249. William Symmes, Jr., at the Massachusetts ratifying convention, did argue that “general welfare” might apply to expenditures, too; indeed “any expenditure whatever.” 2 ELLIOT’S DEBATES, *supra* note 2, at 74. However, he seems to have been making the argument only that the clause was not effective as a *limitation*. If his statement is construed as saying that the General Welfare Clause is a grant of power, it is not the Hamilton-Story view, because he does not distinguish it from statements of the plenary view by denying that the General Welfare Clause gave Congress plenary authority to regulate.

250. Hamilton wrote as follows:

[T]he 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 defence 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 shou’d 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.

It 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

contends for a federal power to interfere in agriculture and similar areas, it is in direct contradiction to the position he took while promoting ratification. In his 1791 “Report” he wrote, “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 sphere of the national Councils *as far as regards an application of Money*.”<sup>251</sup> Yet before ratification, he had assured the public that “supervision of agriculture and of other concerns of a similar nature . . . can never be desirable cares of a general jurisdiction.”<sup>252</sup> Again, he had written of a system in which “encouragement of agriculture and manufactures” were “subjects of state expenditures.”<sup>253</sup> In discussing the need for broad taxation power, he had been careful to limit his list of “exigencies” to those within the enumerated powers.<sup>254</sup>

This sort of contradiction is one reason I often have wondered why some take Hamilton’s Report on Manufactures seriously as a source of “original understanding.” As a *post eventum* statement, it is inherently less reliable as evidence of agreement than statements (including Hamilton’s) issued to induce ratification. Moreover, it would be difficult to find a participant in the constitutional debates who was less reflective of mainstream views than Hamilton. He was a political outlier even among the strongly nationalist majority at the constitutional convention, and he spent comparatively little time there. Of the finished Constitution, he admitted that “[n]o man’s ideas were more remote from the plan than his own were known to be.”<sup>255</sup> If that were all, citing Hamilton’s *post eventum* political statements as evidence of the public agreement would be a little like assessing the goals of the Clinton administration through subsequent statements by Senator Jesse Helms—probative, perhaps, but only minimally so.

Yet it is worse than that. There is evidence that as soon as the Constitution was signed, Hamilton was secretly plotting to betray it. His unpublished paper of September 1787, written within two weeks of the

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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 sphere of the national Councils *as far as regards an application of Money*.

Alexander Hamilton, Report on Manufactures (Dec. 5, 1791), in 2 THE FOUNDERS’ CONSTITUTION, *supra* note 2, art. I, § 8, cl. 1, doc. 21, at 446–47.

251. *Id.* at 447.

252. THE FEDERALIST NO. 17, *supra* note 2, at 118.

253. *Id.* NO. 34, *supra* note 2, at 209.

254. See generally *id.* NOS. 30, 31, 34, *supra* note 2 (focusing heavily on utilizing revenue for purposes of national defense and security).

255. 2 CONVENTION RECORDS, *supra* note 2, at 645–46.

time the national convention adjourned on the 17th, reveals him to be dallying with the notion of reunion with Great Britain (“not much to be feared”)<sup>256</sup> and looking forward to a Washington presidency in which the national government may “triumph altogether over the state governments and reduce them into an entire subordination, dividing the large states into smaller districts.”<sup>257</sup> This mental state implies that Hamilton’s *post eventum* statements are completely worthless as evidence of common understanding. In fact, it suggests that those statements may have negative value, i.e., may tend to *disprove* that understanding.

In summary, the ratification debates support the conclusion that the General Welfare Clause grants no independent authority to Congress, to spend or otherwise. Anti-Federalist suggestions that it might grant independent power were firmly rebutted by Federalists. The Federalists’ agreement to the Tenth Amendment was their seal on the bargain.

### VIII. THE COURSE OF THE RATIFICATION DEBATE: THE GENERAL WELFARE CLAUSE AS A “PUBLIC TRUST” LIMITATION

#### A. *The General Welfare Clause as a Limitation on the Use of Tax Revenue*

Textual analysis suggests that the General Welfare Clause is more than a mere “non-power”—that it is a limitation on the scope of the taxing power.<sup>258</sup> Textual analysis also suggests the nature of the limitation: the Clause limits the purposes for which Congress can tax and, indirectly, the purposes for which tax money can be used.<sup>259</sup>

The last two Parts have shown that the federal convention intended, and the ratification process confirmed, the status of the General Welfare Clause as a limitation. This Part examines what the ratification debate tells us about the nature of that limitation.

Early in the debate, Noah Webster offered the following insight:

Besides, in the very clause which gives the power of levying duties and taxes, the purposes to which the money shall be appropriated are

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256. This statement is ambiguous in that it could mean (1) it is not likely to happen or (2) it wouldn’t be such a bad thing. The context, coupled with Hamilton’s monarchical proclivities, makes it possible he had the latter meaning in mind. See 13 DOCUMENTARY HISTORY, *supra* note 2, at 278 (“The most plausible shape of such a business would be the establishment of a son of the present monarch in the supreme government of this country with a family compact.”).

257. *Id.*

258. See *supra* notes 92–97 and accompanying text.

259. See *supra* notes 92–97 and accompanying text.

specified, viz. *to pay the debts and provide for the common defence and general welfare of the United States*. For these purposes money must be collected . . . .<sup>260</sup>

In a footnote he added:

Any powers not promotive of these purposes, will be unconstitutional;—consequently any appropriations of money to any other purpose will expose the Congress to the resentment of the states, and the members to impeachment and loss of their seats.<sup>261</sup>

This would appear to match the conclusions of textual analysis.

In February, 1788, the Charleston *Columbian Herald* published an essay by David Ramsey, a South Carolina Federalist writing under the name of “Civis.” The essay was subsequently circulated in pamphlet and newspaper form in South Carolina, New York, Pennsylvania, and Virginia.<sup>262</sup> It included the following words: “You may observe, that [Congress’s] future power is confined to provide for the *common defence* and *general welfare* of the United States. If they apply money to any other purposes, they exceed their powers.”<sup>263</sup> Similarly, a pamphlet published in April by “A Native of Virginia,” and circulated in that Commonwealth, stated, “It is here to be observed, that all taxes, imposts, &c. are to be applied only for the common defence and general welfare, of the United States. By no possibility will the words admit of any other construction.”<sup>264</sup> He went on to argue that this limitation prevented “peculation, bribery, and corruption, and of the probability of the public Treasury from being converted to the use of the President and Congress.”<sup>265</sup> The term “corruption” generally was understood at the time to mean, not merely theft (that was covered by the word “peculation”), but the use of government power and assets to benefit localities or other special interests (“factions”).<sup>266</sup>

The nature of the general welfare limitation was explored at the Virginia ratifying convention. One delegate, Henry Lee (of Westmoreland),<sup>267</sup> said that the result of the General Welfare Clause is

260. Ford, PAMPHLETS, *supra* note 2, at 50.

261. *Id.* at 51.

262. 16 DOCUMENTARY HISTORY, *supra* note 2, at 21.

263. *Id.* at 22. The essay was also printed in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS: 1787–1788, at 451 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

264. 9 DOCUMENTARY HISTORY, *supra* note 2, at 669.

265. *Id.*

266. See *infra* notes 284–88 and accompanying text.

267. Not to be confused with the Ant-Federalist Henry Lee of Bourbon.



that “[Congress] can take no more of our money than is necessary to pay our share of the public debts, and provide for the general welfare.”<sup>268</sup> Governor Randolph said, “[t]he plain and obvious meaning of this is, that no more duties, taxes, imposts, and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States.”<sup>269</sup> George Nicholas argued, “[t]he debts of the Union ought to be paid. Ought not the common defence to be provided for? Is it not necessary to provide for the general welfare? It has been fully proved that this power could not be given to another body. The amounts to be raised are confined to these purposes solely.”<sup>270</sup>

### *B. The Trust Principle behind the General Welfare Clause*

It would appear, therefore, that the goal of the General Welfare Clause was to limit all congressional taxation and spending to general interest, as opposed to local or special interest, purposes. The concept seems alien in today’s “broker state”—the “aristocracy of pull”<sup>271</sup>—where the barter and appropriation of billions of dollars of pork is a regular occurrence on the floor of Congress: subsidies for North Carolina tobacco farmers in exchange for museums in Ohio, and the like. That is one reason, I think, why in more recent times the General Welfare Clause has been so grossly misinterpreted. Yet when the Constitution was ratified, limiting taxes and spending to general welfare purposes was part of the reigning Whig notion of responsible government.

Recall that one of the principal grievances the American colonies had with Great Britain was Britain’s practice of imposing taxes and then diverting the money to the benefit of people other than those who paid the bills; John Dickinson’s influential essays had centered partly on this issue.<sup>272</sup> Furthermore, Britain had deployed government power to grant franchises and monopolies to influential groups. Dickinson fulminated against this sort of thing as well, in his *Two Letters on the Tea Tax*.<sup>273</sup> Such experiences—coupled with the writings of prominent British

268. 3 ELLIOT’S DEBATES, *supra* note 2, at 181.

269. *Id.* at 207; *see also id.* at 599 (“I appeal to the candor of the honorable gentleman, and if he thinks it an improper appeal, I ask the gentlemen here, *whether* there be a *general, indefinite* power of providing for the general welfare? The power is, ‘to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare;’ so that they can only raise money by these means, in order to provide for the general welfare.”).

270. 3 ELLIOT’S DEBATES, *supra* note 2, at 244.

271. AYN RAND, ATLAS SHRUGGED 379 (35th Anniversary ed. 1992).

272. *See supra* notes 106–08 and accompanying text.

273. John Dickinson, *Two Letters on the Tea Tax*, in 1 POLITICAL WRITINGS, *supra* note 2, at 457.

writers admired by American Whigs<sup>274</sup>—had instilled a concept of government that we would identify as essentially *fiduciary* in nature. Public officials were seen as the people's agents and trustees, and bound by something akin to private trust standards.<sup>275</sup> Long before Grover Cleveland appropriated the statement,<sup>276</sup> James Madison wrote in *The Federalist* that "governments are in fact . . . agents and trustees of the people."<sup>277</sup> Indeed, Madison's contributions to *The Federalist* contain many references to the "public trust" government officials exercise.<sup>278</sup> Alexander Hamilton also employed that term.<sup>279</sup> John Dickinson's

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274. For example, John Locke made extensive use of the trust analogy. See JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE 18 (Russell Kirk, intro. 1955) ("nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it"); *id.* at 110 ("to the legislative, acting pursuant to their trust"); *id.* at 113–14 ("[T]he community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property, will still be at the same uncertainty as it was in the state of nature."); *id.* at 116–17 ("But government, into whosoever hands it is put, being as I have before shown, entrusted with this condition, and for this end, that men might have and secure their properties"); *id.* at 129 ("The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is [a] fiduciary trust placed in him, for the safety of the people."), and *passim*.

Henry St. John Bolingbroke, actually a Tory, was influential among American Whigs. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 39–40 n.23 (1967). His popular essays were replete with references to public service as a "trust" and public officers as "trustees." See, e.g., 2 HENRY ST. JOHN BOLINGBROKE, *A Dissertation Upon Parties*, in THE WORKS OF LORD BOLINGBROKE (1967); *id.* at 45 (a representative in Parliament is the people's trustee); *id.* at 93 (a representative has a "great and noble trust"); *id.* at 100 (the king serves as trustee of the public revenues); *id.* at 101 ("the people should have frequent opportunities of calling their representatives to account, as it were, for the discharge of the trust committed to them").

*Cato's Letters*, a series of essays by John Trenchard and Thomas Gordon, were popular in America and replete with the language of public trust. 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 111, 142, 179, 267, 411, 415, 416 (Ronald Hamowy ed., 1995); 2 *id.* at 558.

Samuel von Pufendorf, one of the most popular jurists of the time, had not used explicitly the language of public trust, but had contended for a long list of trust-style duties on rulers. Among these were governing for the public welfare, acquiring necessary knowledge, ultimate responsibility of the ruler for ministers, impartiality and the equitable distribution of burdens among citizens, conservation of assets, and avoidance of faction. 2 SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW (Frank Gardner Moore, photo reprint 1964 (1682)), available at <http://www.constitution.org/puf/puf-dut.htm>.

275. For a discussion of how a government can be bound by fiduciary standards, see Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. RICH. L. REV. 191 (2001).

276. After Grover Cleveland said, "We are the trustees and agents of our fellow citizens," W.C. Hudson, a newspaper reporter then working for Cleveland, changed it to "[p]ublic office is a public trust" with Cleveland's permission. To his credit, Cleveland always admitted that the snappier line was not his. William Safire, *How to Write a Memoir*, N.Y. TIMES, Apr. 18, 1988, at 23.

277. THE FEDERALIST NO. 46, *supra* note 2, at 294; see also GARRY WILLS, JAMES MADISON 32–33 (2002) (defining Madison's view of legislation as judicial-style arbitration, "with neutral umpires weighing competing interests, to strike a just balance").

278. E.g., THE FEDERALIST NOS. 49, 55, 57, 63, *supra* note 2, at 316, 345, 350, 383.

279. 1 CONVENTION RECORDS, *supra* note 2, at 290.

writings on government are replete with fiduciary language.<sup>280</sup> John Jay called public officials “agents and overseers for the people.”<sup>281</sup> Tench Coxe referred to “the trusts and powers of the state.”<sup>282</sup> Several state constitutions contained language of public trust.<sup>283</sup>

Fiduciary status implied fiduciary duties, in particular the duty of impartiality.<sup>284</sup> The English tradition favored by American Whigs had emphasized the ideal of government actors rising above “corruption” (the service of private and local interests) and governing instead as disinterested promoters of the general welfare.<sup>285</sup> At the federal convention, promoting governmental impartiality was an important consideration in the drafting process.<sup>286</sup> Madison reflected that view when he wrote in *The Federalist* that government officials should be “*impartial* guardians of a common interest.”<sup>287</sup> Even Hamilton, although

280. 2 *id.* at 123 (“public trust”); *id.* at 169 (“federal trustees”). In the letters of “Fabius,” see, e.g., 17 DOCUMENTARY HISTORY, *supra* note 2, at 122 (“federal trustees”); *id.* at 124 (“undue influence”); *id.* at 124–25 (affirming that presidential electors will reject suggestions “derived from partiality”); *id.* at 125 (referring to the senate’s “trust” in acquiring and preserving information); *id.* at 180 (stating that government is a trust for the benefit of the governed). See also STILLÉ, *supra* note 2, at 204 (quoting Dickinson as referring to a representative as “a trustee for my countrymen,” and noting a corresponding duty for the representative to subordinate his own interest to those he serves).

281. Ford, PAMPHLETS, *supra* note 2, at 77.

282. *Id.* at 146.

283. E.g., DEL. CONST. art. IV, available at The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (“a councilor will remain in trust for three years”); PA. CONST. art. IV, available at The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (“[A]ll power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”).

284. See RESTATEMENT (SECOND) OF TRUSTS § 183 (1959) (“Duty to Deal Impartially with Beneficiaries: When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”).

285. See, e.g., BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 45–48 (1967) (citing, among other points, Bolingbroke’s ideal of the “Patriot Prince”); *id.* at 84–85 (citing Edmund Burke’s description of Parliament as “a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.”). For another view of the Whig concept of the “public good,” also called “good of the whole,” “general good and safety,” and various other terms presaging “common Defence and general Welfare,” see GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 53–65 (1969).

286. See 1 CONVENTION RECORDS, *supra* note 2, at 88 (Pierce Butler, stating that unity in the executive will promote impartiality); *id.* at 139 (Elbridge Gerry, making the same point); *id.* at 427–28 (James Madison, stating that the senate will promote impartiality); *id.* at 580 (John Randolph, speaking on the importance of an impartial census); 2 *id.* at 42 (Gouverneur Morris, speaking on the importance of an impartial impeachment trial); 2 *id.* at 124 (Madison, speaking on impartiality in representation); 2 *id.* at 288 (Oliver Elsworth, speaking to the desirability of impartial rewards for merit).

287. THE FEDERALIST NO. 46, *supra* note 2, at 297 (emphasis added); see also *id.* NO. 54, *supra* note 2, at 341 (stating that the census should be conducted impartially); *id.* NO. 57, *supra* note 2, at

as close to a non-Whig as a non-Loyalist could get, repeatedly praised the virtues of impartiality, at least in the judicial context.<sup>288</sup>

The ideal of government-as-impartial-trustee was as regnant among Anti-Federalists as among Federalists. The ideal shines through the public letters of “Agrippa” (John Winthrop), a Massachusetts Anti-Federalist who criticized the proposed Constitution because he thought it would lead to a government not impartial: “I believe that it is universally true, that acts made to favour a part of the community are wrong in principle[.]”<sup>289</sup> he wrote; “[t]he perfection of government depends on the equality of its operation, as far as human affairs will admit, upon all parts of the empire, and upon all the citizens.”<sup>290</sup> However, the proposed Constitution, in his opinion, would give Congress the right to grant special privileges to some people—exclusive trading charters, a relic of the royal prerogative,<sup>291</sup> and monopolies.<sup>292</sup> Taxation under the new government would impact the states unequally.<sup>293</sup> “In a republick [sic],” he said, “we ought to guard, as much as possible, against the predominance of any particular interest. It is the object of government to protect them all.”<sup>294</sup> Anti-Federalist James Monroe, later President of the United States, reflected the same view: “There are two circumstances remarkable in our colonial settlement:—1st, the exclusive monopoly of our trade; 2nd, that it was settled by the commons of England only. The revolution, in having emancipated us from the shackles of Great Britain, has put the entire government in the hands of one order of people only—freemen not of nobles and freemen.”<sup>295</sup>

The ideal of impartiality heavily influenced the way the new Constitution was written and represented. Although the drafters were not

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351 (stating that the representation in House of Representatives should be “scrupulously impartial to the rights and pretensions of every class and description of citizens”).

288. See *id.* NO. 65, *supra* note 2, at 398 (Alexander Hamilton, stating that the Senate has requisite impartiality to try impeachments); *id.* NO. 78, *supra* note 2, at 465 (Alexander Hamilton, discussing need “to secure a steady, upright, and impartial administration of the laws”); *id.* NO. 80, *supra* note 2, at 475 (Alexander Hamilton, praising use of federal courts where state courts might be biased).

289. Ford, *ESSAYS*, *supra* note 2, at 59.

290. *Id.* at 74; see also *id.* at 102 (“The first principle of a just government is, that it shall operate equally.”).

291. See *id.* at 70 (describing trade charters “as one principal branch of prerogative”); *id.* at 109 (comparing trade charters to aristocracy).

292. See *id.* at 80 (stating that Congress should “be restrained from creating any monopolies”); 6 Storing, *ANTI-FEDERALIST*, *supra* note 2, at 112 (Robert Yates, using the pseudonym “Sydney,” discussing monopoly).

293. Ford, *ESSAYS*, *supra* note 2, at 74–75.

294. *Id.* at 109.

295. 3 ELLIOT’S DEBATES, *supra* note 2, at 208–09 (speaking at the Virginia ratifying convention).

utopian enough to create a purely fiduciary government, fiduciary principles pervade the Constitution.<sup>296</sup> Various sections were crafted to promote equal regulatory treatment,<sup>297</sup> prevent conflicts of interest,<sup>298</sup> and call public officials to account.<sup>299</sup> The document speaks explicitly of “public Trust”<sup>300</sup> and of public offices being “of Trust.”<sup>301</sup> Particular institutions, such as the unitary executive, the Senate, and the electoral college, were inserted to promote governmental impartiality.<sup>302</sup>

Several provisions were designed to promote impartiality in fiscal matters: duties, imposts and excises must be uniform throughout the country;<sup>303</sup> direct taxes must be apportioned by population;<sup>304</sup> and revenue bills must be initiated by the House of Representatives (the branch of government having the most identity of interest with the people).<sup>305</sup> By limiting the purposes for which the new government could raise (and spend) tax revenue, the General Welfare Clause served the same end of fiduciary-style impartiality.

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296. This number has been increased through the amendment process. *See, e.g.*, U.S. CONST. amend. V (prohibiting the taking of private property without compensation); *id.* amend. XII (prohibiting electors from voting for both presidential and vice-presidential candidates from the same state as themselves); *id.* amend. XIII (abolishing slavery); *id.* amend. XIV (granting equal protection of the laws); *id.* amend. XV (abolishing discrimination in voting due to race or color); *id.* amend. XIX (abolishing discrimination in voting due to sex); *id.* amend. XXVII (preventing Congress from increasing Congressional salaries until an election has intervened).

297. *E.g.*, *id.* art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”); *id.* art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

298. *Id.* art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased [sic] during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); *id.* art. II, § 1, cl. 7 (“The President shall . . . receive for his Services, a Compensation, which shall neither be encreased [sic] nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”).

299. *Id.* art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

300. *Id.* art. VI, cl. 3.

301. *Id.* art. I, § 3, cl. 7 (“Office of . . . Trust”); *id.* art. II, § 1, cl. 2 (“Office of Trust”).

302. 1 CONVENTION RECORDS, *supra* note 2, at 88 (Pierce Butler on the executive); *id.* at 139 (Elbridge Gerry on the executive); *id.* at 427–28 (James Madison on the Senate); 17 DOCUMENTARY HISTORY, *supra* note 2, at 124–25 (John Dickinson writing that the electoral college was constructed so that “utterly vain will be the unreasonable suggestions derived from *partiality*”).

303. U.S. CONST. art. I, § 8, cl. 1.

304. *Id.* art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .”).

305. *Id.* art. I, § 7, cl. 1.

In the spring of 1788, John Dickinson became frustrated by the fact that several states still had not subscribed to the Constitution.<sup>306</sup> In April and May, therefore, he published his “Fabius” essays,<sup>307</sup> his last major contribution to the constitutional debates. These were initially printed in Philadelphia, but were soon reprinted widely in states that had not yet ratified.<sup>308</sup> Pervaded with fiduciary as well as Lockean principles, the “Fabius” essays dwelt extensively on the goals of general or common welfare as opposed to welfare merely local or partial.<sup>309</sup> In Dickinson’s view, “the end [purpose] of legitimate government . . . is the general welfare.”<sup>310</sup> Individuals cede to society those rights it would be destructive to exercise separately so as to better protect those rights best exercised individually. Similarly, in entering a confederation states must cede authority over the general welfare for the better protection of their local interests.<sup>311</sup> It followed that the new federal authority was limited to matters pertaining to the general welfare, and did not extend to local or special interests.<sup>312</sup> “America is, and will be, divided into several sovereign states, each possessing every power proper for governing within its own limits for its own purposes. . . .”<sup>313</sup> It was the duty of states, Dickinson added, to protect their remaining powers from federal encroachment.<sup>314</sup> This resultant balance would bring out the best in the several states just as union with England had brought out the best in Scotland: “The cultivation of her virtues and the correction of her errors.”<sup>315</sup>

## IX. CONCLUSION

The current Supreme Court interpretation, the Hamilton-Story view, stands the original meaning of the General Welfare Clause on its head. The Clause was not a qualified grant of spending authority, as Hamilton

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306. See 17 DOCUMENTARY HISTORY, *supra* note 2, at 77 (noting that publication of Dickinson’s essays was occasioned by “an alarming hesitation of some States to ratify the Constitution”).

307. *Id.* at 74.

308. Maryland, Rhode Island, New Hampshire, Virginia, and New York. *Id.* at 78.

309. The topic of general welfare is a frequent one in the Fabius letters. The first letter, for example, discusses how sectional and economic interests can warp views of the common welfare. *Id.* at 81.

310. *Id.* at 195.

311. This is discussed in detail in the third “Fabius” letter. *Id.* at 67.

312. Thus, the electoral college was constructed so that “utterly vain will be the unreasonable suggestions derived from *partiality*.” *Id.* at 124–25 (emphasis in original).

313. *Id.* at 249.

314. *Id.* at 171.

315. *Id.* at 213.

and Story claimed.<sup>316</sup> Nor did it merely point to other powers, as Story understood Madison to have said. On the contrary, the General Welfare Clause was an *unqualified denial* of spending authority. It did not add to federal powers; it subtracted from them.

The General Welfare Clause was designed as a trust-style rule denying Congress authority to levy taxes for any but general, national purposes. Because the Clause prevented Congress from using tax revenue for local or special interest purposes, the Clause indirectly qualified the appropriation power. Even if some enumerated power could be enlisted to support the appropriation,<sup>317</sup> federal tax money was not to be used for the private benefit of a museum—however worthy—in Savannah, nor an artist—however struggling—in New York.

What was to happen if government officials violated the restrictions of the General Welfare Clause? Not many of the Federalists addressed the issue. But three did. David Ramsay (“Civis”) rather naively suggested only electoral retaliation.<sup>318</sup> Noah Webster suggested that remedy, but also countermeasures from the states<sup>319</sup> and impeachment.<sup>320</sup> At the Virginia ratifying convention, Federalist leader George Nicholas offered the answer most relevant today:

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316. Cf. Soifer, *supra* note 2, at 793–94 (1986) (“It is also a truism, however, that the power granted to Congress to spend for the general welfare extends beyond purposes explicitly mentioned elsewhere in the constitutional text.”) In light of the discussion above, if Professor Soifer’s statement is a “truism,” it would appear to be one of those that are not true.

317. Professor Renz suggests that other enumerated powers are not affected by this limitation, Renz, *supra* note 2, at 137–38, but I fail to see why this should be so. The limitation applies by its terms to tax revenue, and nothing in the document suggests inapplicability to tax revenue funding the exercise of enumerated powers. Consider the other major limitation in the Taxation Clause—uniformity of excises. If Congress imposed a sales tax (excise) to fund the military, would that excise be immune from the rule that it be “uniform throughout the United States?” This seems unlikely. See U.S. CONST. art. I, §1, cl. 1.

318. 16 DOCUMENTARY HISTORY, *supra* note 2, at 22 (“The people of the United States who pay, are to be judges how far their money is properly applied”).

319. Several other Federalists suggested strong state countermeasures as a cure for potential federal overreaching. Alexander Hamilton, for instance, noted that

[i]t may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

THE FEDERALIST NO. 28, *supra* note 2, at 181. See also *id.* No. 46 (Madison), at 297–300 (contending that state authority, including the militia power, is a remedy for federal overreaching).

320. Ford, PAMPHLETS, *supra* note 2, at 51.

[W]ho is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void, enforceable ultimately by the courts.<sup>321</sup>

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321. 3 ELLIOT'S DEBATES, *supra* note 2, at 443.