

## RECOVERING THE LOST GENERAL WELFARE CLAUSE

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### ABSTRACT

*The General Welfare Clause of Article I, Section 8, Clause 1 of the Constitution enumerates a power to “provide for the common defense and general welfare.” A literal interpretation of this clause (“the general welfare interpretation”) would authorize Congress to legislate for any national purpose, and therefore to address all national problems—for example, the COVID-19 pandemic—in ways that would be precluded under the prevailing understanding of limited enumerated powers. But conventional doctrine rejects the general welfare interpretation and construes the General Welfare Clause to confer the so-called “Spending Power,” a power only to spend, but not to regulate, for national purposes.*

*This Article argues that both the text and the drafting history of the General Welfare Clause support reading it as a power to regulate on all national problems, such as environmental degradation, violence against women, and pandemic disease. It is only our superficial ideological commitment to enumerationism—the doctrine of limited enumerated powers—that causes us to depart from the most evident textual interpretation of the General Welfare Clause. Recovering the lost General Welfare Clause is particularly important at this moment in constitutional history, when a conservative and*

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*supposedly originalist Supreme Court is poised to greatly constrict federal power to respond to pressing national problems in service of a tendentious and badly one-sided account of Founding Era views on federalism.*

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## INTRODUCTION

Does the Constitution empower Congress to issue a nationwide mask mandate in response to the COVID-19 pandemic? To require individuals to take steps to prevent further environmental degradation? To redress a nationwide pattern of violence against women? The answers to these questions are “no” or “probably not,” according to the questionable ideology of “enumerationism”—the idea that the Constitution confers only limited enumerated powers on the national government and thereby denies the power to address all national problems.<sup>1</sup> Yet these important disputes about the delegated powers of Congress would not even arise under an arguably correct reading of the General Welfare Clause of Article I, Section 8, Clause 1 (Clause 1): “to ... provide for the common Defence and general Welfare.”<sup>2</sup> Such a reading—which I refer to as the “general welfare interpretation” of the General Welfare Clause—would authorize the federal government to legislate on all national problems. This interpretation is hardly far-fetched. According to James Madison, interpreting the General Welfare Clause to “convey the comprehensive power” to legislate on all national matters gives those words the meaning “which taken literally they express.”<sup>3</sup>

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1. On enumerationism, see, e.g., John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507, 510-13 (2019) (reviewing JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018)); Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 183-89 (2020); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2003-06, 2009-11, 2018 (2021); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 581-82 (2017) (originating and defining the term “enumerationism”); see also Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1-2, 6, 12 (2010) (arguing that the original meaning of the Commerce Clause was to function as a broad, national legislative authorization); Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 3-4, 7-8 (2019) (questioning limited enumerated powers). For an excellent earlier example of scholarship on this theme, see Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 27 (2005).

2. U.S. CONST. art. I, § 8, cl. 1.

3. James Madison to Andrew Stevenson (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON 411, 417 (Gaillard Hunt ed., 1906) [hereinafter Madison to Stevenson].

Nevertheless, the settled interpretation departs from this literal meaning of the text. Clause 1 as a whole provides as follows, with the General Welfare Clause italicized:

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>4</sup>

Conventional doctrine maintains that Clause 1 enumerates the taxing and spending powers, and that the words “to ... provide for the common Defence and general Welfare” constitute the “Spending Clause”—conferring a power to spend, but not to regulate, for national purposes.<sup>5</sup> Yet “provide for” is not the most natural way to express the idea of spending; the more obvious interpretation of that phrase is to “legislate” or “regulate,” which is how “provide for” is used elsewhere in the Constitution.<sup>6</sup> Moreover, the most closely applicable canons of construction favor the general welfare interpretation. Nevertheless, the linguistically strained “spending power” interpretation is presumed to be textually correct, whereas the general welfare interpretation—despite being a more natural reading—is viewed as “manifestly erroneous.”<sup>7</sup>

This Article argues that the text and drafting history of the General Welfare Clause favor the general welfare interpretation. The prevailing view, that the narrow spending power interpretation is textually mandated, is wrong. On the contrary, the literal words and applicable canons of construction favor the general welfare interpretation over narrower ones. Further, the drafting history of Clause 1 demonstrates that the Framers intended to favor the general welfare interpretation, albeit by adopting strategically

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

5. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 576 (2012); South Dakota v. Dole, 483 U.S. 203, 206-07 (1987); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 296-99 (6th ed. 2019); Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 511, 516-19 (2009). But see Johnson, *supra* note 1, at 27 (arguing that interpreting the General Welfare Clause as a plenary legislative authorization is “[t]he best reading of the Constitution”).

6. See *infra* text accompanying notes 82-89.

7. See *infra* text accompanying notes 17-22.

ambiguous language that also left space for a narrower interpretation.

This argument casts doubt on enumerationism itself. The general welfare interpretation of the General Welfare Clause truly is incompatible with the doctrine of limited enumerated powers. That doctrine has long and widely been held to be an inexorable textual command.<sup>8</sup> By showing that the text and drafting history of the General Welfare Clause favor the general welfare interpretation, I do not claim to refute enumerationism. But I do claim to undermine the contention that enumerationism is compelled by the Constitution's text or the intentions of its Framers. As we will see, the assumption of limited enumerated powers does all the analytical work that underlies the longstanding rejection of the general welfare interpretation. Whether normatively justified or not, it is our ideological commitment to enumerationism that makes the general welfare interpretation seem outlandish.

The interpretive stakes of this argument are to clarify and expand the newly reopened Founding Era debate about whether the Constitution is best read as granting limited enumerated powers to the federal government, or instead as empowering it to address all national problems. If, as I contend, the text and Framers' intentions favor the anti-enumerationist, general welfare interpretation of the General Welfare Clause, then enumerationism can no longer rest on textual and intent-based arguments. It must instead rely on non-originalist arguments from history, precedent, or the Constitution's "spirit" to compete with a general welfare theory of federal powers.

I believe that the general welfare interpretation is not only textually and historically plausible; it is normatively superior. A fully presented normative case for the general welfare interpretation requires addressing various normative arguments of different modalities. But what most of these interpretive modalities have in common is their belief that the Framers' intent is highly probative, if not dispositive, in interpreting constitutional text. This is true even of the interpretive theory that purports to mount the most damning critique of interpretations that rely on Framers' intent: "original public meaning" originalism. Accordingly, any normative argument for the general welfare interpretation stumbles out of the

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8. See, e.g., *NFIB*, 567 U.S. at 533-34.

gate unless it can counter the predictable objection that *of course* the general welfare interpretation is foreclosed because the Framers intended to confer limited enumerated powers, and not general ones—not even general powers limited to national rather than local problems. This Article meets and rebuts that threshold objection, thereby taking the first large step toward a normative theory, by showing that the text and drafting history of the General Welfare Clause support the general welfare interpretation.

In Part I, I expand on the interpretive stakes of my argument by describing the cost of enumeration. That doctrine requires that we tolerate constitutional prohibitions on the federal government's authority to address at least some national problems—a unified and comprehensive pandemic response being a salient example. I then explain how the drafting history of ambiguous constitutional text is a highly relevant consideration in any mainstream approach to constitutional interpretation, including “original public meaning” originalism.

In Part II, I focus on the text of Clause 1. Although that clause can be parsed in four different ways, none of those achieves a compelling victory over the general welfare interpretation of the General Welfare Clause—whether construing the literal language of Clause 1 or applying interpretive canons to vary the *prima facie* language. It is only our confirmation bias, the tendency to interpret evidence to confirm existing beliefs, that prevents us from seeing the plausibility of the general welfare interpretation. That confirmation bias stems from the entrenchment of enumerationism.

In Part III, I detail the drafting history of the General Welfare Clause within Clause 1. Although this drafting history has been hiding in plain sight ever since publication of Madison's Convention notes in 1840,<sup>9</sup> it has been completely overlooked by historians and constitutional scholars. This may be due in large part to Madison himself, who “loathed” the General Welfare Clause and was largely successful in his lifelong effort to sweep it under the rug.<sup>10</sup> The

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9. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 236-37 (2015).

10. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 77 (1989); David S. Schwartz, *Mr. Madison's War on the General Welfare Clause*, 12-26 (unpublished manuscript) (on file with author) (describing Madison's campaign against the general welfare interpretation).



General Welfare Clause first appeared as a proposal in the Committee of Detail's lesser-known second report presented two weeks after its famous first report of August 6, 1787, which produced the first draft of the Constitution.<sup>11</sup> In that second report on August 22, 1787, the Committee proposed a General Welfare Clause that unambiguously authorized Congress to legislate for "the ... general interests and welfare of the United States."<sup>12</sup> It was to be located at the end of the Necessary and Proper Clause—a placement that would have left little doubt that it was intended as a broad grant of legislative power.<sup>13</sup> Over the next two weeks, that language was ambiguated and relocated to its final placement, at the end of Article I, Section 8, Clause 1.<sup>14</sup>

In Part IV, I analyze the drafting history to draw inferences explaining the Framers' intentions behind Clause 1. This history strongly suggests a compromise between a nationalist, implied-powers bloc and a state-centered, limited-enumerated-powers bloc at the Convention.<sup>15</sup> The "enumerationists," as I call them, successfully bargained for strategically ambiguous language in the final version, language that made interpretive space for a narrow reading of Clause 1.<sup>16</sup> Despite the ambiguity, however, the nationalists were

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11. See *infra* text accompanying notes 210-13.

12. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 367 (Max Farrand ed. 1911, rec. ed. 1937) [hereinafter 2 FARRAND] (Journal). Citations to FARRAND in this Article will identify the source of the document by the name of the delegate whose private notes are cited (for example, "Madison," "McHenry") or, where applicable, the official Convention "Journal." This practice seems worthwhile in light of the research of Professor Mary Bilder, who has shown that the Journal is more reliable, and Madison's notes are less reliable, than traditionally believed. See BILDER, *supra* note 9 *passim*; Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620 *passim* (2012).

13. See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 599-600 (1928) (explaining that the Clause "would have given to Congress practically unrestricted scope of legislation"). Warren, one of only two scholars even to notice this proposed amendment, cursorily dismissed its significance in one sentence. See *id.*

14. See *infra* Part III.E.

15. See Mikhail, *supra* note 1, at 510-16.

16. The Framers resorted to strategic ambiguity in several places in drafting the Constitution. See JACK M. BALKIN, LIVING ORIGINALISM 24-26 (2011) (arguing that the Framers used general, abstract, or open-ended constitutional provisions to accommodate "conflicting interests and values" that "would be left to future generations to work out" through constitutional politics). See generally Roderick M. Hills, Jr., *Strategic Ambiguity and Article VII's Two-Stage Ratification Process: Why the Framers (Should Have) Decided Not to Decide* (N.Y.U. Sch. L. L. & Econ. Rsch. Working Paper, Paper No. 19-43, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3454955](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3454955) [<https://perma.cc/K7S7-WQ9L>].

successful in retaining language whose most plausible, literal interpretation authorized the national government to legislate on all national problems. The “spending power” interpretation that prevails today has no basis in the Framers’ intentions, but rather emerges from post-ratification developments. I conclude by dispensing with some of the weak style-based arguments that present-day scholars rely on to dismiss the plausibility of the general welfare interpretation. As with other textual arguments, it is only our confirmation bias that makes these extremely thin arguments seem dispositive.

Today, we face pressing nationwide problems that fall outside the conventionally understood limited enumerated powers—such as environmental degradation, national healthcare, and the COVID-19 pandemic. At the same time, a conservative and purportedly originalist Supreme Court is poised to greatly constrict federal power to respond to these problems, in service of a tendentious and badly one-sided account of Founding Era views on federal legislative power. The stakes of this interpretive question may be higher than ever.

## I. THE INTERPRETIVE STAKES

Contrary to the weight of the evidence, the General Welfare Clause is not given the general welfare interpretation, “which taken literally [its words] express.”<sup>17</sup> The general welfare interpretation is never considered by courts and is brushed aside by the few scholars who notice it. Constitutional historian Charles Warren announced a century ago that the general welfare interpretation “has been long demolished.”<sup>18</sup> Recent scholars agree that the general welfare interpretation “is manifestly erroneous.”<sup>19</sup> Lengthy histories of the General Welfare Clause ignore it,<sup>20</sup> as did the Supreme Court.<sup>21</sup> One

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17. Madison to Stevenson, *supra* note 3, at 417.

18. WARREN, *supra* note 13, at 476.

19. John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 67 n.18 (2001); accord Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 11 (2003).

20. See, e.g., THEODORE SKY, TO PROVIDE FOR THE GENERAL WELFARE: A HISTORY OF THE FEDERAL SPENDING POWER 36-48 (2003); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5-26 (1994).

21. See, e.g., *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

scholar erases it from the history books, claiming (wrongly) that “no one has ever been heard to make such an argument.”<sup>22</sup>

Why? The answer is an overwhelming confirmation bias. By assuming that the text and original intention of the Constitution establish enumerationism, we render the general welfare interpretation implausible—even invisible. The general welfare interpretation violates enumerationism: if Congress has the power to legislate on all national problems, then the idea that it can only regulate national problems within its enumerated powers is undermined. But, as discussed below, the original Constitution was not clearly enumerationist—far from it.<sup>23</sup> The first decade under the new Constitution saw interpretive struggles over the General Welfare Clause between the general welfare interpretation of Congress’s powers and enumerationism.<sup>24</sup> Only after the repeated electoral triumphs of Jeffersonian Republicanism beginning in 1800-1801 did enumerationism become entrenched as constitutional dogma.<sup>25</sup>

Since the New Deal revolution in 1937, our constitutional order has continued to pay lip service to enumerationism, while making every effort to work around it. Most often, we try to shoehorn regulatory problems into the Commerce Clause.<sup>26</sup> This development has largely removed what might otherwise have been pressure from constitutional politics to revisit enumerationism and the limited interpretation of the General Welfare Clause.

Largely, but not entirely. Enumerationism retains significant bite: cases in which the Supreme Court strikes down a law as exceeding the enumerated powers may be few and far between, but when they occur, they are important. The Violence Against Women Act and the Affordable Care Act (ACA) were significant laws that ran afoul of enumerationism.<sup>27</sup> The COVID-19 pandemic brings to

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22. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 340 (1997).

23. See *infra* Part III.A.

24. Compare, e.g., 2 ANNALS OF CONG. 1926 (1791) (statement of Rep. Elias Boudinot) (noting that the national bank charter is an “exercise [of] power for the general welfare”), *with id.* at 1898 (statement of Rep. James Madison) (noting that limited enumerated powers is “[t]he essential characteristic” of the Constitution).

25. DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* 25 (2019).

26. Schwartz, *supra* note 1, at 620.

27. See *United States v. Morrison*, 529 U.S. 598, 602 (2000); *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 574 (2012). The fact that a majority in *NFIB* rejected the Commerce Clause as a basis to uphold the ACA’s “individual mandate,” arguably the lynchpin

painful reality an example of a major national problem deeply affecting the general welfare that falls outside the conventionally understood enumerated powers: a disease is not commerce.<sup>28</sup> Under the logic of *United States v. Lopez*<sup>29</sup> and *United States v. Morrison*,<sup>30</sup> whatever substantial effects COVID-19 has on the economy, fighting it with health measures is not within the powers of Congress because doing so is not economic activity. Because of enumerationism, Congress probably has the power to require the wearing of masks in bars, restaurants, and grocery stores, but not at schools, political rallies, or large private gatherings. In short, any acknowledgment of a general welfare legislative power rather than limited enumerated powers may not matter often; but when it does, it matters *a lot*.

### A. *The Price of Enumerationism*

The Court's Commerce Clause jurisprudence of the past twenty-five years insists that enumerationism is essential to maintaining "a distinction between what is truly national and what is truly local" by refusing to allow Congress to wield "a general police power of the sort retained by the States."<sup>31</sup> But the Court's reasoning is based entirely on a false dichotomy. Between the poles of limited enumerated powers and a general police power to "perform all the conceivable functions of government"<sup>32</sup> lies an excluded middle ground: limited *general* powers. To say that Congress can legislate on all national problems is in fact a limited delegation of power: it limits Congress to national problems and excludes local ones. This is not merely a logically plausible alternative to the false dilemma of limited-enumerated or else unlimited police powers; it is a historically grounded one. As explained further below, the Constitutional Convention initially approved the concept of a general authorization to address all national problems, passing a resolution that would

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of the law, made the Act vulnerable to a new constitutional challenge once the Republican-controlled Congress zeroed out the "shared responsibility" tax payment on which the 5-4 *NFIB* majority had upheld the law. *See id.* at 574; *California v. Texas*, 141 S. Ct. 2104, 2123 (2021) (Alito, J., dissenting).

28. *See Johnson*, *supra* note 1, at 34.

29. 514 U.S. 549 (1995).

30. 529 U.S. 598 (2000).

31. *Lopez*, 514 U.S. at 567-68.

32. *NFIB*, 567 U.S. at 534.

have authorized Congress “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.”<sup>33</sup>

But by forcing the debate over the scope of powers into the enumerationist mold, the Court needlessly obscures the real issue: the national versus local character of a regulatory problem. Instead, defenders of particular congressional statutes must make strained arguments for why a particular regulatory problem involves interstate commerce. The Court has derided such arguments for “piling inference upon inference” in a manner that makes it impossible “to posit any activity by an individual that Congress is without power to regulate.”<sup>34</sup> And when it comes to a mandate to do something, the Court now directs us to engage in an inane, metaphysical debate about a distinction between activity and inactivity.<sup>35</sup> That contribution from *National Federation of Independent Business v. Sebelius* would undoubtedly be important in a challenge to a national mask or vaccination mandate. But such niceties relate only indirectly, if at all, to the real federalism question: Is the regulatory matter one of predominantly national or local concern?

The general welfare interpretation would at once eliminate the false dichotomy and the doctrinal failure to confront the federalism question at the heart of the Constitution’s division of powers between the national and state governments. By interpreting “provide for the general welfare” to mean “legislate on all national problems,” the national-versus-local question is squarely raised. This, in turn, has direct and vital policy implications. We would not need to worry about creating pointless gaps in Congress’s power to deal with a pandemic or other matters of national concern that do not fit the enumerated pigeonholes.

Strikingly, the logic of enumerationism *requires* that there be national problems that Congress cannot address. This regulatory gap, as I have called it, is not a bug or defect in constitutional design but a defining feature of enumerationism.<sup>36</sup> Madison essentially conceded this point in his 1791 House speech opposing Alexander Hamilton’s bill to charter a national bank: when a desired national

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33. See 2 FARRAND, *supra* note 12, at 21 (Journal); *infra* Part III.A.

34. *Lopez*, 514 U.S. at 564.

35. See *NFIB*, 567 U.S. at 552-53.

36. Schwartz, *supra* note 1, at 589.

power was “omitted, however necessary it might have been, the defect could only [be] lamented, or supplied by an amendment of the Constitution.”<sup>37</sup> Were this design defect not present—if Congress could regulate everything beyond the capabilities of the states—then enumerationism would evaporate and be replaced with the general-but-limited authorization to address all national problems. Thus, for enumerationism to be meaningful, there must be a regulatory gap in which one or more national problems can neither be constitutionally addressed by the federal government nor adequately addressed by the states. Lamentably, the COVID-19 pandemic perfectly fits this regulatory gap built into enumerationism.<sup>38</sup>

While the regulatory gap is a cost of enumerationism—one that seems to be fairly steep in the COVID-19 situation—the benefits are elusive. The best one can say for it is that enumerationism represents a second-best way of limiting national governmental powers on the assumption that the ideal of a general “all national problems” authorization is too amorphous to be enforced. Yet a national-versus-local standard is no more amorphous than most other tests in constitutional law.<sup>39</sup> Moreover, limited enumerated powers is not even a second-best mode of enforcing federalism limits. It is at best a third- or fourth-best mode.<sup>40</sup> The Framers themselves apparently believed that process limits on legislation—such as a two-house legislature and a presidential veto—were more effective than “parchment barriers” in the form of specified limits.<sup>41</sup> But if paper barriers

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37. 2 ANNALS OF CONG. 1900-01 (1791) (statement of Rep. James Madison).

38. The amendment process does not effectively neutralize our motivation to lament. Consider the COVID-19 pandemic. The amendment process would delay needed federal response measures by months or years, assuming an amendment could be passed at all. Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> [<https://perma.cc/Y4DR-6MHG>]. In the current political environment, which has turned the pandemic into a partisan issue, it is unlikely that an amendment would be ratified at all with more than 25 percent of the states politically “red.” See *State Partisan Composition*, NAT’L CONF. OF STATE LEGISLATURES (May 13, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/672B-EWGG>].

39. See, e.g., *NFIB*, 567 U.S. at 552-53.

40. See Primus, *supra* note 1, at 2018-28.

41. See, e.g., THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he efficacy of [parchment barriers] has been greatly overrated.”).

were desirable, then a better way to protect reserved state powers would be to enumerate *limitations*, rather than powers—a point that the Framers apparently understood, for example, in enumerating limits on Congress’s powers in Article I, Section 9.<sup>42</sup>

This point is especially true when we consider the indefiniteness of implied powers, and how even a moderately robust conception of implied powers renders the concept of identifiable reserved state powers untenable.<sup>43</sup> If the goal of limited enumerated powers is to reserve such state powers, a better approach would be the opposite of Madison’s lament: the exercise of a federal power that should have been left to the states “could only [be] lamented, or [expressly reserved to the states] by an amendment of the Constitution.”<sup>44</sup> From a design perspective, this model, coupled with a general principle that truly local matters should be left to the states seems preferable to our limited-enumerated-powers model.

### *B. The Relevance of Drafting History*

The role that the drafting history of an ambiguous constitutional provision should play in that provision’s interpretation is a contentious normative question that generates several plausible answers, depending on one’s favored interpretive theory. But that normative question need not be answered here, because virtually all major interpretive approaches agree that the communicative intent of the Framers is relevant to the interpretation of an ambiguous constitutional provision and that the drafting (or “legislative”) history sheds important light on that intent. Nor is it necessary here to assess how much weight is given in practice to Framers’ intent and drafting history, because virtually all major interpretive theories give significant weight to Framers’ intent.<sup>45</sup> As a result, drafting history is always important. Indeed, it is potentially dispositive when other factors cancel each other out.

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42. See Primus, *supra* note 1, at 2018-28.

43. See David S. Schwartz, *McCulloch v. Maryland and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL’Y 25, 36-37 (2021).

44. See 2 ANNALS OF CONG. 1900-01 (1791) (statement of Rep. James Madison).

45. See, e.g., Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1685 (2012) (noting that historical intent arguments are persuasive authority in U.S. constitutional culture).

One need not look far to find examples of reliance on drafting history in Supreme Court decisions. There, the prevailing interpretive approach remains an eclectic blend of precedent, text, structure, historical context, and Framers' intent, including drafting history.<sup>46</sup> *City of Boerne v. Flores* is one of dozens of examples.<sup>47</sup> In deciding that the Congressional Enforcement Clause in Section 5 of the Fourteenth Amendment restricted Congress's power to "declare" Fourteenth Amendment rights, the Court found it important to compare the final text of the Fourteenth Amendment with a rejected early draft.<sup>48</sup> Whether their historical analysis and conclusion were right or wrong, the Justices made clear that drafting history "confirm[ed]" the Court's "remedial, rather than substantive, [interpretation] of the Enforcement Clause."<sup>49</sup>

The relevance of drafting history might seem too obvious to require argument. But a simplistic understanding of the now in vogue "original public meaning" originalism asserts that the Framers' intent and drafting history do not matter because they were unknown to the ratifiers, who made the proposed Constitution a binding fundamental law. Instead, all that matters is what the words of the Constitution were understood to mean by reasonable ratifiers.<sup>50</sup> On closer inspection, however, drafting history matters even to original public meaning originalists. "The originalist interpreter," say originalist interpreters Vasan Kesavan and Michael Stokes Paulsen, "may infer original meaning by examining how [a] clause was affirmatively changed from its inception to final form at the Philadelphia Convention."<sup>51</sup> Indeed, virtually every original public meaning originalist draws extensively on the drafting history of constitutional provisions, at least when those provisions are ambiguous or their meaning otherwise debatable.<sup>52</sup>

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46. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982).

47. 521 U.S. 507 (1997).

48. See *id.* at 519-24.

49. See *id.* at 520.

50. See, e.g., Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL'Y* 599, 609-10 (2004).

51. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1204 (2003). The authors style themselves advocates of "original, objective-public-meaning textualism." *Id.* at 1132-33.

52. See, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L.J.* 1, 47 (2018) (explaining that they consult the drafting history and intentions of the Framers because the Framers "might have special insight into



The ambiguity of the General Welfare Clause is sufficient to call for a resort to drafting history. Not only does “provide” have multiple meanings, but Clause 1 parses in multiple ways, thus carrying different connotations for the General Welfare Clause.<sup>53</sup> We can add a third type of semantic ambiguity to this list: pragmatic ambiguity, which occurs when the meaning of a sentence may depart from its literal meaning due to contextual factors.<sup>54</sup> Madison and present-day enumerationists essentially rely on this type of ambiguity when arguing that the General Welfare Clause should mean something other than what its words “literally ... express.”<sup>55</sup> Given this ambiguity, even public meaning originalists must concede the relevance of the drafting history of Clause 1.

## II. THE TEXTUAL CASE FOR THE GENERAL WELFARE INTERPRETATION

The General Welfare Clause has been given *four* textually plausible interpretations throughout U.S. constitutional history. But the most natural reading—the one Madison found “literally ... express[ed]”—is the general welfare interpretation.<sup>56</sup> Nothing about the diction, syntax, structure, or textual context of Clause 1, nor inferences from the structure of the enumerated powers as a whole, provides a compelling basis to depart from that literal meaning and choose one of the narrower interpretations.

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the machine that they designed”); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1897, 1920-22 (2008) (analyzing drafting history of Tenth Amendment as part of an inquiry into its original public meaning); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252, 280 (2001) (analyzing drafting history of Article II to establish original public meaning of executive powers). Other versions of originalism embrace the Framers’ intentions as directly controlling. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 760 (2009) (arguing that drafters’ intent was the dominant interpretive principle in the Founding Era).

53. *See Ambiguity*, STAN. ENCYCLOPEDIA OF PHIL. (May 22, 2021), <https://plato.stanford.edu/entries/ambiguity/#UndeSpecGene> [<https://perma.cc/9XQU-Z7E8>] (distinguishing types of ambiguity stemming from multiple definitions of words and multiple ways of parsing sentences).

54. *Id.*

55. *See* Madison to Stevenson, *supra* note 3, at 417.

56. *See id.*

*A. Parsing Clause 1*

Clause 1 can be parsed as a grant of one, two, or three powers. The one-power version looks like this:

“[1] To lay and collect Taxes ... [in order] to pay the Debts and provide for the common Defense and general Welfare of the United States[.]”

This version implicitly adds words to ensure that “to” before “pay” is not a mere infinitive, but is given its purposive definition, “in order to.” This reading treats the pay-and-provide portion of the clause as a constraint on the taxing power rather than a separate grant of power.

But if we decline to add “in order” before “to,” and treat “to pay” as a pure infinitive, then we necessarily read “to pay ... and provide” as the grant of at least one power in addition to the taxing power. Thus, the two-power version parses:

“[1] To lay and collect Taxes ...

[2] to pay the Debts and provide for the common Defense and general Welfare of the United States[.]”

This version treats “to pay ... and provide” as a doublet in which both terms refer synonymously to the outflow of revenue. This parsing is most consistent with the spending power interpretation.

A spending power can also be gleaned from the three-power version:

“[1] To lay and collect Taxes . . .

[2] to pay the Debts . . .

[3] and [to] provide for the common Defense and general Welfare of the United States.”

This parsing treats “to pay ... and provide” as a compound infinitive, a construction used throughout the Constitution.<sup>57</sup> To interpret this parsing as a spending power requires that we read “provide” to mean “pay” or “spend.” But if we accord significance to the verb change (“pay” versus “provide”), we lend support to the general welfare interpretation.<sup>58</sup> Each of these versions is plausible, and all have been offered at one time or another.

### 1. *The Madison and Hamilton Interpretations*

Conventional doctrine has given serious consideration to only two of the four interpretations of Clause 1: those associated with James Madison and Alexander Hamilton.<sup>59</sup> Both Madison and Hamilton are said to have construed the General Welfare Clause as a spending power.<sup>60</sup> This interpretation fits with both the two- and three-power versions of Clause 1, and depends on defining “provide for” to mean “spend.”<sup>61</sup>

Madison and Hamilton, famously, differed on the scope of the spending power. Madison argued that the “true and fair construction” of the General Welfare Clause, “too obvious to be mistaken,” is that the clause authorized spending, but only within the confines of the other enumerated powers.<sup>62</sup> “Congress is authorized to provide money for the common defence and *general welfare*,” Madison acknowledged.<sup>63</sup> But “[m]oney cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare,” and such “particular measure[s]” were those defined and limited by the “enumeration of the cases to which their powers shall extend” in Clauses 2 through 18 of Article I, Section 8.<sup>64</sup> Were it otherwise, Madison argued, Congress could effectively regulate outside of its

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57. See *infra* Part IV.D.3.

58. Cf. Natelson, *supra* note 19, at 15 (suggesting that “pay” and “provide” should not be interpreted as synonyms).

59. See *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

60. See *id.*

61. See Schwartz, *supra* note 1, at 596-97.

62. James Madison, *Report on the Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 341, 356-57 (Gaillard Hunt ed., 1906) [hereinafter Madison, *Virginia Report*].

63. *Id.* at 357.

64. *Id.*

enumerated powers, rendering the enumeration mere surplusage.<sup>65</sup> Hamilton, in contrast, argued that the power to spend money is “*plenary*, and *indefinite*” so long as “the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.”<sup>66</sup> Neither the Madisonian nor Hamiltonian interpretations construed the General Welfare Clause as a purpose limitation on the taxing power by reading an implicit “in order” in front of “to pay.”

Despite the far-reaching influence of Madison’s lifelong argument against the general welfare interpretation,<sup>67</sup> his ultimate interpretation of Clause 1 was rejected by all three branches of government. From the Monroe administration on, most presidents and congresses agreed that Congress could spend (noncoercively) for national purposes, thereby adopting a noncoercive or nonregulatory version of Hamilton’s interpretation.<sup>68</sup> The Supreme Court finally weighed in on this debate in *United States v. Butler*, approving this long-standing consensus, but with little analysis.<sup>69</sup>

Both Madison’s and Hamilton’s interpretations have significant difficulties. Both their interpretations depend on interpreting “provide for” to mean “spend,” a definition omitted from most dictionaries and at best inferable from other meanings.<sup>70</sup> Further, in arguing against Hamilton’s interpretation, Madison asserted that there is not “a power of any magnitude, which, in its exercise, does not involve or admit an application of money.”<sup>71</sup> In other words, a power to spend is implicit in every grant of power. This means that

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65. See *id.* at 356-57; see also THE FEDERALIST NO. 41, *supra* note 41, at 263 (James Madison).

66. Alexander Hamilton, *Final Version of the Report on the Subject of Manufactures* (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett ed., 1966).

67. See Madison to Stevenson, *supra* note 3, at 417-18; THE FEDERALIST NO. 41, *supra* note 41, at 263 (James Madison); James Madison, *Veto Message*, in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1902, at 584 (James D. Richardson ed., 1897) [hereinafter Bonus Bill veto].

68. How spending became conceptualized as noncoercive is an important story in itself, one that I pursue elsewhere. See generally David S. Schwartz, *The General Welfare Clause and the Origins of the Non-Coercive Spending Power* (unpublished manuscript) (on file with author).

69. 297 U.S. 1, 65-66 (1936).

70. See *supra* note 53 and accompanying text.

71. Madison, *Virginia Report*, *supra* note 62, at 356.

Madison's interpretation would render the General Welfare Clause as mere surplusage, in violation of the very rule he used to support his interpretation in Federalist 41.<sup>72</sup> Finally, both Madison's and Hamilton's interpretations rely heavily and circularly on the two overlapping premises previously mentioned: that the enumeration was intended to be exhaustive and that a "general welfare" interpretation would render the enumeration meaningless. These points will be discussed below.<sup>73</sup>

## 2. *The Jeffersonian Interpretation*

According to Thomas Jefferson, in his memorandum urging President Washington to veto the bill to incorporate the Bank of the United States, Clause 1 granted only a power to tax.<sup>74</sup> The rest of Clause 1 prior to the semicolon specified the purposes for which federal taxes could be raised.<sup>75</sup> Congress, Jefferson argued,

are not to lay taxes ad libitum *for any purpose they please*; but only to *pay the debts or provide for the welfare of the Union*. In like manner they are not to *do anything they please* to provide for the general welfare, but only to *lay taxes* for that purpose.<sup>76</sup>

To Jefferson, then, the General Welfare Clause was not a grant of power, not even to spend; it was nothing more or less than a limitation on the taxing power.<sup>77</sup> Jefferson seemed unconcerned to articulate a textual basis for a federal power to spend money.

This interpretation supposes that all taxes will be earmarked for specific national purposes, a requirement that is a practical near-impossibility under a general revenue-raising system. It would also generate constitutional challenges to most taxes on the ground that they favored particular states or regions and were thus not truly for the "general welfare." Undoubtedly, hamstringing the federal government in this way was Jefferson's goal, and for this reason,

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72. *Id.* at 356-57; accord THE FEDERALIST No. 41, *supra* note 41, at 263 (James Madison).

73. *See infra* Part II.B.

74. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275, 277 (Julian P. Boyd ed., 1974).

75. *See id.*

76. *Id.*

77. *See id.*

Jefferson's interpretation has had no purchase since the antebellum era.<sup>78</sup> However, as we will see, this was the interpretation that Constitutional Convention delegate Roger Sherman hoped to make possible by bargaining for strategic ambiguity.<sup>79</sup>

### 3. *The General Welfare Interpretation*

On the other end of the spectrum, Federalists in Congress throughout the 1790s interpreted the General Welfare Clause in exactly the way Jefferson and Madison opposed: as a general authorization to legislate on all national concerns.<sup>80</sup> While Federalists downplayed this view during ratification, Antifederalists were aware that the general welfare interpretation was lurking in the background and tried to foreground it, hoping that its breadth would shock the public and derail ratification.<sup>81</sup>

As Madison noted, the general welfare interpretation is the most natural—"literal[ ]"—interpretation of the language of the General Welfare Clause.<sup>82</sup> "Spend" is omitted and at most only inferable from Founding-Era dictionary definitions of "provide."<sup>83</sup> More importantly, the phrase "provide *for*" primarily means to "take care of

78. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 564 (2012) (stating that taxes need only "produce[] ... some revenue"); *Bailey v. Drexel Furniture Co. (Child Lab. Tax Case)*, 259 U.S. 20, 38 (1922) (holding that taxing for general revenue is constitutional). Unsurprisingly, Jefferson's interpretation now appeals to libertarian originalists. See Natelson, *supra* note 19, at 19 (arguing to revive it).

79. See *infra* Part IV.A.1-2.

80. See, e.g., 2 ANNALS OF CONG. 1926 (1791) (statement of Elias Boudinot) ("[W]ho so proper as the Legislature of the whole Union to exercise such a power for the general welfare? It has also been said that this power is a mere conveniency for the purpose of fiscal transactions, but not necessary to attain the ends proposed in the Constitution. This is denied, and at best is mere matter of opinion, and must be left to the discretion of the Legislature to determine."); 8 ANNALS OF CONG. 1959 (1798) (statement of Harrison Gray Otis) ("If Congress have not the power of restraining seditious persons, it is extremely clear they have not the power which the Constitution says they have, of providing for the common defence and general welfare of the Union.")

81. See THE FEDERALIST NO. 41, *supra* note 41, at 262-64 (James Madison) (arguing against the antifederalist interpretation); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 87-95 (2018) (describing the "dangerous clauses" identified by Antifederalists); Mikhail, *supra* note 1, at 510-12.

82. Madison to Stevenson, *supra* note 3, at 417.

83. See, e.g., *To Provide*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); *Provide*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

beforehand.”<sup>84</sup> In the context of delegating a legislative power, this most naturally means “to legislate.” Significantly, none of the eight other uses of “provide” in the Constitution are limited to spending.<sup>85</sup> By itself, “provide” could mean “to furnish or supply,”<sup>86</sup> but “provide for” is different. “Provide for” could certainly *include* spending, but that usage naturally contemplates regulation as well. Consider the similarity between “provide for” and “establish,” as in “establish Post Offices.”<sup>87</sup> Obviously, this never meant merely to “furnish” or build post offices, but included a regulatory apparatus.<sup>88</sup> In contrast, when the Framers spoke of spending as such, they more typically used the verb “appropriate” or the noun “appropriation,” both in the Constitution itself and elsewhere.<sup>89</sup>

Undoubtedly, Clause 1 could have been drafted more clearly to establish a general welfare legislative power, but the other interpretations make debatable interpretive moves to overcome similar ambiguities. The Jeffersonian interpretation could have been made clear simply by replacing “to” with “for purposes of,” or “in order to”—a proposal that was in fact made and overwhelmingly rejected at the Convention.<sup>90</sup> The spending power interpretations of Madison

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84. See, e.g., *To Provide for*, JOHNSON, *supra* note 83; Natelson, *supra* note 19, at 15 (defining “provide for” as “to see to in advance”).

85. U.S. CONST. pmbl.; *id.* art. I, § 5, cl. 1; *id.* art. I, § 8, cls. 6, 13, 15, 16; *id.* art. II, § 1, cl. 6; *id.* art. II, § 2, cl. 2; see Schwartz, *supra* note 1, at 596; Akhil Reed Amar, *Intra-textualism*, 112 HARV. L. REV. 747, 791-92 (1999) (arguing that Constitution can be a dictionary of its own meaning).

86. See, e.g., *To Provide*, JOHNSON, *supra* note 83 (second definition).

87. U.S. CONST. art. I, § 8, cl. 7.

88. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819) (stating that postal clause included power to make mail robbery a crime).

89. See, e.g., U.S. CONST. art. I, § 8, cl. 12 (“no Appropriation of Money to that Use”); *id.* art. I, § 9, cl. 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); Hamilton, *supra* note 66, at 303 (describing “objects to which [money] may be appropriated,” and “appropriation of money” (emphasis omitted)); Letter from James Madison to James Monroe (Feb. 11, 1787), in 9 THE PAPERS OF JAMES MADISON 260, 260 (Robert A. Rutland & William M. E. Rachal, eds. 1975) (“Let me have your commands also as to the ballance I owe you. It is ready & will remain so till you direct its appropriation.” (footnote omitted)); *Appropriate*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), <http://webstersdictionary1828.com/Dictionary/appropriate> [<https://perma.cc/U4RZ-EHMK>] (giving as first definition of verb “to appropriate” as “[t]o set apart for, or assign to a particular use”); see also *Appropriation*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), <http://webstersdictionary1828.com/Dictionary/appropriation> [<https://perma.cc/JC6D-2TY6>] (defining “appropriation” as “[t]he act of sequestering, or assigning to a particular use or person”); *infra* Part IV.C.

90. See *infra* Part III.D-E.1.

and Hamilton could have been easily clarified by replacing “provide for” with “spend for” or “appropriate money to.” The drafters of the 1861 Confederate Constitution reworked Clause 1 to obviate a general welfare interpretation: “To lay and collect taxes, duties, imposts, and excises, *for revenue necessary to pay the debts, provide for the common defence, and carry on the government of the Confederate States.*”<sup>91</sup> The inference from the “failure to draft better” is entirely double-edged.

### *B. The General Welfare Clause and Interpretive Canons*

Interpretive canons applicable during the Founding Era further support the general welfare interpretation. Madison, the leading Founding Era opponent of that interpretation, purported to rely on interpretive canons to deviate from what he conceded was the literal meaning of the General Welfare Clause.<sup>92</sup> As Madison argued in Federalist 41, and indeed throughout the rest of his life, reading the General Welfare Clause as a general authorization to legislate on all matters affecting the welfare of the nation would “den[y] any signification whatsoever” to the enumerated powers that follow in Clauses 2 through 18 of Article I, Section 8.<sup>93</sup> It would therefore violate the anti-surplusage canon, which directs that legal instruments be interpreted so as to avoid making any provision “meaningless,” that is, functionless.<sup>94</sup> Madison would later go on to make explicit what was only implicit in Federalist 41: only by refusing to interpret the General Welfare Clause as a broad authorization to legislate for the general welfare could the idea of limited enumerated powers be preserved.<sup>95</sup> Madison’s argument has been extremely

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91. CONST. OF THE CONFEDERATE STATES OF AMERICA of 1861, art. 1, § 8 (emphasis added).

92. See *supra* Part II.A.1. Lesser objections based on punctuation and style matters will be discussed at the end of this Article. See *infra* Part IV.D.

93. THE FEDERALIST NO. 41, *supra* note 41, at 263 (James Madison).

94. See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (defining the “surplusage” canon).

95. See Madison, *Virginia Report*, *supra* note 62, at 356 (“[W]hether the [General Welfare Clause] be construed to authorize every measure relating to the common defence and general welfare, as contended by some—or every measure only in which there might be an application of money, as suggested by the caution of others—the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers.”).



influential; it continues to be relied on to this day to reject a broad “general welfare interpretation” of the General Welfare Clause.<sup>96</sup>

But the surplusage argument is obviously wrong. According to Antonin Scalia and Bryan Garner, a specific itemization that follows a general term is not surplusage: “Following the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics.”<sup>97</sup> This can be made clear “with a term such as *including* or even *including without limitation* .... But even without those prefatory words, the enumeration of the specifics can be thought to perform the belt-and-suspenders function.”<sup>98</sup> Thus, the anti-surplusage canon does not apply to “genus-followed-by-species” or “general-specific sequences.”<sup>99</sup> Nor, according to Scalia and Garner, does the *eiusdem generis* canon apply to the general-specific sequence, because that canon generally maintains that general words *following* an enumeration are limited in scope by a preceding

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96. See, e.g., Eastman, *supra* note 19, at 67-68 n.18 (noting that under a broad general welfare interpretation “the remainder of Article I, Section 8 would be redundant (and the doctrine of enumerated powers rendered nugatory”); Michael Ramsey, *David Schwartz on Originalism and Indeterminacy*, ORIGINALISM BLOG (Jan. 8, 2020, 6:23 AM), <https://originalismblog.typepad.com/the-originalism-blog/2020/01/david-schwartz-on-originalism-and-indeterminacy-michael-ramsey.html> [<https://perma.cc/2ZTG-PH6S>] (“And, of course, reading the clause to allow Congress to ‘legislate’ for the general welfare would make most of the rest of Article I, Section 8 superfluous.”); accord Natelson, *supra* note 19, at 11.

97. SCALIA & GARNER, *supra* note 94, at 204.

98. *Id.*; accord Primus, *supra* note 1, at 2018-19.

99. SCALIA & GARNER, *supra* note 94, at 204-05.

specific enumeration.<sup>100</sup> Instead, “[w]hen the genus comes first ... one is invited to take it at its broadest face value.”<sup>101</sup>

Scalia and Garner’s interpretive principle was well-known in the Founding Era. Madison demonstrated this in Federalist 41: “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.”<sup>102</sup> Nevertheless, he then simply dismissed the possibility that Clause 1 could have been drafted that way as “an absurdity.”<sup>103</sup> But why can’t we read the enumeration to “explain or qualify” the general welfare power by offering examples of the kinds of things that would qualify as legislating for the general welfare? Madison never answered that question on textual grounds, in Federalist 41 or elsewhere.

Once we acknowledge, with Scalia, Garner, and Madison himself, that specific terms can meaningfully follow a general introduction, we can see that Madison’s anti-surplusage argument rests on a false dilemma: either the General Welfare Clause is itself a narrow enumerated power, or the rest of the enumeration is meaningless. The third, omitted possibility is that the General Welfare Clause is indeed a general authorization to legislate on all national issues and is designed to signal a non-exhaustive enumeration. Madison’s false dilemma is a corollary to the false dilemma discussed above that still taints enumerationism today: that the only alternative to

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100. *Id.* Eiusdem generis is usually described as a canon that limits the scope of a general term that follows an enumeration of specifics. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). If we treat the General Welfare Clause as a garden variety enumerated power—the spending power—then the Article I, Section 8 enumeration takes on the specific-general pattern, with the Necessary and Proper Clause standing as the following general term. John Mikhail has argued that the Necessary and Proper Clause is a “sweeping clause” that negates the inference of exclusivity of the Article I, Section 8 enumeration. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1121-22 (2014). Whether or not ejusdem generis always limits the general term, and whether or not it applies to sweeping clauses, ejusdem generis would not support an enumerationist interpretation of Article I, Section 8. Given the great importance and scope of “to regulate commerce” and “to declare war,” it is hard to imagine what subjects of national importance would be excluded by the more specific words of the enumeration under ejusdem generis. See Johnson, *supra* note 1, at 28 (arguing that ejusdem generis is nonlimiting in Article I, Section 8); Friedman, *supra* note 22, at 340 (“The enumeration might only have been an iteration of the types of powers Congress possesses—sort of a constitutional ejusdem generis.”).

101. SCALIA & GARNER, *supra* note 94, at 205.

102. THE FEDERALIST NO. 41, *supra* note 41, at 263 (James Madison).

103. *Id.*

limited enumerated powers is a general police power, a dichotomy that ignores the possibility of a general power limited to national, and excluding local, regulatory concerns.<sup>104</sup>

Further interpretive-canon support for the general welfare interpretation comes from the Constitution's preamble. By resorting to a canon of construction to diverge from the literal meaning of the General Welfare Clause, Madison had to treat the Clause as ambiguous.<sup>105</sup> But, according to William Blackstone, arguably the leading authority on Anglo-American law in the Founding Era,<sup>106</sup> "[i]f words happen to be still dubious, we may establish their meaning from the *context* .... Thus the proeme, or preamble, is often called in to help the construction."<sup>107</sup> In the preamble, the purposes of the Constitution did not include protecting state sovereignty or carefully limiting the powers of the national government. Instead,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>108</sup>

Many Federalists in the early republic viewed the preamble as setting out the ends or "objects" of the new national government, and as Madison wrote in Federalist 44, "[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized."<sup>109</sup> Thus, some Federalists relied in part on the preamble to argue that Congress had the power to legislate for the general welfare.<sup>110</sup> Under this view, the "powers"

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104. See *supra* text accompanying notes 31-33.

105. See THE FEDERALIST NO. 41, *supra* note 41, at 263-64 (James Madison).

106. See McGinnis & Rappaport, *supra* note 52, at 776.

107. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 59 (1803).

108. U.S. CONST. pmb1.

109. THE FEDERALIST NO. 44, *supra* note 41, at 285 (James Madison).

110. See 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 497-508 (1953); William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 5-7 (2021).

of the national government were all means to the “ends” stated in the preamble.<sup>111</sup> The general welfare interpretation of the General Welfare Clause fits seamlessly with such a view.

That the preamble is now treated “as an empty verbal flourish”<sup>112</sup> may be another instance of confirmation bias stemming from our assumption of an enumerationist Constitution.<sup>113</sup> There is much reason to believe that the subtle but consequential linguistic and conceptual shift, by which the “objects” of the Constitution changed from those stated in the preamble to those enumerated as “powers,” was a contested ideological development rather than an original intention.<sup>114</sup>

In sum, the primary textual argument against the general welfare interpretation is based on a misapplication of the anti-surplusage canon, which rests on a false dilemma. The general-specific ordering and reference-to-the-preamble interpretive canons are more on point, and they support the general welfare interpretation. The evident weakness of Madison’s surplusage argument is obscured by confirmation bias stemming from our ideological commitment to enumerationism. Enumerationists rightly point out that the general welfare interpretation would indeed undermine the limiting effect of the enumeration. But the best enumerationists can say is that the Constitution’s text *does not foreclose* a limited—enumerated—powers interpretation. There is no compelling *textual* basis for enumerationist readings of the General Welfare Clause in particular, or the enumeration in general.

The argument for enumerationism is therefore not textual, but relies on some other modality: that the Framers or ratifiers intended limited enumerated powers, that some “unwritten postulate of the Constitution’s structure”<sup>115</sup> requires enumerationism, or that some

111. 1 CROSSKEY, *supra* note 110, at 375.

112. *Id.* at 374.

113. *See, e.g.,* *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (noting that the preamble “has never been regarded as the source of any substantive power”); Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 117 (1990) (arguing that preamble has been wrongly disregarded by courts and commentators).

114. *See* 1 CROSSKEY, *supra* note 110, at 400, 509 (chiding Madison for conflating “powers” and “objects”).

115. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 104 (2008); *see* *Printz v. United States*, 521 U.S. 898, 918, 921 (1997).

unwritten constitutional “ethos” like “liberty” or “federalism” is best served by enumerationism.<sup>116</sup> Typically, with Madison and most enumerationists throughout history, this tacit non-textual argument for enumerationism has been assumed, rendering the textual argument against the general welfare interpretation circular: the enumeration is limiting because the General Welfare Clause is limited to spending, and the latter is true because the enumeration is limiting.

### III. THE DRAFTING HISTORY OF CLAUSE 1: TAXES, DEBTS, AND THE GENERAL WELFARE

Conventional historiography of the founding regards the Constitution as primarily designed to implement a federal republicanism by carefully limiting the small set of important new powers granted to the national government.<sup>117</sup> But a newer “internationalist” historiography emerging over the past two decades has argued that the central issue for the Framers was not to “split the atom of sovereignty,” in Justice Kennedy’s misconceived metaphor.<sup>118</sup> Rather, it was to control republicanism while solidifying the place of the United States in a threatening Atlantic world, ringed on all sides by hostile European and Indian nations.<sup>119</sup> To solidify its existence, the government of the United States required the basic overlapping elements of a European “fiscal-military” state<sup>120</sup>—independent taxing power, sound credit, and a capable national defense—along with the regulatory power to control interstate disharmonies that would tend to pull the union apart and open doors for foreign alliances with individual states or regions.<sup>121</sup>

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116. BOBBITT, *supra* note 46, at 7-8.

117. See Max M. Edling, *Peace Pact and Nation: An International Interpretation of the Constitution of the United States*, 240 PAST & PRESENT 267, 287-88 (2018) (describing this historiography).

118. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

119. See Edling, *supra* note 117, at 286-88.

120. See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 48 (2003).

121. See generally PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787 (1983); MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867 (2014); GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017).

This view of things casts Clause 1 in a very different light. It can be seen as a broad introduction to the legislative powers by settling the three most important objectives of the newly proposed fiscal-military United States government: the power to tax; the power to restore credit (by paying the debts); and the power to preserve the union by defending it militarily and reining in disharmonious state legislation through powers to regulate national concerns. These three prime objectives are all stated in the general welfare interpretation of Clause 1. Each of these three subjects—taxes, debts, and the common defense and general welfare—had different origins and pathways into Clause 1, and they arrived separately.<sup>122</sup> The drafting history thus supports the thesis that the Framers intended that the leading interpretation of Clause 1 would be the three-power interpretation, and the general welfare interpretation in particular. The language was made ambiguous to leave room for narrower, secondary interpretations.<sup>123</sup>

#### A. *The Framers and Enumeration*

The assumption of an enumerationist Constitution offers the strongest reason to doubt the general welfare interpretation. Therefore, to understand the Framers' intentions with Clause 1, we must examine their intentions regarding enumerationism. Contrary to the conventional wisdom, the Framers as a whole were not committed to the idea of limited enumerated powers.<sup>124</sup> The enumeration in Article I, Section 8, originated with the Committee of Detail draft, reported to the full Constitutional Convention on August 6, 1787.<sup>125</sup> The Committee's charge was to write up the numerous resolutions approved by the Convention in the form of a draft constitution.<sup>126</sup> The resolution pertaining to the powers of Congress read as follows:

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122. See *infra* Part III.B.

123. See *infra* Part IV.

124. See *supra* note 1 for the growing body of literature advancing this thesis.

125. 2 FARRAND, *supra* note 12, at 181-82 (Madison) (containing "the Report of the Committee of [D]etail" reported to the Convention).

126. *Id.* at 85 (Journal) (approving motion "that the proceedings of the Convention ... be referred to a Committee for the purpose of reporting a Constitution conformably to the Proceedings aforesaid"); *id.* at 129-33 (Committee of Detail papers) (listing Convention resolutions submitted to the Committee of Detail).

That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases *for the general Interests of the Union, and also in those Cases* to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>127</sup>

This resolution was originally proposed as Resolution 6 of the Virginia-Pennsylvania Plan, at the start of the Convention at the end of May.<sup>128</sup> The italicized language was added in July by an amendment proposed by Delaware delegate Gunning Bedford.<sup>129</sup> The resolution conforms to one of the primary purposes of calling the Constitutional Convention in the first place: to add legislative powers to what the Confederation Congress possessed.<sup>130</sup> The Articles of Confederation had conferred several nontrivial powers on the Union, including powers to declare war, conduct certain foreign affairs functions, “appoint[ ]” maritime and prize courts, coin money, fix the standards of weights and measures, regulate commerce and relations with Indian tribes, “establish[ ]” or “regulat[e ]” post offices,

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127. *Id.* at 131-32 (Committee of Detail papers) (emphasis added).

128. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed. 1911, rec. ed. 1937) [hereinafter 1 FARRAND] (Madison). On May 29, Edmund Randolph introduced the collection of resolutions outlining broad-brush provisions for the new constitution that served as the de facto template for discussion from May 29 until the Convention adjourned on July 26 to await the Committee of Detail’s draft. David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033, 2058 (2021); 1 FARRAND, *supra*, at 20-23 (Madison) (containing the text of the resolutions); *id.* at 30 (Journal) (recording that the resolutions were “take[n] up” for discussion “to consider ... the State of the American union”). I follow Dean Treanor’s excellent suggestion that these proposals “more accurately be labelled the Virginia-Pennsylvania Plan” in light of the Pennsylvania delegation’s probably substantial contribution. Prepublication posted version of Treanor, *supra* note 110, at 9. The resolutions were known in the Founding Era as “the Randolph Plan,” and the “Virginia Plan” label probably owes much to historian Max Farrand and his marked tendency to exaggerate Madison’s influence at the Convention. See Schwartz & Mikhail, *supra*, at 2040-42.

129. 2 FARRAND, *supra* note 12, at 21 (Journal), 26 (Madison). For this reason the entire resolution is often referred to, slightly inaccurately, as the Bedford Resolution. See, e.g., Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce”*, 2012 ILL. L. REV. 623, 644 (2012).

130. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 32-34 (1996); *Constitutional Convention and Ratification, 1787-1789*, U.S. DEPT OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> [<https://perma.cc/4YE6-RTAH>].

and incur debt.<sup>131</sup> Passing these on to the new national government was uncontroversial, and was approved unanimously.<sup>132</sup> The “legislate in all cases” language following the semicolon was somewhat more controversial, but was nevertheless approved on July 17 by a solid 8-2 vote of the state delegations present.<sup>133</sup>

The Committee of Detail reported back on August 6 with an enumeration of powers that did not include the General Welfare Clause, but did include the ultimately approved version of the Necessary and Proper Clause.<sup>134</sup> A scholarly debate has emerged over whether the enumeration was intended to be limiting—that is, to be read as exhaustive, according to the *expressio unius canon*, or illustrative. The conventional view that the enumeration is exhaustive requires explaining away the Resolution 6 instruction to authorize Congress to legislate “in *all cases* for the general interests of the Union”<sup>135</sup> to account for an enumeration that purportedly limits Congress to legislate only in “some” such cases. This means arguing either that the Committee of Detail flouted its instructions—for which there is no evidence other than the ambiguous enumeration itself—or that Resolution 6 was all along intended to be a mere placeholder for a limiting enumeration, which goes against the weight of the evidence. Under the alternative view, the Committee of Detail faithfully, or at least ambiguously, implemented the amended Resolution 6 with an illustrative, not exhaustive, enumeration.<sup>136</sup>

There are at least two compelling reasons why the Framers would have used an illustrative enumeration to implement a general authorization to legislate “in all cases for the general interests of the union.”<sup>137</sup> First, by listing the “legislative rights”—that is, powers—“vested in Congress by the confederation,” the Committee could

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131. ARTICLES OF CONFEDERATION of 1777, arts. VI, IX, XII.

132. See 2 FARRAND, *supra* note 12, at 14 (Journal).

133. Bedford’s amendment was approved 6-4, and the clause as amended was then approved 8-2. See *id.* at 21 (Journal), 26 (Madison).

134. See *id.* at 181-82 (Madison).

135. *Id.* at 21 (Journal), 26 (Madison) (emphasis added).

136. See Mikhail, *supra* note 100, at 1096-1106, 1121-24 (ambiguously); GIENAPP, *supra* note 81, at 60 (noting that of the supporters of Resolution 6’s general legislative authorization, “few backtracked”); Balkin, *supra* note 1, at 11 (“[T]he purpose of enumeration was not to *displace* the [Bedford amendment] principle but to *enact* it.”).

137. 2 FARRAND, *supra* note 12, at 21 (Journal).



most easily show that they obeyed that part of Resolution 6.<sup>138</sup> Second, and relatedly, enumerating the most important powers would be desirable to avoid—or to win—foreseeable debates over whether a particular power was in fact “for the general interests of the Union.”<sup>139</sup> Suppose the Committee of Detail had merely enumerated those powers carried over from the Articles of Confederation, and then concluded the enumeration with “and to make all other laws in the general interests of the union.” Under such a Constitution, it would be easy to anticipate debates over whether a proposed commerce regulation or bankruptcy law was “in the general interests of the union.” It is much easier to show that a law is a commerce regulation than that a commerce regulation “is in the general interests of the union”—or so the Framers likely supposed.<sup>140</sup> This is the “belt-and-suspenders” function of a general-specific sequence described by Scalia and Garner.<sup>141</sup>

The historical record of the Framers’ intentions on this point is not dispositive, but it strongly suggests conflicting views on a limiting enumeration. Some believed that the concept of limited enumerated powers that characterized the Articles of Confederation was confederative rather than national, and therefore fundamentally flawed.<sup>142</sup> Others advocated a limiting enumeration.<sup>143</sup> But their outspokenness can as easily suggest a frustrated minority view as a general consensus. Despite claiming a predisposition for an enumeration, Madison was either doubtful about its feasibility or convinced that it could not be done—lest some important federal

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138. *See id.* at 14 (Journal).

139. *See id.* at 21 (Journal).

140. *See Version of Wilson’s Speech by Thomas Lloyd, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 350, 355* (Merrill Jensen ed., 1976) (explaining the purpose of enumeration was “to lessen or remove the difficulty arising from discretionary construction on this subject”); Primus, *supra* note 1, at 2016-17; Balkin, *supra* note 1, at 11.

141. *See SCALIA & GARNER, supra* note 94, at 176-77.

142. *See Johnson, supra* note 1, at 37-39.

143. The South Carolina delegates Charles Pinckney and John Rutledge, and Georgia delegate Pierce Butler insisted on knowing that the powers of Congress would be limited, most likely to assure themselves that emancipating slaves would not be included in the list. *See 1 FARRAND, supra* note 128, at 53 (Madison); *2 FARRAND, supra* note 12, at 95, 364 (Madison); Primus, *supra* note 1, at 2021-23. Edmund Randolph and James Madison came to prefer limited enumerated powers once they lost their bid for a Senate based on proportional representation, in which, they believed, Virginia would be dominant. *See JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 21-23* (1999).

power be excluded, presumably.<sup>144</sup> James Wilson argued that “it would be impossible to enumerate the powers which the federal Legislature ought to have.”<sup>145</sup> Other delegates tried to avoid debating the subject explicitly,<sup>146</sup> perhaps believing that their views were fully expressed by the wording of Resolution 6 and the Bedford Amendment, which had been approved by large margins.<sup>147</sup> When Rutledge moved to refer the question of enumerated powers to a committee for a compromise resolution, the delegates rejected the motion by a 5-5 vote.<sup>148</sup>

The reaction of the full Convention to the Committee of Detail’s draft enumeration is also ambiguous. When the Convention turned to consideration of the enumerated powers on August 16, the delegates are recorded by Madison as going straight into a clause-by-clause discussion without any delegate objecting to the substitution of an enumeration for the Bedford Amendment principle.<sup>149</sup> The conventional view is that the absence of reported objection or debate signaled a unanimous tacit approval. But this seems unlikely. The fact of no objections—if it is a fact<sup>150</sup>—tells us only that the delegates interpreted the enumeration in a way that met their expectations, whether they expected the Committee to produce an exhaustive or illustrative enumeration.<sup>151</sup> On August 18 and 20, a handful

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144. Madison recorded in his notes for May 31 that “his doubts” about enumerating the powers “had become stronger” but that he “could not yet tell” what his ultimate opinion would be. 1 FARRAND, *supra* note 128, at 53 (Madison). But William Pierce of Georgia recorded Madison as “at present ... convinced it could not be done.” *Id.* at 60 (Pierce). Bilder argues that Madison revised his summary of his own speech after the fact to appear more open-minded to limited enumerated powers. *See* BILDER, *supra* note 9, at 67-68.

145. 1 FARRAND, *supra* note 128, at 60 (Pierce).

146. *See, e.g.*, 2 FARRAND, *supra* note 12, at 17 (Madison) (speech of Nathaniel Gorham).

147. *Id.* at 21 (Journal), 26 (Madison).

148. *Id.* at 17 (Madison).

149. *Id.* at 304-10 (Madison).

150. Madison occasionally failed to record debates when his interest flagged. *See* BILDER, *supra* note 9, at 123-25, 130.

151. Conventional scholars assume that a limiting enumeration was inevitable, or intended, all along. *See* LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 159-61 (1995); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 208-09 (1966). Two more nuanced discussions at least recognize that a general legislative authorization was on the table, but ultimately reach the conventional conclusion. *See* RAKOVE, *supra* note 130, at 178 (assuming that a limiting enumeration was inevitable after the “Great Compromise”); LYNCH, *supra* note 143, at 21-23 (arguing that Madison maneuvered for limited enumerated powers once he lost his bid for proportional representation in the Senate). Perhaps the only historian of largely conventional views who even

of delegates proposed a spate of additional enumerated powers.<sup>152</sup> On September 14, more enumerated powers were introduced.<sup>153</sup> Many of these were voted down as “unnecessary” according to Madison,<sup>154</sup> possibly because the proposed additional powers were thought to be comprehended in ones already enumerated.

Assuming Madison’s notes are reliable on these points, the ambiguity remains. Those proposing additional powers may have believed that the enumeration was exhaustive, or they may have simply wanted to place their proposed additional power beyond debate over its “national” character. Those rejecting proposed powers as “unnecessary” may have assumed or hoped that the powers already enumerated, even if exhaustive, would be construed liberally or as carrying broad implied powers. Or they may have viewed the new powers as unnecessary because Article I would authorize all legislation “for the general interests of the union”—and, after September 4, all legislation “for the common defense and general welfare.” Under this view, each newly added enumerated power would detract from this “general welfare” authorization and support the argument for a limiting enumeration.<sup>155</sup>

At the end of the day, the Framers’ intentions are too ambiguous to tell us for sure whether the enumeration *must* be read as exhaustive or illustrative. But it is clear—or would be, if we put aside enumerationist confirmation bias—that both views are substantially present. For reasons convincingly argued by Richard Primus, the illustrative enumeration view better explains the Constitution’s text than the exhaustive enumeration view.<sup>156</sup>

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acknowledged that the delegates considered plenary national legislative powers beyond August 17 is Irving Brant, though he, too, ultimately concluded that the Convention came down decisively for limited enumerated powers. See IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 132-39 (1950).

152. 2 FARRAND, *supra* note 12, at 321-22, 334-35 (Journal).

153. *Id.* at 614-18 (Madison).

154. *Id.* at 615-18 (Madison).

155. While a larger number of enumerated powers would strengthen, it would not *prove* an exhaustive enumeration argument. The reason why not is a variation of the Sorites paradox. See *generally Sorites Paradox*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 26, 2018), <https://plato.stanford.edu/entries/sorites-paradox/> [<https://perma.cc/VK5Q-BDY8>]. Although the Article I, Section 8 enumeration of seventeen powers plus the Necessary and Proper Clause might be characterized as “pretty long,” there is no clear number of powers at which the list flips to “long enough to be exhaustive.”

156. See Primus, *supra* note 1, at 2004-11, 2014-15, 2017-19, 2031. Primus identifies five

Neither side was able to clearly win the point at the Convention, and as in many instances in the final version of the Constitution, the one thing the Framers agreed on was that ambiguity had an upside. Proponents of each view had grounds to argue that the Constitution supported them, and the ambiguities could be exploited to push through to ratification.<sup>157</sup>

### *B. Taxes, the Public Debt, and Legislative Powers*

Up to August 22, the date of the Committee of Detail's crucial second report,<sup>158</sup> the Convention had debated, but not resolved, central issues about taxes, the public debt, and the scope of national legislative powers. The evidence raises two inferences about taxing and spending powers that are critical to our inquiry. First, the Convention seemed determined that a taxing power was not to be hemmed in by specifying or limiting the purposes for which taxes could be raised. Second, a spending power was deemed implied, and thus did not need to be enumerated.

#### *1. The Taxing Clause*

The Convention delegates had a strong consensus about certain principal failures of the Articles of Confederation and how they should be fixed: the general government should have the power to

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problems with the enumerationist interpretation of the enumerated powers: (1) all acknowledged that the new government would have at least some significant unenumerated powers; (2) the story that the Framers believed a bill of rights was unnecessary because the enumerated powers were listed exhaustively was a post hoc rationalization for the ratification debates; (3) scattering the powers throughout the Constitution, rather than listing them all in one place, is inconsistent with an implied "these powers and no others" at the beginning of Article I, Section 8; (4) amended Resolution 6 signified an intention to confer a general legislative power; and (5) the enumeration was so predictably inept as a limitation—as was obvious to Antifederalists—that we would be in effect judging the Framers as bad at constitutional design if we attribute an enumerationist intention to them. *See id.* at 2007-11; *see also* Schwartz, *supra* note 1, at 590-608. Primus goes on to show, first, that the enumeration is better understood as an attempt to empower, far more than to limit, the national legislature. *See* Primus, *supra* note 1, at 2011-18. He also demonstrates how generating an exhaustive list of powers is a poor strategy for protecting the interests purportedly served by the limiting enumeration—individual liberty or state sovereignty. *See id.* at 2018-28.

157. *See* Hills, *supra* note 16, at 47-53.

158. 2 FARRAND, *supra* note 12, at 366-68 (Journal).

raise taxes first and foremost, with a separately specified power to regulate interstate commerce a close second.<sup>159</sup> Although the delegates debated taxation issues extensively, the discussion never turned to the purposes for which taxes would be raised. Instead, the extensive discussions of taxation focused on two other matters. First, the delegates paid considerable attention to whether direct taxes would be apportioned among the states based on property or population, and whether representation in Congress would be similarly based on property or population.<sup>160</sup> Second, the delegates spent several days debating their concerns that taxation of imports and exports, which were anticipated to be the primary revenue-raising measure, would be imposed in discriminatory ways against particular state economies.<sup>161</sup>

Reference to an enumerated taxing power first appeared in the New Jersey Plan, which was presented to the Convention on June 15 by the small-state bloc as an alternative to the more nationalistic Virginia-Pennsylvania Plan.<sup>162</sup> The New Jersey Plan's second resolution tried to limit the purposes for which taxes could be raised. It provided that "in addition to the powers vested in the U[nited] States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties" on all foreign imports, on domestic transactions, and on the mails, "to be applied to such federal purposes as they shall deem proper & expedient; [and] to make rules & regulations for the collection thereof."<sup>163</sup>

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159. See *supra* text accompanying notes 130-42. Even Roger Sherman of Connecticut—who initially advocated merely amending rather than replacing the Articles of Confederation, who led the small state opposition that almost derailed the Convention, and who took states' rights positions throughout the Convention—agreed that a taxing power was one of the two most important additions, along with a commerce power, to the national government. 1 FARRAND, *supra* note 128, at 143 (King) (Sherman was "ag[ains]t a Gen[era]l Gov[ernmen]t" and in favor of a "confederation of the States, with powers to regulate com[m]erce [and] draw therefrom a revenue.").

160. See 1 FARRAND, *supra* note 128, at 196-97, 559-62, 592-97, 602-06 (Madison); 2 FARRAND, *supra* note 12, at 26, 202-03, 219, 273-80 (Madison).

161. See 1 FARRAND, *supra* note 128, at 585, 592-97, 602-06 (Madison); 2 FARRAND, *supra* note 12, at 305-08, 360-63, 374-75 (Madison).

162. 1 FARRAND, *supra* note 128, at 242-45 (Madison).

163. *Id.* at 243 (Madison). Stamp taxes "on paper, vellum or parchment" presumably referred to taxes on document-based transactions. See *id.*

But Edmund Randolph's first draft of a constitution for the Committee of Detail in early August rejected this crabbed view of a taxing power whose sources would be limited to customs duties, transaction taxes (called "stamp taxes"), and postage stamps.<sup>164</sup> His draft provides as the first enumerated legislative power: "To raise money by taxation, unlimited as to sum, ... and to establish rules for collection."<sup>165</sup> Randolph's draft goes on to enumerate a total of nineteen legislative powers, none of them expressly mentioning spending.<sup>166</sup> Later, Randolph added a purpose proviso to his version of the Taxing Clause, tacking on "for the past or future debts and necessities of the union," to follow the word "sum."<sup>167</sup> It appears that he and John Rutledge of South Carolina were collaborating at this stage of the Committee of Detail's work, as emendations appear on the document in both Randolph's and Rutledge's handwriting.<sup>168</sup> It is possible that the "purpose" proviso was the result of discussion with Rutledge to limit the scope of the taxing power, which then—as now—was understood to have extensive regulatory potential.<sup>169</sup>

The nationalist viewpoint on the Committee of Detail was represented by James Wilson of Pennsylvania.<sup>170</sup> In his handwritten copy of the New Jersey Plan, Wilson had added "to lay and collect Taxes" to that plan's tax provision.<sup>171</sup> The final report of the Committee of Detail, based on a draft in Wilson's handwriting with a few emendations in Rutledge's hand, begins the enumeration: "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises."<sup>172</sup> The limiting "purpose" proviso by Randolph and Rutledge was omitted.<sup>173</sup>

The Convention began discussing the Committee of Detail draft, section by section, on August 7.<sup>174</sup> When the Convention turned to the enumerated powers of Congress on August 16, the delegates

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164. See 2 FARRAND, *supra* note 12, at 142-43 (Committee of Detail papers).

165. *Id.* at 142.

166. See *id.* at 143-44.

167. *Id.* at 142.

168. See William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 216 (2012).

169. See Johnson, *supra* note 1, at 28.

170. See, Mikhail, *supra* note 100, at 1047.

171. 2 FARRAND, *supra* note 12, at 157 (Committee of Detail papers).

172. *Id.* at 181 (Madison).

173. See *id.* at 163 & n.17 (Committee of Detail papers), 181 (Madison).

174. *Id.* at 193-94 (Journal).

debated the taxing power for less than a full day.<sup>175</sup> The discussion focused almost entirely on the question of whether Congress would have the power to tax exports.<sup>176</sup> This was a fraught issue for the agricultural, primarily southern slave states, whose economies were dominated by exports and who thereby feared they would be over-taxed—and perhaps that slavery could be taxed out of existence—without an export-tax ban.<sup>177</sup> The delegates could not agree at this stage and voted to postpone consideration of the question.<sup>178</sup> The scope of the taxing power remained to be settled.

## 2. *The Public Debt Issue*

One of the foremost issues of concern to the Framers was paying off the nation's Revolutionary War debt, owed primarily to France and Holland.<sup>179</sup> The Framers were exceedingly concerned about establishing sound national credit with European lenders going forward.<sup>180</sup> This was essential to establishing a viable “fiscal-military” state that could defend the great republican experiment that was the United States.<sup>181</sup> In his speech introducing the Virginia-Pennsylvania Plan, Randolph emphasized as the first and foremost “defect” of the Confederation its failure to produce “security agai[nst] foreign invasion,” noting that “foreign debts had ... become urgent.”<sup>182</sup> The Framers recognized that taxes could never be raised with sufficient rapidity to deal with war emergencies. Instead, following the British model of national finance, they viewed the nation's tax-paying capacity as a security for the amortized repayment of war loans.<sup>183</sup>

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175. *Id.* at 303-04 (Journal), 304-08 (Journal).

176. *Id.* at 305-07 (Madison).

177. *See, e.g., id.* at 305-08 (Madison); 1 FARRAND, *supra* note 128, at 592 (Madison) (noting that General Pinckney of South Carolina was “alarmed” at “the taxing of exports” and “hoped a clause would be inserted ... restraining the Legislature from ... taxing Exports”).

178. 2 FARRAND, *supra* note 12, at 303 (Journal).

179. *See* Richard Buel, Jr., *Charles Beard Revisited: The Revolutionary Debt and the Federal Constitution*, in PAPERS ON THE CONSTITUTION 49, 66 (John W. Elsborg ed., 1990); *U.S. Debt and Foreign Loans, 1775-1795*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/loans> [<https://perma.cc/9FZ6-WL5S>].

180. *See* OFF. OF THE HISTORIAN, *supra* note 179.

181. *See supra* notes 117-20 and accompanying text.

182. 1 FARRAND, *supra* note 128, at 18-19 (Madison) (alteration in original).

183. *See* EDLING, *supra* note 121, at 45-47; VAN CLEVE, *supra* note 121, at 64-68.

The power to pay national debts would seem to be a given. Long after ratification, Madison would observe that the power to pay debts is implicit in the power to borrow.<sup>184</sup> Yet there were reasons why the Convention did not want to leave the issue to implication. While all the delegates acknowledged the urgent necessity to pay both foreign and domestic creditors, the domestic debt situation was chaotic. Not only was there a dazzling array of domestic debt instruments of various types and terms floating around, but there were significant complications caused by state indebtedness incurred for the national defense.<sup>185</sup> The Articles of Confederation expressly provided that “[a]ll charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the [U]nited [S]tates in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states.”<sup>186</sup> This made the Confederation Congress responsible for the entangled postwar accounting between the states, but left its authority vague.

The pattern of state indebtedness varied considerably, both in terms of what the states had spent in support of the Revolutionary War and in what they had paid back.<sup>187</sup> Some states had even assumed responsibility to repay their resident creditors of the Confederation government.<sup>188</sup> Constitutional scholars are familiar with the shortcomings of the Confederation’s “requisition system,” by which Congress obtained revenue indirectly through state taxation.<sup>189</sup> Granting a direct taxing power to Congress was, of course, a remedy to the breakdown of that system, due to the states’ failure to meet their tax obligations to the Union.<sup>190</sup> But the failure of the requisition system was not necessarily a product of the states’ bad

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“A special provision ... could not have been necessary for the debts of the new Congress: For a power to provide money, and a power to perform certain acts of which money is the ordinary & appropriate means, must of course carry with them a power to pay the expense of performing the acts.”

Madison to Stevenson, *supra* note 3, at 417.

185. See Buel, *supra* note 179, at 56.

186. ARTICLES OF CONFEDERATION of 1781, art. VIII.

187. E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790*, at 180-83 (1961).

188. *Id.*

189. See *id.* at 33-34 (describing requisition system).

190. VAN CLEVE, *supra* note 121, at 52-53.



faith. Rather, their large shares of war debt required them to impose taxes deemed unduly burdensome by their citizenry. This in turn produced various forms of tax resistance, the most extreme being outright rebellion, such as with Shays's Rebellion in Massachusetts, which profoundly shook many of the leading founders.<sup>191</sup>

The Convention delegates were well aware of two intertwined policy proposals to resolve the state-debt-and-taxation problem. One was to revive an accounting of state debts and expenditures that had stalled in the Confederation Congress.<sup>192</sup> The other was for the new national government to assume responsibility to pay off state creditors for all debts in support of the Revolutionary War.<sup>193</sup> This latter "debt assumption" issue was highly controversial for two reasons. Primarily, states believing that they would emerge from the accounting process as national creditors worried that debt assumption would in effect bill them for other states' debts.<sup>194</sup> Secondly, by 1787, many debt instruments had been resold in a speculative financial market, often for pennies on the dollar by their original holders: most often needy soldiers, farmers, or small merchants. Repayment at anything close to face value would result in a huge windfall to speculators, offending the actual or pretended sense of fairness of some leaders.<sup>195</sup> Debt assumption was thus one of the foremost contentious policy questions in the late Confederation period, and it carried over into the Convention.

### *3. The Public Debt and Legislative Powers, August 18-21*

By the end of the debate on August 17, the Convention had worked through the enumeration of powers in the Committee of Detail draft.<sup>196</sup> When the Convention opened the next morning, several delegates introduced numerous additional powers to include in the enumeration, ranging from the power to establish universities (or "seminaries") to the granting of charters of incorporation, most

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191. See FERGUSON, *supra* note 187, at 245-50; EDLING, *supra* note 121, at 57-58, 61-68; VAN CLEVE, *supra* note 121, at 76-82, 234-42.

192. See FERGUSON, *supra* note 187, at 204, 210, 213.

193. See *id.* at 306-07.

194. See *id.* at 308-09.

195. See *id.* at 296-98.

196. 2 FARRAND, *supra* note 12, at 312-20 (Journal).

of which were ultimately omitted.<sup>197</sup> With those submissions on the morning of August 18, two things must have been clear to the Convention. First, success was in reach insofar as the Convention's fundamental objectives had already been agreed to: a national government with executive and judicial branches added to the national legislature, having powers to regulate the people directly by taxing them and regulating commerce, as well as to conduct foreign affairs and defend the nation militarily.<sup>198</sup> Second, the project could still die from a thousand cuts if the delegates engaged in endless debates over details—whether potential deal-breakers like the power to tax exports,<sup>199</sup> personal hobbyhorses like George Mason's enumerated power to enact sumptuary laws,<sup>200</sup> or numerous points in between. With those concerns in mind, the Convention delegates assigned most contentious issues during this final month to committees, creating six in all, compared to only four during the first three months of the Convention.<sup>201</sup> In addition, the Committee of Detail continued to meet.<sup>202</sup> From August 18 on, “[w]ith a few exceptions, the important decisions were made [in committees], not on the Convention floor.”<sup>203</sup>

On August 18, the debt issue arose for the first time on the Convention floor.<sup>204</sup> Among the spate of additional enumerated

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197. *Id.* at 324-26 (Madison).

198. *Id.* at 308, 314-19 (Madison).

199. *See supra* notes 174-77 and accompanying text.

200. 2 FARRAND, *supra* note 12, at 344 (Madison).

201. *See* John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 174 (2006). This count includes committees assigned to consider substantive issues and excludes the two procedural committees, the Rules Committee and Committee of the Whole. *See id.* at 149, 153. Professor Vile counts seven committees created after the Committee of Detail. However, his count includes a supposed five-member committee to consider bankruptcy and “full faith” provisions. *Id.* at 169; *see also* BILDER, *supra* note 9, at 143 (identifying separate “bankruptcy and full faith” committee). But as I read the records, that five-member committee was actually the Committee of Detail, though not named as such by the Journal: its five members were the Committee of Detail Members Rutledge (as Chair), Randolph, Wilson, and Gorham, with William Johnson of Connecticut substituting for his fellow Connecticut delegate Oliver Ellsworth, who had by then left the Convention. 2 FARRAND, *supra* note 12, at 445 (Journal) (identifying the members); *id.* at 483 (Rutledge presented the report, indicating that he was the chairman); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed. 1911, rec. ed. 1937) [hereinafter 3 FARRAND] (absence of Oliver Ellsworth from Convention as of August 27).

202. *See* Vile, *supra* note 201, at 166.

203. BILDER, *supra* note 9, at 142.

204. 2 FARRAND, *supra* note 12, at 322 (Journal), 326 (Madison).

powers proposed that morning was a provision “[t]hat Funds which shall be appropriated for payment of public Creditors shall not during the time of such appropriation be diverted or applied to any other purpose.”<sup>205</sup> Significantly, no enumerated power “to pay the debts” had yet been proposed; presumably, a generic power to pay debts was still assumed. The delegates referred this “non-diversion” clause and all the other proposals to the Committee of Detail, which would add a number of them to the final enumeration of powers.<sup>206</sup>

With the public creditor can of worms opened, John Rutledge successfully moved “that a Grand Committee” (that is, a committee with one member from each state delegation) “(be appointed to) consider the necessity and expediency of the U[nited] States assuming all the State debts.”<sup>207</sup> Why would Rutledge do this, since he chaired the Committee of Detail, to which the “non-diversion” of funds to pay the public debts was already referred?<sup>208</sup> Quite possibly, he felt that the five-member Committee of Detail was insufficiently representative to resolve so contentious an issue as assumption, which instead required a compromise among all eleven states present.

Both committees wound up reporting recommendations on this issue. On August 21, the Grand Committee recommended adding a stand-alone clause to the enumeration of powers:

The Legislature of the United-States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the United States, as the debts incurred by the several States during the late war, for the common defence and general welfare.<sup>209</sup>

As written, this language is not a general power “to pay the debts,” but a power expressly authorizing federal assumption of the state debts. The provision would preclude constitutional objections to assumption and put it out of the power of any particular state legislature to refuse assumption. After what Madison records as

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205. *Id.* at 322 (Journal).

206. *See id.* at 327 (Madison).

207. *Id.*

208. *See id.*

209. *Id.* at 352 (Journal).

only two short speeches, the Convention unanimously decided to postpone consideration of this proposed clause, perhaps because the delegates knew that there would be a fight over assumption.

*C. The (Forgotten?) Second Report of the Committee of Detail*

On August 22, the Committee of Detail issued the report that is central to our understanding of the General Welfare Clause. To this point, the three issues of enumerated-versus-general powers, taxation, and the Revolutionary War debts had been debated as separate issues. But for the first time, the Convention would begin to link them.

Confirmation bias can cause us to miss important matters hiding in plain sight in the written historical record. Our focus on the Committee of Detail's most important report of August 6, producing the first draft of the Constitution, has obscured the remarkable second report issued by that Committee on August 22, the day after the Grand Committee report recommending an express debt-assumption power. This report contains the first version of the General Welfare Clause, and it has been essentially ignored by historians and legal scholars.<sup>210</sup>

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210. The disregard ranges from historians who do not consider the General Welfare Clause at all, *see, e.g.*, RAKOVE, *supra* note 130, at 84-89; BANNING, *supra* note 151, at 159-61; ROSSITER, *supra* note 151, at 208-10; MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 145-47 (2016); to those who mention the General Welfare Clause in passing without seriously considering the general welfare interpretation, *see, e.g.*, RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 298-99 (2009) (fleeting acknowledgement of "varying" views on its meaning); LYNCH, *supra* note 143, at 23 (uncritically adopting Madison's interpretation); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 264-65 (1985) (same); to those who mention the August 22 Committee of Detail report without pausing to consider its significance for the General Welfare Clause, *see, e.g.*, David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 243-48 (1995); to those who discuss the August 22 Committee of Detail report while uncritically assuming all along that "provide" meant "spend," *see, e.g.*, SKY, *supra* note 20, at 36-48. Even Professor Crosskey's much-maligned revisionist account, which copiously argues for the general welfare interpretation of the General Welfare Clause, omits any mention of the August 22 report. *See* 1 CROSSKEY, *supra* note 110, at 385-562.

I have found only two scholars who have even mentioned the proposed August 22 General Welfare Clause, and both gloss over it. Charles Warren quotes the language and observes correctly that it "would have given to Congress [a] practically unrestricted scope of legislation." WARREN, *supra* note 13, at 600. But he immediately dismisses it because "the whole theory of a National Government with strictly limited authority would have been dissipated."

The Committee of Detail's August 22 report did not specifically address the bulk of the sundry specific powers referred to it.<sup>211</sup> Instead, the Committee proposed to add just three provisions. First, it proposed adding the following language to the end of the taxing power clause: "*for payment of the debts and necessary expences of the United States.*"<sup>212</sup> This language is almost identical to Rutledge's emendation of Randolph's first Committee of Detail draft in late July.<sup>213</sup> It seems that Randolph and Rutledge were trying to morph a proposal to constitutionalize an assurance to public creditors into the previously abandoned specification or limitation of the purposes of the taxing power. Second, the Committee proposed adding "and with Indians" to the Commerce Clause.<sup>214</sup>

Third, the Committee of Detail proposed adding an extraordinary provision to the end of the Necessary and Proper Clause. To convey its full impact, I quote it in italics along with the then-existing Necessary and Proper Clause language:

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof;<sup>215</sup> *and to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in*

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*Id.* Warren fails to consider why the Committee of Detail would have proposed this language if it were such an obvious nonstarter. Instead, he simply asserts that "the Convention ... took no action on this proposal." *Id.* Less blinded by confirmation bias, Irving Brant suggests that the August 22 report reflected that there was at least an ongoing debate over whether to give Congress general or limited enumerated powers. *See* BRANT, *supra* note 151, at 132-39. Nevertheless, Brant wrongly assumes that the General Welfare Clause in the August 22 report referred only to a spending power, and concludes, wrongly in my view, that the Convention came down decisively for limited enumerated powers. *See id.* at 138-39.

211. *See* 2 FARRAND, *supra* note 12, at 366-67 (Journal).

212. *Id.* at 366 (Journal) (emphasis added).

213. *See id.* at 142 (Committee of Detail papers); Ewald, *supra* note 168, at 216.

214. 2 FARRAND, *supra* note 12, at 367 (Journal).

215. *Id.* at 182 (Madison). In the final version of the Necessary and Proper Clause adopted into the Constitution, the initial "And" was moved to the end of the previous clause, the word "that" was changed to "which," the commas before and after "by this Constitution" were removed, and the final semicolon was replaced by a period. U.S. CONST. art. I, § 8.

*matters which respect only their internal Police, or for which their individual authorities may be competent.*<sup>216</sup>

This proposed language was apparently never voted on, but we should pause to consider it. This language is clearly a forerunner to the General Welfare Clause. To begin with, the state “competen[ce]” language restores a key concept from Resolution 6 of the Virginia Plan: that an important principle for distributing power between the national and state governments is not the enumeration of specific regulatory subjects but the relative “competen[ce]” of the two governments. More importantly, the phrase “provide ... for” plainly is not limited to spending. “[W]ell managing and securing the common property” is not simply a question of applying money; it also requires regulation. This same “regulatory” meaning of “provide

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216. 2 FARRAND, *supra* note 12, at 367 (Journal) (emphasis added). Madison’s notes do not reproduce it, but instead mark a placeholder: a pointing finger with the interlineation, “Here insert—the Report from the Journal of the Convention of this date.” *Id.* at 375 (Madison) (parentheses omitted). Since those who read FARRAND’S RECORDS may gloss over the comparatively dry Journal in favor of Madison’s more colorful notes, we may have a partial explanation of why this extraordinary language, buried in the middle of the Committee of Detail’s otherwise dull report, has been missed.

The Journal also adds confusion by making two numbering errors in identifying the proposal. First, the Journal states that the language was to be added “at the end of the 16 clause of the 2 sect. 7 article.” *Id.* at 367 (Journal). But the Necessary and Proper Clause was in section 1 of article VII of the Committee of Detail draft, not the “2 sect.” as recorded by William Jackson, the Convention secretary. *See id.* at 366 (Journal). Jackson started erroneously recording the enumerated powers as “the 2 sect.” immediately prior to the new General Welfare Clause addition when he reported that the addition of the Indian provision to the Commerce Clause would go “at the end of the 2nd clause, 2 sect.” *See id.* at 367 (Journal). Obviously, the Commerce Clause was in article VII, section 1, not section 2. *Compare id., with id.* at 182 (Madison). Article VII, section 2 was the Treason Clause, to which these additions would obviously have made no sense.

The second error was numbering the Necessary and Proper Clause as clause 16 when it was, in fact, clause 18. *See id.* at 182 (Madison); *see also id.* at 367 (Journal) (approving “the last clause of the 1st sect. 7 article” immediately after considering “the 17 clause”). Clause 16 granted the power “[t]o build and equip fleets,” *id.* at 182 (Madison), to which the general welfare addition would have made no sense. Clause 17 granted the power “[t]o call forth the aid of the militia,” *id.*, to which, again, the general welfare language would not have been an appropriate addition. The Committee of Detail’s enumerated powers were unnumbered, as in the final Constitution. *Id.* Jackson understandably lost count, as he had on August 18, when he double-counted a “14. clause,” failed to number the “Militia Clause” (clause 16), and had to deal with proposed inserted clauses that were postponed for submission to the Committee of Detail. *Id.* at 323 (Journal). If he had looked at his August 18 notes when determining the number of the Necessary and Proper Clause, he would have misled himself by seeing the last recorded number as “the 15 clause.” *Id.*

... for” necessarily applies to the “general interests and welfare of the United States.” As the eminent historian Charles Warren recognized, this clause “would have given to Congress practically unrestricted scope of legislation.”<sup>217</sup> Although its drafter seems to have made a half-hearted effort to dress it in sheep’s clothing by talking first about federal property management, it truly is a broad assertion of federal power: a “wolf [that] comes as a wolf.”<sup>218</sup>

Who might have appended this to the Necessary and Proper Clause, and why? Signs point to James Wilson, who, as John Mikhail and William Ewald have fairly established, was the author of the Necessary and Proper Clause.<sup>219</sup> On July 17, as the Convention debated the scope of national legislative power, Wilson had seconded a motion by Roger Sherman to substitute the pending Resolution 6 of the Virginia Plan with an authorization empowering Congress to legislate “in all cases which may concern the common interests of the Union: but not to interfere with” the states’ “internal police” powers “wherein the general welfare of the United States is not concerned.”<sup>220</sup> Wilson, who at the start of the Convention argued that a limiting enumeration “would be impossible,”<sup>221</sup> on July 17 argued that this language “better express[ed] the general principle” than did Resolution 6.<sup>222</sup> Madison records a single delegate speaking against Sherman’s July 17 motion: Gouverneur Morris argued that “[t]he internal police, as it would be called & understood by the States ought to be infringed in many cases, as in the case of paper money & other tricks by which Citizens of other States may be affected.”<sup>223</sup> Morris undoubtedly spoke for a majority of delegates—including Madison, who was still relying on approval of his national legislative veto over state laws—because the motion was soundly rejected, 2-8, and was immediately followed by Bedford’s motion to amend Resolution 6 to authorize Congress to legislate “in

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217. See WARREN, *supra* note 13, at 600.

218. To use Justice Scalia’s phrase. See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

219. See Mikhail, *supra* note 100, at 1047, 1053; Ewald, *supra*, note 168, at 271-72.

220. 2 FARRAND, *supra* note 12, at 21 (Journal).

221. 1 FARRAND, *supra* note 128, at 60 (Pierce).

222. 2 FARRAND, *supra* note 12, at 26 (Madison).

223. *Id.* (Madison).

all cases for the general interests of the Union,” which was approved, 8-2 (Georgia and South Carolina voting no).<sup>224</sup>

Another set of Wilson’s fingerprints can be found in the wording of the added General Welfare Clause. In 1785, Wilson had published a pamphlet justifying the implied power of the Confederation Congress to charter the national Bank of North America.<sup>225</sup> There, he had used the concept of “state competence” as a touchstone for the dividing line between federal and state power: “Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, *of necessity*, belong to the United States in Congress assembled.”<sup>226</sup> It was Wilson who most likely inserted the language about state “incompeten[ce]” into the original Resolution 6.<sup>227</sup> The August 22 General Welfare Clause restores the state competence concept that had dropped out of the August 6 Committee of Detail draft. Even more Wilsonian is the August 22 language, “provide ... for the well managing and securing the common property and general interests and welfare of the United States.”<sup>228</sup> This phrasing echoes language from Article V of the Articles of Confederation, on which Wilson had relied in his Bank of North America pamphlet.<sup>229</sup> There, Wilson had argued that “[t]he United States have *general* rights, *general* powers, and *general* obligations, not derived from *any* particular States, nor from *all* the particular States, taken *separately*; but *resulting from the union of the whole*.”<sup>230</sup> He then quoted Article V as the textual basis for this claim: “that for the more convenient management of the GENERAL INTERESTS OF THE UNITED STATES, delegates shall be annually appointed [...] to meet in Congress.”<sup>231</sup>

Thus, the August 22 “general welfare” addition to the Necessary and Proper Clause was, in all likelihood, Wilson’s work, perhaps with an assisting push from Oliver Ellsworth passing along the

224. *Id.* at 24, 26 (Journal).

225. JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH AMERICA 3-4 (1785).

226. *Id.* at 10.

227. *See* Mikhail, *supra* note 100, at 1051, 1071-86.

228. 2 FARRAND, *supra* note 12, at 367 (Journal).

229. WILSON, *supra* note 225, at 10.

230. *Id.*

231. *Id.* (quoting ARTICLES OF CONFEDERATION of 1781, art. V). Wilson capitalized the phrase for emphasis, and the bracketed ellipsis indicates where Wilson simply omitted (without ellipsis) the phrase “in such manner as the legislature of each State shall direct.”



strong wishes of his fellow Connecticut delegate Roger Sherman, for the “internal police” limitation. Sherman had a reputation for legislative “cunning” and stubbornness in getting his way.<sup>232</sup> He would later reprise this bid to add restrictive state-police-power language on September 15, as the Convention was polishing the final version of the Constitution.<sup>233</sup> While Sherman and Wilson would no doubt have differed markedly on particular applications of this general welfare addition, they had previously agreed on “the general principle,” as Wilson put it. For Wilson, the sophisticated lawyer, this language would have fully authorized national legislative inroads into state police powers so long as the issue in question concerned the national interest. Sherman had explicitly justified his July 17 proposal by pointing out that it was “difficult to draw the line between the powers of the Gen[eral] Legislature[ ], and those to be left with the States.”<sup>234</sup> Wilson, as we have seen, agreed; and in the Committee of Detail’s first report, he had tried to address this issue by successfully revising the Randolph-Rutledge Necessary and Proper Clause to strengthen it and make clearer that the enumeration was not exhaustive.<sup>235</sup>

The context of the August 22 Committee of Detail report further suggests that a general welfare legislative power had considerable support at the Convention. First, consider what else the delegates referred to the Committee of Detail between August 18 and 20. On August 18, Madison, Charles Pinckney, and others proposed long lists of additional enumerated powers, which were referred to the Committee.<sup>236</sup> In addition, on August 20, Gouverneur Morris, seconded by Pinckney, proposed a battery of executive departments to form a “Council of State” that would include a “Secretary of Domestic Affairs” with the “duty to attend to matters of general police, the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating of communications

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232. On Sherman’s reputation, see 3 FARRAND, *supra* note 201, at 33-34 (Federal Convention Records) (Jeremiah Wadsworth describing Sherman as “cunning as the Devil” and “not easily managed”); William Pierce, *Character Sketches of Delegates to the Federal Convention*, in 3 FARRAND, *supra* note 201, at 88-89 (describing Sherman as “extremely artful in accomplishing any particular object” and noting that “he seldom fails”).

233. 2 FARRAND, *supra* note 12, at 629-30 (Madison).

234. *Id.* at 25 (Madison).

235. Mikhail, *supra* note 100, at 1096-1106.

236. *See supra* note 205.

thro[ugh] the U[nited] States.”<sup>237</sup> Morris did not propose adding enumerated powers to match the matters to which the Secretary of Domestic Affairs would “attend.”<sup>238</sup> He probably assumed the national government would already have a general police power. Second, it must be recalled that Rutledge, the Committee of Detail chair, had moved successfully on August 18 to refer the debt-assumption issue to an eleven-member committee, presumably because an all-states compromise would be needed to resolve so controversial a matter.<sup>239</sup> Yet he accepted the five-man Committee of Detail’s jurisdiction over the Morris-Pinckney proposal for a cabinet official to preside over implied national police powers.<sup>240</sup> This suggests that a power to legislate for the general welfare was deemed less controversial than debt assumption!

The Committee of Detail apparently regarded its August 22 report as concluding its business on all the items referred to it on August 18 and 20.<sup>241</sup> Significantly, none of the additional proposed enumerated powers were reported by the Committee; they may have considered them subsumed, or arguably subsumed, under a General Welfare Clause.<sup>242</sup> The unreported proposals included Morris’s Council of State. Morris was one of the most active and strong-minded members of the Convention, making numerous motions and more floor speeches than any other delegate and serving on several key committees.<sup>243</sup> It seems odd that he would let his August 20 proposals disappear without a peep, yet neither the Journal nor Madison’s notes suggest any motions or speeches on them after they were referred to the Committee of Detail. A plausible explanation is that he was persuaded, perhaps by his fellow Pennsylvanian Wilson, that they were best subsumed into a General Welfare

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237. 2 FARRAND, *supra* note 12, at 335 (Journal), 342-43 (Madison).

238. *See id.* at 335-36 (Journal).

239. *Id.* at 322 (Journal).

240. *Id.* at 334-36 (Journal).

241. On August 29, the Convention referred two more provisions to the Committee of Detail: to consider revising the Full Faith and Credit Clause and adding a bankruptcy power. *See id.* at 445 (Journal). The Committee reported on these points on September 1. *See id.* at 483-84 (Journal). Otherwise, all committee referrals after August 22 were to eleven-member committees. *See Vile, supra* note 201, at 166-72.

242. 2 FARRAND, *supra* note 12, at 366-68 (Journal). The only other change to the enumerated powers was to add “and with Indians, within the Limits of any State, not subject to the laws thereof” to the Commerce Clause. *Id.* at 367.

243. Treanor, *supra* note 110, at 30-45.

Clause added to the Necessary and Proper Clause. We do know that Morris privately asserted on September 6 that a federal power over internal improvements was subsumed into the later Clause 1 version of the General Welfare Clause.<sup>244</sup>

As of August 22, the Committee of Detail proposal for the enumeration began:

[The Congress shall have the power to lay and collect taxes, duties, imposts, and excises] for payment of the debts and necessary expenses of the United States—provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans shall continue in force for more than \_\_ years.<sup>245</sup>

And the proposed enumeration ended with a robust, catchall Necessary and Proper Clause that included a General Welfare Clause authorizing regulatory powers.<sup>246</sup> It thus seems likely that by August 22, Wilson was able, in the Committee of Detail, to strengthen the position of a non-exhaustive enumeration even further than in his prior August 6 draft of the Necessary and Proper Clause. Perhaps Wilson had wanted such general welfare language all along, but previously had to compromise it away in the August 6 Committee of Detail report. Rutledge, the Committee of Detail chair, may by August 22 have softened his earlier insistence on enumerated powers, having won a major concession for the slave states—a ban on federal export taxes—the previous day.<sup>247</sup> Either way, the August 22 report effectively restored the Bedford Amendment to the enumeration of powers. This fact tends to undermine the assumption that the Convention had tacitly accepted an exhaustive enumeration on August 17, and it supports the view that a national legislative authorization delegated in general terms was still being advocated—albeit in committees, outside the purview of Madison's notes.<sup>248</sup>

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244. See *infra* Part IV.B.

245. 2 FARRAND, *supra* note 12, at 366-67 (Journal) (blank space in original).

246. See *id.* at 367.

247. 2 FARRAND, *supra* note 12, at 363 (Madison). Rutledge was an old friend of Wilson's and lived at Wilson's Philadelphia home during the Convention, where Wilson may have been able to persuade him to alter his opinion. See BEEMAN, *supra* note 210, at 269.

248. See BRANT, *supra* note 151, at 132-34.

*D. Taxing, Debt, and Assumption Revisited*

The August 22 Committee of Detail report reintroduced a loose linkage between the idea of an express general welfare power and a proviso stating the purpose of federal taxation—a linkage previously made in the July 17 Sherman-Wilson motion that the Convention rejected.<sup>249</sup> At this point, the debate would create linkages between the issues of taxation and debt assumption.

Consideration of the Committee of Detail's August 22 report was postponed to allow the delegates time to digest it.<sup>250</sup> But near the end of that day, the Convention took up the Grand Committee's August 21 version of a debt-paying clause.<sup>251</sup> After a brief debate reflecting concerns about whether a future government would seek to renege on Revolutionary War debts and whether Congress should be *required* or merely *authorized* to assume state debts, Gouverneur Morris moved to substitute the Grand Committee's freestanding debt clause with: "The Legislature *shall* discharge the debts & fulfil the engagements of the U[nited] States."<sup>252</sup> Morris's amendment seems to have been a compromise of sorts. On the one hand, he made the payment of debts mandatory; on the other, he removed the specific reference to Revolutionary War debts and assumption, essentially papering over that dispute with broad language expressing an unexceptionable obligation to pay debts.<sup>253</sup> This motion showcases Morris's penchant for strategically ambiguous draftsmanship. The delegates unanimously adopted Morris's amendment.<sup>254</sup>

The next day, August 23, the Convention agreed to place this language at the beginning of the enumeration of powers, by amending the Taxing Clause as follows:

The Legislature *shall* fulfil the engagements and discharge the debts of the U[nited] S[tates], & shall have the power to lay & collect taxes duties imposts & excises.<sup>255</sup>

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249. 2 FARRAND, *supra* note 12, at 21 (Journal), 26 (Madison).

250. *Id.* (Journal).

251. *Id.* (Journal).

252. *See id.* at 377 (Madison) (parentheses omitted).

253. *See id.* (Madison).

254. *Id.* at 368 (Journal), 377 (Madison).

255. *Id.* at 392 (Madison).

As written, this version of Clause 1 of the enumerated powers granted two distinct powers: to pay the debts and to tax. Further, the debt-paying power had two elements. The “engagements” clause was a carryover obligation, by which the Constitution would disclaim any intention of the United States government to use a new constitution as an opportunity to renounce preexisting debts.<sup>256</sup> The second element was the “discharge” clause, which, despite dropping the express debt-assumption language, could still be understood, and undoubtedly was understood by many, to be an effort to authorize Congress to assume the states’ Revolutionary War debts.<sup>257</sup> Pierce Butler of South Carolina voiced this understanding: immediately after the August 23 version of the debt-tax clause was approved, he denounced it and moved for reconsideration, arguing that debt assumption would benefit speculators (“[b]lood-suckers”) who bought up government notes from desperate first-holders (presumably soldiers and small merchants) at substantial discounts.<sup>258</sup>

This issue of speculators as windfall creditors, which would return with a vengeance during the congressional debt assumption debate of 1790-91,<sup>259</sup> was picked up by other delegates when Butler’s reconsideration motion was taken up on August 25.<sup>260</sup> George Mason argued that the requirement imposed by the word “shall” would encourage speculators.<sup>261</sup> Elbridge Gerry, allowing his proto-Anti-federalist views to give way to his personal ownership of U.S. government bonds, sounded positively Hamiltonian in replying that there was no reason to censure the “[s]tock-jobbers,” as they created a market for the government paper and sustained its value.<sup>262</sup>

Edmund Randolph then sought to finesse the disagreement by substituting an alternative provision that would split up the clause by peeling off the “debt assumption” issue and refocusing the debate on the less controversial “engagements” issue.<sup>263</sup> Randolph moved a provision that “[a]ll debts contracted & engagements entered into,

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256. See 1 CROSSKEY, *supra* note 110, at 507.

257. See 2 FARRAND, *supra* note 12, at 392 (Madison).

258. See *id.*

259. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 136-61 (1993).

260. 2 FARRAND, *supra* note 12, at 412-13 (Madison).

261. *Id.*

262. *Id.* at 413 (Madison).

263. *Id.* at 414 (Madison).

by or under the authority of [the Confederation] Con[gress]s shall be as valid ag[ain]st the U[nited] States under this constitution as under the Confederation.”<sup>264</sup> Because the Confederation Congress had not yet assumed any state debts, this language avoided any commitment on assumption. Randolph’s substitute was adopted, with only Pennsylvania voting against the maneuver, and it was ultimately incorporated as Article VI, Clause 1 of the final Constitution, with only stylistic changes.<sup>265</sup> Randolph’s motion had the effect of tabling final approval of the amended version of Clause 1, which still proposed to begin the enumeration with a debt-paying obligation.<sup>266</sup>

Immediately after the adoption of Randolph’s motion, still on August 25, Roger Sherman argued that it was “necessary to connect with the clause for laying taxes duties & c an express provision for the object” of taxation, including “the old debts & c.”<sup>267</sup> He therefore moved to add the following italicized language to Clause 1:

The Legislature shall fulfil the engagements and discharge the debts of the United-States, and shall have the power to lay & collect taxes duties imposts & excises *for the payment of said debts and for the defraying the expenses that shall be incurred for the common defence and general welfare.*<sup>268</sup>

Sherman’s motion sought to include the exact phrase “common defence and general welfare,” which had been used in a similar context in the Articles of Confederation—referring to appropriations.<sup>269</sup> It is also the first instance in which the Convention specifically voted on a proposal to add a “purpose” proviso to the taxing power. The Committee of Detail’s similar August 22 recommendation for a purpose proviso appears never to have been

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264. *Id.* (Madison).

265. *See id.* (Madison); U.S. CONST. art. VI.

266. 2 FARRAND, *supra* note 12, at 414 (Madison).

267. *Id.* (Madison). Madison’s notes say that Sherman advocated “an express provision for the object of the old debts [etc.]” This makes no sense, and is probably Madison’s mistranslation of his own notes.

268. *Id.* (Madison) (emphasis added).

269. ARTICLES OF CONFEDERATION of 1777, art. VIII.

separately discussed. Sherman's proposal was decisively voted down, 1-10, with only Connecticut voting aye.<sup>270</sup>

We can now pause to take stock of where things stood with Clause 1. With a General Welfare Clause pending as a possible addition to the Necessary and Proper Clause, a motion had been made and approved to insert a debt-paying obligation (and an arguable debt-assumption power) as the very first enumerated power, prior to the power to lay and collect taxes. This was then postponed in favor of a weaker, related provision to refrain from repudiating the union's preexisting debts (the "Engagements Clause"), a provision whose location in the Constitution was unspecified and which would wind up in Article VI, far removed from the enumerated powers. Sherman's bid to limit the taxing power by connecting it with the payment of debts and expenses was decisively rejected. As of August 25, the wording of Clause 1 had not yet been settled.

### *E. The Final Version of Clause 1*

The version of Clause 1 that wound up in the final draft of the Constitution was the product of another ad hoc committee. In relatively concise language, Clause 1 addressed all three of the foregoing issues that had been debated separately: whether to specify the purpose of federal taxation, whether to authorize or obligate the new Congress to assume state Revolutionary War debts, and whether to include a catch-all power to legislate "for ... the general welfare."

#### *1. The Committee on Postponed Parts*

The debt and general welfare issues were as yet unresolved. The addition of a taxing purpose proviso had been rejected, but its dogged sponsor, Roger Sherman, would not let it rest. On August 31, on a motion by Roger Sherman, the Convention created a committee to deal with loose ends: a committee to which "to refer such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on."<sup>271</sup> This has come to be known as the

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270. 2 FARRAND, *supra* note 12, at 414 (Madison).

271. *Id.* at 473 (Journal), 481 (Madison).

Committee on Postponed Parts, or the Brearley Committee, after its chair, David Brearley of New Jersey.<sup>272</sup> The Committee on Postponed Parts was another “Grand Committee” of eleven members, one from each state delegation in attendance, selected by ballot. In addition to Brearley, its membership included Sherman, Gouverneur Morris, and Madison.<sup>273</sup>

The Journal makes no reference to the specific matters referred to this Committee, and Madison’s notes likewise fail to do so, but we know what the Committee reported on September 1, 4, and 5.<sup>274</sup> These comprised the ineligibility of members of Congress to hold executive offices, the addition of “Indian tribes” to the Commerce Clause, a revision of the impeachment process, a handful of additions or amendments to the enumerated powers, and numerous provisions about the President and Vice President.<sup>275</sup> The documentary record of the Committee’s work is exceedingly thin. It has become best known for creating the Electoral College and adding the Senate advice-and-consent clauses, since these aspects of its work have soaked up almost all the scholarly attention afforded the Committee.<sup>276</sup> Thus, its redrafting of Clause 1 has flown largely under the historical radar.<sup>277</sup>

By definition, the “postponed parts” were proposals and motions that had not been finally acted upon. Among the many issues potentially within the Committee’s purview, the two most relevant here were the pending versions of Clause 1 (the taxing power) and the Necessary and Proper Clause. Amended on August 23, but not finally approved, Clause 1 stood as a two-power clause, enumerating powers to pay the debts from the Revolutionary War and to collect taxes:

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272. See, e.g., BEEMAN, *supra* note 210, at 297. It is also sometimes referred to as the “Committee on Postponed Matters,” or “Committee of Unfinished Parts.” See, e.g., BILDER, *supra* note 9, at 143; BRANT, *supra* note 151, at 135; Vile, *supra* note 201, at 169-70.

273. 2 FARRAND, *supra* note 12, at 473 (Journal).

274. Brant extracts a purportedly complete list of “postponed” matters from Madison’s notes. See BRANT, *supra* note 151, at 135.

275. 2 FARRAND, *supra* note 12, at 483, 493-95, 505 (Journal).

276. See *id.* at 495 (Journal).

277. See, e.g., BEEMAN, *supra* note 210, at 298-99; RAKOVE, *supra* note 130, at 89-91, 178-80. But see BRANT, *supra* note 151, at 132-39. The one full-length biography of Committee chair David Brearley does not even mention the Committee’s revision of the General Welfare Clause. See DONALD SCARINCI, DAVID BREARLEY AND THE MAKING OF THE UNITED STATES CONSTITUTION 193-211 (2005).



The Legislature shall fulfil the engagements and discharge the debts of the United-States, and shall have the power to lay and collect taxes, duties, imposts, and excises.<sup>278</sup>

The postponed version of the Necessary and Proper Clause was the revised August 22 version issued by the Committee of Detail, that now included a General Welfare Clause.<sup>279</sup> *Not* among the postponed matters was Roger Sherman's motion to add a purpose proviso to the Taxing Clause—that *had* been acted upon, and overwhelmingly rejected, on August 25.<sup>280</sup>

On September 4, the Committee on Postponed Parts reported a new version of an amended Clause 1: "The Legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."<sup>281</sup> This version of the clause was adopted, unanimously and without any debate, according to Madison's notes.<sup>282</sup> But for capitalization, and substituting "Congress" for "Legislature," this version appears in the final Constitution.<sup>283</sup>

The Committee on Postponed Parts thus made three noteworthy changes to Clause 1. First, it flipped the order of debts and taxes, placing taxes first. Second, it watered down the debt-paying language. No longer did the clause obligate paying the debts, but rather authorized it. This corresponded with the express views of Roger Sherman, among others.<sup>284</sup> Moreover, the debt language now sounded as though it referred generically to present and future debts, rather than specifically to the Revolutionary War debts. This made it possible to read "to pay the debts" as part of a taxing-purpose proviso. The "engagements" language had been made redundant by the adoption of Randolph's motion of August 25 to include that obligation in a separate provision—now the Engagements Clause of Article VI.

Third, and most critical to this discussion, the Committee proposal added a reworked and more elegant—but also more

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278. 2 FARRAND, *supra* note 12, at 382 (Journal).

279. *Id.* at 367 (Journal).

280. *Id.* at 414 (Madison).

281. *Id.* at 493 (Journal).

282. *Id.* at 497, 499 (Madison).

283. U.S. CONST. art. 1, § 8.

284. 2 FARRAND, *supra* note 12, at 327 (Madison).

ambiguous—version of the General Welfare Clause that had previously been added to the Necessary and Proper Clause. At the same time, the Committee declined to report explicitly on the August 22 proposal to add a general welfare power to the Necessary and Proper Clause. Taking these two points together, the net effect of the Committee of Postponed Parts report was to relocate the General Welfare Clause from the end of the enumerated powers to the beginning, in Clause 1.

## 2. *Finalizing the Constitution*

The Convention records show no further motions or proposals that bear directly on the General Welfare Clause. On September 8, the Convention formed a five-man committee now known as the Committee of Style and Arrangement. Its members included Hamilton, Gouverneur Morris, and Madison, along with William Johnson of Connecticut and Rufus King of Massachusetts.<sup>285</sup> Significantly, Madison, Morris, and King had all served on the Committee on Postponed Parts.<sup>286</sup>

The Committee of Style is known for taking the ungainly twenty-three-article working draft and rearranging it with comparative elegance into seven articles. But historians agree that the Committee's work product went beyond non-substantive editing. This observation has focused on Gouverneur Morris, one of the Convention's most determined nationalists. Recall his comment that state police powers "*ought to be infringed in many cases.*"<sup>287</sup> According to Morris himself, and to Madison years later, it was Morris who took on the lion's share of the drafting work of the Committee of Style.<sup>288</sup> Dean William Treanor has suggested that the finished product included a handful of substantive linguistic turns that served Morris's nationalist agenda, and that, taken together, are suggestive of "Gouverneur Morris's Constitution."<sup>289</sup>

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285. *Id.* at 547 (Madison).

286. *Id.* at 473 (Journal).

287. *Id.* at 26 (Madison) (emphasis added).

288. James Madison to Jared Sparks (Apr. 8, 1831), *supra* note 3, at 447-48; Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in *THE FOUNDERS' CONSTITUTION* vol. 4, art. 3, sec. 2, cl. 1, doc. 60 (Philip B. Kurland & Ralph Lerner eds., 1986), [http://press-pubs.uchicago.edu/founders/documents/a3\\_2\\_1s60.html](http://press-pubs.uchicago.edu/founders/documents/a3_2_1s60.html) [<https://perma.cc/2G67-WTU7>].

289. *See generally* Treanor, *supra* note 110.

The Committee of Style issued its report, the near-final draft of the Constitution, on September 12, five days before the Convention concluded its business.<sup>290</sup> The Committee rearranged the articles such that the enumerated powers, formerly Article VII, Section 1, became Article I, Section 8. The enumeration now began as follows:

The Congress may by joint ballot appoint a treasurer. They shall have power

To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States.<sup>291</sup>

The Committee of Style report also presented the Necessary and Proper Clause in its original August 6 form as written by the Committee of Detail (with only minor changes).<sup>292</sup> This probably followed in due course from the Committee on Postponed Parts' relocation of the General Welfare Clause to the end of Clause 1 and its failure to propose any change to the previously approved August 6 version of the Necessary and Proper Clause.<sup>293</sup> If this was indeed the bargain inside the Committee on Postponed Parts, then Morris, Madison, and King would have been in a position to convey that to the other two members of the Committee of Style, Johnson and Hamilton.<sup>294</sup>

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290. See 2 FARRAND, *supra* note 12, at 582 (Journal).

291. *Id.* at 590, 594-96 (Committee of Style Report) (footnote omitted). Farrand's transcription is based on Madison's copy, which contains Madison's handwritten interlineations. These consist of Madison's recording of the further emendations by the Convention and Madison's letter-numbering of the various clauses. I have omitted these letter-numbers, as well as a period after "They shall have power," apparently a typographical error by Farrand. *Id.* at 594 (Committee of Style Report). The digital photo of Madison's copy on the Library of Congress website, though blurry, appears not to have this period. See *Creating the United States: Convention and Ratification*, LIBR. OF CONG., <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html> [<https://perma.cc/XP4N-E8JB>] (containing clearer copies from additional delegates).

292. 2 FARRAND, *supra* note 12, at 596 (Committee of Style Report).

293. The August 22 General Welfare Clause language dealing with the "well managing" of federal property wound up in the Territories Clause. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."); 2 FARRAND, *supra* note 12, at 459 (Journal), 466 (Madison) (showing August 30 vote approving this provision); Engdahl, *supra* note 210, at 248-51.

294. See 2 FARRAND, *supra* note 12, at 473 (Journal).

The short-lived appearance of the treasurer-appointment provision bears only tangentially on the interpretation of Clause 1.<sup>295</sup> That provision was stricken on separation-of-powers grounds two days later, on September 14, by an 8-3 vote.<sup>296</sup> The Committee of Detail had originally made appointing a treasurer the ninth enumerated power in its August 6 draft.<sup>297</sup> By placing it before the word “power”—that is, before starting to list the legislative powers of Congress—the Committee of Style both underscored the importance of the treasury post and implied that it was a structural provision about the composition of Congress rather than a legislative power.<sup>298</sup>

Most significantly, the Committee of Style dramatically reworked the Constitution’s Preamble. The Committee of Detail’s draft preamble had begun, “We the people of the States of New Hampshire, [et cetera],” and had listed no purposes.<sup>299</sup> The Committee of Style famously changed this to the well-known final version, beginning “We the People of the United States,” and listed several broad purposes—including to “promote the general Welfare.”<sup>300</sup> As argued above, this change to the preamble strengthens the general welfare interpretation of Clause 1,<sup>301</sup> and was probably intended to do so.<sup>302</sup>

The Convention made a handful of changes to the Committee of Style Draft over the next few days, voting to approve the draft, as amended, on Saturday, September 15.<sup>303</sup> Over the remainder of the weekend, the final version of the Constitution was “engrossed” (handwritten) and then signed on Monday, September 17.<sup>304</sup>

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295. *See id.* at 614 (Madison).

296. *Id.* (Madison).

297. *Id.* at 182 (Madison).

298. *Id.* at 614 (Madison). There are also punctuation changes from the Committee of Style draft to the final version; as I shall explain, these did not affect the meaning of Clause 1. *See infra* Part IV.D.

299. 2 FARRAND, *supra* note 12, at 177 (Madison).

300. U.S. CONST. pmb.; *see supra* text accompanying notes 107-10.

301. *See supra* text accompanying notes 106-15.

302. *See infra* text accompanying note 345.

303. 2 FARRAND, *supra* note 12, at 622 (Madison).

304. *Id.* at 648-49 (Madison).

#### IV. THE GENERAL WELFARE POWER AND STRATEGIC AMBIGUITY

The text and drafting history of Clause 1 favor the general welfare interpretation of the General Welfare Clause. There was probably insufficient support to express that interpretation unambiguously, however. It seems likely that proponents of enumeration successfully bargained for strategically ambiguous language as a compromise that would leave interpretive space for the narrower “taxing purpose” interpretation later promoted by Jefferson.<sup>305</sup> The spending power interpretation that ultimately prevailed seems to be completely absent from the Convention records.

##### *A. Signs of a General Welfare Compromise*

The evidence of a strategically ambiguous “general welfare compromise” includes (1) the views of key players, particularly Wilson, Morris, and Sherman; and (2) the various movements and revisions that resulted in the final wording and placement of the General Welfare Clause. Most of this evidence has been discussed; here, I will offer some additional evidence and analysis.<sup>306</sup>

##### *1. The Views of Wilson, Morris, and Sherman*

James Wilson, Gouverneur Morris, and Roger Sherman—three of the most active and strong-minded members of the Convention—probably played key roles in the final compromise language of the General Welfare Clause. They served on the key committees involved in its drafting: Wilson, on the Committee of Detail; Sherman,

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305. See *supra* note 79 and accompanying text.

306. The only previous scholarly account suggesting that the Committee on Postponed Parts reached a compromise on the General Welfare Clause is the brief sketch by Madison biographer Irving Brant. See BRANT, *supra* note 151, at 132-39. Brant portrays all the business conducted by the Committee on Postponed Parts as producing a single, complex compromise with numerous moving parts. *Id.* at 135. He may be right about this, and his account is worth further study. But the three-way compromise I describe below stands on its own. Brant’s suggestion that numerous pieces extraneous to my account were needed to win this or that vote are purely speculative. See *id.* at 134-37. Finally, Brant wrongly assumes, without any evidence, that the final version of Clause 1 was understood on all hands to be a spending power. See *id.* at 139.

on the Committee on Postponed Parts; Morris, on the Committees on Postponed Parts and of Style.<sup>307</sup>

All three had made motions and taken strong positions on matters intertwined with the final version of the General Welfare Clause. These issues were how to express the powers of Congress in general, the power of taxation in particular, and the power or duty to repay the Revolutionary War debt.<sup>308</sup> On the Convention floor on July 17, Wilson had seconded a resolution by Sherman that would have defined the powers of Congress in general terms.<sup>309</sup> That motion was itself a compromise: it would have authorized Congress to legislate “in all cases which may concern the common interests of the Union” while enjoining it “not to interfere with” state “internal police” powers.<sup>310</sup> Morris strongly opposed it, probably because he understood that the Supremacy Clause would produce some preemption of state laws.<sup>311</sup> On August 20, Morris, seconded by Charles Pinckney, assumed a national police power by proposing to create a cabinet secretary to “attend to” such a power.<sup>312</sup> Wilson had fought successfully in the Committee of Detail prior to its first report on August 6 to include “sweeping clause” language in the Necessary and Proper Clause (“and all other powers”).<sup>313</sup> That language could be construed, and was construed by many, as negating the inference of an exhaustive enumeration.<sup>314</sup>

Sherman’s opposition to a broad General Welfare Clause would likely have been supported on the Committee on Postponed Parts by Pierce Butler of South Carolina, who had always favored an enumeration of powers.<sup>315</sup> Further impetus for the compromise may

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307. 2 FARRAND, *supra* note 12, at 473 (Journal), 547 (Madison).

308. *See supra* Part III.B.

309. 2 FARRAND, *supra* note 12, at 26 (Madison).

310. *Id.* at 21 (Journal).

311. *Id.* at 26 (Madison); *see* Schwartz & Mikhail, *supra* note 128, at 2074.

312. 2 FARRAND, *supra* note 12, at 335-36 (Journal). By seconding this motion, Pinckney appears to have shifted away from an enumerationist position. *See supra* note 143. This suggests that for him, and perhaps other pro-slavery delegates, enumerationism was a second-best structural protection for slavery—one that Pinckney, at least, could abandon after accomplishing two other concessions to the slave states: the Three-Fifths Clause and the export tax ban.

313. *Id.* at 182 (Madison).

314. Mikhail, *supra* note 100, at 1121-22.

315. 1 FARRAND, *supra* note 128, at 53 (Madison) (statement of Butler); 2 FARRAND, *supra* note 12, at 17 (Madison) (statement of Butler); *id.* at 24 (Journal) (showing South Carolina

have come from George Mason, who by late August was already gathering himself to oppose the Constitution; he would be one of the three who on September 17 refused to sign it.<sup>316</sup> On August 31, the day the Committee on Postponed Parts was formed, Mason apparently circulated a short list of his objections and “proposed alterations” to the Constitution to a handful of delegates, including at least two of the Committee’s members, Butler and John Dickinson.<sup>317</sup> One of Mason’s alterations was that “[t]he Objects of the National Government to be expressly defined, instead of indefinite powers, under an arbitrary Constructions [sic] of general Clauses.”<sup>318</sup> Mason objected to “[t]he sweeping Clause” which “absorbs every thing almost by Construction.”<sup>319</sup> He knew that the Committee would be considering the August 22 proposal to *strengthen* that clause.

On debt and taxes, Roger Sherman made his views clear that it was “necessary to connect” the taxing power with a statement of the purpose of taxation, including the payment of debts, and he proposed an amendment to that effect on August 25.<sup>320</sup> Morris favored addressing the Revolutionary War debt explicitly, at the start of the enumerated powers, and making repayment obligatory on Congress.<sup>321</sup> Sherman opposed constitutionalizing a repayment obligation.<sup>322</sup>

## 2. *The Contours of the Compromise*

Historians of the Convention label the agreement to establish equal state suffrage in the Senate as the Great Compromise.<sup>323</sup> At the same time, it is widely acknowledged that the Constitution contains many compromises, on matters both of principle and of state or regional interests. Some of these were effectuated in clear,

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voted “no” on Resolution 6).

316. 2 FARRAND, *supra* note 12, at 648-49 (Madison).

317. SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 251 & n.1 (James H. Hutson ed., 1987).

318. *Id.*

319. *Id.* at 249 & n.1.

320. 2 FARRAND, *supra* note 12, at 414 (Madison).

321. *Id.*

322. *Id.*

323. *See, e.g.,* WARREN, *supra* note 13, at 267.

specific language, like the export tax prohibition demanded by the slave states,<sup>324</sup> others in encoded language, like the Fugitive Slave and Migration and Importation Clauses, which eschewed the words “slave” or “slavery.”<sup>325</sup> Other compromises relied on strategic ambiguity: employing ambiguous terms in place of clearer ones, or the judicious use of gaps or silences, for the specific purpose of postponing or papering over disagreements. The disagreements would not necessarily have been intractable disputes among the Convention delegates. Instead, at least some “compromises” were with decisionmakers not present at the Convention: these compromises anticipated likely objections by moderates in the forthcoming ratification campaign. In these latter cases, strategic ambiguity was an important, if not essential, method to accommodate objections in a process in which the states would be foreclosed from conditioning their ratifications on changes to the Constitution. In deploying strategic ambiguity, the Framers assumed that such disagreements, by shared tacit understanding at the Convention, would be worked out in the course of ordinary politics after ratification.<sup>326</sup> The General Welfare Clause has all the hallmarks of a strategically ambiguous clause designed to work a compromise among differing views.<sup>327</sup>

The broad outlines of a three-way compromise comprehending the three issues—a taxing purpose proviso, debt assumption, and national legislative power—emerged with the second Committee of Detail report on August 22. That report included both a taxing purpose clause and a revised Necessary and Proper Clause that was clarified and strengthened by adding a general welfare power to

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324. See U.S. CONST. art. 1, § 9, cl. 5.

325. See U.S. CONST. art. 1, § 9, cl. 1; *id.* art. IV, § 2, cl. 3; 2 FARRAND, *supra* note 12, at 417 (Madison) (stating that Madison “thought it wrong to admit in the Constitution the idea that there could be property in men”).

326. Hills, *supra* note 16, at 4-8.

327. When the Convention records show that a controversial issue was addressed by a committee whose recommendation was subsequently approved unanimously, or nearly so, without debate, that is strong circumstantial evidence of a compromise. Such was the situation with the General Welfare Clause on September 4. Meeting from 10:00 AM to 3:00 or 4:00 PM every day but Sunday, living in a few boardinghouses within just a few city blocks of the Convention hall, and dining together in groups more often than not, the delegates had ample opportunity to communicate off the Convention floor. See BEEMAN, *supra* note 210, at 304-05. Compromise resolutions in committee could easily have been conveyed to the Convention as a whole before being voted on, and even before being formally reported.



it.<sup>328</sup> That general welfare clause provision also included language from the original Resolution 6, as well as from Sherman's "state internal police" motion.<sup>329</sup> Wilson was probably the prime mover behind this language. Wilson was apparently willing to accept the addition of a purpose proviso to the Taxing Clause and a state police power reservation to the Necessary and Proper Clause in exchange for a General Welfare Clause that would plainly restore the general authorization to legislate—as the Bedford Resolution of July 17 had put it—"in all cases for the general interests of the Union."<sup>330</sup> The compromise offered Sherman two concessions (taxing purpose and state police powers) and Wilson one (general welfare legislative power). But a power to pay the Revolutionary War debt (Morris's concern) was left merely implicit in the taxing purpose proviso in the August 22 Committee of Detail report.<sup>331</sup>

It is implausible that on September 4, the Convention unanimously, and without discussion, agreed to tack on an unambiguously limiting "purpose clause" to the taxing power. That intention had been put forward without success three times during the proceedings. Each of these used unambiguous language to describe debt-paying as the purpose of federal taxation. Randolph's revised draft for the August 6 Committee of Detail report, and the August 22 Committee of Detail report, each set out purpose provisos: a taxing power "for ... debts and necessities of the union"<sup>332</sup> and, later, "for payment of the debts and necessary expences of the United States."<sup>333</sup> Neither of these "tax purpose" provisos ever reached a floor vote.<sup>334</sup> Sherman's motion offered a broader range of permissible expenditures, but retained the word "for" to render debt-paying a qualification of the taxing power rather than a separate grant of power.<sup>335</sup> It was decisively rejected by a 1-10 vote.<sup>336</sup> It is not credible that the Committee on Postponed Parts would then, just two weeks later, reintroduce a clause meant to be identical to what was

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328. See 2 FARRAND, *supra* note 12, at 366-67 (Journal).

329. See *supra* text accompanying notes 216-24.

330. 2 FARRAND, *supra* note 12, at 21 (Journal).

331. See *id.* at 369.

332. *Id.* at 142 (Committee of Detail Report).

333. *Id.* at 366 (Journal) (emphasis added).

334. See *id.* at 142 (Committee of Detail Report), 366-69 (Journal).

335. *Id.* at 327 (Madison).

336. *Id.* at 412 (Madison).

rejected, and that the Convention would approve it unanimously without discussion. Those who rejected Sherman's proposal would, far more plausibly, have demanded concessions or reassurances to reconsider it.

It is also doubtful that the General Welfare Clause that first appeared on August 22 as a proposed addition to the Necessary and Proper Clause simply died in silence. There would be little point in moving the "general interest/welfare" language to Clause 1 if the intention was unambiguously to delete it. The only point in retaining the General Welfare Clause anywhere would be to mollify its original proponents in some way. To be sure, the General Welfare Clause's final wording opened competing, narrow interpretations. But the general welfare interpretation was still more linguistically plausible than its competitors, as Madison would later admit.<sup>337</sup>

Finally, the phrase "to pay the Debts" must still be accounted for. As suggested above, the argument that this must be read as a purpose proviso—"in order to pay the debts"—requires explaining why the Convention would, within the space of two weeks and with no discussion, have changed from a 1-10 rejection to an 11-0 approval of a tax-purpose limitation. But if "to pay the Debts" is a grant of power, then so is "and provide ... for the common Defence and general Welfare."

The most likely explanation is that the power "to pay the Debts" resulted from an intertwined element of a general welfare compromise. There was no need to specify a generic debt-paying power, which was implicit in the power to borrow.<sup>338</sup> To nationalists, the only appeal of adding "to pay the Debts" was to permit debt assumption legislation: it would help assumption advocates in future debates to fend off the argument that assuming state debts was unconstitutional. To be sure, the initial impulse to constitutionalize an obligation or even an express authorization to assume state debts was whittled down to a vague authorization. Nevertheless, the reason the clause is in Article I, Section 8 is that the issue was of prime importance to the Framers—so important that they

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337. See *supra* text accompanying notes 82-89.

338. See *supra* note 184 and accompanying text. A government's obtaining money with no intention of repaying it is either taxing, which was already provided for, or mooching, which the Framers disdained. See BRANT, *supra* note 151, at 306-07.

nearly listed it as the first enumerated power. The language of the Debt Clause was moved around and watered down; earlier versions of it had made clear that the debt in question was the Revolutionary War debt, made repayment obligatory, and authorized federal assumption of state debts.<sup>339</sup> The watering down was primarily to make the power discretionary and to beg the question of assumption. Nevertheless, the delegates apparently understood the Debt Clause to refer specifically to a power to pay the Revolutionary War debt.<sup>340</sup> Madison confirmed this in later years, as did Hamilton, who also indicated that the change was a strategic ambiguity.<sup>341</sup>

Viewed in this light, the final version of Clause 1, proposed by the Committee on Postponed Parts on September 4, bears the unmistakable outlines of further progress on this three-way compromise. Moving the General Welfare Clause from the end of the enumeration to the beginning retained its function as a broad legislative authorization. Either a general authorization at the start of a list or a sweeping clause at the end could signal an intention to negate an inference of an exhaustive enumeration of powers. The enumeration now had both. The Committee of Style, led by Morris (with the likely input of Wilson) strengthened the endorsement of introductory “general welfare” language by drafting a preamble with that phrase.<sup>342</sup> To be sure, the general welfare language was packaged in a manner that could arguably be reduced to a mere taxing purpose proviso; to further this interpretation, its language was modified slightly to resemble Article VIII of the Articles of Confederation,

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339. See *supra* text accompanying notes 250-58.

340. See *supra* notes 250-58 and accompanying text.

341. See 2 FARRAND, *supra* note 12, at 392 (Madison); Madison to Stevenson, *supra* note 3, at 418 (noting the General Welfare Clause was a “provision for the debts of the Revolution”). Hamilton recalled “a long conversation, which [he] had with Mr. Madison in an afternoon’s walk,” during the Convention in which he and Madison “perfectly agreed in the expediency and propriety” of federal assumption of state debts, but further agreed “that it would be more advisable to make it a measure of administration than an article of constitution” to minimize objections to ratification. *From Alexander Hamilton to Edward Carrington, 26 May 1792*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-11-02-0349> [https://perma.cc/GU7W-QC94].

342. See Treanor, *supra* note 110, at 4-6 (explaining that Morris and Committee of Style drafted the preamble). Although not formally a member of the Committee of Style, James Wilson may also have had a hand in drafting the preamble. See WARREN, *supra* note 13, at 687-88 (arguing that Wilson is “equally, if not more, entitled to the honor of making this final draft”).

dealing with reimbursement of state expenditures “for the common defence or general welfare.”<sup>343</sup> An express power (not obligation) to “pay the debts” (not assume the state Revolutionary War debts) was likewise presented in a way that could be read as a grant of power or a taxing purpose. The weakening and ambiguating of all three strands of the compromise—obligatory repayment and assumption, broad taxing power, and general power to legislate on all national matters— would give room to Roger Sherman and others to argue that the enumeration was exhaustive and limiting, and that the General Welfare Clause merely identified the purposes for which taxes could be raised.

To be clear, I do not argue that the “General Welfare Compromise” was a deal among *only* Wilson, Morris, and Sherman.<sup>344</sup> I do suggest that they are the most likely architects given their roles in making motions and serving on the three most relevant committees (Detail, Postponed Parts, and Style). But they undoubtedly represented opinions shared by blocs of delegates. For example, we can see indications in the records that John Rutledge favored a purpose clause appended to the taxing power,<sup>345</sup> that Charles Pinckney seconded Morris’s proposal for a cabinet secretary to “attend to” national police power matters,<sup>346</sup> and that Wilson would likely have needed support from Committee of Detail colleagues Ellsworth and Nathaniel Gorham to get his two versions of the Necessary and Proper Clause into the Committee reports of August 6 and August 22.<sup>347</sup> Pierce Butler of South Carolina was opposed to debt assumption and unenumerated powers; he sat on the Committee on Postponed Parts and may have needed assuaging to overcome his likely opposition to the Committee report.<sup>348</sup>

We should pause to consider James Madison’s role in the general welfare compromise, if only because of his (grossly exaggerated but persistent) reputation as principal architect of the Constitution.<sup>349</sup> Although he sat on both the Committees of Postponed Parts and

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343. See BRANT, *supra* note 151, at 135-38; ARTICLES OF CONFEDERATION of 1777, art. VIII.

344. See BRANT, *supra* note 151, at 133-39 (suggesting others possibly involved).

345. See *supra* text accompanying note 169.

346. See *supra* text accompanying note 237.

347. See *supra* text accompanying note 232.

348. See *supra* text accompanying note 258.

349. See Schwartz & Mikhail, *supra* note 128, at 2034-35.

Style, Madison had expressed no strong views on any of the three issues involved in the compromise: he refrained from committing himself on enumerationism,<sup>350</sup> and made no speeches on the Bedford resolution, the debt assumption question, or Sherman's motion to include a taxing purpose proviso.<sup>351</sup> Notwithstanding his later aversion to the General Welfare Clause, Madison gave no indication in his notes of an objection to it at the Convention. Having "proven his value in improving language and sidestepping controversy,"<sup>352</sup> Madison is likely to have played a role in crafting the compromise language of the General Welfare Clause.

### *B. A Textual Victory for the General Welfare Power*

The compromise notwithstanding, Morris and Wilson could well have come away from the bargain believing they had gotten the better end of it, by retaining, and in some ways strengthening, language whose literal meaning was to authorize a power to legislate for the general welfare. The shift of the General Welfare Clause from the Necessary and Proper Clause to the Taxing Clause, and its rewording, made the final General Welfare Clause at once weaker and stronger than the August 22 version. As an add-on to the Necessary and Proper Clause, it had been a virtually unmistakable grant of legislative power. But its new placement at the end of the Taxing Clause increased the prospects of giving it a weaker reading as a non-grant of power. On the other hand, the states'-rights-protective language from the August 22 version, establishing noninterference with state police powers, was dropped. And the revised version clarified the somewhat convoluted wording of the August 22 version: the legislative power was no longer mixed up with a power to manage federal property.<sup>353</sup>

Reading Clause 1 with the interpretive canons, Wilson and Morris could well have believed that they had placed the general welfare interpretation on a much stronger footing than any narrower interpretation. To begin with, merely placing the General Welfare Clause in Clause 1 strengthened it by creating the general-specific

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350. See *supra* text accompanying note 144.

351. 2 FARRAND, *supra* note 12, at 26-27, 377, 412-15 (Madison).

352. See BILDER, *supra* note 9, at 141.

353. The provision was moved into Article IV, Section 3, Clause 2.

pattern known to favor a broad construction of the general term and a non-exhaustive interpretation of the specifics.<sup>354</sup> Moreover, as discussed above, the Committee of Style's revised preamble supports the general welfare interpretation for two reasons, both of which would have been readily apparent to trained and sophisticated lawyers like Wilson and Morris. First, the preamble clarified that the ends of the new national government included "provid[ing] for the common defence [and] promot[ing] the general Welfare."<sup>355</sup> Because "[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized,"<sup>356</sup> a power to *legislate* for the general welfare would be a reasonable means to accomplish the stated purposes of the preamble. Second, Wilson and Morris would have been familiar with Blackstone's maxim that ambiguous terms can be clarified by reference to the preamble.<sup>357</sup> As a textual matter, the strategically ambiguous final version of Clause 1 would thus tilt heavily toward the general welfare interpretation.

The compromise worked to an extent—both sides argued that their interpretation had prevailed. Although Mason continued to object to "the general clause, at the end of the enumerated powers" and opposed ratification on that basis,<sup>358</sup> Roger Sherman declared victory. In a post-Convention debriefing letter to the governor of Connecticut, Sherman and his co-delegate Oliver Ellsworth announced the enumerationist interpretation of Article I, Section 8 as a whole, and Clause 1 in particular.<sup>359</sup> The powers of Congress "extend only to matters respecting the common interests of the union, and are specially defined," they asserted.<sup>360</sup> Moreover, "[t]he objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare, and for payment of the debts

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354. *See supra* Part II.B.

355. U.S. CONST. pmbl.

356. *See* THE FEDERALIST NO. 44 (Madison), *supra* note 41, at 285.

357. *See supra* text accompanying notes 107-08.

358. 2 FARRAND, *supra* note 12, at 637, 640 (Mason); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 86-89 (2010).

359. 3 FARRAND, *supra* note 201, at 99-100 (Sept. 26, 1787) (Roger Sherman and Oliver Ellsworth to the Governor of Connecticut).

360. *Id.* at 99.

incurred for those purposes.”<sup>361</sup> Asserting that these tendentious interpretations were settled by the Constitution’s text was disingenuous and self-serving.

For his part, Gouverneur Morris asserted the general welfare interpretation. On September 6, Maryland delegate James McHenry, who took sporadic notes throughout the Convention, recorded a revealing conversation with Morris outside the Convention room.<sup>362</sup> McHenry, concerned for his Baltimore shipping constituents, had floated the idea “to insert a power in the confederation [sic] enabling the legislature to erect piers for protection of shipping in winter and to preserve the navigation of harbours.”<sup>363</sup> Morris, according to McHenry, “thinks it may be done under the words of the 1 clause of the 1 sect 7 art. amended—‘and provide for the common defence and general welfare.[.]—If this comprehends such a power, it goes to authorize the legis[ature] to grant exclusive privileges to trading companies etc.”<sup>364</sup> It is not clear whether the “exclusive privileges” comment is Morris’s or McHenry’s. Whoever said it was acknowledging two things: first, that the General Welfare Clause was indeed a separate grant of power; and second, that a General Welfare Clause that could improve harbors was a General Welfare Clause that could create monopolies—a *regulatory* power.<sup>365</sup>

### C. *The Spending Power Interpretation as an Afterthought*

What is missing from this historical reconstruction of a general welfare compromise is the spending power interpretation. But that is simply because there is no evidence that anyone advocated an express spending power at the Convention. The word “spend” (as in “spend money”) does not appear anywhere in Madison’s notes or the Convention Journal; the word “provide” nowhere unambiguously appears in the sense of “spend” either.<sup>366</sup> Indeed, the Convention

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361. *Id.*

362. See 2 FARRAND, *supra* note 12, at 529-30 (McHenry).

363. *Id.* at 529 (McHenry).

364. *Id.* at 529-30 (McHenry).

365. Forrest McDonald and William Treanor attribute the comment to McHenry, and McDonald suggests that McHenry was “horrified” at the implication. MCDONALD, *supra* note 210, at 265; Treanor, *supra* note 110, at 22-23. As McHenry’s quoted notes neither suggest horror nor clarify the speaker, these surmises are speculative.

366. These two claims are confirmed by word searches of a searchable PDF version of

delegates never even discussed any such thing as an enumerated “spending power.” The word used by the delegates to refer to the application of money by the national government was not “spend,” but “appropriate.”<sup>367</sup> Moreover, the two provisions in the Constitution dealing with appropriations both impose *limits* on spending.<sup>368</sup> Proposals to limit appropriations were made on July 5 and August 18, without any provision granting an affirmative power to spend having been proposed or discussed.<sup>369</sup> Indeed, the language that we now call the “spending power” was not proposed until September 4.<sup>370</sup> The Committee of Detail’s first draft of the enumerated powers on August 6 did not contain a “spending power.” That draft did, however, include a version of the July 5 motion to *limit* spending: “All bills for raising or appropriating money ... shall originate in the House of Representatives, and shall not be altered or amended by the Senate.”<sup>371</sup> Note that the phrase “raising or appropriating” is *not* a redundant doublet, but rather two separate concepts, parallel to “taxing or spending.” Money coming into the Treasury was “raised”; money going out, or earmarked for going out, was “appropriated.”<sup>372</sup>

The fact that the delegates debated and approved *restrictions* on spending before even purportedly proposing to *grant* a “spending power” strongly suggests that a spending power was simply assumed all along to be implicit in the power to legislate. An implied

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volumes 1 (Journal) and 3 (Madison’s notes) of the Documentary History of the Constitution. See 1 FARRAND, *supra* note 128; 3 FARRAND, *supra* note 201.

367. See *supra* note 89 and accompanying text. See generally Kesavan & Paulsen, *supra* note 51, at 1198 (advocating “first-best use of” the Convention records “as an extratextual dictionary of constitutional meaning”).

368. See U.S. CONST. art. I, § 8, cl. 12; § 9, cl. 7.

369. 1 FARRAND, *supra* note 128, at 524-25 (Journal) (July 5 proposal); 2 FARRAND, *supra* note 12, at 322 (Journal) (August 18 proposal) (“Funds ... appropriated for payment of public Creditors shall not ... be diverted or applied to any other purpose.”).

370. 2 FARRAND, *supra* note 12, at 493 (Journal).

371. *Id.* at 178 (Madison). The Convention initially struck out this House-appropriations provision, *id.* at 224-25 (Madison), but ultimately restored it, albeit split into two parts. Article I, Section 7 of the Constitution now begins: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” U.S. CONST. art. I, § 7, cl. 1. The “appropriations” part was moved into Article I, Section 9, and effectively transmogrified from a limitation on the Senate to a limitation on the Executive: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. CONST. art. I, § 9, cl. 7.

372. See *supra* notes 83-89 and accompanying text.



spending power would not have been the only instance of a legislative power that is assumed by the Constitution and only evidenced by restrictive or prohibitory language: the powers to suspend habeas corpus, to grant titles of nobility, and—later, in the Fifth Amendment—to take property by eminent domain are three other such examples.<sup>373</sup> Madison no doubt captured the sense of the Convention when he stated in 1800 that there is not “a power of any magnitude, which, in its exercise, does not involve or admit an application of money.”<sup>374</sup>

Given that a power to spend money was referred to as “appropriation” and was taken as implicit until at least September 4, when the “provide for the common defense and general welfare” language first appeared, proponents of the spending power interpretation have some explaining to do.<sup>375</sup> Why would a spending power, having been assumed all along as an implied power, be added so late in the day, and only under the highly ambiguous, indeed misleading, word “provide”? The Convention records supply no explanation. If there was a body of opinion within the Convention that called for an enumerated spending power, it was unexpressed—and therefore unlikely. A more likely explanation is that the spending power interpretation did not even arise until the ratification debates or later. The first definitive spending power interpretation was offered by Hamilton in his 1791 *Report on Manufactures*.<sup>376</sup> If there had been a consensus to make the General Welfare Clause an unambiguous spending power, it seems likely that the committee drafters would have used the word “appropriation” there as well: “To lay and collect taxes ... [in order] to appropriate money for the common defense and general welfare.” Using “provide for” would have introduced an ambiguity that would have been pointless if the intention were only to express a spending power.

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373. See U.S. CONST. art. I, § 9, cls. 2, 8; *id.* amend. V.

374. See Madison, *Virginia Report*, *supra* note 62, at 356. Madison at times failed to distinguish the concepts of “raising” and “appropriating,” either from confusion or to mislead his readers. See THE FEDERALIST NO. 41, *supra* note 41, at 263 (Madison) (construing “provide” to mean “raise money”); Madison to Stevenson, *supra* note 3, at 424-28 (using “appropriate” to mean “raise money”).

375. See 2 FARRAND, *supra* note 12, at 493 (Journal).

376. See Hamilton, *supra* note 66, at 302-03.

### *D. Immaterial Style-Based Inferences*

Over the years, it has been argued that small matters of style, punctuation, or sentence structure can clear up the ambiguity built into Clause 1 and dispositively negate the general welfare interpretation. They do not.

#### *1. The Sinister Semicolon*

The most enduring style-based argument stems from the probably apocryphal story that Gouverneur Morris on the Committee of Style tried to defraud the Convention by substituting a semicolon for a comma immediately before “to pay the Debts,” thereby illicitly creating a general welfare interpretation by beefing up the grammatical separation between the Taxing Clause and the “Spending” Clause (or the tax purpose proviso, depending on one’s favored interpretation). But as the story goes, Roger Sherman caught the subterfuge at the last minute, and the comma was restored.<sup>377</sup>

Although numerous historians have perpetuated (or at least repeated) this tale,<sup>378</sup> the story is most likely a 220-year-old urban myth. Originating in a vague account during a 1798 congressional speech,<sup>379</sup> the tale completely lacks documentary support aside from the punctuation itself: the Convention Journal shows a comma in that spot in the approved September 4 version reported by the Committee on Postponed Parts, a semicolon in the September 12 Committee of Style report, and a comma again in what is generally accepted as the final version of the Constitution approved by the Convention.<sup>380</sup>

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377. See, e.g., MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 182-83 (1913).

378. See, e.g., McDONALD, *supra* note 210, at 265 (accepting the story at face value); Treanor, *supra* note 110, at 37-41 (same); Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 338-39 (2002) (accepting the story, but questioning its interpretive relevance); Akhil Reed Amar, Comment, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (same).

379. See 3 FARRAND, *supra* note 201, at 379 (June 19, 1798) (speech of Albert Gallatin).

380. See 2 FARRAND, *supra* note 12, at 493 (Journal), 594 (Committee of Style Report), 655 (engrossed Constitution).

But to view the comma as “original” or “authentic” is a distortion.<sup>381</sup> Significantly, the first written version of Clause 1 that all the delegates would have seen was the September 12 Committee of Style report, which was printed and distributed to the delegates on September 13.<sup>382</sup> Other than that report, and the August 6 Committee of Detail report, both of which were printed and distributed as typeset broadsides, the delegates did not *see* committee reports—those were handwritten and read aloud rather than copied and distributed.<sup>383</sup> So when the delegates approved the September 4 version of Clause 1, they did so based on hearing, rather than reading it. When the Convention approved the final Constitution, they did so based on their own printed copies of the Committee of Style draft with whatever interlineations they made based on the emendations approved from September 13 to 15.<sup>384</sup> Few, if any, delegates would have seen a version with the comma rather than the semicolon before signing the Constitution.<sup>385</sup> It is inconceivable

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381. To begin with, our only record of the text of this report is Secretary Jackson’s copying of it into the Convention Journal. Given the inattention to punctuation niceties by Jackson and all of the Convention hand-writers, it is certainly conceivable that the comma was a transcription error. See David S. Schwartz & Nicholas Brock Enger, *The Sinister Semicolon: On Parsing Punctuation in the Constitution* (manuscript on file with author). The original handwritten committee reports are lost to history, evidently being among “the loose scraps of paper” that were burned by Jackson on September 17. See 3 FARRAND, *supra* note 201, at 82 (Appendix). In contrast to the August 6 Committee of Detail report and the September 12-13 Committee of Style report, both of which were professionally printed and distributed to the delegates, none of the other handwritten committee reports have been found among any of the delegates’ papers.

382. 2 FARRAND, *supra* note 12, at 582 (Journal, Sept. 12) (“ordered that the Members be furnished with printed copies thereof”); *id.* at 609 (McHenry, Sept. 13) (“Recd. read and compared the new printed report”).

383. The September 4 report of the Committee on Postponed Parts was read aloud by Committee Chair Brearley “in his place”—that is, from his seat on the Convention floor and “was afterwards delivered in at the Secretary’s table—and was again read” by Secretary Jackson. See 2 FARRAND, *supra* note 12, at 493 (Journal). Jackson used passive voice when he read committee reports aloud. See *id.* at 366 (noting that Committee of Detail Chair Rutledge “read the report in his place—and the same, being delivered in at the Secretary’s table, was again read”).

384. See *id.* at 609-10 (Journal), 614-15 (Madison).

385. The September 4 report was an extremely long one, in which the General Welfare Clause was followed by seven lengthy sections on the powers and election of the president. See *id.* at 493-95 (Journal), 496-99 (Madison). The delegates quickly and unanimously approved the Committee’s proposed version of the General Welfare Clause based on the oral reading, with no debate recorded by Madison. The delegates then proceeded to debate the latter clauses. When the debate proved inconclusive on the presidential clauses, the delegates voted

that any delegate, let alone a majority, proofread the approximately 4,500 words and hundreds of punctuation marks in the engrossed (handwritten) parchment Constitution in the fleeting moment on September 17 that each stood, one after the other, at the secretary's table to sign the document. What the delegates did see, and approve, was the September 12-13 Committee of Style broadside, with the semicolon.<sup>386</sup> So, if there was any "punctuation fraud," it was in replacing the Committee of Style's semicolon with a comma—rather than the reverse.

But we need not resolve the mystery of the semicolon here, because the comma does not weaken the case for the general welfare interpretation. When Article I, Section 8 enumerates multiple powers in a single clause, those powers are invariably set off by commas, not semicolons—even in the lengthy and tortuous Seat of Government Clause, where a semicolon might help the reader pause for breath.<sup>387</sup> Moreover, the presence of the comma before "to pay the Debts" has a double-edge, weakening the Jeffersonian purpose interpretation compared with the same wording without any punctuation mark.<sup>388</sup> Slyly perhaps, Jefferson himself rendered this piece of text without a comma when arguing his interpretation to President Washington.<sup>389</sup> Note the absence of any punctuation in the pertinent spot in both Jefferson's (mis)quotation of the clause and his interpretation of it: "'To lay taxes to provide for the general welfare of the U.S.' that is to say 'to lay taxes *for the purpose* of providing for the general welfare'."<sup>390</sup> As Kesavan and Paulsen

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to postpone further consideration in order to allow members to make copies of that portion of the report for themselves. *See id.* at 496, 502 (Madison). Those delegates who chose to copy the report for themselves could in theory have seen the comma—if it was a comma—but by then, having already approved the General Welfare Clause, their focus would have been on the numerous lengthy paragraphs on the presidency. *Id.* at 597-600 (Committee of Style Report). The notion that some critical mass of delegates would have seen the comma, attributed decisive significance to it, transcribed it carefully into their own handwritten copy of the September 4 report, and then failed to note the semicolon in the September 12-13 Committee of Style broadside, is implausible.

386. *See id.* at 594 (Committee of Style Report).

387. *See* U.S. CONST. art. I, § 8, cl. 5 ("To coin ..., regulate ..., and fix"); *id.* cl. 11 ("To declare ..., grant ..., and make"); *id.* cl. 17 ("To exercise ..., and to exercise").

388. *See id.* cl. 1.

389. *See* Jefferson, *supra* note 74, at 275-80.

390. *See id.* at 277; *see also* CONST. OF THE CONFEDERATE STATES OF AMERICA of 1861, art. I, § 8, cl. 1 (Mar. 11, 1861) (having no comma between "excises" and "for revenue").

observe, “misquoting constitutional text” signals “a desperate interpreter.”<sup>391</sup>

Historically, the comma argument does indeed seem like a desperate ploy to evade what Madison saw as the Clause’s literal meaning. Madison later wrote that the punctuation issue did not deserve “the weight of a feather” in interpreting the General Welfare Clause.<sup>392</sup> Perhaps the most damning argument against the significance of the semicolon is Professor Crosskey’s commonsense observation: “As the repunctuated clause is still undeniably open to [the general welfare] interpretation as a mere matter of English,” the reinsertion of the comma as “the method chosen by the skilled lawyers of the Federal Convention” to negate that interpretation would have been “singularly inept and ineffective.”<sup>393</sup> At most, the purported semicolon-comma switch offers a cautionary tale against deciding a fundamental constitutional debate over the scope of legislative power by the vagaries of late eighteenth-century mid-sentence punctuation.<sup>394</sup>

## 2. Sentence Structure

Another exceedingly weak argument against the general welfare interpretation arises from the sentence structure of Clause 1. Specifically, the placement of the “tax uniformity” restriction at the end of Clause 1 has convinced some scholars that the entire clause must be limited to taxing, or at least to revenue.<sup>395</sup> But this is

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391. Kesavan & Paulsen, *supra* note 378, at 350.

392. Madison to Stevenson, *supra* note 3, at 412 n.2, 414 n.2 (“Memorandum not used in letter to Mr. Stevenson.”).

393. 1 CROSSKEY, *supra* note 110, at 394; *accord* Amar, *supra* note 378, at 286 n.25 (doubting the interpretive significance of the semicolon versus comma distinction); Kesavan & Paulsen, *supra* note 378, at 339 n.151 (same).

394. The difference in meaning between the two punctuation marks was even less pronounced in the eighteenth century than it is now. It is even possible that the punctuation marks in question were made at the discretion of the Convention’s printer and engrosser, rather than by any of the delegates. *See* Schwartz & Enger, *supra* note 381.

395. U.S. CONST. art. I, § 8, cl. 1 (“[B]ut all Duties, Imposts and Excises shall be uniform throughout the United States.”); *see, e.g.*, Natelson, *supra* note 19, at 14. Natelson categorically rejects a reading that “grants an authority to tax, then grants an authority to spend, then doubles back to restrict the authority to tax” because such a reading “imports into the Constitution a stylistic awkwardness very uncharacteristic of that elegantly-drawn document.” *Id.* This “inference from elegance,” aside from being premised on a debatable aesthetic judgment, overlooks the nature of a group drafting project by a few dozen

wrong, both as a matter of syntax and drafting history. To begin with, the argument assumes that the uniformity proviso was carefully integrated into Clause 1 to affect the meaning of the debt-paying or General Welfare Clauses in some way. It was not. First proposed on August 25, the uniformity proviso had no connection to Clause 1 or the committees that drafted the final version of Clause 1; it had been drafted by an entirely different eleven-member committee.<sup>396</sup> When this language was agreed to on August 31, it had no specific location and seemed destined for the section that ultimately became Article I, Section 9.<sup>397</sup> But for reasons unknown, it was omitted from the Committee of Style draft,<sup>398</sup> and was subsequently tacked on at the end of Clause 1 on September 14, three days before the end of the Convention.<sup>399</sup> It could as well have been included in Section 9 with the other taxing restrictions, and no inference can fairly be drawn from its Clause 1 placement without further evidence.<sup>400</sup> Indeed, on two other occasions, restrictive provisions were added to the Taxing Clause only to be relocated to Section 9.<sup>401</sup> It is probable that the uniformity proviso would have gone the same way had it been inserted before, rather than after, the Committee of Style revisions.

In any case, nothing about English grammar requires that clauses of limitation immediately follow the matter to be limited, with no intervening subject matter. Nor does constitutional “style” support such an interpretive rule.<sup>402</sup> Indeed, three of the four restrictions on federal taxing power are found in Article I, Section

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contentious men eager to get home. And though Natelson identifies as a public meaning originalist, this particular argument is premised on drafters’ intentions—their purported conscious attention to style.

396. See 2 FARRAND, *supra* note 12, at 410 (Journal).

397. *Id.* at 480 (Madison) (approving tax uniformity and port preference language as amendments to Article VII, Section 4 of the Committee of Detail draft).

398. See *id.* at 594-96 (Committee of Style Report).

399. See *id.* at 610 (Journal), 614 (Madison).

400. See *id.* The reasons for placing it in Clause 1—and whether that was even done by motion, as opposed to a scrivener’s correction—are not recorded either in the Journal or by Madison. See *id.* at 610 (Journal), 612-19 (Madison). In his later revision of his notes, Madison merely quoted the provision and wrote that it “was unanimously annexed to the power of taxation.” *Id.* at 614 (Madison).

401. *Id.* at 303 (Journal) (showing the export tax prohibition moved into Article I, Section 9, clause 5); *id.* at 366-67 (Journal) (showing the clause limiting “permanent revenue” moved into Article I, Section 9, clause 7).

402. See 1 CROSSKEY, *supra* note 110, at 395-96.

9, far apart from the Taxing Clause,<sup>403</sup> and restrictive provisions are somewhat haphazardly distributed between Sections 8 and 9.<sup>404</sup>

### 3. Prepositions

Finally, some scholars have tried to eliminate the plausibility of the general welfare interpretation by drawing excessive substantive inferences from fine points of preposition use. But these arguments cannot bear the interpretive weight they are assigned to carry. Most power grants in Section 8 begin with a complete infinitive verb, with the word “to,”<sup>405</sup> but Section 8 usually resorts to compound infinitives, granting multiple powers with “to” implied: “To coin ..., regulate ..., and fix”; “To *declare* War, *grant* Letters of Marque ..., and *make* Rules.”<sup>406</sup> The Committee of Detail did not use compound infinitives in its enumeration, instead listing each grant of power with a single infinitive verb on a separate line.<sup>407</sup> Compound infinitives may have been a thing with Gouverneur Morris. The Committee of Style introduced several compound infinitives, both when grouping certain comparable powers in Article I, Section 8, and in the preamble: “to *form* a more perfect Union, *establish* Justice, *insure* domestic Tranquility, *provide* for the common defence, *promote* the general Welfare, and *secure* the Blessings of Liberty.”<sup>408</sup> But that style is not consistent in Article I, Section 8, apart from Clause 1.<sup>409</sup> Clause 17 provides: “To *exercise* exclusive Legislation ..., and to *exercise* like Authority.”<sup>410</sup>

The most likely explanation for the grammar of Clause 1 is that “to pay ... and provide” was a compound infinitive signifying two powers, just like all the other compound infinitives in Article I,

403. See U.S. CONST. art. I, § 9, cl. 1 (limiting tax on imported slaves to ten dollars per person); *id.* cl. 4 (imposing census requirement on direct taxes); *id.* cl. 5 (prohibiting federal export taxes).

404. Restrictive clauses are found in Article I, Section 8, Clauses 1, 12 (“but no Appropriation of Money”), and 16 (“reserving to the States respectively”). See U.S. CONST. art. I, § 8, cls. 1, 12, 16.

405. See *id.* art. I, § 8.

406. See *id.* cls. 5, 11 (emphasis added).

407. See 2 FARRAND, *supra* note 12, at 177-89 (Madison).

408. U.S. CONST. pmb. (emphasis added).

409. See *id.* art. I, § 8, cl. 1.

410. *Id.* cl. 17 (emphasis added).

Section 8.<sup>411</sup> When the Debt and General Welfare Clauses were added to the Taxing Clause, however, it probably escaped notice that “pay” and “provide” could, for stylistic consistency, have been compounded with “[t]o lay and collect,” merely by deleting “to” before “pay” and adding an Oxford comma after “debts.”<sup>412</sup> Instead, rather than deleting the word “to” in front of pay, the Committee of Style draft added a semicolon.<sup>413</sup> The Committee of Style draft also changed all the semicolons at the end of each enumerated power clause to periods.<sup>414</sup> For unknown reasons, these periods were restored to semicolons after the September 15 vote approving the Committee of Style draft, and the semicolon before “to pay the debts” was changed to a comma.<sup>415</sup>

Such is the nature of group drafting projects, especially in the Constitutional Convention, where the group diverged on many key points and finished its work in a rush.<sup>416</sup> In his speech opposing the first Bank of the United States, Madison offered a candid acknowledgement of the limitations of an inferential textual interpretation of the Constitution: “It is *not* pretended that *every* insertion or *omission* in the Constitution is the effect of *systematic attention*.”<sup>417</sup> Those who rely on prepositions and comma placements to assert dispositive resolution of such great and contested questions as the scope of federal powers would do well to avoid such pretenses.

## CONCLUSION

The General Welfare Clause was initially drafted to authorize the federal government to address all national problems. Due to a compromise, it was rewritten in a strategically ambiguous manner to accommodate an alternative, narrower “taxing purpose” interpretation. Yet the final version of the General Welfare Clause favored the broad general welfare interpretation, whereas the taxing purpose interpretation was arguable, but less plausible.

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411. *See id.* cl. 1.

412. *See id.*

413. *See* 2 FARRAND, *supra* note 12, at 594-96 (Committee of Style Report).

414. *See id.*

415. *See id.* at 655-56 (engrossed Constitution).

416. *See id.* at 493-97 (Journal) (illustrating the delegates’ quick approval).

417. 2 ANNALS OF CONG. 1899 (1791) (emphasis added).



After ratification, two additional, linguistically plausible “spending power” interpretations emerged that had not been contemplated by the Framers—the “Madisonian” and “Hamiltonian” interpretations. Eventually, the constitutional order settled on the Hamiltonian “non-regulatory spending” interpretation as the result of a political compromise brokered by President James Monroe to accommodate the nationalist wing of his dominant Republican coalition. Eventually, the two interpretations contemplated by the Framers—the Jeffersonian and general welfare versions—faded from history, leading modern scholars to assume that they had never been taken seriously. This interpretive journey is a story in itself that I take up elsewhere.<sup>418</sup>

The conventional interpretation of the General Welfare Clause as the Spending Clause runs counter to its text and drafting history. Only by assuming that the enumeration of powers must be interpreted as limiting can we justify the choice of the spending power over the general welfare interpretation as a matter of text or drafters’ intent. But the origins of the General Welfare Clause demonstrate that an enumerationist interpretation of the Constitution is not compelled by the text or drafting history of the enumerated powers.

If, as I have argued, the Framers’ intentions and the text of the Constitution do not foreclose, and indeed support, the general welfare interpretation—that the General Welfare Clause authorizes Congress to legislate on all national problems—the implications are far-reaching. This would mean that enumerationism is not the inexorable constitutional command that is normally associated with clear-cut textual or intent-based arguments—whether those arguments are made by originalists or non-originalists. The argument for enumerationism would necessarily be shifted into modes of constitutional argument dependent on policy and values. Enumerationists would have to explain what values are served by disabling the federal government from addressing national problems that the states collectively have proven unwilling or unable to solve, such as environmental degradation or a pandemic. The constitutional debate over laws like the Violence Against Women Act would address federalism concerns head-on, by discussing whether

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418. See Schwartz, *supra* note 68.

gender-motivated violence is a national or local problem, rather than focusing on the tangential—indeed, absurd—question of whether it is “commerce.” By freeing constitutional interpretation from the dubious given of limited enumerated powers, we can get to the heart of federalism questions. If we are to “lament” the federal government’s constitutional debarment from addressing one or more of our pressing national problems, our constitutional discourse would finally allow us to ask directly whether a particular federalism limitation is worth the price, and indeed, whether such debarment serves any “federalism” values at all.